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

CANDACE LOUISE CURTIS & RIK WAYNE MUNSON	§	
VS.	§	CIVIL ACTION NO. 4:16-CV-01969
CANDACE KUNZ-FREED, ALBERT VACEK, JR., ET AL	§	

Defendants Mendel's & Featherston's Rule 12(b)(6) Motion to Dismiss for Plaintiffs' Failure to State a Claim

I. Summary of the Argument

1.1. The Texas doctrine of attorney immunity bars plaintiffs' claims. It is undisputed that defendants Mendel and Featherston have: (a) never had an attorney/client relationship with either of the plaintiffs; and (b) only served as attorneys in the defense of co-trustee Anita Brunsting. *See Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5TH Cir. 2016).

1.2. The complaint does not provide defendants with fair notice of plaintiffs' claims. Plaintiffs allege that defendants were part of an entity that violated the RICO statute and enumerate several predicate acts allegedly engaged in by defendants, but do so through inference, speculation, and conclusive statements. Such vague statements fail to place defendants on notice of how the entity is alleged to have operated, how the predicate acts furthered the larger conspiracy, or how the defendants knew that these acts would further any conspiracy. By way of example and not as a limitation, Mr. Featherston is alleged to have engaged in illegal wiretapping, the occurrence of which was inferred by the plaintiffs based on the production of voicemail recordings and nothing more. One problem, among others, is that Mr. Featherston's alleged wiretaps predate his involvement with the case.

II. Nature of the Case

2.1. The pro se plaintiffs are Candace Louise Curtis and Rik Wayne Munson. Defendants are Stephen A. Mendel and Bradley E. Featherston, among others. Messrs. Mendel and Featherston are attorneys licensed by the State Bar of Texas. Mr. Mendel is current counsel for Co-Trustee Anita

Brunsting. Mr. Featherston is a former associate attorney of Mr. Mendel, and previously assisted Mr. Mendel with the defense of Co-Trustee Anita Brunsting.

2.2. In addition to suing Messrs. Mendel and Featherston, plaintiffs sued nine (9) other attorneys, two (2) probate judges, and a court reporter for violations of the Racketeer Influenced Corrupt Organization Act (RICO).

2.3. Plaintiffs alleged that all of the defendants were part of a conspiracy in which several Houston area law firms and Harris County Probate Court No. 4 worked in concert to defraud heirs of their inheritances in order to enrich themselves. Plaintiffs' dubbed this alleged entity as the "Harris County Tomb Raiders, a/k/a the Probate Mafia."

2.4. Plaintiffs allege that they were harmed by the Tomb Raiders through its involvement in a related probate case pending in Harris County Probate Court No. 4, under C.A. No. 412249-401, *Estate of Nelva Brunsting, Deceased*. In particular, Mr. Featherston allegedly committed acts of illegal wiretapping and extortion in furtherance of the conspiracy. Both Messrs. Mendel and Featherston were allegedly involved in a conspiracy within the larger conspiracy to induce plaintiff Curtis to sign away valuable trust interests through extortion by way of a "sham mediation."

2.5. For the Court's benefit, plaintiff Curtis and her siblings participated in a mediation in August 2014. No other mediation has occurred. Since Messrs. Mendel and Featherston did not make an appearance as counsel of record until November 2014, it is impossible for them to be involved in a "sham mediation."

2.6. In Spring 2016, the Probate Court ordered a mediation among the parties, and that mediation was scheduled for July 2016, but the mediation never occurred. As such, assuming arguendo that a mediation is a course of conduct not protected by the Texas attorney immunity

doctrine, it is impossible for Messrs. Mendel and Featherston to participate in a sham mediation that never occurred.

III. Argument

3.1. A court has the authority to dismiss a suit for failure to state a claim upon which relief can be granted if the complaint does not provide fair notice of the claim and does not state factual allegations showing the right to relief is plausible. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Alt. Corp. v. Twombly,* 550 U.S. 544, 555-56 & n.3 (2007).

