

<b>Vashovsky v Zablocki</b>
2022 NY Slip Op 31497(U)
May 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 507373/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CHANA VASHOVSKY, individually and  
derivatively on behalf of  
HUDSON VALLEY NY HOLDINGS LLC,  
Plaintiffs,

Decision and Order

-against-

Index No. 507373/21

YOSEF ZABLOCKI and NATIONAL JEWISH  
CONVENTION CENTER,  
Defendants,

And

May 9, 2022

HUDSON VALLEY NY HOLDINGS LLC,  
Nominal Defendant,

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YOSEF ZABLOCKI and NATIONAL JEWISH  
CONVENTION CENTER,  
Counterclaim Plaintiffs,

-against-

CHANA VASHOVSKY and EPHRAIM VASHOVSKY,  
Counterclaim-Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to reargue a decision and order dated March 15, 2022 which denied a motion seeking to amend the complaint to add claims for fraud and RICO. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

It is true the court did not analyze the precise RICO statute alleged, namely (18 U.S.C. §1962(b)) and instead analyzed (18 U.S.C. §1962(c)). The court will now therefore analyze the proposed cause of action of (18 U.S.C. §1962(b)).

As recorded in the prior order, to succeed on a RICO claim, the moving party must demonstrate three elements: (1) a violation of the RICO statute, 18 U.S.C. §1962; (2) an injury to business or property; and (3) the injury was caused by the violation of section 1962 (Spool v. World Child Int'l Adoption Agency, 520 F.3d 178 [2d. Cir. 2008]). Under 18 U.S.C. §1962(b) it is unlawful "through a pattern of racketeering activity...to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce" (id). Thus, this section seeks to prohibit "the takeover of a legitimate business" through racketeering (Wood v. Incorporated Village of Patchogue of New York, 311 F.Supp2d 344 [E.D.N.Y. 2004]). Racketeering activity is defined as any activity included within 18 USC §1961(1) and includes wire fraud and money laundering (id).

However, a party can only establish a violation of the racketeering statute if the racketeering activity caused injury different from the predicate acts, namely the wire fraud and money laundering (Breslin Realty Development Corp., v. Schackner, 397 F.Supp2d 390 [E.D.N.Y. 2005]). In explaining this key distinction the court in D'Addario v. D'Addario, 901 F.3d 80 [2d. Cir. 2018] noted that "to successfully plead a RICO claim under §1962(b), a plaintiff must indeed allege distinct damages arising from the acquisition or maintenance of control of the enterprise.

In other words, those damages must be different from the damages that flow from the predicate acts themselves. For example, a racketeer might use a pattern of physical threats and violence, including an act of arson against the plaintiff's property, to extort an interest in the plaintiff's business. The cost of replacing or repairing property damaged in the fire is a loss caused by the predicate act, the arson, not by the ultimate acquisition of an interest in the plaintiff's business. The 'separate and distinct' damages caused by the RICO violation, as opposed to by the predicate acts, is the value of the share of the plaintiff's business that the owner turned over to the defendant" (id).

The Second Amended Complaint alleges various allegations against the defendant in support of its RICO claim. First, the plaintiff alleges the defendant usurped business opportunities that rightfully belonged to HVR and HVNY by booking through NJCC the defendant's solely owned entity (see, Second Amended Complaint, ¶ 83-89). Next, plaintiff alleges the defendant diverted revenue away from HVR and HVNY to his own entities and has taken goods and workers from HVR to his own wholly owned hotels (see, Second Amended Complaint, ¶ 90-104). Next, the plaintiff alleges the defendant diverted booking fees to NJCC at the expense of HVR. Further, the second amended complaint alleges the defendant returned the money he diverted back to the

HVR as loans, further profiting from his diversion of funds (see, Second Amended Complaint, ¶ 105-109). Further, the plaintiff alleges the defendant ruined the reputation of HVR by his negligent supervision of the hotel and failed to adequately maintain and repair the property.

Paragraph 168 of the Second Amended Complaint asserts that "plaintiffs' injuries are separate and apart from any injuries suffered as a result of the predicate acts committed by the RICO Defendants" (*id.*). However, the injuries suffered as a result of the predicate acts are the obvious loss of income, the losses sustained by the alleged diversion of funds and all the losses that flow from such diversion including the alleged fake loans made by the defendant and all damages sustained by the defendant placing the interests of NJCC and his other entities above those of the HVR. These injuries are not distinct 'acquisition' or 'maintenance' injuries but rather are merely the injuries that are the result of the predicate acts (Siddique v. Anwar, 2017 WL 8776968 [E.D.N.Y. 2017]). Thus, in Compagnie De Reassurance D'Ile De France v. New England Reinsurance Corp., 57 F.3d 56 [1<sup>st</sup> Cir. 1995] the court held that "under §1962(b), the plaintiffs had to show that they were harmed by reason of NERCO's acquisition or maintenance of control of an enterprise through a pattern of racketeering activity. Again, even assuming that plaintiffs proved the underlying RICO violation, they failed to

prove any harm beyond that resulting from the fraud which constituted the predicate act" (id). Again, in Danielsen v. Burnside-Ott Aviation Training Center Inc., 941 F.2d 1220 [D.C. Cir. 1991] the court explained that "plaintiffs do not allege that their purported injury (underpayments of wages and benefits) was caused by the acquisition of an enterprise....[P]laintiffs allege...simply that their injuries result from 'the intentional and continuous underpayment of legally required minimum wages and fringe benefits'" (id).

In the memorandum in support of the motion to amend the plaintiff asserted that "the proposed cause of action relating to RICO offenses based on the numerous instances of wire fraud committed by Defendants in their scheme to diminish and divert Plaintiff's shares in HVNY, so NJCC and Zablocki can obtain Plaintiff's shares, allowing the Rico defendants to take complete control of HVR" and that "by fraudulently requiring Plaintiff to enter into loan agreements, that would provide NJCC, a nonprofit, a percentage of Plaintiff's Shares if the loans were not repaid in unrealistic time periods, is a scheme to illegally take over HVNY. These representations were made so NJCC could improperly obtain as many of Plaintiff's shares in order to dilute her share of HVNY" (see, Memorandum of Law in Support of Motion to Amend, page 6). This is really an admission that the predicate acts, namely the fraud, form the same harms suffered as a result of the

racketeering activity. In its memorandum in reply the plaintiff acknowledged that "a complaint for violation of § 1962(b) "must allege an 'acquisition or maintenance' injury separate and apart from the injury suffered as a result of the predicate acts of racketeering activity" and that "plaintiff has clearly satisfied this burden" (see, Memorandum in Reply, page 7). However, other than merely citing the relevant law, the plaintiff did not establish how the predicate acts, namely the fraud and diversion done to harm the plaintiff is any different than the diversion of funds committed as part of any racketeering scheme.

In any event, even if the plaintiff could allege distinct harms he still fails to allege any RICO violation. Pursuant to the operating agreement between the parties, the defendant was already a fifty percent owner of HVR. The complaint does not allege the defendant did anything to try and wrest the plaintiff's fifty percent share away from the plaintiff at all, but rather to simply steal money that rightfully belonged to HVR and hence to both of them. Paragraph 171 of the second amended complaint asserts that "the nexus between the Plaintiffs' injury and the Defendants' 1962(d) violation is that by acquiring an interest in and control of HVNY, the RICO Defendants were able to divert business and revenue from HVNY and did irreversible reputational damage to HVNY" (see, Second Amended Complaint, ¶ 171). However, all the alleged racketeering conduct occurred

after the defendant maintained a fifty percent ownership share of HVR. Thus, even if the defendant's conduct could be classified as racketeering activity, it was not done "to acquire or maintain, directly or indirectly, any interest in or control of any enterprise" (18 U.S.C. §1962(b)) since he already owned half the enterprise and already maintained the corporation. Thus, "to state a claim under §1962(b), the RICO injury must have been caused by the acquisition or maintenance of control in an enterprise" (see, Westchester County Independence Party v. Astorino, 137 F.Supp3d 586 [S.D.N.Y. 2015]). In this case any injury was not caused by the acquisition or maintenance of control in an entity since, as noted, he already maintained and controlled the entity prior to any of the alleged improper conduct. Consequently, the defendant's activities cannot possibly be RICO related. Therefore, the motion seeking to amend the complaint to add a RICO claim based upon (18 U.S.C. §1962(b)) or conspiracy based upon (18 U.S.C. §1962(d)) is denied. Thus, the motion seeking to reargue this cause of action is denied.

Turning to the motion seeking to reargue the denial of the fraud claim, the court held the Second Amended Complaint failed to adequately plead fraud with the requisite particularity. Upon reargument the plaintiff points to thirteen instances where the Second Amended Complaint did in fact adequately plead fraud. As previously noted to properly assert a fraud claim, the complaint

must allege a misrepresentation of fact which was knowingly false when made for the purpose of inducing the other party to rely upon it, that there was such justifiable reliance, and injury (see, Nerey v. Greenpoint Mortgage Funding Inc., 144 AD3 646, 40 NYS3d 510 [2d Dept., 2016]). An examination of those allegations is therefore necessary. Paragraph 72 states that "upon information and belief, Defendants have not made any additional contributions to HVNY or to HVR and the Additional Contributions made by the Vashovsky were not used for any legitimate business purpose for HVNY or HVR, but rather were diverted and converted and used for the benefit of Zablocki personally and NJCC" (see, Second Amended Complaint, ¶ 72). First, that paragraph does not allege any misrepresentation at all. Moreover, it is well settled that an allegation based upon "information and belief" is "not sufficient to establish the necessary quantum of proof to sustain allegations of fraud" (see, Weinberg v. Kaminsky, 166 AD3d 428, 88 NYS3d 16 [1<sup>st</sup> Dept., 2018]).

Paragraph 73 alleges the defendant made unwarranted calls for the plaintiff to infuse the corporation with cash but the plaintiff refused necessitating the defendant to offer sham loans. Again, no fraud is alleged by that conduct since no reliance is alleged.

Paragraph 91 of the Second Amended Complaint alleges that "plaintiff discovered that Zablocki was not using the funds

HVR had been receiving for HVR's or HVNY's legitimate business purposes and was instead using such funds for Defendants' own purposes" (see, Second Amended Complaint, ¶ 91). Again, that conduct does not involve any material misrepresentation which induced any reliance.

Paragraph 95 of the Second Amended Complaint states that "upon information and belief, Zablocki's fraudulent claims for additional funds to pay for construction costs were pretenses to cause Vashovsky to allegedly dilute her interest in HVNY by selling a portion of her membership interest in HVNY to the NJCC based on Zablocki's representations that additional capital was needed from her to prevent bankruptcy" (see, Second Amended Complaint, ¶ 95). This contention apparently asserts that the defendant fraudulently induced the plaintiff to provide additional funds under the pretense construction costs were required when really the plaintiff sold a portion of her membership interest in HVNY to NJCC based upon another misrepresentation from the defendant that additional capital was needed to prevent bankruptcy. Notwithstanding the complicated nature of the claim there are insufficient facts supporting such an allegation of fraud.

Paragraph 97 of the Second Amended Complaint asserts that when additional funding was deposited it was quickly stolen by the defendant and utilized by the defendant for project he solely

owned. Again, even if true that does not establish any misrepresentation.

Likewise, paragraphs 100 and 101 which alleges the defendant stole meat and workers belonging to the HVR and used the food and the workers for his other wholly owned hotels does not constitute fraud.

Paragraph 109 alleges the defendant diverted revenue from HVR and then loaned it back to the HVR giving the appearance he was loaning his own funds and not funds that belonged to HVR all along. Again, this conduct does not also allege any misrepresentation and is not fraud.

Paragraph 112 states that "Zablocki made additional funding calls in October, November, and December of 2020 and in March and April of 2021. Zablocki most recently made false funding capital calls in November 2021, December 2021 and January 2022" (see, Second Amended Complaint, ¶ 112). To the extent any of these calls were material misrepresentations of fact, as noted in examining paragraph 73, they did not induce any reliance upon the plaintiff.

Paragraphs 333 and 334 allege the defendant failed to make necessary renovations and instead used available funds for such projects for his own personal companies. Again, no material misrepresentation is alleged.


Paragraphs 339, 340 and 345 all assert that the defendant

essentially stole emergency COVID-19 money received by HVR and used the money for his own personal companies. Again, that conduct does not allege any material misrepresentation of any facts. Thus, even if all these allegations prove true they do not allege any fraud at all. To be sure, the alleged misconduct of the defendant is adequately represented by the remaining causes of action. Therefore, based on the foregoing, the motion seeking to reargue the denial of the fraud claim is denied.

So ordered.

ENTER:

DATED: May 9, 2022  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC