871 F.3d 199
United States Court of Appeals,
Second Circuit.

U1IT4LESS, INC., d/b/a Nybikergear,
Plaintiff–Appellant,
v.
FEDEX CORPORATION, Fedex Corporate Services, Inc., Fedex Ground Package System, Inc., Defendants–Appellees.

Docket No. 16–533–cv
|
August Term, 2016
|
Argued: March 7, 2017
|
Decided: September 18, 2017

Opinion

LOHIER, Circuit Judge:

U1IT4Less, Inc., d/b/a NYBikerGear ("BikerGear"), an internet retailer of motorcycle gear, accuses FedEx Corporation and its subsidiaries FedEx Corporate Services, Inc. and FedEx Ground Package System, Inc.[1] of fraudulently marking up the weights of packages shipped by BikerGear and overcharging BikerGear for Canadian customs. In doing so, BikerGear claims, FedEx violated the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 13708(b), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). As relevant to this appeal, the United States District Court for the Southern District of New York (Seibel, J.) dismissed the ICCTA claim on the pleadings because, it concluded, the ICCTA is not "directed at" the type of billing dispute at issue in this case. U1IT4Less, Inc. v. FedEx Corp., 896 F.Supp.2d 275, 294 (S.D.N.Y. 2012). Following discovery, the District Court (Forrest, J.) granted FedEx's summary judgment motion and dismissed BikerGear's substantive RICO claims because BikerGear failed to adduce evidence that FedEx Corp. and FedEx Services, the alleged RICO "persons," are distinct from FedEx Ground, the alleged RICO "enterprise." We **AFFIRM**.[2]

BACKGROUND

FedEx Corp. is the public holding company for all of FedEx's wholly-owned operating subsidiaries. FedEx Ground is FedEx's ground delivery service throughout the United States and Canada. FedEx Services provides sales, marketing, and information technology support to the other FedEx subsidiaries. FedEx Corp., which has fewer than 300 employees, does not exercise day-to-day control over FedEx Ground or FedEx Services. Each company operates mostly with its own directors and officers. FedEx Corp. and FedEx Services are headquartered in Memphis, Tennessee, while FedEx Ground is headquartered in Moon Township, Pennsylvania.

Like thousands of other retail companies, BikerGear used FedEx Ground to ship products to its customers in the United States and Canada. The relevant pricing and shipping contracts were executed by BikerGear and FedEx Services, acting as an agent of FedEx Ground and FedEx Corp.

BikerGear alleges that FedEx engaged in two schemes. Under the first scheme (BikerGear calls it the "Upweighting Scheme"), FedEx Ground rated BikerGear's packages at weights higher than their actual weight, resulting in overcharges to BikerGear. Overall, BikerGear alleges that it was overcharged for roughly 150 of the 5,490 packages it shipped via FedEx Ground from July 2008 to August 2010. Under the second scheme (dubbed the "Canadian Customs Scheme"), FedEx Ground is alleged to have improperly charged BikerGear for Canadian customs at least 150 times. FedEx admits that a glitch in its shipping software, now fixed, caused some wrongful customs charges.

After learning of the improper charges, BikerGear (both individually and on behalf of a putative class of FedEx shipping customers) sued all three defendants for violating the ICCTA and New York State's General Business Law. It also asserted civil RICO and RICO conspiracy claims against FedEx Corp. and FedEx Services under 18 U.S.C. § 1962(c) and (d). FedEx moved to dismiss the claims under Rule 12(b)(6).

Judge Seibel dismissed the ICCTA claim because BikerGear failed to allege that FedEx stated one amount on its invoices but charged a different amount. For reasons not relevant to this appeal, Judge Seibel also dismissed BikerGear's RICO conspiracy and state law claims. U1IT4Less, 896 F.Supp.2d at 291–95. Judge Seibel declined, however, to dismiss BikerGear's substantive RICO claims, holding that the defendants' separate incorporation, without more, satisfied RICO's requirement that the "person" alleged to violate 18 U.S.C. § 1962(c) be distinct from the alleged "enterprise." Id. at 287–88.

After discovery the case was reassigned to Judge Forrest, who granted summary judgment to FedEx and dismissed

the remaining RICO claims. U1IT4Less, Inc. v. FedEx Corp., 157 F.Supp.3d 341 (S.D.N.Y. 2016). Contrary to Judge Seibel's earlier ruling on the motion to dismiss, Judge Forrest held that the mere fact of separate incorporation was not enough to satisfy the requirement that the RICO "person" and "enterprise" be distinct. Id. at 351–52. In addition, Judge Forrest concluded, BikerGear's RICO claims required a showing that the separate incorporation of FedEx Ground facilitated the racketeering enterprise allegedly run by FedEx Corp. and FedEx Services. Id. at 350–51. Because the evidence showed only that BikerGear "interacted with FedEx Ground and FedEx Services precisely as it would have had those sister subsidiaries in fact been divisions of a single FedEx corporation," Judge Forrest concluded that there was "no genuine question as to whether FedEx Corp. and FedEx Services are distinct from FedEx Ground for purposes of the RICO claims." Id. at 351–52.

This appeal followed.

DISCUSSION

We first address Judge Seibel's Rule 12(b)(6) dismissal of BikerGear's claim under the ICCTA, followed by Judge Forrest's grant of summary judgment dismissing the RICO claims.

* * * * *

2. RICO

We now turn to BikerGear's effort to revive its RICO claims, which the District Court dismissed after granting summary judgment to FedEx on the ground that BikerGear failed to satisfy RICO's distinctness requirement under 18 U.S.C. § 1962(c).

Section 1962(c) makes it

> 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 collection of unlawful debt.

18 U.S.C. § 1962(c). "[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001).[8] A corporate entity can be sued as a RICO "person" or named as a RICO "enterprise," see18 U.S.C. § 1961(3), (4), but the same entity cannot be both the RICO person and the enterprise, Anatian v. Coutts Bank (Switzerland) Ltd., 193 F.3d 85, 89 (2d Cir. 1999) (citing Bennett v. U.S. Tr. Co. of N.Y., 770 F.2d 308, 315 (2d Cir. 1985)). Though Congress initially enacted the RICO statute to target organized crime, the Supreme Court has since identified the statute's basic purposes as "both protect[ing] a legitimate 'enterprise' from those who would use unlawful acts to victimize it and also protect[ing] the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a vehicle through which unlawful activity is committed." Cedric Kushner, 533 U.S. at 164, 121 S.Ct. 2087 (quotation marks omitted).

BikerGear insists that the mere fact of separate legal incorporation satisfies the distinctness requirement under Section 1962(c). We disagree. As we have explained, "the plain language and purpose of the statute contemplate that a person violates the statute by conducting an enterprise through a pattern of criminality," so "a corporate person cannot violate the statute by corrupting itself." Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 (2d Cir. 2013) (citing Bennett, 770 F.2d at 315). A corporation can act only through its employees, subsidiaries, or agents. So "if a corporate defendant can be liable for participating in an enterprise comprised only of its agents—even if those agents are separately incorporated legal entities—then RICO liability will attach to any act of corporate wrong-doing and the statute's distinctness requirement will be rendered meaningless." In re ClassicStar Mare Lease Litig., 727 F.3d 473, 492 (6th Cir. 2013) (citing Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994)). Accordingly, a plaintiff may not circumvent the distinctness requirement "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant," Riverwoods, 30 F.3d at 344—that consists, in other words, of a corporate defendant "corrupting itself," Cruz, 720 F.3d at 120.

Our prior decisions reflect this common sense principle, rooted in the language of Section 1962(c). In Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., we held that a corporation was not distinct from an alleged enterprise consisting of the corporation and some of its own employees. 30 F.3d at 344–45. In Discon, Inc. v. NYNEX Corp., we held that a parent corporation and its two wholly-owned subsidiaries were not distinct from an

enterprise consisting of those three entities because each entity, like the corporation and its employees in Riverwoods, was "acting within the scope of a single corporate structure" and "guided by a single corporate consciousness." 93 F.3d 1055, 1064 (2d Cir. 1996), vacated on other grounds, 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998). We reaffirmed Discon in Cruz v. FXDirectDealer, LLC, holding that a wholly-owned subsidiary was not distinct from an enterprise consisting of itself and its parent because the allegations showed only that the two entities "operate[d] as part of a single, unified corporate structure." 720 F.3d at 121.

Of course, the principle we announced in Discon and Cruz has its limits and "does not foreclose the possibility of a corporate entity being held liable ... where it associates with others to form an enterprise that is sufficiently distinct from itself." Riverwoods, 30 F.3d at 344. Where, for example, a natural person controls two active corporations that operate independently in different lines of business, receive independent benefits from the illegal acts of the enterprise, and affirmatively use their separate corporate status to further the illegal goals of the enterprise, we will regard each of the three entities as distinct from their coordinated enterprise under Section 1962(c). SeeSecuritron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263–64 (2d Cir. 1995).[9]

With these background principles in mind, and for the following reasons, we reject BikerGear's argument that FedEx Ground, the alleged RICO enterprise, is sufficiently distinct from the alleged RICO persons, FedEx Corp. and FedEx Services, solely by virtue of their separate legal incorporation. First, BikerGear acknowledges the following facts suggesting FedEx's unified corporate structure: (i) FedEx Corp. is a holding company that operates exclusively through wholly-owned subsidiaries, (ii) FedEx's primary business is shipping, and (iii) FedEx Ground runs a domestic ground shipping operation exclusively on behalf of FedEx Corp. Appellant's Br. 13. Second, BikerGear presented no evidence showing that any FedEx entity operated outside of a unified corporate structure guided by a single corporate consciousness. SeeCruz, 720 F.3d at 121. Nor did BikerGear present evidence that FedEx Corp.'s choice of corporate structure was in any way related to (let alone used to further) the racketeering activity alleged in the complaint.[10]CompareDiscon, 93 F.3d at 1064, withSecuritron Magnalock, 65 F.3d at 263–64; seeCedric Kushner, 533 U.S. at 164, 121 S.Ct. 2087.

Viewing the record in the light most favorable to BikerGear, we hold that no reasonable juror could consider FedEx Corp.'s and FedEx Service's participation in FedEx Ground's affairs as anything other than participation in FedEx Corp.'s own ground shipping business. Even if BikerGear could prove a pattern of racketeering activity, it could show at most that FedEx "corrupt[ed] itself." Cruz, 720 F.3d at 120.

It is true, as BikerGear points out, that the three FedEx defendants have different board members and do not participate in each other's day-to-day operations. But at most this shows that the separate legal identity of each entity is genuine under state corporate law. Under Discon and Cruz, merely describing the governance and management structure of FedEx's corporate family is inadequate to satisfy RICO's distinctness requirement. BikerGear must also show that the corporate structure suggests a distinct corporate consciousness related to the alleged racketeering activity.

BikerGear invites us to distinguish Discon and Cruz by observing that the alleged RICO enterprises in those cases were associations-in-fact comprised of all the defendant corporations combined, while the alleged enterprise here is a discrete subsidiary. In our view, this difference is immaterial. Whether a corporate defendant is distinct from an association-in-fact enterprise turns on whether the enterprise is more than the defendant carrying out its ordinary business through a unified corporate structure unrelated to the racketeering activity—not on whether the plaintiff opts to sue all or only some members of the enterprise. CompareDiscon, 93 F.3d at 1064, withSecuritron Magnalock, 65 F.3d at 263–64.

In addition to being compelled by Discon and Cruz, our holding comports with the Supreme Court's decision in Cedric Kushner. There the Court held that the alleged natural RICO "person," the boxing promoter Don King, was distinct from Don King Productions, the alleged RICO corporate "enterprise," of which Don King was president, sole shareholder, and employee. 533 U.S. at 160, 163, 121 S.Ct. 2087. King allegedly conducted the affairs of Don King Productions through a pattern of racketeering activities consisting of fraud and other RICO predicate crimes. Id. at 160–61, 121 S.Ct. 2087. In concluding that King and Don King Productions were distinct, however, the Supreme Court emphasized that its holding was limited to the circumstances in which "a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority."[11] Id. at 166, 121 S.Ct. 2087. As for both corporate employees and corporate entities, the Supreme Court suggested, Congress had in mind the "protect[ion of] the public from those who would run organizations in a manner detrimental to the

public interest." Id. at 165, 121 S.Ct. 2087 (quotation marks omitted). Indeed, the Court described our earlier decisions relating to the distinctness issue (for example, Discon) as "significantly different"—a strong signal that it was not addressing cases in which, as here, a corporate person conducts the affairs of an enterprise consisting only of corporate members of its wholly-owned corporate family. Id. at 164, 121 S.Ct. 2087; see alsoRayv. Spirit Airlines, Inc., 836 F.3d 1340, 1356 (11th Cir. 2016); ClassicStar Mare, 727 F.3d at 492. If, as BikerGear contends, the mere fact of separate incorporation alone were enough to satisfy the distinctness requirement in all RICO cases involving corporate entities as the alleged persons and enterprise, the Court in Cedric Kushner would not have distinguished decisions like Discon. And on the record in this case FedEx does not remotely resemble an organization being run "in a manner detrimental to the public interest." Cedric Kushner, 533 U.S. at 165, 121 S.Ct. 2087.

Finally, we note that in analogous contexts the majority of our sister circuits appear to agree that the fact of separate incorporation alone fails to satisfy RICO's distinctness requirement. SeeBessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 449 (1st Cir. 2000) ("Without further allegations, the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement"); Gasoline Sales, Inc. v. Aero Oil Co., 39 F.3d 70, 73 (3d Cir. 1994); NCNB Nat'l Bank of N.C. v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987), overruled on other grounds byBusby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare, 781 F.3d 182, 203 (5th Cir. 2015); ClassicStar Mare, 727 F.3d at 492; Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 934 (7th Cir. 2003); Fogie v. THORN Americas, Inc., 190 F.3d 889, 898 (8th Cir. 1999); George v. Urban Settlement Servs., 833 F.3d 1242, 1249 (10th Cir. 2016) (citing Brannon v. Boatmen's First Nat. Bank of Okla., 153 F.3d 1144, 1149 (10th Cir. 1998)); Ray, 836 F.3d at 1356–57; cf.Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 141 (D.C. Cir. 1989) (collecting cases), on reh'g in part, 913 F.2d 948 (D.C. Cir. 1990). Some circuit courts have explained what "more" needs to be shown, consistent with Cedric Kushner and the purpose of the RICO statute itself. We see no need to do the same since, for all the above reasons, on this record, we conclude that BikerGear failed to satisfy RICO's distinctness requirement.[12]

CONCLUSION

To summarize: (1) Section 13708 of the ICCTA requires shipping documents to truthfully disclose the charges that a motor carrier in fact assesses, and prohibits a motor carrier from stating it will charge one amount when in reality it charges another; and (2) where, as here, the RICO persons and the RICO enterprise are corporate parents and wholly-owned subsidiaries that "operate within a unified corporate structure" and are "guided by a single corporate consciousness," the mere fact of separate incorporation, without more, does not satisfy RICO's distinctness requirement under Section 1962(c).

We have considered BikerGear's remaining arguments and conclude that they are without merit. The judgment of the District Court is **AFFIRMED**.

[CONCURRING OPINION OMITTED.]

Footnotes

1 In this opinion we refer to FedEx Corporation as "FedEx Corp.," FedEx Corporate Services, Inc. as "FedEx Services," and FedEx Ground Package System, Inc. as "FedEx Ground." We refer collectively to the three companies as "FedEx."

2 The District Court also granted summary judgment to FedEx on BikerGear's class action RICO claims because the shipping contracts contained class action waivers. U1IT4Less, Inc. v. FedEx Corp., No. 11-cv-1713 (KBF), 2015 WL 3916247 (S.D.N.Y. June 25, 2015). As we affirm the dismissal of BikerGear's individual RICO claims, we express no view on whether the District Court properly did so based on the class action waivers.

5 Otherwise, there would be many more than the twenty-five cases or so that have cited Section 13708 in the twenty-two years since the provision was enacted. Cf.Solo, 819 F.3d at 799 ("Neither we nor our sister circuits have yet examined the scope of § 13708.").

8 A RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of which is proven "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

9 One academic survey of the differing circuit law on this issue explains that in our circuit, "where an association in fact enterprise is allegedly comprised of a subsidiary, with or without agents, controlled by a parent corporation," the existence of a single corporate consciousness can be disproven by showing that the alleged criminal activities are distinguishable from the subsidiary's ordinary business. See Laurence A. Steckman, RICO Section 1962(c) Enterprises and the Present Status of the "Distinctness Requirement" in the Second, Third and Seventh Circuits, 21 Touro L. Rev. 1083, 1096–97, 1270, 1281 (2006).

10 For example, there is no record evidence that FedEx Ground's operations were infiltrated for racketeering activity. See Steckman, supra note 9, at 1096.

11 Elsewhere in its opinion, the Supreme Court strove repeatedly to limit and distinguish its holding. Seeid. at 163, 121 S.Ct. 2087 (explaining that the purpose of incorporation is to create a legal entity distinct from "the natural individuals who created it, who own it, or whom it employs"); id. at 164, 121 S.Ct. 2087 (noting that Second Circuit cases involving corporate entities "involved significantly different allegations compared with the instant case"); id. at 165, 121 S.Ct. 2087 ("[I]n [the] present circumstances the statute requires no more than the formal legal distinction between 'person' and 'enterprise' (namely, incorporation) that is present here." (emphasis added)); id. at 166, 121 S.Ct. 2087 (noting that the Court's holding "says only that the corporation and its employees are not legally identical"); id. (holding "simply" that RICO "applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner").

12 The concurrence emphasizes that we do not here endorse the "facilitation" test that the District Court adopted and that some of our sister circuits have imposed. SeeClassicStar Mare, 727 F.3d at 492 ("[C]orporate defendants are distinct from RICO enterprises when they are functionally separate, as when they perform different roles within the enterprise or use their separate legal incorporation to facilitate racketeering activity."); Bucklew, 329 F.3d at 934 (requiring plaintiffs to show that "the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity"); see also David B. Smith & Terrance G. Reed, Civil RICO ¶ 3.07 [2][a] (2017) (explaining that most circuits "hold that a subsidiary corporation cannot constitute the enterprise through which a defendant parent corporation conducts racketeering activity, at least in the absence of exceptional circumstances, such as a showing that the subsidiary was set up solely for the purpose of perpetrating a fraud"). But even if we adopted such a test, we agree with the District Court that BikerGear failed to satisfy it in this case. SeeU1IT4Less, 157 F.Supp.3d at 350–52.

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