

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

DATA COMM COMMUNICATIONS, INC., : CIVIL ACTION
ERIC J. PERRY, and :
LOUIS SILVER :
 :
 :
 v. :
 :
 :
 MARVIN WALDMAN, :
HENRIETTA ALBAN, :
THE REMINGTON GROUP, and :
ANDREW BOGDANOFF : NO. 97-0735

MEMORANDUM AND ORDER

HUTTON, J.

July 15, 1999

Presently before the Court are the Motion for Summary Judgment of Defendants Marvin Waldman and Henriette Alban (collectively, "Defendants") (Docket No. 72), the Plaintiffs' Response (Docket No. 74), and Defendants' Supplement to their Motion for Summary Judgment (Docket No. 77). For the reasons stated below, Defendants' Motion for Summary Judgment is **DENIED**.

I. BACKGROUND

On December 15, 1997, Data Comm Communications, Inc. ("Data Comm") and its principals, Eric Perry ("Perry") and Louis Silver ("Silver") (collectively, the "Plaintiffs") filed their First Amended Complaint (Am. Compl.) in this Court alleging violations under the Organized Crime Control Act of 1970, Pub. L. No.91-452, § 901(a), of the Racketeer Influenced and Corrupt

Organizations Act ("RICO"), and relevant state law violations. More specifically, the Amended Complaint alleges violations of 18 U.S.C. § 1962(c) (Count I), 18 U.S.C. § 1962(d) (Count II), civil conspiracy (Count III), tortious interference with prospective economic advantage (Count IV), breach of implied covenant of good faith and fair dealing (Count V), and fraud (Count VI). The Amended Complaint named as defendants the following: The Caramon Group, Inc. ("Caramon"), Marvin Waldman ("Waldman"), Henrietta Alban ("Alban"), The Remington Group, and Andrew Bogdanoff ("Bogdanoff") (collectively, the "Defendants"). Now, Defendants Waldman and Alban (collectively, the "Moving Defendants") move the Court to dismiss Plaintiffs' Complaint as it pertains to them pursuant to Federal Rule of Civil Procedure 56.

Viewed in the light most favorable to the non-moving party, the facts are as follows. Caramon is corporation organized and existing under the laws of the State of Maryland with its principal place of business in Fair Hills, Maryland. Waldman was Caramon's Chief Executive Officer. Alban was Caramon's Vice President and Chief Operating Officer. The Remington Group ("Remington") is a corporation organized and existing under the laws of Pennsylvania with its principal place of business in Bala Cynwyd, Pennsylvania. Andrew Bogdanoff was Remington's Chief Executive Officer.

In October 1995, Data Comm was organized to do business

in the Commonwealth of Pennsylvania. Perry and Silver started Data Comm for the purpose of obtaining funding to bid on and procure Federal Communication ("FCC") licenses for personal communication systems ("PCS"). These licenses were to be utilized to establish a full service personal communication company in the Harrisburg/York/Lancaster, Pennsylvania market. Data Comm and its principals were interested in obtaining funding for the February 26, 1996 FCC auction. At this auction, the FCC made available personal communication licenses that would authorize service on various frequency blocks. The February 26, 1996 auction date was later postponed to August.

In preparation of their start-up venture and in order to bid effectively on the FCC licenses that were to be auctioned, Plaintiffs retained Broadcast Investment Analysis ("BIA") to assist in the preparation of an exhaustive, comprehensive business plan which addressed Data Comm's proposed products and services, its management team, its projected financial productions, and its marketing plan. Through their joint efforts, Plaintiffs, in conjunction with its business consultants, Broadcast Investment Analysis, determined that a total of sixteen (16) million dollars would be required at the time of the FCC auction in February 1996 to adequately bid on the licenses. Plaintiffs set out to raise the requisite financing prior to the February 26, 1996, FCC auction.

In mid-October 1995, Silver met with Defendant Waldman,

the Chief Executive Officer of Defendant Caramon Group, Inc. During this meeting in October, Waldman represented himself as an investor and expressed interest in Data Comm and its business goals. Waldman informed Silver that Caramon was interested in funding the entire Data Comm project. Waldman told Silver that Caramon had access to sixteen (16) million dollars to fund the project from a consortium of private investors and European banks who Waldman had a business relationship.

Waldman additionally stated that he was in sole control of the funds. Waldman then instructed Silver to send a business plan to Andrew Bogdanoff of the Remington Group because, according to Waldman, Bogdanoff was responsible for screening all business plan submissions for his company, Caramon. In addition, Waldman instructed the Plaintiffs that he did not want them to pursue other investors not affiliated with Caramon because his company had enough funds to do the deal.

As instructed, Plaintiff Silver forwarded a copy of Data Comm's business plan to Remington Group's office. Accordingly, two or three days later, Defendant Bogdanoff contacted Silver and stated that Data Comm's business plan "definitely is the type of project that Caramon would fund." Bogdanoff continued by stating that the chances of Data Comm receiving financing from Caramon was high because Caramon had funded four out of the last six deals submitted by Bogdanoff and the Remington Group. Bogdanoff then

told Silver that he would schedule a meeting between the parties at Waldman's farm in Elkton, Maryland.

On November 14, 1995, at a finance meeting regarding the Data Comm project, Defendant Waldman made the following representations on behalf of Caramon: (1) \$16,0000.00 was already committed to the project by investors from European banks and individual investors from New York; (2) Waldman had total and complete decision making authority over all investment commitments and investment funds; (3) due diligence for the project would take no more than three to four weeks and the \$16,000,000.00 would be available three weeks after the completion of the due diligence.

Silver received a Letter of Interest dated November 6, 1995. The letter was signed by Perry on November 15, 1995. The Letter of Interest states that Plaintiffs will be required to pay sufficient fees to cover the due diligence process and that any commitment for financing is contingent upon completion of due diligence. Plaintiffs Silver and Perry both identified the Commitment for Financing, which specifies a \$35,000 due diligence fee.

The Commitment for Financing was contingent upon successful completion of due diligence. Plaintiffs negotiated modifications to the commitment for financing. Defendants agreed to many of the requested changes. The estimated due diligence costs totaled \$35,000.00. The Commitment for Financing, which contained Plaintiffs' changes, and Plaintiffs' first installment of the due diligence costs was forwarded to Caramon on January 10,

1996.

Shortly thereafter, Defendants identified Steve Teitleman as team leader. Teitleman issued a report dated February 6, 1996. As a result of Teitleman's report, Caramon issued a letter dated February 8, 1996, to Plaintiffs advising them that due diligence review was unfavorable and that Caramon was no longer interested in dealing with the project and enclosed a refund of \$6,335.00, which represented the unused balance of the due diligence retainer of \$11,667.00 forwarded on January 10, 1996.

Perry received the letter of February 8, 1996 and returned it back to Caramon. Perry then contacted Waldman. Perry contends that Waldman demanded payments of the due diligence funds. Waldman denies this claim. Nonetheless, following Perry's conversation with Waldman, due diligence resumed from a marketing and analysis view point. Lloyd Bashkin of Lloyd Scott and Company were hired to perform marketing plan analysis. Plaintiffs admit that Bashkin was selected from the phone book. Plaintiffs were furnished with Bashkin's credentials. Perry alleges that Bashkin was instructed by Waldman to issue a negative report, but they have produced no factual evidence of such a conspiracy. Bashkin denies any such wrongdoing.

Plaintiffs received multiple reports from Bashkin analyzing their plan, what was wrong with it, and what was needed to correct it. Both Plaintiffs admit receiving these reports.

Following a report issued by Bashkin on June 7, 1996, Caramon withdrew from the project by letter dated June 11, 1996. An accounting for the due diligence payments was forwarded to Plaintiffs by letter dated July 2, 1996. Perry admits that the \$35,000.00 paid to Caramon was for the application fee and the due diligence fee and that Plaintiffs received a variety of due diligence reports.

On January 15, 1999, Defendants Waldman and Alban filed a motion for summary judgment. On February 2, 1999, the Plaintiffs filed their Response in opposition. On February 19, 1999, the Defendants filed a Supplement to their Motion for Summary Judgment. Because the Defendants' motion is ripe, the Court considers the motion for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through

affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Civil RICO

RICO affords civil damages for "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). Under section 1962(c), RICO "prohibits any person employed by or associated with an enterprise engaged in interstate commerce from conducting or participating in the affairs of the enterprise through a 'pattern of racketeering activity.'" Tabas v. Tabas, 47 F.3d 1280, 1289 (3d Cir.), cert.

denied, 515 U.S. 1118 (1995)) (citing 18 U.S.C. § 1962(c)). Moreover, Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)." 18 U.S.C. § 1962(d).

Under 18 U.S.C. § 1962(c), a plaintiff must establish the following four elements to withstand a motion for summary judgment: "(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts." Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989).

A plaintiff must establish the following two elements to sustain a claim under section 1962(d): "(1) [an] agreement to commit the predicate acts of fraud, and (2) knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate section 1962(a), (b), or (c)." Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989). Moreover, a "conspiracy claim must also contain supportive factual allegations . . . sufficient 'to describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in the conspiracy.'" Id. (quoting Alfaro v. E.F. Hutton &

Co., 606 F. Supp. 1100, 1117-18 (E.D. Pa. 1985)).

B. Defendants' Motion for Summary Judgment

In their motion, the Moving Defendants raise essentially three general issues regarding the Plaintiffs' Complaint. First, the Moving Defendants claim that no predicate acts give rise to a RICO claim. Second, Defendants Waldman and Alban contend that the Plaintiffs have suffered no compensable injury. Third, and finally, the Moving Defendants allege that no evidence has been produced of a pattern of racketeering. The Moving Defendants do not specify which causes of action they believe should be dismissed on summary judgment. Two of the arguments asserted by the Moving Defendants pertain to Plaintiffs' RICO claims; the argument regarding Plaintiffs' compensable injury is amorphous. The Court will address each argument in turn.

1. Predicate Acts

In their motion, the Moving Defendants allege that as a matter of law, this Court must find that "there are no predicate acts giving rise to a RICO claim." (Defs.' Mem. at 5.) More specifically, the Moving Defendants argue that the only money that the Plaintiffs paid to them was "the application fee and due diligence monies sums totaling about \$35,000.00, which [the Plaintiffs] knew would be due before they signed any agreements." (Id.) The Moving Defendants conclude that no evidence of extortion

exists, and therefore, no mail fraud. This Court, however, must disagree.

Section 1961(1) enumerates the offenses that qualify as predicate acts. Predicate acts include acts or threats involving the following crimes: murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter and dealing in a controlled substance or listed chemical. 18 U.S.C. § 1961(1)(a). Under the Hobbs Act, 18 U.S.C. § 1951, "[e]xtortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2). The "fear" may be of economic loss as well as of physical harm. See United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1972).

Under 18 U.S.C. § 1341, "[m]ail fraud has two elements: 1) a scheme to defraud, and 2) use of the mails in furtherance of the scheme." City of Rome v. Glanton, 958 F. Supp. 1026, 1044 (E.D. Pa. 1997) (citing United States v. Dreer, 457 F.2d 31 (3d Cir.1972)). As the Third Circuit recently stated:

The mail fraud statute prohibits any person from knowingly causing the use of the mails "for the purpose of executing" any "scheme or artifice to defraud." (citations omitted). The actual violation is the mailing, although the mailing must relate to the underlying fraudulent scheme. Moreover, each mailing that is "incident to an essential part of the scheme" constitutes a new violation. (citations omitted). The mailing need not contain any misrepresentations. Rather, " 'innocent' mailings--ones that contain no false information--may supply the mailing element." (citations omitted).

Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413-14 (3d

Cir.), cert. denied, 501 U.S. 1222, 111 S. Ct. 2839, 115 L.Ed.2d 1007 (1991).

Drawing all reasonable inferences in the light most favorable to the Plaintiffs, the Court finds that ample evidence exists of extortion and mail fraud. If the Court gives credence to the Plaintiffs' testimonies, the Defendants misrepresented their investment capabilities to the Plaintiffs. The Defendants did this in order to convince the Plaintiffs to rely on Defendant's representations of access to investment funds. When the Plaintiffs were in the most vulnerable position with pending deadlines, the Defendants allegedly demanded \$35,000.00 in previously announced fees. Because of the Plaintiffs' earlier reliance on the Defendants promises and representations to grant the loan, the Plaintiffs paid the balance of the previously announced fees. The alleged extortion is revealed in the following statement by Plaintiff Eric Perry:

... But he said with a bit more of a comprehensive marketing plan that can answer some of the questions put forth I will be happy to fund your project and continue, so you can either cash that check and give it back and write me another one or just give me back the check.

At that particular point, the auction date was scheduled for sometime in March we canceled all conversations and negotiations with all other investors and at that particular point we had no choice but to go along with Marvin's wishes and demands.

(Perry dep. at 172.) Thus, the Court finds that a genuine issue of fact exists regarding whether Defendants extorted money arising out

of the Plaintiffs' fear of economic harm. Moreover, by demanding these payments through the United States mail, sufficient evidence has been produced to establish that the Defendants committed mail fraud. Dismissal of Plaintiffs' Complaint on summary judgment, therefore, is not warranted on this ground.

2. Compensable Injury

The Defendants claim that the Plaintiffs have no compensable injury. (Defendants' Mem. at 7.) The Defendants argue that "there is absolutely no evidence that Plaintiffs would have been the successful bidder." (Id.) This argument, however, is without merit. First, the Defendants concede that they were paid \$35,000.00 from the Plaintiffs as part of the alleged scheme to defraud them. The Court has already found that a genuine issue of fact exists regarding whether these payments were "extortion payments." Second, the Defendants have produced evidence that they were required to expend over \$50,000 due to the Defendants' allegedly unreasonable demands. Finally, Plaintiffs' business plan showed the amount needed to bid for the license in 1995 was fourteen million dollars (\$14,000,000.00). Whether the Plaintiffs would have failed at the auction and whether the amount shown as a loss is credible is a jury determination. Accordingly, dismissal of Plaintiffs' Complaint on summary judgment is not warranted on this basis.

3. Racketeering

Finally, the Moving Defendants assert that "there is absolutely no continuity of pattern of racketeering activity as required by law." (Defs.' Mem. at 7.) Specifically, the Moving Defendants attack the reliance of the Plaintiffs' RICO claims on two individuals, R. Dennis Bowers and Robert Krawiecki. (Id.) First, the Moving Defendants claim that the deal between Waldman and Bowers fell apart when Bowers' company was submitted to a takeover attempt. (Id. at 8.) Second, they contend that Waldman withdrew from a deal with Krawiecki when Waldman learned of "previously undisclosed time restraints." (Id.) In sum, the Moving Defendants argue that sound business reasons exist in both the Bowers and Krawiecki deals as to why the loans did not close. (Id.) Consequently, the Moving Defendants request the Court to dismiss the Plaintiffs' RICO claims on summary judgment. That request is denied.

Section 1962(c) applies to a culpable "person" engaged in the conduct of an "enterprise" through a pattern of racketeering activity. Pell v. Weinstein, 759 F. Supp. 1107, 1116 (M.D. Pa. 1991), aff'd, 961 F.2d 1568 (3d Cir. 1992); see Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3287 (1985). "In the Third Circuit, the culpable 'person' and the 'enterprise' must be separate and distinct entities. . . . That is, the person charged with the RICO violation under § 1962(c) cannot be the same entity as the alleged

enterprise." Pell, 759 F. Supp. at 1116. The purpose of section 1962(c) is "to prevent the takeover of legitimate businesses by criminals and corrupt organizations. . . . It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances." B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633 (3d Cir. 1984) (citations omitted).

Section 1962(c) prohibits "any person employed by or associated with any enterprise . . . [from] participat[ing] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). "Racketeering activity" means "any act 'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law." Sedima, 473 U.S. at 481-82 (citing 18 U.S.C. § 1961(1)). Section 1961(5) defines "pattern of racketeering activity" as at least two acts of racketeering activity within ten years; however, a plaintiff must also "show that the racketeering predicates are related." H.J. Inc., 492 U.S. at 239.

In the present matter, the Plaintiffs have produced

sufficient evidence that not only did the Plaintiffs suffer at the hand of the Defendants, so did Bowers and Krawiecki in a related scheme. First, the Plaintiffs have established that the Defendants' scheme to defraud Krawiecki fits a pattern of racketeering activity. Krawiecki is the Owner and Chairman of C.R. Warner Co. in Philadelphia, Pennsylvania. Krawiecki testified that he met Defendant Waldman in 1995-96. Krawiecki, as with Plaintiffs, was introduced to Waldman through Defendant Bogdanoff, Caramon's representative. Krawiecki, at that time was in the process of acquiring real estate and was searching for an individual or company to provide funding to assist with his potential investment. Krawiecki explained to Defendant Bogdanoff that he was seeking between seven hundred fifty thousand dollars (\$750,000.00) and one million dollars (\$1,000,000.00) to fund his investment.

