

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7016

September Term, 2017

FILED ON: JUNE 8, 2018

JOHN C. CHEEKS, ET AL.,
APPELLANTS

v.

FORT MYER CONSTRUCTION CORPORATION, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00914)

Before: GARLAND, *Chief Judge*, and GRIFFITH and SRINIVASAN, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED and ADJUDGED that the district court’s dismissal of the case with prejudice be affirmed.

This case concerns claims of a bid-rigging conspiracy involving numerous defendants that allegedly engaged in violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and antitrust statutes. The plaintiffs-appellants are Cheeks of North America, Inc., a D.C. contractor; John C. Cheeks, that company’s principal owner; and Juanita Q. Gallardo, a former employee of a member of the alleged RICO enterprise (collectively “Appellants”). After two years of proceedings, the district court denied Appellants’ motion for leave to file a fourth amended complaint and dismissed the case with prejudice. *Cheeks v. Fort Myer Constr. Corp.*, 216 F. Supp. 3d 146, 170-71 (D.D.C. 2016). The court subsequently denied Appellants’ motion to alter or amend that judgment.

Appellants principally challenge the district court's conclusion that granting leave to file their fourth amended complaint would be futile. *Id.* at 153-65. The court reviews this decision *de novo*, as it would a dismissal on a Rule 12(b)(6) motion. *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010).

We agree with the district court that granting leave to file that complaint would be futile because Appellants' claims are unable to survive a motion to dismiss.

First, Appellants have not sufficiently stated a civil RICO claim. To do so, a plaintiff must show that a RICO predicate offense was the proximate cause of injury to his or her business or property. *See Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 6, 9 (2010); 18 U.S.C. § 1964(c) (2012). None of the four types of predicate acts alleged in the complaint meets this standard. Appellants' generalized allegations of violent criminal acts directed toward Cheeks, wrongdoing in connection with the incarceration of Gallardo, and other criminal acts do not cross the threshold of plausibility. *Cheeks*, 216 F. Supp. 3d at 155-56, 158-59; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This leaves Appellants' allegations of fraud. Even if the complaint sufficiently alleges the predicate act of fraud, it does not adequately allege that fraud was the proximate cause of any injury. *Cheeks*, 216 F. Supp. 3d at 159-61. Appellants' opening brief fails to make any argument regarding proximate cause. And Appellants' reply brief supports the district court's conclusion that Cheeks of North America's own failure to comply with D.C. bid security requirements caused its bids to be denied. *See id.* at 161; Appellants' Reply Br. at 5, 13. Indeed, Appellants also failed to address, and thereby forfeited, the proximate cause issue with regard to the other alleged predicate acts.

Second, Appellants have forfeited any challenge to the district court's decisions that the complaint fails to state RICO conspiracy or antitrust violations by failing to raise this challenge in their opening brief. *See Payne v. District of Columbia Gov't*, 722 F.3d 345, 354 (D.C. Cir. 2013). Such a challenge would be without merit in any event. *See Cheeks*, 216 F. Supp. 3d at 163-65.

We turn next to the claims against the insurance defendants. The court dismissed defendant CNA Surety, left other insurers dismissed for failure to state a claim, and refused to add CNA Financial to the action. *Id.* at 165-69. Appellants forfeited any challenge to the district court's decision regarding CNA Surety by failing to include this challenge in their opening brief. With respect to the remaining insurers, the complaint alleges the insurers knew or should have known their provision of "bid bonds" to the construction company defendants aided and abetted illegal activities. *See Fourth Am. Compl.* ¶¶ 11, 135-48. As the district court explained, this is insufficient to state a claim. *See Cheeks*, 216 F. Supp. 3d at 166-69 (citing *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1051 (D.C. Cir. 2012)).

Finally, any challenge to the court's October 17, 2014 order regarding the first amended complaint is forfeited. *See Cheeks v. Fort Myer Constr. Corp.*, 71 F. Supp. 3d 163 (D.D.C. 2014). And Appellants affirmatively disclaim reliance on the first amended complaint in their reply brief. *See* Appellants' Reply Br. at 18 n.4 (referring to the first amended complaint as "obsolete[']"). To the extent Appellants have preserved additional arguments regarding the district court's orders of October 17, 2014, September 30, 2015, September 30, 2016, November 1, 2016, or December 19, 2016, we have considered those arguments and find them without merit. *See Cheeks v. Fort Myer Constr. Corp.*, No. 1:14-cv-00914 (D.D.C. Dec. 19, 2016); *Cheeks*, 216 F. Supp. 3d 146; *Cheeks v. Fort Myer Constr. Corp.*, No. 1:14-cv-00914 (D.D.C. Sept. 30, 2016); *Cheeks v. Fort Myer Constr. Corp.*, No. 1:14-cv-00914 (D.D.C. Sept. 30, 2015); *Cheeks*, 71 F. Supp. 3d 163.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk