IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

APOLLON HOLDINGS, LLC,

Plaintiff,

v.

Case No. 2:20-cv-2224-MSN-atc
JURY DEMAND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and DR. BEN CARSON, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, in his official capacity,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim (ECF No. 19) ("Motion"). Plaintiff responded in opposition. (ECF No. 20.) Defendants filed a reply in support. (ECF No. 23.) For the reasons set forth below, Defendants' Motion is **GRANTED**.

BACKGROUND

This matter involves an alleged breach of an oral agreement between Plaintiff and Defendants regarding repairs and improvements to property owned by Plaintiff. Specifically, Plaintiff is the owner of 8.478 acres of real property in Memphis, which is the location of the Sterling Townhomes. (ECF No. 1 at PageID 4–5.) The Sterling Townhomes are a 112-unit multifamily housing project located in an economically depressed area in Memphis, Tennessee. (*Id.* at PageID 5.)

Plaintiff initially acquired the Sterling Townhomes in 2007. (*Id.* at PageID 6.) In 2011, Plaintiff sought to refinance the Sterling Townhomes and executed a promissory note ("Promissory Note") and deed of trust ("Deed of Trust") in favor of Berkadia Commercial Mortgage, LLC ("Berkadia"). (*Id.* at PageID 5.) Simultaneously with the execution of the Promissory Note and Deed of Trust, Plaintiff entered into a Regulatory Agreement with the U.S. Department of Housing and Urban Development ("HUD") dated January 26, 2011. (*Id.* at PageID 5–6; ECF No. 1-2.) The terms of the Regulatory Agreement are specifically incorporated in and made part of the Deed of Trust. (ECF No. 1-1 at PageID 16.) The Regulatory Agreement provided that in exchange for HUD insuring the Promissory Note for the re-financing of the Sterling Townhomes, Plaintiff promised, among other things, to promptly make all payments due under the Promissory Note and Deed of Trust, maintain the property in good repair and condition, and establish a reserve fund for replacements. (*See* ECF No. 1-2 at PageID 28–30; ECF No. 1 at PageID 6.)

As to the reserve fund for replacements, the Regulatory Agreement provided as follows:

> (a) Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgagee or in a safe and responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Secretary of an amount equal to **$4,666.67** per month and an initial deposit of **$224,000.00** unless a different date or amount is approved in writing by the Secretary.
>
> Such fund, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America shall at all times be under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements and mechanical equipment by the project or for any other purpose, may be made only after receiving the consent in writing of the Secretary. In the event that the owner is unable to make a mortgage note payment on the due date and that payment cannot be made prior to the due day of the next such installment or when the mortgagee has agreed to forgo making an election to assign the mortgage to the Secretary based on the monetary default, or to withdraw an election already made, the Secretary is authorized to instruct the mortgagee to withdraw funds from the reserve fund for

> replacements to be applied to the mortgage payment in order to prevent or cure the default. In addition, in the event of a default in the terms of the mortgage, pursuant to which the loan has been accelerated, the Secretary may apply or authorize the application of the balance of such fund to the amount due on the mortgage debt as accelerated.

(ECF No. 1-2 at PageID 28–29; *see* ECF No. 1 at PageID 5–6.)

In 2018, HUD sent an inspector to conduct a Real Estate Assessment Center ("REAC") inspection. (ECF No. 1 at PageID 7.) The Sterling Townhomes scored poorly on the inspection. (*Id.*) HUD subsequently sent another inspector, and again, the Sterling Townhomes scored poorly. (*Id.*) As a result of the two inspections, the Sterling Townhomes were placed on the troubled properties list and referred for an enforcement action. (*Id.*)

In April 2019, Plaintiff commissioned a property assessment, rehabilitation plan, and cost estimate for the Sterling Townhomes. (*Id.*) The plan called for a four-phase rehabilitation at a cost of $332,398. (*Id.* at PageID 7–8.) Plaintiff alleges that it approached HUD about the rehabilitation plan for the Sterling Townhomes, and HUD orally agreed to work with Plaintiff and release money from the reserve fund to assist with the proposed rehabilitation provided that a mortgage arrearage of approximately $300,000 was cured. (*Id.* at PageID 8–9.) Plaintiff alleges that based on HUD's oral promise, Plaintiff's principal, George Fakiris, used his personal funds to cure the mortgage arrearage, but HUD thereafter refused to release money from the reserve fund as promised. (*Id.* at PageID 8.)

In July 2019, Berkadia advised Plaintiff that it was accelerating the full amount due under the Promissory Note and demanded payment in full be made immediately. (*Id.*) On October 31, 2019, Berkadia sent a letter to Plaintiff informing it that Berkadia had assigned and transferred the Promissory Note and Deed of Trust to HUD. (*Id.* at PageID 9.)

On March 30, 2020, Plaintiff filed its Complaint in this matter alleging the following causes of action related to the alleged oral agreement with HUD: (1) Breach of Contract; (2) Fraud; (3)

Negligent Misrepresentation; (4) Misrepresentation by Concealment; and (5) Intentional Interference with Business Relationships. (*Id.* at PageID 9–12.)

STANDARD OF REVIEW

Defendants' Motion seeks dismissal under either Rule 12(b)(1) or Rule 12(b)(6). Because this Court finds dismissal is appropriate under Rule 12(b)(1), the Court includes only the standard of review for motions under Rule 12(b)(1).

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal for lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be premised on a facial or factual attack. *See Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014); *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A facial attack questions the sufficiency of the pleading without disputing the facts alleged in it. *See Gentek Bldg. Prods., Inc.*, 491 F.3d at 330. A factual attack challenges the factual allegations underlying the assertion of jurisdiction. *See United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). When reviewing a facial attack, a district court takes the allegations of the complaint as true. *Gentek Bldg. Prods., Inc.*, 491 F.3d at 330. A factual attack "controvert[s] the accuracy (rather than the sufficiency) of the jurisdictional facts asserted by the plaintiff and proffer[s] materials . . . in support of that position." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

DISCUSSION

HUD is an agency of the Federal government, *see* 42 U.S.C. § 3531 *et seq.*, and therefore, an action against HUD must satisfy all the requirements for actions against the United States. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal government and its agencies from suit."). In a suit against the United States, a plaintiff must show

both a waiver of sovereign immunity and a grant of subject matter jurisdiction. *See Presidential Gardens Assocs. v. United States*, 175 F.3d 132, 139 (2d Cir. 1999); *see also V S Ltd. P'ship v. Dep't of Hous. & Urb. Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). Although the same provision of law may satisfy both requirements, each is "wholly distinct" and must be separately considered. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786–87 n. 4 (1991). The fact that a federal court has jurisdiction to entertain a cause of action does not correspondingly mean that the United States has waived its immunity from being sued on that same cause of action. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37–38 (1992); *see, e.g.*, *Blatchford*, 501 U.S. at 786 n. 4 ("The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim."); *United States v. Certain Land Situated in the City of Detroit*, 361 F.3d 305, 307 (6th Cir. 2004) (concluding 28 U.S.C. § 1367(a), the supplemental-jurisdiction statute, "does not constitute a waiver of sovereign immunity"); *Reed v. Reno*, 146 F.3d 392, 398 (6th Cir. 1998) ("Section 1331's general grant of federal question jurisdiction, however, does not by its own terms waive sovereign immunity and vest in district courts plenary jurisdiction over claims for money judgments against the United States.") (internal citation and quotation marks omitted). It is a plaintiff's burden to "identify a waiver of sovereign immunity in order to proceed against the United States. If [it] cannot identify a waiver, the claim must be dismissed on jurisdictional grounds." *Reetz v. United States*, 224 F.3d 794, 795 (6th Cir. 2000).

In its Complaint, Plaintiff pleads that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C § 1332(a)(1), and 12 U.S.C. § 1702. (*See* ECF No. 1 at PageID 3–4.) Plaintiff further pleads that this Court has Supplemental Jurisdiction over any claims under Tennessee law pursuant to 28 U.S.C. § 1367. (ECF No. 1 at PageID 4.) Plaintiff does not specifically plead a waiver of sovereign immunity in its Complaint, but based on Plaintiff's

response in opposition to the Motion, it appears Plaintiff relies on 12 U.S.C. § 1702 of the National Housing Act ("NHA"). That provision provides, in relevant part:

> The Secretary shall, in carrying out the provision of this subchapter and subchapters II, III, V, VI, VII, VIII, IX–B and X of this chapter, be authorized, in his official capacity to sue and be sued in any court of competent jurisdiction, State or Federal.

