08-4873-cv

United States Court of Appeals

for the

Second Circuit

ELIOT I. BERNSTEIN, individually, P. STEPHEN LAMONT, on behalf of SHAREHOLDERS OF IVIWEIT HOLDINGS, INC., IVIEWIT TECHNOLOGIES, INC., UVIEW.COM, INC., IVIEWIT.COM, INC., I.C., INC., IVIEWIT.COM LLC, IVIEWIT LLC, IVIEWIT CORPORATION, IVIEWIT, INC., and PATENT INTEREST HOLDERS,

Plaintiffs-Appellants,

– v. –

APPELLATE DIVISION FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, in his official and individual capacity,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE RAYMOND A. JOAO

FRIED & EPSTEIN LLP
Attorneys for Defendant-Appellee
Raymond A. Joao
Empire State Building
350 Fifth Avenue, Suite 7612
New York, New York 10118
(212) 268-7111

JOSEPH WIGELY, in his official and individual capacity, CATHERINE O'HAGAN WOLFE, in her official and individual capacity, PAUL CURRAN, in his official and individual capacity, MARTIN R. GOLD, in his official and individual capacity, ANGELA M. MAZZARELLI, in her official and individual capacity, RICHARD T. ANDRIAS, in his official and individual capacity, DAVID B. SAXE, in his official and individual capacity, DAVID FRIEDMAN, in his official and individual capacity, LUIS A. GONZALES, in his official and individual capacity, APPELLATE DIVISION SECOND DEPARTMENT, LAWRENCE F. DIGIOVANNA, in his official and individual capacity, DIANA MAXFIELD KEARSE, in her official and individual capacity, JAMES E. PELTZER, in his official and individual capacity, A. GAIL PRUDENTI, in her official and individual capacity, STEVEN C. KRANE, in his official and individual capacity, HON. JUDITH S. KAYE, in her official and individual capacity, KENNETH RUBENSTEIN, ESTATE OF STEPHEN KAYE, PROSKAUER ROSE LLP, MELTZER LIPPE GOLDSTEIN & BREISTONE LLP, LEWIS S. MELTZER, RAYMOND A. JOAO, FOLEY & LARDNER LLP, MICHAEL C. GREBE, WILLIAM J. DICK, DOUGLAS A. BOEHM, STEVEN C. BECKER, STATE OF NEW YORK COMMISSION OF INVESTIGATION, LAWYERS FUND FOR CLIENT PROTECTION OF THE STATE, THE FLORIDA BAR, LORRAINE CHRISTINE HOFFMAN, in their official and individual capacity, ERIC TURNER, in his official and individual capacity, JOHN ANTHONY BOGGS, in his official and individual capacity, KENNETH MARVIN, in his official and individual capacity, THOMAS HALL, in his official and individual capacity, DEBORAH YARBOROUGH, VIRGINIA STATE BAR, ANDREW H. GOODMAN, in their official and individual capacity, NOEL SENGEL, in his official and individual capacity, MARY W. MARTELINO, in her official and individual capacity, JOHN DOES,

Defendants-Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

Rules **Page**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ELIOT BERNSTEIN, *et al*.,	:	
	:	
Plaintiffs-Appellants,	:	08-4873-cv
	:	
- v. -	:	
	:	
APPELLATE DIVISION FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, *et al*.,	:	
	:	
Defendants-Appellees.	:	

BRIEF FOR DEFENDANT-APPELLEE RAYMOND A. JOAO

The order of the United States District Court for the Southern District of New York (Shira A. Scheindlin, U.S.D.J.), filed on August 8, 2008, dismissing the amended complaint should be affirmed.

Jurisdictional Statement

Any decision and order of this Court that affirms the dismissal of all the federal question claims but which reverses the dismissal on any state claim would deprive the district court of diversity of citizenship jurisdiction because plaintiff-appellant P. Stephen Lamont and defendant-appellee Raymond A. Joao are both citizens of New York.

