

Hermes stores in Hong Kong. Malecki convinced David and Donna Long to open a Hermes store at the King of Prussia Mall in King of Prussia, Pennsylvania. Adena, a Pennsylvania corporation, was formed to operate the Hermes store. Malecki was to manage the Hermes store and was the majority shareholder of Adena as well as the corporation's sole director, president, secretary and treasurer. David, Donna and Carolyn Long ("Longs") were the minority shareholders. The Hermes store opened on June 8, 1996. On or about August 1, 1997, Malecki retained Clifford Cohn, Esq. of Cohn Associates to represent Adena and Malecki as the Longs were attempting to obtain access to Adena's financial records.

The evidence of Malecki's acts leading up to and following the retention of Cohn are not disputed and present a significant pattern of misappropriating Adena funds and merchandise.

Following a series of differences, including a divorce from Carolyn Long, Malecki entered into a settlement agreement with the Longs. Among other things, Malecki resigned from Adena and transferred his stocks to the Longs. The agreement, which also included a release, provided that Adena was to pay an outstanding bill of \$20,000 counsel fees to the Cohn Defendants for legal services rendered to the Corporation. Despite the agreement, Adena and the Longs refused to pay the attorney fees, contending much of those fees were incurred for Malecki's personal business.

After months of unsuccessful negotiations over the attorney

fees, the Cohn Defendants filed a Petition to Compel Arbitration in June 1999 in the Philadelphia Court of Common Pleas. In addition, the Cohn Defendants filed a complaint against Adena and the Longs in the Philadelphia Court of Common Pleas. In the Amended Complaint, filed September 21, 1999, the Cohn Defendants asserted claims similar to the Counterclaims being asserted against Adena and the Longs in this federal action. Following negotiations, the Cohn Defendants agreed to withdraw the Common Pleas Complaint if Adena and the Longs agreed to submit the matter to the Fee Disputes Committee of the Philadelphia Bar Association.

The agreement to proceed to arbitration was finalized, however, disagreements as to the scope and extent of the arbitration arose and the Longs refused to proceed.¹ On June 15, 2000, Adena and the Longs filed this instant federal action. Default was entered against Malecki, who apparently now lives in France, on April 2, 2001. On November 27, 2000, the Cohn Defendants reinstated their complaint against Adena and the Longs in the Philadelphia Court of Common Pleas.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary

¹ The arbitration has been stayed pending the resolution of an appeal filed by Adena and the Longs in the Superior Court of Pennsylvania after the Court of Common Pleas found in favor of the Cohn Defendants.

judgment "shall be rendered forthwith 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." This court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id. at 255.

Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

A. Civil RICO

Section 1962(b)

18 U.S.C. § 1962(b) (1994) of the Racketeer Influenced Corrupt Organizations Act ("RICO") makes it unlawful "for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise." The control encompassed by this section need not be formal, "such as the holding of majority stock or actual designation as an officer or director." Ikuno v. Yip, 912 F.2d 306, 310 (9th Cir. 1990); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 653 (7th Cir. 1984). Control does require, however, that the defendant participate. Occupational-Urgent Care Health Sys., Inc. v. Sutro & Co., 711 F. Supp. 1016, 1025 (E.D. Cal. 1989) (noting that control exists where "defendants were indirectly running the company").

Here, Plaintiffs have presented no evidence of control acquired by the Cohn Defendants of the type contemplated by the statute. There is no evidence that the Cohn Defendants either operated within Adena or participated in the operations or general management of Adena. Accordingly, summary judgment will be granted to the Cohn Defendants on Plaintiffs' § 1962(b) claim. Additionally, Plaintiffs have not presented sufficient evidence to establish that the Cohn Defendants conspired to obtain control

necessary to establish a violation of § 1962(d). Plaintiffs simply cannot show that the Cohn Defendants sought to participate in or control the operation or management of Adena. Absent such evidence, Plaintiffs cannot establish a § 1962(d) claim of conspiracy based on this conduct.

2. Section 1962(c)

The statute provides:

(c) 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 enterprises' affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Four elements under this provision are necessary to make out a claim. Plaintiff must allege (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 of 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).

Plaintiffs allege that Adena was the relevant RICO

enterprise.² The enterprise referred to in subsection (b) is "something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in [subsection (b)] is the victim of unlawful activity." National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994). The enterprise in subsection (c), however, refers to "the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity." Id. While there is substantial evidence that Adena was the victim of Malecki's fraud, there is no evidence that Adena was used as the vehicle to commit racketeering activity. Therefore, summary judgment will also be granted to the Cohn Defendants on the § 1962(c) claim. Because Adena is not a proper RICO enterprise under § 1962(c), Plaintiffs also cannot prove a § 1962(d) conspiracy based upon subsection (c).

With judgment entered in favor of the Cohn Defendants on all RICO claims, there is no remaining subject matter jurisdiction in federal court in this case. Plaintiffs' remaining claims and the Cohn Defendants' counterclaims are dismissed without prejudice.

² Plaintiffs could not allege that Malecki and the Cohn Defendants constituted the enterprise as there would be no enterprise separate from the racketeering activity. See Seville Industrial Machinery v. Southmost Machinery, 742 F.2d 786, 789-790 (3d Cir. 1984).

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

ADENA, INC., et al	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
CLIFFORD B. COHN, ESQ., et al	:	
Defendants.	:	No. 00-3041

O R D E R

AND NOW, this day of August, 2002, upon consideration of the Motion for Summary Judgment of Defendants Clifford B. Cohn, Esq. and Cohn & Associates (Doc. No. 40), the Motion for Partial Summary Judgment of Plaintiffs Adena Inc., David Long, Donna Long, and Carolyn Long (Doc. No. 46), and the various Responses and Replies thereto, it is ORDERED:

1. The Motion for Summary Judgment of Defendants Clifford B. Cohn, Esq. and Cohn & Associates are GRANTED IN PART. Judgment is ENTERED in favor of Defendants Clifford B. Cohn, Esq. and Cohn & Associates and against Plaintiffs Adena Inc., David Long, Donna Long, and Carolyn Long on Plaintiffs' claims pursuant to the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. 1962 (b-d) (1994).

2. As this Court now lacks subject matter jurisdiction over Plaintiffs' Complaint and the Counterclaim of Defendants, the remaining counts of the Complaint of Plaintiffs Adena Inc., David Long, Donna Long, and Carolyn Long and the Counterclaim of Clifford B. Cohn, Esq. and Cohn & Associates are DISMISSED WITHOUT PREJUDICE.

3. The remainder of the Motion for Summary Judgment of Defendants Clifford B. Cohn, Esq. and Cohn & Associates and the Motion for Partial Summary Judgment of Plaintiffs Adena Inc., David Long, Donna Long, and Carolyn Long are DENIED AS MOOT.

4. The Motion in Limine to Bar or Limit Introduction of Evidence of the Motion for Summary Judgment of Defendants Clifford B. Cohn, Esq. and Cohn & Associates (Doc. No. 48) and the Motion in Limine of Plaintiffs Adena Inc., David Long, Donna Long, and Carolyn Long (Doc. No. 54) are DENIED AS MOOT.

5. Plaintiffs Adena Inc., David Long, Donna Long, and Carolyn Long may file an appropriate motion to enter a default judgment against Defendant, Phillippe Malecki, on or before October 1, 2002.

BY THE COURT:

JAMES MCGIRR KELLY, J.