IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM J. KEEFE and
RANDY J. KEEFE,

OPINION AND ORDER

Plaintiffs,

00-0016-C

v.

RONALD A. ARTHUR
and KATHLEEN M. ARTHUR,
individually and in their official capacities
with named Enterprises herein,

Defendants.

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This civil action is one in a long line of law suits between plaintiffs William Keefe and Randy Keefe and defendants Ronald Arthur and Kathleen Arthur. From 1993 until 1995, defendants were both the lawyers for plaintiffs and their business partners. The joint business venture involved acquiring land, turning trees on the land into lumber and selling it and re-selling the land. The parties disagree about almost everything except the fact that their relationship had crumbled beyond repair by April 1995.

Plaintiffs filed their complaint originally in January 2000. In addition to the Arthurs, plaintiffs named several public officials and entities as defendants, which I later dismissed

because they were immune from suit. March 2, 2000 Op. and Order, dkt. #10. Before plaintiffs were able to serve the Arthurs with their complaint, plaintiffs received formal notice that Ronald Arthur had filed for bankruptcy in Virginia. I dismissed the case without prejudice because the bankruptcy proceeding had the potential to dispose of all of plaintiffs' claims. April 25, 2000 Op. and Order, dkt. #16. Three years later, I granted plaintiffs' motion to reopen the case after they submitted an order from the bankruptcy court (the case had since been transferred to the Eastern District of Wisconsin) denying defendants a discharge. May 15, 2003 Order, dkt. # 22; see 11 U.S.C. § 362(c)(2) (automatic stay lifted at "the time a discharge is granted or denied").

In their amended complaint, plaintiffs identify 25 "causes of action" against defendants, most of which arise purportedly under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, and its Wisconsin counterpart, the Wisconsin Organized Crime Control Act, Wis. Stat. §§ 946.80-88. In addition, plaintiffs assert state law claims for injury to their business under Wis. Stat. § 134.01, conversion, breach of contract, malicious prosecution and intentional interference with a contract.

Presently before the court is defendant Ronald Arthur's motion to dismiss for failure to state a claim upon which relief may be granted, which defendant Kathleen Arthur has joined. Defendants advance several grounds in support of their motion to dismiss: (1) plaintiffs' claims are barred by the doctrines of claim and issue preclusion; (2) plaintiffs'

RICO claims are barred by the statute of limitations; (3) plaintiffs failed to plead their RICO claims with specificity as required by Fed. R. Civ. P. 9(b); and (4) plaintiffs have not incurred an injury that is compensable under RICO.

Claim preclusion is the most obvious ground for dismissal, given the number of cases in which the parties have been involved. Under this doctrine, a party may not relitigate a claim that has or should have been litigated in a previous case. Beischel v. Stone Bank School District, 362 F.3d 430, 434 (7th Cir. 2004); Town of Delafield v. Winkelman, 2004 WI 17, ¶ 33, 269 Wis. 2d 109, 675 N.W.2d 470. First, there is the bankruptcy action of defendant Ronald Arthur, In re Ronald A. Arthur, 00-27594-MDM (Bankr. E.D. Wis.). According to defendants, in the context of an adversary proceeding filed by plaintiffs, the bankruptcy court dismissed claims identical to those that plaintiffs are bringing in this court on the ground that they were precluded by earlier state court claims. However, the court documents submitted by defendants do not support their position. (Because court documents are matters of public record, I may consider them without converting defendant's motion to dismiss into one for summary judgment. General Electric Capital v. Lease Resolution, 128 F.3d 1074, 1080-81 (7th Cir. 1997).) Rather, it appears from the bankruptcy court's docket sheet that the court closed plaintiffs' adversary proceeding without deciding it after the court accepted Ronald Arthur's waiver of discharge. Thus, I cannot conclude at this stage of the proceedings that the bankruptcy proceedings act as a bar

to this action.

There is also the case brought by plaintiffs against defendants in state court, Keefe v. Arthur, 96-CV-3154 (Milwaukee County Cir. Ct.). In that case, as in this one, plaintiffs alleged that defendants had conspired to harm plaintiffs' business, breach their contract with plaintiffs and steal plaintiffs' property. The circuit court dismissed that case as a sanction for plaintiffs' failure to respond to defendants' discovery requests. However, in February 2004, the circuit court granted plaintiffs' motion to vacate the judgment after finding that defendant Ronald Arthur had obtained the judgment by committing a fraud on the court. The court concluded: "[T]he claims herein should be and the same hereby are dismissed without prejudice or costs to any party to allow the parties to pursue their claims under the RICO action now pending in Federal Court." Thus, the circuit court appears to have reopened the case only to "abstain" from deciding anything so that the action in this court could proceed. In any event, because the judgment in 96-CV-3154 has been vacated, it cannot have any preclusive effect.

Finally, there are the cases defendant Ronald Arthur (but not Kathleen Arthur) brought against plaintiffs in state court, Arthur v. Keefe, Nos. 95-CV-31 & 96-CV-22 (Marquette County Cir. Ct.). In these two cases, which were ultimately consolidated, Ronald Arthur sought injunctive relief against plaintiffs for entering on certain parcels of land and removing logs from those parcels. In addition, he asserted claims for unfair trade

practices, conspiracy to cause trade and business injury, timber theft and trespass. Plaintiffs filed counterclaims for fraud and intentional misrepresentation, breach of contract and misuse of the attorney-client relationship, alleging that Arthur knew that he would be unable to obtain financing for plaintiffs as he promised and that Arthur used his relationship as plaintiffs' attorney to obtain economic advantages to plaintiffs' detriment. Plaintiffs later amended their counterclaim to include causes of action for perjury, malicious prosecution, timber theft, defamation and abuse of process. The circuit court entered a default judgment against plaintiffs on all of their counterclaims because plaintiffs had failed to appear at a pretrial conference and a deposition. (The court dismissed Ronald Arthur's claims as well because he had misused the attorney-client relationship with plaintiffs.) The Wisconsin Court of Appeals affirmed the circuit court's decision. Arthur v. Keefe, Nos. 98-2301 & 98-2302, 2001 WL 170891 (Wis. Ct. App. Feb. 22, 2001).

Although the Marquette County case ended with a default judgment rather than a decision on the merits, claim preclusion would still apply to all facts pleaded in the counterclaims. A.B.C.G. Enterprises v. First Bank S.E., 184 Wis. 2d 465, 481, 515 N.W.2d 904, 910 (1994) (when prior lawsuit resolved through default judgment, preclusive effect of judgment limited to facts alleged in pleadings); 28 U.S.C. § 1738 (federal courts must give prior state court judgments same preclusive effect as they would have in that state). Plaintiffs would also be precluded from raising claims that arose out of the same

"transaction" or "series of connected transactions" as their counterclaims in the state court action. Bank of Sun Prairie v. Marshall Development Co., 2001 WI 64, ¶32, 242 Wis. 2d 355, 626 N.W.2d 319. This means that plaintiffs may not repackage adjudicated state law claims as federal law claims if they are based on the same set of facts. Froebel v. Meyer, 217 F.3d 928, 934 (7th Cir. 2000) (applying Wisconsin law).

There is no precise test for determining whether two claims arise from the same transaction or series of transactions. Courts have applied a standard similar to the one used to determine whether to exercise supplemental jurisdiction, that is, whether the two claims share a "common nucleus of operative fact." A.B.C.G., 184 Wis. 2d at 481, 515 N.W.2d 904. This standard too is far from self-defining. However, appropriate considerations are "whether the facts are related in time, space, origin, or motivation . . . and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Post v. Schwall, 157 Wis. 2d 652, 658-59, 460 N.W.2d 794 (Ct. App. 1990) (citations omitted).

The difficulty of applying the test is heightened in this case because many of plaintiffs' allegations are abstruse. Plaintiffs' complaint is nearly 30 pages long, but there is no coherent narrative that holds it together. However, it appears that each of plaintiffs' 25 "causes of action" fall into one of the following categories:

(1) defendants failed to uphold their contractual agreement to help plaintiffs obtain

a $150,000 mortgage loan;

(2) in December 1994, after defendant Ronald Arthur "had led plaintiffs and their business to the point of business failure, " defendants attempted to "coerce" plaintiffs into laundering money; when plaintiffs refused, Ronald Arthur "made credible threats of contract murder" against plaintiffs;

(3) in January 1995, defendants entered into a conspiracy to steal more than $200,000 of logs and lumber to which plaintiffs had possessory rights; defendants continued to steal from plaintiffs until July 1995;

(4) defendants used the proceeds they obtained from plaintiffs to buy other pieces of property and concealed their theft by transferring property and setting up "charitable" corporations;

(5) in various court proceedings in state court and in bankruptcy court, defendants made false representations to the court and to plaintiffs and instructed other witnesses to do the same.

Plaintiffs made the first and third of these allegations in their state court counterclaims against defendant Ronald Arthur, so claims based on those allegations are barred by claim preclusion. However, this conclusion does not apply to defendant Kathleen Arthur because she was not a party in the earlier cases. Staats v. County of Sawyer, 220 F.3d 511(7th Cir. 2000) (under Wisconsin law, no claim preclusion unless there is "identity of

parties" in both cases). Although there is a narrow exception for non-parties who are in "privity" with parties, Pasko v. City of Milwaukee, 2002 WI 33, 252 Wis. 2d 1, 643 N.W.2d 72, defendants do not argue that this exception would apply in this case.

This does not mean that plaintiffs are home free with respect to their claims against defendant Kathleen Arthur. As defendants point out, the statute of limitations for a civil RICO action is four years. Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997). The limitations period begins to run as soon as the plaintiff discovers his injury or could have discovered it with reasonable diligence. Rotella v. Wood, 528 U.S. 549 (2000); McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 (7th Cir. 1992). The alleged money laundering scheme, the murder threat and thefts all occurred in 1995 or before. The allegations in plaintiffs' complaint demonstrate that plaintiffs knew of their injuries in 1995, even if they were not aware immediately of the alleged racketeering activities. Because plaintiffs did not file this action until January 2000, any RICO claims based on these events are barred by the statute of limitations.

In their complaint and their brief, plaintiffs do allege that there is a "continuing pattern" of racketeering activity that has continued to the present. They point to several transactions that defendants made from 1996 to 2000 to conceal the money they took from plaintiffs, such as transferring property and setting up nonprofit corporations. The problem with these allegations is that they do not identify an independent injury. One of the

elements of a RICO claim is an injury to the plaintiff's business or property. 18 U.S.C. § 1964(c). Without an injury occurring within the limitations period, plaintiffs cannot maintain a RICO action in federal court.

Even if the statute of limitations was not a problem, plaintiffs have still failed to allege a compensable injury under RICO. The only business or property-related injury alleged by plaintiffs in support of their RICO claims is a loss of approximately $200,000 in timber and logs. However, the United States District Court for the Eastern District of Wisconsin has determined that plaintiffs did not have a possessory interest in that property. In Keefe v. Marquette County, No. 99-C-1501-C (E.D. Wis.), plaintiffs sued a number of public entities and officials under 42 U.S.C. § 1983 for false arrest and unreasonable seizure of property. Among other things, plaintiffs contended that deputy sheriff Kelly Campion had violated the Fourth Amendment when he removed the disputed logs at defendant Ronald Arthur's request on April 25, 1995. In an opinion and order dated August 28, 2001, the district court concluded that "the logs and lumber which were removed from the sawmill site were not the property of the Keefes, individually. Rather, at best, it was Statewide Log & Lumber Co., Inc., that had an ownership or, more properly, a possessory interest in them." The district court dismissed the claim on the ground that "a plaintiff-shareholder cannot maintain a civil rights action for damages suffered by the corporation." The Court of Appeals for the Seventh Circuit affirmed the decision. Keefe v. Marquette County, No. 01-

3675, 2002 WL 453709 (7th Cir. Mar. 20, 2002).

Both William and Randy Keefe were parties to the Eastern District case. Although neither Ronald or Kathleen Arthur were parties, this is not a requirement for applying issue preclusion. It is sufficient if the party being precluded from asserting an issue was a party to the earlier case. Allen v. McCurry, 449 U.S. 90, 94-95 (1980). The remaining elements of issue preclusion are satisfied as well: the issue being precluded in this case is identical to the issue in the Eastern District case, the issue was actually adjudicated and the issue was necessary to the judgment. Loeb Industries v. Sumitomo Corp., 306 F.3d 469, 496 (7th Cir. 2002).

If plaintiffs did not own the property allegedly stolen, they cannot maintain an action under RICO. As under § 1983, shareholders of corporations that are injured by racketeering activities may not recover for the corporation's injuries. Manson v. Stacecsu, 11 F.3d 1127, 1131 (2d Cir. 1993) ("A shareholder generally does not have standing to bring an individual action under RICO to redress injuries to the corporation in which he owns stock. This is true even when the plaintiff is the sole shareholder of the injured corporation.") (citations omitted); Wooten v. Loshbough, 951 F.2d 768 (7th Cir. 1991); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175 (7th Cir. 1989). The Wisconsin Organized Crime Control Act contains a similar requirement. City of Milwaukee v. Universal Mortgage Corp., 692 F. Supp. 992, (E.D. Wis. 1988); Wis. Stat. § 946.87(4). Plaintiffs cannot avoid the district court's

findings by failing to mention the existence of the corporation in their complaint. Accordingly, I conclude that plaintiffs have failed to state a claim under RICO.

Almost all of plaintiffs' federal law claims are premised on RICO. Plaintiffs also assert violations of the Fourteenth Amendment, but they do not allege any facts suggesting that defendants may be treated as "state actors" for the purpose of holding them liable under the Constitution. Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2003). Finally, plaintiffs allege that defendants committed a fraud on the bankruptcy court, in violation of 18 U.S.C. § 152. However, § 152 is a criminal statute; it does not provide for civil remedies. Further, to the extent that plaintiffs believe that defendants concealed assets in the bankruptcy proceedings, any remedy that they may have is with the bankruptcy court, not this court. E.g., In re Scott, 172 F.3d 959 (7th Cir. 1999).

I note briefly that plaintiffs rely heavily on disciplinary proceedings that the Wisconsin Office of Lawyer Regulation has initiated against defendant Ronald Arthur and are pending before the Wisconsin Supreme Court, In the Matter of the Disciplinary Proceedings Against Ronald A. Arthur, No. 01-1914-D. In these proceedings, the office has alleged that Ronald Arthur violated various rules of professional conduct both during and after the time he served as plaintiffs' lawyer, such as filing lawsuits for the purpose of harassment and making false statements of fact to the court. The referee has recommended license revocation as the appropriate sanction for Ronald Arthur's alleged misconduct.

The allegations of the Office of Lawyer Regulation are undoubtedly very serious. If the state supreme court adopts the office's findings, it would not be surprising if the court also adopted the recommended discipline. Unfortunately for plaintiffs, however, even if the findings of the supreme court are consistent with plaintiffs' allegations and could be introduced as evidence in a civil action, this would not mean that plaintiffs are entitled to relief in federal court. Rules relating to claim and issue preclusion and statutes of limitations apply regardless of the veracity of a party's allegations. Thus, however the state disciplinary proceedings turn out, plaintiffs' federal law claims must be dismissed.

All that remains are plaintiffs' state law claims. A district court may decline to exercise supplemental jurisdiction over state law claims when it has dismissed all of the federal law claims before trial. 28 U.S.C. § 1367(c)(3). In interpreting § 1367, the Court of Appeals for the Seventh Circuit has stated: "[W]here a federal claim drops out before trial, a district court should not retain the state claims absent extraordinary circumstances." Wentzka v. Gelman, 991 F.2d 423, 425 (7th Cir. 1993). Neither side has advanced any reasons why I should exercise supplemental jurisdiction over plaintiffs' state law claims. In fact, neither side even *mentions* the state law claims in their briefs. Accordingly, I decline to

exercise supplemental jurisdiction over the state law claims.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Ronald Arthur and Kathleen Arthur is GRANTED. The federal law claims of plaintiff William Keefe and Randy Keefe are DISMISSED WITH PREJUDICE. I decline to exercise supplemental jurisdiction over plaintiffs' state law claims. The clerk of court is directed to enter judgment in favor of defendants and close this case.

Entered this 25th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge