

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NORTH SEA ASSOCIATES, INC.,

Plaintiff,

v.

PAYTON LANE NH, INC.,

Defendant.

Case No. CV-11-0048 (JS)(WDW)

PAYTON LANE NH, INC.

Defendant/Third Party
Plaintiff,

v.

PFC CORPORATION and THE UNITED
STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,

Third-Party Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF THE
UNITED STATES DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT'S MOTION TO DISMISS THE
COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)**

Robert W. Schumacher
Assistant U.S. Attorney
(Of Counsel)

LORETTA E. LYNCH
United States Attorney
Eastern District of New York
610 Federal Plaza
Central Islip, New York 11722

Pursuant to Fed. R. Civ. P. 12(b)(1), Third-Party Defendant United States Department of Housing and Urban Development (“HUD”) respectfully submits this memorandum of law in support of its motion to dismiss the claims asserted against HUD in the third-party complaint (the “Third-Party Complaint”) filed by Third-Party Plaintiff Payton Lane NH, Inc. (“Payton Lane”).

PRELIMINARY STATEMENT

The allegations in the Third-Party Complaint arise out of a transaction in which Payton Lane executed a note (the “Note”) and mortgage (the “Mortgage”) in favor of co-Third Party Defendant PFC Corporation (“PFC”), and entered into a building loan agreement (together with the Note and the Mortgage, the “Loan”) with PFC for the construction of a residential nursing facility at 64 Country Road 39, in Southampton, New York (the “Nursing Home”). Payment of the Mortgage is insured by HUD under Section 232 of the National Housing Act, 12 U.S.C. § 1715w. (Third-Party Complaint ¶¶ 5-6, 9; *see also* Verified Complaint by Plaintiff North Sea Associates, Inc. (“North Sea”) against Payton Lane (the “Underlying Complaint”), at ¶ 3.)¹

On or about September 21, 2005, Payton Lane entered into an agreement with North Sea to lease the Nursing Home for 33-years. (Third Party Complaint at ¶ 7.) Pursuant to this agreement, North Sea was required to pay a “Certified Debt Service” on the Mortgage directly to PFC. (Third Party Complaint at ¶ 8.) North Sea began making those payments in February of 2006. (Third Party Complaint at ¶ 8; Underlying Complaint at ¶¶ 7-11, 16-17.)

¹ By restating the allegations set forth in the Third Party and Underlying Complaints, HUD does not admit their truth; to the contrary, HUD reserves its right to answer, deny, and/or respond to all allegations at the appropriate time.

The Third-Party Complaint alleges that, as a result of a delay in the final endorsement of the Mortgage, Payton Lane believed that the payments being made to PFC (including the Certified Debt Service being paid by North Sea) were in excess of amounts due under the Loan. (Third Party Complaint at ¶ 11.) These alleged overpayments were being collected in an escrow account (the “Excess Escrow Account”). (Third Party Complaint at ¶ 12.) The funds in the Excess Escrow Account were used to pay Payton Lane’s vendors and payees, and also were applied towards the Note. (Third Party Complaint at ¶ 19.)

In or about July 2008, Payton Lane sued PFC in New York state court for, among other things, reimbursement of the perceived overpayments to PFC. (Third Party Complaint at ¶ 13.) During that case, the court purportedly indicated that all amounts collected by PFC had been proper. (Third Party Complaint at ¶ 15.) At the conclusion of that litigation, on or about July 16, 2009, Payton Lane and PFC, purportedly at HUD’s direction, entered into a modification of the Note (the “Recast Note”). (Third Party Complaint at ¶ 16.) On July 21, 2010, North Sea sued Payton Lane in New York Supreme Court, seeking the recovery of overpayments in “Certified Debt Service” payments it believed it had made (which it alleges to be \$921,658.08). (Third Party Complaint at ¶ 22.) Payton Lane then filed a Third-Party Complaint² seeking a declaratory judgment from the Court that it “has no liability to HUD, PFC, or North Sea with respect to the Excess Funds Escrow or the Certified Debt Service monies” and that “the Recast Note as written satisfies all of Payton Lane’s contractual obligation to North Sea, HUD, and PFC under the

² In this action, Payton Lane filed the Third-Party Complaint against HUD and PFC and, on January 5, 2011, HUD removed the case to this Court pursuant to 28 U.S.C. § 1442(a)(1).

Loan, the Lease, the Recast Note, and any other agreement relating to [the Nursing Home].”
(Third Party Complaint at ¶ 29.)