12 U.S.C. § 1702.

When interpreting the scope of § 1702, courts have declined to extend its sovereign immunity waiver to actions taken under subchapters other than those specified therein, *see United Am., Inc. v. N.B.C.-U.S.A. Hous., Inc. Twenty Seven*, 400 F. Supp. 2d 59, 62 (D.D.C. 2005), or that were not "carrying out the provisions" of the NHA. *V S Ltd. P'ship.,* 235 F.3d at 1112; *Teitelbaum v. U.S. Dep't of Hous. & Urb. Dev.*, 953 F. Supp. 326, 330 (D. Nev. 1996). Relevant here, HUD officials' actions do not "carry out" the provisions of the NHA when those actions are specifically prohibited by the NHA and its implementing regulations. *V S Ltd. P'ship.,* 235 F.3d at 1112; *Teitelbaum.*, 953 F. Supp. at 330.

Title 12 U.S.C. § 1715z-4 of the NHA provides:

> The Secretary shall not consent to any request for an extension of the time for curing a default under any mortgage covering multifamily housing, as defined in the regulations of the Secretary*, or for a modification of the terms of such mortgage, except in conformity with regulations prescribed by the Secretary* in accordance with the provisions of this section.

12 U.S.C. § 1715z-4 (emphasis added). And under HUD regulations, mortgage modifications must be in writing and approved by the Federal Housing Administration Commissioner. *Teitelbaum*, 953 F. Supp. at 330–31; *V S Ltd. P'ship.,* 235 F.3d at 1112; 24 C.F.R. § 207.256b. Hence, if the alleged oral agreement here constitutes an oral modification of a mortgage agreement, then the actions of HUD officials in making the alleged oral agreement were not "carrying out" the provisions of the NHA, and there has been no waiver of sovereign immunity.

Plaintiff argues that it has not alleged a breach of a mortgage agreement but rather a breach of the "Regulatory Agreement, which is outside the scope of any mortgage document." (ECF No. 20 at PageID 102.) Plaintiff's argument, however, overlooks the language of the Deed of Trust, which specifically incorporates in and makes the Regulatory Agreement part of the Deed of Trust. (*See* ECF No. 1-1 at PageID 16.) And Plaintiff does not really allege a breach of the Regulatory Agreement, but rather a breach of an oral agreement with terms that contradict those in the Regulatory Agreement. In other words, Plaintiff has alleged a breach of an oral modification of the Deed of Trust, *i.e.* breach of an oral modification of a mortgage agreement. Thus, Plaintiff cannot rely on the NHA's sovereign immunity waiver for any of its claims because HUD officials' actions underlying those claims were not "carrying out" the provisions of the NHA as they are specifically prohibited by the NHA and its implementing regulations. *See V S Ltd. P'ship.,* 235 F.3d at 1112; *Teitelbaum.*, 953 F. Supp. at 330.

So, if the NHA does not provide the needed sovereign immunity waiver, is there another waiver of immunity Plaintiff can rely on? Maybe there is, or maybe there's not, but Plaintiff points to only the NHA in its Complaint and response, and because it is Plaintiff's burden to identify a waiver of sovereign immunity to proceed against the United States, this Court will not engage in a *sua sponte* analysis of other potential sources of that waiver.[1]

[1] The Court notes that Defendants' Motion specifically argues against two other potential sources of sovereign immunity waiver—the Federal Tort Claims Act ("FTCA"), *see* 28 U.S.C. § 2674, and the Tucker Act, *see* 28 U.S.C. § 1491. However, Plaintiff specifically argues against application of the FTCA; therefore, this Court does not address Defendants' arguments. Similarly, Plaintiff does not argue a waiver pursuant to the Tucker Act, so the Court does not address it. However, the Court notes that even if Plaintiff could establish a waiver of immunity under the Tucker Act, the United States Court of Federal Claims has exclusive jurisdiction for Tucker Act claims greater than $10,000.

Therefore, because Plaintiff failed to identify a waiver of sovereign immunity that would allow it to bring its claims against the United States, the Complaint is **DISMISSED** pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is **GRANTED**, and Plaintiff's Complaint is **DISMISSED**.

IT IS SO ORDERED, this 30th day of September 2021.

s/ Mark S. Norris
MARK S. NORRIS
UNITED STATES DISTRICT JUDGE