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711 F.3d 106, 163 Lab.Cas. P 36,101, RICO Bus.Disp.Guide 12,331, 20 Wage & Hour Cas.2d (BNA) 583
(Cite as: 711 F.3d 106)

United States Court of Appeals,
Second Circuit.
Dennis LUNDY, on behalf of themselves and all other employees similarly situated, Patricia Wolman, Kelly Iwasiuk, Plaintiffs–Appellants,
Daisy Ricks, on behalf of herself and all other employees similarly situated, Plaintiff,
v.
CATHOLIC HEALTH SYSTEM OF LONG ISLAND INCORPORATED, dba Catholic Health Services of Long Island, Good Samaritan Hospital Medical Center, Mercy Medical Center, New Island Hospital, aka St. Joseph Hospital, St. Catherine of Siena Medical Center, St. Charles Hospital and Rehabilitation Center, St. Francis Hospital, Roslyn, New York, Our Lady of Consolation Geriatric Care Center, Nursing Sisters Home Care, dba Catholic Care Home, James Harden, Defendants–Appellees, Long Island Health Network, Incorporated, Brookhaven Memorial Hospital Medical Center Incorporated, aka Brookhaven Memorial Hospital Medical Center, John T. Mather Memorial Hospital of Port Jefferson, New York, Incorporated, aka John T. Mather Memorial Hospital, South Nassau Communities Hospital, Winthrop–University Hospital, Terry Hargadon, Brian Currie, Kathleen Masiulis, Defendants.

Docket No. 12–1453.
Argued: Oct. 25, 2012.
Decided: March 1, 2013.

Before: JACOBS, Chief Judge, WALKER, Circuit Judge, and O'CONNOR, Associate Justice (retired). [Footnote omitted.]

DENNIS JACOBS, Chief Judge:

Plaintiffs, a respiratory therapist and two nurses, allege that the Catholic Health System of Long Island Inc., a collection of hospitals, healthcare providers, and related entities (collectively, "CHS"), failed to compensate them adequately for time worked during meal breaks, before and after scheduled shifts, and during required training sessions. They sued on behalf of a purported class of similarly situated employees (collectively, "the Plaintiffs") and take this appeal from orders of the United States District Court for the Eastern District of New York (Seybert, *J.*), dismissing the claims asserted under the Fair Labor Standards Act ("FLSA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the New York Labor Law ("NYLL").

We affirm the dismissal of the FLSA and RICO claims for failure to state a claim. We also affirm the dismissal of Plaintiffs' NYLL overtime claims, which have the same deficiencies as the FLSA overtime claims. However, because the district court did not explain why Plaintiffs' NYLL gap-time claims were dismissed with prejudice, we vacate that aspect of the judgment and remand for further consideration of the NYLL gap-time claims.

BACKGROUND

The original complaint, alleging violations of FLSA and RICO, was filed in March 2010 by Daisy Ricks, a healthcare employee, on behalf of similarly situated employees, against the Long Island Health Network, Inc., Catholic Health Services of Long Island, and various related entities. [Footnote Omitted.] The First Amended Complaint, filed in June 2010, substituted Dennis Lundy, Patricia Wolman, and Kelly Iwasiuk as lead plaintiffs, dropped some defendants, and added claims under NYLL and state common law. The twelve causes of action pleaded were FLSA, RICO, NYLL, implied contract, express contract, implied covenants, quantum meruit, unjust

enrichment, fraud, negligent misrepresentation, conversion, and estoppel. This case is one of many similar class actions brought by the same law firm, Thomas & Solomon LLP, against numerous healthcare entities in the region. A dozen of them are currently on appeal before this Court. [Footnote omitted.]

The FLSA claims focused on alleged unpaid overtime. In relevant part, FLSA's overtime provision states that "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). [Footnote omitted.]

