

FILED
U.S. DISTRICT COURT

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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DEPUTY CLERK

WORLD WIDE ASSOCIATION OF
SPECIALTY PROGRAMS, a Utah
Corporation,

Plaintiff,

vs.

PURE, INC., PURE FOUNDATION, INC.,
SUE SCHEFF and DOES 1 THROUGH 10,
Defendants.

ORDER DENYING MOTION TO
DISMISS FRAUD CLAIM, AND
GRANTING MOTION TO DISMISS
BREACH OF CONTRACT AND
RICO CLAIM

Case No. 2:02-cv-00010 PGC

The plaintiff, World Wide Association of Specialty Programs ("World Wide"), filed a motion to dismiss defendants PURE, Inc. and Ms. Sue Scheff's ("Ms. Scheff's") counterclaims for breach of contract, fraud and RICO violations. Having carefully reviewed the pleadings the court determines that oral argument would not be helpful and rules as follows.

Statement of Facts

World Wide is a Utah non-profit agency comprised of an association of residential treatment programs for troubled and at-risk youth. The various programs that World Wide refers to are located inside and outside of the United States. World Wide provides marketing support and referral

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services for its associated programs and deals directly with parents, governmental agencies, other residential treatment facilities , and industry professionals. World Wide's headquarters are located in St. George, Utah. World Wide maintains an extensive network of relationships and contracts with its affiliated programs.

In 2000, Ms. Scheff placed her daughter in a residential facility recommended by World Wide, the Carolina Springs Academy ("Carolina Springs") in North Carolina. The agreement with Carolina Springs specifies:

Sponsors [defined as Ms. Scheff] understand and agree that the business "Carolina Springs" has sole responsibility for the performance of this contract and the general care and well being of the student. Therefore the Sponsors agree to hold harmless and release from liability or damages any person or persons, agency, organization, or program that has referred the Sponsor to Carolina Springs. Sponsor further agrees to hold harmless and release from liability or damages any person or persons, organization or businesses that provide contract services to the School/Program. The Sponsors understand and agree that "Carolina Springs" takes sole responsibility for the performance of this contract and the general care and well being of the student.

In November 2000, Ms. Scheff sent notice to Carolina Springs that she wished to withdraw her daughter from the program within 60 days, despite prior communication from Ms. Scheff that she was happy with the results at Carolina Springs. Ms. Scheff indicates in her amended counterclaim that her daughter, in December 2000, while still at Carolina Springs, was admitted to the hospital for food poisoning. Ms. Scheff picked up her daughter from Carolina Springs on December 24, 2000. Several months later, Ms. Scheff's daughter expressed concerns with her treatment at Carolina Springs. Ms. Scheff alleges that Carolina Springs did not have a license, did not provide horseback riding, and did not have the therapy that had been represented to her by World Wide.

In February 2001, Ms. Scheff established her own referral network for residential treatment facilities, PURE, Inc. Following that, Ms. Scheff and PURE allegedly began posting negative information about World Wide through false identities at respected chatrooms for parents of troubled teens.

Procedural History

On November 15, 2002, this court ruled that personal jurisdiction was proper over PURE, Inc. and Ms. Scheff. On December 2, 2002, Ms. Scheff filed her counterclaim. World Wide then filed this motion to dismiss the counterclaims of breach of contract, fraud, and RICO violations under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On January 28, 2003, Ms. Scheff filed the first amended counterclaim that is at issue here. In March 2003, Ms. Scheff further briefed the court on the substantive merits of the motion to dismiss. World Wide filed a reply, on February 11, 2003, and a surreply on March 18, 2003.

Standard of Review

Under Rule 12(b)(6), the court accepts as true all well-pleaded factual allegations in the amended complaint, and those allegations are viewed in the light most favorable to the nonmoving party.¹ A 12 (b)(6) motion should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him or her to relief.² In this case, the court's function is to assess whether Ms. Scheff's counterclaim alone is legally sufficient

¹ See *County of Santa Fe, NM, v. Public Service Co. of New Mexico*, 311 F.3d 1031, 1034 (10th Cir. 2002) citing *Sutton v. Utah State School for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

²*Id.*

to state a claim for which relief may be granted.³ The court must indulge all “reasonable” inferences in favor of the counter-claimant.⁴

Breach of Contract Claim

Dismissal of this cause of action is appropriate because Ms. Scheff has not alleged sufficient facts to meet the necessary elements of a breach of contract claim, specifically (1) existence of a contract, (2) performance of or nonperformance of the contract, and (3) damages.⁵

Confusingly, in Ms. Scheff’s opposition to the motion to dismiss, she disputes the validity of the very contract for which she alleged breach. Ms. Scheff seems to argue she did not sign the contract, despite the fact that it appears to bear her signature in 12 different places. Despite this denial of the agreement here, on her website she acknowledges that she “signed on the dotted line,” referring back to the agreement with Carolina Springs.⁶

In any event, the missing element of the cause of action in this case is the existence of a contract with World Wide.⁷ Ms. Scheff makes no allegations about an implied contract with World Wide, so the court is left to presume that she refers to the agreement with Carolina Springs Academy as the “contract” for her breach of contract claim.

