

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

MICHAEL MORRIS	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
FIRST UNION NATIONAL BANK, et al.	:	
Defendants.	:	NO. 01-1953

Reed, S.J.

January 14 , 2002

MEMORANDUM

Pro se plaintiff Michael Morris (“Morris”) initiated this lawsuit by filing a motion for a temporary restraining order. After holding hearing pursuant to Federal Rule of Civil Procedure 65, this Court denied the motion filed by Morris. (Document No. 4.) Presently before this Court are two motions to dismiss filed on behalf of defendant First Union National Bank (“First Union” or “the Bank”), (Document Nos. 12 and 13), pursuant to Federal Rule of Civil Procedure 12(b)(6).¹ After Morris failed to respond to the pending motions, this Court issued an Order directing Morris to respond by November 19, 2001, or this Court would consider the motions as unopposed.² (Document No. 14.) Plaintiff still failed to file a response. Upon consideration of these unopposed motions, and for the reasons which follow, this Court will grant the motions to dismiss.

I. Background

In denying the motion of plaintiff for a temporary restraining order, this Court found that

¹ Wells Fargo Bank was dismissed with prejudice as a defendant from this case by stipulation. (Document No. 11.)

² The clerk’s file in this action indicates that plaintiff received a copy of the Order issued by the Court directing plaintiff to respond to the pending motions by November 19, 2001.

Morris had failed to show to the satisfaction of the Court that he would likely prevail at trial on either the jurisdictional merits or substantive merits of the case, and that plaintiff presented to the Court vague, inconsistent, and unreliable proffers of evidence and arguments. The complaint here filed is plagued by the same cloudiness.

It seems that plaintiff obtained a mortgage from First Union and that he maintained several personal and business accounts with the Bank. (Compl. ¶ 6.) Plaintiff asserts that when he opened these accounts he was informed that no information concerning these accounts could be provided to anyone other than plaintiff without a subpoena, court order or authorization by plaintiff. (Id. ¶ ¶ 7-8.) Morris alleges that First Union and unnamed John Does “fraudulently disclosed certain information” to unnamed third parties concerning his account without his authorization or an appropriate court order. (Id. ¶ 9.) Plaintiff asserts that as a result of this alleged misconduct, “third parties were able to misrepresent” plaintiff’s accounts, (id. ¶ 11), and as a result of this misrepresentation, he suffered a foreclosure on the mortgage, the loss of his employment, and “other damages.” (Id. ¶ 12.) Plaintiff brings forth the following nine counts: (1) Fraud, (2) Breach of Fiduciary Duty, (3) Gross Negligence/Malfeasance, (state law counts), (4) five counts under Civil RICO, and (5) Civil Conspiracy, (state law claim), as well as a prayer for injunctive relief. Plaintiff has demonstrated that this Court has jurisdiction over the RICO counts³ and supplemental jurisdiction over the state law claims.⁴ I will thus reach the merits of the motions before me.

³ 28 U.S.C. § 1331.

⁴ 28 U.S.C. § 1367. Plaintiff claims diversity jurisdiction. The documents of record do not allow this Court to presume diversity jurisdiction exists.

II. Standard

Rule 12 (b) of the Federal Rules of Civil Procedure provides that “the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.” In deciding a motion to dismiss under Rule 12 (b) (6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969). Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

A motion to dismiss should be granted if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). In considering a motion to dismiss, the proper inquiry is not whether a plaintiff will ultimately prevail, but rather whether a plaintiff is permitted to offer evidence to support its claims. See Children’s Seashore House v. Waldman, 197 F.3d 654, 658 (3d Cir. 1999), cert. denied, 120 S. Ct. 2742 (2000) (quoting Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996)). The moving party bears the burden of showing that the non-moving party has failed to state a claim for which relief can be granted. See Gould Elec. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000). While all facts in the complaint must be accepted as true, this Court “need not accept as true unsupported conclusions and unwarranted inferences.” Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 184 (3d Cir. 2000), cert. denied, 121 S. Ct. 2000 (2001) (citations omitted).

This Court is mindful of the fact that *pro se* complaints are to be construed liberally to

afford litigants all reasonable latitude. See Haines v. Kerner, 404 U.S. 519, 520-21, 91 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972). This leniency does not excuse a *pro se* plaintiff from conforming to the rules of civil procedure or from pleading the essential elements of his claim. See Floyd v. Brown & Williamson Tobacco Corp., 159 F. Supp. 2d 823, 832 (E.D. Pa. 2001); Smith v. Social Sec. Admin., 54 F. Supp. 2d 451, 454 (E.D. Pa. 1999).

III. Analysis

A. Fraud: Count One

Plaintiff's first count is one for fraud which, under Pennsylvania law, contains the following elements: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Gibbs v. Ernst, 538 Pa. 193, 207-08, 647 A.2d 882, 889 (1994) (citing W. Page Keaton, Prosser and Keaton on the Law of Torts § 105 (5th ed. 1984)). Under Federal Rule of Civil Procedure 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." While the "date, place or time" of the alleged fraud need not be plead, plaintiffs must use some means for "inject[ing] precision and some measure of substantiation" into the allegations. Allen Neurosurgical Assoc., Inc. v. Lehigh Valley Health Network, No. Civ. A. 99-4653, 2001 WL 41143 (E.D. Pa. Jan. 18, 2001) (quoting Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 789 (3d Cir. 1984)). The complaint must assert who made the fraudulent statement and who received the information, particularly when there is no indication that such information is in the exclusive control of the defendant. See F.D.I.C. v.

Bathgate, 27 F.3d 850, 876 (3d Cir. 1994) (quoting Saporito v. Combustion Eng'g Inc., 843 F.2d 666, 675 (3d Cir. 1988), cert. granted and judgment vacated on other grounds, 489 U.S. 1049 (1989)). Conclusory allegations fail to satisfy the particularity requirement. See Lujan v. Mansmann, 956 F. Supp. 1218, 1228 (E.D. Pa. 1997) (citing Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989)). *Pro se* litigants are not relieved from the burdens imposed under Rule 9. See Floyd, 159 F. Supp. 2d at 832.

The complaint before me provides:

14. Pursuant to the Agreement and representation of the Bank at the time of opening the accounts at the Bank and obtaining a mortgage from the Bank, the Bank was not able to disclose financial information about the Plaintiff without the consent of the Plaintiff or an order of the Court directing the disclosure of the information.

15. Defendants Bank and/or John Does initiated a scheme whereby the financial information of the Plaintiff would be disclosed to third parties.

16. Defendant Bank and/or other John Does made false representations the [sic] Plaintiff, or failed to properly disclose relevant information to the Plaintiff, including, but not limited to, statements as to the disclosure of financial information about the Plaintiff and his business entities, with the intent that said parties rely upon the representations.

(Compl. ¶¶ 15-16.)

A liberal reading of the complaint supports an inference that plaintiff is basing his fraud claim on the theory that the Bank fraudulently represented to him that it would not disclose information regarding his business with First Union, that the Bank made some disclosure, and this alleged misconduct harmed him. Even if his theory were viable, the complaint has fatal defects. Morris does not allege what information was disclosed, who precisely made the alleged disclosure, or who exactly received the information. He merely refers to John Does and unnamed third parties. The complaint is also flawed in that it contains only conclusory

statements with respect to the causation element of a claim for fraud. As explained above, plaintiff is required to plead that “the resulting injury was proximately caused by the reliance.” Gibbs, 538 Pa. at 207-08, 647 A.2d at 889. There is no causal connection between the alleged fraudulent disclosures to unnamed persons and the ensuing foreclosure on plaintiff’s mortgage. Reading in such a connection would be counter to even the lenient inferences afforded to *pro se* litigants. I therefore conclude that the claim for fraud was not adequately plead and will be dismissed.

