

**Alarmex Holdings L.L.C. v Pianin**

2006 NY Slip Op 30247(U)

April 10, 2006

Supreme Court, New York County

Docket Number:

Judge: Helen E. Freedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN  
*Justice*

PART 39

ALARMEX HOLDINGS L.L.C.

Plaintiff,

- v -

SCOTT PIANIN and ALASKA TRUST COMPANY

Defendant.

INDEX NO. 602075/05

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001 of 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

This motion is decided in accordance with the accompanying memorandum decision.

**FILED**

APR 13 2006

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: April 10, 2006

H. E. Freedman  
Helen E. Freedman, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



contribution, claiming that they also acted disloyally and caused Alarmex to spend exorbitant sums for their own benefit. In a separate action, Pianin has sued Alarmex and its directors alleging that they breached the company's operating agreement provision related to his termination and the corporate buy-out of his equitable interest.

In motion 001, Pianin moves to dismiss causes of action against him for fraudulent inducement, fraudulent conveyance, and RICO violations. In motion 003, Spier and Sitomer move to dismiss the third party complaint, contending that Pianin's claims against them are unrelated to the claims and injuries alleged in the underlying complaint and thus Pianin's contribution claim is improper. For the foregoing reasons, both motions are granted.

*Facts:*

Alarmex designs, manufactures, and sells sportswear and other clothing. Its operations commenced on October 31, 2000 when William Spier acquired, on behalf of Alarmex, certain assets of Periscope Sportswear ("Periscope"), a clothing company that employed Pianin. Earlier that year in April 2000, Periscope's president Glenn Sands was terminated for accepting kickbacks from Periscope's suppliers and embezzling funds from the company. Upon Sand's termination, Pianin was appointed Periscope's President. William Spier invited Pianin to join Alarmex as a minority member when he acquired Periscope's assets.

Section 6.2(c) of the Alarmex Holdings, L.L.C. Second Amended and Restated Operating Agreement (the "Operating Agreement") dated May 11, 2001 named Pianin president of Alarmex. Section 6.2(g) of the Operating Agreement provides that both Pianin and Jonathan Spier shall "(i) devote all reasonable efforts to the promotion of the business and interests of the Company, (ii) devote substantially all of his time to the performance of such duties, and (iii) not compete with or

otherwise act in conflict with the best interests of the Company.”

Pursuant to the Operating Agreement, Pianin initially obtained a 25% interest in Alarmex in exchange for a capital contribution of \$500,000 and an additional 5% in exchange for contributing certain services. In 2002, Pianin exercised a right and option given to him under the Operating Agreement, making his membership interest, after a 4.4% adjustment, 34.4%. On December 23, 2003, Pianin assigned 10% of his 34.4% equitable interest in the company to the “Pianin 2003 Alaska Trust,” with “The Alaska Trust Company” (the “Alaska Trust”) as trustee. On December 12, 2005, the Alaska Trust reassigned that interest back to Pianin.

*Alarmex's Allegations:*

Alarmex alleges that William Spier invited Pianin to join Alarmex as a minority member because he did not believe that Pianin participated in Glenn Sands' kickback scheme when Pianin worked at Periscope. In September 2004, however, Alarmex's Korea-based knit sourcing agent, Phil's Sourcing company (“Phil's Sourcing”) allegedly informed Alarmex that it had been paying Pianin cash kickbacks totaling more than \$70,000 each year, and that this arrangement began when Pianin worked at Periscope. Alarmex alleges that Pianin arranged to have the manufacturer that Phil's Sourcing used for particular jobs increase its prices and send inflated invoices to Alarmex, and then Pianin would cause Alarmex to pay the manufacturer the inflated amount. The manufacturer would in turn pass all or part of the overcharge to Phil's Sourcing, who would transfer all or part of the money to Pianin.

Alarmex alleges that Pianin accepted a total of over \$1 million in kickbacks, derived from Alarmex's overpayments to Phil's Sourcing, that Alarmex overpaid Phil's Sourcing and its suppliers by over \$6 million, and that Pianin's failure to disclose his misconduct fraudulently induced Alarmex

to execute the Operating Agreement, retain Pianin as president, and continue to compensate Pianin a total amount of about \$3.7 million. Upon receipt of his unlawful payments, Pianin allegedly deposited the amounts in multiple bank accounts that he controlled, each deposit equaling between \$1000 and \$9000. Alarmex also alleges that Pianin's assignment to the Alaska Trust constituted a fraudulent conveyance to shield Pianin's assets from Alarmex, a potential judgment creditor. Additionally, Alarmex claims that Pianin's kickback scheme constitutes the "predicate criminal acts" that are an element of Alarmex's claim under the federal RICO statute.

*Pianin's Allegations:*

Pianin alleges that on several occasions during the years 2002 - 2004, Spier and or Sitomer arranged to individually receive cash payments from vendors and suppliers to the detriment of Alarmex. For instance, Pianin alleges that Sitomer and Spier permitted another corporation to use Alarmex's "Periscope" label in return for cash payments. Additionally, Pianin alleges that Alarmex retained the company Peter Chic and its affiliates to manufacture goods, and then Peter Chic over-billed Alarmex and payed Spier the excess amount. In July 2004, Sitomer allegedly arranged for Alarmex's affiliate, AHG Licensing Inc., to enter into an agreement with Maui General Store, Inc., of which Sitomer was a director and part-owner, and the Alarmex Board never approved this transaction and it constituted self-dealing. Pianin also alleges Spier and Sitomer poorly managed the company, making Alarmex vulnerable to potential litigation.

*Fraudulent Conveyance:*

The fraudulent conveyance cause of action under NY Debtor and Creditor Law § 276 seeking to set aside the conveyance to the Alaska Trust is dismissed as moot because the Alaska Trust reassigned the 10% interest back to Pianin on December 12, 2005.

*Fraudulent Inducement:*

To make out a fraudulent inducement claim, the plaintiff must allege misrepresentations of present facts, rather than merely of future intent, that were collateral to the contract and which induced the allegedly defrauded party to enter into it. *See Orix Credit Alliance, Inc. v. The R.E. Hable Co.*, 256 A.D.2d 114, 682 N.Y.S.2d 160 (1<sup>st</sup> Dept. 1998). The claim that Pianin fraudulently induced Alarmex to continue compensating him for his role as president is not collateral to the Operating Agreement, and this claim is duplicative of the breach of contract cause of action. Besides basing the fraud and breach of contract claims on the same allegations, *see Richbell Information Services, Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288 (1<sup>st</sup> Dept. 2003), Alarmex seeks identical damages for the claims, namely the difference between the amount Alarmex actually owed its suppliers and the inflated amount that Pianin allegedly caused it to pay. *See Orix Credit Alliance, Inc. v. The R.E. Hable Co.*, 256 A.D.2d 114, 682 N.Y.S.2d 160 (1<sup>st</sup> Dept. 1998).

In any event, Pianin's alleged silence about his future intent to breach the Operating Agreement is not actionable. This allegation does not involve a misrepresentation or omission of present facts, and before the Operating Agreement was executed, Pianin owed no duty to disclose the information based on a contractual or fiduciary relationship. *See Elghanian v. Harvey*, 249 A.D.2d 206 (1<sup>st</sup> Dept. 1998). Moreover, Pianin's alleged superior knowledge of his involvement with the Periscope kickback scheme did not create a duty to disclose because the Alarmex directors knew about Periscope's former president's acceptance of kickbacks and could have inquired of Pianin about his knowledge of or involvement with that kickback scheme. Because the Alarmex directors had the opportunity to inquire further, the "superior knowledge" doctrine does not apply. *See Jana v. West 129<sup>th</sup> Street Realty Corp.*, 22 A.D.3d 274 (1<sup>st</sup> Dept. 2005).

*RICO Claims:*

The RICO and RICO conspiracy claims are also dismissed. Under 18 U.S.C. § 1962(c), a plaintiff claiming a RICO violation must properly allege (1) conduct of an (2) enterprise (3) through a pattern of (4) racketeering activity. *Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450 (1988). A plaintiff must plead the RICO elements with particularity and allege an injury to the plaintiff's business or property. In *Simpson Electric Corp. v. Leucadia, Inc.*, *supra*, the court found that allegations that defendants had engaged in a kickback scheme carried out, in part, by submitting inflated invoices to the plaintiff did not support a RICO cause of action because it did not show any enterprise or pattern of activity. As in that case, Pianin's and Phil's Sourcing's alleged participation in wrongdoings does not constitute an "enterprise," the allegations supporting the "racketeering activity" are duplicative of each other and lack sufficient particularity, and there is no continued threat of criminal activity. Each of these deficiencies will be discussed.

An "enterprise" is "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). Alarmex claims that Pianin and Phil's Sourcing constitute an "association in fact," and thus satisfy the enterprise element. An "association in fact" is an ongoing organization, formal or informal, where the various associates of the alleged enterprise functioned "as a continuing unit." *U.S. v. Turkette*, 452 U.S. 576 (1981). Specific allegations regarding the hierarchy, organization, and activities of the alleged association-in-fact enterprise are required in order to demonstrate that it functioned as a continuing unit. *See First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2<sup>nd</sup> Cir. 2004). The enterprise must be distinct from the "pattern of racketeering activity," a separate RICO element. *See U.S. v. Turkette*, 452 U.S. 576 (1981). Here, Alarmex does not

sufficiently support its claim that Pianin and Phil's Sourcing constituted an "enterprise," but merely asserts that they constituted an association in fact because they conducted the alleged racketeering activity together. Such conclusory and circular assertions without any facts relating to their organization, structure, or whether they functioned as a unit do not suffice. *See First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159, 175 (2<sup>nd</sup> Cir. 2004).

"Racketeering activity" includes at least two of the specifically enumerated predicate acts under the statute, 18 U.S.C. § 1961(1). While there need not have been a successful criminal prosecution of such offenses, they must be factually supportable in the civil action. Alarmex has alleged that Pianin committed mail and wire fraud, money laundering, and violated the National Stolen Property Act and Travel Act, and NY Penal Law § 180.03 related to commercial bribery.<sup>1</sup> Alarmex uses the same allegations regarding Pianin's acceptance of kickback payments as a basis for many of these claimed predicate acts, and to the extent that the allegations supporting the alleged predicate crimes duplicate each other, they cannot constitute separate predicate acts to support a RICO claim. *See Bernstein v Misk*, 948 F.Supp. 228 at 236 (E.D.N.Y. 1997). Additionally, Alarmex does not sufficiently allege all of the required elements of the predicate crimes or fails to plead the elements with sufficient particularity. Predicate acts supporting a RICO cause of action are subject to a heightened pleading standard because "such assertion has been found to be an unusually potent weapon--the litigation equivalent of a thermonuclear device." *See Besicorp Ltd., v. Kahn*, 290 A.D.2d 147 at 151 (3<sup>rd</sup> Dept. 2002).

Alarmex alleges that Pianin's receipt of kickback checks and the invoices sent to Alarmex

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<sup>1</sup>Alarmex originally alleged Pianin committed other crimes including state and federal computer crimes. However, Alarmex concedes that these additional crimes are not enumerated crimes under the RICO statute.

constitute mail and wire fraud. Mail and wire fraud claims require particularized pleading with respect to the alleged fraud. Alarmex's assertion that the inflated invoices and kickback checks were mailed does not provide any details as to particular counts of mail or wire fraud, the dates and quantity of these mailings, or information supporting the extent of the fraud, namely the amount that each invoice increased the amount owed for goods above the normal rates. *See Besicorp Ltd., v. Kahn*, 290 A.D.2d 147 (3<sup>rd</sup> Dept. 2002). Pianin's peculiar knowledge of his own actions does not relieve the plaintiff of its obligation to plead with particularity because Alarmex received the allegedly inflated invoices and thus can provide factual support for its allegations if such support exists.

Commercial bribery under NY Penal Law § 180.03 requires a showing that an employee accepted a benefit from another, without the employer's consent, to influence conduct, causing economic harm to the employer. To demonstrate economic harm, Alarmex must sufficiently allege that absent the corrupt arrangement, Alarmex would have paid lower prices for the same goods. *See People v. Wolf*, 98 N.Y.2d 105 (2002). The allegation that a defendant accepted kickback payments, without more, does not sufficiently allege that economic harm to plaintiff resulted. *Id.*

Money laundering in violation of 18 U.S.C. § 1956 and § 1957 relates to hiding proceeds obtained from unlawful activity that is specified in the federal statute. Alarmex has not sufficiently alleged that any of the enumerated unlawful acts occurred or that Pianin's deposit of amounts between \$1000 and \$9000 into New York bank accounts constitute laundering or financial transactions in interstate commerce. *See Bernstein v Misk*, 948 F.Supp. 228 at 236 (E.D.N.Y. 1997). A money laundering claim under § 1957 requires that each alleged transactions exceed \$10,000, and Alarmex does not allege that any of the bank account deposits involved amounts that exceeded

\$10,000.

The allegations regarding the violations of the National Stolen Property Act, 18 U.S.C. § 2314 and the Federal Travel Act, 18 U.S.C. § 1952 duplicate the allegations supporting the mail and wire fraud claims, and thus can not also support additional predicate acts. *See Bernstein v Misk*, 948 F.Supp. 228 at 236 (E.D.N.Y. 1997). The allegations also consist of speculative and conclusory allegations of receipt of stolen property and the use of the media to carry out the scheme and, thus, fail to sufficiently plead all of the elements of the alleged crimes. *See Bernstein v Misk*, 948 F.Supp. 228 (E.D.N.Y. 1997); *Kades v. Organic, Inc.*, 2003 WL 470331 (S.D.N.Y. 2003).

Finally, Alarmex has not sufficiently alleged a pattern of racketeering activity. A "pattern of racketeering activity" consists of at least two predicate acts committed in a ten-year period, 18 U.S.C. § 1961(5), which "amount to or pose a threat of continued criminal activity." *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2<sup>nd</sup> Cir. 2004). Because Alarmex has not sufficiently pled the elements of at least two distinct crimes, there can be no "pattern" of activity.

Even if the allegations sufficiently supported the predicate acts, there is no threat of continued criminal activity. In order to demonstrate a continued threat, there must be either an open-ended or a closed-ended pattern. Pianin's and Phil's Sourcing's scheme is not open-ended or ongoing because Phil's Sourcing voluntarily disclosed the scheme to Alarmex, and Alarmex subsequently terminated Pianin. For a closed-ended pattern to have existed, there must be a showing that there was a variety of predicate acts, a number of both participants and victims, and the presence of separate schemes. *See First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2<sup>nd</sup> Cir. 2004). Although the activity allegedly occurred over a period of years, there is only one alleged victim, at most two participants, and one primary scheme to defraud alleged. Such a limited

scheme does not constitute a continuing closed-ended “pattern” under the RICO statute. *See Stein v. NY Stair Cushion Co., Inc.*, 2006 WL 319300 (E.D.N.Y., Feb. 10, 2006.) (finding that where the conduct at issue involves a limited number of perpetrators and victims and a limited goal, the conduct is lacking in closed-ended continuity). *See also Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450 (1988) (holding that a kickback scheme involving a few participants, one victim, and several alleged counts of alleged mail fraud violations did not constitute a pattern of racketeering activity that could support a civil RICO cause of action).

Because there is no stated cause of action for the substantive civil RICO claim, Alarmex has also not stated a cause of action for RICO conspiracy.

*Third Party Complaint for Contribution against Spier and Sitomer:*

Spier and Sitomer move to dismiss Pianin’s third party complaint in its entirety, contending that the third party complaint is improper under CPLR 1007, which provides that “... a defendant may proceed against a person who is not a party who is or may be liable to the defendant for all or part of plaintiff’s claim against that defendant.” Spier and Sitomer argue that the third party complaint does not comply with CPLR 1007 because it does not allege that they are or may be liable to Pianin for part or all of Alarmex’s claims against Pianin.

Spier and Sitomer also contend that the third party complaint does not state a claim for contribution because it does not seek redress for the same injuries for which Alarmex is suing Pianin in the underlying complaint. CPLR 1401 provides that a defendant may seek contribution when there are “.. two or more persons who are subject to liability for damages for the same personal injury, injury to property, or wrongful death.” While theories underlying the injuries may differ, the injuries that Pianin allegedly caused and the injuries for which he seeks contribution must be the

same. *See Francis Edouard v. Ginsberg & Broome, P.C.*, 229 A.D.2d 559 (2<sup>nd</sup> Dept. 1996).

While Pianin broadly characterizes Alarmex's allegations against him and his allegations against Spier and Sitomer as acting disloyal and decreasing Alarmex's revenue, the specific injuries that Alarmex alleges Pianin caused and the injuries that Pianin alleges the third party defendants caused differ significantly. Even accepting Pianin's allegations as true, the third party complaint does not state that Spier and Sitomer caused or aggravated the injuries that Alarmex claims Pianin caused through his alleged kickback scheme with Phil's Sourcing. Thus, the third party complaint does not state a cause of action for contribution and should be dismissed. *See Old Republic Nat'l Title Ins. Co. v. Cardinal Abstract Corp.*, 14 A.D.3d 678 (2<sup>nd</sup> Dept. 2005).

Accordingly, it is

ORDERED that Pianin's motion to dismiss the fourth, fourteenth, fifteenth, and sixteenth causes of action in the complaint is granted, and it is further

ORDERED that the remaining causes of action in the complaint continue, and it is further

ORDERED that Spier's and Sitomer's motion to dismiss the third-party complaint is granted and the third-party complaint is dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Parties are directed to appear for a preliminary conference in room 208 on May 2, 2006 at 9:30 a.m.

DATED: April 10, 2006

**FILED** ENTER:  
 APR 13 2006  
 COUNTY CLERK'S OFFICE  
 HENRY ST. CLERK  
 Helen E. Freedman, J.S.C.