³See *County of Santa Fe*, 311 F.3d at 1034, citing *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

⁴*County of Santa Fe*, 311 F.3d at 1034.

⁵*Cf. Mackey v. Cannon*, 996 P.2d 1081, 1084 (Ut. Ct. App. 2000).

⁶See www.helpyourteen.com, “A Parent’s True Story.”

⁷See *Mackey*, 996 P.2d 1081.

The only contract that could be subject to breach is the contract that Ms. Scheff *signed with Carolina Springs, not World Wide*. In that contract it specifically stated:

Sponsors [Ms. Scheff] understand and agree that the business “Carolina Springs” has sole responsibility for the performance of this contract and the general care and well being of the student.

Ms. Scheff does not allege any representations that would alter the plain language of this contract, which does not list World Wide as a party. Ms. Scheff also stated that the “paperwork” she signed enrolling her daughter in Carolina Springs was in fact given *directly to Carolina Springs* staff when her daughter arrived there in the Fall of 2000.

Ms. Scheff’s claims of an alter-ego relationship between World Wide and Carolina Springs fall flat as well. First, nowhere in the first cause of action does she allege how World Wide and Carolina Springs might be connected. All of the specific allegations are directed at World Wide, with no reference of Carolina Springs. In her statement of facts, Ms. Scheff tersely indicates “upon information and belief” that World Wide and Carolina Springs (and essentially every other teen program World Wide ever worked with) share a “unity of interest,” without any further supporting details. She further alleges that Carolina Springs, and all other residential treatment programs are the “alter ego” of World Wide. Yet, she alleges no common ownership, financial interest, or other explanation as to how an “alter-ego” might exist.

If true, Ms. Scheff’s allegations about Carolina Springs are disturbing. However, based on the amended counterclaim, it appears the proper remedy for breach of any contract involving treatment of her daughter would be a suit against Carolina Springs, not World Wide. Therefore, the breach of contract claim against World Wide is dismissed without prejudice.

Fraud

Ms. Scheff alleges that World Wide, by providing allegedly false information regarding its facilities, induced her to enroll her daughter at Carolina Springs, and she subsequently suffered harm as a result. World Wide argues that the signed document with Carolina Springs negates the alleged oral fraudulent statements by World Wide.⁸ However, at this time, the court must assume the facts as alleged in the pleadings. Based on the alleged facts, the fraud claim is adequately pleaded and the motion to dismiss is denied.

RICO Claim

World Wide argues that Ms. Scheff has not properly plead her RICO claim. In her amended counterclaim, Ms. Scheff dropped her original claims under 18 U.S.C. § 1962 (a), (b), and (d) and focused her counterclaim on allegations under § 1962(c). To establish a civil RICO claim under this provision, Ms. Scheff must establish that World Wide (1) participated in the conduct (2) of an enterprise (3) through a pattern of racketeering activity.⁹ In Scheff's amended counterclaim, she alleges:

71. Upon information and belief an enterprise exists through which various corporations and business entities and other individuals operate to advertise services for treatment of troubled teens, recruit, enroll families in these programs and operate the programs are placed. Associated with this enterprise are marketing, referral agencies, teen escort services and residential programs.

⁸ *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060 (Utah 1996).

⁹ *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999)(citations omitted).

72. WWASP is involved in the conduct and the activity of this enterprise by recruiting parents of troubled teens to enlist them at member programs and upon information and belief by regulating the affairs of member programs.

Courts have been hesitant to expand the use of RICO to mere bad acts, such as fraud, committed by corporations. As the Seventh Circuit has explained:

The firm must be shown to use its agents or affiliates in a way that bears least a family resemblance to the paradigmatic RICO case in which a criminal obtains control of a legitimate (or legitimate-appearing) firm and uses the firm as the instrument of his criminality.¹⁰

Furthermore, as this court has noted, “vague, conclusory allegations fail to state a claim for relief under RICO.”¹¹

Ms. Scheff fails to meet the heavy burden in establishing a RICO violation for a corporate act of fraud. Ms. Scheff’s counterclaim does not properly establish any of the three necessary elements of RICO.

