

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. )

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DEFENDANT SWANSON MIDGLEY LLC'S MEMORANDUM IN  
SUPPORT OF ITS MOTION TO DISMISS UNDER RULE 55.27(g)(2)  
FOR FAILURE TO STATE A CLAIM

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

INTRODUCTION

This action stems from an underlying matter in which it appears that Christopher Barhorst and Holly Fischer, attorneys employed at Defendant Swanson Midgley, LLC represented co-Defendant Chapel Ridge Multifamily, LLC in evicting Plaintiff from his apartment on their premises and obtaining a garnishment for past-due rent. Plaintiff alleges that Defendant's actions in doing so were in violation of the Racketeer Influenced and Corrupt Organizations Act. Thus, Plaintiffs claims against Defendant should be dismissed for failure to state a claim.

## MOTION TO DISMISS STANDARD

A motion to dismiss for failure to state a cause of action is "solely a test of the adequacy of the plaintiffs petition" accepting the allegations as true and giving the Plaintiff all reasonable inferences therefrom. *State ex rei. Henley v. Bickel*, 285 S.W.3d 327,329 (Mo. 2009). In order to survive a motion to dismiss, "the petition must invoke substantive principles of law entitling plaintiff to relief and ... ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial." *Id.* at 329-330. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Gill Construction, Inc. v. 18<sup>th</sup> & Vine Authority*, 157 S.W.3d 699, 707 (Mo.App. W.D. 2005), quoting *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. banc 2002). Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, of of a cause that might be adopted in that case. *Id.* If a petition contains only conclusions and "does not contain the ultimate facts or any allegations from which to infer those facts, the petition may be dismissed for failure to state a claim." *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371,379 (Mo. banc 1993).

Here, Plaintiff has failed to state a claim as he has failed to plead his allegations of mail and wire fraud with sufficient particularity and has failed to plead a pattern of racketeering activity as required under the RICO statutes.

## ARGUMENTS AND AUTHORITIES

### **I. Elements of RICO Claim**

The Racketeer Influenced and Corrupt Organizations Act prohibits any person from conducting the affairs of an enterprise through a pattern racketeering activity. *Bennett v. Berg*, 685 F.2d 1053,1062 (8<sup>th</sup> Cir. 1982). Acts of racketeering are defined in U.S.C. § 1961 and are

referred to as "predicate acts." Plaintiff alleges that Defendant committed essentially two predicate acts: mail fraud under U.S.C. § 1341 and wire fraud under U.S.C. § 1343.

Plaintiff fails to establish the essential elements of a RICO claim in that he fails to plead mail fraud and/or wire fraud with sufficient particularity and does not establish a pattern of racketeering activities.

II. Plaintiff has failed to plead mail fraud under 18 U.S.c. § 1341 with particularity as required by Missouri Rule of Civil Procedure 55.12.

Rule 55.12 of the Missouri Rules of Civil Procedure requires that "in all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity." Rule 9(b) of the Federal Rules of Civil Procedure has the same requirement and the federal courts provide guidance on sufficiently pleading a mail or wire fraud claim. In any claim for mail or wire fraud under the RICO statutes, the plaintiff must identify the "'who, what, where, when, and how' of the alleged fraud." *BJC Health System v. Columbia Casualty Co.*, 478 F.3d 908, 917 (8<sup>th</sup> Cir. 2007). Essentially, a plaintiff must plead "the equivalent of the first paragraph of any newspaper story." *Drobnak v. Anderson Corp.*, 561 F.3d 778, 784 (8<sup>th</sup> Cir. 2009).

