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

PIONEER CONTRACTING, INC.,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-01437
	)	
vs.	)	
	)	
EASTERN EXTERIOR WALL SYSTEMS, INC.; WAYNE MARTIN; and KEVIN M. KASSAVAUGH,[1]	)	
	)	
Defendants	)	

* * *

APPEARANCES:
ARTHUR R. SHUMAN, ESQUIRE
On behalf of Plaintiff

JAMES D. HOLLYDAY, ESQUIRE
On behalf of Defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, Rule 12(e) Motion for a More Definite Statement.

[1] Although defendants indicate in their motion to dismiss that plaintiff misspelled the last name of defendant Kevin M. Cassavaugh as "Kassavaugh," the caption of this case has not been formally amended to reflect the proper spelling of the defendant's name. However, in the body of this Opinion, we will utilize the proper spelling of defendant's name.

The motion was filed April 26, 2004.[2] For the reasons expressed below, we grant defendants' motion to dismiss plaintiff's two-count Complaint in its entirety.[3]

Specifically, we grant defendants' motion to dismiss with prejudice Counts One and Two as to defendant Eastern Exterior Wall Systems, Inc. ("Eastern"). Defendants' motion to dismiss Counts One and Two as to defendants Kevin M. Cassavaugh and Wayne Martin is granted without prejudice for plaintiff to file an Amended Complaint with respect to its claims against defendants Kevin M. Cassavaugh and Wayne Martin pursuant to 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d).

PROCEDURAL HISTORY

This case commenced with the filing of a two-count civil Complaint on March 31, 2004. Plaintiff Pioneer Contracting, Inc. alleges two separate counts under the Racketeer Influenced and Corrupt Organizations Act ("RICO").[4] Count One is

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[2] On May 13, 2004, Plaintiff's Response to Defendants' Motions Pursuant to Rules 12(b)(6) and 12(c) FRCP was filed. On May 26, 2004, Defendants' Reply Memorandum in Response to Plaintiff's Response to Defendants' Motions Pursuant to Rules 12(b)(6) and 12(e) FRCP was filed. On June 24, 2004, Plaintiff's Response to Defendants' Reply Memorandum to Plaintiff's Response to Defendants' Motions Pursuant to Rules 12(b)(6) and 12(e) FRCP was filed.

[3] Because we grant defendants' motion to dismiss, we need not consider or dispose of defendants' alternative motion for a more definite statement.

[4] 18 U.S.C. §§ 1961-1990.

brought pursuant to 18 U.S.C. § 1962(c). Count Two asserts a claim pursuant to 18 U.S.C. § 1962(d).

JURISDICTION AND VENUE

The matter is before the court on federal question jurisdiction. 18 U.S.C. § 1964; 28 U.S.C. § 1331. Venue appears appropriate in this district because plaintiff avers that the facts and circumstances giving rise to its claims occurred in Northampton, Bucks and Philadelphia counties. See 18 U.S.C. § 1965; 28 U.S.C. §§ 118, 1391.

SUMMARY OF DECISION

Section 1962(c) of RICO makes it unlawful for any person associated with an enterprise engaged in interstate commerce to conduct the affairs of the enterprise through a pattern of racketeering activity. Because plaintiff's Complaint asserts that Eastern was the "enterprise", Eastern cannot also be held liable under Section 1962(c) as a "person" for the conduct of its employees, defendants Cassavaugh and Martin, whom plaintiff specifically alleges were acting within the scope of their employment and authority on behalf of Eastern.

Because plaintiff has failed to establish a viable claim against Eastern under Section 1962(c), its Section 1962(d) claim must also fail. Section 1962(d) of RICO makes it unlawful for any person to conspire to violate subsection (c). However,

conspiracy cannot lie against the corporation for the actions of its employees who violate RICO on its behalf. Moreover, employees of a corporation, while acting in the course and scope of their employment, cannot conspire with each other.

Therefore, we dismissed both RICO counts of plaintiff's Complaint against defendant Eastern with prejudice.

A pattern of racketeering activity requires the commission of at least two predicate offenses listed in RICO. Plaintiff alleges mail fraud and wire fraud as those offenses. Under Federal Rule of Civil Procedure 9(b), allegations of fraud must be pled with particularity.

