807 F.3d 785
United States Court of Appeals,
Sixth Circuit.

Linda GRUBBS; Tri–Serve, LTD.; Tri–Serve # 1, LLC; Capital Concepts, Inc., Plaintiffs–Appellants,
v.
SHEAKLEY GROUP, INC., et al., Defendants–Appellees.

No. 15–3302.
|
Argued: Oct. 6, 2015.
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Decided and Filed: Dec. 7, 2015.

OPINION

CLAY, Circuit Judge.

Plaintiffs Linda Grubbs and the companies she owns, Tri–Serve, Ltd.; TriServe # 1, LLC; and Capital Concepts, Inc., appeal the order of the district court dismissing Plaintiffs' claims under the Lanham Act, 15 U.S.C. § 1125, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, for failure to state a claim, and dismissing all remaining state law claims over which the district court had pendent jurisdiction. For the reasons that follow, we **AFFIRM** in part, and **REVERSE** in part, the order of the district court, and remand for further proceedings consistent with this opinion.

BACKGROUND

Plaintiff Linda Grubbs is the owner of Plaintiff Capital Concepts, Inc., a financial planning, wealth management, and tax preparation firm providing, among other things, 401(k) planning. At all relevant times, she was also the owner of Plaintiffs Tri–Serve, Ltd. and TriServe # 1, LLC ("Tri–Serve"), the successors to four professional employment organizations ("PEOs") she purchased on October 13, 2008. A PEO is a type of Ohio regulated entity to which employers may outsource certain administrative tasks, such as payroll, workers' compensation, and benefits. PEOs serve as co-employers with their clients and are contractually responsible for those functions outsourced to them. Tri–Serve is based in Harrison, Ohio and provides PEO services to the greater Cincinnati, Ohio market. It is unclear from the record whether Tri–Serve had any clients outside of Ohio. After the purchase of Tri–Serve, Grubbs asked Defendant Angelia Strunk–Zwick to manage the newly acquired companies because of her expertise with PEOs. During her employment with Tri–Serve, Strunk–Zwick was subject to a non-competition agreement.

Defendant Larry Sheakley owns and operates the Sheakley Group of Companies, comprising at least fifteen entities, all named as defendants. According to their own marketing material, the Sheakley Group of Companies (collectively, "Sheakley") also provide "401(k) services, flexible benefit plans, workers' compensation, payroll, ***790** [and] human resources outsourcing solutions." Sheakley is headquartered in Cincinnati, Ohio.

On February 25, 2009, the President of Defendant Sheakley HR Solutions e-mailed Strunk–Zwick to ask for her assistance with Sheakley's PEO division. During March and April 2009, Strunk–Zwick was paid by Sheakley on a consulting basis, and was sometimes absent from the Tri–Serve office during business hours in order to provide services to Sheakley. On May 27, 2009, Strunk–Zwick met with employees of Sheakley to discuss moving Tri–Serve and its clients to Sheakley. At a follow-up meeting on June 2, 2009, Defendant Larry Sheakley agreed that Strunk–Zwick and two other Tri–Serve staff members would join Sheakley. Over the next several weeks, Strunk–Zwick and various Sheakley employees planned and coordinated the transfer of the Tri–Serve clients to Sheakley via e-mail and phone. Defendant Steve Wolf, acting senior vice-president for Sheakley HR, LLC, suggested in an e-mail on June 21, 2009 to Strunk–Zwick that she contact the Tri–Serve clients to inform them that "we are partnering with Sheakley and that we may transition them over to give them better service etc." (R. 87, Compl.¶ 971(h), Page ID 3221.) Strunk–Zwick's first day at Sheakley was to be July 6, 2009.

