IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 17-cv-00210-RBJ

LIST INTERACTIVE, LTD. d/b/a UKnight Interactive, and
LEONARD S. LABRIOLA,

Plaintiffs,

v.

KNIGHTS OF COLUMBUS,

Defendant.

ORDER on PENDING MOTIONS

This case is again before the Court on several motions. I discussed the background and issues of this case in detail in an order issued on July 28, 2017. ECF No. 54. I will repeat that discussion only as necessary to make sense of the latest batch.

FACTS

Plaintiff List Interactive, Ltd., frequently referred to by its d/b/a UKnight Interactive or just "UKnight," is a company that designs web systems. Plaintiff Leonard Labriola is the manager of UKnight. They allege that in September 2011 defendant Knights of Columbus promised to announce to the broader Knights of Columbus fraternity of lodges and agents ("the Order") an agreement whereunder UKnight would be the designated vendor for the Order's life insurance business.

The promised announcement never occurred, and as a result, we are embroiled in the present litigation. In their First Amended Complaint plaintiffs assert eight claims against one or more of the three defendants named in that document: (1) violation of the Racketeer Influenced

and Corrupt Organizations Act ("RICO"), essentially alleging that defendants terminated the relationship because plaintiffs had uncovered they were committing insurance fraud on reinsurers, licensing authorities, their own lodges, and others; (2) breach of contract; (3) promissory estoppel; (4) misappropriation of trade secrets; (5) intentional interference with prospective business relationship; (6) fraudulent misrepresentation; (7) negligent misrepresentation ; and (8) slander *pro quod*.

Defendants moved to dismiss certain of these claims under either Rule 12(b)(1) or 12(b)(6). The Court dismissed the claims against the individual defendants, Thomas P. Smith, Jr. and Matthew A. St. John, without prejudice for lack of personal jurisdiction. ECF No. 54 at 38. I denied defendants' motion to dismiss the breach of contract and promissory estoppel claims. I dismissed plaintiff's slander claim with prejudice, finding that the applicable statute of limitations had expired. Perhaps most significantly, I granted defendants' motion to dismiss the RICO claim for failure to state a claim on which relief could be granted. However, the latter was without prejudice, because plaintiffs represented that they could and would amend their RICO claim so that it did state a viable claim. Finally, I denied defendants' motion to strike large portions of plaintiffs' amended complaint but suggested that plaintiffs word their next amended complaint more professionally.

I now address the motions that have been filed since that previous order.

A. <u>Dismissed Defendants' Motion for Attorney's Fees, ECF No. 56</u>.

UKnight named Mr. Smith and Mr. St. John as additional defendants to the RICO claim. UKnight also named Mr. St. John as a defendant to the misappropriation of trade secrets claim. UKnight and Mr. Labriola named Mr. Smith as an additional defendant to the slander claim. ECF No. 15 at 25-39; 42-43; 47-48. As indicated above, the Court dismissed the claims against Mr. Smith and Mr. St. John for lack of personal jurisdiction. The two individual defendants now

seek an award of their reasonable attorney's fees under Colorado Revised Statutes § 13-17-201 which provides,

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

To begin, both parties assume without discussion that Colorado law applies to this issue, notwithstanding that this Court previously determined that Connecticut law applied to the contract and promissory estoppel claims. I agree. Specifically, I agree with Judge Miller's analysis in *Grynberg v. Ivanhoe Energy, Inc.,* No. 08-cv-02528-WDM-BNB, 2011 WL 3294351, at **1-2 (D. Colo. Aug. 1, 2011). He concluded that Colorado law applied where the issue concerned events of the litigation itself. *Id.* at *2.

Next, there appears to be no dispute that the Colorado statute applies to state law tort claims notwithstanding that the case is in federal court. *See Jones v. Denver Post Corp.,* 203 F.3d 748, 757 (10th Cir. 2000) (C.R.S. § 13-17-201 applies to pendent state claims). *See also Shrader v. Beann,* 503 F. App'x 650, 655 (10th Cir. 2012) (unpublished) (C.R.S. 13-17-201 "applies to a dismissal under Fed. R. Civ. P. 12(b) of a tort claim brought under Colorado law.").

Defendants argue that the statute also should be applied to the dismissal of the RICO claim because (1) it applies to "all actions" based on tort, and the RICO claim is in substance a federal statutory tort, "especially where the predicate acts alleged in support of the RICO claim – here, trade secret misappropriation and fraud – are themselves torts;" and (2) where the action contains a mixture of claims, fees may be awarded if the action is primarily a tort action. ECF No. 56 at 3.

Plaintiffs respond that the "essence" of the claims against Mr. Smith and Mr. St. John is that they are "RICO claims heard pursuant to federal subject matter jurisdiction," not state-law

tort claims considered pursuant to supplemental jurisdiction," and, therefore, that an award of attorney's fees pursuant to C.R.S. § 13-17-201 is inappropriate. ECF No. 62 at 2.

The parties define the essence of the case to fit the moment. Plaintiffs call this a RICO case, even though they asserted seven other claims that arise under state law. Possibly this is because RICO only permits prevailing plaintiffs to recover attorney's fees. 18 U.S.C. § 1964(c). *See Chang v. Chen,* 95 F.3d 27, 28 (9th Cir. 1996). Defendants have in the past labeled this as a "garden-variety business dispute," and they have accused plaintiffs of "trying to leverage their breach-of-contract case into a claim under RICO." ECF No. 23 at 2. Now, however, they are at least temporarily happy to accept plaintiffs' insistence that it is a tort case, because that better fits their attorney's fees argument.

The action as against Mr. Smith and Mr. St. John undoubtedly was a tort action. The claims against them were a combination of state law tort claims and the RICO claim. "RICO claims [] effectively sound in tort." *General Steel Domestic Sales, LLC v. Denver/Boulder Better Business Bureau,* No. 1:07-cv-01145-DME-KMT, 2009 WL 1292780, at *2 (D. Colo. May 8, 2009). Mr. Smith and Mr. St. John are, therefore, entitled to an award of attorney's fees under the Colorado statute.

One can debate whether that would ordinarily include fees incurred in defending a RICO claim that is included with state law tort claims. *Compare General Steel Domestic Sales,* 2009 WL 1292780, at *2 ("[S]ection 13-17-201 does not apply to federal RICO claims because its application is preempted.") *with Grynberg,* 2011 WL 3294351, at **3, 4 (RICO does not preempt § 13-17-201). I need not resolve that dispute today because here, as in *Grynberg,* the dismissal was based solely on lack of personal jurisdiction, not on the merits of any of the claims. The Court found that plaintiffs did not establish that either individual had sufficient

"minimum contacts" with Colorado to permit the exercise of jurisdiction as a matter of constitutional due process. Plaintiffs' unsuccessful attempt to avoid this constitutional shortcoming by invoking RICO's nationwide service of process provision cannot now give them a bootstrap benefit by reducing the fees they caused these defendants to incur in responding to that attempt. I conclude that it makes no sense to try to separate out the RICO claim from the others in this instance. Mr. Smith and Mr. St. John are awarded their reasonable attorney's fees under C.R.S. § 13-17-201 incurred in defending against the claims asserted against them.

This does not, however, conclude the matter. Plaintiffs are entitled to an evidentiary hearing on the reasonableness of the amount requested and on whether and how to apportion the fees between the two plaintiffs, unless, of course, the parties can reach an agreement on these issues.

B. [Plaintiffs'] Motion to Amend Complaint and Revise Caption, ECF No. 58.

Plaintiffs wish to amend their complaint, not only to try to shore up their RICO claim, but to expand the litigation well beyond its already broad scope. Now they wish to challenge the Knights of Columbus's tax-exempt status, add the Commissioner of the Internal Revenue Service as a defendant, accuse the defendant of extortion, and even change the defendant's name. In response defendant launches a wholescale attack not only on the merits of the amended complaint but on plaintiffs' good faith in filing it.

The Court declines the invitation to wade into the merits just yet. The Court takes seriously the command of Rule 15(a)(2) that leave to amend should be freely given when justice so requires. We still are in the early stages of the case, and I see no prejudice to the defendants other than the obvious escalation of the costs of litigation. But plaintiffs are not alone in that. The defendant filed its own 59-page answer to the plaintiffs' First Amended Complaint,

including 12 affirmative defenses, a nine-claim set of counterclaims, and (after requesting and receiving the Court's permission) four additional parties as defendants to the counterclaims.

Some clichés come to mind, such as "be careful what you ask for," and "if you're in a hole, stop digging." I wonder whether Mr. Labriola, Mr. Smith and Mr. St. John really want to go down this road, as it undoubtedly will prove to be very expensive, very stressful, and very distracting to all of them. That is not a comment on the merits of either side's position. There will be plenty of time for that. It is a suggestion that now might be a good time to take a deep breath, reevaluate where you are, and decide what you really wish to do. If it is to press forward with the plaintiffs' Second Amended Complaint, defendant's inevitable motion to dismiss some or all of the Second Amended Complaint (which they have already written in the form of their opposition to the motion to amend), plaintiff's inevitable motion to dismiss defendant's inevitable counterclaims to the Second Amended Complaint, and on and on over the next two or more years, so be it. But I suggest that you at least think about it and consider whether there might be as better way.

The motion to amend is granted with the exception that the Court rejects plaintiffs' request to change the caption to identify the defendant as the "Knights of Columbus, **Inc.**" (emphasis added). Whether adding "Inc." to the name would avoid or add to any confusion, that is not, so far as I am aware, the name of the defendant. The ", Inc." will be omitted from the name of the defendant in the caption.

C. [Counterclaim Defendants'] Motion to Dismiss Counterclaims, ECF No. 61.

This motion is denied as moot. Because the Court has now granted plaintiff's motion to amend to assert their Second Amended Complaint, defendant's answer to the First Amended Complaint and the counterclaims that went with it are now moot and will have to be tailored and

filed in response to the Second Amended Counterclaims. Therefore, the motion to dismiss the original counterclaims is moot.

D. [Plaintiff's] Motion for an Emergency Temporary Restraining Order and Preliminary Injunction and for Sanctions for Witness Intimidation, ECF No. 76.

E. Defendant's Motion for Protective Order, ECF No. 77.

The Court has already addressed these opposing motions to some extent in a telephone hearing held on September 25, 2017 and an order issued following that hearing. ECF No. 79. The motions have been partially briefed, *see* ECF Nos. 84 and 88, and are the subjects of a hearing scheduled for October 17, 2017. No reply briefs are requested. The Court will not make any further comment on either motion today but asks the parties to reconsider their respective positions if necessary in light of the Second Amended Complaint.

ORDER

For the reasons set forth in this order,

1. Defendants' Motion for Attorney's Fees, ECF No. 56, is GRANTED IN PART AND DENIED IN PART. The motion is granted to the extent that the Court concludes that the individual defendants are entitled to an award of their reasonable attorney's fees incurred in defending against the claims asserted against them. However, plaintiffs are entitled to an evidentiary hearing on the necessity and reasonableness of the amount.

2. [Plaintiffs'] Motion to Amend Complaint and Revise Caption, ECF No. 58, is GRANTED IN PART AND DENIED IN PART. The motion is granted except as to the requested change of the name of defendant Knights of Columbus in the caption. Plaintiff is directed to file a clean version of the Second Amended Complaint minus the ", Inc."

3. [Counterclaim Defendants'] Motion to Dismiss Counterclaims, ECF No. 61, is DENIED AS MOOT.

DATED this 13th day of October, 2017.

BY THE COURT:

R. Brooke Jackson
United States District Judge