

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Rebecca Ahava Wooten,

Debtor.

The Estate of Rebecca Wooten by its Trustee,

Plaintiff,

v.

Ahava LLC, Great Games, Inc., Jay Martin
and Rebecca Wooten,

Defendants.

C/A No. 00-08374-W

Adv. Pro. No. 01-80074-W

JUDGMENT

Chapter 7

ENTERED

JUL 11 2001

D.G.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Defendant Jay Martin's Motion to Dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) is hereby denied as it relates to the First and Second Causes of Action asserting claims pursuant to §548 and §549. However, as for the RICO claim, Plaintiff has failed to assert a cause of action upon which relief could be granted; therefore, Defendant Jay Martin's Motion to Dismiss as to the RICO claim is granted.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 9, 2001.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

JUL 11 2001

BNC to serve plaintiff

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

DEBI GREEN

Deputy Clerk

016

JUL 11 2001

CLERK

FILED
at ___ O'clock & ___ min. ___ M

JUL 10 2001

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (28)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	
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The Estate of Rebecca Wooten by its Trustee,	
	Plaintiff,
v.	
Ahava LLC, Great Games, Inc., Jay Martin and Rebecca Wooten,	
	Defendants.

C/A No. 00-08374-W

Adv. Pro. No. 01-80074-W

ORDER

Chapter 7

ENTERED

JUL 11 2001

D.G.

THIS MATTER comes before the Court upon the Motion of Defendant Jay Martin to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and/or Strike Plaintiff's Rico Claim Pursuant to Fed. R. Civ. P. 12(f) and 9(b) (the "Motion"), filed with the Court on May 15, 2001. After considering the pleadings in the adversary proceeding and the arguments of counsel at the hearing on the Motion; the Court makes the following Findings of Fact and Conclusions of Law:¹

FINDINGS OF FACT

1. Rebecca Wooten ("Debtor") filed a no-asset petition under Chapter 7 of the Bankruptcy Code on September 30, 1999. At the time the petition was filed, Debtor was a party to an

¹ The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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unexpired lease of a location where she operated a video poker business. Debtor was also a party to an executory contract with Great Games, Inc. for the latter to provide video gaming machines.

2. Martin is the president of Great Games, Inc., a South Carolina Corporation.²

3. On October 1, 1999, one day after the Chapter 7 petition was filed, Debtor executed a transfer of the lease with the consent of the landlord, wherein she assigned the lease to Great Games, Inc. It is undisputed that Martin signed the transfer of the lease in his capacity as President of Great Games.

4. On October 15, 1999, Debtor filed the balance of her schedules which did not list the lease as an asset of the estate. The schedules also did not list Debtor's contract with Great Games, Inc. for the latter to provide video games.

5. On April 12, 2001, Plaintiff commenced the above-referenced adversary proceeding. On April 18, 2001, prior to the filing of any answer, Plaintiff filed an Amended Complaint in which he asserted three causes of action against Ahava LLC, Great Games, Inc., Jay Martin, and Debtor seeking the Court's finding that they are jointly and severally liable. More specifically, the Amended Complaint alleges a 11 U.S.C. §549³ action against Defendants asserting that Debtor's unexpired lease, generating annual revenues of approximately one million dollars, was assigned to Great Games one day after the filing of the Chapter 7 petition and that revenues were collected post-petition on the leasehold and executory contracts by Debtor and Great Games "or through or

² Great Games, Inc. was formerly in the business of providing and servicing video gaming machines; however, video poker was banned in South Carolina effective July 1, 2000 by the South Carolina Supreme Court's decision in Joytime Distrib. & Amusement Co. v. State, Op. No. 25007 (S.C. Sup. Ct. filed October 14, 1999).

³ Further references to the Bankruptcy Code shall be by section number only.

to entities controlled by them.” For a Second Cause of Action, Plaintiff asserts a claim pursuant to §548, alleging that Debtor transferred interest in property of the estate to Ahava LLC “or other persons” within one year before the date of the filing of the bankruptcy petition and with the intent to hinder or defraud Scott’s Vending, Inc., which had supplied video gaming machines to Debtor. Lastly, Plaintiff asserts a claim under Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §1961 *et seq.* (“RICO claim”) against Defendants, alleging that Defendant conducted and participated directly or indirectly through a pattern of racketeering activity.

6. On May 15, 2001, Martin filed the present Motion claiming that Plaintiff’s Amended Complaint fails to state a cause of action against Martin under §548 and §549 in that it does not assert any allegations that Martin received any pre-petition transfer or that Debtor assigned or transferred any property to Martin post-petition. Furthermore, Martin moved to dismiss the RICO claim as no allegations were asserted that Martin received property in violation of 18 U.S.C. §1962. In the alternative to the dismissal of Plaintiff’s RICO claim, Martin asserts that it is entitled to an order striking it pursuant to Fed. R. Civ. P. 12(f).

