

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

ROBERT E. OGLESBY and : CIVIL ACTION  
JUDY OGLESBY :  
 :  
v. :  
 :  
 :  
 :  
SAINT-GOBAIN CORPORATION; :  
CERTAINTEED CORPORATION; JAMES :  
E. HILYARD; and ROBERT WILK : NO. 97-4038

**MEMORANDUM**

Giles, J.

August 29, 1997

Plaintiffs bring this action pursuant to the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1962(c) and (d) (Count I), with appended state law claims of defamation (Count II), fraud and conspiracy (Count III), and loss of consortium (Count IV). Before the court are defendants’ motion to dismiss for failure to state a claim and plaintiffs’ motion to file a second amended complaint. For the reasons which follow, defendants’ motion is granted in part and denied in part. Plaintiffs’ motion is denied.

**FACTUAL BACKGROUND**

Plaintiff, Robert Ogelsby, was employed by defendant CertainTeed Corporation (“CertainTeed”), a wholly owned subsidiary of defendant Saint-Gobain Corporation (“SG”), as Director of Purchasing and Transportation of CertainTeed’s Roofing Products Group. As such, he was responsible for negotiating contracts for purchases by CertainTeed from various vendors and suppliers. (Amend. Compl. ¶¶ 11-12.) However, he had no authority to enter into contracts

on behalf of CertainTeed. All contracts had to be signed by defendant Hilyard, the president of the Roofing Products Group. At all relevant times, defendant Wilk was Manager of Corporate Security for SG.

In July of 1987, CertainTeed decided to close its Savannah, Georgia plant. This involved the clean up and disposal of underground pollutants on the property (“the Savannah Remediation Project”). (Amend. Compl. ¶¶ 15-19.) Hilyard directed plaintiff to obtain a proposal from Hagan Construction Company (“Hagan”) without securing bids from other contractors. Plaintiff did what he was told. On May 14, 1993, Hilyard signed a contract with Hagan on behalf of CertainTeed for the removal of 10,840 tons of contaminated soil for the amount of \$201,685. (Amend. Compl. ¶¶ 28-31.) Eventually, the clean-up of the site involved the removal and replacement of over 60,000 tons of soil at a cost of approximately \$1,100,000. (Amend. Compl. ¶¶ 41, 64).

In August of 1995, defendant Wilk and Joe Johnson, another SG employee from Corporate Security, met with Hagan and its accountant, Clarence Taylor to examine Hagan’s corporate books and records. Plaintiff alleges that, after implying that he and his wife were living beyond their means, Wilk and/or Johnson threatened Hagan and Taylor with criminal investigation and prosecution unless they offered up the name of the CertainTeed employee with whom Hagan colluded in defrauding CertainTeed. (Amend. Compl. ¶¶ 43-46). The complaint does not state, however that Hagan gave them the plaintiff husband’s name.

On August 29, 1995, plaintiff was ordered by Hilyard to attend a meeting with Wilk and Johnson and CertainTeed’s Vice President of Finance, Raymond Gryzbowski. There, Wilk told plaintiff that CertainTeed had been overcharged by Hagan in the sum of approximately

\$750,000, and implied that plaintiff had taken kickbacks from Hagan. At the conclusion of the meeting, plaintiff was suspended from his position with pay. A week later he was called back to work but was told he would have to submit all proposed contracts through Gryzbowski for review before submitting them to Hilyard for signature. (Amend. Compl. ¶¶ 47-50).

On or about February 1, 1996, Hilyard, on behalf of CertainTeed, submitted a proof of loss claim (“the Fidelity Bond Claim”) to SG’s insurer, Arkwright Mutual Insurance Company (“Arkwright”) for losses resulting from the Savannah Remediation Project. The claim characterized the loss as arising from employee theft. It alleged that Hagan overcharged CertainTeed because of kickbacks paid to plaintiff. The claim document was submitted through the United States mails. (Amend. Compl. ¶¶ 53-58.) The claim was concealed from the plaintiff. He continued to work for CertainTeed for the next year. On January 21, 1997, plaintiff was terminated for gross mismanagement of the Savannah Remediation Project. (Amend. Compl. ¶¶ 84-85.)

On February 13, 1997, plaintiff received a certified letter from a claims attorney who had been retained by Arkwright to investigate the Fidelity Bond Claim. Not only did the letter inform him of the gravamen of the claim, but also that Arkwright had the right to recover losses from all the responsible parties. This is the first notice plaintiffs had of the Fidelity Bond Claim. (Amend. Compl. ¶¶ 89-92.) On February 18, 1997, Hilyard again submitted, through the United States mails, a revised proof of loss, citing plaintiff as the thieving employee responsible for losses of at least \$944,548. (Amend. Compl. ¶ 93.) To date, Arkwright has made no determination of the Fidelity Bond Claim one way or the other. Plaintiffs assert that defendants continue to pursue this claim.

In their first amended complaint, plaintiffs allege that the individual and corporate defendants conspired and have associated together, in fact, as an enterprise which engaged in a pattern of racketeering activity -- namely mail fraud -- in violation of 18 U.S.C. §§ 1962(c) and (d).<sup>1</sup> The object of the conspiracy was, and is, to file a false claim with Arkwright. Plaintiffs further allege that plaintiff, Robert Oglesby, was the direct and intended victim of the fraudulent conspiracy and scheme, since any claim would result in Arkwright requiring defendants to terminate plaintiff and in Arkwright filing a claim against him for indemnity. (Amend. Compl. ¶¶ 101-07).

#### STANDARD FOR DISMISSAL

Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the plaintiff's allegations, not his evidence. The court must accept as true all of plaintiff's factual allegations and draw from them all reasonable inferences favorable to the plaintiff. Oshiver v. Levin Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994). A claim should not be dismissed unless it appears certain that no relief can be granted under any set of facts that could be proved consistent with plaintiff's allegations. Hishon v. King & Spalding, 467 U.S. 69 (1984).

Defendants allege numerous deficiencies in plaintiffs' RICO claims, which the court will address in turn. As noted above, plaintiffs have proposed a second amended

---

1. Paragraph 108 of the first amended complaint references § 1962(b). However, there are no allegations that defendants acquired control of any enterprise or any other reference to this subsection. The court assumes this one single reference is a typographical error.

complaint.<sup>2</sup> Accordingly, the court will test the first amended complaint against the alleged deficiencies and, where necessary, look to the proposed second amended complaint. The court will not grant plaintiffs' motion for leave to amend if the proposed second amended complaint would not cure any fatal defects that the first amended complaint may contain. See Metcalf v. PaineWebber, Inc., 886 F. Supp. 503, 507 (W.D. Pa. 1995).

### DISCUSSION

RICO provides a private cause of action for “[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). Plaintiffs allege that defendants violated section 1962(c), which states, in relevant part:

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 . . .

18 U.S.C. § 1962(c). Plaintiff also alleges that defendants violated section 1962(d), which makes it unlawful for any person to conspire to violate any of the other provisions of section 1962.

#### **Claims under 18 U.S.C. § 1962(c)**

To make out a claim under this provision, plaintiffs must allege (1) the existence of an enterprise effecting interstate commerce; (2) that defendants were persons employed by or associated with the enterprise; (3) that the defendants participated, directly or indirectly, in the conduct or affairs of the enterprise; and (4) that defendants participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts within the

---

2. The proposed second amended complaint differs from the first only in the allegations of Count I, the RICO allegations.

last ten years. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989). We turn now to defendants' arguments that plaintiffs have failed to allege a cause of action upon which relief can be granted under RICO and that therefore, Count I should be dismissed.

*A. Racketeering Activity*

The predicate acts constituting racketeering activity are listed in 18 U.S.C. § 1961(1). This list is all-inclusive. Tabas v. Tabas, 47 F.3d 1280, 1291 (3d Cir. 1995); Eagle Traffic Control, Inc. v. James Julian, Inc., 933 F. Supp. 1251, 1256 (E.D. Pa. 1996). Here, plaintiffs have alleged two fraudulent insurance claims submitted through the United States mails. As mail fraud is one of the predicate offenses listed under section 1961, plaintiffs have met this pleading requirement.<sup>3</sup>

*B. Pattern of Racketeering Activity*

In addition to pleading mere numerosity of predicate acts, plaintiffs must show that there is a threat of continuing activity. Eagle, 933 F. Supp at 1257. Plaintiffs can meet the continuity requirement if they plead a threat of continued racketeering activity, i.e., where the predicate acts are alleged to be a regular way of conducting business or are part of an ongoing enterprise. Tabas, 47 F.3d at 1295.

Defendants argue that plaintiffs have not pled a pattern of activity as required by the statute. They argue that the second mailing of the claim was merely a reiteration of the first

---

3. Plaintiffs have also alleged that the meeting in which Wilk threatened Hagan and Taylor with criminal prosecution unless they revealed the name of a CertainTeed employee taking kickbacks constitutes extortion, another predicate offense. (Amend. Compl. ¶¶ 43-46, 101). Defendants argue that these allegations do not plead extortion under Pennsylvania law. Plaintiffs counter that the court should look to Georgia law, as the alleged meeting took place in Savannah. Since the court finds the allegations of mail fraud sufficient, we need not address this dispute between the parties.

and that a year's lapse between the two mailings do not constitute a substantial period of time. We disagree. Where the RICO predicate acts are mail fraud, the court must look beyond the mailing to the underlying scheme or artifice. "Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1414 (3d Cir. 1991). Plaintiffs allege that defendants made two illegal mailings as part of an ongoing scheme which continues to this date. Since the alleged scheme to defraud Arkwright is still active, the complaint sufficiently pleads past conduct which, by its nature, projects into the future with the threat of repetition. Tabas, 47 F.3d at 1292.

*C. The Enterprise/Person Distinctiveness Requirement*

Because § 1962(c) requires a "person" acting through an "enterprise," this circuit has long held that the person subject to liability cannot be the same entity as the enterprise. See, e.g., Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 262 (3d Cir. 1995); Hirsch v. Enright Refining Co., 751 F.2d 628, 633 (3d Cir. 1984). Defendants are correct in their assertion that, on its face, Count I of the first amended complaint alleges that all the defendants formed an association in fact (the enterprise) and are also the persons liable. (Amend. Compl. ¶¶ 101-07.)

However, it is clear from the facts pled in the complaint that plaintiffs are alleging that the corporate entity is the enterprise through which the individual defendants -- the persons - - conducted the pattern of racketeering. The complaint alleges that Hilyard committed the acts of mail fraud and that Wilks threatened Hagan and Taylor. (Amend. Compl. ¶¶ 43-46, 54, 93.) There are no acts pled as to CertainTeed or SG. Plaintiffs' proposed second amended complaint supports this interpretation. They would amend the complaint to allege that the corporate

defendants were the enterprise and that the individual defendants were the persons. (Pls.’ Conditional Motion to File Second Amend. Compl.; Ex. 1 , ¶ 102.) Because we find the facts as alleged in the first amended complaint sufficient to state a RICO claim against the individual defendants, we decline to dismiss Count I as to them.

Nevertheless, while corporate officers may be held liable for conducting a pattern of racketeering activity through a corporate enterprise, the corporation itself cannot be held liable under § 1962(c) unless it engages in racketeering activity as a “person” in another distinct enterprise. Jaguar Cars, 47 F.3d at 268. Viewing the facts pled in the first amended complaint, in the light most favorable to the plaintiffs, there is nothing which supports the existence of an enterprise distinct from CertainTeed/SG. Although Count I states the defendants were “associated together in fact” (Amend. Compl. ¶ 101), plaintiffs do not allege any facts which would support this allegation.<sup>4</sup> The facts do not allege that the corporations were anything but a vehicle through which the individual defendants acted. Indeed, it is clear that the two corporations are, in fact, one corporate enterprise. The only way Hilyard could make the alleged fraudulent claim was to go through the parent corporation as the policy holder. The facts pled in the first amended complaint do not support a conclusion that the corporations acted as two separate entities to form a distinct enterprise. Thus, the RICO claims against the corporate defendants must be dismissed.

The court does not find that the proposed second amended complaint would be curative of this defect. The only proposed change would be to identify CertainTeed and SG as an

---

4 . Because the complaint is deficient, the court declines to address the question of whether a corporation can associate in fact with its wholly-owned subsidiary corporation where the complaint does not allege that the corporations are distinct and separate entities.

association-in-fact enterprise and to identify the individual defendants as the persons operating the enterprise. (Pls.' Conditional Motion to File Second Amend. Compl.; Ex. , ¶ 102.)

Accordingly, the motion for leave to file a second amended complaint is denied.

*D. Respondeat Superior and Aiding and Abetting Liability Under § 1962(c)*

Plaintiffs claim that the corporate defendants, having benefitted from the racketeering activity of its employees, have respondeat superior liability under § 1962(c). See Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1361-62 (3d Cir. 1987). This is true, where the corporate defendant is named as a person in a separate, distinct enterprise. However, where the allegations show that the defendant corporation is the enterprise and do not support a separate enterprise theory, imposing respondeat superior and aiding and abetting liability would run afoul of the Enright prohibition against holding the enterprise liable. Petro-Tech, 824 F.2d at 1359.<sup>5</sup> Therefore, the corporate defendants cannot be held liable under this theory.

*E. Defendant Wilk and Fed. R. Civ. P. 9(b)*

Defendants argue that the first amended complaint fails to specify with any particularity, the nature of Wilk's involvement in the underlying fraud. We disagree. In this circuit, the requirements of Rule 9(b) are met where the plaintiff alleges the circumstances of fraud sufficiently to put the defendants on notice of the precise misconduct with which they are charged. Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 791 (3d Cir. 1984), cert. denied 469 U.S. 1211; Fried v. Sungard Recovery Services, Inc., 900 F. Supp. 758, 763

---

5. While Petro-Tech was decided prior to Jaguar Cars, the Third Circuit has made it clear that the central holding of Enright remains undisturbed. A corporation, as an enterprise, cannot be held liable under § 1962(c). Jaguar Cars, 47 F.3d at 268.

(E.D. Pa. 1995). Here, plaintiffs have identified the fraud as an insurance claim of theft which is not, in fact, due to theft. They have identified Wilk's role in the scheme, namely his intimidation of Hagan and Taylor to obtain plaintiff's name as a scapegoat. These allegations suffice to place Wilk on notice as to his role in the alleged fraud.

#### **Claims under 18 U.S.C. § 1962(d)**

To plead conspiracy properly, plaintiffs' allegations must address the period of the conspiracy, the object of the conspiracy, and the actions the alleged conspirators undertook to attempt to achieve that purpose. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166 (3d Cir. 1989). Defendants argue that it is impossible, as a matter of law, for a corporation to conspire with its employees or its parent corporation. We need not address this argument since the plaintiffs' failure to plead a cause of action against the corporate defendants under § 1962(c) forecloses a subsection (d) claim against them. Jaguar Cars, 47 F.3d at 262; Kehr Packages, Inc., 926 F.2d at 1411 n.1. Defendants do not challenge the adequacy of the conspiracy claims asserted against the two individual defendants. Accordingly, we find that plaintiffs have adequately stated a violation of subsection 1962(d) as to the individual defendants..

#### **18 U.S.C. § 1964(c)**

Having concluded that plaintiffs have sufficiently alleged a violation of § 1962(c) by defendants Hilyard and Wilk, we must next consider whether they allege an injury within the meaning of 18 U.S.C. § 1964(c). Shearin, 885 F.2d at 1167. The alleged RICO injuries are the loss of plaintiff's job and related benefits and the damage to his reputation. In a RICO claim, "the compensable injury necessarily is the harm caused by [the] predicate acts . . . for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise."

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985). Thus, the alleged injuries must stem from the acts of mail fraud.

Defendants contend that the alleged acts of mail fraud did not result in plaintiff's termination, analogizing this situation to that in Shearin. We disagree. In Shearin, that plaintiff alleged that she was terminated to prevent her from making disclosures about defendants' illegal activities which constituted the predicate acts. 885 F.2d at 1164. Thus, the district court found, and the Third Circuit agreed, that it was not the predicate acts which caused her termination, but rather her refusal to play along. Id. Here, the predicate acts set in motion an insurance claim which would, of necessity, require plaintiff's eventual termination. Defendants would have a difficult time pressing the claim with Arkwright as an earnest claim if they continued to employ a person who was determined to have caused losses, through kickbacks, totaling over \$900,000.

Moreover, even if the court were to find plaintiffs' damages too attenuated to the § 1962(c) predicate acts, they clearly resulted from the alleged conspiracy. Acts which are predicate to conspiracy, yet distinct from the racketeering acts listed in § 1961(1), are sufficient to confer standing where plaintiffs have alleged a § 1962(d) violation. Id. at 1169. Plaintiff's termination plausibly constitutes an overt act in furtherance of the conspiracy to violate § 1962(c). Indeed, it was arguably essential to the conspiracy to defraud Arkwright. The claimed loss of earnings, benefits and reputation are self-evident injuries which are expectable from any wrongful termination action. Id.

### **Plaintiffs' State Law Claims**

Because the federal claims against the corporate defendants have been dismissed, the court declines to assert pendent jurisdiction over the state law claims as to them. However,

as the court is retaining federal jurisdiction over the individual defendants, the pendent state law claims remain.<sup>6</sup>

### CONCLUSION

Because plaintiffs' first amended complaint fails to state a cause of action against the corporate defendants under RICO, defendants' motion to dismiss will be granted to that degree. In all other respects, it is denied. Because plaintiffs' proposed second amended complaint would not cure the fatal defect, their motion for leave to amend is denied.

An appropriate order follows.

---

6 . Although, in their motion, defendants make a brief footnote assertion that the state law claims should be dismissed in their own right, they have not adequately briefed the issue.

