FILED
United States Court of Appeals
Tenth Circuit

August 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHERMAN G. SORENSEN, M.D.,

Plaintiff - Appellant,

v.

GERALD POLUKOFF, M.D.; ZABRISKIE LAW FIRM; RHOME ZABRISKIE, J.D.; FLEMING NOLEN & JEZ, a Texas limited liability partnership; RAND P. NOLEN, J.D.,

Defendants - Appellees.

No. 18-4120
(D.C. No. 2:18-CV-00067-TS)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **PHILLIPS**, Circuit Judges.

Sherman Sorensen, M.D., appeals the dismissal of his claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962. The district court determined that Dr. Sorensen's amended complaint does not meet RICO's "pattern requirement" because it fails to adequately plead two or more predicate acts. *Sorensen v. Polukoff*, No. 2:18-CV-67 TS, 2018 WL 3637518 (D. Utah July 31, 2018). For the reasons explained below, we reverse and remand for further proceedings.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND[1]

Dr. Sorensen is a cardiologist who began practicing medicine in Utah in 1982. He is well-known for his extensive experience in repairing two kinds of heart defects involving incomplete closures of the atrial chambers: patent foramen ovale (PFO) and atrial septal defect (ASD). In 2006, Dr. Sorensen formed the Sorensen Cardiovascular Group (SCG), which provided cardiology services in Salt Lake City, Utah, until December 2011. Through his practice with SCG, he performed many PFO and ASD closures, provided follow-up care for those patients, and maintained medical and billing records for each patient.

SCG stored its patients' medical charts in paper format in the SCG office and stored its patients' billing records on hard drives housed on the SCG site. The billing records on these hard drives contained HIPAA-protected information,[2] including:

> (1) patient names, addresses, telephone numbers, and other personal identifying information; (2) patient demographic information; (3) patient insurance information, including medical diagnostic and procedure codes; (4) patient charges; and (5) a summary of the care SCG provided to the patients.

Appellant's App. at 400. A local technical support company, TecCon, Inc., maintained and periodically replaced SCG's hard drives. Dr. Sorensen and the SCG billing manager were the only people authorized to direct TecCon to perform work for SCG.

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[1] Dr. Sorensen alleges these facts in his amended complaint, which, at this stage, we accept as true. *See Reed v. Heckler*, 756 F.2d 779, 783 (10th Cir. 1985).

[2] HIPAA refers to the Health Insurance Portability and Accountability Act of 1996. Pub.L. 104–191, Aug. 21, 1996, 110 Stat. 1936.

In early 2011, after taking a position at the University of Utah School of Medicine, Dr. Sorensen wanted to scale back his clinical practice. He reached out to Gerald Polukoff, M.D., a cardiologist who had previously expressed interest in joining SCG to learn how to perform PFO closures from Dr. Sorensen. Dr. Polukoff reaffirmed his interest, so he and Dr. Sorensen began negotiating terms of employment. In June 2011, Dr. Polukoff entered into a one-year employment contract to work for SCG, and he began practicing with SCG two months later. Under the agreement, Dr. Polukoff was a contract employee and was not authorized to make decisions on behalf of SCG or to access any of SCG's medical or billing records.

In July 2011, soon after he began training Dr. Polukoff (but before Dr. Polukoff began practicing with SCG), Dr. Sorensen suffered a heart attack. Soon thereafter, Dr. Sorensen offered to sell his practice to Dr. Polukoff. Dr. Polukoff responded that he needed to ensure SCG's financial viability before accepting the offer. In October, Dr. Sorensen announced to his staff his decision to retire, effective that December.

It was around this time that the allegedly fraudulent scheme began. On October 7, 2011, Dr. Polukoff allegedly:

> [m]et with TecCon, without Dr. Sorensen's authorization or knowledge; [f]alsely informed the TecCon technician, Scott Peacock, that he would be assuming ownership of SCG and wanted to discuss future work by TecCon; [i]nstructed that new backup hard drives be installed, despite the fact that new hard drives had already been installed in May 2011 . . . ; [c]oncealed from Dr. Sorensen the directions to install new hard drives; and [r]equested to receive his own hard drive to take offsite.