CONCLUSIONS OF LAW

Martin has moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the causes of action asserted against him in Plaintiff’s Complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6), made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7012, provides in pertinent part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is

required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .

When considering a motion to dismiss for failure to state a claim, “a court must accept the factual allegations of the complaint as true and must view the complaint in the light most favorable to the plaintiff.” GE Investment Private Placement Partners II v. Parker, 247 F.3d 543, 548 (4th Cir. 2001); Tolemac, Inc. v. McCullough (In re United Trading Co.), C/ A No. 93-76076-W; Adv. Pro. 94-8277-W (Bankr. D.S.C. 4/13/1995) (“In making a determination under Rule 12(b)(6) of the Federal Rules of Civil Procedure, this Court must consider the complaint, matters of public record, orders, items appearing in the record of the case and the exhibits attached to the complaint.”). Therefore, in order to determine whether Martin should prevail in his Motion, the Court shall review each cause of action individually and determine whether the allegations asserted in the Amended Complaint are sufficient to state a claim.

I. Section 548 Claim.

A trustee may bring an action under §548 to “avoid any transfer of an interest of the debtor in property . . . made or incurred within one year before the date of the filing of the petition.” §548. Section 548 further sets forth some elements that need to be proven in order for the transfer to be avoided. In fact, the trustee would also need to prove that the subject transfer was made “with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted”; or, in the alternative, the trustee may show that the debtor was insolvent on the date of the transfer and “received less than a reasonably equivalent value in exchange for such transfer or obligation.” §548.

In this case, the Court finds that the allegations made by Plaintiff in the Amended Complaint are sufficient to assert a cause of action under §548. In fact, the Amended Complaint alleges that Debtor transferred certain property to Ahava LLC, one of the named defendants, “or other persons.” It is also alleged that the interest in said property was transferred within one year before the date of the filing of the petition and that such transfer was made by Debtor with the actual intent to hinder, delay, or defraud Scott’s’s Vending, Inc. to whom she was indebted. Furthermore, Plaintiff stated that Debtor received less than a reasonably equivalent value in exchange for such transfer and asserted that Debtor was or became insolvent as a result of such transfer. If such allegations are accepted as true, the Trustee would be entitled to avoid the transfer pursuant to §548 and recover all revenues generated by the interest in the property from the persons to whom it was transferred pursuant to §550.

II. Section 549

Section 549 allows the Trustee to avoid any transfer of estate property that occurs after the commencement of the case. §549(a)(1). To the extent that a transfer is avoided under §549, the Trustee may recover, for the benefit of the estate, the property transferred or the value of the property transferred from the “initial transferee of such transfer or the entity for whose benefit such transfer was made.” §550(a)(1). In this case, Plaintiff seeks to augment the bankruptcy estate by avoiding certain transfers of property of the estate, some of which occurred post-petition. The property of the estate that was transferred was allegedly the leasehold and the right to contract with a video poker machine operator or operators to install video poker machines in the leasehold. The Amended Complaint alleges that the transfers occurred post-petition and that

Martin signed the transfer of the lease. Furthermore, the Amended Complaint asserts that “[r]evenues were collected post petition on the leasehold and executory contract by Debtor and Great Games or through or to entities controlled by them.” Thus, the Amended Complaint states sufficient facts that make it appear that a judgment for a \$550 recovery against Martin, as an immediate or mediate transferee of such initial transferee, is possible pursuant to a §549 action.

III. RICO Claim

The Racketeer Influenced and Corrupt Organizations Act (“RICO”) was implemented approximately thirty years ago to combat organized crime. It allows, in limited circumstances, persons injured by such criminal activities to maintain a civil action for damages. 18 U.S.C. §1964. In this case, Martin claims that a RICO action does not fall within the Trustee’s statutorily enumerated avoidance powers. In other words, Martin argues that the Trustee in this case lacks standing to sue him under RICO because the trustee suffered no personal injury. However, because the Court finds that the RICO claim asserted in this case should be dismissed for failure to state a claim upon which relief can be granted, the Court does not reach the issue of the Trustee’s standing to bring the RICO claim.⁴

In order to maintain a civil cause of action under RICO, a plaintiff must allege that a (1) defendant person (2) employed or associated with (3) an enterprise, the activities of which affect

⁴ Even if no conclusion as to the Trustee’s standing to bring a RICO claim is reached in this Order, the Court notes that in other cases in which a Chapter 7 Trustee brought an adversary proceeding seeking to recover post-petition transfer and asserting RICO and other claims, the court concluded that the trustee failed to state a cause of action under RICO but never stated that the cause of action was dismissed due to lack of standing. Eisenberg v. Bank of New York (In re Sattler’s, Inc.), 73 B.R. 780 (Bankr. S.D. N.Y. 1987).

interstate commerce, (4) conducted or participated in the conduct of affairs of the enterprise, (5) through a pattern of racketeering activity. 18 U.S.C. §1962(c); Sedima, SPRL v. Imrex Co., Inc., 473 U.S. 479, 496 (1985); Sadighi v. Dahighfekr, 36 F. Supp. 2d 279 (D/S.C. 1999). To make out a pattern of racketeering activity, a RICO plaintiff must allege at least two “predicate acts” which pose a threat of continued criminal activity. 18 U.S.C. §1961(5); Sadighi v. Daghighfekr, 36 F. Supp.2d 279 (D.S.C. 1999); see also GE Investment Private Placement Partners II v. Parker, 247 F.3d 543, 549 (4th Cir. 2001) (emphasis added) (“To establish a pattern of racketeering activity, the plaintiff must show that the predicate acts are related and that they “amount to or pose a threat of *continued criminal activity*. . . . Continuity refers ‘either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.’ . . . ‘Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.’”); Eisenberg v. Bank of New York (In re Sattler’s, Inc.), 73 B.R. 781, 787 (Bankr. S.D. N.Y. 1987) (quoting S.Rep. No. 91-617, p. 158 (1969)) (“‘The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one “racketeering activity” and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.’”).

In the present case, Plaintiff alleges that the racketeering activity includes “offenses involving fraud connected with a case under Title 11.” Specifically, the predicate acts alleged are set forth in the Amended Complaint as follows:

- (1) The knowing and fraudulent false oath by [debtor] on October 15, 1999 [filing date of the schedules] in violation of 18 U.S.C. §152(2);

- (2) the knowing and fraudulent false oath of debtor made at the §341 meeting, in violation of 18 U.S.C. §152(2);
- (3) the post-petition assignment of the lease to Great Games, Inc. which was “executed, conducted by and under the control of Jay Martin and [Debtor]” and “the knowing and fraudulent receipt of all post petition revenues on at least a weekly basis on the unexpired leasehold and unlisted executory contract with the intention of defeating the provisions of Title 11, [in] violation of 18 U.S.C. §152(5).”

As a starting point, 18 U.S.C. §152(2) is clearly not applicable to Martin in this case.

There are no assertions that Martin filed any documents in the underlying bankruptcy; or that he made any statement under oath; and even the Amended Complaint contains no allegation that Martin participated in any way in Debtor’s false statements or schedules. Thus, 18 U.S.C. §152(2) cannot serve as the only predicate act to confer standing to bring a RICO claim against Martin. Moreover, even if the Court accepts at face value the claim that Martin violated 18 U.S.C. §152(5), that violation, standing alone, would not add up to a sufficient number of predicate acts.⁵ Furthermore, the Court notes that the Amended Complaint also fails to allege that the predicate acts amount or pose a threat of continued criminal activity, as required in order to assert a RICO claim.

Thus, as to the RICO claim, the Court concludes that the Amended Complaint does not plead a sufficient cause of action against Martin; but the dismissal of this cause of action is

⁵ In his proposed order, Plaintiff argued that the government can prove the existence of a RICO claim agreement one of two ways: the government may either prove (1) that a defendant agree to the overall objective of the conspiracy or (2) that the defendant personally committed two predicate acts thereby participating in a single objective conspiracy. See, e.g. United States v. Shenberg, 89 F.3d 1461, 1471 (11th Cir. 1996). In this case, not only does the Amended Complaint fail to assert at least two predicate acts as attributable to Martin; but there are also no allegations that Martin participated in the conspiracy with knowledge of the essential nature of the plan.

without prejudice. See, e.g. Eisenberg v. Bank of New York (In re Sattler's Inc.), 73 B.R. 780, 789 (Bankr. S.D., N.Y. 1987) (concluding that the trustee failed to state cause of action under RICO but concluding that "these deficiencies may be curable.").

CONCLUSIONS

From the foregoing arguments, it is therefore

ORDERED that Defendant Jay Martin's Motion to Dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) is hereby denied as it relates to the First and Second Causes of Action asserting claims pursuant to §548 and §549.

IT IS FURTHER ORDERED that, as for the RICO claim, Plaintiff has failed to assert a cause of action upon which relief could be granted; therefore, Defendant Jay Martin's Motion to Dismiss as to the RICO claim is granted.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 9, 2001.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

JUL 11 2001

BNC to serve:
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

DEBI GREEN
Deputy Clerk

*Plaint/att
def/att*