Plaintiff’s declaratory judgment claims against HUD should be dismissed. First, the Third-Party Complaint fails to allege that the government has waived sovereign immunity with regard to Payton Lane’s claims. In addition, the Third Party Complaint fails to set forth any “case of actual controversy” which exists between Payton Lane and HUD sufficient to trigger jurisdiction under the federal Declaratory Judgment Act, 28 U.S.C. § 2201(a) (the “DJA”), which is not a jurisdictional statute, or under any other source. Thus, under the facts alleged, this Court has no subject matter jurisdiction to entertain this action and it should be dismissed.

ARGUMENT

THE THIRD-PARTY COMPLAINT SHOULD BE DISMISSED AS TO HUD FOR LACK OF SUBJECT MATTER JURISDICTION

When a motion to dismiss pursuant to Rule 12(b)(1) is brought, it is a court’s duty to resolve disputed jurisdictional facts. *See Cargill Int’l S.A. v. M/T Pavel Dynenko*, 991 F.2d 1012, 1019 (2d Cir. 1993). As federal courts are of limited jurisdiction, courts must police subject matter delineations on their own initiative. *See Fed. R. Civ. P. 12(h); Lyndonville Savings Bank & Trust Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000) (“failure of subject matter jurisdiction is not waivable and may be raised at any time by a party or the court *sua sponte*”). A court may consider evidence outside the pleadings where the complaint may be dismissed for lack of jurisdiction. *Robinson v. Gov’t of Malaysia*, 269 F.3d 133, 141 n.6 (2d Cir. 2001) (finding that courts “must” consider affidavits and other materials beyond the pleadings “if the resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction”); *see Zappia Middle East Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253

(2d Cir. 2000). Furthermore, in resolving a challenge to subject matter jurisdiction, a court does not draw inferences in favor of the plaintiff. *See Shipping Fin. Servs. Corp v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998); *Obilo v. City Univ. of N.Y.*, No. CV-01-5118 (DGT), 2003 U.S. Dist. LEXIS 2886, at *46 (E.D.N.Y. Feb. 28, 2003). Indeed, it is the “plaintiff [that] must prove the existence of subject matter jurisdiction by a preponderance of the evidence.” *Moser v. Pollin*, 294 F.3d 335, 339 (2d Cir. 2002) (citations omitted); *see also Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

In the first instance, the Third-Party Complaint is deficient as pled because it is devoid of any allegation setting forth the statutory basis upon which the United States has purportedly waived sovereign immunity with regard to the declaratory judgment claim asserted against HUD. The plaintiff bears the burden of showing that the government has consented to suit. *Cominotto v. United States*, 802 F.2d 1127, 1129 (9th Cir. 1986). Indeed, “[t]o maintain an action against the United States in federal court, a plaintiff must identify a statute that confers subject matter jurisdiction on the district court and a federal law that waives the sovereign immunity of the United States to the cause of action.” *Clark v. United States*, 326 F.3d 911, 912 (7th Cir. 2003). Therefore, given Payton Lane’s failure to allege the basis on which the United States has waived sovereign immunity and consented to be sued on Payton Lane’s claim, the Third-Party Complaint should be dismissed as against HUD for lack of subject matter jurisdiction.³

Sitkovetskiy v. Housing Auth. Of City of New London, 2007 WL 911905, at *2 (D. Conn. March

³ The DJA does not suffice—it is a remedial statute which is not an independent source of subject matter jurisdiction and does not constitute a waiver of sovereign immunity. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *St. Vincent’s Hospital and Medical Center of New York v. Division of Human Rights*, 553 F. Supp. 375, 377-78 (S.D.N.Y. 1982); *Andrews v. Martinez*, 2002 WL 31368850, at *3 (S.D. Ohio Aug. 21, 2002).

23, 2007)(dismissing claim against HUD because the Plaintiff failed to identify any basis upon which the court could conclude that HUD has waived sovereign immunity).

In addition to this pleading defect, the Third-Party Complaint is also deficient because it fails to allege any “case of actual controversy” between Payton Lane and HUD sufficient for jurisdiction under the DJA. The DJA provides that, “[i]n a *case of actual controversy* within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration[.]” 28 U.S.C. § 2201(a)(emphasis added). To determine whether an “actual controversy” exists, a court considers “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)(emphasis added); *see also Tevdorachvili v. Chase Manhattan Bank*, 103 F. Supp. 2d 632, 642 (E.D.N.Y. 2000) (“[t]here is nothing in the circumstances of this case as pleaded that justifies the invocation of the mechanism of declaratory judgment.”).