Statement of the Issues

Whether the district court properly dismissed the amended complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure.

Summary of Alleged Facts Pertaining to Joao

Mr. Joao, a resident of the state of New York and an attorney, was "of counsel" to and possibly a partner at defendant Meltzer Lippe Goldstein Wolf & Schlissel, P.C. ("MLG"), a New York law firm. (Am. Compl., at 21--22, ¶¶ 60 and 62).

From in or about 1988 through 2001, plaintiff-appellant Eliot I. Bernstein and plaintiffs-appellants Iviewit Companies (collectively "Iviewit") retained defendant-appellee Proskauer Rose LLP ("Proskauer") to review and procure IP for a number of inventions pertaining to digital video and imaging. (Am. Compl., at 74, ¶ 252). In 1998, defendant-appellee Christopher C. Wheeler, a partner at Proskauer, misrepresented to Plaintiffs that Joao and defendant-appellee Kenneth Rubenstein were Proskauer partners who, with other Proskauer lawyers, "were on board to protect and secure the technologies discovered by Plaintiff Bernstein" and others. (Am. Compl., at 15, ¶ 29; 16, ¶ 34; 21-22, ¶¶ 60 and 62, 74, ¶ 254, 252). Instead, at that time, Joao and Rubenstein were attorneys with MLG. Thereafter, Proskauer hired Rubenstein away from MLG, but Joao

remained there. Iviewit was told that "Rubenstein would be in control of the IP with Joao assisting him at MLG until Joao could transfer to Proskauer." (Am. Compl., at 75, ¶¶ 258--9; 76, ¶261]).

After being introduced to and retained by Mr. Bernstein and Iviewit, Joao began a series of actions that caused immediate suspicion concerning IP filings he was making and not making, including filing inventions for himself as the inventor for ideas he had learned from Plaintiffs' disclosures to him. (Am. Compl., at 83, ¶¶ 299 and 300). Days before the first provisional patent filing had to be filed as a pending application, Joao visited Iviewit's offices in Boca Raton, Florida, where he met with the inventors, Mr. Bernstein and Zakirul Shirajee, to finalize the application and to have the inventors sign the application. Thereafter, "[Joao] immediately ran next door to Proskauer's office and in that time it was found that he had used a computer in the Iviewit Companies offices [presumably, in Proskauer's Boca Raton office] to make changes to the application, not approved by the inventors, after the inventors has signed for them." (Am. Compl., at 83, ¶301]). Joao then sealed the application in an overnight packing. The inventors, however, opened the packing, "and what they found was that the application had been materially changed and they forced Joao to rewrite the application and correct a myriad of problems, once they

received that, they sealed the document and Mr. Bernstein, Jennifer Kluge, and E. Lewin took the package to the US Post office and sent it to the USPTO." (Am. Compl., at 83, ¶¶ 302]).

Thereafter, Plaintiffs learned that "Joao has delayed original filings, had not filed all the IP he was supposed to and perhaps changed much of IP filings fraudulently, . . . had 90+ patents in his own name… [and] many of these patents encompass the technologies he learned from and stole from Iviewit Companies." (Am. Compl., at 84, ¶¶ 305 and 306).

Plaintiffs terminated Joao's services as a lawyer due to his malfeasance and misfeasance (Am. Compl., at 83, ¶¶ 302 and 303]) and, by August 25, 2000, Proskauer had acquired Plaintiffs' entire patent portfolio. (Am. Compl., at 216, ¶ 796]).

ARGUMENT

POINT I

THE AMENDED COMPLAINT WAS PROPERLY DISMISSED FOR FAILING TO COMPLY WITH CIVIL RULE 8(a)(2).

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides as follows: "A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief [.]"

