UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

United States v. Ianniello

646 F. Supp. 1289 (S.D.N.Y. 1986) · No. 86 Civ. 1552-CSH · Decided September 30, 1986

SUMMARY

The court denied defendants' Rule 12(b)(6) motion to dismiss the Government's civil RICO complaint, holding that challenges to the scope of requested relief were premature and that a related criminal acquittal did not collaterally estop the civil action. The court also granted the Government's renewed application for appointment of a receiver pendente lite for Umberto's Clam House based on evidence of continued skimming and permissible adverse inferences from defendants' invocation of the Fifth Amendment. The court rejected defendants' argument that the Twenty-first Amendment barred the requested federal relief.

CASE DETAILS

COURT	United States District Court for the Southern District of New York
WRITING FOR THE COURT	Charles L. Haight, Jr.
JURISDICTION	New York
DECIDED	September 30, 1986
DOCKET	86 Civ. 1552-CSH
DISPOSITION	other
PROCEDURAL POSTURE	Defendants moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss an amended civil RICO complaint. The Government also renewed its application for appointment of a receiver pendente lite for Osbro Restaurant, Inc., doing business as Umberto's Clam House.
STANDARD OF REVIEW	On a Rule 12(b)(6) motion, dismissal is improper so long as the plaintiff may conceivably have some remedy for the claim asserted. For preliminary equitable relief under RICO, the court considered whether the Government showed a likelihood of success on the merits and whether the requested relief was authorized by 18 U.S.C. § 1964.
PRECEDENTIAL VALUE	published district court opinion
PARTIES	Matthew Ianniello, Benjamin Cohen, Paul Gelb, Alfred Ianniello, Osbro Restaurant, Inc., Robert Ianniello, P & G Funding Corp.,

Pauline Gelb, John Zaffarano, John Doe, John Doe, Inc. v. United States of America

TOPICS

motions to dismiss | injunctions | remedies | evidence | civil procedure

PRACTICE AREAS

civil RICO | civil procedure | equitable remedies | constitutional law | evidence

QUESTIONS PRESENTED

1. Whether the amended civil RICO complaint should be dismissed under Rule 12(b)(6) because some forms of relief requested by the Government might be unavailable.
2. Whether Robert Ianniello's acquittal in the related criminal case collaterally estopped the Government from litigating his participation in the alleged RICO conduct.
3. Whether defendants' invocation of the Fifth Amendment in civil discovery could support an adverse factual inference.
4. Whether the Twenty-first Amendment barred the Government's civil RICO action or the requested equitable relief.
5. Whether the expanded record justified appointment of a receiver pendente lite under 18 U.S.C. § 1964.

HOLDINGS

1. A civil RICO complaint should not be dismissed under Rule 12(b)(6) merely because some requested forms of relief may be unavailable; the scope of appropriate relief may be determined after the Government prevails on the merits.
2. The acquittal did not, at the pleading stage and on the record presented, collaterally estop the Government from pursuing the civil RICO action against Robert Ianniello.
3. In a civil RICO proceeding, a factfinder may draw a probative adverse inference from an individual or corporate defendant's invocation of the Fifth Amendment, provided the inference is considered as one factor among the facts and is not used as the sole automatic basis for a civil sanction.
4. The Twenty-first Amendment did not bar the federal civil RICO action or the requested equitable relief.
5. The Government established sufficient grounds for appointment of a receiver pendente lite for Osbro Restaurant, Inc., doing business as Umberto's Clam House.

KEY QUOTATIONS

> *“As long as the plaintiff "might conceivably have some remedy" for the claim asserted, a Rule 12(b)(6) challenge must fail.”* (646 F. Supp. at 1290)

> *“That premise does not arise where the Government has at its disposal potentially result-altering facts admissible in the civil case that were inadmissible in the prior criminal proceeding.”* (646 F. Supp. at 1291)

> *"I conclude that the case at bar is civil in nature, and that a probative adverse inference may properly be drawn from the corporate and individual defendants' invocation of the Fifth Amendment."* (646 F. Supp. at 1298)

> *"The Government's motion for the appointment of a receiver pendente lite of Osbro Restaurant, Inc., doing business as Umberto's Clam House, is granted."* (646 F. Supp. at 1300)

FACTUAL BACKGROUND

The Government alleged that defendants used Osbro Restaurant, doing business as Umberto's Clam House, in a RICO scheme involving the skimming and diversion of restaurant receipts. In the related criminal case, Matthew and Alfred Ianniello were convicted of the skimming allegations, while Robert Ianniello was acquitted. The Government presented expert evidence estimating that Umberto's annual gross receipts were approximately $1.3 million, substantially higher than the receipts reported in defendants' records, and defendants invoked the Fifth Amendment to refuse discovery concerning the restaurant's operations.

PROCEDURAL HISTORY

The civil RICO action followed a related criminal prosecution in which Matthew and Alfred Ianniello were convicted of participating in a scheme involving skimming receipts from Umberto's, while Robert Ianniello was acquitted. The court previously denied appointment of a receiver because the factual showing was insufficient, but permitted the Government to supplement the record with expert evidence. After considering the expanded evidentiary record and defendants' Fifth Amendment refusals during discovery, the court denied the Rule 12(b)(6) motion and granted the Government's renewed receiver application.

DISPOSITION

other

CASES CITED

- Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978)
- Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971)
- United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970)
- Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)
- Sprecher v. Graber, 716 F.2d 968 (2d Cir. 1983)
- United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)
- Standefer v. United States, 447 U.S. 10 (1980)
- Baxter v. Palmigiano, 425 U.S. 308 (1976)
- Jones v. United States, 466 F.2d 131 (10th Cir. 1972)
- McCarthy v. Arndstein, 266 U.S. 34 (1924)
- Brink's Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983)
- Lefkowitz v. Cunningham, 431 U.S. 801 (1977)

- SEC v. Musella, 578 F. Supp. 425 (S.D.N.Y. 1984)
- Bilokumsky v. Tod, 263 U.S. 149 (1923)
- In re Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied, 434 U.S. 829 (1977)
- In re Gault, 387 U.S. 1 (1967)
- United States v. United States Coin & Currency, 401 U.S. 715 (1971)
- Boyd v. United States, 116 U.S. 616 (1886)
- United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961)
- In re Debs, 158 U.S. 564 (1895)
- United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974)
- United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945)
- Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)
- California Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)
- Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)
- California Bankers Assn. v. Schultz, 416 U.S. 21 (1974)
- United States v. Ianniello, 621 F. Supp. 1455 (S.D.N.Y. 1985)
- United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 780 F.2d 267 (3d Cir. 1985)
- Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)