We find that plaintiff has not alleged the predicate acts of mail fraud or wire fraud with the requisite particularity of Rule 9(b). Therefore, we dismiss plaintiff's Complaint against defendants Cassavaugh and Martin. The dismissal is without prejudice for plaintiff to file an Amended Complaint, so that plaintiff may, if it is able, describe with particularity the contents of those defendants' allegedly false letters, memos, fascimile transmissions and telephone calls and identify specifically when, how, by whom or to whom each of the communications were made or sent.

We also conclude that plaintiff fails to allege that the various entities involved in this construction project, working together in a structured relationship, constituted the

enterprise. Accordingly, we also permit plaintiff, in its Amended Complaint, to identify each person known to have conspired with defendants Cassavaugh and Martin, as well as each person's affiliation, or lack thereof, with Eastern.

STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss examines the sufficiency of the Complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). When considering a motion to dismiss the court must accept as true all factual allegations in the Complaint and construe all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. Jurimex Kommerz Transit G.M.B.H. v. Case Corporation, 65 Fed. Appx. 803, 805 (3d Cir. 2003) (citing Lorenz v. CSX Corporation, 1 F.3d 1406, 1411 (3d Cir. 1993)).

A Rule 12(b)(6) motion should be granted "if it appears to a certainty that no relief could be granted under any set of facts which could be proved." Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997) (citing D.P. Enter. Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984)). But a court need not credit a complaint's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. Morse, 132 F.3d at 906. (Citations omitted.)

In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the

Complaint, exhibits attached to the Complaint, matters of public record, and documents that form the basis of the claim. Lum v. Bank of America, 361 F.3d 217, 222 n.3 (3d Cir. 2004).

FACTS

Based upon the foregoing standard of review and the allegations in plaintiff's Complaint, which we must accept as true for purposes of this motion, the following are the pertinent facts.[5]

The claims of plaintiff Pioneer Contracting, Inc. originate from the performance of a contact entered into with defendant Eastern Exterior Wall Systems, Inc. for certain caulking work in connection with the Dockside Residences @ Pier 30 construction project ("Project") in Philadelphia, Pennsylvania. As part of its performance of the contract, Eastern contracted with a general contractor, Keating Building Corporation, to install exterior wall panels on a building for the Project.[6]

The Project experienced problems, including water leakage. The parties dispute who is responsible for the leaks. Plaintiff contends that the leakage resulted from a defective

[5] Because plaintiff failed to state its claims in the Complaint in numbered paragraphs as required by Rule 10(b) of the Federal Rules of Civil Procedure, our citations to the Complaint will only reference the page in the Complaint where each averment is found.

[6] Complaint, pages 2, 7.

panel design which was not in accordance with the specifications and the failure to prime a metal flashing on the panels. Plaintiff claims that both errors may be attributed to Eastern and defendant Kevin M. Cassavaugh, the Manager of the Project for Eastern.[7]

Eastern, through defendants Cassavaugh and Martin[8], accused plaintiff of failing to submit the flashing to Dow Corning Company for determination of the suitability of the caulking compound and the need for priming. Eastern contends that this failure was the sole cause of the leakage problem.[9]

Acting on behalf of defendant Eastern, defendants Cassavaugh and Martin mailed letters and memos, transmitted faxes, and made telephone calls to plaintiff and others expressing defendants' position in the dispute. In all of these communications, defendants knew that their oral and written statements were false. In addition, Eastern failed to pay plaintiff for its work on the Project and eight other projects in which plaintiff performed subcontracting work for Eastern.[10]

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[7] Complaint, pages 3, 8-9.

[8] Mr. Martin was the Manager of Eastern's Mid-Atlantic Division.

[9] Complaint, pages 3-4, 9-10.

[10] Complaint, pages 4, 11-12.

DISCUSSION

Defendants contend that plaintiff's Complaint should be dismissed for the following reasons: (1) Eastern, as a corporate entity, cannot be subject to RICO liability under Sections 1962(c) and (d) for the alleged racketeering of defendants Cassavaugh and Martin; (2) defendants Cassavaugh and Martin cannot be subject to RICO liability under Section 1962(c) because plaintiff fails to plead the predicate acts of mail and wire fraud with requisite specificity; and (3) defendants Cassavaugh and Martin cannot be subject to RICO conspiracy under Section 1962(d) because employees acting within the scope of their employment cannot conspire with each other.