Id. at 404–05. One week later, Dr. Polokuff "again met with TecCon without Dr. Sorensen's authorization or knowledge" and instructed Peacock to "set up and provide

him with remote access to SCG's billing records," which Peacock did. *Id.* at 405. Dr. Polukoff also sent various e-mails to Peacock about obtaining the hard drive in which he stated that he was authorized to access the patient information. Then, after obtaining the hard drive, which contained information for about 10,000 patients, Dr. Polukoff "opened a port on the server" to access "the remote desktop." *Id.* Finally, on November 4, 2011, Dr. Polukoff, "without the knowledge or authorization of Dr. Sorensen, signed a new 'TecCon Service Level Agreement' for SCG," which revised "the entire IT infrastructure at SCG even though it was recently upgraded." *Id.*

In early November 2011, Dr. Polukoff rejected Dr. Sorensen's offer to take over his practice, so they executed a release whereby Dr. Sorensen paid Dr. Polukoff $200,000 to buy out the remainder of his contract. Shortly thereafter, in mid-November, Dr. Sorensen learned of Dr. Polukoff's unauthorized access to SCG's billing records and informed his staff that "a backup hard drive might be missing." *Id.* at 407. Dr. Sorensen sent Dr. Polukoff an e-mail asking about the missing hard drive, but Dr. Polukoff denied any knowledge or involvement. Dr. Sorensen alleges that the combined value of the hard drive and its contents exceeds $5,000.

On December 6, 2011, Dr. Polukoff filed a *qui tam* action against Dr. Sorensen. *See United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730 (10th Cir. 2018). In the suit, which is still ongoing, Dr. Polukoff alleges that Dr. Sorensen routinely overbilled the federal government by performing medically unnecessary procedures.[3] *Id.*

[3] The details of the *qui tam* suit are only tangentially related to this appeal. The case came before us after the district court concluded that a physician's medical

at 734. Dr. Polukoff and his attorneys admit that they used information obtained from the hard drive in the *qui tam* litigation, though they insist that they lawfully obtained a "copy" of the hard drive. Appellant's App. at 446.

After unsuccessfully demanding that Dr. Polukoff return the hard drive, Dr. Sorensen sued Dr. Polukoff, as well as the lawyers representing Dr. Polukoff in the *qui tam* action, Rand Nolen and Rhome Zabriskie, and their respective law firms, Fleming, Nolen & Jez, LLP and Zabriskie Law Firm, LLC. Dr. Sorensen alleges that the Defendants violated, and collectively conspired to violate, RICO. Specifically, Dr. Sorensen alleges violations of the following predicate acts under RICO: (1) transportation of stolen goods, in violation of 18 U.S.C. § 2314; (2) sale of or receipt of stolen goods, in violation of § 2315; (3) mail fraud, in violation of § 1341; and (4) wire fraud, in violation of § 1343. According to Dr. Sorensen, the Defendants schemed to deprive him of the hard drive through false pretenses so that they could use the information in the *qui tam* litigation, as well as directly solicit Dr. Sorensen's former patients to encourage them to file malpractice suits against him. Dr. Sorensen also asserts various state-law claims.

The Defendants allegedly solicited Dr. Sorensen's patients through the U.S. mail, as well as social-media, newspaper, and website advertisements. Using the contact information discovered on the stolen drive, the Defendants mailed letters to Dr. Sorensen's former patients asking them to indicate their interest in suing Dr. Sorensen for

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judgment, about which reasonable minds could differ, cannot form the basis of a claim under the False Claims Act. *Polukoff*, 895 F.3d at 739. We reversed and remanded. *Id.* at 742.

malpractice. When a patient did not respond, the Defendants sent a follow-up letter explaining that they were currently presenting a case to a pre-litigation medical-negligence panel, the facts of which were "nearly identical" to that of the solicited patient. *Id.* at 411–12. Dr. Sorensen asserts that the only way to know that a patient's case is "nearly identical" to another's is through the information on the allegedly stolen hard drive, because the Defendants had no direct knowledge about the solicited patients' care from Dr. Sorensen. *Id.* at 412. The Defendants also solicited patients through newspaper advertisements and posts on their law-firm websites and on social-media websites, such as Reddit and Facebook. One posting on the Zabriskie firm website claims that "7,000 PFO and ASD closures were performed in violation of FDA and AMA standards," a figure that Dr. Sorensen maintains the Defendants could know only through access to his hard drive. *Id.* at 424 & n.4. Dr. Sorensen maintains that the mail solicitations, newspaper advertisements, and internet posts contain false information about his medical practice.

The Defendants moved to dismiss the amended complaint, and the district court granted the motion. Dr. Sorensen has appealed. "We review de novo a district-court dismissal of a complaint for failure to state a claim." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1298 (10th Cir. 2018).

DISCUSSION

"The Racketeer Influenced and Corrupt Organizations Act (RICO), Pub.L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968, provides a private civil action to recover treble damages for injury 'by reason of a violation of' its substantive provisions." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985)

(quoting 18 U.S.C. § 1964(c)). "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime," and it "is to be read broadly" and "liberally construed to effectuate its remedial purposes." *Id.* at 497–98 (citations omitted).

Dr. Sorensen alleges that the Defendants violated 18 U.S.C. § 1962(c), which makes it "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 such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Therefore, to avoid dismissal, Dr. Sorensen must allege that the Defendants "(1) conducted the affairs (2) of an enterprise (3) through a pattern (4) of racketeering activity." *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1248 (10th Cir. 2016). He must also allege that the Defendants' conduct caused him injury. *See Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010).

At issue here is whether Dr. Sorensen has sufficiently alleged facts to meet the "pattern" element. "To establish a pattern of racketeering activity, the plaintiff[] must allege at least two predicate acts" listed in 18 U.S.C. § 1961(1). *George*, 833 F.3d at 1254. "Although proof of at least two predicate racketeering acts are necessary to prove a pattern," the plaintiff must also establish (1) "a relationship between the

predicates"[4] and (2) "the threat of continuing activity."[5] *Resolution Tr. Corp. v. Stone*, 998 F.2d 1534, 1543 (10th Cir. 1993) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 236–37 (1989)). "Whether a pattern exists is a question of fact for the jury to determine." *Id.*

The district court concluded that Dr. Sorensen's pleading fails to satisfy the "pattern" element as a matter of law, because it does not sufficiently allege any predicate acts under RICO. *Sorensen*, 2018 WL 3637518, at *3–10. First, it concluded that Dr. Sorensen fails to allege mail and wire fraud under 18 U.S.C. §§ 1341 and 1343, because the alleged mail and wire solicitations did not contain any fraudulent or false information. *Id.* at *4–7. Second, it concluded that Dr. Sorensen fails to allege either transportation of stolen goods, 18 U.S.C. § 2314, or sale of or receipt of stolen goods, *id.* at § 2315, because Dr. Sorensen does not allege that the physical hard drive itself was worth $5,000 or more. *Id.* at *7–8. Accordingly, the district

[4] "The relationship test is not a cumbersome one for a RICO plaintiff." *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1555 (10th Cir. 1992) (citation and internal quotation marks omitted). A plaintiff need only show that the "predicate acts have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* (citation omitted).

[5] "To establish continuity, the plaintiff must demonstrate either a closed period of repeated conduct or past conduct that by its nature projects into the future with a threat of repetition." *Boone*, 972 F.2d at 1555 (citation and internal quotation marks omitted). "These two forms of continuity are respectively referred to as closed-ended and open-ended continuity." *Id.* (internal quotations omitted).

court dismissed Dr. Sorensen's RICO claims. *Id.* at *11.[6] We agree with Sorensen that both conclusions are contrary to Tenth Circuit precedent.

A. Mail and Wire Fraud Predicate Acts

Dr. Sorensen alleges that the Defendants committed the predicate acts of mail fraud and wire fraud in furtherance of their scheme. The elements of mail fraud under 18 U.S.C. § 1341 are "(1) a scheme or artifice to defraud or obtain property by means of false or fraudulent pretenses, representations, or promises,[7] (2) an intent to defraud,[8] and (3) use of the mails to execute the scheme." *United States v. Zander*,

[6] For the same reasons it dismissed Dr. Sorensen's complaint, the district court also denied Sorensen's motion for a preliminary injunction, which asked the court to enjoin the Defendants from further accessing the hard drive, to compel them to return it and all information obtained from it, and to require them to verify under oath that they have complied with the injunction. *Sorensen*, 2018 WL 3637518, at *10–11.

[7] Dr. Sorensen frames the scheme to defraud as the Defendants depriving him of his hard drive under false pretenses to "induce patients to sue Sorensen for medical malpractice, all for [the] Defendants' financial benefit." Appellant's Opening Br. at 15. Specifically, he alleges that Dr. Polukoff "induced" SCG staff "to believe that he intended to take over the practice," "attempted to obtain passwords to [SCG's] billing information," "falsely informed a technician that he would be assuming ownership of [SCG]" and "was authorized to access patient information," and "concealed from [Dr.] Sorensen his communications with the IT company." *Id.* at 15–16. Then, the Defendants allegedly "coordinated to use the information on the hard drive in an unauthorized manner," "made numerous false statements" in the local newspaper, on their websites, and on social media, and "concealed from patients that they were using protected information for their own financial gain." *Id.* at 16.

[8] Proving an intent to defraud does not require proof of an intent "to inflict economic harm" or "to achieve personal gain," but rather may be inferred "where a defendant intends to deprive another of its money, other property, or right to honest services through deceit or misrepresentation." *United States v. Welch*, 327 F.3d 1081, 1104, 1106 (10th Cir. 2003). Such a deprivation may occur even where no financial loss results, if the "fraudulent conduct caused the [victim] to permit the use of its

794 F.3d 1220, 1226 (10th Cir. 2015) (citation omitted). Relevant here, there need not be any "direct connection between fraudulent misrepresentations and the use of the mails." *Id.* at 1228. Rather, the mailing need only be "incident to an essential part of the scheme." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008) (quoting *Schmuck v. United States*, 489 U.S. 705, 712 (1989)). "The elements of wire fraud under 18 U.S.C. § 1343 are similar [to mail fraud] but require that the defendant use interstate wire, radio or television communications in furtherance of the scheme to defraud." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 892 (10th Cir. 1991); *see also United States v. Redcorn*, 528 F.3d 727, 738 (10th Cir. 2008) ("[A wire] transmission is considered to be for the purpose of furthering a scheme to defraud so long as the transmission is incident to the accomplishment of an essential part of a scheme." (citation and internal quotation marks omitted)).

Here, the district court concluded that Dr. Sorensen does not sufficiently allege mail fraud because he "fails to show any false representations or promises in the letters," and does not sufficiently allege wire fraud because he fails to allege "any falsities in the advertisements that Defendants allegedly used to fraudulently induce his former patients to file claims against him." *Sorensen*, 2018 WL 3637518, at *5, 7. But Dr. Sorensen need not allege that the mailings or the wire communications themselves were fraudulent. Rather, he needs only allege that they were "incident to

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funds in a manner which the [victim], if cognizant of the truth, would not have sanctioned." *Id.* at 1108.

an essential part" of a fraudulent scheme. *See Bridge*, 553 U.S. at 639; *see also Redcorn*, 528 F.3d at 738.

Nor does Dr. Sorensen need to "connect[] the names on the hard drive to any of [his former] patients that saw the posts and subsequently filed claims against" him. *Sorensen*, 2018 WL 3637518, at *7. To be sure, Rule 9(b) of the Federal Rule of Civil Procedure requires claims based on fraud be pleaded "with particularity." *Cayman Expl. Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989). But the particularity requirement requires only that the plaintiff "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *George*, 833 F.3d at 1254 (citation omitted); *see also id.* at 1256 (finding a sufficient allegation of fraud where the plaintiffs identified the names of individuals who made false statements, the dates of the allegedly false statements, "the actions the plaintiffs took in reliance on those misrepresentations," "the injuries they suffered as a result," and how those misrepresentations furthered the defendants' ultimate fraudulent goals); *Tal v. Hogan*, 453 F.3d 1244, 1266 (10th Cir. 2006) (finding communications to be "alleged with sufficient particularity to establish cognizable claims for wire fraud" where the "communications not only describe the date, the parties to the communication and the subject matter, but also how they were fraudulent and what they were designed to accomplish").[9]

[9] Though Dr. Sorensen must plead his allegations of fraud with particularity, the district court should consider his "inability to obtain [any] information in the

B. Stolen-Property Predicate Acts

Dr. Sorensen also alleges that the Defendants committed the predicate acts of transportation of stolen goods and receipt of stolen goods. The relevant statutes prohibit knowingly selling, receiving, or transporting stolen goods worth $5,000 or more. *See* 18 U.S.C. §§ 2314 & 2315. Significant here, because "the intangible intellectual property value of goods may vastly exceed the intrinsic worth of accompanying tangible goods," courts must "include intangible value when thefts of tangible objects occur" to determine the value of the allegedly stolen goods under §§ 2314 and 2315. *United States v. Lyons*, 992 F.2d 1029, 1033 (10th Cir. 1993); *see also Dowling v. United States*, 473 U.S. 207, 216 (1985) ("Nor does it matter [under § 2314] that the [stolen] item owes a major portion of its value to an intangible component.").

Here, the district court determined that "the information on the hard drive is intangible information that does not fit within the definition of a 'good,' so the value of the hard drive itself must be $5,000 or more in order for [Dr. Sorensen] to plead the violations of these statutes as predicate acts." *Sorensen*, 2018 WL 3637518, at *8 (footnote omitted). This was a clear error. So long as some tangible property was stolen (here, the hard drive), and the combined value of the property (both tangible and intangible) is $5,000 or more, the theft qualifies under §§ 2314 and 2315. *See*

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defendant's exclusive control." *See George*, 833 F.3d at 1255; *see also Polukoff*, 895 F.3d at 745 ("Rule 9(b) does not require omniscience." (citation omitted)).

Dowling, 473 U.S. at 216*; Lyons*, 992 F.2d at 1033; *United States v. Brown*, 925 F.2d 1301, 1308 (10th Cir. 1991).

In addition, as it did for Dr. Sorensen's mail and wire fraud allegations, the district court required more particularity than is required under Rule 9(b). At the pleading stage, Dr. Sorensen need not identify the "brand, size, serial number, and other identifying information" of the hard drive. *Sorensen*, 2018 WL 3637518, at *8. Rather, the district court must accept the pleaded facts about the hard drive's value as true, so long as they are plausible. *See George*, 833 F.3d at 1247. The actual value of the hard drive and its contents is a factual question to be resolved at the summary-judgment stage or trial.

CONCLUSION

We reverse the judgment of the district court and remand for proceedings consistent with this opinion.[10] We also reverse the district court's denial of

[10] We take no position on the ultimate adequacy of Sorensen's pleadings. The district court did not consider whether Sorensen's pleadings satisfied other elements of RICO, such as "continuity," affecting interstate commerce, or RICO injury. We therefore exercise our discretion to decline to consider them here. *See Plains Res., Inc. v. Gable*, 782 F.2d 883, 885 (10th Cir. 1986) ("[S]ince the district court has not had an opportunity to consider the additional issues which the defendants present in their brief, we decline to do so."). This decision is bolstered by the parties' inadequate briefing of these issues on appeal. *See In re: Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1114 (10th Cir. 2017) ("[W]e find this argument inadequately briefed and decline to consider it.").

Sorensen's motion for a preliminary injunction.

Entered for the Court

Gregory A. Phillips
Circuit Judge