

Grafstein v Schwartz

2009 NY Slip Op 33172(U)

December 23, 2009

Supreme Court, Nassau County

Docket Number: 022043/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

NORMAN GRAFSTEIN,

Plaintiff,

-against-

RICHARD SCHWARTZ, HOWARD SCHULTZ,
MARTIN SAGE, SCHULTZ & SAGE, CPAs, P.C.,
MARIE NEUBERT and NORTH AMERICAN
ENCLOSURES, INC.,

Defendants.

TRIAL/IAS, PART 3
NASSAU COUNTY

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MOTION DATE: Nov. 6, 2009
Motion Sequence # 003

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Support..... X
- Affirmation in further Support..... X
- Memorandum of Law..... XXX
- Reply Memorandum of Law..... X

This motion, by plaintiff, pursuant to CPLR 2221 to reargue a portion of a prior motion by defendants to dismiss plaintiff's complaint wherein the RICO (eighth and ninth) causes of action were dismissed. In the alternative, the plaintiff seeks leave to amend the RICO claim during or after completion of discovery.

Plaintiff alleges the defendants misled plaintiff into exercising his buy out option at a great financial disadvantage.

The court agrees with plaintiff that, pursuant to CPLR 2103(b)(2), the motion herein is timely.

As noted by one federal court: “[t]his court looks with particular scrutiny at Civil RICO claims to ensure that the Statute is used for the purposes intended by Congress. In considering RICO claims, courts must strive to achieve results consistent with Congress’s goal of protecting legitimate businesses from infiltration by organized crime. As one district court within the circuit has stated, Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device. Because the mere assertion of a RICO claim . . . has an almost inevitable stigmatizing effect on those named as defendants, . . . courts should strive to flush out frivolous RICO allegations at an early stage of the litigation. To this end, a court’s focus must be to ensure that RICO’s severe penalties are limited to enterprises consisting of more than simple conspiracies to perpetuate the acts of racketeering. Thus, courts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor’s trendy garb.” (internal citations omitted) (emphasis supplied) (*Schmidt v Fleet Bank*, 16 F.Supp2d 340, 346).

Plaintiff has alleged breach of fiduciary duty (first, second and thirteenth causes of action), fraud (third cause of action), aiding and abetting breach of fiduciary duty (fourth, fifth causes of action), accounting malpractice (sixth, seventh causes of action), RICO causes of action (eighth and ninth causes of action), breach of contract (tenth cause of action), piercing the corporate veil (eleventh cause of action) and tortious interference with a contract (twelfth cause of action). ~~(see Exhibit 1 complaint annexed to plaintiff’s motion).~~

To state a viable claim for damages under the act, plaintiffs must allege that defendants violated the substantive RICO statute (18 U.S.C. § 1962). In so doing, they must claim the existence of seven constituent elements: (1) that the defendants (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 (See *Pinnacle Consultants v Leucadia Nat’l Corp.*, 101 F.3d 900, 904 (2nd Cir. 1996).

In RICO actions, the predicate acts of racketeering activity must be related and amount to or pose a threat of continued criminal activity (*Cofacredit, S.A. v Windsor Plumbing Supply Co.*, 187 F.3d 229).

A plaintiff must allege “continuity” as a prerequisite for the existence of a “pattern of racketeering activity” that is consistent or threatens long term criminal activity (J.H. Inc. v Northwestern Bell Telephone Co., 492 U.S. 229, 230).

Ordinarily, courts will not find a threat of future racketeering in cases concerning alleged racketeering activity in furtherance of endeavors that are not inherently unlawful such as fraud in the sale of property (see United States v Aulicino, 44 F.3d 1102).

Here, the conduct of defendants alleged by plaintiff as noted, *supra*, is not inherently unlawful. The allegations sound more in the nature of fraud as evidence by plaintiff’s other causes of action brought under that and similar theories.

New York does not recognize civil conspiracy to commit a tort as an independent cause of action. Thus, a claim for conspiracy stands or falls with the underlying tort (Ward v City of New York, 15 AD3d 392). Thus the RICO cause of action (the eighth) and the conspiracy to commit RICO alleged violation (ninth cause of action) must fall together.

The Court is aware of Fischbein v Sayers, (___ F.Supp. ___, 2009 WL 2170349), relied on by plaintiff to invigorate his RICO claims. This court cannot examine the complaint therein, and this court chooses not to emphasize the “Racketeer” in RICO as did the federal court in Fischbein v Sayers, *supra*, and let plaintiff herein utilize the many other causes of action stated in the complaint to pursue his position.

The plaintiff’s motion for reargument is **denied**.

It is settled that “[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision” (Carrillo v PM Realty Group, 16 AD3d 611, 612; see CPLR 2221[d][2]; Barnett v Smith, 64 AD3d 664; Frisenda v X-Large Enterprises, 280 AD2d 514; Pahl Equip. Corp. v Kassis, 182 AD2d 22; see also Foley v Roche, 68 AD2d 558).

Notably, the remedy “is not designed to provide an unsuccessful party with successive opportunities” to make repetitious applications, “rehash questions already decided” or “present arguments different from those originally presented” (McGill v Goldman, *supra*; William P. Pahl Equipment Corp. v Kassis, *supra*; see Gellert & Rodner v Gem Community Mgt., 20 AD3d 388; Pryor v Commonwealth Land Title Ins. Co., 17 AD3d

434, 436; Amato v Lord & Taylor, Inc., 109 AD3d 374, 375).

Nor has the plaintiff demonstrated that the court overlooked or misapprehended the facts or law relative to its analysis and subsequent dismissal of the plaintiff's RICO causes of action in respect to which the plaintiff's current submissions now rehash, repeat and recast the same basic theories and arguments previously advanced and rejected upon its original application.

Where fraudulent communication by mail or wire are alleged as predicate RICO (Racketeer Influenced and Corrupt Organizations Act) (18 U.S.C. § 1961, *et seq*), particularity is required: 1) precisely what statements were made in what documents or oral representations or what omissions were made, and 2) the time and place of each such statement and the person responsible for making same, 3) the content of such statements and the manner in which they misled the plaintiff, and 4) what the defendants obtained as a consequence of the fraud (*see Conan Properties v Mattel, Inc.*, 619 F.Supp. 2167, 1172).

A RICO mail fraud complaint should set forth the letters' dated content, origin, destination and role in the fraudulent scheme (*see Sun Savings and Loan Ass'n. v Dierdorff*, 825 F.2d 187). Previously, this court properly noted plaintiff's RICO causes of action lacked the requisite specificity. Plaintiff contends its RICO claim could be revitalized by disclosure of what defendants know. This court disagrees.

While leave to amend is to be freely given (CPLR 3025[b]; *see Edendale Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; Kinzer v Bederman, 59 AD3d 496, 497), a court should nevertheless deny the motion when, *inter alia*, "the insufficiency and lack of merit of the plaintiff's proposed amendment are clear and free from doubt (*see e.g., McCluskey v Gabor and Gabor*, 61 AD3d 646; Lucid v Mancuso, 49 AD3d 220, 226-227; Norman v Ferrari, 107 AD2d 739, 740; *see generally Rosenblum v Frankl*, 57 AD3d 960, 961; Scofield v DeGroot, 54 AD3d 1017, 1018; Smith-Hoy v AMC Property Evaluations, Inc., 52 AD3d 809, 811).

Additionally, "a plaintiff must meet his or her burden of demonstrating that the proposed amendments to the complaint were not palpably insufficient or patently devoid of merit" (Zelenik v MSI Const., Inc., 50 AD3d 1024, 1025; *see Brunetti v Musallam*, 59 AD3d 220, 223; Lucido v Mancuso, supra; Joyce v McKenna Associates, Inc., 2 AD3d

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592; Ripepe v Crown Equipment Corp., 293 AD2d 462, 463).

The decision whether to grant leave to amend a pleading rests within the court's discretion, the exercise of which will not be lightly disturbed (Pergament v Roach, 41 AD3d 569, 572).

Here, although now resubmitted through the vehicle of a motion to amend—the very same theories and claims were substantively examined only recently, and determined by this court to be lacking in merit. This court feels that the allegations by plaintiff that all the facts are currently in the defendants' possession will not, at a later date, cause the herein matter to develop into viable RICO causes of action.

Reargument could not be employed as a vehicle for seeking new forms of relief; where the plaintiff did not seek leave to amend or replead in its opposition to a prior motion to dismiss, its application for such leave upon a motion for reargument or renewal could not be entertained (American Trading Co., Inc. v Fish, 87 Misc2d 193).

Further, denial of a motion to amend the pleadings is appropriate where a party seeks to "re-assert a cause of action that was previously dismissed" (Dialcom, LLC v AT&T Corp., 50 AD3d 727)

That is the situation here, and this court adheres to its original determination in denying plaintiff's RICO claim.

Accordingly, plaintiff's motion is **denied** in its entirety.

Counsel are reminded of the status conference scheduled for January 26, 2010.

Dated 23 December 2009

Stephen A. Bucaria
J.S.C.

ENTERED

JAN 05 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE