

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ENEZ BALTHAZAR,	:	
Plaintiff,	:	CIVIL ACTION
vs.	:	NO. 02-cv-1136 (SMO)
ATLANTIC CITY MEDICAL CENTER,;	:	
ATLANTIC CITY MEDICAL CENTER	:	
COMMUNITY HEALTH SERVICES,	:	
et al.,	:	
Defendants	:	

**MOTION TO DISMISS OF ATLANTIC CITY MEDICAL CENTER
AND ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES**

Atlantic City Medical Center and Atlantic City Medical Center Community Health Services (hereinafter collectively referred to as “Atlantic City Medical”) respectfully requests that their motion to dismiss the complaint of Enez Balthazar (“Balthazar”) be granted and states in support thereof the following:

1. Balthazar attempts to state a cause of action against Atlantic City Medical based on an alleged violation of 18 U.S.C. §1962(c) and (d) and based upon 42 U.S.C. §1985(3). A copy of the complaint is attached hereto as Exhibit “A”.
2. An examination of the relevant counts of the complaint shows that it fails to state a cause of action pursuant to either of these statutes for a variety of reasons set forth in the accompanying brief of Atlantic City Medical.
3. In addition, Balthazar bases her claim on the identical factual situation which she asserted in the Superior Court of New Jersey at Docket No. ALT-L-4192-99. The Superior Court dismissed Balthazar’s claim against Atlantic City Medical because of the failure to submit an affidavit of merit within the required time-period. See Exhibit “B”. A copy of the complaint in the state court action appears hereto as Exhibit “C”. The doctrine of res judicata bars the complaint in this case. The entire controversy doctrine bars the complaint in this case.

WHEREFORE, Atlantic City Medical Center and Atlantic City Medical Center

Community Health Center respectfully requests that their motion to dismiss be granted and that the complaint be dismissed as to them.

GOLD, BUTKOVITZ & ROBINS, P.C.

BY: _____
SEAN ROBINS
Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ENEZ BALTHAZAR,

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Plaintiff,

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CIVIL ACTION
NO. 02-cv-1136 (SMO)

vs.

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ATLANTIC CITY MEDICAL CENTER, :
ATLANTIC CITY MEDICAL CENTER :
COMMUNITY HEALTH SERVICES, :
et al., :

:

Defendants

BRIEF OF ATLANTIC CITY MEDICAL CENTER AND ATLANTIC
CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES IN SUPPORT
OF THEIR MOTION TO DISMISS THE COMPLAINT OF
ENEZ BALTHAZAR

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I. PROCEDURAL HISTORY

Enez Balthazar (“Balthazar”) has filed a complaint in this Court against Atlantic City Medical Center and Atlantic City Medical Center Community Health Services (collectively referred to as “Atlantic City Medical”), Barbara Henderson, M.D. (“Henderson”), Joseph DeStefano, M.D. (“DeStefano”), Allan Feldman, M.D. (“Feldman”) and Philip Korzeniowski, M.D. (“Korzeniowski”), DeStefano, Feldman, Kaufman and Korzeniowski, P.A., DeStefano, Feldman & Kaufman, P.A., University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine and Richard Cooper, D.O. alleging that all of the defendants engaged in conduct that violated 18 U.S.C. §1962(c) and 18 U.S.C. §1962(d) of the Racketeer Influenced Corrupt Organization Act (“RICO”). The complaint also alleges a conspiracy by all of the defendants pursuant to 42 U.S.C. §1985(3).

Balthazar had filed a complaint involving the identical defendants and facts in the Superior Court of New Jersey. A copy of the complaint appears hereto as Exhibit “C”. Balthazar had alleged that all of the defendants had committed medical malpractice against her. The Superior Court of New Jersey in response to a motion for summary judgment by Atlantic City Medical granted summary judgment because of the failure of Balthazar to file an affidavit of merit within the time period required by New Jersey law. See Exhibit “B”, a copy of the Superior Court’s order. Balthazar has appealed that decision to the Superior Court Appellate Division.

Atlantic City Medical seeks dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the complaint fails to state a cause of action. It does not allege sufficient allegations to show a cause of action pursuant to either 18 U.S.C. §1962(c), or §1962(d) or 42 U.S.C. §1985(3). The doctrines of res judicata and the entire case controversy rule independently bar the complaint.

Since this Court has no jurisdiction over this case pursuant to any federal statute or claim it should decline to exercise pendent claim jurisdiction based on 28 U.S.C. §1367.