3.2. A careful reading of the plaintiffs claims against Messrs. Mendel and Featherston show that those claims are all related to their roles as attorneys in the defense of Co-Trustee Anita Brunsting. As such, the claims are barred as a matter of law by the Texas attorney immunity doctrine. *Troice*, 816 F.3d at 348. The Texas attorney immunity doctrine provides true immunity from suit and is not merely an affirmative defense. *Id*. at 346. Dismissal is, therefore, warranted regardless of the merits of the alleged conduct. *Id*. at 348-49.

3.3. More specifically, the plaintiffs' allege that Mr. Featherston engaged in wiretapping and theft/extortion, and that both Messrs. Mendel and Featherston were involved in a conspiracy to commit theft/extortion, all of which were done in furtherance of the larger RICO conspiracy. However, the actions underlying these claims are: (1) arguing in the probate court or through judicially filed instruments for the admissibility of voicemail recordings, which is alleged as "wiretapping;" (2) arguing in the probate court or through judicially filed instruments that claims for trust distributions violated the no-contest clause of the Qualified Beneficiary Trust ("QBT"), which is alleged as "theft/extortion;" and (3) arguing in the probate court or through judicially filed instruments that the parties should mediate, which is the "conspiracy to commit theft/extortion."

3.4. Each alleged act as to Messrs. Mendel and Featherston is the kind of conduct that an attorney normally engages and is expected to engage when representing a client and is entirely covered by attorney immunity. *See Troice*, 816 F.3d at 348 (the defendant attorney sent letters to the SEC regarding jurisdiction, communicated with the SEC about document discovery and the legitimacy of his client's business, stated that certain witnesses would provide more relevant testimony than others in a deposition, and represented one of his client's executives in a deposition). Because all of the plaintiffs' claims derive from conduct covered by attorney immunity, the complaint fails to state a claim for which relief may be granted and should be dismissed for this reason alone.

3.5. Yet, the plaintiffs' claims can be dismissed for a second reason, which is that the claims fail to provide Messrs. Mendel and Featherston with fair notice of what they allegedly did wrong. *Ruvio v. Wells Fargo Bank N.A.,* 766 F.3d 87, 90-91 (1ST Cir. 2014); *Brooks v. Ross,* 578 F.3d 574, 581-82 (7TH Cir. 2009). A complaint that provides only labels and conclusions or formulaic recitation of the elements of a cause of action is insufficient to show grounds for the plaintiff to be entitled to relief. *Iqbal,* 556 U.S. at 678; *Twombly*, 550 U.S. at 555 & n.3; *Brooks*, 578 F.3d at 581.

3.6. In addressing their claim that a broad RICO type conspiracy exists between the defendant law firms and the probate court, the plaintiffs describe the alleged "entity" as "a secret society . . . associated together for the purpose of carrying out an ongoing criminal theft enterprise . . . through a multi-faceted campaign of lies, fraud, threats, and official corruption in furtherance of a conspiracy involving a pattern of racketeering activity . . . ." This description is repeated with slight variations throughout the complaint and appears to have been crafted by combining several definitions taken from 18 U.S.C. § 1961, and a vague list of types of alleged actions taken by those

involved in the conspiracy in furtherance of the same. There is not a single fact of what Messrs. Mendel and Featherston said that were lies or threats, no facts to show fraud, nor any factual explanation as to how Messrs. Mendel and Featherston could commit official corruption when neither is a government official.

3.7. Likewise, the plaintiffs cannot describe a single fact as to how Messrs. Mendel and Featherston used the "entity" to syphon "off the assets of our elders . . . through . . . schemes and artifices" as part of a plan which they refer to as "Involuntary Redistribution of Assets." There are no facts to show how this alleged scheme works, whom are the elders, the types of assets that are being syphoned off, the value of the assets allegedly being syphoned, nor how much Messrs. Mendel and Featherston wrongfully received.

3.8. The plaintiffs admit that "the specific quid pro quo profit sharing is unknown" to them, but insist that proof of "a reciprocal stream-of-benefits necessarily flows from the fact of the in-concert activities of the co-conspirators." Nebulous rhetoric, conclusory statements, and unsupported presumptions do not constitute facts and, therefore, are insufficient to sustain a claim against Messrs. Mendel and Featherston.

3.9. When plaintiffs attempt to describe overt acts in furtherance of the conspiracy by particular defendants they are similarly vague and conclusory. As previously indicated, the plaintiffs claim that Mr. Featherston engaged in illegal wiretapping in furtherance of the conspiracy. The basis for this claim is that Mr. Featherston argued in court or through judicial instruments for the admissibility of recordings of telephone conversations between Curtis' brother, Carl Brunsting and their mother, Nelva Brunsting.

3.10. The plaintiffs' main argument that these recordings were obtained via an illegal

wiretapping device seems to be the existence of the recordings of private conversations that, they believe, could only be obtained by wiretapping Carl's telephone. However, in reality, the recordings are nothing more than recorded messages from Nelva Brunsting's answering machine that were produced during discovery in the underlying probate case. Producing 2011 recordings made by others as required the Texas Rules of Civil Procedure does not mean the attorney producing the recordings in 2014 or thereafter engaged in wiretapping.

3.11. Plaintiffs further allege that Mr. Featherston, along with other defendant attorneys, provided evidence that such wiretapping occurred by arguing that the recordings were admissible. Plaintiffs argue that Mr. Featherston implied that he knew the nature of the "device," its ability to record accurately, and the qualifications of its operator by arguing for the recordings' admissibility. What the plaintiffs fail to explain is why any "device" attached to Carl Brunsting's telephone would be necessary when the recordings were available from the decedent's answering machine, or how Mr. Featherston was involved with the use of such a device.

3.12. Plaintiffs also fail to account for the fact that the recordings in question were made in Spring 2011, more than three (3) years before Mr. Featherston was even involved with the probate case. Absent any facts, much less specific facts, the plaintiffs' claims are based entirely on speculation and inference and do not state a claim to which the defendants may or should have to respond.

3.13. Plaintiffs also claim that Mr. Featherston engaged in state law theft and/or federal law extortion by asserting that plaintiff Curtis' and Carl Brunsting's applications for interim distributions violated the no-contest clause of the QBT. The QBT was prepared by defendant Alfred Vacek, Jr. in August 2010 at the request of his now deceased client, Nelva Brunsting. Neither Mr. Featherston,

nor Mr. Mendel, nor their client, Co-Trustee Anita Brunsting, were involved with the drafting of the QBT in any way. As such, unless a court of competent jurisdiction declares the QBT invalid, Messrs. Mendel and Featherston and their client have the right to make any argument they so desire with regard to the enforceability of the provisions of the QBT, and such arguments cannot, as a matter of law, constitute predicate RICO acts.

3.14. Notwithstanding the fact that the plaintiffs lack a judicial determination that the no-contest clause is not enforceable, the plaintiffs claim the QBT is an "extortion instrument" being used to "instill fear of economic harm" in plaintiff Curtis and Carl Brunsting. Plaintiffs' description of both the purpose of the "extortion instrument" and its alleged use to harm plaintiffs is vague and conclusory in that it does not explain how or when any threats were made, the nature of the threats, which specific defendants made the threats, or give any indication as to how Mr. Featherston was supposed to have known of the threats so that his objection would become part of a wider conspiracy to extort anything from plaintiffs. Without such additional information, the complaint fails to state a claim to which the defendant can provide an answer.

3.15. Finally, plaintiffs' allege that Messrs. Mendel and Featherston, along with several other attorneys, engaged in a conspiracy, in support of the larger conspiracy, to commit theft and extortion through a "sham mediation" in which plaintiff Curtis was coerced into signing away valuable inheritance rights. Leaving aside whether the mediation in question was or was not a "sham," the plaintiffs only make a bare assertion that it was.

3.16. The larger problem with this claim is that there were two (2) mediations in the case in question. The plaintiffs argue that the first mediation was tainted by threats, intimidation, and a "thug mediator," but never explain how the first mediation was a "sham mediation." Furthermore,

the plaintiffs fail to explain how a second mediation that never occurred was a sham mediation, or how there can be liability for something that never occurred.

IV. Prayer

Defendants Mendel and Featherston pray that the Court grant their motion to dismiss for plaintiffs' failure to state a claim and for such other and further relief, general and special, legal and equitable, to which it may be entitled to receive.

Respectfully Submitted,

// s // Stephen A. Mendel

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Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following persons via e-service, email, or first class mail:

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on this September 30, 2016.

// s // Stephen A. Mendel

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