

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE GENTLE WIND PROJECT,)
ET AL.)
)
Plaintiffs,) Civil Action Docket No. 04-CV-103
)
v.)
)
JUDY GARVEY, ET AL.)
)
Defendants.)

MOTION OF DEFENDANTS JAMES BERGIN,
JUDY GARVEY AND J.F. BERGIN COMPANY
TO DISMISS PURSUANT TO RULE 12(b)(6)

Motion

Defendants Judy Garvey, James Bergin, and J.F. Bergin Company move the Court to dismiss the federal RICO and Lanham Act counts asserted against them, pursuant to Fed. R. Civ. P. 12(b)(6), and to decline to exercise supplemental jurisdiction over plaintiffs’ state law claims, consistent with this Court’s practice when the foundational federal claims are dismissed.

Memorandum of Law

Introduction

This is an action arising out of plaintiffs’ claim that defendants Judy Garvey, James Bergin and J.F. Bergin Company¹, as well as other named defendants, have defamed them because they characterize The Gentle Wind Project as a “cult” which exploited them and drained away their financial resources. In addition to garden-variety state law claims for defamation

¹ There is no, and in fact has never been any, “J.F. Bergin Company.” However, for purposes of this motion, defendants assume that the “Company” is “an unincorporated entity owned or controlled by Bergin,” since the allegations in the Complaint must be taken as true. Complaint ¶ 11.

(Count III), tortious interference (Count IV), intentional and negligent infliction of emotional distress (Counts V and VI), and false light (Count VII), plaintiffs contend that defendants are liable to them under § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) (Count I) and § 43 of the Lanham Act (Count II), 15 U.S.C. § 1125(a)(1)(B). It is these two federal claims which provide the foundation for jurisdiction in this Court.

The Lanham Act allegations fail to state a claim because neither Bergin, Garvey nor J.F. Bergin Company sell any products or services in any of the communications to which plaintiffs object, and those communications accordingly do not satisfy the statutory requirement of commercial speech made with the intent of influencing potential customers to purchase the speaker’s goods or services. The RICO count fails for similar reasons – these defendants’ communications do not seek to deprive anyone of money or property, and the alleged predicate acts of wire fraud fail as a matter of law. With the dismissal of the federally-based claims, the Court should decline to exercise supplemental jurisdiction over the state law claims, which should be dismissed as well.

Statement of Facts

The facts at issue in this motion to dismiss are derived from the Complaint, its exhibits, and the website for the Gentle Wind Project (www.gentlewindproject.org), which is identified in ¶ 24 of the Complaint.

Plaintiff The Gentle Wind Project (“GWP”) is a Maine nonprofit corporation allegedly dedicated to emotional and physical healing and well-being. Plaintiffs Mary Miller, Shelly Miller, Carol Miller, Joan Carreiro, Pam Ranheim and John Miller are staff/employees/directors of GWP. Complaint ¶ 1, 29. GWP is “dedicated to education and research aimed at alleviating human suffering and trauma.” It researches, develops and distributes “healing instruments” that

it believes restore and regenerate “the human energy field and contribute to human healing.” Complaint ¶ 23. GWP maintains a website and conducts seminars “at which its principles and healing instruments are discussed.” GWP does not sell its healing instruments. When GWP distributes a healing instrument, a suggested donation is requested. All GWP income comes from donations. Complaint ¶ 25.

According to GWP’s webpage entitled “About Us...Some History,” the healing instruments “restore and regenerate a person’s energetic structure”:

This healing technology was designed to restore and regenerate a person's energetic structure when used one time in a person's life. Your energetic structure is the invisible etheric web in which you exist. The energetic web is, generally speaking, oval in shape. It extends 8 to 10 feet in height and 4 to 6 feet in width, with your physical body in the middle. Within this system, there are 32 different levels. Over 90 percent of the world's population is missing between 10 and 15 levels. If you had etheric vision and could see 32 layers deep, you would see fragmented, burnt-out, sub-atomic spiritual nets in just about everyone, including all the great spiritual leaders past and present.

GWP claims with respect to its healing instruments that the “technology available through The Gentle Wind Project comes from the Spirit World, not the human world.” GWP webpage, “About Us...Technology from the Spirit World.” Suggested donations for GWP’s healing instruments shown on the website range from the \$450 “High Density Healing Card and Pain Card” to the \$5,850 “Rainbow Puck V” (and which is a more portable version of the “Photon Health Accelerator”) to the \$7,600 “Healing Bar Version 1.3” (which is now available because “time shifting constraints and multidimensional/matrix layering” have been overcome). GWP webpage, “Instruments – Our Instrument Catalogue.”

