Docket #0120 Date Filed: 8/21/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: TEHUM CARE SERVICES, INC., Debtor.	Case No. 23-90086 (CML) Chapter 11
ANANT KUMAR TRIPATI, Plaintiff, v. SARAH TIRSCHWELL, *et al.*, Defendants.	Adv. Pro. No. 23-03072 (CML)

LEXINGTON INSURANCE COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

ZEICHNER ELLMAN & KRAUSE LLP
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 223-0400

23900862308210000000000008

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT
PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT SHOULD BE DENIED BECAUSE AMENDMENT WOULD BE FUTILE 2

A. Amendment Would Be Futile Because Plaintiff's Claims Remain Time Barred 2

B. Amendment Would Be Futile Because the Proposed Second Amended Complaint Still Violates FRCP 8(a) and 9(b) 3

C. Amendment Would Be Futile Because the Proposed Second Amended Complaint Still Fails to Plead Plausible RICO Claims 4

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page(s)**

Ashcroft v. Iqbal,
556 U.S. 662 (2009) ..... *passim*

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 1, 3

Conley v. Gibson,
355 U.S. 41 (1957) 3

Foman v. Davis,
371 U.S. 178 (1962) 1

Holmes v. Securities Investor Protection Corp.,
503 U.S. 258 (1992) 7

In re Taxable Municipal Bond Securities Litigation,
1993 U.S. Dist. LEXIS 17978 (E.D. La. 1993) 5

Jackson v. NAACP,
546 Fed. Appx. 438 (5th Cir. 2013) 6

LaBarbera v. Angel,
2000 U.S. Dist. LEXIS 1195 (E.D. Tex. 2000) 7

Reves v. Ernst & Young,
507 U.S. 170 (1993) 5

Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.,
365 F.3d 353 (5th Cir. 2004) 4

U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.,
125 F.3d 899 (5th Cir. 1997) 4

United States v. Turkette,
452 U.S. 576 (1981) 5

Williams v. WMX Tech., Inc.,
112 F.3d 899 (5th Cir. 1997) 4

Wilson v. Arch-Air Freight, Inc.,
1997 U.S. Dist. LEXIS 827 (E.D. La. Jan. 29, 1997) 5

Statutes

18 U.S.C. § 1962 5,6,7

Rules

Federal Rule of Civil Procedure ("FRCP") 8 ..... 1, 3, 4
FRCP 9 ..... 1, 3, 4
FRCP 12 ..... 1, 4

PRELIMINARY STATEMENT

The Court should deny plaintiff Anant Kumar Tripati's ("Plaintiff") motion for leave to file a Second Amended Complaint [ECF Docket No. 96] against Lexington Insurance Company ("Lexington"). While leave to amend a complaint is generally freely given when justice so requires (Fed. R. Civ. P. 15(a)), leave should be denied where, as here, amendment would be futile. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962).

On June 20, 2023, Lexington moved to dismiss the original Complaint with prejudice as to it. *See* Lexington Motion to Dismiss [ECF Docket No. 47]. Lexington explained that the Complaint should be dismissed with prejudice for four independent reasons: (i) Plaintiff's claims were untimely and violated the applicable statutes of limitation; (ii) the Complaint was incomprehensible and confusing, in violation of Federal Rule of Civil Procedure ("FRCP") 8(a); (iii) the Complaint did not plead any actionable facts as to Lexington, in violation of FRCP 9(b); and (iv) Plaintiff failed to state plausible RICO claims, in violation of FRCP 12(b)(6). *See id.* at 1-18.

Plaintiff now proposes he be permitted to file a *Second* Amended Complaint. This third complaint, however, is as fatally defective as his first. Plaintiff's claims remain untimely and, therefore, barred by the applicable statute of limitations. In addition, Plaintiff's proposed Second Amended Complaint fails to assert a viable RICO claim against Lexington because, *inter alia*, Plaintiff's allegations against Lexington remain entirely conclusory. He continues to provide no facts showing what Lexington did, or how Lexington caused Plaintiff injury. Instead, all Plaintiff alleges is that Lexington is a liability insurer, with the specifics of what Lexington did or did not do to be fished for later in discovery. However, making "naked assertion[s]" (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)), or raising "the mere possibility of misconduct" in a complaint (*Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)) cannot prevent its

dismissal. Yet, naked assertions are all that Plaintiff continues to offer regarding Lexington. Accordingly, Plaintiff's motion for leave to amend his Complaint should be denied as futile.

ARGUMENT

PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT SHOULD BE DENIED BECAUSE AMENDMENT WOULD BE FUTILE

A. Amendment Would Be Futile Because Plaintiff's Claims Remain Time Barred

Plaintiff's federal RICO claims have a statute of limitations of four years from the date Plaintiff knew or should have known of his injury, and his Arizona state RICO claims have a statute of limitations of three years from discovery. *See* Lexington Motion to Dismiss [ECF Docket No. 47] at 5-6 (and cases cited). Plaintiff expressly pled in his original complaint that, in May 2018, he "saw documents that reflect the concealment of evidence" he now complains injured him. ECF Doc. No. 1, ¶¶ 44-45. Thus, Plaintiff's claims are time barred, because he only brought this adversary proceeding on May 1, 2023 (*id.*), which is *five years* after discovery.

The proposed Second Amended Complaint does not cure the time-barred nature of his claims. Plaintiff now alleges he discovered the concealment of evidence, including "CDS/DVDS with privileged documents," in March 2019, not May 2018. *See* ECF Doc. No. 96, ¶¶ 86, 90. This new date does not help because the time period between March 2019 and May 1, 2023 is still more than four years, meaning Plaintiff's federal RICO claims are time-barred as of March 2023 (four-year limitations period), and his Arizona RICO claims are time-barred as of March 2022 (three-year limitations period).

Plaintiff also apparently contends, to the extent understandable, that his "spoliation claims" also accrued in February 2023, when the bankruptcy petition was filed, because the automatic bankruptcy stay purportedly prevents Plaintiff's spoliation claims from being heard and adjudicated in other courts. *See* Motion for Leave [ECF Docket No. 96], ¶¶ 71-

74, 248, 252; *see also* Plaintiff's Response to Lexington Motion to Dismiss [ECF Docket No. 66] at 15-16. Lexington, however, did not file for bankruptcy, debtor Tehum Care Services, Inc. ("Tehum") did. Thus, the bankruptcy petition date is irrelevant to any claims Plaintiff may have *against Lexington*, and his claims against Lexington remain time barred. For this reason alone, Plaintiff's proposed Second Amended Complaint is futile, and the motion for leave to amend as to Lexington should be denied.

B. Amendment Would Be Futile Because the Proposed Second Amended Complaint Still Violates FRCP 8(a) and 9(b)

The proposed Second Amended Complaint – spanning 63 pages and 344 paragraphs – remains prolix and incomprehensible in violation of FRCP 8, which mandates "a short and plain statement of the claim showing that the pleader is entitled to relief" (FRCP 8(a)(2)) and is intended to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (citing to FRCP 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Plaintiff's proposed Second Amended Complaint also continues to violate FRCP 9(b). Specifically, while Plaintiff's RICO claims are predicated on alleged acts of fraud, he fails to "state with particularity the circumstances constituting [that] fraud" (FRCP 9(b)) when it comes to Lexington. Instead, Plaintiff clumps Lexington together with other "liability insurers" and then conclusory alleges these liability insurers allowed other defendants, such as Corizon, to engage in misconduct "by making policy exceptions" and failing to "review and investigate prisoner claims." *See* ECF Docket No. 96, ¶¶ 74, 267. Such conclusory allegations, devoid of specific facts as to Lexington, are not enough. *See Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 679. The heightened pleading standard of FRCP 9(b) requires that Plaintiff provide Lexington and the Court with specific facts showing the "who, what, when, where, and how" of

Lexington's alleged involvement in fraud. *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (citing *Williams v. WMX Tech., Inc.*, 112 F.3d 899, 903 (5th Cir. 1997)); *see also Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 365 (5th Cir. 2004) (allegations against a group not "properly imputable to any particular defendant unless the connection between the individual defendant and the allegedly fraudulent statement is specifically pleaded"). Here, in violation of FRCP 9(b), no specific Lexington policy, or specific breach of that policy by Lexington, is identified in the Second Amended Complaint. Likewise, no specific fraudulent act or statement by Lexington is pled anywhere in it.

Granting Plaintiff leave to amend would be futile because his proposed Second Amended Complaint still violates FRCP 8(a) and 9(b). Accordingly, the Court should deny Plaintiff's motion for leave to amend as to Lexington.

C. Amendment Would Be Futile Because the Proposed Second Amended Complaint Still Fails to Plead Plausible RICO Claims

In its Motion to Dismiss, Lexington identified seven independent reasons why Plaintiff failed to state valid federal or state RICO claims, requiring dismissal of the complaint under FRCP 12(b)(6). *See* Lexington Motion to Dismiss [ECF Docket No. 47] at 9-18. The proposed Second Amended Complaint cures none of those fatal deficiencies.[1]

1. Plaintiff Still Fails to Plead a Separate and Distinct RICO Enterprise. Plaintiff still does not allege facts showing a RICO enterprise "separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583 (1981); *see*

[1] In his proposed Second Amended Complaint, Plaintiff also seeks a declaration that the "liability insurers" enabled the alleged misconduct by providing insurance coverage to Defendants without proper due diligence. *See* ECF Doc. No. 96 ¶¶ 334-338 (Fourth Cause of Action). This additional cause of action is fatally flawed as to Lexington. Among other things, no specific facts are alleged as to any Lexington acts or omissions, and Plaintiff does not explain how Lexington providing insurance coverage somehow enabled Corizon to divert funds, pay improper bonuses to management, spoliate evidence, or file for bankruptcy in bad faith.

also Lexington Motion to Dismiss [ECF Docket No. 47] at 10-11. Not only does Plaintiff still provide no clarity as to what, exactly, the enterprise is and how it functions, but the wrongdoing he alleges – Corizon improperly using COVID funds to give "management bonuses" and/or diverting monies that should have gone towards the inmates' medical care or claims (ECF Docket No. 96, ¶¶ 101-127) – does not need a separate and ascertainable structure outside of Corizon itself.

2. Plaintiff Still Fails to Plead that Lexington Participated in the Operation or Management of the Enterprise. For Lexington to be liable under RICO, 18 U.S.C. § 1962(c), it must have participated "in the operation or management of the enterprise itself" and "direct[ed] the enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179, 184-185 (1993); *see also* Lexington Motion to Dismiss [ECF Docket No. 47] at 11-13. Plaintiff pleads no such facts of operation, management, and direction. All he alleges is that the "liability insurers" group "did not follow their policies and industry practices, in dealing with claims, involving Corizon and other Defendants." ECF Docket No. 96, ¶ 125; *accord id.* at ¶¶ 266-268, 270-272, 274, 277-281. However, Lexington rendering insurance services, even in purported breach of industry policy and practice, is not the same as Lexington directing the affairs of the enterprise. *See, e.g., In re Taxable Municipal Bond Securities Litigation*, MDL No. 863, No. 90-4714, No. 90-4718,1993 U.S. Dist. LEXIS 17978, *14 (E.D. La. 1993) (even assuming attorney had substantial persuasive power over the enterprise, the "performance of legal services that facilitate operation of an enterprise does not represent participation in the 'operation or management' of the enterprise"); *Wilson v. Arch-Air Freight, Inc.*, No. 93-4222, 1997 U.S. Dist. LEXIS 827, *9-11 (E.D. La. Jan. 29, 1997) (no liability when allegations solely accused defendant of conducting its own affairs, not those of the enterprise); other cases cited in Lexington Motion to Dismiss [ECF

Docket No. 47] at 12-13.

3. Plaintiff Still Fails to Allege Two Predicate Acts of Racketeering Activity by Lexington. RICO requires a "pattern of racketeering activity" – *i.e.*, at least two predicate acts of racketeering activity within a ten-year period – connected to the acquisition, establishment, conduct, or control of an enterprise. 18 U.S.C. §§ 1962(c), 1961; Lexington Motion to Dismiss [ECF Docket No. 47] at 13-14. Plaintiff continues to plead no specific predicate acts of racketeering activity *by Lexington* in his proposed Second Amended Complaint. In this regard, (i) spoliation of evidence is not an act of racketeering under RICO and, in any event, is alleged to have been done by others, not Lexington; (ii) the alleged fraudulent diversion of funds and fraudulent statements are alleged to have been done by others, not by Lexington; and (iii) the allegedly fraudulent bankruptcy petition was not filed by Lexington, but by debtor Tehum.