A complaint should be dismissed if it is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) (citation omitted). A recitation of "vague and conclusory allegations whose relevance to the asserted claims is uncertain" is not a short and plain statement of a claim that complies with Rule 8. *Martin Luther King Jr. H.S. Parents v. New York City Dep't of Educ.*, No. 02 Civ. 1689 (MBM), 2004 WL 1656598, at *2 (S.D.N.Y. July 23, 2004), *vacated and remanded (on other grounds) by sub nom. Blakely v. Wells,* 209 Fed. Appx. 18 (2d Cir. 2006). Although *pro se* litigants are sometimes held to a less rigorous Rule 8(a)(2) standard than are litigants represented by lawyers, courts have dismissed *pro se* complaints for failure to comply with this rule. *See, e.g. Prezzi v. Schelter*, 469 F.2d 691, 692 (2d Cir. 1972); *Jones v. National Communication and Surveillance Networks*, 409 F. Supp.2d 456, 464-65 (S.D.N.Y. 2006), *aff'd*, No. 06-1220-CV, 2008 WL 482599 (2d Cir. Feb. 21 2008); *Solomon v. H.P. Action Center,* No. 99 Civ. 10352 (JSR), 1999 WL 1051092, at *1 (S.D.N.Y. Nov. 19, 1999).

Plaintiffs' amended complaint is neither short nor plain. It is a rambling, stream-of-consciousness litany of accusations made against at least one hundred eighty-three (183) individuals, including many public servants, business

organizations, law firms, and government and judicial entities. Joao is one of those defendants. The amended complaint does not reveal how Joao, as apart from the other one hundred eighty-two (182) defendants, is liable to Plaintiffs pursuant to any one of the twelve counts. Rule 8 is intended to avoid placing on litigants the unjustified burden of having to respond to scant factual allegations in a pleading that are buried amid a mass of verbiage, comprised of accusations of misconduct. *Appalachian Enters., Inc. v. ePayment Solutions, Ltd*., No. 01 CV 11502 (GBD), 2004 WL 2813121, at *7 (S.D.N.Y. Dec. 8, 2004).

Accordingly, the district court's dismissal of the amended complaint should be affirmed.

POINT II

THE FOUR FEDERAL QUESTION CLAIMS AGAINST JOAO WERE PROPERLY DISMISSED AS FAILING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Count One (Constitutional violations), Count Two (antitrust violations), and Count Three (violations of Title VII of the Civil Rights Act of 1964) were properly dismissed. As to Count One, Joao is an individual and not a state official or other public servant and, therefore, he cannot be held liable for a denial of Plaintiffs' Constitutional rights. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

Further, because Plaintiffs have alleged no conduct by Joao that constitutes a restraint of interstate commerce (Count Two) or that he engaged in employment discrimination (Count Three), these counts were correctly dismissed.

Likewise, the civil RICO claim (Count Four) was properly dismissed for failure to state a cause of action. Recently, the Supreme Court modified pleading requirements. *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007). Under the old rule, that the Supreme Court abandoned in the *Bell Atlantic* case, "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, 45-6 (1957). In the *Bell Atlantic* case, the Court stated that "[f]actual allegations [in a pleading] must be enough to raise a right to relief above the speculative level[,]" and "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl.,* 127 S.Ct. at 1965, 1969 (citations omitted). Although this Court does not believe that the *Bell Atlantic* case set a heightened standard for fact pleading, the Court did acknowledge that now a pleader must amplify a claim with sufficient factual allegations so as to render the claim plausible. *Iqbal v. Hasty*, 490 F.3d 143,

157-58 (2d Cir. 2007). Applying the *Bell Atlantic* pleading standard here requires an affirmance of the dismissal of Plaintiffs' civil RICO claim against Joao.