Defendant Bogdanoff informed Krawiecki--as he informed Plaintiffs--that Waldman had funded previous deals and was capable of funding Krawiecki's project. Based upon the representations by Bogdanoff that Defendant's had funded previous deals and could fund Krawiecki's deal, Krawiecki gave both Bogdanoff and Waldman up front fees through the mail. Krawiecki met with Defendants Waldman and Alban to obtain financing. The Defendants allegedly made several false representations to the Plaintiffs including that Krawiecki had to pay an up front fee of five thousand dollars

(\$5,000.00) for due diligence in order to obtain the \$1,000,000.00

financing. Krawiecki paid Defendant Waldman the \$5,000.00 up-front fee.

After paying the up-front fee to Defendants Bogdanoff, Waldman, and Alban, however, Krawiecki received nothing in return--not even the due diligence. Krawiecki testified:

We gave him some money. I think he, they didn't return phone calls. I think the response was--you--know we called them a couple of times, what's gonna go on, what's going on with this thing. All of a sudden we get a cold shoulder approach to this whole thing. Like what are we pushing for in a way; we're just trying to figure out if this guy is for real or not. That's when I basically got a little ticked off at the situation.

(Krawiecki dep. at 22.) Krawiecki testified that he was "ticked off" because his project had a pending time deadline--which Defendants were aware of--but "all of a sudden, Defendants are taking money and nobody is doing anything, we had time restrictions to get a deal put together." (Krawiecki dep. at 22.) Krawiecki further testified that:

We had to get the deal done. I want to know if I'm dealing with players or non-players; that's all I wanted to know. I go down and meet with Waldman; this guy wants stuff--yeah, yeah, we can do all these things. They get dough (money) and all of a sudden things stop dead in the water

(Krawiecki dep. at 23.) Accordingly, the Court finds that sufficient evidence exists that the Krawiecki paid the Defendants under false pretenses. Furthermore, the alleged scheme to defraud Krawiecki was virtually identical to the alleged scheme to defraud the Plaintiffs. The Defendants used the United States mail and

wire to allegedly extort money from Krawiecki's business when the business was at the most vulnerable by misrepresenting their investment abilities.

Second, the Plaintiffs have established that the Defendants' scheme to defraud Bowers fits a pattern of racketeering activity. Bowers is the President and Chief Executive Officer of National Health and Safety Corp. (NHSC). Bowers was introduced to Defendant Waldman because he was in the process of looking to obtain expansion financing for his company. Like Plaintiffs, and Krawiecki, Bowers was looking to obtain a sizable amount of money--ten million dollars (\$10,000,000.00). The Defendants' representative in Philadelphia informed Bowers that the Defendants had the ability to fund part of the deal. Accordingly, similar to Plaintiffs and Krawiecki, Bowers sent Defendants a business plan. Although a fee for services was discussed, Bowers informed Defendant Waldman that his company did not pay up-front fees.

Defendant Waldman represented to Bowers, as he did with Plaintiffs and Krawiecki that he would be able to fund one to three million dollars of his deal that came from a group of European and Canadian investors. Defendant Waldman represented to Bowers--as he did to Plaintiffs and Krawiecki--that Defendants had control over the investment funds that the investors were willing to invest on the basis of due diligence. Based upon these representations, Bowers and his company entered into a due diligence with the

Defendants. Bowers testified that:

Marvin [Waldman] agreed that he was at the end of his due diligence process and everything looked very good that they would be able to proceed into financing very soon
.....

(Bowers dep. at 27-28.) The Defendants again demanded an up-front fee of \$30,000.00 for the due diligence. Bowers was not able to pay this amount.

Like the Plaintiffs and Krawiecki, Bowers did not receive any financing. To the contrary, Bowers testified further that: "... I should explain by saying that as time went on there seemed to always be more information that was necessary." (Bowers dep. at 30.) Ultimately, Bowers never received his financing. Construing the evidence in the light most favorable to the Plaintiffs, the Court finds that sufficient evidence shows that the Defendants attempted to extort money from Bowers when he was most vulnerable. The Defendants used the same alleged scheme against Bowers as they did against Plaintiffs and Krawiecki. Accordingly, the Court finds that the Plaintiffs have produced sufficient evidence of "racketeering," and denies the Moving Defendants' Motion for Summary Judgment in its entirety.

An appropriate Order follows.

