IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEROY J. SMITH, et al.	:	
v.	:	CIVIL ACTION No. 99-2133
JOHN G. BERG, et al.	:	

O'Neill, J. April , 2000

M E M O R A N D U M

This case is a putative class action with claims under RICO and state law. Defendants have moved to dismiss the complaint on a variety of grounds. Defendants' motion will be GRANTED IN PART.

BACKGROUND

For the purposes of this motion, I assume that the well-plead factual allegations in the complaint are true.

Plaintiffs allege that defendant John G. Berg, acting through the corporate entities New Century Homes, Inc. and Affordable Residences, Inc., engaged in fraudulent and deceptive practices during the sale, financing and settlement of at least nine residential developments in Philadelphia from 1994 to 1997. See Amended Complaint ¶¶ 1-2. Berg allegedly used misleading and fraudulent financial incentives, such as tax abatements and mortgage credit certificates, to induce plaintiffs' purchase of homes which they otherwise could not afford. Id. ¶ 3. In furtherance of this scheme, Berg used misleading mailings and radio and television advertisements. Id. ¶ 99.

Plaintiffs further allege that defendants Fidelity National Financial, Fidelity National Title Insurance Company of Pennsylvania, Columbia National Inc., First Town Mortgage Corp., and Countrywide Credit Industries, Inc. conspired with Berg to defraud the plaintiffs and "realize maximum profits from the sale and financing of each transaction." Id. ¶ 9. Specifically, plaintiffs allege that the Fidelity defendants cooperated with Berg by "allowing him to assume many of [Fidelity's] normal functions during settlements" and by recording false information on HUD-1 Settlement Statements. Id. ¶ 109. Plaintiffs also allege that the defendant lending companies cooperated with Berg by contacting prospective buyers to encourage them to make the purchases, communicating and negotiating with Berg rather than directly with the plaintiffs, failing to make Truth-In-Lending Law disclosures, and granting mortgages for which the lenders knew plaintiffs were unqualified. Id. ¶ 118.

Count I of the complaint claims that Berg engaged in a RICO enterprise in violation of 18 U.S.C. § 1962(c). Count II claims that defendants Fidelity National Financial and Fidelity National Title Insurance Company participated in a RICO conspiracy with Berg in violation of 18 U.S.C. § 1962(d). Count III claims that defendants Columbia National, Inc., First Town Mortgage Corp. and Countrywide Credit Industries, Inc. also participated in a RICO conspiracy with Berg in violation of 18 U.S.C. § 1962(d). The remaining counts state claims against all defendants for common law fraud (Count IV), breach of fiduciary duties (Count V), negligence (Count VI), and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count VII).

DISCUSSION

A. Substantive RICO Claim

Count I alleges that Berg violated 18 U.S.C. § 1962(c) by operating a corrupt enterprise that defrauded plaintiffs by engaging in multiple acts of mail fraud and wire fraud. See Amended Complaint ¶¶ 91, 97. Berg argues that the Court of Appeals' recent decision in Annulli v. Panikkar, 200 F.3d 189 (3d Cir. 1999), requires dismissal of this claim.

Section 1962(c) makes it unlawful to participate in an "enterprise" engaged in a "pattern of racketeering activity." For the purposes of this statute, an "enterprise" can be "virtually any de facto or de jure association." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 789 (3d Cir. 1984). However, "pattern of racketeering activity" is a term of art that is statutorily defined to mean at least two "predicate acts" of racketeering activity. See 18 U.S.C. § 1961(5). Section 1961(1) contains a laundry-list of activities that qualify as predicate acts, including mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343).

In Annulli, the Court of Appeals considered whether, in addition to § 1961(1)'s specific enumeration, state law torts and breaches of contract also qualify as predicate acts. See Annulli, 200 F.3d at 192. The Court, noting that it "would have thought the answer to this question obvious," ruled that such violations of state law are not predicate acts because § 1961(1)'s "list of . . . predicate acts is exhaustive." Id. at 192, 200.

Berg argues that Annulli places his alleged fraudulent acts outside of the coverage of the RICO statute because plaintiffs have characterized those acts as violations of both federal law (i.e., mail fraud and wire fraud) and state law (i.e., common law fraud, breach of fiduciary duties, etc.). However, this is far too broad a reading of Annulli.

In Annulli, the proffered predicate acts were violations of state law only. There was no claim that the defendants had committed mail fraud, wire fraud, or any of the other acts specifically listed in § 1961(1). Id. at 200. In this case, plaintiffs assert that Berg's action violated both federal and state law. Specifically, plaintiffs plead approximately a dozen predicate acts of mail fraud and wire fraud.[1] See Amended Complaint Appendix A and B. Since conduct amounting to federal mail fraud and wire fraud is often punishable by state law as well, Berg's reading of Annulli would in most cases have the effect of deleting these predicate acts from § 1961(1)'s enumeration. This would frustrate "RICO's text and the Supreme Court's instruction that RICO is too be read broadly." Annulli, 200 F.3d at 199, quoting Tabas v. Tabas, 47 F.3d 1280, 1296-97 (3d Cir. 1995) (en banc).

For this reason, I reject Berg's contention that Annulli requires dismissal of this claim.

B. RICO Conspiracy Claims

Counts II and III allege that defendants Fidelity National Financial[2], Fidelity National Title Insurance Company, Columbia National, Inc., First Town Mortgage Corp. and Countrywide Credit Industries, Inc. (collectively the "non-Berg defendants") violated § 1962(d) by conspiring with Berg to violate § 1962(c). The non-Berg defendants argue that the conspiracy claims fail as

[1] These predicate acts of mail fraud and wire fraud were plead with sufficient particularity under Fed. R. Civ. P. 9(b).

[2] Fidelity National Financial is the parent corporation of Fidelity National Title Insurance Company. Fidelity Financial persuasively argues that plaintiffs have not alleged any involvement by the parent corporation or any facts that would justify piercing the corporate veil and holding the parent liable for its subsidiary's actions. Plaintiffs have failed to respond to this argument in any way. Therefore, all claims against Fidelity National Financial will be dismissed.

a matter of law because their conduct is not alleged to have violated § 1962(c). See, e.g., Mem. of Defendant Countrywide at 9 ("Plaintiffs have again not pleaded any facts that would establish . . . that Countrywide agreed to commit the predicate acts.") (emphasis in original); Mem. of Defendant Fidelity at 11 ("By their own averment, plaintiffs do not even suggest that Fidelity would itself be liable under § 1962(c) if it successfully completed [the alleged] acts."); Mem. of Defendant Columbia at 7 ("Stated another way, if the § 1962(d) allegations would not amount to § 1962(c) liability, they must fail.").

To evaluate this claim, I must consider whether the Court of Appeals' decision in United States v. Antar, 53 F.3d 568 (3d Cir. 1995), remains viable in light of the Supreme Court's decision in Salinas v. United States, 522 U.S. 52 (1997). The starting point for this inquiry is the Supreme Court's decision in Reves v. Ernst & Young, 507 U.S. 170 (1993). In Reves, the Court ruled that in order to be held liable under § 1962(c)[3], a person must participate in the "operation or management" of the corrupt enterprise's affairs. Id. at 179. In Antar, the Court of Appeals considered the interplay between the RICO conspiracy statute, § 1962(d)[4], and the Reves interpretation of § 1962(c). The Court held that the operation or management test from Reves applied to both substantive RICO claims under § 1962(c) and RICO conspiracy claims under § 1962(d). The Court explained its reasoning as follows:

> As one commentator has explained, "[i]f Congress' restriction of section 1962(c) liability to those who operate or manage the enterprise can be avoided simply by

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[3] 18 U.S.C. § 1962(c) states: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[4] 18 U.S.C. § 1962 (d) states: "It shall be unlawful to conspire to violate [§ 1962(c)]."

> alleging that a defendant aided and abetted or conspired with someone who operated or managed the enterprise, then Reves would be rendered almost nugatory" . . . But we believe that a distinction can be drawn between, on the one hand, conspiring to operate or manage an enterprise, and, on the other hand, conspiring with someone who is operating or managing the enterprise. Liability under section 1962(d) would be permissible under the first scenario, but, without more, not under the second. This is because in the former situation, the defendant is conspiring to do something for which, if the act was completed successfully, he or she would be liable under section 1962(c). But in the latter scenario, the defendant is not conspiring to do something for which he or she could be held liable under the substantive clause of the statute. Therefore, liability should not attach.

Antar, 53 F.3d at 581 (internal citations omitted).

If Antar's reasoning is applicable to this case, the non-Berg defendants cannot be held liable under § 1962(d). Plaintiffs do not allege that the non-Berg defendants operated or managed Berg's corrupt enterprise. Nor do plaintiffs allege that the non-Berg defendants committed any of the predicate acts of mail fraud and wire fraud. Rather, plaintiffs allege that the non-Berg defendants agreed with Berg to the violation of § 1962(c) and took certain overt acts in furtherance of that agreement.[5] Therefore, the non-Berg defendants could not be held liable under § 1962(c), and, under Antar, could not be held liable under § 1962(d).

However, in my view the Supreme Court's decision in Salinas changes this result. In Salinas, the defendant was charged with criminal violations of both § 1962(c) and § 1962(d). The jury acquitted him of the substantive charge but convicted him of the conspiracy charge. The Supreme Court upheld the conviction and found that a violation of § 1962(c) is not a

[5] The alleged overt acts in furtherance of the conspiracy by defendant Fidelity include allowing Berg to assume many of Fidelity's normal functions during settlements and recording false information on HUD-1 Settlements Statements. See Complaint ¶¶ 109, 188. The alleged overt acts in furtherance of the conspiracy by the defendant lenders include contacting plaintiffs to encourage them to purchase Berg's homes, failing to make Truth-In-Lending Law disclosures, and granting mortgages for which the lenders knew plaintiffs were unqualified. Id. ¶¶ 118.

prerequisite to a violation of § 1962(d). Salinas, 522 U.S. at 66. The Court reasoned that "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." Id. at 63. Rather, "it suffices that he adopt the goal of furthering or facilitating the criminal behavior." Id. at 65.

Although no other court in this Circuit has assessed whether Antar is viable after Salinas, I conclude that Antar was implicitly overruled by Salinas. Antar imposed the operation or management requirement on § 1962(d) to prevent a defendant from being held liable for conspiring to do something for which he could not be held liable under § 1962(c). Antar, 53 F.3d at 581. However, the facts and reasoning of Salinas make it clear that § 1962(c) liability is not a prerequisite to § 1962(d) liability.

Were I writing on a clean slate, I would adopt the Court of Appeals' reasoning in Antar and would not impose § 1962(d) liability on defendants who could not be held liable under § 1962(c). However, I am obviously bound by the Supreme Court's decision to the contrary. Under Salinas, the essential elements of a § 1962(d) conspiracy are: 1) knowledge of the corrupt enterprise's activities; and 2) agreement to facilitate those activities. Salinas, 522 U.S. at 66. Counts II and III of the Amended Complaint plead those elements in a manner sufficient to survive a motion to dismiss.

C. State Law Claims

1. Fraud

Count IV pleads common law fraud as to all defendants. As I explained at length in my Memorandum and Order of December 1, 1999, Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be plead with particularity." See Fed. R. Civ. P. 9(b). The purpose of Rule 9(b) is to "place defendants on notice of the precise misconduct with which they are charged and to guard against spurious charges of immoral and fraudulent behavior." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984).

Plaintiffs have plead with sufficient particularity approximately a dozen predicate acts of mail fraud and wire fraud allegedly committed by defendant Berg. Because they are incorporated by reference into the fraud count, those allegations are sufficient to state a claim against Berg. However, the same cannot be said as to the non-Berg defendants. The predicate acts of mail fraud and wire fraud reveal absolutely nothing about the allegedly fraudulent conduct with which the non-Berg defendants are being charged. The fraud count itself does contain a handful of vague allegations regarding the conduct of the non-Berg defendants, but those allegations say nothing of the "who, what, when and where" of the alleged fraud. Cf. United States ex rel. Waris v. Staff Builders, No. 96-1969, 1999 WL 179745, at *4 (E.D. Pa. Mar. 4, 1999). For this reason, Count IV will be dismissed as to all of the non-Berg defendants.

2. Breach of Fiduciary Duties

Count V pleads breach of fiduciary duty against all defendants. The non-Berg defendants argue that this claim fails as a matter of law because they did not owe a fiduciary duty to the plaintiffs. Plaintiffs have failed to respond to this argument.

Defendant Fidelity National Title was the title insurer for the plaintiffs. However, under Pennsylvania law, insurers generally do not owe a fiduciary duty to their insureds. See Wood v.

All-State Ins. Co., No. 96-4574, 1996 WL 637832, at *2 (E.D. Pa. Nov. 4, 1996) (under Pennsylvania law, there is no common law tort for breach of fiduciary duty against an insurer); Garvey v. Nat'l Grange Mut. Ins. Co., No. 95-0019, 1995 WL 115416, at *4 (E.D. Pa. Mar. 16, 1995) ("Despite creative attempts by the Plaintiff to turn the insurance contract into a fiduciary relationship, Plaintiff's complaint here alleges nothing more than a breach of contract based on good faith and fair dealing."); Connecticut Indem. v. Markham, No. 93-799, 1993 WL 304056, at *5-6 (E.D. Pa. Aug. 6, 1993) (under Pennsylvania law, an insurer does not have a fiduciary duty to an insured, except in limited circumstances such as where the insurer asserts a right to defend claims against the insured). The complaint does not allege any exceptional circumstances that would create a fiduciary duty in this case.

Similarly, defendants Columbia, First Town and Countryside were mortgage lenders to the plaintiffs. However, "Pennsylvania law follows the well recognized principle that a lender is not a fiduciary of the borrower." See Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 318 (E.D. Pa. 1992), citing Grace v. Moll, 132 A. 171, 171-72 (Pa. 1926); GE Capital Mortgage Servs., Inc. v. Pinnacle Mortgage, 897 F. Supp. 854, 862 (E.D. Pa. 1995) (a lender does not owe a fiduciary duty to a borrower unless the lender gains "substantial control" over the borrowers business affairs). The complaint does not allege that the lenders gained such control over plaintiffs' affairs.

As to all of the non-Berg defendants, plaintiffs have failed to allege any circumstances that would give rise to fiduciary duties; therefore, Count V will be dismissed as to these defendants.

3. Negligence

Count VI pleads negligence against all defendants. Defendants argue that the economic loss doctrine precludes recovery for negligence in this case. Plaintiffs have failed to respond to this argument as well.

In Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 619-621 (3d Cir. 1995), the Court of Appeals predicted that the Pennsylvania Supreme Court would apply the economic loss doctrine to bar recovery for purely economic damages in cases of negligent misrepresentation. The Court agrees with defendants' contention that the negligence in this case, if any, was in the nature of negligent misrepresentations and that all conceivable damages flowing from such misrepresentations are purely economic. Duquesne therefore requires that Count VI be dismissed as to all defendants.

4. Unfair Trade Practices and Consumer Protection Law

Count VII pleads violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq., against all defendants. In order to state a claim under the UTPCPL, a plaintiff must plead the elements of common law fraud, and, therefore, Rule 9(b) applies. See Calabria v. Newmar Corp., No. 98-4026, 1999 WL 98574, at *3 (E.D. Pa. Feb. 26, 1999). As was the case in plaintiffs' claim for common law fraud, plaintiffs have met this burden as to defendant Berg because of the dozen RICO predicate acts that have been plead with particularity. However, plaintiffs make no allegations of fraudulent behavior by the other defendants. Therefore, Count VII will be dismissed as to the non-Berg defendants.

D. Statute of Limitations as to Plaintiff Matthews

Defendants have argued that the RICO claims of plaintiff Valice Matthews are barred by the statute of limitations. Matthews concedes that these claims were brought outside of the four-year limitations period, but argues that the limitations period was equitably tolled by Berg's fraudulent concealment of his activities.

Applying the doctrine of equitable tolling is a fact-sensitive inquiry, and in arguing this point all sides have relied upon materials outside of the pleadings. I therefore conclude that the statute of limitations issue will be best resolved in a motion for summary judgment after the close of discovery on that issue[6].

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

[6] The accompanying Order directs the parties to conduct an abbreviated period of discovery limited to the class certification issue. Additional discovery will be delayed until after the Court considers the motion for class certification. At that time, I will entertain suggestions for managing discovery, including the possibility of a limited period of discovery on the statute of limitations issue.

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ORDER

AND NOW, this day of April, 2000, in consideration of defendants' motion to dismiss, and plaintiffs' response thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1) All claims against defendant Fidelity National Financial are dismissed;

2) Counts IV (common law fraud), V (breach of fiduciary duties), and VII (breach of the Pennsylvania Unfair Trade Practices and Consumer Protection Law) are dismissed as to defendants Fidelity National Title Insurance Company of Pennsylvania, Columbia National Inc., First Town Mortgage Corp., and Countrywide Credit Industries, Inc.; and

3) Count VI (negligence) is dismissed as to all defendants.

It is further ORDERED that:

1) An initial period of discovery shall commence immediately and shall end 45 days after the entry of this Order;

2) During this initial period, discovery shall be limited to issues related to class certification under Fed. R. Civ. P. 23(c)(1);

3) Plaintiffs shall file their motion for class certification under Fed. R. Civ. P. 23(c)(1) within 20 days of the close of the initial discovery period and defendants shall respond within 20 days thereafter; and

4) No additional discovery shall occur until ordered by the Court.

THOMAS N. O'NEILL, JR., J.