To prove a civil RICO claim, "a plaintiff must show that he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Cofacredit, S.A. v. Windsor Plumbing Supply Co*., 187 F.3d 229, 242 (2d Cir. 1999) (quoting *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 520 (2d Cir. 1994)). Here, for the reasons set forth by the other defendants-appellees, the amended complaint does not properly allege the existence of a RICO enterprise. But, if the Court were to conclude a RICO enterprise was pleaded properly, then the dismissal of this count in the amended complaint as to Joao should still be affirmed because it does not allege sufficient facts, under the *Bell Atlantic* standard, to make that claim even remotely plausible as to Joao. In particular, the amended complaint does not allege that Joao conducted the alleged enterprise through a pattern of racketeering activity.

The RICO statute defines "racketeering activity" to include certain enumerated federal and state crimes, which are the predicate acts. 18 U.S.C. § 1961(1). To plead properly a "pattern of racketeering activity," a plaintiff must allege that at least two predicate acts of "racketeering activity" were committed

in a ten-year period, 18 U.S.C. § 1961(5), that the predicate acts are related to each other and constituted a threat of continuing activity, *H.J. Inc. v. Northwestern Bell Tel. Co*., 492 U.S. 229, 239 (1989), and that **each defendant** must have engaged in at least two predicate acts. *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001); *Hoatson v. New York Archdiocese*, No. 05 Civ. 10467 (PAC), 2007 WL 431098, at *3 (S.D.N.Y. Feb. 8, 2007). Here, there are simply no facts pleaded that even suggest that Joao engaged in two predicate acts. At most, Mr. Bernstein discovered problems in a patent application that Joao had prepared while in Boca Raton. Mr. Bernstein then had Joao rewrite the application to his satisfaction. Thereafter, Mr. Bernstein and not Joao sent the application to the United States Patent and Trademark Office *via* the U.S. mail. (Am. Compl., at 83, ¶¶ 301 and 302). There are no other factual allegations concerning Joao in the amended complaint. True, the amended complaint accuses Joao of stealing Plaintiffs' technology for use in patent applications that Joao fraudulently filed with the USPTO, but no facts are pleaded in support of that accusation.

Accordingly, the dismissal of the amended complaint as to Joao should be affirmed because this pleading does not allege sufficient facts, under the *Bell Atlantic* standard, to make that claim even remotely plausible.

As an alternative ground, the RICO claim was properly dismissed as barred by the four-year statute of limitations, see *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), which began to run in 2001, when the attorney-client relationship between Mr. Bernstein and Proskauer terminated.

POINT III

EACH OF THE EIGHT STATE LAW CLAIMS AGAINST JOAO WAS CORRECTLY DISMISSED.

Each of the eight state law claims as to Joao was properly dismissed as barred by various statutes of limitation, all of which began to run no later than August 25, 2000. According to the amended complaint, as of that date, Plaintiffs already had terminated Joao's services as a lawyer (Am. Compl., at 83, ¶¶ 302 and 303]), and Proskauer had acquired Plaintiffs' entire patent portfolio (Am. Compl., at 216, ¶ 796]). Plaintiffs initiated this action on December 12, 2007.

Count Five: Legal Malpractice and Negligence. Three-year limitation, CPLR 214(6). Expiration of limitation period: August 25, 2003.

Count Six: Breach of Contracts. Six-year limitation, CPLR 213(2). Expiration of limitation period: August 25, 2006.

Count Seven: Tortuous Interference with Advantageous Business Relationships. Three-year limitation, CPLR 214(4). Expiration of limitation

period: August 25, 2003.

Count Eight: Negligent Interference with Contractual Rights. Three-year limitation, CPLR 214(4). Expiration of limitation period: August 25, 2003.

Count Nine: Fraud. Six-year limitation, CPLR 213(8). Expiration of limitation period: August 25, 2006. The fraud claim also should be dismissed because it fails to comply with Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9 requires that allegations of fraud be pled with particularity. Here, the amended complaint does not identify what statements Joao made that Plaintiffs believe are fraudulent, when and where those statements were made, why Plaintiffs believe those statements are fraudulent, and there must be allegations of facts that give rise to a strong inference of fraudulent intent. *Koehler v. Bank of Bermuda (New York) Ltd.,* 209 F.3d 130, 136 (2d Cir. 2000), *amended* by 229 F.3d 424 (2d Cir. 2000); *S.Q.K.F.C. Inc. v. Bell Alt. TriCon Leasing Corp*., 84 F.3d 629, 634 (2d Cir. 1996).

Count Ten: Breach of Fiduciary Duties as Directors and Officers. Three-year limitation, CPLR 214(4). Expiration of limitation period: August 25, 2003.

Count Eleven: Other Civil New York, Florida, and Delaware Claims. Six-year limitation, CPLR 213(1). Expiration of limitation period: August 25, 2006.

Count Twelve: Misappropriation and Conversion of Funds. Three-year limitation, CPLR 214(4). Expiration of limitation period: August 25, 2003.

CONCLUSION

Defendant Raymond A. Joao respectfully requests that the order of the United States District Court for the Southern District of New York (Shira A. Scheindlin, U.S.D.J.), filed on August 8, 2008, dismissing the amended complaint should be affirmed.

Dated: New York, New York
March 27, 2009

FRIED & EPSTEIN LLP

By_____
John W. Fried (JF2667)

Empire State Building
350 Fifth Avenue, Suite 7612
New York, New York 10118
(212) 268-7111

Attorneys for Defendant-Appellee Raymond A Joao

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT EXPRESS**
COUNTY OF NEW YORK)		**MAIL**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 30, 2009

deponent served the within**: Brief for Defendant-Appellee Raymond A. Joao**

upon: See attached Service List

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York and served electronically via email.

Sworn to before me on March 30, 2009

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2011

Job # 221883

SERVICE LIST

Eliot I. Bernstein
2753 Northwest 34th Street
Boca Raton, FL 33434
561-245-8588
iviewit@iviewit.tv
Plaintiff- Appellant Pro Se

P. Stephen Lamont
35 Locust Avenue
Rye, New York 10580
914-217-0038
pstephen.lamont@verizon.net
Plaintiff-Appellant Pro Se

Lili Zandpour
Friedman Kaplan Seiler & Adelman LLP
1633 Broadway, 46th Floor
New York, New York 10019
(212) 833-1100
lzandpour@fklaw.com
Attorneys for Foley & Lardner LLP Defendants-Appellees

Patrick J. Walsh
Office of the New York Attorney General
120 Broadway, 25th Floor
New York, NY 10271
212-416-6197
Patrick.Walsh@oag.state.ny.us
Attorney for the New York State Defendants-Appellees

Stephen M. Hall
Assistant Attorney General III
Office of the Attorney General
900 E. Main Street
Richmond, VA 23219
SHall@oag.state.va.us
Attorney for the Virginia Defendants-Appellees

Gregg Mashberg
Proskauer Rose, LLP
1585 Broadway
New York, NY10036
212-969-3000
gmashberg@proskauer.com; jfsmith@proskauer.com
Attorneys for Proskauer Rose Defendants-Appellees

SERVICE LIST (Contin.)

Glenn T. Burhans, Jr.
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32301
850-425-8532
burhansg@gtlaw.com; KeatingM@gtlaw.com
Attorneys for the Florida Defendants-Appellees

Richard M. Howard
Law Offices of Richard M. Howard
190 Willis Avenue
Mineola, NY 11501
516-747-0300
rhoward@meltzerlippe.com
Attorneys for Meltzer Lippe Defendants-Appellees

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Bernstein v. Appellate Division First Department Disciplinary Committee

DOCKET NUMBER: 08-4873-cv

I, Maryna Sapyelkina, certify that I have scanned for viruses the PDF version of the

_____ Appellant's Brief

___X___ Appellee's Brief

_____ Reply Brief

_____ Notice of Appearance

that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Trend Micro AntiVirus version 8.0 was used.

_____
Maryna Sapyelkina

Date: March 30, 2009