

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

ERIC J. TALLEY :
 :
 v. : CIVIL ACTION
 :
 BERNICE HALPERN, : NO. 05-4184
 Executrix of the Estate of :
 Benjamin J. Winderman :

MEMORANDUM

Padova, J.

August 16, 2005

Plaintiff Eric J. Talley has brought this *pro se* action against Bernice Halpern, the Executrix of the estate of Benjamin J. Winderman, Esq., alleging three counts of violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, (Counts One-Three), and one count of legal malpractice (Count Four). Presently before the Court is Plaintiff's "Motion to Proceed *in Forma Pauperis*." For the reasons that follow, said Motion is granted. Moreover, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Counts One, Two and Three of the Complaint are dismissed for failure to state a claim upon which relief can be granted, and the Court declines to exercise supplemental jurisdiction over Count Four of the Complaint pursuant to 28 U.S.C. § 1367(c)(3).

I. BACKGROUND

On December 5, 1999, Plaintiff entered into a written contract with Winderman, who was an employee, agent or representative of the Winderman Law Office. (Compl. ¶6.) Pursuant to this contract, Winderman agreed to represent Plaintiff in a tax action against the federal government and the Internal Revenue Service. (Id. ¶ 7.)

Although Winderman filed an appropriate action in the United States District Court for the Eastern District of Pennsylvania, Winderman thereafter intentionally breached his contract with Plaintiff by failing to properly prosecute and manage the lawsuit when he was unable to properly serve the defendants. (Id. ¶¶ 9-10, 15.) Due to Winderman's actions, the court entered an Order to Show Cause why the complaint should not be dismissed pursuant to Federal Rule of Civil Procedure 4(m). (Id.)

In response to the court's Order to Show Cause, Winderman moved to re-open the case and falsely informed the court that service had not been effected in a timely manner because the attorney who had originally handled Plaintiff's case had left the Winderman Law Office, and Plaintiff's case file had not been located. (Id. ¶ 15.) Upon learning of Winderman's explanation for the delay, the court denied the motion to re-open and dismissed Plaintiff's tax lawsuit pursuant to Rule 4(m) without prejudice. (Id. ¶ 18.) Winderman then telephoned Plaintiff to inform him that the case had been dismissed, but noted that there was no reason to worry because the case could and would be reopened. (Id. ¶ 24.) In reliance upon Winderman's representations, Plaintiff did not file a motion for reconsideration of the court's Order dismissing his case, and refrained from hiring another attorney before the 2-year statute of limitations governing the filing of federal tax claims had expired. (Id. ¶ 29.)

II. LEGAL STANDARD

The *in forma pauperis* statute, 28 U.S.C. § 1915, "is designed

to ensure that indigent litigants have meaningful access to the federal courts." Neitzke v. Williams, 490 U.S. 319, 324 (1989) (citing Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 342-43 (1948)). Specifically, Congress enacted the *in forma pauperis* statute to ensure that administrative court costs and filing fees, both of which ordinarily must be paid when filing a lawsuit, would not prevent indigent persons from pursuing meaningful litigation. Jones v. Zimmerman, 752 F.2d 76, 78-79 (3d Cir. 1985). Nevertheless, Congress was similarly concerned that persons could abuse this cost-free access to the federal courts. Denton v. Hernandez, 504 U.S. 25, 31 (1992).

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), a court may dismiss an action if the court determines that the action "fails to state a claim on which relief can be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). "The standard for failure to state a claim under § 1915(e)(2)(B)(ii) is the same as that for [a] motion to dismiss for failure to state a claim under Rule 12(b)(6)." Azubuko v. Massachusetts State Police, No. Civ. A. 04-4176, 2004 WL 2590502, at *1 (E.D. Pa. Nov. 12, 2004) (citing Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000)). When determining a Motion to Dismiss pursuant Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all well pleaded facts in the

complaint and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993). A complaint will be dismissed when a plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. DISCUSSION

A. RICO Claims

The RICO statute authorizes civil suits by "any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). Here, the Complaint sets forth three separate RICO claims for violations of subsections 1962(a), (b), and (c). The United States Court of Appeals for the Third Circuit ("Third Circuit") has explained that:

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 "conducting or participating . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity."

Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir. 1991).

1. Section 1962(a)

Section 1962(a) provides, in relevant part, as follows:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise

18 U.S.C. § 1962(a). To state a claim 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. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1188 (3d Cir. 1993). The injury resulting from the use or investment of the racketeering income must be separate from any injury resulting from the racketeering acts themselves. Id. An allegation that the "use and investment of racketeering income keeps the defendant alive so that it may continue to injure plaintiff [] is insufficient to meet the injury requirement of section 1962(a)." Id.

