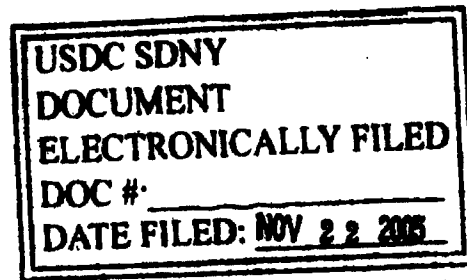


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



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ORRIN DEVINSKY, :

Plaintiff, :

- against - :

DANIEL KINGSFORD, et al. :

Defendant. :

05 Civ. 2064 (PAC)

ORDER

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HONORABLE PAUL A. CROTTY, United States District Judge:

Orrin Devinsky ("Plaintiff") asserts claims under RICO, 18 U.S.C. §§ 1961 et seq., and for common law fraud, negligence, unjust enrichment, and breach of contract, as well as state law claims under New York Debtor and Creditor Law §§ 237 and 276 based on an alleged Ponzi scheme, which purportedly involved fraudulently induced investments in real estate. Defendants include: the Estate of Robert K. Marceca ("Estate of Marceca"), the alleged leader of the Ponzi scheme; Daniel Kingsford, an alleged long-time associate of Marceca's ("Kingsford"); Judith Kingsford, Daniel Kingsford's wife ("J. Kingsford"); Goldie Rotenberg, another alleged associate of Marceca's ("Rotenberg"); John Hoey ("Hoey") and Michael Blumenthal ("Blumenthal"), individually and as executors of the Estate of Marceca; and a trust and various real estate entities alleged to be involved in the scheme.

Defendants Estate of Marceca, Blumenthal, Hoey, and a number of the real estate entities<sup>1</sup> move under Federal Rules of Civil Procedure 9(b) and 12(b)(6) to dismiss Devinsky's RICO, common law fraud, and unjust enrichment claims and to abstain from determining the remaining claims with the suggestion that the claims be presented to a New York County Surrogate's Court proceeding involving the Estate of Marceca. Defendants Kingsford, J. Kingsford, and Kingsford-related entities<sup>2</sup> (collectively "the Kingsford Defendants") move to dismiss all claims against J. Kingsford for lack of personal jurisdiction; to dismiss RICO and common law fraud claims against Kingsford; to dismiss fraudulent conveyance claims under New York state law against the Kingsford Defendants; and the unjust enrichment claim against J. Kingsford and the Kingsford-related entities. The Court having carefully reviewed the parties' submissions and heard Oral Argument grants the motion to dismiss the RICO claim and denies the remainder of all the motions to dismiss.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). On a motion to dismiss based on Rule 12(b)(6), "all factual allegations in the complaint must be taken as true and construed favorably to the plaintiff." LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991) (citations omitted). Here, accepting as true the complaint's material allegations, plaintiff has plead facts sufficient to state fraud claims under New York law – the complaint alleges that false representations were made, that those making them were in a position to know there were false and knew they were false, that those

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<sup>1</sup> The defendant entities that are part of this motion include RKM Enterprises Real Estate Investments, Inc., Kane Realty Services, Inc., Kensington Holding Corporation, Oldco Units LLC, RJJM Corporation, 111 East 26 Member LLC, 32<sup>nd</sup> Street Member LLC, 13 East 32<sup>nd</sup> Unites LLC, and East-West 4 LLC.

<sup>2</sup> These defendants include Amanda Trust, Amanda LLC, and Aesop Stables LLC.

misrepresentations were made to induce plaintiff to make the investments and not question the management of those investments, and that plaintiff reasonably relied on those misrepresentations.

Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994) (citations omitted).

Defendants also move to dismiss various claims grounded in fraud under Rule 9(b). Rule 9(b) provides that “[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity.” Fed. R. Civ. P. 9(b). Plaintiff, as well, “complied with this Rule’s requirement that the complaint plead with particularity the facts and circumstances constituting the fraud itself.” Cohen v. Koenig, 25 F.3d at 1173. Plaintiff set out the representations on which he relied. The Court further notes that “great specificity [is] not required with respect to . . . allegations of . . . scienter.” Id. (citation omitted). Here, plaintiff met the pleading burden through “allegations of a motive to deceive and access to accurate information” with regard to Marceca, Kingsford, and Rotenberg. Id. at 1173-74.

J. Kingsford moves to dismiss for want of personal jurisdiction. When moving for this relief under Rule 12(b)(2), “the plaintiff bears the burden of showing that the court has jurisdiction over the defendant[s].” Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996) (citation omitted). Prior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction. Id. (citation omitted). Upon examining the pleadings and affidavit in light most favorable to the plaintiff, as the non-moving party, the Court concludes that plaintiff has pled facts sufficient to show that the Court has personal jurisdiction over J. Kingsford and denies this motion to dismiss, without prejudice to its renewal after discovery.

Also before the Court, is a motion for it to abstain from determining fraud and contract claims. “Abstention from the exercise of federal jurisdiction is the exception, not the rule.” Moses H.

Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 14 (1983) (citation and internal quotations omitted). Here, consideration of factors such as the fact that the federal forum is not inconvenient, the desirability of avoiding piecemeal litigation in light of the denial of most of the other motions to dismiss before the Court, and that “[o]nly the clearest of justifications warrants dismissal” all weigh against abstention. Id. at 15-16 (citing Colorado River Water Conservation Dist. v. U.S., 420 U.S. 800, 818-19 (1976) (emphases in original omitted).

With regard to the RICO claim, however, plaintiff has failed to meet the pleading requirements. Plaintiff essentially alleges that defendants engaged in a single scheme to defraud him (and several other investors). Nevertheless, notwithstanding “however egregious [defendants’] fraud on [plaintiff] may be been,” plaintiff fails to meet the pleading requirements necessary to state a RICO civil claim. First Capital Asset Mgmt. v. Satinwood, 385 F.3d 159, 182 (2d Cir. 2004). The Supreme Court in H.J. Inc. v. Northwestern Bell Telephone Co. stated that “[w]hat a plaintiff . . . must prove is continuing of racketeering activity, or its threat, *simpliciter*.” 492 U.S. 299, 241 (1989). “‘Continuity’ is both a closed- and open-ended concept, referring 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.” Id. The Court further explained that:

A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.

Id. at 242. Here, since the activities were interrupted by Marceca’s death in late 2000, and could not have continued beyond the termination of Kingsford and Rotenberg, as employees of the Estate,

plaintiff bases the RICO claim on closed-ended continuity. “Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case.” Id.

The Second Circuit has interpreted “a substantial period of time” to mean at least two years. Cofacredit v. Windsor Plumbing Supply Co., 187 F.3d 229, 242 (2d Cir. 1999) (“Since the Supreme Court decided *H.J., Inc.*, this Court has never held a period of less than two years to constitute a ‘substantial period of time’.” (citations omitted)) (collecting cases); but see Metromedia Co. v. Fugazy, 983 F.2d 350, 369 (2d Cir. 1992) (noting, in dicta, that “[p]eriods of 19 or 20 months . . . have been held sufficient to support a finding of continuity” in other circuits). “Although close-ended continuity is primarily a temporal concept, other factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes are also relevant in determining whether close-ended continuity exists.” Cofacredit, 187 F.3d at 242 (citation omitted).

“[T]he duration of a pattern of racketeering activity is measured by the RICO predicate acts the defendants commit.” Id. at 243 (citing H.J., Inc., 492 U.S. at 242). Predicate acts are set out in 18 U.S.C. § 1961. GICC Capital Corp. v. Technology Fin. Group., 67 F.3d 463, 465 (2d Cir. 1995).

The Amended Complaint contains the following allegations:

- Plaintiff communicated with defendants through “telephone calls that cross state lines” (Devinsky in New Jersey and RICO defendants in New York) between September 2000 and January 2001. Am. Compl. ¶ 95(a).
- Defendants required plaintiff to send his payments of investments in Marceca’s entities by wire across state lines. Plaintiff instructed his brokerage in California to wire investments on November 10, 2000. Id. ¶ 95(b).

- Defendants transferred funds by interstate wires “between 2001 and August 2002.” Id. ¶ 95(c).<sup>3</sup>
- “Although Marceca died on December 20, 2000, the Enterprise and scheme continued until it was involuntarily terminated in October 2002 when Kingsford and Rotenberg were fired as managers of the Marceca real estate entities.” Id. ¶ 91.

The termination of Kingsford and Rotenberg in October 2002 cannot constitute a “predicate act” under the statute.


Considering the number and variety of purported predicate acts, the number of alleged participants, and the presence of separate actors, schemes, and motivations, and even assuming a very generous reading of the pleadings, this Amended Complaint falls short of this Circuit’s requirement in a RICO case for “continuity” over a two-year period. The fraud and breach of contract claims at the heart of this Amended Complaint do not convert to a RICO action, simply by reference to the sporadic and episodic use of mails, telephones, and transferring funds by wire. Accordingly, the Court grants the motion to dismiss the RICO claim.

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<sup>3</sup> The Amended Complaint contains other general statements such as that “[o]ther acts of mail and wire fraud took place between 1999 and 2000 in connection with a similar scheme by certain of the RICO defendants . . . against [another purportedly defrauded investor].” Id. ¶ 96. Such non-particularized allegations, however, are insufficient to establish the predicate acts necessary to survive a motion to dismiss under Rules 12(b)(6) and 9(b) of a RICO civil claim.

In all other respects, the Court denies the motions to a more particular statement of the alleged fraud, to dismiss for want of personal jurisdiction, to dismiss for failure to state a claim and to abstain from determining fraud and contract claims.

SO ORDERED

  
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PAUL A. CROTTY  
United States District Judge

Dated: New York, New York  
November 22, 2005