B. Fiduciary Duty: Count Two

Plaintiff’s second count is for breach of fiduciary duty. Under Pennsylvania law, a fiduciary duty arises from a special relationship of trust in which there is “confidence reposed by one side [and] domination and influence exercised by the other.” Polymer Dynamics, Inc. v. Bayer Corp., No. Civ. A. 99-4040, 2000 WL 1146622, at *7 (E.D. Pa. Aug. 14, 2000) (citation omitted). This confidential relationship exists when “one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence or justifiable trust, on the other.” Commonwealth of Pa. Dep’t of Transp. v. E-Z Parks, Inc., 153 Pa. Commw. 258, 268, 620 A.2d 712, 717 (1993) (quoting Estate of Clark, 467 Pa. 628, 635, 359 A.2d 777, 781 (1976)). Under Pennsylvania law, a lender is not a fiduciary of the borrower, see Smith v. Berg, No. Civ. A. 99-2133, 2000 WL 365949, at *5 (E.D. Pa. Apr. 10, 2000), aff’d, 247 F.2d 532 (3d Cir. 2001) (collecting cases), nor does a bank/customer relationship give rise to a fiduciary relationship, see Wye v. Commonwealth Bank, 846 F. Supp. 321, 325 (M.D. Pa. 1994). I therefore conclude that the claim for breach of fiduciary duty cannot survive.

C. *Gross Negligence/Malfeasance: Count Three*

Morris next asserts a cause of action for gross negligence and malfeasance. While the Pennsylvania courts acknowledge differing standards of care, the courts do not recognize degrees of negligence. See Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 462 (3d Cir. 1990); Floyd, 159 F. Supp. 2d at 828; Ferrick Excavating and Grading Co. v. Senger Trucking Co., 506 Pa. 181, 192, 484 A.2d 744, 749 (1984). Accordingly, this Court construes the complaint as asserting a claim for negligence and malfeasance. Under Pennsylvania law, where, as here, a negligence claim closely resembles and arises out of a breach of contract, a court must determine whether there was an improper performance of a contractual obligation (malfeasance), or a mere failure to perform (nonfeasance); only the former gives rise to an action in tort. See Kearns v. Minnesota Mut. Life Ins. Co., 75 F. Supp. 2d 413, 421 (E.D. Pa. 1999) (collecting cases).

In the instant action, it appears that plaintiff wishes to proceed on the theory that contrary to his agreement with First Union, the Bank disclosed certain information thereby improperly performing its contractual obligation to not make such disclosures. Assuming this theory is viable, the problem with the complaint, as discussed above, is that there is an utter disconnect between the alleged misconduct and the fact that the Bank foreclosed on the mortgage it held with plaintiff. In order to establish a claim for negligence, the plaintiff must show that defendant owed a duty of care; the defendant breached that duty; such breach caused an injury to the plaintiff; and that the plaintiff suffered an actual loss or damage. See Martin v. Evans, 551 Pa. 496, 502, 711 A.2d 458, 461 (1998). Demonstrating a breach of the duty of care and the occurrence of the injury is insufficient; the plaintiff must also prove “the vitally important link of

causation.” Cuthbert v. City of Philadelphia, 417 Pa. 610, 614, 209 A.2d 261, 263 (1965) (collecting cases; cited in Skipworth v. Lead Indus. Ass’n, Inc., NL, 547 Pa. 224, 231, 690 A.2d 169, 172 (1997); Taylor v. Jackson, 164 Pa. Commw. 482, 490, 643 A.2d 771, 775 (1994)). See also Hamil v. Bashline, 481 Pa. 256, 264, 392 A.2d 1280, 1284 (1978). Even if the Court were to agree that Morris adequately plead a breach of duty by alleging that the Bank disclosed certain information and that Morris adequately plead injury by alleging that his mortgage was foreclosed, there are simply no facts from which it can be inferred that the alleged disclosure caused the foreclosure. I therefore conclude that the count for negligence and malfeasance will be dismissed.

D. Civil Rico: Counts Four, Five, Six, Seven and Eight

The RICO statute authorizes civil suits by “[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962].” 18 U.S.C. § 1964(c). Section 1962 contains four separate subsections each of which address a different problem. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir. 1991). As explained by the Court of Appeals:

Section 1962(a) prohibits ‘any person who has received any income derived . . . from a pattern of racketeering activity’ from using that money to acquire, establish or operate any enterprise that affects interstate commerce. Section 1962(b) prohibits any person from acquiring or maintaining an interest in, or controlling any such enterprise ‘through a pattern of racketeering activity.’ Section 1962(c) prohibits any person employed by or associated with an enterprise affecting interstate commerce from ‘conduct[ing] or participat[ing] . . . in the conduct of such enterprise’s affairs through a pattern of racketeering activity.’ Finally, section 1962(d) prohibits any person from ‘conspir[ing] to violate any of the provisions of subsections (a), (b), or (c).’