It is alleged that CHS used an automatic timekeeping system that deducted time from paychecks for meals and other breaks even though employees frequently were required to work through their breaks, and that CHS failed to pay for time spent working before and after scheduled shifts, and for time spent attending training programs. [Footnote omitted.]

* * * *

DISCUSSION

On appeal, Plaintiffs challenge the dismissal of [1] the overtime claims under FLSA; [2] the gap-time claims under FLSA (and NYLL); [3] the NYLL claims *with prejudice;* and [4] the RICO claims.

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Finally, Plaintiffs challenge the dismissal of their RICO claims, which alleged that CHS used the mails to defraud Plaintiffs by sending them their payroll checks. The district court dismissed the RICO claims, holding that Plaintiffs had not alleged any pattern of racketeering activity.

To establish a civil RICO claim, a plaintiff must allege "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity," as well as "injury to business or property as a result of the RICO violation." *Anatian v. Coutts Bank (Switz.) Ltd.,* 193 F.3d 85, 88 (2d Cir.1999) (internal quotation marks omitted). The pattern of racketeering activity must consist of two or more predicate acts of racketeering. 18 U.S.C. § 1961(5).

The Third Amended Complaint cites the mailing of "misleading payroll checks" to show mail fraud as a RICO predicate act, J.A. 1779, on the theory that the mailings "deliberately concealed from its employees that they did not receive compensation for all compensable work that they performed and misled them into believing that they were being paid properly." *Id.* at 1764–65; *see also id.* at 1765–67 (describing the mailing of checks).[FN12]

FN12. Federal courts are properly wary of transforming any civil FLSA violation into a RICO case. *See, e.g., Vandermark v. City of New York,* 615 F.Supp.2d 196, 209–10 (S.D.N.Y.2009) (Scheindlin, *J.*) ("Racketeering is far more than simple illegality. Alleged civil violations of the FLSA do not amount to racketeering.").

"To prove a violation of the mail fraud statute, plaintiffs must establish the existence of a fraudulent scheme and a mailing in furtherance of the scheme." *McLaughlin v. Anderson,* 962 F.2d 187, 190–91 (2d Cir.1992). On a motion to dismiss a RICO claim, Plaintiffs' allegations must also satisfy the requirement that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b); *see McLaughlin,* 962 F.2d at 191. So Plaintiffs must plead the alleged mail fraud with particularity, and establish that the mailings were in furtherance of a fraudulent scheme. *Id.* Plaintiffs' allegations fail on both accounts.

As to particularity, the "complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Cosmas v. Hassett,* 886 F.2d 8, 11 (2d Cir.1989). Plaintiffs here have not alleged what any particular Defendant did to advance the RICO scheme. Nor have they otherwise pled particular details regarding the alleged fraudulent mailings. Bare-bones allegations do not satisfy Rule 9(b).

Almost more fundamentally, Plaintiffs have not established that the mailings were "in furtherance" of any fraudulent scheme. As the district court observed, the mailing of pay stubs cannot further the fraudulent scheme because the pay stubs would have revealed (not concealed) that Plaintiffs were not being paid for all of their alleged compensable overtime. *See* Special App. 16–17. Mailings that thus "increase[ ] the probability that [the mailer] would be detected and apprehended" do not constitute mail fraud. *United States v. Maze,* 414 U.S. 395, 403, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *see also Cavallaro v. UMass Mem'l Health Care Inc.,* No. 09–40152, 2010 WL 3609535, at *3 (D.Mass. July 2, 2010) (examining very similar claim of mail fraud based on paychecks and ruling that the mailings "made the scheme's discovery more likely"). We therefore affirm the dismissal of Plaintiffs' RICO claims.

CONCLUSION

For the foregoing reasons, we affirm the dismissal of Plaintiffs' claims under FLSA, their NYLL overtime claims, and their RICO claims, but we vacate the dismissal with prejudice of Plaintiffs' gap-time claims under the NYLL, and remand for further consideration in that limited respect.