

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5261

MARILYN RITTER, Bankruptcy Trustee,
Substitute for TOMMY H. CONDREY,

Plaintiff-Appellant,

versus

RICHARD K. HOWARD, JR., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(CV-89-0953)

(July 5, 1994)

Before JONES and DeMOSS, Circuit Judges, SCHWARTZ,* District
Judge.

EDITH H. JONES, Circuit Judge:**

Tommy Condrey appeals after his second jury trial in
this civil RICO case. Both trials resulted in large verdicts
favorable to him, and both times the trial court refused to enter
judgment on the verdict, granting a motion for new trial the

* District Judge of the Eastern District of Louisiana, sitting by
designation.

**Local Rule 47.5 provides: "The publication of opinions that have no
precedential value and merely decide particular cases on the basis of well-
settled principles of law imposes needless expense on the public and burdens on
the legal profession." Pursuant to that Rule, the Court has determined that this
opinion should not be published.

first time around and a judgment as a matter of law following the second trial.

Condrey's case was constructed despite many and complex conceptual and factual difficulties. We will not dwell on the niceties of such issues, nor will we attempt to rehash the involved relationships among Condrey, his firms, and the defendants. Even if Condrey could succeed on all the other issues raised on appeal, we are persuaded that the trial court properly held that he did not prove that the alleged RICO enterprise -- consisting of himself, Richard Howard, Louisiana Fiber Corp., Howard Gin, Inc., and Dixie River Cotton Products -- engaged in a "pattern of racketeering activity."

DISCUSSION

This court reviews de novo a district court's judgment as a matter of law pursuant to Fed. R. Civ. P. 50. See Omnitech Int'l, Inc. v. The Clorox Co., 11 F.3d 1316, 1322-23 (5th Cir. 1994). A grant of judgment as a matter of law is appropriate when, after considering all of the evidence presented at trial in the light most favorable to the non-moving party, the evidence points so strongly and overwhelmingly in the moving party's favor that reasonable jurors could not have reached a contrary conclusion. See id.

A.

Racketeer Influenced and Corrupt Organizations (RICO)

As a general matter, all Racketeer Influenced and Corrupt Organizations ("RICO") claims require proof of (1) a person engaging in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. See 18 U.S.C. § 1962; see also In re Burzynski, 989 F.2d 733, 741-42 (5th Cir. 1993); Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453, 1461 (5th Cir. 1991).

Our analysis regarding whether Condrey established a sufficient pattern of racketeering activity -- a required element of a successful civil RICO action -- is dictated by H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S. Ct. 2893 (1989). In H.J. Inc., the Court concluded that although the RICO statute provides for as few as two predicate acts to support a finding of a pattern of racketeering activity, see 18 U.S.C. § 1961(5), it is clear that two predicate acts without more does not.

[T]he term "pattern" itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of continuity plus relationship which combines to produce a pattern. . . . [T]o prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.

H.J. Inc., 492 U.S. at 239 (emphasis in original; quotation marks and citations omitted).

B.

Alleged Predicate Acts

Viewing the evidence in the light most favorable to Condrey, the facts necessary to this discussion are that in November of 1985, Tommy Condrey and Richard Howard formed a business, Dixie River Cotton Products, Inc. ("Dixie River Cotton Products" and "DRCP"), for the purposes of buying, selling, storing, and brokering cottonseed. Both Condrey and Howard had worked in the cotton industry for several years and over the years had become associated with various cotton-related businesses. Neither Condrey nor Howard could afford to make any capital investment into the newly formed company, so they decided to use assets and manpower associated with the other businesses with which they were associated. Condrey brought this lawsuit alleging that Howard used Dixie River Cotton Products as well as the other businesses with which Howard was associated -- Louisiana Fiber Corp. and Howard Gin -- to steal from Condrey in violation of RICO law.¹

Condrey claims sundry events that took place among the defendants -- with Howard always at the center -- constitute various predicate acts of mail fraud, wire fraud, and theft of goods in interstate commerce and, when taken together, establish a pattern of racketeering activity for purposes of RICO law. We disagree.

¹ Richard Howard's attorney, Leo Miller, was also a named defendant. However, he settled with Condrey three days into the second trial.

1. Port Authority Lease

Condrey first alleges that Howard's involvement in a warehouse lease amounted to a predicate act of mail fraud. See 18 U.S.C. § 1961(1)(B). The elements for RICO mail fraud are (1) a scheme to defraud by means of false or fraudulent representation, (2) intrastate or interstate use of the United States mail to execute the scheme, (3) the use of the mail by the defendant connected with the scheme, and (4) actual injury to the plaintiff. See Burzynski, 989 F.2d at 742.

