

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Kim v. Kimm

884 F.3d 98 (2d Cir. 2018) · Decided February 27, 2018

SUMMARY

The Second Circuit affirmed dismissal of Daniel Kim's civil RICO action arising from an earlier trademark-infringement lawsuit. The court held that allegedly fraudulent litigation activities, without more, could not constitute RICO predicate acts, and it upheld the denial of leave to amend and the motion to disqualify counsel. The court also affirmed the denial of the defendants' motion for sanctions because Kim's claims were not foreclosed by binding precedent when filed.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Sack, Circuit Judge; Jacobs, Circuit Judge; Parker, Circuit Judge
JURISDICTION	Federal
DECIDED	February 27, 2018
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed the dismissal of his amended RICO complaint and the denial of his motions for leave to amend and to disqualify opposing counsel. Defendants cross-appealed the denial of their motion for sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927.
STANDARD OF REVIEW	Dismissal under Rule 12(b)(6) was reviewed de novo. Denials of leave to amend, disqualification of counsel, and sanctions were reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published and precedential; binding precedent in the Second Circuit
PARTIES	Daniel Kim v. Michael S. Kimm and other defendants

TOPICS

[motions to dismiss](#) [civil procedure](#) [appellate procedure](#) [commercial litigation](#) [trademark law](#)

PRACTICE AREAS

[civil procedure](#) [appellate procedure](#) [RICO](#) [commercial litigation](#) [trademark litigation](#) [sanctions](#)

QUESTIONS PRESENTED

1. Whether allegations that defendants engaged in fraudulent, frivolous, or baseless litigation activity in a single prior lawsuit can constitute RICO predicate acts sufficient to state a civil RICO claim.
2. Whether the district court abused its discretion by denying Kim leave to file a second amended complaint when the proposed amendments added only further litigation-related predicate acts.
3. Whether the district court abused its discretion by treating Kim's motion to disqualify opposing counsel as moot after dismissing the complaint with prejudice.
4. Whether the district court abused its discretion by denying defendants' motion for sanctions under Rule 11 and 28 U.S.C. § 1927.

HOLDINGS

1. Where a plaintiff alleges that a defendant engaged in a single frivolous, fraudulent, or baseless lawsuit, litigation activity alone cannot constitute a viable RICO predicate act.
2. The district court did not abuse its discretion in denying leave to amend because the proposed amendments added only litigation-related predicate acts and therefore would have been futile.
3. The district court did not abuse its discretion in denying the disqualification motion as moot after dismissing Kim's complaint with prejudice.
4. The district court did not abuse its discretion in denying sanctions because Kim's claims, although unsuccessful, were not so clearly foreclosed by binding precedent as to be legally indefensible, and the defendants did not adequately support their preclusion argument.

KEY QUOTATIONS

“We conclude only that where, as here, a plaintiff alleges that a defendant engaged in a single frivolous, fraudulent, or baseless lawsuit, such litigation activity alone cannot constitute a viable RICO predicate act.”
(884 F.3d at 105)

“We therefore conclude that the district court did not abuse its discretion in denying the defendants' motion for sanctions.” (884 F.3d at 107)

FACTUAL BACKGROUND

Kim had been sued in an earlier action, *Sik Gaek, Inc. v. Yogi's II, Inc.*, concerning alleged trademark-license and trademark-infringement violations. After obtaining summary judgment in that action, Kim filed this RICO suit alleging that the opposing parties had created fraudulent documents and used a baseless lawsuit to extort \$2 million from him. The alleged predicate acts principally consisted of preparing, signing, and filing declarations and other documents in the prior litigation, with some alleged pre-litigation conduct.

PROCEDURAL HISTORY

Kim sued parties involved in an earlier trademark-infringement and contract action, alleging that their litigation activities constituted RICO predicate acts. The Eastern District of New York dismissed the amended complaint

under Rule 12(b)(6), denied leave to amend, denied Kim's motion to disqualify Michael Kimm as counsel, and later denied defendants' sanctions motion. The Second Circuit affirmed all challenged rulings.

DISPOSITION

affirmed

CASES CITED

- Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)
- Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
- Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)
- Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 (2d Cir. 2013)
- DeFalco v. Bernas, 244 F.3d 286, 305-06 (2d Cir. 2001)
- Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985)
- Snow Ingredients, Inc. v. SnoWizard, Inc., 833 F.3d 512, 525 (5th Cir. 2016)
- Raney v. Allstate Insurance Co., 370 F.3d 1086, 1087-88 (11th Cir. 2004)
- Deck v. Engineered Laminates, 349 F.3d 1253, 1258 (10th Cir. 2003)
- Gabovitch v. Shear, 70 F.3d 1252 (1st Cir. 1995) (table)
- Curtis & Associates, P.C. v. Law Offices of David M. Bushman, Esq., 758 F. Supp. 2d 153, 171-73 (E.D.N.Y. 2010)
- Engel v. CBS, Inc., 182 F.3d 124, 129 (2d Cir. 1999)
- Sykes v. Mel Harris & Associates LLC, 780 F.3d 70, 79-80 (2d Cir. 2015)
- Sykes v. Mel Harris & Associates, LLC, 757 F. Supp. 2d 413, 418-20, 425 (S.D.N.Y. 2010)
- ATSI Communications, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 108 (2d Cir. 2007)
- McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007)
- Ellis v. Chao, 336 F.3d 114, 127 (2d Cir. 2003)
- Bobal v. Rensselaer Polytechnic Institute, 916 F.2d 759, 764 (2d Cir. 1990)
- Ramey v. District 141, International Association of Machinists & Aerospace Workers, 378 F.3d 269, 282 (2d Cir. 2004)
- Eisemann v. Greene, 204 F.3d 393, 396 (2d Cir. 2000)
- Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 336 (2d Cir. 1999)
- Perez v. Posse Comitatus, 373 F.3d 321, 325-26 (2d Cir. 2004)
- Fishoff v. Coty Inc., 634 F.3d 647, 655 (2d Cir. 2011)
- Lederman v. New York City Department of Parks & Recreation, 731 F.3d 199, 203 n.1 (2d Cir. 2013)
- Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998)
- Sassower v. Field, 973 F.2d 75, 80 (2d Cir. 1992)