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

PRESENT: Charles Edward Ramos PART 53

Index Number : 602408/2006

OPPENHEIM, AVIVITH

vs

MOJO-STUMER ASSOCIATES

Sequence Number : 014

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with accompanying memorandum decision. Settle Order.

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

Dated: 9/10/2010

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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AVIVITH OPPENHEIM and WILLIAM OPPENHEIM,

Index No. 602408/06

Plaintiff,

-against-

MOJO-STUMER ASSOCIATES ARCHITECTS, P.C. d/b/a MOJO-STUMER ASSOCIATES, P.C., MARK STUMER and JOSEPH VISCUSO,

Defendants.

----------x

Charles Edward Ramos, J.S.C.:

Following a failed renovation project on their Fifth Avenue Manhattan cooperative apartment, plaintiffs Avivith and William Oppenheim (the Oppenheims), seek to recover against the defendant architect, Mojo Stumer Associates Architects, P.C. (Mojo-Stumer), one of its owners, Mark Stumer, and Joseph Viscuso (together Defendants), the owner of the renovation project's general contractor, Vista. Vista, a debtor in bankruptcy court, is not a party to this action.

The Oppenheims move to amend their third amended complaint: (1) to plead an additional Racketeer Influenced and Corrupt Organizations Act (RICO) violation cause of action based on predicate acts of mail and wire fraud as a seventh cause of action; (2) to add language to their existing bribery-based RICO cause of action; and (3) to add Tom Mojo as a defendant to both RICO claims (CPLR 3025 [b]).

Defendants cross-move for sanctions pursuant to 22 NYCRR 130-1.1 (a).

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Background

For a fuller recitation of the facts, see this Court's decision filed on April 23, 2009, which discusses the allegations of the second amended complaint.

In their initial complaint, the Oppenheims asserted a RICO claim based on mail and wire fraud predicate acts in connection with the renovation of their apartment. That claim was dismissed. Thereafter, the Oppenheims asserted a similar claim in their First Amended Complaint, which was also dismissed.

In August 2007, Viscuso pled guilty to misdemeanor commercial bribery in the second degree for a crime committed between May 1, 2003 and January 10, 2005. On October 27, 2007, the Oppenheims were granted leave to amend their complaint to plead a bribery-based RICO cause of action.

In November 2008, the Oppenheims again sought leave to amend their complaint to add a RICO cause of action based on the allegation that Defendants had engaged in mail and wire fraud in connection with the renovation project, and also renovation/construction projects done for other non-parties (Projects).

By order dated September 15, 2009 (September 15, 2009 Order), this Court denied leave to add that claim because the alleged mail and wire fraud predicate criminal acts were not sufficiently particularized as to the non-party homeowners and property owners (Property Owners) allegedly defrauded by Defendants. As a result, the Oppenheims' allegations concerning

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these predicate acts were not considered in determining whether or not they had sufficiently alleged the pattern of racketeering activity necessary to state a RICO claim, and the Oppenheims were unable to demonstrate the pattern. The Court determined that the Oppenheims also failed to state a claim because their allegations reflected only a single, non-complex scheme in which Mojo-Stumer, in order to receive kickbacks from Vista, induced homeowners to retain Vista for construction services and then failed to alert the homeowners that Vista was overcharging them or performing substandard work (September 15, 2009 Order, at 9).

Discussion

Pursuant to CPLR 3025 (b), leave to amend pleadings "shall be freely given," absent prejudice or surprise to the opposing party (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Nevertheless, the court is required to examine the underlying merits of the proposed claims (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept], *lv dismissed* 12 NY3d 880 [2009]). Leave must be denied where the proposed pleading lacks merit (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

I. Tom Mojo

The Oppenheims seek to add Tom Mojo, whom they allege has been a co-owner of Mojo-Stumer since the inception of this action, and a participant and co-conspirator with the other Defendants in their acts of bribery and mail and wire fraud (*see* Pl. Mov. Aff., Exh. 1, ¶¶ 8, 175, 178, 230). The Oppenheims

state that, since July 2008, they have known that Tom Mojo had knowledge of the kickback schemes, that his knowledge of Mojo-Stumer's repeated fraudulent conduct is imputed by virtue of his position with the company, and because each bribe payment check was reflected in the company's financial records as a receipt from Viscuso attributable to the various Projects.

The Oppenheims claim that, because they did not have sufficient information to include Tom Mojo as a defendant until July 2008, the statute of limitations for the RICO claims begins running at that point in time. Alternatively, the Oppenheims argue that the claims against Tom Mojo relate back to the inception of the action.

Civil RICO claims are subject to a four-year statute of limitations that begins to run when the plaintiff discovers or should have discovered the RICO injury (*Agency Holding Corp. v Malley-Duff & Assocs., Inc.*, 483 US 143, 155-56 [1987]).

Defendants contend that the proposed claim is time-barred. They submit the previously submitted affidavit of Avivith Oppenheim, in which she avers that in December 2004, she had received the report of a consulting architect and engineer, FSI Architecture (FSI), stating that Vista's payment applications sought payment for work at higher percentages than had been completed and that Vista and Mojo-Stumer had represented that a higher percentage of the project was complete than actually was complete (Def. Op. Aff., Exh. C).

Additionally, Defendants submit the affidavit of James

Ciaclo, FSI's principal, who avers that in December 2004, he advised Avivith Oppenheim that the applications for payment and completion percentages of the various trades "were grossly exaggerated and incorrect" (Def. Op. Aff. Exh. D, ¶ 16).

These affidavits demonstrate that the Oppenheims were on notice of their alleged RICO injury as early as December 2004. Therefore, the statute of limitations ran in December 2008. The Oppenheims provide no support for their contention that the statute of limitations did not begin to run upon Oppenheims' notice of the alleged injury.

"Once a defendant has shown that the statute of limitations has run, the plaintiff bears the burden of demonstrating the applicability of the relation-back doctrine" (*Cintron v Lynn*, 306 AD2d 118, 119-20 [1st Dept 2003]).

Defendants argue that the relation-back doctrine is inapplicable with respect to Tom Mojo because the Oppenheims cannot demonstrate that, but for a mistake as to the identity of the proper parties, the action would have been brought against Mojo.

Three conditions must be satisfied for a claim asserted against a defendant subsequently sought to be joined to relate back to claims asserted against another defendant:

> (1) both claims must arise out of the same conduct, occurrence or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have

> been brought against him as well (*Cintron*, 306 AD2d at 119-20). The Oppenheims acknowledge that they were equipped to assert a claim against Tom Mojo in July 2008. In November 2008, prior to the running of the limitations period, the Oppenheims moved to amend their complaint but did not seek leave to add Mojo. As explanation for not bringing the claim sooner, the Oppenheims assert that, if any mistake was made, it was that of their counsel in failing to identify Mojo as a participant, and appropriately calculate the start date of the limitations period. The Oppenheims' counsel avers that he mistakenly thought that he could obtain additional proof of Mojo's participation through discovery, and that he was concerned about the court's threat to sanction Oppenheims for an additional RICO pleading unsupported by factual proof.

However, the Oppenheims do not claim that they were mistaken as to Mojo's identity or his alleged role. Neither do they provide support for their assertion that their counsel's mistake may be excused. Consequently, their motion for leave to add Mojo as a defendant is denied as untimely.

II. The RICO Mail and Wire Fraud Cause of Action

Oppenheims seek to assert a RICO claim based on mail and wire fraud. To sustain a RICO claim, a plaintiff must allege:

> "(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 F2d 5, 17 [2d Cir 1983], *cert denied* 465 US 1025 [1984]).

Allegations of RICO fraudulent predicate acts are subject to a heightened pleading standard (*Fekety v Gruntal & Co.*, 191 AD2d 370, 370-371 [1st Dept 1993]).

The Oppenheims allege that Mojo-Stumer, Vista, Stumer and Viscuso (together, the RICO Defendants) carried out fraudulent schemes in which Stumer induced the Oppenheims and the Property Owners to retain Viscuso and Vista without disclosing that they were paying kickbacks/bribes to Stumer and Mojo-Stumer in exchange for Stumer steering the contracts to, and rigging the bid process in favor of Vista, approving and certifying Vista's fraudulent overcharges, and allowing Vista to repeatedly deliver delayed, substandard work in nine projects.

The Oppenheims contend that bribe/kickback payments were financed by the fraudulent overcharges, and that the RICO Defendants sent mail, faxed and telephoned Property Owners on many occasions over years, without disclosing the bribes/kickbacks and dishonest relationship.

The Oppenheims maintain that the RICO Defendants' intent to defraud the Property Owners is demonstrated by their failure to disclose the bribe/kickback associated with the particular owner's project, as well as those associated with the projects of all of the Property Owners, and that Mojo-Stumer had a dishonest reason to induce the selection of Vista as the Project's

contractor.

For this same reason, the Oppenheims allege "on information and belief" that each of the many mailing and wire communications were misleading. The Oppenheims contend that each Property Owner relied on the fraudulent statements or omissions in these communications and continued to engage Mojo-Stumer and Vista throughout the construction process, despite problems and disputes, acted upon proposed change orders and fees requests, and paid the architects' and contractors' overcharged fees.

The Oppenheims annex to the proposed complaint separate schedules for each of the Projects, and each of the schedules lists numerous mailings and/or faxes over the course of the project. However, the allegation that the mailings and faxes were sent is upon "information and belief" for eight of the nine Projects (*see e.g.* Pl. Mov. Aff., Exh. 1, ¶¶ 279, 305). The allegations in the proposed complaint regarding the overcharges and schedules are also made upon information and belief (*id.*, ¶ 340; Schedule A-2, items numbered 5, 9, 10-20, 23; Schedule A-8, items 2-7), with the allegations devoid of a factual basis for either the information or the belief.

For the few communications where the Oppenheims' allegations of overcharges are not made upon information and belief, the proposed complaint and schedules are also devoid of facts to demonstrate the basis for the assertion (*see e.g. id.*, Schedule A-3, items 1-5).

To support their allegations, the Oppenheims submit the

affidavit of one of the Property Owners, Pinky Sohn (Sohn Affidavit). Mr. Sohn avers that, after he received a change order from Vista that he believed should have been included in the basic contract price, he went into the market to get quotes on proposed electrical work and learned that the change order was "grossly overbilled" (*id.*, ¶¶ 14-16). He also states that he encountered many problems during construction and that Stumer repeatedly told him to pay bills that Sohn believed were overstated (Sohn Aff., ¶ 17).

Other than Mr. Sohn's single change order, the Oppenheims' allegations concerning the overcharges lack a supporting factual basis, and are conclusory. Thus, they may not be considered in determining whether or not the Oppenheims have stated a mail and wire fraud claim, a RICO claim, or the racketeering pattern element of a RICO mail and wire fraud claim.

The RICO statute defines a "pattern of racketeering" as requiring at least two predicate acts of racketeering activity that occurred within 10 years of each other (18 USC § 1961 [5]). In addition, a plaintiff must show both that the alleged predicate acts are related and that they are continuous (*East 32nd St. Assoc. v Jones Lang Wooten USA*, 191 AD2d 68, 73 [1st Dept 1993]).

In seeking to satisfy the element of continuity, a plaintiff must show that the defendant's activities are neither isolated or sporadic (*GICC Capital Corp. v Technology Finance Group, Inc.*, 67 F3d 463, 469 [2d Cir 1995], *cert denied* 518 US 1017 [1996]).

Nonetheless, the acts may be close-ended, posing a threat of related predicate acts extending over a substantial period of time in the past, or open-ended, posing a threat of continuing criminal conduct beyond the period during which the predicate acts were performed (*H.J. Inc. v Northwestern Bell Tel. Co.*, 492 US 229, 239-243 [1989]).

The Court has previously determined that Vista's bankruptcy eliminated the possibility of an open-ended pattern of racketeering activity (*see* September 15, 2009 Order, at 10). This issue will not be revisited, in light of the conclusory allegations offered by the Oppenheims with respect to the Overcharges.

To determine whether a sufficient closed-ended pattern exists, courts rely on a number of factors, including: (1) the length of time over which the alleged predicate acts took place; (2) the number of predicate acts; (3) the nature and variety of acts; (4) the number of participants; (4) the number of victims; and (5) the presence of separate schemes (*GICC Capital*, 67 F3d at 467).

To prove a violation of the mail or wire fraud statutes, the Oppenheims must establish the existence of a fraudulent scheme and a mailing in furtherance of that scheme (*see Schmuck v United States*, 489 US 705, 712 [1989]). Both mail and wire fraud require the intent to defraud or deceive (18 USC §§ 1341, 1343).

The Oppenheims have provided only a conclusory basis for nearly all of their allegations of Overcharges, and that Vista or

Viscuso financed the bribes/kickbacks through Overcharges. Indeed, the Oppenheims essentially speculate that other Property Owners were overcharged, and that the bribes/kickbacks were financed through overcharging. Discounting those allegations, as is required, the alleged fraudulent scheme that remains concerning the Property Owners is that they were induced by Stumer to enter into agreements with Vista without disclosure of the kickback/bribe dishonest relationship, and that the process for choosing Vista as a contractor for the Projects was dishonest (*see* Pl. Mov. Aff., Exh. 1, ¶ 340).

These alleged omissions or deceptive acts necessarily occurred at or around the time that Stumer recommended Vista to each Property Owner, from January 2003 to May 2004. This time-period falls short of the two-year period generally required to demonstrate closed-ended continuity. While the Oppenheims allege many mailings, in the absence of sufficient allegations concerning Overcharges, they do not demonstrate any connection between these mailings and the alleged failure to disclose the bribes/kickbacks.

In addition, while the Oppenheims name as proposed defendants Viscuso, Stumer and Mojo-Stumer, the allegations themselves essentially speak to Viscuso and Stumer's alleged wrongful conduct. While there were at least nine alleged victims, considering the nature of the conduct alleged, the failure to disclose the bribes/kickbacks, and the relatively short time in which it occurred, the Oppenheims do not allege an

elaborate or complex fraud scheme, or one of sufficient duration to state a RICO claim.

Consequently, the Oppenheims' motion to amend the complaint to add a mail and wire fraud-based RICO claim is denied. As the Oppenheims have not adequately stated a claim for violation of 18 USC § 1962 for mail and wire fraud, their related claim of conspiracy under 18 USC § 1962(d) fails as a matter of law (*Crab House of Douglaston Inc. v Newsday, Inc.*, 418 F Supp 2d 193, 212 [ED NY 2006]).

The Court has considered the Plaintiffs' remaining arguments and finds them meritless.

III. The Bribery-Based RICO Claim

Defendants argue that the proposed bribery claim is deficient because the Oppenheims to fail to plead with the requisite particularity the continuity element. However, this is not a motion to dismiss and the Oppenheims merely seek to add details to an existing claim for a bribery-based RICO violation. Moreover, Defendants provide no persuasive reason as to why the Oppenheims should not be permitted to add details to their claim. Therefore, this portion of the Oppenheims' motion is granted.

IV. Cross Motion for Sanctions

Defendants have demonstrated no grounds for an award of sanctions or costs for frivolous conduct under 22 NYCRR 130-1.1. Therefore, the cross-motion is denied (*see Parkchester South Condo. Inc. v Hernandez*, 71 AD3d 503 [1st Dept 2010]).

Accordingly, it is

ORDERED that the plaintiffs' motion to amend the third amended complaint is denied, to the extent that they seek to add Tom Mojo as a defendant and to interpose a mail and wire-based fraud RICO cause of action as a seventh cause of action, and is granted to the extent of adding details to the existing claim of bribery; and it is further

ORDERED that the defendants' cross-motion for sanctions is denied.

Dated: September 10, 2010

ENTER:

J.S.C.

CHARLES E. RAMOS