

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

STEVE ATUAHENE, AGNES ATUAHENE, :
F.A. MANAGEMENT GROUP INC., and :
AYERS BEVERAGE CO., INC. :
 :
v. :
 : CIVIL ACTION
SHERMET INDUSTRIES, INC., PENSKE :
TRUCK LEASING CO., L.P., TRAVELERS :
PROPERTY & CASUALTY INS. CO., JANE :
AND JOHN DOES, individually and as :
officers of PENNDOT, PENNDOT, MARC :
SHERMAN, PHILIP SHERMAN, LILYAN :
SHERMAN, GORDON FINNERTY, JOHN :
TOOLAN, TOOLAN ASSOCS., MICHAEL : NO. 99-896
EAGAN, LOUIS CHEEK, TOOLAN, EGAN, :
YANNI & GARTNER, and JOHN AND JANE :
DOES, employees of Shermet Indus., :
Inc., Penske Truck Leasing Co., :
Travelers Property & Casualty Co., :
PENNDOT, and TOLLAN, EGAN, YANNI & :
GARTNER :

M E M O R A N D U M

WALDMAN, J.

September 7, 2000

Plaintiffs are Steve and Agnes Atuahene and two businesses which they own. They assert a laundry list of claims including civil rights claims under 42 U.S.C. §§ 1981, 1983 and 1985; civil RICO claims; and, supplemental state law claims of negligence, fraud, negligent misrepresentation, and intentional and negligent infliction of emotional distress.

Underlying all of the claims is a March 29, 1993 car accident in which Steve and Agnes Atuahene were allegedly injured. Plaintiffs filed suit to recover damages in the Philadelphia Court of Common Pleas in March 1995 ("Atuahene I")

against Universal Commodities Corporation a/k/a Electronics Processing Company of America. After a jury found for the plaintiffs at trial, the Court entered a judgment notwithstanding the verdict against them on January 19, 1999. That judgment was affirmed by the Superior Court on January 31, 2000.

In July 1998, plaintiffs filed another action in the Philadelphia Court of Common Pleas for damages allegedly sustained as a result of tortious conduct by the current defendants arising out of the same 1993 automobile accident ("Atuahene II"). After the defendants filed motions to dismiss the complaint, plaintiffs abandoned their claims and agreed to dismissal of their complaint.

Plaintiffs then commenced this action, asserting most of the same claims as they did in Atuahene II. In so far as the court can discern, all of the claims asserted arise from the March 1993 car accident and are predicated on defendant Shermet Industries' alleged fraudulent acquisition of driving privileges and insurance in Pennsylvania and an alleged scheme by defendants to prevent plaintiffs from recovering damages for the injuries they sustained as a result of that accident.

Mr. Atuahene has been a frequent litigant in this District as well as the Pennsylvania state courts. He has filed at least ten lawsuits in this District over the past several years using different variations of his name, including Stephen Frempong-Atuahene, Steven Atuahene and Steve Frempong-Atuahene.

A colleague recently observed that Mr. Atuahene "has waged a war of harassment in the courts of the Eastern District of Pennsylvania against many private and public entities on the basis that those entities somehow wronged him, his family or his business enterprises" and in so doing "puts forth frivolous legal arguments in equally frivolous lawsuits that are vexatious and abusive of the judicial process." Frempong-Atuahene v. City of Philadelphia, et al., 2000 WL 233216, *1 (E.D. Pa. Feb. 24, 2000). After concluding that plaintiff's "objective is not justice but harassment," the Court in that case enjoined plaintiff from filing further lawsuits without prior Court approval. See Frempong-Atuahene, 2000 WL 233216 at *3.

The claims pled in the instant action, as well as plaintiffs' continuing disregard of procedural requirements including the duty to serve all papers when they are filed, are entirely consistent with those observations. As this case was filed prior to entry of the injunction, however, the court will entertain and adjudicate it on the merits.

Plaintiffs allege that in August 1992 Shermet Industries and Marc Sherman entered into a leasing contract with Penske Truck Leasing Co. Because of the high cost of insurance in New Jersey where Shermet Industries and Marc Sherman were residents, Mr. Sherman misled PennDot and an insurer to believe that he lived in Pennsylvania and that Shermet Industries operated in Pennsylvania. Travelers provided Shermet Industries

insurance coverage. PennDOT provided a vehicle registration to Shermet Industries and licensed it to drive the vehicle involved in the accident in Pennsylvania. The vehicle was leased to Shermet Industries and used by Electronic Processing Corporation of America ("EPCA"), in which Marc Sherman and his father Philip were officers.

On March 29, 1993, a Shermet Industries vehicle collided with a car driven by plaintiff Agnes Atuahene in which Steve Atuahene was a passenger, causing plaintiffs to suffer personal injuries. Plaintiffs essentially allege that defendants conspired to conceal the identity of the owner of the vehicle and to thwart plaintiffs' lawsuit to recover damages by engaging in deceptive and dilatory litigation techniques. Plaintiffs allege that defendants engaged in this activity because of the Atuahenes' race and national origin.

Plaintiffs have sued Shermet Industries as the lessee, and Penske as the owner-lessor, of the vehicle which allegedly caused the 1993 accident. They have sued the three Shermans who are officers of Shermet, Gordon Finnerty who operated the leased vehicle at the time of the 1993 accident and Travelers which insured that vehicle. They have sued PennDOT and "John Doe" officials of that agency for permitting the vehicle to be registered and operated in the Commonwealth. The other defendants are lawyers who represented the defendant in Atuahene I.

Many of the defendants have not been properly served with process and no good cause has been shown therefor. The 120 day period for service provided in Fed. R. Civ. P. 4(m) has long expired, as has the extension of time to effect service granted to plaintiffs by order of July 7, 1999. These defendants are the Shermans, Shermet Industries, Gordon Finnerty, John Toolan, Toolan Associates, Vickie Gehr and Louis Cheek. The claims against these defendants are thus subject to dismissal pursuant to Rule 4(m). There also are no factual allegations in the actual body of the amended complaint against John Toolan, Toolan Associates, Louis Cheek, Vickie Gehr or John and Jane Does.

The defendants who have been served have moved to dismiss for failure to state a cognizable claim and on statute of limitations grounds. By order of this date, the court has granted defendant PennDOT's Motion to Dismiss. The court now addresses the motions of defendants Penske Truck Leasing Co., Travelers Property & Casualty, Michael Egan and Toolan, Egan, Yanni & Gartner.

Plaintiffs' § 1981 claim is predicated on defendants' refusal to settle Atuahene I and on their filing of "frivolous" motions in that case which plaintiffs assert occurred because the Atuahenes "are blacks from Africa." There are no factual allegations from which one may find that any defendant settled any comparable lawsuit involving white claimants. Two state courts determined that plaintiffs were in fact not entitled to

any compensation in Atuahene I. The only defense motions filed of record in that case were a motion to compel plaintiffs to respond to discovery requests which was granted; a motion for sanctions against plaintiffs which was granted; a motion to preclude testimony by plaintiffs for failure to provide discovery which was denied but not before the Court granted defendants' motion for leave to depose plaintiffs before commencement of a trial; a motion for judgment on the pleadings or summary judgment which was denied; and a motion for judgment n.o.v. which was granted. Even assuming that some or all of these motion were "frivolous" although four of the six were granted, § 1981 does not encompass the filing by a party to a lawsuit of typical motions for resolution by a court. In any event, there are no factual allegations from which one may find that any defendant litigated any comparable case involving white claimants any differently.

Plaintiffs' § 1983 claim is predicated on a deprivation of property without due process and a denial of equal protection of the laws. The property of which they were allegedly deprived was compensation for damages flowing from the 1993 accident. It is axiomatic that a § 1983 claim may properly be asserted only against a party acting under color of state law. See Stephens v. Kerrigan, 122 F.3d 171, 183 (3d Cir. 1997). One cannot find from plaintiffs' allegations that they were deprived of any constitutional right by a defendant acting under color of law.

Plaintiffs were also afforded due process. They were provided by the state with an opportunity to adjudicate their claims in the courts of law of the Commonwealth.

In asserting their § 1985 claim, plaintiffs merely recite the statute verbatim and state that this is what defendants did. They do not allege any specific conduct which denied them equal protection or equal privileges and immunities because of race. They suggest that some defendants collaborated fraudulently to obtain Pennsylvania driving privileges and insurance for Shermet, and that others knew or should have known this had occurred. If so, this clearly had nothing to do with intentional racial discrimination. At the time the driving privileges and insurance were obtained, clearly no defendant intended that the operator of a Shermet vehicle collide with another vehicle occupied by plaintiffs, by any black person or by persons of any race.

Plaintiffs assert civil RICO claims against the Shermans, Shermet Industries, Travelers and Penske. The alleged enterprises are Shermet Industries and EPCA.

Insofar as plaintiffs seek RICO damages for pain and suffering and medical expenses occasioned by the 1993 accident, they have no standing to do so. A RICO plaintiff may recover only for injury to his property or business. Injury to the person, including medical expenses, is not recoverable under civil RICO. See 18 U.S.C. § 1964(c); Genty v. Resolution Trust Corp., 937 F.3d 899, 918-19 (3d Cir. 1991); Fried v. Sunguard

Recovery Servs., Inc., 900 F. Supp. 758, 762 (E.D. Pa. 1995); In re Orthopedic Bone Screw Products Liability Litigation, 1995 WL 273600, *3 (E.D. Pa. Mar 2, 1995)(medical expenses incurred by plaintiffs in connection with their personal injuries cannot be recovered under RICO).

Plaintiffs have pled no facts to show that Travelers conducted the affairs of the alleged enterprises. As to Penske, plaintiffs allege only that Penske participated in the management and control of Shermet by virtue of a vehicle lease service agreement which obligated Penske to maintain and repair the leased vehicle which collided with the Atuahene vehicle in March 1993. This does not remotely show that Penske participated in the operation or management of Shermet's affairs. See Reves v. Ernst & Young, 507 U.S. 170, 185 (1993).

Plaintiffs also have failed to plead facts to show that any defendant engaged in a pattern of racketeering activity. To state a RICO claim under §§ 1962(a),(b),(c) or (d), a plaintiff must set forth a pattern of racketeering activity as defined in 18 U.S.C. § 1961(1). Section 1961 provides an exhaustive list of those acts which constitute predicate acts of racketeering activity. Plaintiffs identify as the predicate acts violations of 18 U.S.C. §§ 1341, 1343, 1503, 1511, 1951 and 1952; oral misrepresentations about the ownership of the Penske vehicle leased to Shermet; Shermet's misrepresentations to Penske and Travelers that it was a Pennsylvania, rather than New Jersey, corporation; non-payment of New Jersey taxes owed by EPCA; and,

the filing of frivolous defense motions and deceitful conduct in state court during the litigation of Atuahene I.

Common law fraud and the filing of frivolous motions in a state court civil action do not constitute racketeering activity. See 18 U.S.C. § 1961(1); Annulli v. Panikkar, 200 F.3d 189, 200 (3d Cir. 1999)(§ 1961 does not encompass garden-variety state law crimes, torts and contract breaches). Marc Sherman's alleged refusal to comply with a deposition subpoena in connection with Atuahene I, with the alleged encouragement of Travelers and Penske, does not constitute a violation of 18 U.S.C. §§ 1503 or 1511. Penske's registration of the subject vehicle in Pennsylvania instead of New Jersey clearly would not violate 18 U.S.C. §§ 1951 (interference with commerce by threats or violence) or 1952 (interstate travel in aid of a business involved in gambling, liquor, narcotics or prostitution, bribery, extortion or arson).

Plaintiffs have failed to set forth any predicate acts of wire fraud. They have set forth two instances of use of the mails for a fraudulent purpose. They allege that Shermet misrepresented its state of incorporation or operation in mailings to PennDOT and Travelers in the course of licensing and insuring the vehicle later involved in the 1993 accident. That PennDOT and the insurer may have been victims of fraud, however, is beside the point. Plaintiffs must show that they were injured as a proximate result of the predicate acts. See Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 268 (1992); Callahan v.

A.E.V., Inc., 182 F.3d 237, 261 (3d Cir. 1999) (plaintiff cannot recover under RICO for injury flowing from defendant's fraud upon state agency to obtain licenses); Browne v. Abdelhak, 2000 WL 1201889, *5 (E.D. Pa. Aug. 23, 2000) (plaintiff's allegation that his injury merely flows from predicate acts aimed at third party insufficient).

Plaintiffs have also failed to set forth a series of predicate acts extending over a substantial closed period of time or conduct which by its nature projects into the future the threat of repetition as required to establish a "pattern" of racketeering activity. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 241-42 (1989); U.S. v. Pelullo, 964 F.2d 193, 209 (3d Cir. 1992); Gurfein v. Sovereign Group, 826 F. Supp. 890, 915 (E.D. Pa. 1993). The only validly pled predicate conduct is a set of mailings by Shermet to PennDOT and an insurer during a very brief period in the summer of 1992 which can reasonably be characterized only as "isolated events." See H.J. Inc., 492 U.S. at 240. This alleged conduct also occurred beyond the four year limitations period.

The statute of limitations for personal injury and other negligence actions in Pennsylvania is two years. See 42 Pa. C.S.A. § 5524; Moses v. T.N.T. Red Star Exp., 725 A.2d 792, 796 (Pa. Super. 1999). Plaintiffs' negligence claims, including the two simply captioned "Tort," for damages sustained in the accident on March 29, 1993 are time barred.

Plaintiffs' claims for fraud and negligent misrepresentation are asserted only against Marc Sherman and Shermet Industries who have not been served. It may be noted, however, that these claims too are time barred.

Fraud and negligent misrepresentation claims are subject to a two year statute of limitations. See 42 Pa. C.S.A. § 5524(7); Algrant v. Evergreen Valley Nurseries Ltd. Partnership, 126 F.3d 178 (3d Cir. 1997)(common law fraud); Jordan v. SmithKline Beecham, Inc., 958 F. Supp. 1012, 1026 (E.D. Pa. 1997)(negligent misrepresentation). These claims are premised on the alleged misrepresentations by Shermet to PennDOT and the insurer in registering and insuring the vehicle involved in the March 1993 accident, and Shermet's alleged deception regarding ownership of the vehicle. Plaintiffs acknowledge that Penske titled the vehicle in Pennsylvania and that they had the license plate and VIN number in 1993. They have alleged no facts to show that they could not have timely ascertained pertinent information about the ownership and leasing of the vehicle with the exercise of due diligence or that they were unaware of Universal's position regarding control of the vehicle by December 1, 1995 when it filed an answer in Atuahene I. See Gurfein, 826 F. Supp. at 919.

Plaintiffs also do not plead a cognizable fraud claim based on misrepresentations to PennDOT and the insurer. See Elia v. Erie Ins. Exchange, 581 A.2d 202, 212 (Pa. Super. 1990) (no cause of action for fraud absent misrepresentation intended to

cause the plaintiff to act). See also Westwood-Booth v. Davy-Loewy Ltd., 1999 WL 219897, *4 (E.D. Pa. Apr. 13, 1999) ("plaintiff cannot state a claim for fraud based on a third party's reliance on a misrepresentation even when it was made to influence the third party foreseeably to act in a manner detrimental to the plaintiff").

Insofar as plaintiffs assert a claim for negligent infliction of emotional distress apart from that sustained in the 1993 accident, they have alleged no discrete physical manifestation of such distress necessary to sustain such a claim. See Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997); Doe v. Philadelphia Community Health Alternatives AIDS Task Force, 745 A.2d 25, 28 (Pa. Super. 2000). Plaintiffs also have failed to state a cognizable claim for intentional infliction of emotional distress as none of the conduct alleged was remotely "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." See Bedford v. Southeastern Pa. Trans. Auth., 867 F. Supp. 288, 297 (E.D. Pa. 1994); Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998); Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 991 (Pa. 1987); Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 45 (Pa. Super. 2000).

Plaintiffs have failed to plead viable claims. Accordingly, defendants' motions will be granted. The claims asserted against the unserved defendants will be dismissed

without prejudice, consistent with Rule 4(m).

This does not, however, mean that plaintiffs may freely reassert these claims in a new action upon proper service of process. Plaintiffs should be mindful of Fed. R. Civ. P. 11 which provides for monetary and other sanctions for filing pleadings for purposes of harassment or containing legally or factually unwarranted claims. Plaintiff Steve Atuahene, of course, must also heed the injunction regarding further filings in this District entered against him and any party acting at his behest entered by the court in Frempong-Atuahene v. City of Philadelphia on February 24, 2000.

An appropriate order, consistent with the foregoing, will be entered.

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PENNDOT, and Tollan, Egan, Yanni & :
Gartner :

NO. 99-896

O R D E R

AND NOW, this day of September, 2000, upon
consideration of the Motions to Dismiss Plaintiffs' Amended
Complaint filed by defendant Penske Truck Leasing Company (Doc.
#25) and defendants Travelers Property & Casualty Insurance
Company, Michael Egan and Toolan, Egan, Yanni & Gartner (Doc.
#26), consistent with the accompanying memorandum, **IT IS HEREBY**
ORDERED that said Motions are **GRANTED** and accordingly all claims
against these defendants in this action are **DISMISSED**; all claims
in this action against Shermet Industries, its John and Jane Doe
employees, Marc Sherman, Philip Sherman, Lilyan Sherman, Gordon
Finnerty, John Toolan, Toolan Associates, Vickie Gehr and Louis
Cheek are **DISMISSED** without prejudice pursuant to Fed. R. Civ. P.

4(m); and, all claims against PennDOT and its Jane and John Doe officers having also been dismissed by separate order of this date, the above civil action is terminated.

BY THE COURT:

JAY C. WALDMAN, J.