IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2537
Summary Calendar

TORTUGA BAY CORPORATION, ET AL.,

Plaintiffs,

JOSE M. GARZA, ET AL.,

Plaintiffs-Appellants,

versus

ARNOLD DEVELOPMENT CO., ET AL.,

Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-87-03597)

(April 7, 1994)

Before REAVLEY, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:*

This RICO claim has been rejected at the pleading stage by the district court. We affirm.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Several investment minded individuals sought to obtain financing to build a Mexican theme shopping center to be called "El Mercado Del Sol" in a depressed area of Houston. On July 6, 1983, a memorandum of understanding was executed by defendants City of Houston, Encore Development Corporation, Charles Arnold, James Knighton, and Dudley Webb. The city submitted an application to the United States Department of Housing and Urban Development (HUD) for an Urban Development Action Grant, and agreed to advance the developers $500,000 from a community grant, secured by an assignment of rent from the project. The city also agreed to assist the project in acquiring nearby land to be used for a municipal park.

In May, HUD formally rejected the grant application. Encore, Knighton and Webb assigned all their interests in the project to Arnold in June. Arnold subsequently organized the "El Mercado, Limited," a limited partnership, to own the project, and "Arnold Development Company" to develop the project. The city proceeded with the project by executing a second memorandum of understanding, which contained an additional provision stating that advances from the city would be guaranteed by Arnold and the Arnold Companies.

Arnold obtained financing from Mainland Savings Association. While the project was under construction, the developer defendants leased some of the space to tenants, who were required to assist in the financing of the project. The plaintiffs allege

that in order to coax the prospective tenants to lease, the defendants falsely represented that most of the space available in the project had been leased, that the financing was adequate to fully develop the project, and that sufficient funds had been set aside for advertising and promotion. The plaintiffs also allege that they were told a cinema, bank and other well know enterprises would be "anchor" tenants.

The shopping center formally opened in May 1985 and was an economic failure. The developer defendants defaulted on the loan from Mainland and when Mainland failed in April 1986, the FSLIC was named as its receiver. The FSLIC foreclosed on the project and appointed Eastdill its manager. Eastdill in turn assigned Noons (who had handled Mainland's loan account for the project) and Bettencourt to have responsibility over the failing project. FSLIC also hired Moody-Rambin Interests, Inc. to aid in management of the project.

On November 13, 1987, several individuals and entities who leased space and invested funds in the project brought suit against several individuals involved in various stages of the project under RICO, 18 U.S.C. §§ 1961 et seq., and under common law theories of breach of contract, fraud, conversion, and unjust enrichment. (The FDIC properly became a defendant since FSLIC has been abolished.)

The district court granted the FDIC parties' motions to dismiss, holding that the plaintiffs failed to plead an enterprise under RICO. The court also dismissed the state law

claims against Encore and Webb, because the court found that they only participated in the first stage of the project which involved the unsuccessful attempt to obtain HUD financing. The court dismissed the common law claims against the FDIC because there was no waiver of sovereign immunity and the plaintiffs' failed to exhaust administrative remedies. Finally, the court dismissed all remaining claims against the defendants, including RICO claims against the city of Houston and its employee, Efraim Garcia. The plaintiffs appeal.

DISCUSSION

We will uphold a dismissal pursuant to Rule 12(b)(6) if the plaintiff can prove no set of facts in support of his or her claim. Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989). In order to state a RICO claim under 18 U.S.C. § 1962, a plaintiff must allege the following in his complaint: 1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. Id. at 880. An enterprise under RICO can include usual legal entities or any union or group of individuals "associated in fact," although not a legal entity. Manax v. McNamara, 842 F.2d 808, 811 (5th Cir. 1988).

To establish an association, a plaintiff must show evidence of an ongoing organization, and must show that the various associates were functioning as a continuing unit. Id. at 811. An enterprise must be a separate entity from the pattern of activity in which it engages. Id. It must have an ongoing

organization whose members function as a continuing unit "as shown by a decision making structure." Id.

The defendants allegedly were all somehow involved in the establishment of the El Mercado project. The plaintiffs' complaint fails under RICO, however, because the plaintiffs have not sufficiently alleged that the defendants formed an ongoing organization that functioned as a continuing unit. Furthermore, there was no "decision making structure" that existed among the defendants. The plaintiffs merely assert that all the defendants were associated with the alleged enterprise. The establishment of a RICO enterprise must be pleaded using specific facts, however, and not merely conclusory allegations. Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 427 (5th Cir. 1987). Because nothing in the plaintiffs' complaint linked the various defendants together other than accusations of independent fraudulent acts, the plaintiffs' failed to allege a RICO enterprise and their claims under 18 U.S.C. § 1962 fail. See Shaffer v. Williams, 794 F.2d 1030, 1033 (5th Cir. 1986).

Dismissal of pendent state law claims

We review the refusal to exercise pendent jurisdiction under an abuse of discretion standard. Wong v. Stripling, 881 F.2d 200, 204 (5th Cir. 1989). The plaintiffs complain that we should reverse the dismissal of their pendent claims under the guidance of Newport Ltd. v. Sears, Roebuck and Co., 941 F.2d 302 (5th Cir. 1991), cert. denied, 112 S.Ct. 1175 (1992). In Newport, we reversed the district court's dismissal of pendent claims because

four years of litigation had produced thousands of pages of record, over a hundred depositions and nearly two hundred thousand pages of discovery production. Id. at 307. We opined that the trial court had abused its discretion by declining to hear the state claims on the eve of trial in Newport, due to fairness and due to the intricate development of the case in federal court. Id. at 307-08.

The present case has not developed to the extent of the litigation in Newport and does not mandate a similar result. Furthermore, the plaintiffs' claims were dismissed without prejudice and have already been re-filed in state court. AFFIRMED.