Defendants Bergin, Garvey and J.F. Bergin Company are residents of Blue Hill, Maine. Complaint ¶ 9-11. The Complaint alleges that Garvey and Bergin were involved with GWP for many years, at their election, and that Garvey voluntarily made loans to GWP. Complaint ¶ 30.

In 1999, Garvey volunteered at GWP's Kittery office. Plaintiffs allege that the arrangement was unsuccessful, and Garvey was asked to leave. Complaint ¶ 31. Sometime thereafter, Garvey demanded immediate repayment of the loan, and GWP completed repayment by the early summer of 2003. Complaint ¶ 32. Plaintiffs allege that in October, 2002, Garvey for the first time defamed GWP by claiming that she had been subject to "mind control" by GWP. Complaint ¶ 33. She sent other allegedly defamatory emails thereafter. Complaint ¶ 53, 55. In November, 2003, Garvey authored what plaintiffs refer to as the "Garvey Report," a document containing numerous allegedly defamatory statements about the plaintiffs, including claims that GWP is a cult engaged in mind-control, group sexual rituals, and abuse and neglect of children. Complaint ¶ 34-36. Plaintiffs also allege that Bergin authored the so-called "Bergin Report," a document containing similarly defamatory statements from a husband's perspective. Complaint ¶ 38-39. Bergin and Garvey posted the Garvey Report and the Bergin Report, along with other defamatory statements, on a website which they created, operate and maintain (www.windsofchange.org), and further published the Reports to others. Complaint ¶ 41-42, 46, 49-51. Significantly, in none of the referenced emails, the Garvey Report, the Bergin Report, or the website is there any offer by Garvey, Bergin or J.F. Bergin Company to sell goods or services, nor is there any solicitation of money or property, whether through donations or otherwise.

According to the Complaint, Garvey is a hypnotherapist. Plaintiffs speculate on information and belief that "Garvey's business would benefit from public attention to her" claims regarding GWP and the individual plaintiffs. Complaint ¶ 59. Plaintiffs allege on information and belief that Bergin is engaged in commerce with respect to cults and new religious movements, that he engages in commerce through J.F. Bergin Company, and that, like

Garvey, his business will benefit from public attention arising out of his claims against GWP.
Complaint ¶ 58.

Argument

I. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST
BERGIN, GARVEY AND J.F. BERGIN COMPANY
UNDER THE LANHAM ACT BECAUSE THESE
DEFENDANTS ARE NOT ENGAGED IN
COMMERCIAL ADVERTISING OR PROMOTION

In Count II of their Complaint, plaintiffs allege a violation of § 43 of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B).² The statute provides that:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. §1125(a)(1)(B). In the first instance, the Complaint alleges only that GWP's goods, services and/or commercial activities are affected by the statements made by Bergin, Garvey and J.F. Bergin Company. Complaint ¶ 145. Accordingly, the individual plaintiffs do not state a claim under the Lanham Act.

The critical element of the Count II allegations for purposes of this motion to dismiss is the phrase "commercial advertising and promotion." As noted by the First Circuit, the courts have developed a four-part test "to ascertain which representations fall into the category of

² In the heading of their Count II, plaintiffs reference § 1125(a)(1)(B), and consistent with that reference, they assert that statements by the defendants constitute "commercial advertising or promotion." Complaint ¶ 143. In their prayer for relief under Count II, plaintiffs refer to §1125(a)(1)(A). The reference in the prayer must be a typographical error, since subsection (a)(1)(A), unlike plaintiffs' claims here, relates to confusion or mistake as to the origin or sponsorship of goods and services.

‘commercial advertising or promotion.’” *The Podiatrist Association, Inc. v. La Cruz Azul De Puerto Rico, Inc.*, 332 F.3d 6, 34 (1st Cir. 2003). The statute covers statements which

- (a) constitute commercial speech;
- (b) are made with the intent of influencing potential customers to purchase the speaker’s goods or services;
- (c) are uttered by a speaker who is a competitor of the plaintiff in some line or trade or commerce; and
- (d) are disseminated to the consuming public in such a way as to constitute “advertising” or “promotion.”

Id.

Count II fails to satisfy the four-part test for a myriad of reasons. With respect to Bergin, Garvey and J.F. Bergin Company, plaintiffs in general, and GWP in particular, do not allege in their Complaint that Bergin, Garvey or J.F. Bergin Company is a competitor of GWP “in some line of trade or commerce.” Plaintiffs allege only that these defendants are engaged in “commerce” with respect to “hypnotherapy” (in the case of Garvey) and “cults and new religious movements” (in the case of Bergin and J.F. Bergin Company). Indeed, GWP expressly denies that it is a cult or similar movement; rather, it claims to be a non-profit organization dedicated to emotional and physical healing and well-being.