4. Plaintiff Still Lacks Standing to Sue Under RICO. Plaintiff continues to assert that, but for the spoliation of evidence, he would have prevailed in his prior litigations against Corizon and other medical providers. *See* Complaint [ECF Docket No. 1], ¶¶ 11, 46; Motion for Leave [ECF Docket No. 96], ¶ 252. As previously explained, however, this type of intangible, expectation-based injury is not the type of "injury to business or property" cognizable under RICO. *See, e.g., Jackson v. NAACP*, 546 Fed. Appx. 438, 442 (5th Cir. 2013) ("Injury to mere expectancy interests or to an intangible property interest is not sufficient to confer RICO standing."); Lexington Motion to Dismiss [ECF Docket No. 47] at 14-15 (and cases cited).

In his Second Amended Complaint, Plaintiff also tries to attain standing by alleging he was personally injured, suffering physical pain and a failure to have his "brain issues" properly diagnosed. *See* Motion for Leave [ECF Docket No. 96], ¶ 287. However, this allegation is insufficient to establish standing to assert a RICO cause of action, as "[r]ecovery for

physical injury or mental suffering is not allowed under civil RICO because it is not an injury to business or property." *LaBarbera v. Angel*, 2000 U.S. Dist. LEXIS 1195, *8 (E.D. Tex. 2000). Thus, Plaintiff still lacks standing to sue under RICO.

5. Plaintiff Still Fails to Plead Facts Showing Proximate and "But For" Causation by Lexington. A defendant's violation of § 1962 must be both the "but for" cause and proximate cause of plaintiff's injury. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-266 (1992); Lexington Motion to Dismiss [ECF Docket No. 47] at 15-16. Plaintiff still fails to plead facts showing either type of causation as to Lexington.

6. There Is Still No "Aider and Abettor" Liability Under RICO. Plaintiff continues to allege that Lexington is liable to him because it "aided and abetted." Motion for Leave [ECF Docket No. 96], ¶ 301. Civil aider and abettor liability, however, is unavailable under RICO as a matter of law. *See* Lexington Motion to Dismiss [ECF Docket No. 47] at 16-17.

7. Because Plaintiff has failed to plead and prove Lexington violated RICO section 1962(c), he cannot successfully bring a civil conspiracy claim under section 1962(d). *See* discussion, *supra*, at Argument, Point C; Lexington Motion to Dismiss [ECF Docket No. 47] at 17-18.

CONCLUSION

Lexington moved to dismiss Plaintiff's complaint because it was readily apparent that the flaws in Plaintiff's claims were, and would always remain, material, systemic, and irreparable. Rather than permit Tripati to continue wasting the Court and Lexington's valuable time and money with another futile amendment, for the reasons discussed herein the Court should (i) deny Tripati's motion for leave to amend; (ii) dismiss the current complaint as to Lexington, in its entirety and with prejudice; and (iii) grant Lexington such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 21, 2023

Respectfully submitted,

/s/ Michael S. Davis

Michael S. Davis (*pro hac vice* approved in *Tehum* case on 03/01/2023; pro hac vice approved in Adversary case on 06/27/2023)

Yoav M. Griver (*pro hac vice* approved in Adversary case on 06/27/2023)

ZEICHNER ELLMAN & KRAUSE LLP
1211 Avenue of the Americas, 40th Floor
New York, New York 10036
(212) 223-0400
Attorneys for defendant Lexington Insurance Company

CERTICATE OF SERVICE

The undersigned attorney hereby certifies that, on August 21, 2023, a true and correct copy of the foregoing document was served upon all counsel of record through the Bankruptcy Court's Electronic Case Filing (ECF) system, and on the Plaintiff by first class U.S. mail, postage prepaid, at the following address:

Anant Kumar Tripati
Inmate # 102081
P.O. Box 8909
Yuma, AZ 85349

/s/ Michael S. Davis
MICHAEL S. DAVIS