II. CLAIMS ATTEMPTED TO BE PRESENTED BY THE COMPLAINT AGAINST ATLANTIC CITY MEDICAL

The complaint contends that during the course of discovery in the medical malpractice case in the Superior Court of New Jersey all of the defendants provided false answers in the complaint in the malpractice case in the answers to interrogatories and submitted fraudulent documents, and perjured deposition testimony, all of which were served on Balthazar's counsel by the United States Mail. See Exhibit "A", paragraph 33. The complaint also asserts that the answer of Atlantic City Medical to the complaint and its answers to interrogatories contained false and fraudulent responses concerning Balthazar's medical care and the persons administering that care. See Exhibit "A", paragraph 33(c). The complaint also asserts that Atlantic City Medical mailed to Balthazar's counsel in the malpractice case its motion to dismiss which contained false and fraudulent allegations. See Exhibit "A", paragraphs 33(b), (c) and (e).

Count I of the complaint attempts to state a cause of action against all of the defendants pursuant to 18 U.S.C. §1962(c). Count II of the complaint also attempts to state a cause of action against all of the defendants pursuant to 18 U.S.C. §1962(c). Count III of the complaint attempts to state a cause of action against all of the defendants pursuant to 18 U.S.C. §1962(d). Count IV of the complaint attempts to state a cause of action against all of the defendants based upon 42 U.S.C. §1985. Count V of the complaint attempts to state a cause of action against all of the defendants pursuant to N.J.S.A. 2C:41-1, the New Jersey RICO statute. Count VII of the complaint attempts to state a cause of action pursuant to all of the defendants pursuant to N.J.S.A. 2C:21-4.1, N.J.A.C. 13:35-6.5 and N.J.A.C. 8:43G-15.3(d). Count VIII of the complaint attempts to state a cause of action against all of the defendants based on fraudulent concealment.

III. ARGUMENT

- A. Counts I and II Of The Complaint Fail To State A Cause Of Action Against Atlantic City Medical Based Upon 18 U.S.C. §1962(c) Because The Complaint Fails To Allege An Enterprise Separate From Atlantic City Medical And Fails To Allege An Injury Caused By Conduct Barred By The RICO Statute.

Counts I and II of the complaint attempt without success to state a cause of action against Atlantic City Medical based upon a violation of 18 U.S.C. §1962(c). 18 U.S.C. §1962(c) states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, where 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.

To recover in a civil RICO action a plaintiff must prove (1) a violation of 18 U.S.C. §1962; (2) an injury to the plaintiff's business or property; and (3) that the RICO violation was the proximate cause of the injury. Dongelewicz v. First Eastern Bank, 80 F.Supp. 2d 339, 344 (E.D. Pa. 1999). To establish a violation of §1962 the plaintiff must prove (1) the conduct (2) of an enterprise; (3) through a pattern (4) of racketeering activity. Dongelewicz v. First Eastern Bank, 80 F.Supp. 2d 339, 345 (E.D. Pa. 1999). A pattern of racketeering activity is the occurrence of at least two acts of racketeering activity, known as predicate acts and enumerated in the statute, within a period of ten years. Id. at 345, 18 U.S.C. §1961(5), Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, n. 14 (1985).

The United States Court of Appeals for the Third Circuit has repeatedly concluded that a defendant cannot be both a person and the enterprise under §1962(c). Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1358-59 (3d Cir. 1987); B.F. Hersch v. Enright Refining Co., Inc., 751 F.2d 628, 633-34 (3d Cir. 1984). Here, the complaint attempts to have Atlantic City Medical function as both the person and the enterprise. The complaint never identifies an enterprise that Atlantic City Medical operated in a racketeering manner. Apparently, according to the complaint, it operated itself in a racketeering manner. That means that according to the complaint Atlantic City Medical functioned as both the person and the enterprise. That fails to state a cause of action as a matter of law pursuant to 18 U.S.C. §1962(c). See Marraczo v. Bucks County Bank & Trust Co., 814 F.Supp. 437 (E.D. Pa. 1993).

A second independent reason exists which requires the dismissal of Counts I and II of the complaint against Atlantic City Medical. In order to state a cause of action pursuant to 18 U.S.C.

§1962(c), Balthazar has to show that the alleged violation of that section caused the injury about which she complains. An examination of the complaint shows that she has failed to allege this.

Balthazar contends that the actions of Atlantic City Medical caused the dismissal of her medical malpractice claim. But an examination of the order of the court and the transcript of the hearing relating to the grant of the order shows that the Court dismissed the case for the failure to submit an affidavit of merit as required by the New Jersey Rules of Civil Procedure. See Exhibits “B” and “D”. Failure to sufficiently allege that the violations of §1962(c) caused the harm for which he seeks compensation should result in the dismissal of Balthazar’s claim based on 18 U.S.C. §1962 in both Counts I and II of the complaint. See Rehkop v. Berwick Healthcare Corp., 95 F.3d 285 (3d Cir. 1996)(plaintiff failed to state a cause of action pursuant to 42 U.S.C. §1962(c) where the alleged racketeering activities of the defendant did not cause the plaintiff to lose her job.

In Count II of the complaint Balthazar alleges that all of the defendants operated as an association in fact constituting an enterprise. The complaint never asserts what the purpose of the association in fact was when it was created or how it operated. This fails to meet the requirements of an enterprise. Count II also never states that Atlantic City Medical operated the enterprise. This constitutes a fatal flaw which requires the dismissal of Count II. See Reves v. Ernst & Young, 507 U.S. 170, 180, 185 (1993)(to conduct or participate directly or indirectly in the conduct of an enterprise’s affair a defendant must have had some part in directing those affairs; that is must have participated in the operation or management of the enterprise itself.)

B. Count III Of The Complaint Fails To State A Cause Of Action Pursuant To 18 U.S.C. §1962(d).

Count III of the complaint fails to state a cause of action pursuant to 18 U.S.C. §1962(d). To allege a claim pursuant to that section a plaintiff must allege that (1) there was an agreement to commit the predicate acts of fraud, and that the (2) defendants had knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate §1962(a), (b) or (c). Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1993); Martin v. Brown,

758 F.Supp. 313, 319 (W.D. Pa. 1990).

The complaint never alleges an agreement to commit the predicate acts of mail fraud. Examine the complaint. No such averment appears.

No averment appears in the complaint that the defendants had knowledge that their acts were part of a pattern of racketeering activity conducted in such a way as to violate 18 U.S.C. §1962(c).

For the reasons previously indicated, Balthazar has failed to allege a substantive violation of 18 U.S.C. §1962. To state a cause of action for conspiracy to violate §1962. Balthazar must allege sufficient averments to establish a substantive claim. Any claims under §1962(d) based on a conspiracy to violate the other subsections of §1962 fails if the substantive claims themselves are deficient. Jiffy Lube International v. Jiffy Lube of Pennsylvania, 848 F.Supp. 569, 583 (E.D. Pa. 1994); Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1993). Consequently, for three separate reasons Count III fails to state a cause of action for conspiracy based upon 42 U.S.C. §1962(d).

C. Count IV Of The Complaint Fails To State A Cause Of Action Against Atlantic City Medical Based Upon 42 U.S.C. §1985 Because The Complaint Fails To Allege That The Conspiracy Against Balthazar Was Motivated By Racial Or Class Base Invidiously Discriminatory Animus.

Balthazar attempts to allege a cause of action against Atlantic City Medical based upon 42 U.S.C. §1985(3). To state a claim under this statute Balthazar must set forth (1) a conspiracy; (2) motivated by racial or class based invidiously discriminatory animus; (3) to deprive one of equal protection of the law; (4) that the conspirators committed some act in furtherance of the conspiracy and (5) plaintiff was injured in her person or property or deprived of a right or privilege as a United States citizen. Hill v. Borough of Swathmore, 4 F.Supp. 2d 395 (E.D. Pa. 1998).

Here, Balthazar has failed to allege class based or racial based animus. Instead, she asserts that she is a member of the African race. See Exhibit “A”, paragraph 73. She never contends that any of the actions by Atlantic City Medical or any of the defendants resulted from

her race. This constitutes a fatal flaw in her claim pursuant to 42 U.S.C. §1985(3). It requires the dismissal of that claim.

D. Balthazar Fails To State A Cause Of Action In Count IV Of Her Complaint Based Upon 42 U.S.C. §1985(3) Because She Does Not Assert A Violation Of Equal Protection Of The Laws.

In order to state a cause of action pursuant to 42 U.S.C. §1985(3) Balthazar must show factual averments that, if proven, establish a violation of the equal protection of the law. Instead, she concedes that she suffered a due process injury and an equal protection of the law injury. See Exhibit “A”, paragraph 73. She fails to allege how the defendants deprived her of equal protection of the law. Her statement that she suffered a delay in the adjudication of her malpractice case fails to establish a violation of the equal protection of the law. She has not alleged that the defendants treated her any differently than they treated anyone else who brought a malpractice claim against them.

She has also not set forth factual averments to establish that the conduct of the defendants caused her harm. Balthazar asserts that the conduct of the defendants caused the dismissal of her claim. But she fails to show how that conduct prevented her from filing an affidavit of merit. The failure to submit an affidavit of merit led to the dismissal of her claim. See Exhibits “B” and “D”.

E. Balthazar Has Not Set Forth A Cause Of Action Pursuant To 42 U.S.C. §1985(3) Because She Has Not Asserted The Required Elements Of A Conspiracy.

In stating a complaint for conspiracy pursuant to 42 U.S.C. §1985(3) a plaintiff may not rely on bare conclusory allegations of conspiracy or concerted action. Rather, she must expressly allege an agreement, or make averments of communications, consultation, cooperation, or command from which such an agreement can be inferred. Averments must be supported by facts bearing out the existence of a conspiracy and indicating its broad objectives and the role each defendant allegedly played in carrying out those objections. Burden v. Wilkes-Barre Area High School District, 16 F.Supp. 2d 569 (M.D. Pa. 1998).

An examination of the complaint of Balthazar shows that she has failed to meet this

standard. She has submitted only bare, conclusory allegations of conspiracy. She has not alleged factual averments of an agreement or averments of communication, consultation, cooperation or command from which such an agreement can be inferred. The averments are not supported by facts showing the existence of a conspiracy. Balthazar submits boilerplate allegations only which could appear in any complaint alleging a conspiracy pursuant to 42 U.S.C. §1985(3).

F. The Doctrine Of Res Judicata Bars the Complaint In This Case.

The doctrine of res judicata bars the complaint in this case. Res judicata, also known as claim preclusion, prohibits a party from reopening or relitigating issues that in a previous case involved the same parties arising out of the same transaction. Claim preclusion consists of three elements; (1) a final judgment on the merits and a prior suit involving (2) the same claim and (3) the same parties or their privies. EEOC v. United States Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990).

Here, the complaint in this case involves the same parties as those in the Superior Court action. The issues arise out of the same nucleus of facts. The action was disposed of on the merits. It must be dismissed.

G. The Entire Controversy Doctrine Bars The Complaint Of Balthazar.

The entire controversy doctrine bars the complaint of Balthazar. The main test concerning the applicability of the entire controversy doctrine is whether “the claims against different parties arise from related facts or the same transaction or series of transactions. It is the core set of facts that provide the link between distinct claims against the same or different parties and triggers the requirement that they be determined in one proceeding. DiTrollo v. Antiles, 142 N.J. 253, 267-268 (1995).

Here, the parties in both cases are the same. The claims in the second suit in this Court arise from the same facts as the first suit. They should have been known at the time of the first suit and they should have been raised in the first suit. Permitting this case to go forward undercuts the entire controversy doctrine. Plaintiff may argue that she had no ability to raise the

claims in this Court in the Superior Court. This constitutes nonsense. New Jersey has a RICO statute virtually identical to the federal RICO statute that Balthazar raises here. A state court has original jurisdiction over a claim pursuant to 42 U.S.C. §1985(3).

H. This Court Should Decline To Assert Pendent Claim Jurisdiction Pursuant To 28 U.S.C. §1367.

This Court may exercise its discretion pursuant to 28 U.S.C. §1367 to decline to assert jurisdiction over the state law claims set forth by Balthazar in her complaint in this Court. If this Court dismisses the federal claims, no basis exists for this Court to retain jurisdiction over the state law claims against Atlantic City Medical. Virtually every federal court to consider the issue has concluded that when federal claims are dismissed early on in litigation pursuant to a motion to dismiss the federal district court should not retain jurisdiction over the state law claims.

Franks v. Magnolia Hosp., 888 F.Supp. 1310 (N.D. Miss. 1995) aff'd 77 F.3d 478 (5th Cir. 1995); Orraca v. City of New York, 897 F.Supp. 148 (S.D.N.Y. 1995); Kirsch v. Franklin, 897 F.Supp. 1173 (E.D. Wis. 1995); Meek v. Springfield Police Department, 990 F.Supp. 598 (C.D. Ill. 1998); Landefeld v. Marion General Hospital, Inc., 994 F.2d 1178 (6th Cir. 1993).

III. CONCLUSION

In the light of the foregoing Atlantic City Medical Center and Atlantic City Medical Center Community Services respectfully request that their motion to dismiss be granted and that the complaint be dismissed against them.

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**APPENDIX IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS,
ATLANTIC CITY MEDICAL CENTER AND ATLANTIC CITY
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