The evidence at trial indicated that in the spring of 1986, Howard and Condrey learned that the local Port Commission was seeking bids on a 20-year lease for a warehouse in Lake Providence, Louisiana. They decided that their corporation Dixie River Cotton Products would make a bid for the warehouse. While Condrey was traveling out of the city, Howard telephoned him to keep him apprised of the progress of the bid. The bid submitted by Howard and Condrey was mailed to and accepted by the Port Commission in July of that same year. However, when the lease was drawn up by the Port Commission, it indicated that defendant Louisiana Fiber Corp. d/b/a Dixie River Cottonseed Products (not Dixie River Cotton Products) was the holder of the lease.² Their bid on the port lease was published in the Banner-Democrat, the official newspaper of East Carroll Parish, and was sent through the mail to all subscribers on August 17, 1986 and September 4, 1986. (Tr. 91,

² Defendant Louisiana Fiber is Richard Howard's closely-held corporation. Dixie River Cottonseed Products was a nonexistent business.

758). Condrey argues that this establishes several instances of mail fraud based on (1) the letters sent which misrepresented the name of the lessee and (2) the mailing of the local paper reporting the bid to its subscribers.

The district court concluded that Howard's conduct in taking the lease in the name of the wrong corporation was mail fraud because Howard used the U.S. mail in effectuating this fraud. The district court stated that there was

an act of fraud culminating in placing of the lease of the warehouse from the Lake Providence Port Authority [which] was accomplished through the sending of letters in July, 1986, misrepresenting the name of the lessee and resulting in a lease to Louisiana Fiber, d/b/a Dixie River Cottonseed Products, rather than [Dixie River Cotton Products], on August 1, 1986.

Ruling on Post Trial Motions, p. 14. In brief to this court, Condrey does not indicate where the evidence supporting the district court's finding can be found, but after review of the record, this court does find some evidence that two letters were sent in July of 1986 to accomplish this fraud.³ (Tr. 679-80; plaintiff's exhibits 4 and 69). Each mailing in furtherance of a scheme to defraud constitutes individual acts of mail fraud. See United States v. McClelland, 868 F.2d 704, 706 (5th Cir. 1989). Therefore, for purposes of this court's opinion, we will assume without deciding that Condrey has established two acts of mail fraud.

³ Although the both letters were not sent by Richard Howard himself, it is not necessary to a claim of mail fraud that the defendant himself use the mails. Rather, the defendant need only have caused the mail to be used or reasonably foreseen that such use of the mail may result from his conduct. See United States v. McClelland, 868 F.2d 704, 707 (5th Cir. 1989).

Condrey also claims that the placing of the Port Authority lease was mail fraud because the bid on the lease and the acceptance of the lease were reported in the Banner-Democrat, a publication mailed to its subscribers. We disagree.

It is essential to Condrey's contention that he establish that the use of the mails was for the purpose of executing the fraudulent scheme. See id. (relying on United States v. Maze, 414 U.S. 395 (1974)). The thing mailed must be an integral part of the execution of the scheme. See id. (quoting United States v. Kent, 608 F.2d 542, 546 (5th Cir. 1979)). The fact that the local newspaper reporting the bid was mailed to its subscribers through the U.S. mail does not establish a relationship sufficiently close to the execution of Howard's scheme. This activity does not constitute mail fraud within 18 U.S.C. § 1341 and accordingly is not a predicate act for purposes of RICO law.

2. Walden Loaders

The second predicate act that Condrey alleges is mail fraud related to the purchase of three Walden front end loaders by Dixie River Cotton Products. In August of 1986 Howard and Condrey decided to purchase the loaders for use at Dixie River Cotton Products. In charge of this purchase, Howard -- unbeknownst to Condrey -- arranged for title to the loaders to be placed in H & W Warehouse instead of Dixie River Cotton Products.⁴ The down payment for the loaders was drawn on the InterFirst Bank of

⁴ H & W Warehouse is another of Richard Howard's companies. H & W Warehouse was not a defendant in this case.

Harlingen, Texas (Tr. 111-12), and the mortgage papers were mailed from Howard's attorney Leo Miller in Lake Providence, Louisiana to Harlingen, Texas. (Tr. 682-83) Condrey also alleges that later payments on the loaders were also sent through the mail.

