IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5624

Summary Calendar

DONALD GENE HENTHORN,

Plaintiff-Appellant,

versus

LEON V. LASHOMB, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CA-188)

(September 22, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

In the early 1980's Donald Henthorn founded clubs in Louisiana and Texas for former members of the Central Intelligence Agency's "Air America" organization. He alleges that club members wrongfully refuse to return money and property he gave the Texas club. He filed a complaint and an amended complaint against club members alleging violations of the civil provisions of the

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Racketeer Influenced and Corrupt Organizations Act (RICO), copyright and trademark infringement claims, and pendent state law claims. The district court granted the defendants' motion for summary judgment and dismissed the RICO and copyright and trademark infringement claims with prejudice, and dismissed the pendent state law claims without prejudice.

Henthorn challenges the district court's handling of his case in four ways. First, he argues that the district court erred because it did not strike from the record the untimely answer filed on behalf of the Air America Association, Inc. and the supplemental answer filed on behalf of the remaining defendants. The district court did not explicitly rule on the defendant's motion challenging the timeliness of the defendants' pleadings but did deny Henthorn's motion for a default judgment filed contemporaneously with the motion to strike.

We review a district court order striking pleadings for abuse of discretion. See Frame v. S-H, Inc., 967 F.2d 194, 203 (5th Cir. 1992). The challenged pleadings were filed after defendants' first motion for summary judgment and raised no new defenses. Henthorn was not prejudiced and the district court did not abuse its discretion.

Second, Henthorn argues that the district court should have stricken from the record defendants' supplemental motion for summary judgment because several of his duplicative pleadings were stricken from the record. He did not raise this issue in the district court. As the claim does not raise a purely legal

question, which would result in manifest injustice if we failed to consider it, we do not address it. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

Third, Henthorn argues that he was denied due process because the magistrate refused to require the defendants to comply with his discovery requests. He filed a motion to compel the defendants to cooperate in discovery and the defendants filed a motion for a protective order alleging that the discovery requests were untimely and were designed to harass the defendants and not to lead to relevant admissible evidence. The magistrate ordered the defendants to answer only those questions potentially relevant to the subject matter of the action. We find no abuse of discretion under these circumstances. See Dukes v. South Carolina Ins. Co., 770 F.2d 545, 549 (5th Cir. 1985).

Finally, Henthorn contends that the district court erred in granting summary judgment for the defendants on his RICO and copyright and trademark infringement claims.

As background to analyzing this contention, we note that many of the documents he submitted as summary judgment evidence were unverified copies of receipts, letters, checks and invoices. Unsworn documents are not proper summary judgment evidence. See Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987).

Henthorn's proper summary judgment evidence established that he incorporated the "Air America Club, Inc." as a nonprofit social club in Louisiana; that with the assistance of defendants Lashomb

and Keele he incorporated a second club in Texas and provided funds and property to support the Texas corporation; that the defendants refused to repay Henthorn for the money he "loaned" to the Texas corporation, reimburse him for his expenses related to the operation of the corporation, or return the property he "loaned" to the corporation; that LaShomb eventually returned some of the office equipment but it was not in working condition; that after a 1985 criminal conviction Henthorn was given a lifetime membership in the Texas club, which was revoked following a 1988 criminal conviction; that the defendants changed the name of the Texas corporation to "Air America Association, Inc." and changed the bylaws and charter of the corporation without his knowledge; and that the defendants used the telephone and mails to solicit funds for the corporation but allegedly diverted the funds for their personal use.

The district court correctly granted summary judgment on Henthorn's RICO claims. One element of a civil RICO claim is proof of a pattern of racketeering activity. In re Burzynski, 989 F.2d 733, 741 (5th Cir. 1993). Henthorn alleges that the defendants used the mail and telephone to solicit funds in the name of the Texas corporation but diverted these funds for their personal use. No competent summary judgment evidence supports these claims. To the extent that Henthorn alleged that the defendants committed other illegal acts, such as changing the name and bylaws of the corporation without his consent, these allegations do not

constitute "racketeering activity" as defined in the statute. See 18 U.S.C. § 1961(1).

In response to the magistrate judge's questionnaire, Henthorn also alleged that the defendants breached their fiduciary duty to the Texas corporation, wasted corporate assets, and mismanaged the corporation. However, Henthorn's complaints states that he is not bringing a derivative action on behalf of the corporation. He thus lacks standing to bring a civil RICO claim for injuries to the corporation. See Leach v. FDIC, 860 F.2d 1266, 1273-74 (5th Cir.), cert. denied, 491 U.S. 905 (1988); Whalen v. Carter, 954 F.2d 1087, 1091-92 (5th Cir. 1992).

The district court also correctly granted summary judgment on Henthorn's claims of copyright infringement. A prima facie case of copyright infringement requires proof of the plaintiff's ownership of copyrighted material and that the defendant copied that material. Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1462 (5th Cir.), cert. denied, 498 U.S. 952 (1990). Henthorn has not provided summary judgment evidence establishing that he had a copyright or that the defendants copied his material. To the contrary, Henthorn submitted an unverified document indicating that his attempt to get a copyright failed.

We also affirm the district court's grant of summary judgment on Henthorn's claims of trademark infringement. A cause of action for the infringement of a registered trademark exists where a person uses:

> (1) any reproduction, counterfeit, copy or colorable imitation of a mark; (2) without the registrant's

> consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive.

Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1009-10 (5th Cir.), cert. denied, 423 U.S. 868 (1975). A cause of action exists for the infringement of an unregistered trademark if the alleged unregistered trademarks used by the plaintiff are so associated with its goods that the use of the same or similar marks by another company constitutes a representation that its goods come from the same source. Id. at 1010. Henthorn provided no summary judgment evidence establishing that he had either a registered or unregistered trademark, or that the defendants used his mark to create the impression that their goods were associated with him.

AFFIRMED.