UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	**Case No. 23-90086**
TEHUM CARE SERVICES, INC.	§	**(Jointly Administered)**
	§	
DEBTORS.	§	**Chapter 11**

ANANT KUMAR TRIPATI	§	**Adversary No. 23-03072**
	§	
Plaintiff	§	
v.	§	
	§	
SARA TIRSCHWELL, et al.,	§	
Defendants.	§	

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
AND INSUFFICIENT SERVICE OF PROCESS

This motion seeks an order that may adversely affect you. If you oppose the motion, you should immediately contact the moving party to resolve the dispute. If you and the moving party cannot agree, you must file a response and send a copy to the moving party. You must file and serve your response within 21 days of the date this was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement, you must attend the hearing. Unless the parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing.

Represented parties should act through their attorney.

Sara Tirschwell, defendant in the above-referenced bankruptcy case ("Tirschwell"), by and through her counsel, files this Motion to Dismiss for Failure to State a Claim and Insufficient Service of Process (the "Motion"), and in support thereof, shows as follows:

I. Summary of Relief Requested

1. Plaintiff Anant Kumar Tripati ("Plaintiff") sued 44 separate defendants, including Tirschwell, for alleged violations of the federal RICO Act and the Arizona RICO statute, and for

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conspiracy to violate the same. The Complaint alleges Plaintiff was unable to obtain review of his spoliation claims in various courts because of the actions of the defendants, but Plaintiff fails to set forth how Tirschwell specifically harmed Plaintiff or what damages he is claiming as a result. Moreover, as detailed below, Tirschwell has not been properly served. Therefore, under Federal Rule of Civil Procedure 8(a), 9(b), and 12(b)(5)-(6), made applicable to this proceeding by Federal Rules of Bankruptcy Procedure 7008, 7009, and 7012, Tirschwell asks this Court to dismiss Plaintiff's Complaint against Tirschwell with prejudice.

2. Additionally, Plaintiff has twice sought leave to file amended complaints. Docket Nos. 4 and 96. Neither of the proposed amended complaints remedy the legal deficiencies of the Complaint. Therefore, Tirschwell seeks dismissal of the amended complaints against her and denial of leave to amend.

II. Jurisdiction and Venue

3. The United States Bankruptcy Court for the Southern District of Texas (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

4. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

III. Factual Background

5. On May 1, 2023, Plaintiff filed his Verified Adversary Complaint [Docket No. 1] (the "Complaint") in the Bankruptcy Court for the Southern District of Texas, initiating the above-referenced adversary proceeding. The adversary was filed in connection with the bankruptcy case of Tehum Care Services, Inc. (the "Debtor").

6. The Complaint asserts two causes of action: 1) violation of section 1962(c) of the Racketeer Influenced and Corrupt Organizations ("RICO") Act and the Arizona state equivalent

(Ariz. Rev. Stat. Ann § 13-2314.04); and 2) conspiracy to violate the same under section 1962(d) of the RICO Act. Complaint at ¶¶ 431-458.

7. Ms. Tirschwell is the former CEO of YesCare, Corp. ("YesCare"), which was formerly Corizon Health, a provider of correctional health care services and the predecessor in interest to the Debtor. She is no longer employed by or affiliated with any of these entities. The other defendants named in the Complaint include attorneys and law firms involved in the Debtor's bankruptcy, insurance companies, the Arizona Department of Corrections, and several companies that appear to be affiliated with the Debtor or its predecessors.

8. The Court's docket reflects that a summons was issued for Tirschwell and many other defendants on May 4, 2023 [Docket No. 2], and that service was executed on Tirschwell on May 19, 2023 [Docket No. 9]. However, the address listed on the certificate of service is 205 Powell Place #104, Brentwood, Tennessee 37027, which is the address of YesCare and Corizon Health. Tirschwell has not been associated with those companies since March of 2023, and does not have an office or residence at the address at which Plaintiff claims to have effectuated service.

9. As for the substance of the Complaint, Plaintiff makes sweeping allegations that "Defendants" generally were part of a scheme "to engage in spoilation of evidence in prisoner cases." Complaint at ¶11. The Complaint generally appears to allege that this scheme involved diversion of assets from the prison healthcare company, which resulted in poor healthcare services, and when prisoners sought recompense, evidence was allegedly spoliated to prevent these claims from being successful. Complaint at ¶¶ 43, 45, 67-68, 333-337, 422-430. The Complaint describes numerous incidents of alleged prisoner mistreatment in detail, but fails to allege how the defendants contributed to or engaged in the scheme.

10. As to Tirschwell specifically, the Complaint alleges generally that she approved emails sent to management staff directing that "employees work at least 16 hours daily, and if they did work, they should not be paid overtime, and the Managers shall get bonuses." Complaint at ¶ 341. The only additional information about the emails contained in the Complaint is that "the emails also informed managers not to have inmates go to hospital, see specialists, and of hey (sic) die, so be it." Complaint at ¶ 342. The Complaint fails to explain how these emails have any connection to Plaintiff's alleged RICO claims.

11. The Complaint also alleges that Tirshwell and several other defendants determined that the bankruptcy should be filed in Texas, and that the "reorganization was a sham designed to defraud." Complaint at ¶¶ 343-47.

12. There are no further specific mentions of Tirschwell in the Complaint.

IV. Argument

A. The Complaint Should Be Dismissed for Improper Service under Fed. R. Civ. Pro. 12(b)(5)

13. Pursuant to Federal Rule of Civil Procedure 12(b)(5), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012, a complaint may be dismissed for "insufficient service of process." A motion to dismiss pursuant to Rule 12(b)(5) turns on the legal sufficiency of the service of process. The serving party has the burden of demonstrating validity of service when an objection to service is made. *Quinn v. Miller*, 470 Fed. Appx. 321, 323 (5th Cir. 2012) (citing *Carimi v. Royal Caribbean Cruise Line, Inc.*, 959 F.2d 1344 (5th Cir. 1992) and holding that where defendant's 12(b)(5) motion stated that he no longer lived at address where plaintiff contended service was effected, burden shifted to plaintiff to show proper service).

14. As noted above, the Court's docket reflects that a summons was issued for

Tirschwell on May 4, 2023 [Docket No. 2]. However, the address listed on the certificate of service is 205 Powell Place #104, Brentwood, Tennessee 37027. This is the Debtor's principal place of business, but Tirschwell left her position as CEO more than two months prior to service of the Complaint and does not have an office or residence at the address at which Plaintiff claims to have effectuated service. Accordingly, the summons was ineffective. FED. R. BANKR. P. 7004(b)(1).

15. As a result, the Complaint should be dismissed as to Tirschwell.

B. The Complaint Should be Dismissed for Failure to State a Claim under Fed. R. Civ. P. 8(a), 9(b), and 12(b)(6)

16. To survive a 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The pleading must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Although Plaintiff is proceeding pro se, that does not relieve him of his pleading burden; Pro se plaintiffs must still plead factual allegations that raise the right to relief above the speculative level. *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016).[1]

17. Further, to avoid dismissal, a plaintiff must meet the pleading requirements of Federal Rule of Civil Procedure 8. Under Rule 8, A pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief sufficient to give the defendant fair notice of the claim and the grounds upon which it rests. FED. R. CIV. P. 8(a); FED. R. BANKR.

1 Although pro se, Plaintiff is no stranger to the Court system. *See, e.g., Tripati v. Wexford Health Sources Inc*., No. 2:20-CV-427, 2022 WL 101344341-426, at *1n.1 (W.D. Pa. Apr. 5, 2022) ("Tripati is a well-known vexatious litigant who had been enjoined from filing frivolous and harassing claims in certain federal courts."); *Tripati v. Schriro* 124 S.Ct. 2182 (2004) ("[P]etitioner has repeatedly abused this Court's process. . .").

P. 7008. The Complaint does not include a short and plain statement of any claim against Tirschwell. Instead, the Plaintiff makes broad, sweeping statements about "Defendants," seemingly referring to all 44 defendants at once. In the few instances where Tirschwell is identified by name, it is unclear what causes of action the Plaintiff is asserting against her specifically.

18. Because Plaintiff uses the terms, "fraud," "defraud," and "fraudulent activity," throughout the Complaint, and seems to allege fraud as a predicate act to support his RICO causes of action, the Complaint is also subject to the heightened standard of Federal Rule of Civil Procedure 9(b), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7009. Rule 9(b) requires that, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Pleading fraud with "particularity" means that the complaint must specify "the who, what, where, when, and how of the alleged fraud." *Colonial Oaks Assisted Living Lafayette, LLC v. Hannie Dev. Inc.*, 972 F.3d 684, 689 (5th Cir. 2020).

19. To properly plead a RICO claim under federal law, a Plaintiff must allege the following elements: (1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (internal citations and quotations omitted). "Racketeering activity" consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity. *Id.* (internal citations and quotations omitted). The Arizona RICO statute was modeled after the federal RICO statute and Arizona courts look to federal law to interpret such claims. *Lifeflite Med. Air. Trans., Inc. v. Native Am. Air Servs., Inc.*, 198 Ariz. 149 (Ariz. Ct. App. 2000).

20. Predicate acts for RICO violations are identified in 18 U.S.C. § 1961(1) and A.R.S. § 13-2301(D)(4)(a)-(b). Although Plaintiff cites numerous statutes, ostensibly in an attempt to link

the Defendants to predicate acts, he fails to specifically allege that Tirschwell engaged in any particular act or acts. *See, e.g.,* Complaint at ¶¶ 338, 350, 379. Without a predicate act, Plaintiff cannot show a pattern of racketeering activity. Because Plaintiff alleges fraud, it is subject to the heightened pleading standards in Rule 9, and the Complaint falls woefully short. As to Tirschwell, Plaintiff alleges only generally that she approved emails, with no allegation as to where, when, or how. It is not even clear who these alleged emails were sent to, as the Complaint simply refers to "all management staff" and "managers." This, without more, can hardly satisfy the pleading standard.