The district court assumed for purposes of its opinion that the various mortgage papers and payments for these loaders were sent through the United States mail, although evidence to this effect was not made clear at trial. After a thorough review of the record, there is evidence -- although meager -- to support Condrey's contention that the mortgage papers for these loaders were sent through the U.S. mails. (Tr. 682-83). And viewing the evidence in the light most favorable to Condrey, we assume -- again without deciding -- that this establishes one act of mail fraud.

However, we cannot conclude as the district court did that Condrey established mail fraud with regard to the payments made on these loaders. We simply have found no evidence to support this conclusion, and in brief to this court Condrey does not direct us to evidence presented at trial establishing use of the mails in this regard.

3. Agway

Condrey also asserts that Howard's behavior in connection with Agway -- a customer of Dixie River Cotton Products -- amounted to a predicate act. The evidence presented at trial suggests that Agway, a Pennsylvania company, arranged to buy cottonseed from Dixie River Cotton Products. Howard was involved in filling the barges used to transport the cottonseed to Agway's facilities.

Condrey claims that Howard overstated the weight of the barges carrying the cottonseed which resulted in Dixie River Cotton Products charging Agway for cottonseed that was never received.

At trial Condrey presented evidence establishing that Agway did in fact wire money to Dixie River Cotton Products in connection with this scheme. (Tr. 145) Based on this evidence, the district court ruled that this conduct by Howard amounted to the predicate act of wire fraud, see 18 U.S.C. § 1961(1)(B), because it was foreseeable and expected that Agway would wire funds to Dixie River Cotton Products upon receipt of the grossly exaggerated statements.⁵

4. Hycoloader Building

The next alleged predicate act relates to the fraudulent renovation and transfer of title documents of a hycoloader building. Condrey contends that Howard Gin⁶ owned a hycoloader building -- a large building used to store cottonseed -- that Howard and Condrey agreed to purchase on behalf of Dixie River Cotton Products. The building was purchased solely with Dixie River Cotton Products' cottonseed money. Although upon sale of the building Condrey and Howard agreed that the title was to be placed in the name of Dixie River Cotton Products, in August of 1986 the

⁵ This transaction was not mail fraud because Dixie River Cotton Products used Federal Express, not the United States mail, to send out its invoices.

⁶ Howard Gin was owned by Howard's father Keener Howard. Richard Howard served as vice president and manager of Howard Gin.

title documents to the building were in fact placed in the name of Howard and his wife Judith.

The district court did not find these activities to constitute a predicate act. We agree. This alleged fraudulent activity does not amount to mail fraud, wire fraud, or any other offense sufficient to constitute a predicate act. Interestingly enough, in brief to this court Condrey himself concedes that this is not a predicate act, but merely demonstrative of a pattern of fraudulent activity engaged in by Howard. See Blue brief at 10 n.8.

5. Shortweighing Scheme

Condrey also claims that Howard engaged in a shortweighing scheme that constitutes a predicate act of theft from an interstate shipment. See 18 U.S.C. § 1961(1)(B). The evidence presented at trial showed that at some point after becoming involved with Howard in Dixie River Cotton Products, Condrey discovered that a significant amount of seed was missing from the hycoloader building. In response to this missing seed problem, Condrey instituted a new weight ticket procedure. Under the new procedure, every truck delivering seed to Dixie River Cotton Products was weighed before and after delivery of the seed, and the weight ticket was stamped by machine. The difference between the full and tare -- or empty -- weights indicated the weight of the seed delivered.

Condrey contends that after this policy was instituted, Dixie River Cotton Products had problems with the tickets

reflecting deliveries from Howard Gin. Condrey contends that these tickets reflected deliveries of cottonseed to Dixie River Cotton Products that were never made and resulted in Dixie River Cotton Products paying Howard Gin for cottonseed DRCP never received.

The district court ruled that this alleged shortweighing scheme did not constitute a predicate act because Condrey did not present any evidence of mail fraud as to most of them and there was no theft of an interstate shipment. We agree. After reviewing the record, the evidence presented at trial shows no evidence of theft, as opposed to misstatements of the amounts of seed being conveyed. The misstatements are not theft of goods moving in commerce.⁷

Condrey also contends that the transactions with Farmers Cottonseed, which allegedly involved shortweighing, violated the mail or wire fraud statutes. The sufficiency of evidence that Howard or Farmers transacted any of their business by mail is hotly disputed. The evidence of the use of the mails is vague at best. But for purposes of this appeal, we shall assume that some use was made of the mails.