Here, the Complaint alleges only that the money Winderman received from Plaintiff through "a pattern of racketeering activity" was invested in an enterprise that was corrupted by Defendant's racketeering activity. (Compl. ¶¶ 37-38.) These allegations do not establish an injury separate from the racketeering activity, and are clearly insufficient to establish a violation of Section 1962(a). See Lightning Lube, 4 F.3d at 1188. Accordingly, the Court concludes that Count One of the Complaint alleging a violation of Section 1962(a) of the RICO statute fails

to state a claim upon which relief can be granted and must be dismissed pursuant to Section 1915(e)(2)(B)(ii).

2. Section 1962(b)

Section 1962(b) provides, in relevant part, that “[i]t shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.” 18 U.S.C. § 1962(b). To state a claim under Section 1962(b), a plaintiff must allege that he suffered an injury from the defendant’s acquisition or control of an interest in a RICO enterprise. Lightning Lube, 4 F.3d at 1190. “The injury must be incurred from the acquisition or control of an interest in the RICO enterprise rather than from the pattern of racketeering.” Dianese, Inc. v. Pennsylvania, No. Civ. A. 01-2520, 2002 WL 1340416, at *9 (E.D. Pa. June 19, 2002). Such an injury occurs, for example, 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.

Here, the Complaint alleges only that Plaintiff was injured due to a pattern of racketeering activity Winderman engaged in and which prevented Plaintiff from securing a just and speedy determination of his underlying tax lawsuit. (Compl. ¶ 44-45.) These allegations do not establish an injury separate from the pattern of racketeering activity, and are clearly insufficient to

establish a violation of Section 1962(a). See Lightning Lube, 4 F.3d at 1190. Accordingly, the Court concludes that Count Two of the Complaint alleging a violation of Section 1962(b) of the RICO statute fails to state a claim upon which relief can be granted and must be dismissed pursuant to Section 1915(e)(2)(B)(ii).

3. Section 1962(c)

Section 1962(c) provides, in relevant part, that “[i]t shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity” 18 U.S.C. § 1962(c). To state a claim under Section 1962(c), a plaintiff must allege “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” Warden v. McLelland, 288 F.3d 105, 114 (3d Cir. 2002). A “pattern” requires “at least two acts of racketeering activity” which occur within a ten year period. 18 U.S.C. § 1961(5). To prove a pattern of racketeering activity, a plaintiff must show that “the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.” H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989). Racketeering activities are related if they “have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” Id. at 240 (quoting 18 U.S.C. § 3575(e)).

“Racketeering activity” is defined in the RICO statute to

comprise the state law offenses of murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and dealing in a controlled substance or listed chemical, as well as several federal offenses such as mail and wire fraud. See 18 U.S.C. § 1961(1). Breach of contract, however, "is not a predicate act of racketeering activity enumerated in § 1961(1)," and courts have "refused to read it into § 1961's expansive list." Annulli v. Panikkar, 200 F.3d 189, 199-200 (3d Cir. 1999).

Here, the Complaint alleges that Winderman engaged in a pattern of racketeering activity by committing mail and wire fraud, in violation of 18 U.S.C. § 1341. The elements of the predicate act of mail fraud are: "(1) the existence of a scheme to defraud; (2) the participation by the defendant in the particular scheme charged with the specific intent to defraud; and (3) the use of the United States mails in furtherance of the fraudulent scheme." United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994) (footnote omitted) (citing United States v. Burks, 867 F.2d 795, 797 (3d Cir. 1989)). The wire fraud statute, 18 U.S.C. § 1343, is virtually identical to the mail fraud statute, except that it concerns interstate "communications transmitted by wire." United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994); see also 18 U.S.C. §§ 1341, 1343. Thus, "'the cases construing the mail fraud statute are applicable to the wire fraud statute as well.'" Id. at 797 n.2 (quoting United States v. Tarnpol, 561 F.2d 466, 475 (3d Cir. 1977)). However, while wholly intrastate use of the mails for fraudulent purposes violates the mail fraud statute, the wire fraud

statute is only violated through the interstate use of the wires. Spitzer v. Abdelhak, No. Civ. A. 98-6485, 1999 WL 1204352, at *5 (E.D. Pa. Dec. 15, 1999).

A mail and wire fraud scheme "need not be fraudulent on its face but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. Proof of specific intent is required[,] . . . which may be found from a material misstatement of fact made with reckless disregard for the truth." United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995) (citations omitted). "[W]hen alleging mail and wire fraud as predicate acts in a RICO claim, plaintiff's pleadings must identify the purpose of the mailing within the defendant's fraudulent scheme and specify the fraudulent statement, the time, place and speaker and content of the alleged misrepresentations." Annulli, 200 F.3d at 201 n.10.

With respect to wire fraud, the Complaint alleges only intrastate wire communications between Winderman, Plaintiff, and the United States District Court for the Eastern District of Pennsylvania. (See Compl. ¶¶ 19-20, 24.) Indeed, both Winderman and Plaintiff resided and were located within the Commonwealth of Pennsylvania at the relevant times. (See id. ¶¶ 4-5.) Wholly intrastate use of the wires, however, does not give rise to the predicate act of wire fraud. Spitzer, 1999 WL 1204352, at *5. The Court, therefore, finds that the Complaint's allegations of wire fraud are clearly insufficient to establish a violation of Section 1962(c). Id.

With respect to mail fraud, the Complaint alleges that Winderman violated Section 1962(c) when he filed a motion to re-open the underlying tax lawsuit which contained fraudulent statements. "[A] number of courts have considered whether serving litigation documents by mail can constitute mail fraud, and all have rejected that possibility.'" Nolan v. Galaxy Scientific Corp., 269 F. Supp. 2d 635, 643 (E.D. Pa. 2003) (quoting United States v. Pendergraft, 297 F.3d 1198, 1208 (11th Cir. 2002)(collecting cases)). In this district, courts have similarly been "unwilling to expand RICO liability for mail fraud in such a dramatic fashion as to include litigation papers and pre-litigation statements of legal position." Id. Accordingly, Winderman's representation of Plaintiff in the underlying tax lawsuit cannot form the basis of a RICO claim under Section 1962(c).

The Complaint further alleges that Winderman engaged in mail fraud in violation of Section 1962(c) when he sent Plaintiff a copy of the retainer contract, pursuant to which Winderman agreed to represent Plaintiff in the underlying tax litigation. A single act, however, is insufficient to establish a "pattern" within the meaning of the RICO statute. See 18 U.S.C. § 1961(5) ("at least two acts of racketeering activity" are required to establish a RICO violation.) Moreover, the Court notes that the Complaint's allegations "simply contain no indication of the deception or overreaching which the mail fraud statute requires." Kehr, 926 F.2d at 1417. Indeed, while the Complaint's allegations could "possibly amount to a breach of contract," the fact that Winderman

did not represent Plaintiff in the underlying tax lawsuit to Plaintiff's satisfaction "contains no deception that would bring [Winderman's actions] within the purview of the mail fraud statute." Id.; see also Annulli, 200 F.3d at 199-200 (breach of contract "is not a predicate act of racketeering activity"). The Court, therefore, finds that the Complaint's allegations of mail fraud are clearly insufficient to establish a violation of Section 1962(c). See Warden, 288 F.3d at 114. Accordingly, the Court concludes that Count Three of the Complaint alleging a violation of Section 1962(c) of the RICO statute fails to state a claim upon which relief can be granted and must be dismissed pursuant to Section 1915(e)(2)(B)(ii).

B. Legal Malpractice Claim

Here, no diversity of citizenship exists and the Court's sole basis for exercising subject matter jurisdiction over this action is federal question jurisdiction under 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 1367(c)(3), a federal court may decline to exercise supplemental jurisdiction over a pendant state law claim if the court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Third Circuit has determined that "[i]f it appears that the federal claim is subject to dismissal . . . the court should ordinarily refrain from exercising [supplemental] jurisdiction in the absence of extraordinary circumstances." Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196 (3d Cir. 1976). As all federal claims in this action have been dismissed pursuant to 28 U.S.C. §

1915(e)(2)(B)(ii) for failure to state a claim upon which relief can be granted, the Complaint provides no other grounds for subject matter jurisdiction, and no extraordinary circumstances are present, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claim for legal malpractice.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's "Motion to Proceed *in Forma Pauperis*" is granted. Moreover, pursuant to 28 U.S.C. § 1915 (e)(2)(B)(ii), Counts One, Two and Three of the Complaint alleging RICO claims are dismissed for failure to state a claim upon which relief can be granted, and the Court declines to exercise supplemental jurisdiction over Count Four of the Complaint, which asserts a claim for legal malpractice.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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 v. : CIVIL ACTION
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 BERNICE HALPERN, : NO. 05-4184
 Executrix of the Estate of :
 Benjamin J. Winderman :

O R D E R

AND NOW, this 16th day of August, 2005, upon consideration of Plaintiff's "Motion to Proceed *in Forma Pauperis*" (Doc. No. 1), **IT IS HEREBY ORDERED** as follows:

1. Plaintiff's request to proceed *in forma pauperis* is **GRANTED**;
2. Counts One, Two and Three of the Complaint are **DISMISSED** for failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii);
4. The Court **DECLINES** to exercise supplemental jurisdiction over Count Four of the Complaint; and
5. The Clerk of the Court shall **CLOSE** this case for statistical purposes.

BY THE COURT:

John R. Padova, J.