> On July 2, 2009, Strunk–Zwick sent an e-mail to a potential client stating, "[W]e will be moving our offices over the weekend, so on Monday, my direct dial number will be 513.728.xxxx and my email will beastrunk@sheakleyhr. com." (*Id.* ¶ 967(ba), Page ID 3215.) The following day, Strunk–Zwick sent another e-mail to twenty-two Tri–Serve clients:
>
> Customers:
>
> We are moving! In order to better serve you, we are partnering with Sheakley HR and moving our offices. As many of you know, we have partnered with Sheakley over the years with regards to our workers

compensation and unemployment management. We have been blessed to have experienced tremendous growth over the last 6 months. We find ourselves needing more office space and more resources to ensure that our customer service level continues to meet your expectations. By moving into Sheakley Group we will be able to provide you and your employees with additional resources, services, and benefits, while continuing to provide you with the service that you have grown accustomed to expect from TriServe. Nothing will change from your standpoint. We will have new contact information, but nothing else will change. You will begin to see the Sheakley HR name and we will be introducing new benefits and new services to assist you with growing your business. Our focus has always been and will continue to be assisting you, the small business owner, with Rediscovering Your Passion. We appreciate your business over the years and look forward to continuing a long, beneficial relationship with you and your employees. As always, if you have any questions or concerns please feel free to call me.

Effective Monday, July 6, 2009 our Contact Information will be:

TriServe LTD c/o Sheakley HR Solutions

One Sheakley Way

Cincinnati, OH 45246

513–728–xxxx P

513–672–xxxx F

Payroll Time Submission via web:www.triservehr.com

Payroll Time Submission via fax: 513–672–xxxx

***791** Payroll Time Submission via email: sfernbach@sheakleyhr.com

Angie Strunk Direct Dial: 513–728–xxxxEmail: astrunk@sheakleyhr.com

Susan Fernbach Direct Dial: 513–728–xxxxEmail: sfernbach@sheakleyhr.com

Kym Martin Direct Dial: 513–728–xxxxEmail: kmartin@sheakleyhr.com

Thanks,

Angie Strunk

(R. 87, Compl. ¶ 840, Page ID 3185–86.) That same day, she mailed a hard copy of the e-mail to most of the same clients. Several Tri–Serve clients expressed dissatisfaction with the move, were upset that they had received no notice, and worried that all of their information had been transferred to Sheakley. On July 5, 2009, Strunk–Zwick sent notice of her resignation from Capital Concepts by e-mail to Grubbs. Before leaving the Capital Concepts office, Strunk–Zwick removed all files, including all customer files, and deleted computer files and e-mails. She also took Tri–Serve's tax returns for 2009. Sheakley continued to use the Tri–Serve name thereafter, including in promotional materials.

For the next several months, Grubbs had sporadic contact with Strunk–Zwick and Sheakley as they tried to work out various issues with payroll, taxes, and similar matters for 2009. By August 2009, health insurers and workers' compensation departments were still sending third-quarter invoices to Tri–Serve at Grubbs' office, but Sheakley, not Grubbs, received the client payments. From August 26–28, 2009, Grubbs communicated at length with Defendant Tom Pappas, a Sheakley employee, via e-mail regarding the location of various Tri–Serve files, including Tri–Serve's own tax documents. On August 30, Strunk–Zwick stated, in an e-mail to Pappas to be forwarded to Grubbs, that she did not have the tax records in question. Through at least November 2009, Ms. Grubbs continued receiving bills for Tri–Serve, which she paid from her retirement account.

On April 15, 2013, Plaintiffs filed a complaint in the United States District Court for the Southern District of Ohio against Strunk–Zwick, some fifteen Sheakley entities ("the Sheakley Entity Defendants"), several other former Sheakley employees (collectively, the "Sheakley Defendants," a term Plaintiffs use to denote both the entities and the employees).[1] Plaintiffs twice amended their complaint, adding additional defendants not before this Court.[2] The nineteen-count complaint, some 1,018 paragraphs long, contained four claims arising under federal law: trade name infringement and false designation of origin (against the Sheakley Entity Defendants); false advertising (against the Sheakley Entity Defendants and Strunk–Zwick); and substantive RICO and RICO conspiracy ***792** claims (against all Sheakley Defendants and Strunk–Zwick). It also asserted fifteen additional state law claims over which it requested the court exercise pendent jurisdiction.

The Sheakley Defendants, Strunk–Zwick, and other defendants moved separately to dismiss for failure to state a claim. The case was referred to a magistrate judge, who

issued a Report and Recommendation recommending that the false designation of origin, false advertising, and RICO claims be dismissed and that the district court dismiss the remaining state-law claims. The district court adopted the Report and Recommendation without changes and entered an order dismissing the Lanham Act claims and the RICO claims for failure to state a claim. The remaining state-law claims were dismissed without prejudice. Plaintiffs now appeal.

DISCUSSION

Standard of review

We review *de novo* the grant of a motion to dismiss for failure to state a claim. *Casias v. Wal–Mart Stores, Inc.,* 695 F.3d 428, 435 (6th Cir.2012). In reviewing a motion to dismiss, we are obliged to "accept all factual allegations as true," construing the complaint "in the light most favorable to the plaintiff." *Laborers' Local 265 Pension Fund v. iShares Trust,* 769 F.3d 399, 403 (6th Cir.2014). To survive a motion to dismiss, plaintiffs must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). To do so, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937.

Analysis

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III. RICO claims

Plaintiffs further allege that Strunk–Zwick and all Sheakley Defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO) with their plan to steal Tri–Serve's client base. RICO prohibits

> any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Both individuals and corporate entities may be held liable under RICO; a person "includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). "Racketeering activity" encompasses many criminal acts, including those indictable for mail or wire fraud.[5] *See* 18 U.S.C. § 1961(1). Finally, the statute requires at least two acts of racketeering activity within ten years to qualify as a "pattern of racketeering activity." 18 U.S.C. § 1961(5). The RICO statute allows a civil remedy to persons injured by a violation of 18 U.S.C. § 1962(c). 18 U.S.C. § 1964(c).

In practice, two acts of racketeering activity within ten years will not generally give rise to liability. Predicate acts of racketeering must be both continuous and related to " 'combine[ ] to produce a pattern.' " *Fleischhauer v. Feltner,* 879 F.2d 1290, 1297 (6th Cir.1989) (quoting *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, n. 14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)). In assessing continuity and relatedness, courts consider several factors: "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Fleischhauer,* 879 F.2d at 1298. Continuity, for RICO purposes, "is both a closed—and open-ended concept, referring 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." *Moon v. Harrison Piping Supply,* 465 F.3d 719, 724 (6th Cir.2006) (quoting *H.J., Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 241, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)).

The court below dismissed both the substantive RICO claim and the RICO conspiracy claim on the ground that Plaintiffs failed to plead either closed—or open-ended continuity: the alleged racketeering acts of mail and wire fraud occurred within an eight-month period in pursuance of a single scheme with a single victim, and Plaintiffs pled no facts indicating that the alleged acts of racketeering activity would continue into the future.

The Sheakley Defendants and Strunk–Zwick ask this court to affirm the ruling of the court below finding lack of continuity. Plaintiffs, they argue, did not show that the

conduct lasted long enough to constitute a closed-ended RICO violation, and did not show enough potential to continue into the future for open-ended liability. ***805** They rely principally on several cases denying RICO claims where the alleged racketeering activity occurred over periods ranging from six to seventeen months, and where plaintiffs had not shown any threat of future conduct. *See Moon,* 465 F.3d at 725–26 (affirming dismissal of RICO complaint for lack of continuity where predicate acts occurred over nine months); *Vemco, Inc. v. Camardella,* 23 F.3d 129, 134–35 (6th Cir.1994) (seventeen months); *Vild v. Visconsi,* 956 F.2d 560, 569–70 (6th Cir.1992) (six or seven months). The Sheakley Defendants also argue that the alleged activity was a single, terminable scheme with only one victim that was, by nature, not open-ended. *See Moon,* 465 F.3d at 725 (no RICO liability where defendant had "single objective" and there were "no facts suggesting that the scheme would continue beyond the [d]efendants accomplishing their goal"); *Vemco,* 23 F.3d at 134 (no RICO liability where there was a "single victim and a single scheme for a single purpose").