In the Third-Party Complaint, the only allegations pertaining to HUD are that:

- HUD is the insurer of the payment of the Mortgage (Third Party Complaint ¶ 9);
- HUD directed Payton Lane and PFC to enter into a “Recast Note,” with HUD’s approval (Third Party Complaint ¶ 16);
- “HUD and PFC informed Payton Lane that if Payton Lane did not enter into the Recast Note, Payton Lane would face default under the Loan.” (Third Party Complaint ¶ 17);
- “Prior to authorizing the final endorsement of the Note, HUD required Payton Lane to evidence that certain vendors and other payees of Payton Lane were paid.” (Third Party Complaint ¶ 18);
- “At HUD’s insistence, the Recast Note retroactively folded the purported overpayments in the Excess Funds Escrow into the original Note[,] and directed payment of the remaining vendors and payees from the funds otherwise applied to the Note then sitting

in the Excess Funds Escrow. These actions were taken at HUD's direction." (Third Party Complaint ¶ 19);

- "HUD and PFC explained to Payton Lane that the result of recasting the Note in such a manner would be to eliminate the Excess Funds Escrow entirely." (Third Party Complaint ¶ 20);
- "All of the documents effecting this transaction, including the allonges to the Note, were drafted by PFC and/or HUD." (Third Party Complaint ¶ 21);
- "All of the money in the Excess Funds Escrow, as directed by HUD, have [sic] been paid out to vendors, and none of the monies used are now or were ever considered overpayments by either HUD or PFC." (Third Party Complaint ¶ 23);
- "In order to resolve the litigation with North Sea, Payton Lane requires a declaration from the Court with respect to its obligations to HUD, PFC, and North Sea." (Third Party Complaint ¶ 24);
- "Payton Lane has been subject to contrary instruction with respect to the Excess Funds Escrow from North Sea, HUD, and PFC." (Third Party Complaint ¶ 26);
- "Specifically, according to HUD, PFC, and the Recast Note, there has been no overpayment on the Note and, consequently, no overpayment of any amounts paid over by North Sea as Certified Debt Service." (Third Party Complaint ¶ 27);
- "Payton Lane has no liability to HUD with respect to the Excess Funds Escrow or the Certified Debt Service monies"; and "the Recast Note as written satisfies all of Payton Lane's contractual obligations to HUD under the Loan, the Lease, the Recast Note, and any other agreement relating to the Nursing Home." (Third Party Complaint ¶ 29).

Put simply, the Third-Party Complaint does not allege the existence of an immediate dispute between Payton Lane and HUD and, thus, fails to demonstrate the existence of "a case of actual controversy" between Payton Lane and HUD sufficient for DJA jurisdiction to be exercised. There is no allegation that HUD has a pending claim under any contract, note, mortgage, or lease upon which Payton Lane's allegations are based. There is no allegation that HUD has otherwise made a claim for funds. There is no allegation that HUD has an adverse legal position to Payton Lane or has made any administrative decision to take action. Indeed, there is no dispute in this case between HUD and Payton Lane. The only dispute alleged arises

between North Sea and Payton Lane regarding whether payments made by North Sea exceeded the amounts due under the Lease.

Where, as here, a complaint is completely devoid of allegations setting forth a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests, no “case of actual controversy” exists, and a claim for declaratory relief should be dismissed for lack of subject matter jurisdiction. *See North Jefferson Square Assocs. v. Virginia Housing Dev. Authority*, 94 F. Supp.2d 709, 716-18 (E.D. Va. 2000), *aff’d* 2002 WL 506406 (4th Cir. April 4, 2002) (dismissing third-party declaratory judgment claim against HUD because no actual case controversy existed where, *inter alia*, HUD made no claim under the underlying contracts, and had no adverse legal position to the third-party plaintiff).

CONCLUSION

For the foregoing reasons, HUD respectfully requests that the Court grant Defendant’s motion pursuant to Fed. R. Civ. P. 12(b)(1) and dismiss Payton Lane’s claims against HUD in their entirety, with prejudice, together and with such other and further relief as this Court may deem just and proper.

DATED: Central Islip, New York
March 21, 2011

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney
Eastern District of New York
610 Federal Plaza
Central Islip, New York 11722

BY: /s/ Robert W. Schumacher

Robert W. Schumacher
Assistant U.S. Attorney
(631) 715-7871

Attorneys for Third-Party Defendant HUD