

IN THE STATE OF MISSOURI
JACKSON COUNTY SIXTEENTH CIRCUIT COURT
AT INDEPENDENCE

SAMUEL K. LIPARI,)
)
 Plaintiff,)
)
 v.) Case No. 0916-CV38273
) Division 15
 CHAPEL RIDGE MULTIFAMILY LLC,)
 et al.,)
)
 Defendants.)

DEFENDANT SWANSON MIDGLEY'S REPLY TO PLAINTIFF'S RESPONSE TO
DEFENDANT SWANSON MIDGLEY'S MOTION TO DISMISS
PLAINTIFF'S AMENDED PETITION

COMES NOW Defendant sued herein as Swanson Midgley LLC, ("Defendant"), and in support of its Reply to pro se Plaintiff Samuel Lipari's Response to Defendant's Motion to Dismiss Plaintiffs Amended Petition for Plaintiffs failure to state a claim, states:

1. Plaintiff fails to plead that Defendant is part of a larger "enterprise" under RICO statutes and thus fails to establish a pattern of racketeering activity.

Plaintiffs response to Defendant's Motion to Dismiss relies almost entirely on Defendant being a part of the alleged larger conspiracy or enterprise to defraud Medicare of funds and deprive Plaintiff of his property and business through acts of racketeering. Plaintiff does not, however, sufficiently plead that Defendant is part of the larger enterprise or that a larger enterprise exists at all.

The existence of an enterprise is an essential element of a RICO claim. *See Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982) (citing *Us. v. Turkette*, 452 U.S. 576 (1981)). The courts have consistently held that an enterprise must have a separate existence apart from the acts of racketeering. *Bennett*, 685 F.2d at 1060. In other words, "an enterprise may be said to exist where such separateness from the acts of racketeering can be found. Discrete existence, rather

than the legality or illegality of the enterprise's activities or goals, is the test." *Id.* The organization does not need to be a legitimate organization, but it must be a "discrete economic association existing separately from the racketeering activity." *Turkette*, U.S. at 585. For example, the enterprise in *Bennett* was a retirement community. *Bennett*, 685 F.2d at 1060. In one of the cases Plaintiff cites as support, *Police Retirement System of St. Louis v. Midwest Investment Advisory Services*, 706 F.Supp. 708, 711 (Mo. E.D. 1989), the enterprise was the Retirement System, a trust which provided retirement and death benefits to police officers.

Each example the Plaintiff cites from his Amended Petition of pleading an enterprise demonstrates that the enterprise Plaintiff alleges exists only for the purpose of criminal activity. See, e.g., Amended Petition, ~ 282 ("defendants ... formed an agreement to participate in an 18 U.S.C. 1962(d) criminal conspiracy ... whose overarching purpose is to artificially inflate hospital supply costs in an ongoing hospital skimming scheme to loot Medicaid, Medicare and private insurance funds") and Amended Petition, ~ 18-19:

The latecomer RICO co-conspirator defendants are now participants in a RICO conspiracy ... As co-conspirators, the latecomers had knowledge of acts of the ongoing criminal RICO conspiracy and intentionally participated in furthering the objectives of the racketeering enterprise and the RICO conspiracy to restrain trade in hospital supplies and overcharge Medicare by the latecomer conspirators violating Missouri statutes and committing frauds on the 16th Circuit State of Missouri Court in an agreement to join the ongoing conspiracy through predicate acts of mail fraud and wire fraud designed to injury the plaintiffs business and take his property in the manner the US Supreme Court has determined ...

These examples, as well as a review of the entire Amended Petition, show that Plaintiff has pleaded the larger conspiracy/enterprise exists solely to commit fraud on Medicare and deprive him of his business and property through acts of racketeering. He does not plead that this enterprise was a separate entity that existed for purposes other than these alleged acts of racketeering. Thus, Plaintiff has failed to establish a larger enterprise under the RICO statutes.

Plaintiff relies on case law such as *Salinas v. U.S.*, 522 U.S. 52 (1997) and *U.S. v. Yannotti*, 541 F.3d 112 (2nd Cir. 2008) for support for his argument that it is irrelevant whether Defendant itself committed a predicate act under the RICO statute, because Defendant was part of a larger conspiracy. This argument ignores the fact that no larger criminal enterprise has been pleaded.

As Plaintiff has failed to plead that Defendant is part of a larger enterprise, the only alleged acts of racketeering are Defendant's alleged actions to evict Plaintiff from his apartment and obtain a garnishment on his bank account for past-due rent. Plaintiff argues that he has sufficiently alleged a pattern of racketeering activity because there is a hearing scheduled to take place in January 2010. See ~ 15 of Plaintiff's response to Motion to Dismiss, citing Petition, ~ 46-48. A review of the Petition reveals, however, that this hearing does not involve Defendant. See Petition ~ 46-48. As discussed in Defendant's Motion to Dismiss, the alleged pattern of racketeering against Defendant lasted only a few months, well short of the one-year guideline provided by the Eighth Circuit. *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215 (8th Cir. 1992). Plaintiff has therefore failed to allege sufficient continuity to establish a pattern of racketeering activity, an essential element of a RICO claim. Thus, his RICO claims against Defendant must be dismissed.

II. Defendant has not waived affirmative defenses.

Plaintiff argues that Defendant has waived its affirmative defenses to Plaintiff's allegations. Rule 55.25 of the Missouri Rules of Civil Procedure provides, however, that the filing of a motion under Rule 55.27 alters the time for filing a responsive pleading as follows:

If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within ten days after notice of the court's action ...

Thus, the Defendant will have 10 days after notice of the court's action to file an Answer if the Court does not grant Defendant's Motion to Dismiss Plaintiffs Amended Petition.

CONCLUSION

Therefore, based upon the above and foregoing, Plaintiff's RICO claims and claims based on the Missouri Rules of Professional Conduct against Defendant Swanson Midgley LLC must be dismissed for Plaintiff's failure to state a claim upon which relief can be granted.

WHEREFORE, for the foregoing reasons, Defendant Swanson Midgley LLC, requests that this Court issue its Order dismissing Plaintiff Samuel Lipari's Amended Petition against Swanson Midgley LLC, and for such other and further relief as the Court deems just and proper.

MORROW, WILLNAUER & KLOSTERMAN, L.L.C.

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I hereby certify that a copy of the above and foregoing was mailed, via U.S. mail, first class, postage prepaid on this 11th day of February 2010, to all parties, with a copy of the same being served via electronic mail to Plaintiff this 11th day of February 2010, to:

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