

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT**

D’LIVRO BEAUCHAMP;)	
OBELISK HEALTHCARE, LLC)	
)	
Plaintiffs,)	
)	
vs.)	Case No.: 2:11-CV-1029-MHT
)	
MIKE WALLACE a/k/a NUMEN)	
BILAL; ADVANCED RECOVERY)	
SYSTEM; DE LAGE LANDEN)	
INTERNATIONAL, B. V. d/b/a)	
DE LAGE LANDEN; SPENSER)	
CAPITAL GROUP, INC. d/b/a)	
GROUP FINANCIAL SERVICES,)	
)	
Defendants.)	

**MOTION TO DISMISS FIFTH AMENDED COMPLAINT,
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Defendant Spenser Capital Group, Inc. d/b/a Group Financial Services (“GFS”) moves to dismiss the Fifth Amended Complaint (the “Complaint”) and all claims against GFS pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and states that the claims asserted against it are due to be dismissed on the following grounds:

1. Lack of personal jurisdiction;
2. Improper venue;
3. Insufficient process and/or insufficient service of process; and,
4. Failure to state a claim upon which relief can be granted.

In the alternative, GFS moves for a summary judgment on the grounds that there is no genuine issue of material fact and GFS is entitled to a judgment as a matter of law.

Motion to Dismiss

1. GFS adopts and incorporates by reference all defenses asserted in its previous Motion to Dismiss (Doc. 134), which was filed in response to Plaintiffs' Fourth Amended Complaint.¹

2. In addition, GFS avers that Plaintiffs' Fifth Amended Complaint fails to state a claim against GFS for the following reasons:

a. It fails to put GFS on adequate notice as to the claims being asserted against it, as it vaguely refers to the "defendant" without specifying which defendant is intended to be referenced. As courts have held, general pleading may be permitted, but "only if the underlying factual allegations of a complaint specify what each defendant is alleged to have done so that a legal claim against him or her can be understood." *Watts v. Florida International University*, 2005 WL 3730879 (S.D. Fla. 2005).

¹At the time of this filing, GFS's previous Motion to Dismiss remains under submission as to the defenses of venue and insufficient service of process, and it has been denied without prejudice as to all other asserted defenses. *See Order*, Doc. 196.

b. Count One, which alleges theft by the defendants, fails to state a claim against GFS because the Complaint as a whole demonstrates that the allegations of theft are directed to other defendants (Numen Bilal and Advanced Recovery System). The conduct made the basis of Count One is the alleged falsification of two electronic bank drafts which resulted in a payment of \$7500 from plaintiffs' bank account. *See Complaint*, Doc. 164-1, pp. 13-14, at ¶¶ 32-33. While these paragraphs vaguely refer to "defendants", other parts of the Complaint clearly identify Numen Bilal and Advanced Recovery System as the defendants who are alleged to have committed these acts.² *See Complaint*, Doc. 164-1, p. 18, at ¶ 36.F. ("That on or about April 27, 2011, Numen Bilal and Advanced Recovery System forged and falsified two bank drafts and stole \$7,500 from plaintiff's account[.]")

c. Count One also fails to state a claim because theft is not a civil cause of action. *See Burchfield v. Industrial Chemicals, Inc.*, 2012 WL5872808, at *4 (N.D.Ala.2012).

d. Count Two fails to state a claim for fraud against GFS because the

²As shown herein below, it is undisputed that GFS had assigned the leases to DLL years earlier and had no interest in the leases at the time of these alleged acts of theft. It is also undisputed that DLL (not GFS) hired Advanced Recovery System to undertake collection of the alleged indebtedness.

plaintiffs could not have reasonably relied upon any of the alleged oral representations made by or on behalf of GFS that were contradicted by the terms of the documents plaintiffs signed. *See Foremost Ins. Co. v. Parham*, 693 So.2d 409, 421 (Ala.1997)(reasonable reliance standard imposes on plaintiff a general duty to read the documents received in connection with a particular transaction and to inquire and investigate).

e. Count Three fails to state a claim upon which relief can be granted because it is vague and unclear as to what employees or agents of GFS were negligently hired, trained or supervised.

f. Count Four fails to state a claim under the federal RICO statute. Plaintiffs' allegations do not demonstrate that GFS engaged in ongoing criminal conduct that would constitute a "pattern of racketeering activity." *See Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1264 (11th Cir. 2004)(discussing requirements for establishing a pattern of racketeering activity).

g. Finally, the Complaint fails to state a claim upon which relief can be granted because any of the alleged claims against GFS would be barred by the applicable statutes of limitations. Plaintiffs' dealings with GFS occurred in 2004 and early 2005, and plaintiffs did not file suit until December 2011.

MOTION FOR SUMMARY JUDGMENT

In support of its Motion for Summary Judgment, GFS relies upon:

1. The pleadings and other materials of record;
2. The following factual summary and memorandum of law;
3. Exhibit A - The previously filed Declaration of Richard Einhorn (Doc. 134-1, "Einhorn Declaration");
4. Exhibit B - The previously filed Affidavit of Raymond Ridge (Doc. 129-1, "Ridge Affidavit");
5. Exhibit C - The previously filed Affidavit of Charles McAllister (Doc. 168-1, "McAllister Affidavit");³
6. Exhibit D - The previously filed Declaration of D'Livro Beauchamp (Doc. 159-1, "Beauchamp Declaration");
7. Exhibit E - GFS's sworn Answers to Plaintiffs' Interrogatories;
8. Exhibit F - Notices of Termination of Leases previously filed by the plaintiffs (Doc. 151-7);
9. Exhibit G - Master Contract Financing Program Agreement previously filed by plaintiffs (Doc. 178-1, "Master Contract").

³The attached copy of the McAllister Affidavit does not include the exhibits that were originally filed with the Affidavit, which were over 100 pages.

Factual and Procedural Background

1. Plaintiffs commenced this action by the filing of their original Complaint on December 5, 2011. (Doc. #1.)
2. Plaintiffs' original Complaint named GFS as a defendant and stated (incorrectly) that GFS is an Indiana corporation. (Doc. #1, at ¶6.)
3. The original Summons and Complaint were not directed to any individual and were not served upon any officer of GFS or any agent authorized to accept or receive service of process. (Doc. #5; *see also* Declaration of Richard Einhorn ("Einhorn Declaration"), attached hereto as "Exhibit A", at ¶15.)
4. GFS did not appear or file any response to Plaintiff's original Complaint. (See Docket Report.)
5. On September 21, 2012, Plaintiffs filed their Fourth Amended Complaint. (Doc. #62.)
6. GFS was served with a summons and a copy of Plaintiffs' Fourth Amended Complaint on January 25, 2013. (Doc. #123.)
7. GFS provides leasing/financing agreements to health care professionals and related businesses. (Einhorn Declaration, ¶10.)
8. GFS is incorporated in the State of South Carolina and has its principal offices in the State of South Carolina. (Einhorn Declaration, ¶2.)

9. GFS has no offices or employees in the State of Alabama. (Einhorn Declaration, ¶¶ 4-5.)

10. GFS does not perform any maintenance or installation or any other services in the State of Alabama. (Einhorn Declaration, ¶7.)

11. GFS never sent any employee into Alabama to meet with the plaintiffs. (Einhorn Declaration, ¶11.)

12. GFS's only direct communication with the Plaintiffs was by telephone or written correspondence (which may have included mail, fax, and/or email) at or around the time the leases were originated. (Einhorn Declaration, ¶¶12-13.)

13. GFS was the original lessor on the subject lease(s), but GFS immediately assigned the leases to De Lage Landen Financial Services, Inc. ("DLL") pursuant to the Master Contract between GFS and DLL. (Einhorn Declaration, ¶13; Ridge Affidavit, ¶3; McAllister Affidavit, ¶6; Master Contract, attached hereto as Exhibit G.)

14. DLL purchased and received assignment of all three of the leases referenced in the Complaint. (McAllister Affidavit, ¶6.)

15. The subject leases provided by GFS were used to finance equipment and services that were provided to plaintiffs by Turenne PharMedCo. (See copies of invoices from Turenne PharMedCo., attached to Ridge Affidavit.)

16. Plaintiffs acknowledge that Dr. Beauchamp signed two of the three leases for Obelisk Healthcare. (*Complaint*, Doc. 164-1, ¶¶11, 14.)

17. Each of the leases was accompanied by a written “End of Term Option Rider - Fixed Price Purchase Option” which was also signed by Obelisk Healthcare. (*See* copies attached to Ridge Affidavit.)

18. Plaintiffs do not allege that they were unable to read these documents before signing them, but they allege they relied upon certain oral representations made by Numen Bilal and/or Heath Wilson. (*See Complaint*, pp. 4-6, ¶¶11-15.)

19. Heath Wilson was a salesperson for Turenne PharMedCo., and was not an employee of GFS. (*See* GFS’s Answers to Plaintiffs’ Interrogatories, p. 9, at #2.)

20. Numen Bilal was an employee of Advanced Recovery System. (McAllister Affidavit, ¶13.)

21. While plaintiffs’ Complaint alleges that GFS participated in falsifying and forging Dr. Beauchamp’s name to Lease No. 24593682 (the alleged “dummy lease”), plaintiffs made payments on that lease to DLL from November 8, 2004 to at least March 15, 2010. (*See Complaint*, Doc. 164-1, pp. 18-19, ¶36.G.; *see also* McAllister Affidavit, ¶23.)

22. At no time during that period did plaintiffs dispute the validity of Lease No. 24593682. (McAllister Affidavit, ¶23.)

23. According to documents produced by plaintiffs and previously filed with the Court, plaintiff Obelisk Healthcare sent a letter to DLL dated April 8, 2009, stating that Obelisk Healthcare did not wish to renew Lease No. 24593682 and wished to take the buyout option.⁴ (Doc. 151-7, copy attached hereto as Exhibit F.)

24. DLL entered into a Collection Agency Agreement with Advanced Recovery System in March of 2009, and GFS was not a party to such agreement. (McAllister Affidavit, ¶¶19-20.)

25. Having sold and assigned the leases to DLL at the outset, GFS had no involvement whatsoever in any of the alleged debt collection activities that are made the basis of this lawsuit, which activities were not commenced until years after GFS had assigned the leases to DLL. (*See* Einhorn Declaration, ¶13; McAllister Affidavit, ¶¶9-10, 19-20; *see also* Master Contract attached hereto as Exhibit G.)

LEGAL ARGUMENT

I. GFS is entitled to a summary judgment as to Count I, which alleges Theft.

The allegations of theft are based on alleged debt collection activities, which plaintiffs allege occurred in 2011. (*See Complaint*, Doc. #164-1, ¶¶23-27, 31-36; *see also* Beauchamp Declaration, Doc. #159-1, copy attached hereto as Exhibit D.) These

⁴If the lease was fabricated, why did Obelisk Healthcare pay on it for so many years and seek to exercise the buyout option in 2009?

allegations do not appear to be directed toward GFS. According to both the Complaint and Dr. Beauchamp's Declaration, Numen Bilal and Advanced Recovery Systems committed the alleged theft, not GFS.

Numen Bilal and Advanced Recovery Systems were not agents of GFS, but were contracted by DLL. (McAllister Affidavit, ¶¶19-20.)

GFS assigned the leases to DLL immediately after they were originated in late 2004 and early 2005, and GFS had no further interest or involvement in the leases after that time. (Einhorn Declaration, ¶13; Ridge Affidavit, ¶3; McAllister Affidavit, ¶6.) Simply put, GFS was not involved in any of the debt collection activities that are made the basis of Count I. The acts complained of occurred years after GFS had assigned the leases to DLL. Therefore, GFS is entitled to a summary judgment as to Count I.

