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United States Court of Appeals,
Fifth Circuit.
DAVIS-LYNCH, INC., Plaintiff-Appellee,
v.
Jose Alfredo MORENO d/b/a Hanna-Skye and Ac-
curate and Ronald Wayne Pucek, Defendant-
Appellants.

No. 10-20859.
Jan. 10, 2012.
As Revised Jan. 11, 2012.

[WIENER](#), Circuit Judge:

Plaintiff-Appellee Davis-Lynch, Inc. (“Davis-Lynch” or the “Appellee”) filed a lawsuit against several defendants, including Defendant-Appellants Jose Alfredo Moreno (“Moreno”) and Ronald Wayne Pucek, III (“Pucek”) (collectively the “Appellants”), seeking injunctive relief and damages pursuant to the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. §§ 1961-1968](#) (“RICO”), and Texas law.

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I. Facts & Proceedings

A. Facts

Davis-Lynch is a designer, manufacturer, and marketer of cementing and floating equipment for the oil field industry. Nancy Moreno (“Nancy”), an employee of Davis-Lynch, was in charge of accounts payable and accounts receivable for the company. Moreno has been married to Nancy since August 16, 2008 and Pucek is married to Nancy's daughter. Relatives of Nancy, including her daughter, worked under her supervision at Davis-Lynch.

After discovering that one of its copy machines was located at facilities owned or operated by Nancy's son, Davis-Lynch undertook an investigation into the accounts payable that Nancy managed. According to its complaint, Davis-Lynch discovered through its investigation that Nancy and several others had embezzled millions of dollars from Davis-Lynch. Specifically, Davis-Lynch alleges that Nancy and other Davis-Lynch employees issued checks on Davis-Lynch's accounts payable to various entities

and individuals that were not entitled to any funds, including to Pucek and to Moreno and his company, Hanna-Skye, Inc. (“Hanna-Skye”).

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III. Motion Summary Judgment

A. Standard of Review

We review a district court's grant of summary judgment *de novo*, applying the same legal standards as the district court.^{[FN26](#)} Summary judgment should be granted if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”^{[FN27](#)} A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant.^{[FN28](#)} “[A]ll facts and evidence must be taken in the light most favorable to the non-movant.”^{[FN29](#)} To avoid summary judgment, however, the non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial.^{[FN30](#)} We are “not limited to the district court's reasons for its grant of summary judgment” and “may affirm the district court's summary judgment on any ground raised below and supported by the record.”^{[FN31](#)} The moving party has the burden of establishing that there is no genuine dispute of material fact; and, unless that party does so, a court may not grant the motion, regardless whether any response is filed.^{[FN32](#)}

B. RICO Substantive Holding: § 1962(a)

RICO creates a civil cause of action for “[a]ny person injured in his business or property by reason of a violation of [section 1962](#) ...”^{[FN33](#)} [18 U.S.C. § 1962\(a\)](#) states:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of [section 2, title 18, United States Code](#), to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

To establish a claim under [§ 1962\(a\)](#), a plaintiff must show that its injuries resulted from the investment or use of racketeering proceeds. ^{FN34} In other words, injuries resulting from predicate acts of “racketeering activity”^{FN35} themselves cannot form the basis of an investment injury for purposes of [§ 1962\(a\)](#). Instead, the court must determine whether the injuries asserted were the result of the predicate acts or of the investment of racketeering proceeds into a RICO enterprise.^{FN36}

In this case, Davis–Lynch has not shown that it was injured from the investment of the alleged racketeering proceeds. As previously stated, the only undisputed facts presented by Davis–Lynch appear to be that (1) Pucek received and deposited checks from Davis–Lynch for work he did not perform, and (2) Moreno, through Hanna–Skye, received a machine for which neither he nor his company paid. Davis–Lynch does not discuss or a present facts regarding how these alleged racketeering proceeds (*i.e.*, the money received by Pucek and the machine received by Hanna–Skye) were then invested in any enterprise. Furthermore, even if Davis–Lynch were able to show that these alleged proceeds were then invested in an enterprise, it still has not asserted or presented facts showing the necessary next step, *viz.*, how it was injured by the *investment* of the proceeds. Specifically, Davis–Lynch has not shown how Pucek’s alleged deposit of the funds paid to him after 2006 and Hanna–Skye’s acquisition or use of the machine noted in Davis–Lynch’s records actually injured Davis–Lynch. At most, Davis–Lynch has shown only that the payment of money to Pucek for work that he did not perform and the removal of one of its machines without payment harmed Davis–Lynch, stating only that “stolen funds” were in the amount of \$15,072,474.92. Accordingly, the district court erred by holding that Pucek and Moreno were liable for substantive civil RICO violations under this provision.

C. RICO Substantive Holding: [§ 1962\(c\)](#)
[\[12\] 18 U.S.C. § 1962\(c\)](#) states:

“It shall be unlawful for 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 collec-

tion of unlawful debt.”

To “participate, directly or indirectly, in the conduct of such enterprise’s affairs”, an individual must have some part in the operation or management of the enterprise itself.^{FN37} An enterprise may be “operated” or “managed” by those not employed by the enterprise if they exert control over it as, for example, by bribery.^{FN38}

Davis–Lynch has failed to show that it was entitled to summary judgment with respect to this provision because it has not presented facts to demonstrate that either Moreno or Pucek “operated” or “managed” the enterprise under the instant case. Receiving funds or materials on its own, without more, does not show that Moreno or Pucek actually operated the scheme to obtain those funds or materials. As there is nothing in the Cummings report showing that Pucek or Moreno had any control over the enterprise to embezzle funds from Davis–Lynch, the district court erred in granting summary judgment to Davis–Lynch against Pucek and Moreno or his company for substantive violations of RICO with respect to this provision.

D. RICO Conspiracy Holding: [§ 1962\(d\)](#)

[Subsection \(d\) of § 1962](#) provides for a RICO conspiracy, stating that “[i]t shall be unlawful for any person to conspire to violate any of the provisions of [subsection \(a\), \(b\), or \(c\) of \[§ 1962\]](#).” To demonstrate a civil RICO conspiracy, a claimant must show that: (1) two or more persons agreed to commit a substantive RICO offense, and (2) the defendant knew of and agreed to the overall objective of the RICO offense.^{FN39}

A person need not commit or agree to commit the requisite two or more predicate acts of “racketeering activity” to be held *criminally* liable as a conspirator under RICO.^{FN40} To have standing to establish a *civil* RICO conspiracy, however, a claimant must allege injury from an act that is independently wrongful under RICO.^{FN41} Injury caused by acts that are not racketeering activities or otherwise wrongful under RICO will not establish a viable civil RICO claim.^{FN42}

Here, the district court specifically relied on the Supreme Court’s holding in [Salinas v. United States](#), [522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352](#)

(1997) to support holding Moreno and Pucek liable for a civil RICO conspiracy.^{FN43} Although *Salinas* held that a defendant need only know of and agree to the overall objective of the RICO offense to be held *criminally* liable for a RICO conspiracy, the Supreme Court's subsequent holding in *Beck v. Prupis*, 529 U.S. 494, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) made clear that, “to establish a *civil* RICO conspiracy, a RICO conspiracy plaintiff [must] allege injury from an act that is analogous to an act of tortious character, meaning an act that is independently wrongful under RICO.”^{FN44} (emphasis added). Therefore, Davis–Lynch needed to allege injury from an act on the part of Pucek and Moreno that was independently wrongful under RICO.

Furthermore, the Supreme Court observed in *Beck* that “[t]he specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive violation the defendant is alleged to have committed.”^{FN45} Noting that it was not expressing a view on this issue, the Supreme Court explained that, for example, when a plaintiff alleges a violation of § 1962(a), it would arguably have to allege injury from the defendant's use or investment of income derived from racketeering activity.^{FN46}

As noted, Davis–Lynch failed to meet its burden showing that it was entitled to summary judgment on its substantive RICO claims under 18 U.S.C. § 1962(a) and (c). In addition, Davis–Lynch failed to present evidence or allege in its motion for summary judgment that either Moreno or Pucek engaged in any of the enumerated predicate acts of “racketeering activity” as listed under 18 U.S.C. § 1961(1).^{FN47} As Davis–Lynch has thus failed to establish injury from an act that is independently wrongful under RICO, the district court erred in granting summary judgment to Davis–Lynch with respect to its RICO conspiracy claim.

* * * *

IV. CONCLUSION

The district court's order denying Pucek's withdrawal of the Fifth Amendment privilege against self incrimination is AFFIRMED. The district court's denial of Moreno's withdrawal of the Fifth Amendment privilege against self incrimination is REVERSED and REMANDED. The district court's summary judgment for Davis–Lynch is REVERSED and REMANDED for further proceedings consistent with this opinion.

FN26. *United States v. Caremark, Inc.*, 634 F.3d 808, 814 (5th Cir.2011).

FN27. FED.R.CIV.P. 56(c).

FN28. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FN29. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir.2007).

FN30. *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752 (5th Cir.2006).

FN31. *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 478 (5th Cir.2008).

FN32. *Hibernia Nat'l Bank v. Admin. Cent. Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir.1985).

FN33. 18 U.S.C. § 1964(c).

FN34. See *Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir.1992).

FN35. Section 1961(1) defines “racketeering activity” as constituting a number of enumerated offenses. To establish that a person engages in “a pattern of racketeering activity”, the individual must have committed at least two crimes listed under 18 U.S.C. § 1961(1). 18 U.S.C. § 1961(5).

FN36. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 443 (5th Cir.2000).

FN37. *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

FN38. *Id.* at 184, 113 S.Ct. 1163.

FN39. *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 239 (5th Cir.2010) (citation omit-

ted).

[FN40. *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 \(1997\).](#)

[FN41. *Beck v. Prupis*, 529 U.S. 494, 505, 120 S.Ct. 1608, 146 L.Ed.2d 561 \(2000\).](#)

[FN42. *Id.*](#)

[FN43.](#) Specifically, the district court cited [*Salinas*](#), stating that “a person can be liable for the acts of others engaged in a conspiracy where he/she engages in the conspiracy even by a single act where there is knowledge that a crime has occurred and their conduct furthers the criminal act.”

[FN44. *Beck*, 529 U.S. at 505, 120 S.Ct. 1608.](#) (internal quotation and citation omitted).

[FN45. *Beck*, 529 U.S. at 505, 120 S.Ct. 1608.](#)

[FN46. *Id.* at n. 9.](#)

[FN47.](#) Davis–Lynch contends on appeal that its summary judgment evidence shows that Moreno and Pucek “objectively manifested their intent to directly participate in the RICO enterprise.” It also asserts that a pattern of racketeering activity existed in this case because “Nancy committed numerous acts of bank fraud against Davis–Lynch.” Although it also states in passing that all of the defendants engaged in “a pattern of racketeering activity”, Davis–Lynch does not provide any further detail. In its motion for summary judgment, Davis–Lynch simply advanced that all the defendants engaged in “fraudulent invoice recording, check issuance to themselves and false vendors, false entries into the books and records of Davis–Lynch, and the establishment of companies through assumed named certificates’ filings in various counties of Texas.”