

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,)
)
Plaintiff,)
)
vs.) Case No. 07-0849-CV-W-FJG
)
GENERAL ELECTRIC COMPANY, et al.,)
)
Defendants.)

**REPLY SUGGESTIONS IN FURTHER SUPPORT OF
MOTION OF SEPARATE DEFENDANT
SEYFARTH SHAW LLP TO DISMISS**

COMES NOW the separate defendant, Seyfarth Shaw LLP, and submits the following Reply Suggestions in Further Support of its Motion to Dismiss filed herein. This defendant submits that, despite its length, the plaintiff’s “Consolidated Suggestions in Opposition” to the motions of the various defendants to dismiss fails to address several of the major points set forth in this defendant’s motion, and does not support plaintiff’s claim for relief against this defendant on the remaining points. This Reply will focus on those two points which plaintiff attempts to make in his Suggestions against this separate defendant, and submits that the Motion to Dismiss filed by Seyfarth Shaw LLP should be granted.

I. INTRODUCTION.

This defendant’s points in this Reply are as follows:

1. Plaintiff’s RICO claims fail to demonstrate any legal duty owed by Seyfarth Shaw LLP to plaintiff, and the Amended Complaint still fails to state a claim against this separate

defendant under RICO, despite plaintiff's misguided reliance on the case of *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997). (See Section II, *infra*.)

2. Plaintiff's arguments regarding issue preclusion are unavailing, since plaintiff's purported assignor, Medical Supply Chain, was a party to the previously-dismissed action. (See Section III, *infra*.)

II. *HANDEEN V. LEMAIRE* PROVIDES NO AID AND ASSISTANCE TO PLAINTIFF.

Plaintiff pins his whole case against this separate defendant, Seyfarth Shaw LLP, on a liberal reading and an illogical extension of the Eighth Circuit's decision in *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997).

In the present case, plaintiff argues an "enterprise" that was supposedly aimed "to obstruct the petitioner's [plaintiff's] entry into the hospital supply market."¹ Suggestion, p. 41. He further alleges that the RICO defendants conspired "to obtain Medicare and Medicaid funds through false claims against the federal government." *Id.* But plaintiff claims that defendant Seyfarth Shaw LLP participated in the "enterprise" by "obtaining" a court order from the Honorable Mark Filip in the Northern District of Illinois to require plaintiff (individually, and not as the "assignee" of Medical Supply Chain, Inc.) to appear for his deposition in Illinois, thereby placing the plaintiff (individually, and not Medical Supply Chain, whose rights plaintiff purports to assert in this action) in "terror, fearing for his life and safety." Suggestions, p. 33.

¹ Plaintiff offers no explanation as to how this so-called "enterprise" has or had any existence separate and apart from the alleged pattern of racketeering activity – a necessary element of pleading and proof in a RICO case. See *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987) and other cases cited at page 9 of this defendant's Motion to Dismiss.

First, as a factual matter, there was no deposition of Mr. Lipari in the proceeding before Judge Filip, nor was it requested, discussed or even considered. If the time would ever come for plaintiff to prove his claims in this regard, as well as most of the other outlandish allegations of the amended complaint, the whole house of cards would come tumbling down anyway. But even at the pleading stage, he has still failed to establish a legal basis for any liability on the part of Seyfarth Shaw LLP.

To support the leap in logic between the alleged RICO “enterprise” and the “predicate acts” claimed against Seyfarth Shaw LLP, plaintiff cites and quotes from *Handeen v. Lemaire*, arguing that the case supports his position that Seyfarth Shaw LLP can be held liable. *Id.*, at pp. 16-18. However, this argument is misplaced.

In *Handeen*, plaintiff was owed a sum of money by Lemaire by reason of a judgment obtained against Lemaire for damages and injuries resulting from Lemaire shooting Handeen with a rifle. 112 F.3d at 1343. Lemaire filed bankruptcy to avoid the judgment, and Handeen claimed that Lemaire and his lawyers fraudulently attempted to discharge the judgment in bankruptcy. *Id.* at 1343 – 1344. Thus, the alleged predicate act was fraud. The issue addressed by the Court in the section quoted by the plaintiff Lipari’s Suggestions in the present case was whether the bankruptcy proceeding constituted an “enterprise” and whether the law firm representing the debtor in a bankruptcy proceeding could be held liable for “conducting” the enterprise, the bankruptcy proceeding. *Id.* at 1350. Based on the facts presented in that particular case, the court held that the bankruptcy estate could be a RICO “enterprise” in which the law firm had participated. *Id.*, at 1353. However, that holding and the legal principles announced in association with that holding have nothing to do with the present case.

Here, plaintiff Samuel Lipari (on behalf of his alleged assignor, Medical Supply Chain) alleges that Seyfarth Shaw LLP participated in a “pattern of racketeering activity” (by a single act) in the Illinois litigation, but that the “enterprise” to which all the defendants belong is a group intending to keep Medical Supply Chain out of the Medicare business. Plaintiff does not claim (as did the plaintiff in *Handeen*) that the Illinois litigation was the “enterprise.” Unlike the disparate, unrelated claims of (alleged) criminal acts by the various defendants in the present case, “the predicate acts relied upon by *Handeen* were related, as they had the same purposes, results, participants and victim.” *Id.*

In fact, the holding in *Handeen* supports the defendants in this case, because the “enterprise” alleged by the plaintiff in this case would have no existence separate and apart from the predicate acts which he has claimed. 112 F.3d at 1352. As noted by another court in commenting on *Handeen*:

Simply put, Kearney's allegations fail to show that, in the absence of the alleged malicious prosecution and scheme of intimidation against him, there would have been any association-in-fact at all among the Defendants. See *Handeen v. Lemaire*, 112 F.3d 1339, 1352 (8th Cir. 1997) (“In assessing whether an alleged enterprise has an ascertainable structure distinct from that inherent in a pattern of racketeering, it is our normal practice to determine if the enterprise would still exist were the predicate acts removed from the equation.”). Therefore, Kearney has failed to properly plead an enterprise, and his RICO claims were properly dismissed.

Kearney v. Dimanna, No. 04-1439, 195 Fed.Appx. 717, 721, 2006 WL 2501414, at *3 (10th Cir. 08/30/2006) (footnotes omitted). Placed in the context of the present case, the same rule applies: Mr. Lipari’s allegations fail to show that, in the absence of the alleged misconduct by Seyfarth Shaw

LLP in the Illinois litigation, there would have been any association-in-fact or RICO “enterprise” among the defendants, at least insofar as it would include Seyfarth Shaw LLP.

There is no logical connection between the holding in *Handeen*, then, and the claims of this case, and plaintiff Lipari’s reliance on that case is misplaced.

Plaintiff’s reliance upon *Cardtoons v. Major League Baseball Players Association*, 208 F.3d 885 (10th Cir. 2000) is even more mis-placed. There, the sole conduct at issue alleged involved *pre-litigation* communications. 208 F.3d at 892 (“A letter from one private party to another private party . . .”) Here, the sole conduct at issue (as to defendant Seyfarth Shaw LLP) involves the taking of a deposition *in the midst of litigation*. Thus, the litigation privilege applies. *Trachsel v. Two Rivers Psychiatric Hosp.*, 883 F.Supp. 442 (W.D. Mo. 1995); *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047, 1050 (8th Cir. 1992); *Laun v. Union Electric Co.*, 350 Mo. 572, 166 S.W.2d 1065, 1068-69 (1942); *Cummins v. Heaney*, 2005 WL 2171066 (N.D. Ill. 2005); *Zanders v. Jones*, 680 F.Supp. 1236, 1238 (N.D.Ill. 1988); *Popp v. O’Neil*, 313 Ill.App.3d 638, 642, 730 N.E.2d 506, 510 (2000).

Plaintiff’s sole claim against Seyfarth Shaw LLP also depends on a defect fatal in logic (let alone in fact). Plaintiff’s sole complaint against Seyfarth Shaw LLP is that he was required to give his deposition in Illinois “without legal representation.” Suggestions in Opposition, p. 33.² As noted above, the so-called deposition was not even taken. However, even if the deposition *were* taken, and exploring that contention, one of two conclusions must be reached:

² Plaintiff does not contend that any defendant prevented him from engaging counsel of his choice to represent him in this (supposed) deposition. This is because there was nothing preventing him from doing so. He also does not explain how this so-called “predicate act” (which was directed to him, individually) could form the basis of any claim asserted by his assignor, Medical Supply Chain.

1. Did Mr. Lipari comply with this oath to tell the truth, and testify truthfully in response to the questions posed to him in the deposition? If so, then the ends of justice were served, as courts are entitled to, and expect, truthful testimony. *Ash, Trustee v. Wallenmeyer*, 879 F.2d 272, 275 (7th Cir. 1989) (“[L]itigation under the Federal Rules of Civil Procedure is not supposed to be merely a game, a joust, a contest; it is also a quest for truth and justice.”)

An appellate court is obliged to allow district courts discretion to preserve the integrity of a trial. Substantial deference is due a district court's evidentiary rulings and reversal may occur only where there has been an abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). This deference is especially appropriate where, as here, the district court's actions are designed to protect the truthfulness of testimony. As the Supreme Court has stated, "If truth and fairness are not to be sacrificed, the Judge must exert substantial control over the proceedings." *Geders [v. United States]*, 425 U.S. [80] at 87 [(1976)]. **The judicial system as a whole has a global interest in protecting the truth-finding process.**

United States v. Rhynes, 196 F.3d 207, 227 (4th Cir. 1999)(Emphasis added).

No unjustified harm or damage can come from providing testimony which is truthful.

2. Alternatively, did plaintiff testify falsely in his deposition? If so, then it is he who has committed fraud on the court himself, making his hands unclean and entitled to no relief in this action. See, *Beermart Inc. v. Stroh Brewery Co.*, 804 F.2d 409, 413 (7th Cir. 1986).

Either way, plaintiff can have no civil cause of action against defendant Seyfarth Shaw LLP for its involvement in obtaining his sworn testimony in the Illinois case (especially since it did not happen). Not only was it privileged, its result was testimony which plaintiff can hardly disavow.

III ISSUE PRECLUSION VERSUS *RES JUDICATA*.

Plaintiff seeks to avoid the clear impact of the doctrine of issue preclusion³ by arguing that the parties in the prior actions were not identical. Suggestions in Opposition, p. 4. However, this argument confuses the concept of issue preclusion with that of *res judicata*. In the case of *res judicata*, the parties in both actions must be identical. *Taylor v. Compere*, 230 S.W.3d 606, 609-610 (Mo. 2007). In the case of claim preclusion, there is no need for identity of parties, so long as the party sought to be bound was a party to the prior action.

The concept of collateral estoppel has been extended, allowing strangers to the prior suit to assert collateral estoppel against parties to the prior suit to bar relitigation of issues previously adjudicated. This extension of the concept of collateral estoppel removes the requirement of mutuality of estoppel which required that the party asserting the estoppel also be bound by the estoppel. See, *Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); *LaRose v. Casey*, 570 S.W.2d 746, 749-750 (Mo.App. 1978).

Estate of Jess Brown v. Bank of Piedmont, 763 S.W.2d 719, 721 (Mo. App. 1989). These cases extend the protection of collateral estoppel to those who were not parties to the prior actions, but who are in “privity” with one or more parties to the prior actions. *Dodson v. City of Wentzville*, 133 S.W.3d 528, 533 (Mo. App. 2004). In the present case, it is impossible for plaintiff to allege that Seyfarth Shaw LLP is part of a “conspiracy” with the other defendants, and yet is not “in privity” with those other defendants. Thus – accepting plaintiff’s contentions as true solely for purposes of this Motion to Dismiss – there is privity of parties, for purposes of claim preclusion, and

³ See *Misischia v. St. John’s Mercy Health System*, 457 F.3d 800 (8th Cir. 2006); *Whitaker v. Ameritech Corp.*, 129 F.3d 952 (7th Cir. 1997); *Barkley v. Carter County State Bank*, 920 F.Supp. 1441 (E.D. Mo. 1996); *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986); *Gray v. Coomer*, 706 F.Supp. 539 (W.D. Ky. 1988).

therefore, all matters litigated in the prior cases are final and cannot be raised in the present case, and plaintiff's claims here are therefore barred.

IV. CONCLUSION.

The plaintiff's "Consolidated Suggestions in Opposition to Dismissal" provides no support for plaintiff's amended complaint. Based upon all the foregoing arguments and authorities, defendant Seyfarth Shaw LLP prays that all claims in the amended complaint be dismissed against this defendant be dismissed, with prejudice, and that this defendant be awarded its costs herein incurred and expended.

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Certificate of Service

I hereby certify that on April 21, 2008, I electronically filed the foregoing with the clerk of the court using the CM/ECF system which will send a notice of electronic filing to the following:

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