STATE OF MICHIGAN

COURT OF APPEALS

DAVID BRAXTON and TERESA JORDAN, Personal Representatives of the Estate of TELINA MARIE JORDAN,

Plaintiffs-Appellants,

v

SCOTTISH GUARANTY INSURANCE COMPANY,

Defendant-Appellee,

and

PETER A. FLAMER and THE FLAMER GROUP,

Defendants-Appellees,

and

FIRESTONE AGENCY,

Defendant.

UNPUBLISHED
January 17, 1997

No. 184751

Macomb County
LC No. 94-000482-CK

Before: Taylor, P.J., and Markey and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order denying their motion for entry of a default judgment for treble damages under the federal Racketeer Influenced and Corrupt Organizations ("RICO") act , 18 USC 1961 *et seq.*, against defendants Peter A. Flamer and The Flamer Group. We affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiffs obtained a judgment in the amount of $225,000.00 against the Van Dyke Sports Center, Inc. for the death of decedent, who died in an accident at an amusement park owned by Van Dyke. Defendant Scottish Guaranty Insurance Company, organized and apparently operated by defendant Peter Flamer and defendant Flamer Group, was obligated to pay the judgment pursuant to a contract of insurance between it and Van Dyke, but Scottish was financially unable to pay the judgment. After plaintiffs became the assignees of Van Dyke's claims against defendants, plaintiffs brought this action for treble damages under RICO against defendants, alleging in part that defendants Flamer and Flamer Group violated RICO, 18 USC 1962(c), because their acts of purporting to provide insurance through an insolvent company constituted mail fraud, 18 USC 1341, and wire fraud, 18 USC 1343. Because defendants failed to comply with a court order compelling answers to plaintiffs' interrogatories, the trial court entered a default against them. Plaintiffs subsequently requested a default judgment in the amount set forth in their complaint and for treble damages.[1]

The trial court granted the default judgment in the amount of $225,000.00 on the non-RICO claim but denied treble damages because (1) plaintiffs failed to specifically plead that while engaging in an interstate enterprise, defendants committed two or more predicate or indictable offenses within a ten-year time span, and (2) even assuming plaintiffs' RICO claims were well-pleaded, plaintiffs lacked standing to recover treble damages because they were not injured by the predicate acts that formed the bases of the RICO claims. We agree that plaintiffs failed to plead with specificity their RICO claims.

Plaintiffs argue that they are entitled to treble damages for their RICO claims against defendants because a default constitutes an admission by the defaulting party to all well-pleaded allegations. Entry of a default is equivalent to the defaulting party's admission of all well-pleaded allegations. *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 512; 303 NW2d 234 (1981). The entry of a default does not, however, operate as an admission that the complaint states a cause of action. *State ex rel Saginaw Prosecuting Attorney v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981). Where the complaint fails to state a claim upon which relief can be granted, it will not support entry of a judgment obtained by a default. *Hunley v Phillips*, 164 Mich App 517, 523; 417 NW2d 485 (1987).

Here, plaintiff's RICO allegations are anything but a model of clarity; indeed, they contain only the following:

> 18. By means of utilizing the United States Mail in violation of 18 USCS 1341 and telephone and other means of "wire" communications in violation of 18 USCS 1343, Defendants PETER A. FLAMER and THE FLAMER GROUP engaged in a pattern of racketeering activity in violation of 18 USCS 1961, 1962, 1964 and 1965, in that the said Defendants conducted an enterprise in which:
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> A. Defendant PETER A. FLAMER operated and was the principal offices [sic] of Defendant SCOTTISH which Defendants purported to provide insurance in Michigan and other states in order to cause insureds and potential insureds to pay substantial premiums through Defendant PETER A. FLAMER to Defendant SCOTTISH.

B. Defendant PETER A. FLAMER knew that Defendant SCOTTISH was under funded and was insolvent in that its obligations and potential obligations far exceeded its ability to meet those obligations and potential obligations.

C. Instead of applying premiums paid to be able to meet its obligations and potential obligations, Defendant PETER A. FLAMER wrongfully caused premiums and other earnings of Defendant SCOTTISH to be diverted to Defendant PETER A. FLAMER and to Defendant THE FLAMER GROUP or for the benefit, directly or indirectly, of Defendant PETER A. FLAMER and Defendant THE FLAMER GROUP.

WHEREFORE, Plaintiffs request Judgment against Defendants in an amount over $10,000.00 together with costs, interest and attorney fees plus triple damages.

As a starting point, only 18 USC 1962 defines RICO violations. Thus, plaintiffs' allegations that defendants violated 18 USC 1961, 1964, or 1965 are simply not well-pleaded. Moreover, plaintiffs have failed to indicate by subsection which of the four RICO violations defined in §1962 defendants purportedly committed. The allegations do not even facially state a claim for violations of subsections (a), prohibiting investment of the proceeds of a pattern of racketeering activity in an interstate enterprise, (b), prohibiting acquisition of an interstate enterprise through a pattern of racketeering activity, or (d) prohibiting conspiracies to violate subsections (a), (b), or (c). At best, plaintiffs attempt to state a claim for violation of subsection (c), prohibiting the conduct of the affairs of an interstate enterprise through a pattern of racketeering activity. [2] See *In the Matter of Callanan*, 419 Mich 376, 382; 355 NW2d 69 (1984).

In order to state a valid civil RICO claim pursuant to 18 USC 1962(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, SPRL v Imrex Co*, 473 US 479, 496; 105 S Ct 3275; 87 L Ed 2d 346 (1985); *Hofstetter v Fletcher*, 905 F2d 897, 901 (CA 6, 1988). The definition of "racketeering activity" contained in 18 USC 1961(1) refers to various federal offenses, including mail fraud, 18 USC 1341, and wire fraud, 18 USC 1343, i.e., "predicate acts." *Hofstetter, supra* at 902. The statutory description of a "pattern of racketeering activity" is the commission of two predicate acts within ten years of each other. 18 USC 1961(5); *American Eagle Credit Corp v Gaskins*, 920 F2d 352, 354 (CA 6, 1990). The courts have expanded upon the pattern element by requiring that the plaintiff show at least two predicate acts of racketeering that are related and amount to or pose a threat of continued criminal activity. 18 USC 1961(5); *HJ Inc v Northwestern Bell Telephone*, 492 US 229, 238; 109 S Ct 2893; 106 L Ed 2d 195 (1989).

Plaintiffs assert that the trial court abused its discretion by failing to grant a default judgment on their RICO claims because their complaint alleged that defendants engaged in mail fraud and wire fraud, which are two predicate acts for purposes of RICO. We find no abuse of discretion. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 662; 513 NW2d 441 (1994). The elements of mail fraud are (1) a scheme to defraud, (2) the use of the U.S. Mail for the purpose of executing the scheme, and (3) specific intent to deceive or defraud. *Central Distributors of Beer, Inc v Conn*, 5 F3d 181, 184

(CA 6, 1993). The elements of wire fraud are (1) a scheme to defraud, (2) the use of an interstate electronic communication in furtherance of the scheme, and (3) specific intent to deceive or defraud. *Id.* The plaintiff must allege that the defendant made false statements or material misrepresentations of fact to the plaintiff to support a finding of wire fraud or mail fraud as a predicate act for a RICO claim, and the plaintiff must plead with particularity the false statements and the facts showing that the plaintiff relied on those statements to his detriment. *Id.*

Plaintiffs' scant RICO allegations fail to specifically and particularly allege the existence of mail or wire fraud as a predicate act. They fail to meet the statutory definition as to the timing of the acts forming the pattern. They fail to allege the requisite continuity of or relatedness between the predicate acts. The complaint reads as if plaintiffs are claiming breach of contract or fraud, not a pattern or racketeering activity. *Arzuaga-Collazo v Oriental Federal Savings Bank*, 913 F2d 5, 6 (CA 1, 1990). Plaintiffs' allegations are merely conclusory statements consisting of unexplained and unrelated events. *Id.; Craighead v E.F. Hutton & Co, Inc*, 899 F2d 485, 489 (CA 6, 1990). We therefore find that plaintiffs failed to plead with particularity that defendants committed two specific predicate acts occurring within the course of ten years that were related and posed a continuing threat of criminal activity. *Central Distributors of Beer, Inc, supra.* Thus, a default judgment regarding those claims was not warranted.

With respect to the court's second point, it is widely accepted that a plaintiff can only recover damages from an injury resulting from the predicate acts themselves. *Id.; Arzuaga-Collazo, supra.* Assuming, arguendo, that plaintiffs sufficiently pleaded their civil RICO claims, plaintiffs, as Van Dyke's assignees, stand in Van Dyke's shoes and can pursue any relief to which Van Dyke is entitled as against defendants. See *St Paul Fire & Marine Ins Co v Michigan Nat'l Bank of Detroit*, 660 F2d 196, 197 (CA 6, 1981); see also *Joos v Drillock*, 127 Mich App 99, 102-103; 338 NW2d 736 (1983). Having standing as Van Dyke's assignees alone does not insure that plaintiffs would recover three times the $225,000.00 default judgment, because plaintiffs still must prove and allege the amount of damages they suffered as a result of the predicate acts. *Central Distributors of Beer, Inc, supra* at 184. In light of the insufficient allegations of predicate acts in plaintiffs' complaint, we find nothing in plaintiffs' RICO claims supporting the conclusion that the $225,000.00 in damages plaintiffs seek to treble result from the purported predicate acts, i.e., mail or wire fraud.

In conclusion, because plaintiff failed to sufficiently plead their RICO claims, the trial court did not abuse its discretion by refusing to enter a default judgment for treble damages against defendants Peter Flamer and The Flamer Group. *Coleman-Nichols, supra.*

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka

[1] Plaintiffs brought a claim against Scottish Guaranty Insurance Company alleging breach of contract for failing to pay the judgment and against Firestone Agency alleging professional negligence for advising Van Dyke to enter into a contract with Scottish. Eventually, the trial court entered a default judgment against Scottish in the amount of $225,000, plus costs, interest and attorney fees. Firestone was dismissed with prejudice.

[2] 18 USC 1962(c) reads as follows:

> It shall be 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.