21. Finally, because Plaintiff fails to plead a substantive RICO claim under federal or Arizona law, he cannot bring a 1962(d) or A.R.S. § 13-2314.04 conspiracy claim. *North Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 203 (5th Cir. 2015).

22. At best, the Complaint makes only conclusory statements about Tirschwell without connecting her to any alleged scheme. This is not enough to plead a cause of action under the federal RICO Act or the Arizona equivalent. Because the Complaint fails to meet the pleading standards, the Complaint should be dismissed as to Tirschwell.

C. The Complaint Should Be Dismissed Because the Plaintiff Lacks Standing

23. Notwithstanding that Plaintiff fails to meet the pleading standards, Plaintiff lacks standing to assert RICO claims against Tirschwell because he fails to demonstrate an injury caused by her alleged RICO violation. Both federal civil RICO claims and Arizona RICO claims require the plaintiff to allege an injury. *Price v. Pinnacle Brands, Inc.,* 138 F.3d 602, 606 (5th Cir. 1998); *Hannosh v. Segal*, 235 Ariz. 108, 112-13 (Ariz. Ct. App. 2014). "Injury that is speculative, based on a mere expectancy, or gives rise to unliquidated damages does not confer civil RICO standing." *HCB Financial Corp. v. McPherson*, 8 F4th 335, 345 (5th Cir. 2021).

24. The only injury alleged by Plaintiff seems to be that he was unable to have various courts "review [his] spoliation claims against Defendants." Complaint at ¶¶ 11-13. This is purely speculative. The Complaint contains no specific allegation of the amount of the damages, other than sweeping conclusion that Plaintiff's alleged damages are no less than $30 million. Moreover, it is unclear how Tirschwell specifically contributed to these alleged damages, if any exist. As articulated above, the Complaint does not make a connection between Tirschwell's alleged acts and his alleged damages.

25. Because the Plaintiff fails to demonstrate specific injury, he lacks standing to bring the RICO causes of action and the Complaint should be dismissed as to Tirschwell.

D. Amending the Complaint Would Be Futile

26. Leave to amend is typically granted unless "amendment would be futile." *Jabaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 322 (5th Cir. 2009). Here, amendment certainly would be futile. Plaintiff has twice sought leave to file amended complaints. *See* Docket Nos. 4 and 96. Neither of the proposed amended complaints remedy the legal deficiencies of the Complaint. The Proposed First Amended Complaint adds, without any factual basis, a claim that Tirschwell and the other named defendants are alter egos of each other. Docket No. 4-1. No additional facts are added with regard to Tirschwell's alleged actions, and it is still extremely unclear against whom the Plaintiff is asserting which cause(s) of action. The Proposed Second Amended Complaint only repeats the same conclusory statements. Docket No. 96.

V. Conclusion and Prayer

27. For the foregoing reasons, Plaintiff has not and cannot articulate a viable claim against Tirschwell. Therefore, Tirschwell seeks dismissal of the amended complaints and denial of leave to amend.

WHEREFORE, Defendant Sara Tirschwell respectfully requests the Court dismiss Plaintiff's Complaint with prejudice, deny leave to amend the Complaint, and any further relief that the Court deems appropriate.

Dated: November 28, 2023

Respectfully submitted,

McCLOSKEY ROBERSON WOOLLEY, PLLC

By: */s/ Thomas A. Woolley, III*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on (i) all parties receiving ECF notice in the case, and (ii) to the following addresses via First Class Mail.

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/s/ Thomas A. Woolley, III
Thomas A. Woolley, III

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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Plaintiff	§	
v.	§	
	§	
SARA TIRSCHWELL, et al.,	§	
***Defendants*.**	§	

ORDER GRANTING MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM AND INSUFFICIENT SERVICE OF PROCESS

On this day, the Court considered Defendant Sara Tirschwell's Motion to Dismiss for Failure to State a Claim and Insufficient Service of Process (the "Motion"), and any responses to the Motion, and the Court, having found that it has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and that it constitutes a core proceeding pursuant to 28 U.S.C.§ 157, finds that the Motion should be granted; it is hereby:

ORDERED that the Motion is GRANTED; it is further

ORDERED that all claims raised in the Complaint [Docket No. 1] against Sara Tirschwell are DISMISSED with prejudice to their refiling; it is further

ORDERED that notice of the Motion is deemed good and sufficient notice and the requirements of the Federal Rules of Bankruptcy Procedure and the Local Rules are satisfied by such notice; it is further

ORDERED that the Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Signed:

_____
United States Bankruptcy Judge

Order submitted by:
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