1. Participation in the Conduct

First, the RICO counterclaim fails to properly allege how World Wide “participated in the conduct” of the enterprise. Ms. Scheff seems to allege that World Wide participated in the conduct of an enterprise, involving not just Carolina Springs, but also many other treatment facilities. At a bare minimum, an allegation of RICO liability under 1962(c) must indicate *how* the defendant used

¹⁰*Emery v. American General Finance Inc.*, 134 F.3d 1321 (7th Cir. 1998), *cert. denied*, 525 U.S. 818 (1998), *cited in Brannon v. Boatmen’s First Nat. Bank of Oklahoma*, 153 F.3d 1144, 1146-47 (10th Cir. 1998).

¹¹*Arena Land & Investment Co. Inc. v. Petty*, 906 F.Supp. 1470, 1477 (D.Utah 1994).

the alleged enterprise to facilitate the fraudulent conduct.¹² The amended counterclaim contains no allegations of cooperation between the treatment facilities and World Wide other than an unsupported statement that World Wide “regulated” these facilities. Ms. Scheff herself disputes this conclusion later in her counterclaim when she discusses the “State of California’s” investigation into Carolina Springs. No where does the counterclaim specify what “course of conduct” World Wide used to orchestrate its scheme.

Even assuming that the marketing information that World Wide provided was false and misleading, and constituted mail fraud, what is missing is any information regarding connection of these actions to the alleged problems at Carolina Springs. No one questions that World Wide provided marketing support to these facilities. But the complaint fails to specify *how* World Wide reached into Carolina Springs and controlled what was allegedly happening to Ms. Scheff’s daughter.

Ms. Scheff also broadly alleges that this conduct occurred with other treatment facilities. She does not however, provide the names, locations or individuals involved at any other facilities. This unsupported allegation of other facilities involvement, without the critical “who,” “what,” “where,” and “when,” fails to satisfy the RICO pleading requirements concerning the “participation in the conduct” of a RICO enterprise.

2. Enterprise

Even if Ms. Scheff did properly plead “participation in the conduct” of an enterprise, Section 1962(c) imposes liability only on the RICO “persons” participation in a RICO “enterprise.” Under

¹² *Emery*, 134 F.3d at 1324 and *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997); cited in *Brannon*, 153 F.3d at 1147.

RICO, the defendant “person” must be an entity *distinct* from the alleged “enterprise.”¹³ This interpretation flows from the statute’s mandate that the person who engages in the pattern of racketeering activity be “employed by or associated with” an enterprise.¹⁴ Logic dictates that one entity may not serve as the enterprise and the person associated with it because “you cannot associate with yourself.”¹⁵ Liability under Section 1962 (c) depends on showing that there were at least two distinct entities.¹⁶

According to the counterclaim, the alleged fraud was conducted entirely by World Wide, the defendant person. Accepting Ms. Scheff’s allegations as true, World Wide marketed the various treatment programs as World Wide. No where in the complaint is one of the non-defendant entities (such as Carolina Springs who is supposedly part of the “enterprise”), described as playing a role in the placement of young people at their facility. The counterclaim alleges only that World Wide perpetrated the fraud on Ms. Scheff. The complaint alleges no activity on the part of Carolina Springs or other facilities that might reasonably be understood to implicate it in the scheme attributed to World Wide.

Furthermore, Ms. Scheff’s indecisiveness regarding the agreement with Carolina Springs proves problematic here as well. Under Ms. Scheff’s alter-ego argument, World Wide and Carolina

¹³*Brannon*, 153 F.3d 1144 citing *Board of County Comm’rs v. Liberty Group*, 965 F.2d 879, 885 & n. 4 (10th Cir. 1992)(remaining citations omitted).

¹⁴18 U.S.C. § 1962(c)

¹⁵*Yellow Bus Lines, Inc. v. Drivers, Chauffers and Helpers Local Union 639*, 883 F.2d 132, 139 (D.C. Cir. 1989); quoting *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985) cited in *Brannon*, 153 F.3d at 1146.

¹⁶*See Brannon* 153 F.3d at 1147-48.

Springs are the “same” entity, and would thus defeat the distinction requirement of the RICO statute.

However, if the contract existed, it helps Ms. Scheff’s case by indicating that Carolina Springs was a distinct entity from World Wide. But, again, the plain language of the agreement makes clear that families that chose Carolina Springs should not rely on representations made by referring organizations, and thus defeating claims of an “enterprise.”

In sum, the counterclaim fails to properly define the RICO “enterprise” and must be dismissed on this basis as well.

3. Pattern of Racketeering

The final element of RICO requires the plaintiff to establish a pattern of racketeering. In her amended counterclaim, Ms. Scheff states:

73. The enterprise engages in a pattern of fraudulent and misleading statements to parents of troubled teens in order to entice the parents to place their children in programs where they then suffer abusive treatment.

Ms. Scheff’s pleading vacillates between two sets of bad acts, creating problems for her RICO allegations. Initially, it appears the bad acts involved in the RICO violation are the alleged fraudulent misrepresentations and mail fraud conducted by World Wide staff to prospective parents. However, this bad act defeats the RICO requirement of two distinct entities because only World Wide made the fraudulent statements alleged, not the treatment facilities.

Assuming Ms. Scheff’s allegations mail fraud are true, they do not satisfy RICO’s requirement of a pattern. “Mail fraud is not committed . . . simply by sending false statements through the mail. Instead, the mails must have been used to further a *scheme* to defraud or obtain

money or property through false pretenses.”¹⁷ Again, the lack of evidence of a “scheme” defeats this claim. Before this court is a single incident of alleged abusive treatment of a single child, at a single facility. Ms. Scheff has plead her individual problems with World Wide, she fails, however, to allege any facts surrounding a “scheme” involving other parents or families, or treatment facilities.

In her RICO claim Ms. Scheff also alleges that the bad acts involved were the alleged abusive treatment suffered by teens, specifically her daughter, at Carolina Springs. Assuming the facts alleged as true, again, Ms. Scheff has only alleged one specific incidence of abuse – her daughter’s treatment at Carolina Springs – not the necessary “pattern” of bad acts required by RICO.

World Wide (and PURE, Inc.) function as a for-hire, matching service for parents of troubled teens and various treatment facilities. They had relationships with facilities and tried to match the needs of the teens with the capabilities of the various facilities, for a referral fee. World Wide and PURE provide advertising and promotion for these facilities, but as the contract for Carolina Springs explained, a parent’s choice to place their teens at one of these facilities, was subject to a separate contract specifically exempting World Wide from liability. Nothing in the counterclaim explains how World Wide, in Utah, could control or dictate the running of these various facilities that are – literally – all over the world. It does allege a single case of possible misrepresentation, fraud, or negligence involving Ms. Scheff’s daughter, who notably, is not a party to this lawsuit. This however is insufficient to support a counterclaim for a RICO violation.

¹⁷*Dirt Hogs, Inc. v. Natural Gas Pipeline Co. of America*, 2000 U.S. app. LEXIS 6463, *9, *aff’d*, 210 F.3d 389 (10th Cir. 2000). *See also Brannon* 153 F.3d at 1102.

Under Rule 12(b)(6) , a plaintiff with an arguable claim is accorded notice of the pending motion to dismiss and given an opportunity to amend the complaint, before the court rules.¹⁸ Ms. Scheff had notice of the pending motion to dismiss under 12(b)(6), and had the opportunity to amend her counterclaim to cure any defects. She failed to cure the defects with her RICO counterclaims.

The court could allow Ms. Scheff to file a second amended counterclaim, but based on the facts alleged to date, any such amendment would be futile. A court may refuse leave to amend if any amendments would fail to cure deficiencies, or be futile.¹⁹ The facts alleged supporting her RICO claim would not change with an amended pleading, and neither would RICO law. Therefore Ms. Scheff's RICO claims are dismissed, with prejudice.

CONCLUSION

The court GRANTS plaintiff's motion to dismiss defendants breach of contract and RICO counterclaims, and DENIES plaintiff's motion to dismiss defendant's fraud counterclaim. The motion to dismiss is therefore GRANTED in part, and DENIED, in part. (#22-1).

SO ORDERED.

DATED this 2nd day of May, 2003.

BY THE COURT:



Paul G. Cassell
United States District Judge

¹⁸See *Dopp v. Loring*, 54 Fed. Appx. 296, 298 (10th Cir. 2002) (unpublished opinion) citing *Neitzke v. William*, 490 U.S. 319, 329 1

¹⁹See *Castleglen, Inc. v. Resolution Trust Corp.*, 984 F.2d 1571, 1585 (10th Cir. 1993).

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United States District Court
for the
District of Utah
May 6, 2003

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:02-cv-00010

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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