

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

BOLLING B. SMITH II.,

Defendant.

ORDER

10-cr-180-bbc

In a superseding indictment returned on April 13, 2011, the grand jury charged defendant Bolling B. Smith II in count 1 with conspiracy to make false statements in mortgage applications, and in count 2 with unlawfully making a material false statement to an FBI agent investigating this case. Dkt. #27. Before the court are defendant's motion to dismiss count 1, dkt. #19, incorporated into dkt. #53, and motion to dismiss count 2, Dkt. #53. For the reasons stated below, I am denying both motions.

In challenging count 1, defendant invokes the Fifth and Sixth Amendments, as well as Fed. R. Crim. P. 7(c) and 12(b), to argue that the government's evidence supporting Count 1 fails to show that any of defendant's actions amounted to a conspiracy; rather, the allegations show that alleged coconspirator Brian K. Bowling acted alone in deceiving the

government. Dft's Br. in Supp., dkt. #30, at 1. Moreover, defendant's alleged acts were not illegal by themselves, but were common practices in brokerage firms. Id. at 3. Defendant argues that none of his actions amount to a violation of the underlying false statements statute, 18 U.S.C. § 1014, and none constitute being part of a conspiracy under 18 U.S.C. § 371. Therefore, defendant argues count 1 fails to allege all of the necessary elements of the offense. Id. at 4-5.

The government responds that an indictment is legally sufficient if it states the elements of the offense, apprises defendant of the charge and enables defendant to plead the judgment as a bar to future prosecution for the same offense. United States v. Sandoval, 347 F.3d 627, 632 (7th Cir. 2003). The government asserts that count 1 passes this test. What defendant actually is challenging is whether the facts alleged in the indictment adequately support the conspiracy charge. However, a pretrial motion to dismiss is not a vehicle to challenge whether the government ultimately can prove its case. United States v. Thomas, 150 F.3d 743, 747 (7th Cir. 1998) (Easterbrook, J., concurring). Gov't's Resp., dkt. #35, at 2-3.

The government is correct. Count 1 alleges the elements of a § 371 conspiracy, and in its detailed narration of manners, means, and overt acts, it adequately apprises defendant of the conduct underlying the charge, enabling defendant to plead the judgment in this case as a bar to future prosecution. As the government notes, overt acts alleged in a conspiracy

charge need not be illegal in themselves; what the government must prove is that the charged conspiracy, that is, the agreement to commit unlawful acts, existed and that defendant knowingly joined this conspiracy. Perhaps this burden is harder to meet when a defendant's acts allegedly supporting a criminal conspiracy are routine and mundane, but that is a determination the jury must make at trial. Defendant is not entitled to dismissal of count 1.

In count 2 of the superseding indictment, the government alleges that defendant violated 18 U.S.C. § 1001 when he knowingly and willfully made false statements to an FBI agent on October 5, 2009, during an investigation of a mortgage fraud scheme. Defendant told the agent that he “did not broker or have any direct involvement with the J.H. loan,” when in fact he did have direct involvement, including six specified acts or types of acts. Dkt. #27 at 6-7.

Defendant argues that count 2 fails to state an offense because it does not provide an exact quote of what he allegedly said to the agent, it does not define or explain “direct involvement,” and it does not allege with specificity how defendant did in fact “broker” the loan. Dft's Br., dkt. #52. The government responds by repeating its arguments opposing dismissal of count 1. Dkt. #58.

Again, the government is correct. The elements of a §1001 charge are that the defendant knowingly and willfully made a false, material statement in a matter within the

jurisdiction of the federal government. Count 2 of the superseding indictment alleges all of these elements along with necessary details such as when defendant allegedly made the statement, to whom he made it, what he said and why it was false. Defendant's contentions that the government has not adequately cabined the falsity or materiality of his alleged statement are more properly addressed at trial. They are not a basis on which to dismiss count 2.

ORDER

IT IS ORDERED that defendant's motions to dismiss counts 1 and 2 of the superseding indictment are DENIED.

Entered this 9th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge