

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

HEALTHANDBEAUTYDIRECT.COM,	*	
	*	
Plaintiff	*	
	*	
vs.	*	Case No. RWT 03-CV-3665
	*	
JON SCHULBERG, et al.,	*	
	*	
Defendants	*	

MEMORANDUM OPINION

Pending before the Court is Third Party Defendant Brian Fraidin’s Motion to Dismiss Third Party Complaint [Paper No. 43].¹ The issue has been fully briefed and the Court now rules, no hearing being deemed necessary. See Local Rule 105.6. For the reasons that follow, the Court will grant the motion in part and deny it in part.

BACKGROUND

Brian Fraidin (“Fraidin”) is the Chief Executive Officer, director, and shareholder of Healthandbeautydirect.com (“HBD”), a direct marketing company. Third-Party Compl. ¶ 1. Jon Schulberg (“Schulberg”) is the president of Schulberg MediaWorks, Inc. (“SMW”),² a business that creates, produces and markets infomercials. Countercl. ¶¶ 9 - 11.

In the summer of 1999, HBD, through Fraidin, began discussions with SMW, through Schulberg,

¹ The Court’s analysis of the RICO claim asserted under count seven is also applicable to Plaintiff/Counter-Defendant Healthandbeautydirect.com, Inc.’s Motion to Dismiss Count VII of the Counterclaim [Paper No. 35] and to the Third Party Corporate Defendants’ Motion to Dismiss Third Party Complaint [Paper No. 42]. Accordingly, those motions, by separate order, will be granted.

² For ease of reference, SMW and Schulberg are also referred to as “the Schulberg parties” in this Memorandum Opinion.

concerning the acquisition of SMW by HBD. Id. ¶ 12. During negotiations Fraidin represented that HBD had the capital and business connections to create a team of specialized agencies to efficiently bring an idea to market. Id. ¶ 17. In particular, Fraidin represented that HBD had the support of the Sinclair Broadcast Group (“Sinclair”), one of the largest, privately owned media companies in the country. Id. ¶ 19.

Fraidin represented to the Schulberg parties that as part of the acquisition: (1) SMW and Schulberg would manage the infomercial component and direct marketing efforts of the business. Id. ¶ 21; (2) Schulberg would receive stock in HBD, and that, within two years of working together, HBD would be taken public, increasing the value of Schulberg’s shares. Id. ¶ 22; and (3) Schulberg would become part of HBD’s senior management team. Id. ¶ 24. Fraidin drafted a proposed deal structure in November of 1999, but a written contract was never executed. Id. ¶¶ 26 - 27.

In contemplation of the proposed venture, Schulberg, Fraidin and HBD began working together. SMW continued doing business with others throughout the acquisition period and produced, at cost, for HBD the Deja vu and LandRider infomercials and worked on HBD’s Linda Siedel infomercials and the Fat Free Express and Magnet projects. Id. ¶¶ 34 - 38. The parties also agreed that for a fee, HBD would provide accounting services for SMW. Id. ¶ 30 - 31. In November of 1999, SMW began forwarding its revenues to HBD, who opened a bank account from which it was to pay SMW employee salaries and SMW’s expenses. Id. ¶ 32. In 2000 and 2001, Fraidin also assisted the Schulberg parties in recovering royalties in the amount of \$550,000.00, from HSN Direct Joint Venture, a party unrelated to the action before the Court, for work that the Schulberg parties performed in 1996. Id. ¶ 46.

The dispute between the parties began in late 2002, when the proposed acquisition of SMW by HBD had not yet occurred. Id. ¶ 44. HBD filed suit against SMW and Schulberg to recover sixty

marketing and production videos related to the LandRider infomercials. Compl. ¶¶ 8-9 and 25. SMW and Schulberg responded by filing a Counterclaim against HBD and a Third-Party Complaint against Fraidin and several companies that are under Fraidin's control,³ alleging several state law claims and violations of the Racketeering Influenced and Corrupt Organizations ("RICO") Act.

STANDARD OF REVIEW

The purpose of a motion to dismiss pursuant to Fed.R.Civ.P. 12 (b) (6) is to test the sufficiency of the plaintiff's complaint. See Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). Accordingly, a 12 (b) (6) motion ought not to be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 - 46 (1957). Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of Rule 8 (a), Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R.Civ. P. 8 (a) (2).

In its determination, the court must consider all well-pled allegations in a complaint as true, see Albright v. Oliver, 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. See Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783 (4th Cir. 1999). The court need not, however, accept unsupported legal allegations, Revene v. Charles County Comm'rs, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, Papsan v. Allain, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual

³ The other Third-Party Defendants are Venture Cycle, LLC, VI Holdings, Inc., Ventech, Inc., DMSG Holdings, Inc., Venture Media Limited Partnership and Venture Media Buying Service, LLC.

events, United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979).

DISCUSSION

As detailed below, the Court rejects Fraidin’s challenges to the state law claims asserted by SMW and Schulberg. However, the RICO claim, which the Court will address first, will be dismissed.

I.

The RICO statute creates civil liability for those who engage in a “pattern of racketeering activity.” 18 U.S.C. §§1962, 1964. The Schulberg parties specifically allege that Fraidin violated § 1962 (c), which provides:

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 collection of unlawful debt.

Id. § 1962 (c). The statute defines racketeering activity to include acts of mail and wire fraud. Id. § 1961 (1). A “pattern of racketeering activity” requires “at least two acts of racketeering activity” occurring within a ten year period, 18 U.S.C. § 1961(5), that are related and “amount to or pose a threat of continued criminal activity.” H.J. Inc., v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989). “There are . . . two areas that are examined to determine if a scheme meets the ‘pattern’ requirement, namely relatedness and continuity.” The Maryland Nat’l Capital Bank & Planning Comm’n v. Boyle, 203 F.Supp. 2d 468, 475 (D.Md. 2002) (citations omitted). Predicate racketeering acts are related if they “have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” H.J. Inc., 492 U.S. at 240.

Fraidin argues that the allegations do not sufficiently support the existence of a “‘scheme’ [under the mail and wire fraud statutes] involving a pattern of racketeering/criminal activity that will continue into

the future.” Mot. to Dismiss at 14. The Court agrees.

In their simplest form, the four alleged predicates are based on Fraidin’s “misleading and untrue statements” and promises, made by mail and wire, for the purpose of inducing certain acts from the Schulberg parties, Marketing Products Management, LLC (“MPM”) and Chris Lundin (“Lundin”), the Quantum group, and MotorUp for the purpose of “further[ing] the LandRider business.” Opp. to Mot. to Dismiss at 12. The Schulberg predicate act, which also forms the basis of the Third Party Complaint, stems from negotiations among the parties beginning in the summer of 1999, and carrying through 2002, relating to HBD’s acquisition of SMW. Countercl. ¶¶ 12 and 35. The MPM/Lundin predicate act involves Fraidin’s fraudulent acts from October through December of 2000, through which he induced MPM and Lundin to assign to HBD their rights to the LandRider technology in exchange for a share of the profits from the sales of the LandRider Bike and a Consulting Agreement under which MPM and Lundin would perform consulting services with respect to the LandRider, its market and its technology. *Id.* ¶ 55. Fraidin allegedly misrepresented that HBD had the support of industry leaders, including Sinclair and Schulberg, whom Fraidin falsely represented as being a member of HBD’s senior management team. *Id.* ¶ 56.

The predicate act involving the Quantum group stems from Fraidin’s purchase in bankruptcy of E4L, Inc., a company consisting of a group of marketing companies located on the Asian Pacific Rim identified as the Quantum group (herein “the Quantum group”). *Id.* ¶ 60. The Schulberg parties allege that through certain fraudulent representations made by mail and wire, including that “Schulberg and Lundin were his partners,” Fraidin obtained the support of the bankrupt company’s management team; thus, securing his purchase of the company in bankruptcy. *Id.* ¶¶ 61 - 62. Lastly, the allegations involving MotorUp are that: (1) MotorUp had a distribution contract with the company purchased by Fraidin in

bankruptcy; (2) MotorUp terminated that contract in November of 2001; and (3) “[n]otwithstanding termination of the distributorship agreement, . . . , Fraidin has caused MotorUp products, both legitimate and counterfeit, to be sold in . . . violation of the property rights of MotorUp” Id. ¶ 72.

These predicate allegations do not describe a “pattern of racketeering activity.” While “[t]here is no mechanical formula to assess whether the pattern requirement has been satisfied; [such] is a commonsensical, fact-specific inquiry.” Eplus Tech., Inc. v. Aboud, 313 F.3d 166 (4th Cir. 2002) (citing H.J. Inc., 492 U.S. at 237-38). The Fourth Circuit has stressed that it was Congress’ intent that RICO “serve as a weapon against ongoing unlawful activities whose scope and persistence poses a special threat to social well-being,” and that what constitutes a RICO pattern of racketeering activity is “a matter of criminal dimension and degree.” Int’l Data Bank Ltd. v. Zepkin, 812 F.2d 149, 155 (4th Cir. 1987). This circuit has also been particularly cautious “about basing a RICO claim on predicate acts of mail and wire fraud” as “it will be the unusual fraud that does not enlist the mails and wires in its service at least twice.” Al-Abood v. El Shamari, 217 F.3d 225, 238 (4th Cir. 2000) (citations omitted); see also Kann v. United States, 323 U.S. 88, 94 (1944) (“The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.”). Moreover, “[t]he target of RICO is not sporadic activity.” Zepkin, 812 F.2d at 154 (quoting S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)).

Here, the Schulberg and Lundin allegations bear on contractual arrangements with little or no relation. Schulberg’s production of the infomercial for the LandRider, the rights of which Fraidin fraudulently secured from Lundin, does not encapsulate Schulberg’s and Fraidin’s business relationship. That is, the LandRider was but one of several projects that Schulberg produced and worked on for Fraidin.

Likewise, neither Fraidin's acquisition of the Quantum group nor the MotorUp matter bears any relationship to the scheme which allegedly stems from 1999, when Fraidin began discussions with Schulberg for the acquisition of SMW by HBD. Fraidin's purchase of the Quantum group appears to be sporadic activity, which is not the target of RICO. There are no facts alleged that Fraidin caused or influenced the bankruptcy of the Quantum group for the purpose of furthering the LandRider business. And, while the MotorUp matter may constitute commercial fraud, it does not support a "pattern of racketeering activity" as alleged by the Schulberg parties.

II.

Turning to the state law claims, a suit in equity for an accounting may be maintained when the remedies at law are inadequate. P.V. Props., Inc. v. Rock Creek Vill. Assocs. Ltd. P'ship, 77 Md. App. 77, 89, 549 A.2d 403 (1988). Specifically, an accounting is proper where there is a confidential or fiduciary relation between the parties, and a duty rests upon the defendant to render an account. Id. A confidential relationship exists in every case where confidence is reposed by one person and accepted by the other. Id. Under the circumstances alleged, where HBD and Fraidin maintained and exclusively controlled an account containing SMW's revenues, and from which HBD paid SMW's expenses, an accounting, as alleged in Count I, is appropriate. See Countercl. ¶ 31 (based on the representations by Fraidin, "beginning in . . . November 1999, SMW began to forward all its revenues to HBD").

A constructive trust, which contrary to Fraidin's argument Maryland recognizes as a cause of action, see Jahnigen v. Smith, 143 Md. App. 547, 558, 795 A.2d 234 (2002), is sufficiently pleaded where a claim alleges that property has been acquired by fraud, misrepresentation, or other improper method, or where the circumstances render it inequitable for the party holding title to retain it. Wimmer v. Wimmer,

287 Md. 663, 668, 414 A.2d 1254 (1980). In their claim for constructive trust (Count II), SMW and Schulberg sufficiently allege a right to their revenues, including the royalties received in arbitration from the HSN Direct Joint Venture, which HBD and Fraidin managed beginning in November of 1999, and now allegedly “improperly and wrongfully retain[.]” *Id.* ¶ 38.

Next, Fraidin challenges the claims for quantum meruit, unjust enrichment and promissory estoppel (Counts III, IV and the first Count V, respectively), solely on the basis that HBD “would have been the ‘contracting’ party,” not Fraidin individually. Mot. to Dismiss at 5. A motion to dismiss ought not be granted unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45 - 46 (1957). Fraidin is named in this action not only in his “individual” capacity, but in his capacity as a servant, agent, employee or representative of HBD. Countercl. ¶ 1. SMW and Schulberg allege rendering services to Fraidin, in addition to HBD, through their work on the Deja Vu, LandRider and Linda Seidel infomercials, as well as the Fat Free Express and Magnet projects. Countercl. ¶¶ 91, 92, 96 and 97. Fraidin has not articulated any arguments as to why he could not also be a “contracting” party. Thus, the Court is unconvinced that these claims, as Fraidin asserts, “can only be brought against HBD.” Mot. to Dismiss at 5.

The Court is also unpersuaded by Fraidin’s challenge to the claim for negligent misrepresentation (the second Count V).⁴ Fraidin maintains that the Schulberg parties “alleged no duty individually owed by [him] to them” and fail to identify any false statements. Mot. to Dismiss at 8. To state a claim for negligent misrepresentation a plaintiff must assert that: (1) the defendant, owing a duty of care to the plaintiff,

⁴ The Third-Party Complaint identifies the claims under promissory estoppel and negligent misrepresentation as counts five.

negligently asserts a false statement; (2) the defendant intends that its statement will be acted upon by the plaintiff; (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury; (4) the plaintiff, justifiably, takes action in reliance on the statement; and (5) damages. See Miller v. Fairchild Indus., Inc., 97 Md. App. 324, 345 - 46, 629 A.2d 1293 (1993).

Considering the well-pled allegations in a complaint as true, as the Court is required to do in the context of this motion, see Albright v. Oliver, 510 U.S. 266, 268 (1994), the Court is satisfied that, at the least, Fraidin owed the Schulberg parties a duty arising from his “extensive negotiations” which resulted in HBD’s agreement to provide to SMW “accounting and financial management services.” Countercl. ¶¶ 105 - 106 (“HBD and Fraidin negligently asserted that: [] they would, for a fee, provide accounting and financial management to SMW during the transition period prior to the acquisition of SMW.”).

Fraidin’s challenges to the claim for intentional misrepresentation (Count VI) are also unavailing. He summarily argues “that any statements made by [him] were made in his capacity as an officer of HBD.” Mot. to Dismiss at 9. As the Court has already observed, Fraidin offers no legal authority in support of the contention that he is an improper party because “any statements by [him] were made in his capacity as an officer of HBD.” Id. While there may be a basis in law for Fraidin’s contention, he has not identified any.

He also maintains that because the “alleged statements were merely promissory in nature [such] cannot sustain a cause of action in fraud.” Mot. to Dismiss at 9. While Fraidin correctly states the general rule that “[a] fraud action can only be predicated on a misrepresentation of past or existing fact,” see Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 631 (4th Cir. 1977), he ignores that fraud may be established by demonstrating that the defendant never intended to perform the promises he made. See First Union Nat’l

Bank v. Steele Software Sys. Corp., 154 Md. App. 97, 134, 838 A.2d 404 (2003) (stating, “[a]lthough a cause of action for fraud may not rest on a statement about future events, a person may commit fraud if he . . . enters an agreement to do something, without the present intention of performing”).

Lastly, the Court disagrees with Fraidin’s contention that the alleged damages are “too tenuous and speculative to sustain a claim.” Mot. to Dismiss at 9. For instance, the royalties received by SMW in arbitration from HSN Direct Joint Venture in the amount of \$550,000.00, are a sum certain. As alleged, “those funds were paid by wire transfer . . . or by checks.” Countercl. ¶¶ 52 and 114. In addition, the damages claimed for services relating to the Schulberg parties’ work on the infomercials is quantifiable.

CONCLUSION

For the reasons stated above, Third Party Defendant Brian Fraidin’s Motion to Dismiss Third Party Complaint, by separate order, will be granted to the extent that the RICO claim, Count VII of the Third-Party Complaint, will be dismissed.

9/1/04
Date

/s/
ROGER W. TITUS
UNITED STATES DISTRICT JUDGE