United States District Court, S.D. New York.
ALFIE'S ORIGINAL SOULIERS, INC., a New York corporation, Plaintiff,
v.
FLEET BANK, United International Adjusters, Inc., Leonard Patnoi, Fernando Peters, Jillian Shaia and Marilyn States, Defendants.
No. 95 CIV. 8741 (RPP).

May 17, 1996.

Solomon E. Antar, Brooklyn, New York, for Plaintiff.

Debra L. Wabnik, Mineola, New York, for Defendants.

OPINION AND ORDER

ROBERT P. PATTERSON, Jr., District Judge.

***1** Defendants, Fleet Bank ("Fleet") and Leonard Patnoi, Fernando Peters, Jillian Shaia, and Marilyn States [FN1] ("Fleet employees") move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") to dismiss plaintiff's claims under 18 U.S.C. § § 1961-1967, the Racketeer Influenced and Corrupt Organizations Act ("RICO") for failure to state a claim upon which relief can be granted. Said defendants also move to dismiss plaintiff's fraud claim on the ground that plaintiff has failed to comply with the pleading requirements of Fed.R.Civ.P. 9(b). [FN2] For the reasons stated below, defendants' motion to dismiss is granted.

FN1. Defendants contend that Marilyn States has not been served in this action, but note that all arguments set forth by defendants apply equally to Marilyn States. (Defendants' Memorandum of Law in Support of Motion to Dismiss ("Defs.' Mem.") p. 1, n. 1.)

FN2. Defendant, United International Adjusters, Inc., has absconded and not been served in this action.

BACKGROUND

Plaintiff, Alfie's Original Souliers ("Alfie's"), is a New York corporation with offices in Brooklyn, New York and a factory located in Richmond County, New York. (Complaint dated October 10, 1995 ("Complaint") ¶ ¶ 3, 14.) Defendant, Fleet Bank, is a banking corporation authorized to conduct business in the state of New York which has offices in the City and State of New York. (*Id.* ¶ 4.) The Fleet employees were employed by Fleet Bank at all relevant times. (*Id.* ¶ ¶ 6-9.)

On or about September 24, 1992, a fire occurred on plaintiff's property in Richmond County, New York. On the same day, plaintiff hired United International Adjusters ("United") to assist it with the presentation of a claim to plaintiff's insurance company, Zurich American Insurance Company ("Zurich"). At that time, Alfie's and United entered into a Public Adjuster Compensation Agreement which included a provision stating that Alfie's authorized United to endorse checks on its behalf. (Affidavit of Solomon E. Antar dated March 6, 1996 ("Antar Aff."), Ex. 2.)

On October 6, 1992, Zurich issued a check for $25,000 payable to plaintiff as an advancement and/or partial payment in settlement of plaintiff's claim. On November 12, 1992, Zurich issued a second check for $150,000 which listed both plaintiff and United as payees. (Complaint ¶ 15; Defs.' Mem. p. 2.) United deposited both of these instruments in its account with Fleet Bank for collection. (Complaint ¶ 16.)

The complaint alleges that during the period between September 24, 1992 and November 12, 1992, United, in order to provide security or dissuade inquiry into any pending claims, would issue its own checks to clients, such as Alfie's, as loans, advances and/or partial payment toward their claim. (*Id.* ¶ 17.) After issuing such checks, however, United allegedly would issue stop payment orders thereon and then replace the checks which had been "stopped" with substitute checks. (*Id.*) According to the complaint, during the first two months after United opened its account, Fleet processed approximately one hundred stop payment orders and returned the unpaid checks out of United's account. (*Id.*)

Once United obtained possession of actual settlement checks, including the two checks from Zurich pertaining to Alfie's claims arising out of the September 24, 1992 fire, United allegedly closed its offices; absconded with the funds deposited in its account at Fleet; and has not been heard from since. (*Id.*)

***2** In August of 1993, plaintiff commenced a civil action against United and Fleet in the Supreme Court of the State of New York, County of New York, claiming conversion and breach of contract. United

never appeared in the New York County action. (Affidavit of Debra L. Wabnik dated January 10, 1996 ("Wabnik Aff.") ¶ 4.) That case is still pending against Fleet in the Supreme Court of New York.