6. Economic Development Loan

Dixie River Cotton Products was a potential beneficiary of an economic development loan granted by the East Carroll Parish Police Jury. (Tr. 435). The procedure for becoming a beneficiary of this economic development loan is that any entity desiring the

⁷ We find unpersuasive Condrey's argument that the shortweighing was equivalent to loading the trucks with seed and then removing the seed, thereby linking the seed to interstate commerce. There was no evidence to this effect at trial and we are not persuaded by such an inventive argument here.

loan -- in this case Dixie River Cotton Products -- would submit a plan to the police jury indicating how the entity's receipt of this loan would create more jobs in the community. In a letter applying for the loan, Dixie River Cotton Products indicated that it held the lease for the Port Authority building. However, as discussed supra, the lease was actually in the name of Louisiana Fiber. Subsequently, the police jury was informed by Howard's attorney Leo Miller that the Port lease was actually in the name of Louisiana Fiber.

An additional requirement to receiving the loan was that Howard had to file non-collusion affidavits from all of the companies with whom the loan recipient anticipated working. Upon learning of this requirement, Howard requested that the police jury withdraw DRCP's application. The loan was awarded to another company, and Howard did not receive any monies from the state of East Carroll Parish in connection with this activity.

Condrey alleges that this establishes a predicate act. The district court found this to be without merit. We agree. We fail to see how this conduct constitutes a viable predicate act for purposes of RICO.

C.

No Pattern of Racketeering Activity

Condrey has established, at most, a few predicate acts -- two instances of mail fraud relating to the Port Authority lease, one act of mail fraud relating to the Walden loaders, wire fraud concerning sales to Agway, and some type of mail fraud with

respect to Farmers Cottonseed.⁸ However, these predicate acts without more are insufficient to establish a pattern of racketeering activity. Condrey's claim is lacking proof of a pattern.

As the Court stated in H.J. Inc., "there is something to a RICO pattern beyond simply the number of predicate acts involved." H.J. Inc., 492 U.S. at 238 (emphasis in original). The predicate acts must have a "relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.'" Id. A pattern is not established by proving, as Condrey has here, sporadic, opportunistic criminal conduct. See id. at 239. Establishing a pattern requires showing (1) a relationship between the predicate acts and (2) a threat of continuing criminal activity. See id.

The relationship among the predicate acts necessitates a showing that the predicate acts "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." Id. at 240 (relying on 18 U.S.C. § 3575(e)). The predicate acts allegedly proved in this case are of two types: (1) those that divested Dixie River Cotton Products of property that should have belonged to it and (2) those that cheated two customers of DRCP and its successors. There is no

⁸ Even if we were persuaded that all of Condrey's alleged acts constituted predicate acts for RICO, in this case that would not be enough. As discussed infra, [i]t is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.'" H.J. Inc., 492 U.S. at 238.

relationship between these two types of dishonest dealing which had different victims, purposes, results, and methods of commission.

Moreover, Condrey fails to satisfy the second requirement of establishing a pattern because there is no threat of continuing criminal activity. The Court in H.J. Inc. indicated three ways that continuity could be demonstrated: (1) showing that the related predicates involve a distinct threat of long-term racketeering activity; (2) showing that the predicate acts are a part of an ongoing entity's -- usually an entity that exists for a criminal purpose -- regular way of doing business; or (3) showing that the predicates are a regular way of conducting a defendant's ongoing legitimate business. See id. at 242-43.

The predicate acts whose existence we have confirmed or assumed do not threaten long-term racketeering activity, and Condrey makes no claim that they do. Neither does proof of these predicate acts establish the alleged entity's regular way of doing business. The three predicate activities relating to DRCP occurred during the summer of 1986. The Agway and Farmers Cottonseed transactions occurred in two separate years and involved different business arrangements with the customers. The Farmers Cottonseed transaction took place only because DRCP failed to stay in business. These transactions do not reflect continuity so much as a lack of continuity in the methods by which Howard and Condrey did business and their conspicuous lack of success at posing a continuing threat. Predicate acts extending over a few weeks or months and threatening no future criminal conduct cannot satisfy

RICO's continuity requirement. "Congress was concerned in RICO with long-term criminal conduct." Id. at 241-42.

CONCLUSION

Civil RICO law provides extraordinary remedies in response to egregious conduct and is concerned with long-term criminal conduct. It is not a weapon to be employed indiscriminately. It is evident that Richard Howard had his hands in a lot of different pots and, to mix metaphors, that a lot of fishy business was going on for which he and Condrey have paid the price. Even so, RICO liability is not suitable against the sporadic, scattered misdeeds of Richard Howard.

For these reasons, we **AFFIRM** the judgment of the district court.