Also, theft is not a civil cause of action. *See Burchfield v. Industrial Chemicals, Inc.*, 2012 WL5872808, at *4 (N.D.Ala.2012). Therefore, even if Plaintiffs intended to direct allegations of theft at GFS, summary judgment would be proper as to this Count.

II. Count II fails to state a claim for fraud against GFS.

GFS's only communication with the plaintiffs was at the time the leases were originated. (Einhorn Declaration, ¶13.) While plaintiffs' allege they replied upon

oral representations made by alleged agents of GFS when they entered into the leases, they could not, as a matter of law, recover for fraud based on alleged representations that are contradicted by the documents they received in connection with the transaction. *See Foremost Ins. Co. v. Parham*, 693 So.2d 409, 421 (Ala.1997)(reasonable reliance standard imposes on plaintiff a general duty to read the documents received in connection with a particular transaction and to inquire and investigate).

The plaintiffs' allegations that defendants falsely created a dummy lease numbered 24593682 are refuted by the plaintiffs' own admission that Obelisk Healthcare paid on the lease for several years, then notified DLL that it did not wish to renew the lease and wished to exercise the buyout option. (*See Complaint*, pp. 18-19, ¶¶36.G; *see also* copy of lease termination, attached hereto as Exhibit F.)

III. Count III fails to state a claim against GFS for negligent or wanton hiring, training and/or supervision.

GFS adopts and incorporates by reference the arguments set forth in Advanced Recovery Systems' Brief in Support of Motion for Summary Judgment. (Doc. 74, pp. 10-13.) Moreover, the Complaint fails to identify any employee of GFS that Plaintiffs contend did anything wrong or caused Plaintiffs any damage. Neither Heath Wilson, nor Numen Bilal are employees of GFS. (GFS's Answers to Plaintiffs'

Interrogatories, p. 9, at #2; McAllister Affidavit, ¶13.) Heath Wilson was a salesperson for the equipment vendor, Turenne PharMedco. (GFS's Answers to Plaintiffs' Interrogatories, p. 9, at #2.) Numen Bilal was an employee of Advanced Recovery Systems. (McAllister Affidavit, ¶13.)

A. Count IV fails to state a claim arising under the RICO statute.

GFS adopts and incorporates by reference the arguments set forth in ARS' Brief in Support of Motion for Summary Judgment and in the Motion to Dismiss by DLL Financial Services. (Doc. 74, pp. 14-16; Doc. #129, pp. 15-21.) Plaintiffs' allegations do not demonstrate that GFS engaged in ongoing criminal conduct that would constitute a "pattern of racketeering activity." *See Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1264 (11th Cir. 2004)(discussing requirements for establishing a pattern of racketeering activity). Even if an employee of GFS had committed forgery, this single act would not support a RICO claim against GFS. *Id.* GFS was not involved in the debt collection activity that Plaintiffs allege constituted theft, so there are no other criminal acts to meet the requirements for imposing liability under RICO.

IV. Plaintiffs' claims are barred by the applicable statutes of limitations.

As repeated many times herein, GFS was only involved at the outset of the subject leases, which, according to the Complaint, was in 2004, approximately seven

years before the commencement of this action. Hence, Plaintiffs' claims against GFS are barred by the applicable statutes of limitations.

Fraud and negligence actions are subject to a two year statute of limitations in Alabama. *Ala. Code* § 6-2-38. Civil RICO claims are subject to a four year statute of limitations. *Agency Holding Corp. v Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). Any claim Plaintiffs may have had against GFS would have accrued more than four years prior to the filing of this lawsuit. Therefore, Plaintiffs' claims against GFS are barred by the applicable statutes of limitations.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, GFS respectfully requests that all claims be dismissed for failure to state a claim upon which relief may be granted. In the alternative, GFS moves for entry of a summary judgment as there is no genuine issue of material fact and GFS is entitled to a judgment as a matter of law.

/s/Brenton K. Morris
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon the below-listed persons/entities via ECF on this 25th day of October, 2013.

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