In the instant case, commenced in October 1995, plaintiff alleges that defendants committed mail and wire fraud, conspired, and engaged in a pattern of racketeering activity aimed at defrauding plaintiff and others in violation of 18 U.S.C. § § 1961-1968 of RICO. (Complaint ¶ ¶ 10, 24-32.)

Plaintiff alleges that United and the Fleet employees, acting in concert, in combination, and with the complicity of Fleet, conspired and engaged in a continuing pattern of racketeering activity which was deliberately intended and directed at perpetrating a scheme to defraud plaintiff and others; impeding and obstructing plaintiff's attempts to recover its losses; and causing plaintiff to suffer damages. (*Id.* ¶ ¶ 10, 27.) Defendants are alleged to have acted in concert, in combination, and in joint association and thus to have constituted an enterprise which affected interstate commerce due to its use of the interstate banking system, mail, and telephones in the course of its banking activities. (*Id.* ¶ ¶ 25-26.)

The pattern of racketeering activity is alleged to have "... consisted of the commission of at least two predicate acts by Fleet Bank's acceptance and process of numerous checks [FN3] through the account of United which contained forged endorsements of either some or all of the payees therein ..."; and in "... aiding, abetting and committing this conspiracy through the issuance and delivery ..." of checks from United's account "... upon which payment was subsequently stopped and/or returned unpaid, after which United absconded with the proceeds thereof...." (*Id.* ¶ 28.) The complaint alleges that because the processing of the falsely endorsed checks deposited into United's account and the issuance of stop payment orders therein involved the use of the mails, wires, and/or telephones, these actions constituted mail and wire fraud, indictable acts under 18 U.S.C. § 1341. (*Id.* ¶ ¶ 29, 30.)

> FN3. Paragraph 28 of the complaint lists over 90 checks, dated from October 14, 1992 to November 30, 1992, which were returned.

Plaintiff claims to have been "injured in its business or property and has sustained actual damages in the amount of $175,000.00" (*id.* ¶ 32) as a result of defendants' actions. Additionally, plaintiff seeks treble damages and attorney's fees pursuant to § 1964(c) of RICO. (*Id.* ¶ 35(b).)

This Court heard oral argument on defendants' motion to dismiss on April 15, 1996.

DISCUSSION

I. *Abstention*

Defendants contend that this action should be dismissed on the grounds that an action based on the same facts, seeking the same relief and involving the same parties is currently pending in state court. Plaintiff contends that this action should proceed because it involves federal law and includes parties, the Fleet employees, not named in the state court action.

***3** Under *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976), only under exceptional circumstances can a federal court abstain from hearing an action pending the outcome of a parallel state court proceeding. Under *Colorado River*, however, the task

> ... is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.

Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 25-26 (1983) (emphasis in original). There are a number of factors which must be considered by courts in determining whether exceptional circumstances exist, but no one factor is determinative. The factors include: (1) whether a court has exercised jurisdiction over a res; (2) the convenience of the forums; (3) the need to avoid piecemeal litigation; (4) the order in which the courts obtained jurisdiction; (5) whether federal or state law provides the rule of decision; and (6) whether the state court will adequately protect the parties' rights. *Colorado River*, 424 U.S. at 818; *Moses H. Cone*, 460 U.S. at 23- 27.

Defendants contend that this action presents the threat of piecemeal litigation because the same transactions and factual circumstances underlie both cases, giving rise to the potential for inconsistent adjudication and duplicative efforts. The same facts underlie both cases, however, this action seeks different relief from Fleet and from the Fleet employees, who are not named in the state court action. Although there is some risk that defendants

will be forced to assert affirmative defenses which have already been asserted in the state forum and inconsistent judgments could result, this factor does not rise to the level of an exceptional circumstance.

