

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

LEROY J. SMITH, et al.

v.

JOHN G. BERG, et al.

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CIVIL ACTION  
No. 99-2133

O'Neill, J.

July , 2000

**MEMORANDUM**

This case is a putative class action with claims under RICO and state law. Presently before me is the question of whether Counts II and III of the complaint should be dismissed in light of the Supreme Court's recent ruling in Beck v. Prupis, \_\_ U.S. \_\_, 120 S.Ct. 1608 (2000). For the reasons stated below, I conclude that the complaint should not be dismissed. However, because there are substantial grounds for difference of opinion on this issue, I will certify it for immediate appeal pursuant to 28 U.S.C. § 1292(b).

**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 Title Insurance Company, Columbia National Inc., First Town Mortgage Corp., and Countrywide Credit Industries, Inc. (collectively the "non-Berg defendants") 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, by communicating and negotiating with Berg rather than directly with the plaintiffs, by failing to make Truth-In-Lending Law disclosures, and by granting mortgages for which the lenders knew plaintiffs were unqualified. Id. ¶ 118.

Plaintiffs do not allege that any of the non-Berg defendants committed overt acts in furtherance of the conspiracy that are predicate acts of racketeering under the RICO statute.

Count I of the Amended Complaint claims that Berg engaged in a RICO enterprise in violation of 18 U.S.C. § 1962(c). Count II claims that defendant 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 Berg for common law fraud (Count IV), breach of fiduciary duties (Count V), and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count VII).

On April 10, 2000, I denied the non-Berg defendants' motion to dismiss Count II and III of the Amended Complaint. See Smith v. Berg, No. 99-2133, 2000 WL 365949, at \*3-4 (E.D. Pa. Apr. 10, 2000) ("Smith I").<sup>1</sup> That decision was specifically premised on my conclusion that the Supreme Court's decision in Salinas v. United States, 522 U.S. 52 (1997), had implicitly overruled the Court of Appeals' decision in United States v. Antar, 53 F.3d 568 (3d Cir. 1995), and, therefore, plaintiffs did not have to prove that the non-Berg defendants committed predicate acts of racketeering in order to hold those defendants liable under the RICO conspiracy statute.

On April 26, 2000, the Supreme Court handed down Beck v. Prupis, \_\_\_ U.S. \_\_\_, 120 S.Ct. 1608 (2000), and arguably changed this rule. I therefore ordered the parties to brief the question of whether Beck required that the non-Berg defendants be dismissed from this case. See Order dated April 26, 2000. On May 5, 2000, plaintiffs responded to this request with a motion seeking leave to amend the Amended Complaint so that predicate acts of racketeering could be plead against the non-Berg defendants. In that motion, plaintiffs explicitly conceded that in light of Beck the Amended Complaint was insufficient as a matter of law. See Plaintiffs' Motion to Amend ¶¶ 3, 6. I subsequently ordered a new briefing schedule that: 1) combined briefing on the merits of the motion to amend and the question raised by Beck; and 2) directed plaintiffs to supplement their motion to amend with their proposed averments regarding the

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<sup>1</sup> Smith I also: 1) dismissed all claims against defendant Fidelity National Financial (the parent of defendant Fidelity National Title Insurance Company); 2) dismissed Counts IV, V, and VII as to the non-Berg defendants; and 3) dismissed Count VI (negligence) as to all defendants.

predicate acts of racketeering that were allegedly committed by the non-Berg defendants. See Order dated May 9, 2000.

The parties have complied with the May 9 Order. However, in their final reply brief plaintiffs have once again changed course. Plaintiffs now argue that Beck does not render the Amended Complaint insufficient as a matter of law and have withdrawn their motion to amend. See Plaintiffs' Brief of June 20, 2000 at 6 ("Plaintiffs believe, based upon a more thorough reading and analysis of Beck, that amendments are not warranted and therefore are withdrawing their motion to amend.") (emphasis in original). Therefore, the only issue presently before me is whether Beck requires that the complaint be dismissed as to the non-Berg defendants.

## DISCUSSION

### A. Beck

In Beck, the Supreme Court set out to answer the question of "whether a person injured by an overt act done in furtherance of a RICO conspiracy has a cause of action under [18 U.S.C.] § 1964(c), even if the overt act is not an act of racketeering." Beck, 120 S.Ct. at 1611. While Beck was the CEO of a company called Southeastern Insurance Group (SIG), he discovered that certain directors and officers of SIG were engaging in acts of racketeering. After the discovery, those parties orchestrated a scheme to remove Beck from his position with the company. Beck responded by filing suit under, inter alia, the civil RICO statute, 18 U.S.C. § 1964(c).

Beck alleged that the defendants had conducted a corrupt enterprise through a pattern of

racketeering activity in violation of § 1962(c)<sup>2</sup> and conspired to conduct such an enterprise in violation of § 1962(d)<sup>3</sup>. The Court explained that: “[Beck’s] theory was that his injury was proximately caused by an overt act – namely, the termination of his employment – done in furtherance of respondents’ conspiracy, and that § 1964(c) therefore provided a cause of action.” Id. at 1612.

The Court rejected that theory and ruled that an “injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO . . . is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d).” Id. at 1616. Therefore, since Beck’s termination was not a predicate act of racketeering as defined by § 1961(1), he had no conspiracy claim.

At first blush, this would appear to preclude plaintiffs’ claims against the non-Berg defendants in this case. Like the Beck conspirators, the non-Berg defendants are alleged to have injured plaintiffs by committing overt acts in furtherance of the conspiracy that are not predicate acts of racketeering in their own right. However, this case has one distinguishing fact. Unlike Beck, plaintiffs here allege that they were also directly injured by Berg’s racketeering.<sup>4</sup> The question is therefore whether this distinction makes a difference in the reasoning enunciated by

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<sup>2</sup> Section 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.”

<sup>3</sup> Section 1962(d) states: “It shall be unlawful to conspire to violate [§ 1962(c)].”

<sup>4</sup> Beck would therefore be analogous to this case if, for example, he had alleged that in addition to being wrongfully terminated one or more of the conspirators had injured him through mail fraud or wire fraud.

the Beck Court.

Apparently, it does. In dicta, the Court responded to the argument that its interpretation rendered the conspiracy statute superfluous because any plaintiff with a claim for a violation of § 1962(d) would necessarily also have a claim under § 1962(c). The Court stated that its interpretation did not render § 1962(d) “mere surplusage” because “a plaintiff could, through a § 1962(c) suit for a violation of § 1962(d), sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962.” Id. at 1617.

Plaintiffs’ claim in this case appears to be the scenario the Court was anticipating. As the Court emphasized, civil conspiracy often is not considered a separate cause of action, but rather a “mechanism for subjecting co-conspirators to liability when one of their member committed a tortious act.” Id. at 1615. Beck probably is best read as severely limiting the opportunities for vicarious conspiratorial liability under the RICO statute, not as making § 1962(c) liability an absolute prerequisite to § 1962(d) liability. Since in my view this case represents one of the few instances where such liability is appropriate after Beck, dismissal of Counts II and III is not appropriate.

#### B. Certification for Appeal

29 U.S.C. § 1292(b) provides that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The foregoing conclusion that Beck does not preclude plaintiffs’ claims against the non-

Berg defendants is predicated on dicta in a recent Supreme Court decision that addresses an inherently murky area of the law, and, as was explained in detail in Smith I, is also predicated on my earlier conclusion that Supreme Court implicitly overruled Antar in Salinas. Therefore, I will certify this Order and my Order in Smith I for appeal pursuant to § 1292(b).

Should defendants choose not to appeal this Order at this time, I am willing to entertain a motion for an expedited class certification schedule, such as was included in the Order in Smith I.

An appropriate Order follows.

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**ORDER**

AND NOW, this            day of July, 2000, it is hereby ORDERED that:

- 1) Plaintiffs' motion for leave to file an amended complaint is DENIED as moot;
- 2) The motion to dismiss Counts II and III is DENIED;
- 3) Defendants shall have 20 days from the date of this Order to answer the Amended Complaint; and
- 4) Pursuant to 28 U.S.C. § 1292(b), the Court certifies that this Order and the Court's Order of April 10, 2000 involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from those Orders may materially advance the ultimate termination of the litigation.

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