Id. (alterations in original).

Under section 1962(a), a plaintiff must allege that he suffered an injury specifically from the use or investment of income in the named enterprise. See id.; Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1188 (3d Cir. 1993); Moore v. Reliance Standard Life Ins. Co., No. Civ. A. 98-4610, 1999 WL 299577, at *3 (E.D. Pa. May 10, 1999); Lim v. New York Life Ins. Co., No. C.A. 97-1972, 1998 WL 54331, at *3 (E.D. Pa. Jan. 13, 1998). Morris links his injury to the alleged unlawful disclosure of certain account information to unnamed third parties. There is no allegation linking his injuries to the use or investment of income in any named enterprise. Accordingly, I will dismiss the claim asserted under section 1962(a).

Section 1962(b) requires a plaintiff to allege that he suffered an injury from the defendant's acquisition or control of an interest in a RICO enterprise. See Lightning Lube, 4 F.3d at 1190; Moore, 1999 WL 299577, at *3. For example, such an injury occurs when "the owner of an enterprise infiltrated by the defendant as a result of racketeering activities is injured by the defendant's acquisition or control of his enterprise." Lightning Lube, 4 F.3d at 1190 (citation omitted). The plaintiff must also show that the interest or control of the RICO enterprise by the person resulted from the racketeering. See id. It is insufficient to merely demonstrate that a person engaged in racketeering has an otherwise legitimate interest in an enterprise. See id. Rather, the plaintiff must firmly show a "nexus between the interest and the alleged racketeering activities." See id.

The complaint before this Court fails to make such allegations. Morris essentially asserts that his injury is the foreclosure of the mortgage by the Bank that held the mortgage, and that the misconduct involved the Bank and unidentified persons making certain disclosures to unidentified third parties. Even a liberal reading of the complaint fails to allow a reasonable

inference that Morris has plead facts that support his claim that First Union acquired or controlled a racketeering enterprise that injured Morris or that any acquisition or control was a result of racketeering. I will therefore dismiss the claim asserted under section 1962(b).

As explained, section 1962(c) prohibits *persons* who are employed by or associated with an *enterprise* from conducting the enterprise's affairs through a pattern of racketeering. Liability rests upon the culpable person, not the enterprise. See Dugan v. Bell Tel. of Pa., 876 F. Supp. 713, 719 (W.D. Pa. 1994). The plaintiff must assert that the person and the enterprise are separate and distinct. Lightning Lube, 4 F.3d at 1191; Metcalf v. Painewebber Inc., 886 F. Supp. 503, 511 (W.D. Pa. 1995), aff'd, 79 F.3d 1138 (3d Cir. 1996); Dugan, 876 F. Supp. at 719. A corporation cannot be held liable under section 1962(c) unless it engages in activity as a "person" in a separate enterprise. See Oglesby v. Saint-Gobain Corp., No. Civ. A. 97-4038, 1997 WL 570925, at * (E.D. Pa. Sept. 4, 1997). Where persons are employees of the corporation, the plaintiff must assert that such persons acted outside the scope of their employment. See Metcalf, 886 F. Supp. at 513-14. Morris identifies no entity separate and distinct from First Union. Rather, he asserts that unidentified John Does, presumably employees of the Bank, made unauthorized disclosures to third parties. There is also no allegation that these unnamed persons acted for their own personal pursuit. Accordingly, I conclude that this claim must also be dismissed.

Liability under section 1962(d) is dependent on a conspiracy to violate one of the other 1962 subsections; thus, where, as here, a plaintiff has failed to assert a valid claim under any of those subsections, the plaintiff cannot pursue a claim under 1962(d). See Lightning Lube, 4 F.3d at 1191.