There appears to be some disagreement among the courts as to whether misrepresentations are required as an element of mail fraud. Compare *Us. v. Parker*, 364 F.3d 934~ 943 (8<sup>th</sup> Cir. 2004) (holding that misrepresentations or false 'promises is an element of mail fraud) with *Murr Plumbing v. Scherer Brothers Financial Services*, 48 F.3d 1066, 1070 (8<sup>th</sup> Cir. 1995) (holding that mail and wire fraud statutes encompass both frauds involving misrepresentations and frauds not involving misrepresentations). As *Parker* is more recent, it appears that the trend is to require misrepresentation to establish mail fraud. Under either version of the elements, however, Plaintiff has failed to state a claim for mail fraud.

In *Parker*, the court held that there are four essential elements of mail fraud:

1. a scheme to defraud by means of material false representations or promises,
2. intent to defraud
3. reasonable foreseeability that the mail would be used
4. the mail was used in furtherance of some essential step in the scheme

*Parker*, 364 F.3d at 943. In *Murr Plumbing*, the court held that in cases of mail or wire fraud not involving a misrepresentation, there are four elements of mail fraud under U.S.C. § 1341:

- 1) a scheme to defraud
- 2) intent to defraud;
- 3) reasonable foreseeability that the mails (or wires) would be used;
- 4) use of the mails (or wires) in furtherance of the scheme.

*Murr Plumbing*, 48 F.3d at 1069. Plaintiff alleges Defendants committed both fraud involving misrepresentation and frauds not involving misrepresentations. See Plaintiff's Petition, ~ 7. Plaintiff fails to plead the who, what, where, when, and how of the alleged misrepresentations and other frauds with particularity.

Instead, Plaintiff makes vague and conclusory allegations against Defendant, such as stating that "Swanson Midgley LLC, Christopher Barhorst, Holly L. Fischer deceived the 16<sup>th</sup> Circuit Court of Missouri to evict the Plaintiff from his apartment/business office on the date and time stated above and in the plaintiff's affidavit attachments" and "Swanson Midgley LLC, Christopher Barhorst, Holly L. Fischer used the U.S. mail to send letters on the dates described above and in the attachments to the plaintiff's affidavit to further the defendant's fraudulent scheme to injure the plaintiff." See Petition, , 180-81. It is difficult to determine what "date and time stated above" references in these paragraphs, as these statements are made in paragraphs 180-183 on page twenty-seven of the Petition. The only clear date in the Petition regarding communication between Defendant and Plaintiff is found in paragraph 129, where Plaintiff alleges that he received a letter from Christopher Barhorst on July 28, 2009 "as notice for rent

not yet 30 days past due." Plaintiff does not make clear whether this letter contained misrepresentations and if so, what the misrepresentations were.

Plaintiff is somewhat more specific when he alleges that Defendant

deceived the Plaintiff into relinquishing his leasehold in his apartment/business office on the date and time stated above and in the plaintiff's affidavit attachments because of the fostered illusion of the RICO conspiracy to keep the plaintiff from being able to sale (sic) hospital supplies had the courts of the State of Missouri were rigged.

See Petition, ~ 183. As with all of his allegations against Defendant, however, Plaintiff fails to plead specific information regarding the circumstances of this alleged fraud. There is no indication as to when this alleged deceit took place, who specifically defrauded the Plaintiff, or the content of the alleged fraud. As such, his claims of mail fraud against Defendant must fail.

The plaintiff's petition in *Hanrahan v. Nashua Corporation*, 752 S.W.2d 878 (Mo. App. 1988) was dismissed for failure to plead fraud with particularity. The plaintiff alleged that his employer represented "all of his documents were contained in his personnel file when in truth and fact Defendant knew said favorable documents to Plaintiff had been hidden and concealed." *Id.* at 880. In affirming the trial court's dismissal of this count of fraud, the court of appeals noted that the plaintiff did not sufficiently plead the circumstances of the alleged fraud, in that he failed to state the circumstances under which the alleged representations were made, the individuals who made the representations, and whether those individuals had the authority to do so. *Id.* at 883. Here, the Plaintiff's Petition includes far less detail than the petition in *Hanrahan*, as the Plaintiff never alleges who specifically made what misrepresentations or engaged in the acts of fraud, nor does he allege the content of any misrepresentations or acts of fraud.