Plaintiffs contend that their Complaint pled facts sufficient to support open-ended continuity of racketeering activity because the acts, admittedly committed within eight months, were "continuous in that they are capable of being continued into the future and pose that threat of continuing for a lengthy period of time." (Pls.' Br. at 43.) One may indeed establish the threat of continued criminal activity by showing that the predicate acts are part of the " 'regular way of conducting [a] defendant's ongoing legitimate business.' " *Vild,* 956 F.2d at 569 (quoting *H.J.,* 492 U.S. at 243, 109 S.Ct. 2893). However, Plaintiffs have not done so with respect to Strunk–Zwick or any of the Sheakley Defendants. They argue, with no citation to the record, that the "ends justify the means [sic] management style" of Sheakley—in which Sheakley failed to respect the confidentiality of client lists—gives "no indication that their pattern of behavior would not continue indefinitely into the future." (Pls.' Br. at 45–46.) As support for their position in favor of open-ended liability, they cite *United States v. Busacca,* in which a RICO conviction was upheld where a defendant embezzled pension funds from his union six times within two and a half months to pay his own legal fees in a prior RICO case. 936 F.2d 232, 237–38 (6th Cir.1991). In *Busacca,* we considered the defendant's total control of the pension funds, disregard of procedures, and repeated misstatements to the union board to have created an ongoing risk of criminal activity at the time the acts were committed that was fortuitously interrupted by his conviction. *Id.* at 238.

The facts in the Complaint, accepted as true, make this eight-month course of conduct more analogous to the short-term, terminable schemes in *Moon, Vemco,* and *Vild* than the unusual circumstances of control in *Busacca,* let alone the "long-term criminal conduct" the RICO statute was enacted to combat. *See H.J.,* 492 U.S. at 242, 109 S.Ct. 2893 (citing legislative history). According to the pleadings, the wire fraud began in the first half of 2009; the most recent alleged act of wire fraud occurred on August 30, 2009, when Strunk–Zwick claimed not to have tax documents. As noted, Plaintiffs alleged no further facts showing that Sheakley threatened future criminal conduct. Thus, this single eight-month scheme to move the Tri–Serve clients to Sheakley with the single victim of Grubbs cannot meet the standard for closed- or open-ended RICO liability. We therefore affirm the district court's dismissal of Plaintiffs' substantive RICO claim.

This result is fatal to the RICO conspiracy claim Plaintiffs seek to assert pursuant to 18 U.S.C. 1962(d). To state a ***806** claim for RICO conspiracy, one must "successfully allege all the elements of a RICO violation, as well as ... 'the existence of an illicit agreement to violate the substantive RICO provision.' " *Heinrich v. Waiting Angels Adoption Servs., Inc.,* 668 F.3d 393, 411 (6th Cir.2012) (quoting *United States v. Sinito,* 723 F.2d 1250, 1260 (6th Cir.1983)). While the facts, as pled, show ample evidence of agreement on the part of Strunk–Zwick and various individual Sheakley Defendants to bring Tri–Serve to Sheakley, Plaintiffs' RICO conspiracy claim fails because Plaintiffs failed to allege a substantive RICO violation in the first place.

* * * *

CONCLUSION

For the foregoing reasons, we **REVERSE** the order of the district court dismissing Plaintiffs' Lanham Act claims for failure to state a claim and **AFFIRM** the order of the district court dismissing Plaintiffs' RICO claims. We **REMAND** this case for further proceedings, in which the district court may, in its discretion, re-examine whether to reinstate any of Plaintiffs' state law claims.

Footnotes

5 To establish RICO liability, predicate acts of mail or wire fraud must be pled with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. *See Heinrich v. Waiting Angels Adoption Servs., Inc.,* 668 F.3d 393, 404 (6th Cir.2012).