The order in which the cases were filed is a significant factor in this case. The state action was commenced in August 1993. Substantial discovery and motion practice has taken place in that case. Currently, summary judgement motions made by plaintiff and Fleet are pending. (Wabnik Aff. ¶ 4.) The instant action was not initiated until October 1995, more than two years after plaintiff filed suit in state court. Although discovery will be similar in both cases, this action lags substantially behind the state court proceeding. The significant progress in the state court action weighs heavily in favor of granting of a stay.

The fact that the plaintiff's claims are governed by federal law, however, weighs against such a stay. The plaintiff's claims asserted in this action can be adjudicated by the state court since New York has a state RICO, but "... the presence of federal-law issues must always be a major consideration weighing against the surrender" of federal jurisdiction. *Moses H. Cone*, 460 U.S. at 26.

***4** In the instant action, there is no res over which this Court or the state court needs to exercise control; New York is the forum for both actions; and although plaintiff asserts federal claims, its rights could be adequately protected in the state court proceeding. Although these factors may present exceptional circumstances warranting a stay, no stay will be issued in view of the Court's decision on defendants' motion to dismiss.

II. *Plaintiff's claims under RICO*

To state a cause of action for a violation of § 1962 of RICO, a plaintiff must plead: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir.1983).

Although a plaintiff is required to allege "at least" two predicate acts, predicate acts alone may not be enough to establish a pattern of racketeering activity under RICO. 18 U.S.C. § § 1961(5), 1962. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238 (1989). In order to show a pattern of racketeering activity, the plaintiff must show (1) a relationship between the predicate acts and (2) that "the predicates themselves amount to or ... otherwise constitute a threat of, *continuing* racketeering activity. *H.J. Inc.*, 492 U.S. at 239-240 (emphasis in original). The factors of relationship and continuity combine to produce a pattern of activity. *H.J. Inc.*, 492 U.S. at 239.

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." *H.J. Inc.*, 492 U.S. at 240 (internal citations omitted). With regards to the continuity element, the Court has not provided a general test, but has described the requirement as follows:

> '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--and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear to one another, are distinct requirements. 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. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases liability depends on whether the *threat* of continuity is demonstrated....

***5** *H.J. Inc.*, 492 U.S. at 241-242 (internal citations omitted; emphasis in original). In this case, the complaint's's predicate acts are alleged to have occurred over a period of less than 2 months. This is not sufficient to show continuity.

According to the complaint, the alleged pattern of activity does pose a threat of continued racketeering activity because during the pending state court action, the Fleet employees took steps "... to cover up and obscure their activities through fraudulent and deceitful practices ..." such as "... the secreting or disposing of Fleet Bank's rules and regulations concerning the operation of its customers accounts ..." and "... deliberately withholding and failing to disclose information and/or knowingly and

consciously giving the incorrect or misleading information to the plaintiff concerning claims and lawsuits against defendant Fleet Bank with reference to the maintenance of United's account which would have been detrimental to Fleet Bank's case therein." (Complaint ¶ 22.)

These allegations, however, do not tend to show that any future criminal conduct is threatened. Indeed, it is undisputed that United, the only party that appears to have benefited from the alleged activity, has disappeared and is not alleged to have participated in the coverup. Plaintiff cannot use defendants' failure to produce all information and documentation requested in the state court action as evidence that defendants' actions pose a threat of continuing criminal conduct. Thus, plaintiff has not adequately alleged a pattern of racketeering activity.

Furthermore, in order to state a claim under § 1962(c) of RICO, a plaintiff must allege not only the existence of an ongoing enterprise through which defendants engaged in a pattern of racketeering activity [FN4], but also that defendants conducted or participated, directly or indirectly, in the conduct of such enterprises' affairs. 18 U.S.C. § 1962(c).

> FN4. Section 1961(4) of RICO defines enterprise as "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).

Allegations pertaining to the existence of an enterprise must provide more than general assertions that a group of defendants constituted an enterprise. *International Paint Co. v. Grow Group, Inc.*, 648 F.Supp. 729 (S.D.N.Y.1986). An enterprise is "... a group of persons associated together for a common purpose of engaging in a course of conduct ...", and is proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). "The 'enterprise' is not 'the pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583.

To hold a participant in the enterprise liable, it must be shown that the individual participated in the operation or management of the enterprise. Although RICO liability is not limited to those with a formal position within the enterprise, allegations that defendants "conduct or participate, directly or indirectly in the conduct of [an] enterprise's affairs," must demonstrate that defendants play some part in directing the enterprise. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1170-1171 (1993).

***6** Plaintiff claims that the defendants acted as part of an enterprise, but makes no showing that the defendants were part of an entity separate and apart from Fleet Bank. Even if plaintiff's conclusory allegations pertaining to the existence of an enterprise were accepted, plaintiff has not shown that the defendants played any role in the operation or management of the enterprise. Plaintiff provides no factual allegations which demonstrate that the Fleet employees committed illegal acts, or functioned as anything but bank employees. The acceptance of checks endorsed by United on behalf of Alfie's was explicitly permitted by the Public Adjuster Compensation Agreement which Fleet had on file, and in the absence of any facts showing an unlawful agreement between United and the Fleet employees, the processing of stop payment orders and the return of unpaid checks do not constitute prohibited acts.

In order to hold defendants liable on the basis of participation in conspiracy under § 1962(d), a plaintiff must allege "... that each member of the conspiracy 'agreed to participate in what he knew to be a collective venture directed toward a common goal.' " *Laterza v. American Broadcasting Co., Inc.*, 581 F.Supp. 408, 413 (S.D.N.Y.1984) *quoting U.S. v. Martino* 664 F.2d 860, 876 (2d Cir.), *cert. denied* 458 U.S. 1110 (1982). [FN5]

> FN5. "The mere fact that defendants contracted together is not enough to impose RICO liability on them." *Laterza*, 581 F.Supp. at 413.

Although two years of discovery have been conducted in the state court action, there are no facts alleged showing that the Fleet employees knowingly agreed to participate in a collective venture aimed at defrauding plaintiff and others, nor is there any showing the Fleet employees or Fleet entered into any agreement with United. The allegation that United had an account with Fleet and a contractual relationship existed between those parties, does not support the conclusion that the parties were in collusion. Furthermore, the complaint provides no facts to show any benefit defendants could have derived from participation in the alleged conspiracy.

Alfie's complaint does not adequately allege that

defendants violated § 1962 of RICO. The allegations set forth do not show that defendants took part in a pattern of racketeering activity, that the alleged activity posed a threat of continuing criminal conduct, or that defendants participated in the operation and management of an enterprise as defined by RICO. Accordingly, plaintiff's RICO claims are dismissed.

III. *Fraud*

Rule 9(b) of the Fed.R.Civ.P. provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed.R.Civ.P. 9(b). In order to state a claim of fraud, however, plaintiffs are required to support their claims with ample factual basis. Such claims may not be based on speculations and conclusory allegations. *O'Brien v. National Property Analysts Partners*, 936 F.2d 674, 676 (2d Cir.1991).

***7** Plaintiff's fraud claims are based on conclusory allegations regarding a conspiracy to defraud plaintiff, but the complaint contains no factual allegations which support plaintiff's assertions that defendants acted with fraudulent intent. The facts alleged by plaintiff do not give rise to the inference that defendants intended to commit fraud.

CONCLUSION

Plaintiff's allegations that defendants violated 18 U.S.C. § § 1961-1967 fail to state a claim upon which relief can be granted. Defendants' motion to dismiss is granted pursuant to Fed.R.Civ.P. 12(b)(6) and plaintiff's RICO claims are dismissed. Plaintiff's fraud claim is also dismissed for failure to comply with the pleading requirements of Fed.R.Civ.P. 9(b) and for lack of subject matter jurisdiction since jurisdiction was based on 18 U.S.C. § 1961 *et seq.*

IT IS SO ORDERED.

1996 WL 263004 (S.D.N.Y.), RICO Bus.Disp.Guide 9060

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