The court in *Hess v. Bank First*, 2009 WL 806809 (D. Neb.) also dismissed the petition for failure to state a claim under the mail or wire fraud statutes. The plaintiffs stated that a defendant committed wire fraud because it "stole \$30,000 from their credit card receipts" and

that a "letter to Sharon Coleman with the FDIC constitutes mail:fraud ... Id. at \*4. The court noted that with each of these allegations, the Plaintiffs failed to alleged the "time, place, or contents of the alleged acts of fraud." *Id.* at \*4. The court held that these statements were conclusory and dismissed the petition for failure to plead fraud with particularity. *Id.* Here, the Plaintiff s allegations in the Petition are similar to those in *Hess*, in that the Plaintiff makes conclusory statements that Defendant engaged in mail and wire fraud, without ever pleading the specific circumstances of the alleged fraud.

III. Plaintiff has failed to plead wire fraud under 18 U.S.C. 1343 with particUlarity as required by Missouri Rule of Civil Procedure 55.12.

Plaintiff also alleges that Defendant engaged in wire fraud, another predicate act under the RICO statutes. Section 1343 regarding wire fraud provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The essential elements of wire fraud are: "a scheme to defraud, the use of interstate wires incident to the scheme, and an intent to cause harm." *United States v. Frost*, 321 F.3d 738, 741 (8th Cir.2003). Similar to mail fraud, there are two types of wire fraud-those which involve misrepresentations and those which do not. *Murr v. Plumbing*, 48 F.3d 1066, 1070 (8<sup>th</sup> Cir. 1995). -Plaintiff is required to plead, regardless of whether misrepresentations are alleged, the "'who, what, where, when, and how' of the alleged fraud." *BJC Health System v. Columbia Casualty Co.*, 478 F.3d 908, 917 (8<sup>th</sup> Cir. 2007). Essentially, a plaintiff must plead "the equivalent of the first paragraph of any newspaper story." *Drobnak v. Anderson Corp.*, 561 F.3d 778, 784 (8<sup>th</sup> Cir. 2009).

In a claim for fraud, the plaintiff "must allege ultimate facts and cannot rely upon conclusions." *Black v. Rite Mortgage and Financial, Inc.*, 239 S.W.3d 165, 169 (Mo. App. 2007). Indeed, the alleged fraud "must appear clearly from the facts alleged and be independent of conclusions." *Id.* A review of the petition shows that Plaintiff has failed to plead wire fraud with particularity, in that Plaintiff never alleges that Defendant used interstate wires to further their alleged scheme, an essential element of wire fraud. *United States v. Frost*, 321 F.3d 738, 741 (8th Cir.2003). Plaintiff concludes -that Defendant "used electronic communications and caused to be communicated electronically via fax and the Missouri Case Net on the dates described above -and in the attachments to the plaintiff's affidavit to further the defendant's fraudulent scheme to injure the plaintiff." See Petition, , 238. The petition does not contain any ultimate facts or allegations to support this conclusion. When a petition which states only conclusions without ultimate facts or "any allegations from which to infer those facts, the petition may be dismissed for failure to state a claim." *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 379 (Mo. banc 1993).

The only clear reference to the use of interstate wires in reference to Defendant is found in paragraphs 132 and 134 of the Petition. Plaintiff alleges that he emailed Christopher Barhorst, but there is no allegation that Mr. Barhorst ever responded to Plaintiff's emails. Section 1343 is clear that it is the alleged defendant who must make use of interstate wires to be liable for wire fraud, not the alleged victim. See 18 U.S.C. § 1343 ("Whoever, having devised or intending to devise any scheme or artifice to defraud... transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce...").

If the plaintiff fails to plead any essential element of fraud properly, "the petition is defective and subject to dismissal." *Black*, 239 S.W.3d at 169. In fact, if all averments of fraud

are not stated with particularity in compliance with Rule 55.15, "no claim is stated." *Hanrahan v. Nashua Corporation*, 752 S.W.2d 878, 883 (Mo. App. 1988). As Plaintiff failed to allege that Defendant used interstate wires, his claim of wire fraud against Defendant must fail.

IV. Plaintiff fails to establish a pattern of Racketeering Activity under the RICO statutes.

Even if Plaintiff pleaded his claims of mail and wire fraud with particularity, his RICO claims against Defendant must be dismissed because he has failed to plead a pattern of racketeering activity, an essential element of a RICO claim. See *HJ Inc. v. Northwestern Bell Tel.Co.*, 492 U.S. 229 (1989). To prove a pattern of racketeering activity, a plaintiff must show "that the racketeering activities are related, and that they amount to or pose a threat of continued criminal activity." *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1028 (8<sup>th</sup> Cir. 2008) (citing *HJ Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). Continuity in this context refers "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 1028 (citing *HJ Inc.*, 492 U.S. at 241).

Close-ended continuity involves "a series of related predicates extending over a substantial period of time." *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 406 (8<sup>th</sup> Cir. 1999) (citing *HJ Inc. v. Northwestern Bell Tel.Co.*, 492 U.S. 229, 241-242 (1989)). Open-ended continuity involves "acts, which by their very nature, threaten repetition into the future." *Id.* (citing *HJ Inc.*, 492 U.S. at 241-242). Although the Eighth Circuit has declined to set a minimum amount of time for "continuity" under the RICO statutes, it has consistently held that "the requirement of continuity over a closed period is not met when the predicate acts extend less than a year." *Primary Care investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215 (8<sup>th</sup> Cir. 1992).

Although the allegations in the Petition are somewhat difficult to follow, a summary of Plaintiff's allegations against Defendant is found in paragraph two of the Petition, where Plaintiff states:

This petition arises from the legally separate defendants' decisions through their Missouri chartered law firm agents to deprive the plaintiff of his virtual office phone and mail service, his apartment home office and his business automobile on the same day through bad faith proceedings in violation of the plaintiffs' contracts, Missouri landlord tenant<sup>th</sup> law and consumer protection act notice requirements via fraudulent filings in the 16<sup>th</sup> Circuit State of Missouri Court.

It appears from this paragraph and the rest of the Petition that Plaintiff alleges Defendant were engaged in a close-ended scheme to deprive him of his phone service, mail service, and apartment. Although there are vague allegations that Defendant are part of a larger conspiracy, these allegations are never fleshed out and there are no specific facts pleaded connecting Defendant to a larger conspiracy. Thus, the length of time of this alleged close-ended scheme to fraudulently deprive Plaintiff of his apartment/home office is crucial in determining whether Plaintiff has met the continuity requirement of a RICO claim. Plaintiff does not include a clear timeline of events in his Petition. It appears that the sequence of events involving Defendant began on July 24, 2009 when Christopher Barhorst filed suit, or potentially on July 28, 2009 when Plaintiff received a letter from Christopher Barhorst informing him that his rent was past due. See Petition, ~ 127, 129-130.

The Plaintiff does not make clear when the action to evict him from his apartment terminated, but he states that Defendant was successful in "obtaining a judgment evicting the plaintiff." See Petition, ~ 262. Plaintiff further states that on October 29, 2009, he emailed the Missouri Board of Bar Governors regarding "the continued fraudulent outcomes procured through extrinsic fraud on the court and the cases affected by the fraud." See Petition, ~ 172. In the immediately preceding paragraph, Plaintiff alleges that Judge Charles Stitt proceeded with

the garnishment action filed by Defendant despite his knowledge that the garnishment was procured by fraud committed on the court by Defendant. See Petition, ~ 171. We can therefore safely assume that Plaintiff was referencing the completed eviction/garnishment action in his letter of October 29, 2009.

Based on these pleadings, the entire fraudulent scheme allegedly perpetrated by Defendant lasted approximately three to four months, well short of the one-year guideline given by the Eighth Circuit. Plaintiff has therefore failed to allege sufficient continuity and has failed to establish a pattern of racketeering activity, an essential element of a RICO claim. Thus, his claims against Defendant must be dismissed.

V. Violations of the Missouri Rules of Professional Conduct do not create a private cause of action.

Plaintiff seems to allege in support of his claims against Defendant that Defendant's actions violated the Missouri Rules of Professional Conduct. See, e.g., Petition, ~ 26. Missouri case law is clear that these rules do not create a private cause of action:

The Rules of Professional conduct do not form a basis for a civil cause of action. While they provide standards and violation of them result in disciplinary action, they do not augment an attorney's substantive legal duty or the extra-disciplinary consequences of violating such a duty.

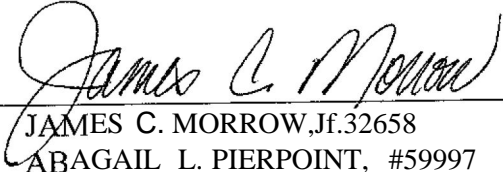
*Roth v. La Societe Anonyme Turbomeca*, 120 S.W.3d 764, 777 (Mo. App. 2003). Thus, any claims against Defendants in Plaintiff's Petition based on their alleged violation of the Missouri Rules of Professional Conduct must be dismissed.

CONCLUSION

Therefore, based upon the above and foregoing, Plaintiff's RICO claims against Defendant Swanson Midgley LLC 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 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.

By   
JAMES C. MORROW, Jf. 32658  
ABAGAIL L. PIERPOINT, #59997

Executive Hills East, Building A  
10401 Holmes, Suite 300  
Kansas City, Missouri 64131-3405  
Telephone: (816) 382-1382  
Fax: (816) 382-1383  
Email: [jmorrow@mwklaw.com](mailto:jmorrow@mwklaw.com)  
[apierpoint@rnwklaw.com](mailto:apierpoint@rnwklaw.com)

ATTORNEY FOR DEFENDANTS  
SWANSON MIDGLEY LLC, CHRISTOPHER  
BARHORST, AND HOLLY L. FISCHER

I hereby certify that a copy of the  
above and foregoing was mailed, via U.S.  
mail, first class, postage prepaid, this 20th  
day of January 2010, to:

Samuel K. Lipari  
803 S. Lake Drive  
Independence, Missouri 64064

PLAINTIFF PRO SE

Chapel Ridge Multifamily, LLC  
3460 NE Akin Boulevard  
Lee's Summit, Missouri 64064

DEFENDANT

Regus, PLC  
22 Grenville Street  
St. Helier, Jersey, LU 00000

DEFENDANT

Regus Management Group, LLC  
RA: CSC Lawyers Incorporating Service, Inc.  
150 S. Perry Street  
Montgomery, Alabama 36104

DEFENDANT

Lianne Zellmer  
2300 Main Street, Suite 900  
Kansas City, Missouri 64108

DEFENDANT

Wells Fargo  
420 Montgomery Street  
San Francisco, California 94163

DEFENDANT

Wachovia Dealer Services, Inc.  
8575 W. 110th Street, Suite 100  
Overland Park, Kansas 66210

DEFENDANT

Troppito & Miller, LLC  
508 Walnut Street  
Kansas City, Missouri 64106

DEFENDANT

Chris M. Troppito  
508 Walnut Street  
Kansas City, Missouri 64106

DEFENDANT

Nicholas L. Ackerman  
508 Walnut Street  
Kansas City, Missouri 64106

DEFENDANT

Tony R. Miller  
508 Walnut Street  
Kansas City, Missouri 64106

DEFENDANT

  
JAMES C. MORROW