In response, plaintiff contends that defendants' motion to dismiss should be denied in all respects. Specifically, plaintiff maintains that corporations, as "persons" in the eyes of the law, may be held liable under the RICO statutes when their managers, acting for them, engage in a pattern of racketeering activity with respect to another "enterprise," other than the corporation itself. Plaintiff also asserts that its Complaint contains sufficient specific information to put defendants on notice of the conduct alleged and the period within which it occurred.

For the following reasons, we agree with defendants.

Liability of Eastern Pursuant to Sections 1962(c) and (d) of RICO

Section 1962(c) of RICO provides, 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 or collection of unlawful debt.

18 U.S.C. § 1962(c).[11] Section 1962(d) makes it unlawful for any person to conspire to violate subsections (a) through (c) of Section 1962.

The United States Court of Appeals for the Third Circuit has held that:

> [A] claim simply against one corporation as both "person" and "enterprise" is not sufficient. Instead, a viable § 1962(c) action requires a claim against defendant "persons" acting through a distinct "enterprise." But, alleging conduct by officers or employees who operate or manage a corporate enterprise satisfies this requirement.
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> * * *
>
> [W]e do not believe that allowing a § 1962(c) action against officers conducting a pattern of racketeering activity through a corporate

[11] For purposes of this section, "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). "Enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

> enterprise yields an "absurd result." In such an action, the plaintiff can only recover against the defendant officers and cannot recover against the corporation simply by pleading the officers as the persons controlling the corporate enterprise, since the corporate enterprise is not liable under § 1962(c) in this context. Instead, a corporation would be liable under § 1962(c), only if it engages in racketeering activity as a "person" in another distinct "enterprise," since only "persons" are liable for violating § 1962(c).

Jaguar Cars, Inc. v. Royal Oaks Motor Car Company, 46 F.3d 258, 268 (3d Cir. 1995). (Citations omitted.)

Despite plaintiff's assertions in its response brief,[12] it is clear from its Complaint that Eastern is the sole "enterprise" and that defendants Cassavaugh and Martin, as employees acting within the scope of their employment,[13] conducted the affairs of Eastern. Specifically, plaintiff alleges in its Complaint that

> This action is brought pursuant to the civil provisions of Title 18, Section 1961 through 1968, which prohibits [sic], *inter alia*, the carrying on of the affairs of an enterprise,

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[12] In its response, plaintiff now asserts that the various entities involved in the project, working together in a structured relationship, constituted the enterprise whose affairs Eastern conducted through a pattern of racketeering activity and which was utilized by Eastern's managers to defraud plaintiff. However, these allegations are not contained in plaintiff's Complaint. In deciding motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, courts generally need only consider the allegations in the Complaint, exhibits attached to the Complaint, matters of public record, and documents that form the basis of the claim. Lum, supra.

[13] Plaintiff alleges that defendants Cassavaugh and Martin were, at all times relevant to the Complaint, "the agent[s], servant[s] and employee[s] of Eastern...and [were] acting within the scope of [their] employment and authority on behalf of Eastern." Complaint, pages 6-7.

> to wit Eastern Exterior Wall Systems, Inc., through a pattern of racketeering activity, to wit mail and wire fraud....

Complaint, page 2.

In addition, plaintiff specifically identifies Eastern as the "enterprise" in the fact section of its Complaint.[14] Finally, with respect to Count One, plaintiff alleges that

> From October of 2002 and continuing until the date of this filing, the individual defendants, Martin and Kassavaugh [sic], have conducted the affairs of Eastern Exterior Wall Systems, Inc. ("the enterprise") through a pattern of racketeering activity, to wit, mail and wire fraud in violation of Title 18 U.S.C. Sections 1341 and 1343.

Complaint, page 12.

Nowhere in its Complaint does plaintiff allege that the various entities involved in the Project, working together in a structured relationship, constituted the "enterprise." Moreover, plaintiff does not allege any facts in its Complaint showing how

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[14] Plaintiff's Complaint provides, in pertinent part:

> The Enterprise: Eastern is a business corporation formed in 1986 under the laws of the Commonwealth of Pennsylvania. In addition to its headquarters in Bethlehem, Pennsylvania, it has a New York regional office in Clinton, New Jersey; a Midlantic [sic] Regional office in Horsham, Pennsylvania, and a New England Regional office in Pawtucket, Rhode Island. The corporation has manufacturing facilities in Bethlehem, Pennsylvania and Bohemia, New York. As of the date of this filing, Eastern lists twenty (20) active major projects in locations ranging from Rochester, New York to Suitland, Maryland.

Complaint, page 10.

Eastern, as a distinct "person," operated that "enterprise" in an illegal fashion.

Because plaintiff's Complaint clearly asserts that Eastern was the "enterprise," Eastern cannot also be held liable as a "person" for the conduct of its employees, defendants Cassavaugh and Martin, whom plaintiff specifically alleges were "acting within the scope of [their] employment and authority on behalf of Eastern." Jaguar Cars, 46 F.3d at 268. Accepting as true all factual allegations in plaintiff's Complaint, it is clear that Eastern cannot be held liable under Section 1962(c). Morse, 132 F.3d at 906.

Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient. Lightning Lube, Inc. v. Witco Corporation, 4 F.3d 1153, 1191 (3d Cir. 1993)(citing Leonard v. Shearson Lehman/American Express, Inc., 687 F. Supp. 177, 182 (E.D. Pa. 1998)).

Because plaintiff has failed to establish a viable claim against Eastern under Section 1962(c), its Section 1962(d) claim must also fail. Moreover, the majority rule is that conspiracy cannot lie against the corporate entity for the concerted action of its employees who allegedly violate RICO on its behalf. Northeast Jet Center v. Lehigh-Northampton Airport Authority, 767 F. Supp. 672, 684 (E.D. Pa. 1991).

We conclude that Eastern, as the corporate entity or "enterprise," cannot be subject to RICO liability under Sections 1962(c) and (d) for the alleged racketeering of defendants Cassavaugh and Martin. Accordingly, we grant defendants' motion to dismiss as to Eastern and dismiss Counts One and Two of plaintiff's Complaint with prejudice.

Liability of Defendants Cassavaugh and Martin Pursuant to Section 1962(c) of RICO

Defendants assert that plaintiff (1) has failed to plead its allegations of mail and wire fraud with the heightened specificity required by Rule 9(b) of the Federal Rules of Civil Procedure; (2) has failed to allege facts to demonstrate a pattern of criminal activity of sufficient scope and duration; and (3) has failed to allege facts that the acts of mail fraud and wire fraud were the cause of plaintiff's compensable injury.

Each subsection of 18 U.S.C. §1962 requires the existence of a "pattern of racketeering activity." The statute defines a "pattern of racketeering activity" as requiring the commission of at least two predicate offenses listed in 18 U.S.C. §1961(1).[15] See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1412 (3d Cir. 1991)(citing 18 U.S.C. §1962(5)). Here, plaintiffs allege that the defendants violated § 1341 (mail

[15] The relevant portions of 18 U.S.C. § 1961(1) provide: "racketeering activity" means any act which is indictable under any of the following provisions of Title 18, United States Code: Section 1341 (relating to mail fraud) and Section 1343 (relating to wire fraud).

fraud) and § 1343 (wire fraud) of Title 18 of the United States Code.

Defendants contend that plaintiff fails to allege any viable claim for fraud.[16] To prove mail or wire fraud, the plaintiff must demonstrate (1) the defendants' knowing and willful participation in a scheme or artifice to defraud; (2) with the specific intent to defraud; and (3) the use of the mails or interstate wire communications in furtherance of the scheme. United States v. Antico, 275 F.3d 245, 261 (3d Cir. 2001).

Although the mail or wire communication must relate to the underlying fraudulent scheme, it need not contain any misrepresentations. Mail fraud occurs so long as the mailing is "incident to an essential part of the scheme". See Schmuck v. United States, 489 U.S. 705, 712, 109 S.Ct. 1443, 1448, 103 L.Ed.2d 734, 744 (1989). Moreover, the scheme or artifice to defraud need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. Kehr Packages, 926 F.2d at 1415.

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[16] Because the plaintiff's mail and wire fraud claims are almost factually identical, we consider them concurrently. "As we have noted, the wire fraud and mail fraud statutes differ only in form, not in substance, and cases...interpreting one govern the other as well." See United States v. Morelli, 169 F.3d 798, 806 n.9 (3d Cir. 1999).

Keeping in mind that allegations of fraud must be pled with particularity under Federal Rule of Civil Procedure 9(b),[17] we conclude that plaintiff's Complaint fails to allege mail fraud or wire fraud with the required particularity.

In it Complaint, plaintiff alleges that the racketeering activity began in October of 2002 when defendants Cassavaugh and Martin

> wrote a series of letters, at least four in number, to Pioneer with copies to Keating, and to Keating, in which they falsely accused Pioneer of failing to submit the flashing to Dow for evaluation.... These letters were sent through the United States mails and/or transmitted by facsimile over the telephone lines. Because these communications were made with the intention of misrepresenting the facts in order to defraud Pioneer, and because they used either the mails or wire communications, both instruments in interstate commerce, their acts constitute violations of Title 18 U.S.C. Sections 1341 and 1343. As such, they constitute a "pattern of racketeering activity" as defined in Title 18 U.S.C. Section 1962.

Complaint, pages 10-11.

In support of their position regarding the lack of specificity in plaintiff's Complaint, defendants rely primarily on the decision of the United States Court of Appeals for the Third Circuit in Rolo v. City Investigating Company Liquidating Trust, 155 F.3d 644 (3d Cir. 1998). In Rolo, the Third Circuit

[17] Rule 9(b) of the Federal Rules of Civil Procedure provides in pertinent part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

affirmed the dismissal of plaintiff's Complaint for failure to allege mail fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. 155 F.3d at 658-659.

In so doing, the Court found that although the content of the mailing was described in reasonably specific terms, it did not detail "when, by whom, and to whom a mailing was sent, and the precise content of each mailing". Rolo, 155 F.3d at 658-659. Allegations of mail and wire fraud in a RICO complaint that fail to indicate who made and who received the fraudulent representation are insufficient under Rule 9(b) of the Federal Rules of Civil Procedure. Saporito v. Combustion Engineering, Inc., 843 F.2d 666, 673-676 (3d Cir. 1988).

In this case, plaintiff fails to describe with particularity the contents of a single alleged letter, memo, fax or telephone call. In addition, plaintiff fails to specifically identify when, how, by whom or to whom each of the alleged communications were sent. Although plaintiff avers that defendants Martin and Cassavaugh wrote letters, plaintiff fails to specify who actually sent the letters.

Further, plaintiff does not specify a time period, let alone a specific date, in which any letter or communication was made or sent. While plaintiff alleges that the activity began in October of 2002, it does not specify when a single letter, memo or fax was actually sent. Accordingly, we find that plaintiff

has not alleged the predicate acts of mail or wire fraud with the requisite particularity of Rule 9(b) of the Federal Rules of Civil Procedure.

Defendants also contend that plaintiff's Complaint is deficient because plaintiff fails to allege facts to demonstrate a pattern of criminal activity of sufficient scope and duration. In order to prove a pattern of racketeering activity, plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195, 208 (1989).

Under the first, or "relatedness", requirement of the RICO statute, predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Tabas v. Tabas, 47 F.3d 1280, 1292 (3d Cir. 1995). (Citations omitted.)

With respect to the "continuity" prong, the United States Supreme Court has held that "what a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, simpliciter." H.J. Inc., 492 U.S. 229, 239, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195, 208 (1989). In explaining how a plaintiff could make this continuity showing, the United States Supreme Court stated:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.... It is, in either case, centrally a temporal concept.... A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time.

H.J. Inc., 492 U.S. 229, 241-242, 109 S.Ct. 2893, 2902, 106 L.Ed.2d 195, 209 (1989).

As stated above, plaintiff fails to describe with particularity the contents of a single alleged letter, memo, fax or telephone call. Therefore, it remains unclear whether the acts pled by plaintiff satisfy the relatedness requirement.

In other words, it is unclear whether the letters, memos, faxes and telephone calls "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Tabas, supra. However, we conclude that although plaintiff has not yet done so, it may be able to plead facts regarding the content of the alleged communications which may establish the relatedness requirement.

In addition, although plaintiff alleges that the activity began in October of 2002, plaintiff does not specify when a single letter, memo or fax was actually sent. It remains unclear whether the alleged communications were made or sent

continuously throughout the seventeen-month time span pled by plaintiff[18] or whether they were made or sent within a matter of a few months during that seventeen-month time span. We assume, however, that although plaintiff has not yet done so, it may be able to plead facts regarding the specific time frame or dates in which the communications were sent which may establish the continuity requirement.[19]

Finally, defendants assert that plaintiff has failed to allege facts that the alleged acts of mail fraud and wire fraud were the cause of plaintiff's compensable injury. Specifically, defendants contend that plaintiff's Complaint alleges it was injured by the failure of defendants to pay the amount due for its work on the Project. Defendants maintain that this injury did not and could not result from alleged acts of mail fraud and

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[18] Plaintiff alleges in its Complaint that the racketeering activity began in October of 2002 and continued until the date of the filing of its Complaint. Complaint, page 12. Plaintiff's Complaint was filed on March 31, 2004. Accordingly, the period of time alleged by plaintiff is approximately seventeen months.

[19] See United States v. Pelullo, 964 F.2d 193, 209 (3d Cir. 1992) (holding that a jury could find a nineteen-month period of racketeering activity sufficient to satisfy continuity requirement); Swistock v. Jones, 884 F.2d 755, 759 (3d Cir. 1989) (fourteen-month period of conduct may be sufficient to establish closed-ended continuity). But see Hughes v. Consol-Pennsylvania Coal Company, 945 F.2d 594, 610-11 (3d Cir. 1991) (fraudulent conduct lasting twelve months does not establish closed-ended continuity); Hindes v. Castle, 937 F.2d 868, 875 (3d Cir. 1991) (eight-month period of predicate acts without a threat of future criminal conduct does not satisfy continuity requirement); Marshall-Silver Construction Company v. Mendel, 894 F.2d 593 (3d Cir. 1990) (seven month single-victim, single-injury scheme does not satisfy continuity requirement).

wire fraud, that is, the writing of letters, memos and faxes by defendants Cassavaugh and Martin.

In order to recover under Section 1962(c) plaintiff must demonstrate that it has been injured in its business or property by the conduct constituting the violation. Sedima v. Imrex Co., Inc., 473 U.S. 479, 496-497, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346, 359 (1985).

Contrary to defendants' assertion, plaintiff also alleges injury to its reputation. Specifically, plaintiff alleges that

> As the direct result of the conduct, by Kassavaugh [sic], Martin and others known and unknown, Pioneer Contracting, Inc. has been deprived of the Dockside contract price, and of the funds received on behalf of Pioneer by Eastern for eight other contracts successfully performed, and has been injured in its reputation in the community of owners, builders and general contractors, upon whom it depends for its livelihood.

Complaint, page 13.

Again, because plaintiff has failed to describe with particularity the contents of a single alleged letter, memo, fax or telephone call, it is unclear whether these alleged acts could have caused plaintiff's injury. We perceive that, depending on the content of the communications, plaintiff may be able to demonstrate the requisite causation.

Accordingly, we dismiss plaintiff's RICO claims based on Section 1962(c) as to defendants Cassavaugh and Martin without

prejudice, and we grant plaintiff leave to file an Amended Complaint by April 20, 2005.[20]

Liability of Defendants Cassavaugh and Martin Pursuant to Section 1962(d) of RICO

In their motion to dismiss, defendants contend that because defendants Cassavaugh and Martin are the only individuals upon which plaintiff's Section 1962(d) conspiracy is based, they cannot be subjected to liability under Section 1962(d) because employees of a corporation, while acting in the course and scope of their employment, cannot conspire with each other.

In support of their assertion, defendants rely upon United National Insurance Company v. Equipment Insurance Managers, Nos. Civ. A. 95-0116 and 95-2892, 1995 U.S. Dist. LEXIS 15868 (E.D. Pa. October 27, 1995)(Rendell, U.S.D.J.). In United National, former United States District Judge (now United States Court of Appeals for the Third Circuit Judge) Marjorie O. Rendell held that under both RICO and Pennsylvania civil conspiracy law, employees of a corporation, while acting in the course and scope of their employment, cannot conspire with each other. 1995 U.S. Dist. LEXIS 15868 at *18.

[20] Specifically, we grant plaintiff leave to file an Amended Complaint so that plaintiff may, if it is able, describe with particularity the contents of the alleged letters, memos, fascimile transmissions and telephone calls and identify specifically when, how, by whom or to whom each of the alleged communications were made or sent.

In Count Two of its Complaint, plaintiff specifically alleges that

> From October of 2002 and continuing until the date of this filing, the individual defendants, Martin and Kassavaugh [sic], have conspired among themselves and with others known and unknown to conducted [sic] the affairs of Eastern Exterior Wall Systems, Inc. ("the enterprise") through a pattern of racketeering activity, to wit, mail and wire fraud in violation of Title 18 U.S.C. Sections 1341 and 1343.

Complaint, page 13.

Because plaintiff alleges that the conspiracy may have involved persons, known and unknown, other than defendants Cassavaugh and Martin, it is conceivable that one of the alleged persons may not have been employed by Eastern. Accordingly, we dismiss plaintiff's RICO claims based on Section 1962(d) as to defendants Cassavaugh and Martin without prejudice and grant plaintiff leave to file an Amended Complaint by April 20, 2005.[21]

[21] Specifically, we grant plaintiff leave to file an Amended Complaint so that it may identify each person known to have conspired with defendants Cassavaugh and Martin as well as each person's affiliation, or lack thereof, with Eastern. With respect to those persons plaintiff alleges are unknown, we grant plaintiff leave to file an Amended Complaint so that it may identify whether those persons are affiliated with Eastern.

CONCLUSION

For all the foregoing reasons, we grant defendants' motion to dismiss and dismiss plaintiff's Complaint against Eastern with prejudice, and against defendants Cassavaugh and Martin without prejudice for plaintiff to file an Amended Complaint consistent with this Opinion against those individual defendants.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PIONEER CONTRACTING, INC.,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-01437
	)	
vs.	)	
	)	
EASTERN EXTERIOR WALL	)	
SYSTEMS, INC.;	)	
WAYNE MARTIN; and	)	
KEVIN M. KASSAVAUGH,[22]	)	
	)	
Defendants	)	

O R D E R

NOW, this 29th day of March, 2005, upon consideration of Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's

[22] Although defendants indicate in their motion to dismiss that plaintiff misspelled the last name of defendant Kevin M. Cassavaugh as "Kassavaugh," the caption of this case has not been formally amended to reflect the proper spelling of the defendant's name. However, in the body of this Order, we will utilize the proper spelling of defendant's name.

Complaint, or, in the Alternative, Rule 12(e) Motion for a More Definite Statement, which motion was filed April 26, 2004; upon consideration of Plaintiff's Response to Defendants' Motions Pursuant to Rules 12(b)(6) and 12(c) FRCP, which response was filed May 13, 2004; upon consideration of Defendants' Reply Memorandum in Response to Plaintiff's Response to Defendants' Motions Pursuant to Rules 12(b)(6) and 12(e) FRCP, which reply memorandum was filed May 26, 2004; upon consideration of Plaintiff's Response to Defendants' Reply Memorandum to Plaintiff's Response to Defendants' Motions Pursuant to Rules 12(b)(6) and 12(e) FRCP, which response to reply memorandum was filed June 24, 2004; upon consideration of the pleadings; upon consideration of the briefs of the parties; and for the reasons expressed in accompanying Opinion,

IT IS ORDERED that defendants' motion to dismiss is granted.

IT IS FURTHER ORDERED that defendants' motion to dismiss Counts One and Two of plaintiff's Complaint is granted as to defendant Eastern Exterior Wall Systems, Inc.

IT IS FURTHER ORDERED that defendant Eastern Exterior Wall Systems, Inc. is dismissed with prejudice from this lawsuit as a party.

IT IS FURTHER ORDERED that defendants' motion to dismiss Counts One and Two of plaintiff's Complaint is granted as

to defendants Wayne Martin and Kevin M. Cassavaugh.

IT IS FURTHER ORDERED that Counts One and Two of plaintiff's Complaint are dismissed with leave for plaintiff to file an Amended Complaint against defendants Wayne Martin and Kevin M. Cassavaugh.

IT IS FURTHER ORDERED that plaintiff shall have until April 20, 2005 to file an Amended Complaint with respect to claims against defendants Wayne Martin and Kevin M. Cassavaugh pursuant to 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d).

IT IS FURTHER ORDERED that Defendants' Rule 12(e) Motion for a More Definite Statement is dismissed as moot.[23]

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

[23] Because we grant defendants' motion to dismiss, we need not consider or dispose of defendants' alternative motion for a more definite statement. Moreover, we have required plaintiff to file an Amended Complaint, which may provide defendants with the information which they claim is lacking in plaintiff's original Complaint.