Plaintiffs also accuse these defendants of wrongdoing in connection with two distinct forms of communication: the Garvey Report, Bergin Report, and the website, on the one hand, and individual emails described in ¶¶ 33, 53, 54, 55, and 56 of the Complaint on the other. The emails cannot form the basis for a Lanham Act claim because they do not constitute “advertising or promotion.” That term refers to communication with “anonymous recipients” as opposed to

face-to-face or other specifically directed communications. *See Podiatrist Association*, 332 F.3d at 19, *citing First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803 (7th Cir. 2001).

The Lanham Act claim also fails because these defendants' statements do not, as a matter of law, constitute commercial speech made with the intent of influencing potential customers to purchase the defendants' goods and services. The core focus of plaintiffs' claims is the website operated by Garvey and Bergin, along with the Garvey Report and the Bergin Report which have been published on the website. Those materials do not constitute "commercial speech" and they are not made with the intent to influence the reader to purchase any goods or services. In dismissing a § 43 claim, the Second Circuit has noted that the term "commercial speech" is "speech which does no more than propose a commercial transaction." *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004). There is nothing on the website, in the Garvey or Bergin Reports, or for that matter in any of the individual emails that proposes any commercial transaction, offers anything for sale, or even solicits donations.

The plaintiffs allege generally in Count II that all of the defendants made "the above-described statements in commercial advertising or promotion." Complaint ¶ 143. This general statement does not suffice to defeat dismissal under Rule 12(b)(6). Documents submitted with the Complaint may be taken into account by the Court without converting this motion into a motion for summary judgment. *See Epimenio Soto-Negron v. Taber Partners I*, 339 F.3d 35, 36-37 (1st Cir. 2003). As the First Circuit noted in *Epimenio*, 339 F.3d at 38:

We need not, however, accept as true all facts in the complaint: "We exempt, of course, those "facts" which have since been conclusively contradicted by plaintiffs' concessions or otherwise...."

Paragraph 143 of the Complaint lumps all defendants together. In alleging commercial advertising and promotion, the paragraph refers to the defendants' "above-described statements"

contained in the factual recitations in the Complaint. In the case of Bergin, Garvey, and J.F. Bergin Company, there are no “above-described” statements which constitute commercial speech made with the intent to induce the reader to purchase the defendants’ goods and services. By referring to statements which do not exist, plaintiffs effectively concede that they make no allegation of commercial speech and promotion as it applies to Bergin, Garvey and J. F. Bergin Company.

Plaintiffs appear to recognize the need to link their allegations to some form of commercial activity. Since they cannot allege that the Reports, emails, or the website solicit trade or business, they allege instead, “on information and belief,” that Garvey’s and Bergin’s businesses “would benefit from public attention” to their claims regarding GWP and the individual plaintiffs. Complaint ¶¶ 58-59. Public attention, created by critical statements contained on a website, which generates interest in a person’s business activities not even referenced on the website cannot be said to convert those statements to commercial speech. By speculating that Bergin, Garvey or J.F. Bergin Company may obtain some tangential commercial benefit from their publications, plaintiffs simply confirm that these defendants’ statements do not constitute the “commercial advertising and promotion” covered by § 43 of the Lanham Act. Count II of the Complaint should be dismissed as against Garvey, Bergin and J.F. Bergin Company.

**II. PLAINTIFFS’ RICO CLAIM SHOULD BE DISMISSED
BECAUSE THE COMPLAINT FAILS AS A MATTER OF LAW
TO SHOW THAT THESE DEFENDANTS COULD BE
FOUND LIABLE FOR ANY PREDICATE ACT**

Plaintiffs allege in Count I that Garvey and Bergin violated § 1962(c) of RICO.³ Section 1962(c) provides:

³ Defendant J.F. Bergin Company is not a named “Count I Defendant.” Complaint ¶ 133.

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

The First Circuit has developed a short-hand description of the four elements of § 1962(c) that must be alleged in order to state a claim: Plaintiffs must allege that Garvey and Bergin were, or are, involved in the (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *Epimenio Soto-Negron v. Taber Partners I*, 339 F.3d at 38.

Plaintiffs seek to satisfy the four-part test through their Count I allegations. They allege that Garvey and Bergin (as well as defendants Equilibra Gamble, Truth Campaign, Fraser, Hassan, Freedom of Mind Resource Center, Inc., Ross, Rick A. Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements, and Mander) engaged in conduct through the “posting of the above-described statements on the internet web sites and the transmission of electronic mail messages via internet message boards and electronic mail.” Complaint ¶ 133. They allege that the defendants were associated “and acted as an enterprise.” Complaint ¶ 134. They further allege that Garvey and Bergin engaged in a pattern of racketeering activity through “multiple violations” of the wire fraud statute, 18 U.S.C. § 1343. Complaint ¶ 136, 137, 138.

Although plaintiffs recite the statutory mantra in their Complaint, their allegations again fail, as with the Lanham Act count, to satisfy the standard for asserting a RICO claim. In order to commit wire fraud, Garvey and Bergin must have used the interstate wires and have:

devised, or intend[ed] to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises....

18 U.S.C. § 1343. The critical elements of wire fraud include a scheme to defraud, with the specific intent to deprive another of money or property. *Lavery v. Kearns*, 792 F. Supp. 847, 861

(D. Me. 1992). Moreover, in order to state a claim against Garvey or Bergin under § 1962(c) grounded on wire fraud, plaintiffs must satisfy Rule 9, and allege with particularity the content of wire communications involving Garvey and/or Bergin which they contend constitute a scheme to defraud with the intent of depriving another of money or property. *See The Overton Corporation v. Case Equipment Company*, 1990 U.S. Dist. LEXIS 18275 at 7-9 (D. Me. 1990)(must plead wire fraud with particularity, and must state “the content of any wire...communications specifically involving” the targeted defendants).

In assessing whether plaintiffs state a claim, as noted earlier, the Court is not required to accept plaintiffs’ bare allegations in the face of documentary evidence submitted with the Complaint. *Epimenio*, 339 F.3d at 36-38. The plaintiffs specify emails, the Bergin/Garvey website, the Garvey Report and the Bergin Report as the “above-described” instances of wire fraud authored by Garvey or Bergin. Complaint ¶ 133. In none of those wire communications is there any effort to sell goods or services, to seek donations, or otherwise to solicit funds. The wire communications in which Garvey and Bergin were involved simply cannot be construed to be a scheme to defraud with the intent to deprive another of money or property because they do not seek, either “directly or indirectly,” any financial contribution or compensation.

As with the Lanham Act Count, and perhaps recognizing that they have not even a thin reed on which to argue that Garvey and Bergin will receive any money or property from the wire communications, plaintiffs contend that these defendants may improve their alleged businesses through publicity arising out of their criticism of GWP. The sole economic benefit that Garvey and Bergin will allegedly receive from their so-called scheme to commit wire fraud is improved business as a result of “public attention” arising out of their Reports. Complaint ¶ 58-59. At best, this alleged economic benefit, arising only from publicity is tangential – it is not, as a

matter of law, sufficient to establish a scheme or artifice to defraud. Accordingly, plaintiffs cannot demonstrate that Garvey or Bergin engaged in the requisite predicate acts of wire fraud. Count I should be dismissed.

III. WITH THE DISMISSAL OF PLAINTIFFS'
FEDERAL CLAIMS, PLAINTIFFS' SUPPLEMENTAL
STATE LAW CLAIMS SHOULD BE DISMISSED

Since GWP is a Maine corporation and Bergin and Garvey are domiciled in the State of Maine, Complaint ¶ 2, 9, 10, there is no diversity of citizenship providing jurisdiction over plaintiffs' state law claims in Counts III through VII. Rather, jurisdiction over Counts III through VII rests on the Court's supplemental jurisdiction. 28 U.S.C § 1367. This Court's general practice is to decline to exercise supplemental jurisdiction over state law claims "when a plaintiff's foundational federal claims are dismissed before trial." *Gorman v. Coogan*, 2004 U.S. Dist. LEXIS 301 at 68-69 (D. Me. 2004)(Cohen, M.J.); *see also Camelio v. American Federation*, 137 F.3d 666, 672 (1st Cir. 1998) ("The balance of competing factors ordinarily will weigh strongly in favor of declining jurisdiction over state law claims where the foundational federal claims have been dismissed at an early stage in the litigation.") For this reason, upon dismissal of Counts I and II for failure to state a claim under Rule 12(b)(6), this Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims.

Conclusion

For all of the foregoing reasons, plaintiffs' complaint should be dismissed as against defendants Judy Garvey, James Bergin, and J.F. Bergin Company.

Dated: June 30, 2004

/s/ Jerrol A. Crouter
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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2004, I electronically filed an assented-to motion to file responsive pleading with the Clerk of Court using CM/ECF system which will send notification of such filing(s) to the following: James G. Goggin, Esq.

/s/ Jerrol A. Crouter