E. Civil Conspiracy: Count Nine

Plaintiff's final claim is one for civil conspiracy, in which he alleges that the Bank and John Does conspired against him. (Compl. ¶¶ 77-78.) Under Pennsylvania law, a civil conspiracy occurs when two or more commit an unlawful act or commit an otherwise lawful act by unlawful means; some overt act is taken in furtherance of the conspiracy, and the plaintiff experiences a legal harm. See Barmasters Bartending School, Inc. v. Authentic Bartending School, Inc., 931 F. Supp. 377, 387 (E.D. Pa. 1996). In general, under Pennsylvania law, a corporation cannot conspire with itself or with its agents or employees when such agents or employees act solely for the corporation and not on their own behalf. See Tyler v. O'Neill, 994 F. Supp. 603, 613 (E.D. Pa. 1998), aff'd, 189 F.3d 465 (3d Cir. 1999); United Nat'l Ins. Co. v. Equip. Ins. Managers, Nos. Civ. A. 95-0116, 95-2892, 1995 WL 631709, at *6 (E.D. Pa. Oct. 27, 1995); Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1328 (E.D. Pa. 1994). The exception to this rule arises where the agent or employee acts in pursuit for personal reasons, and one of the parties to the conspiracy is not an agent or employee of the corporation. See Tyler, 994 F. Supp. at 613; United National, 1995 WL 631709, at *6; Kohn, Nast & Graf, 862 F. Supp. at 1328.

Here, Morris asserts that the Bank is a conspirator, (Compl. ¶ 77), which as explained is not allowed by law to support this claim. The complaint also fails allege the identities of John Does beyond providing that they are "unknown individuals, partnerships, corporations, or other business entities." (Id. ¶ 3.) Plaintiff asserts that the "Bank never disclosed that individuals working within the Bank could and/or would disclose information concerning the various accounts and mortgage of the Plaintiff to third parties." (Id. ¶ 8.) He further asserts, in the next paragraph. that "Defendant Bank and John Does fraudulently disclosed certain information to

third parties about the various bank accounts. . . .” (*Id.* ¶ 9.) The only reasonable inference is that the John Does who allegedly disclosed certain information were employees of First Union. Thus, the complaint is flawed in that it does not allege that these individuals disclosed information for their own personal benefit. In addition, civil conspiracy requires an underlying tortious act, *see Allegheny Gen. Hosp. v. Phillip Morris, Inc.*, 228 F.3d 429, 446 (3d Cir. 2000), which plaintiff does not plead in his complaint. For these reasons, I conclude that the claim for civil conspiracy will be dismissed.

F. Leave to Amend

Under Federal Rule of Civil Procedure 15(a), “leave [to amend] shall be freely given when justice so requires.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) (alteration in original). Leave to amend may be denied on grounds of undue delay, bad faith, dilatory motive, prejudice and futility. *See id.* Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted, under the same standard of legal sufficiency as Rule 12(b)(6). *See id.* In addition to the fact that plaintiff has not requested leave to amend, I conclude that leave to amend will not be granted *sua sponte* because it would be an exercise in futility. For the reasons stated above, the allegations of the complaint as to civil RICO are fatally defective in that the allegations fail to support a cause of action. As well, there is no suggestion that there is further evidence available to support a civil RICO action. Having decided to dismiss the RICO counts, this Court declines to retain supplemental jurisdiction over the state law claims.

IV. Conclusion

The motions to dismiss filed by defendant will be granted and the complaint will be

dismissed with prejudice as to the civil RICO counts as plaintiff has failed to meet his pleading requirements under the Federal Rules of Civil Procedure. The state law counts will be dismissed without prejudice. An appropriate Order follows.

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

MICHAEL MORRIS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
FIRST UNION NATIONAL BANK, et al.	:	
	:	
Defendants.	:	NO. 01-1953

ORDER

AND NOW, this 14th day of January, 2001, upon consideration of the two unopposed motions to dismiss filed on behalf of defendant First Union National Bank, (Document Nos. 12 and 13), pursuant to Federal Rule of Civil Procedure 12(b)(6), and having concluded for the reasons set forth in the foregoing memorandum that plaintiff has failed to state a cause of action as to the civil RICO counts, and that it would be futile to *sua sponte* grant plaintiff leave to amend the complaint, it is hereby **ORDERED** that the motions are **GRANTED** and the civil RICO counts of the complaint are **DISMISSED** with prejudice and the state law counts are **DISMISSED** without prejudice.

This is a final order.

LOWELL A. REED, JR., S.J.