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Massachusetts District Court  
Case No. 1:11-cv-12000-RBC  
**Greenspan v. Random House, Inc. et al**

Document 49



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# United States District Court District of Massachusetts

AARON GREENSPAN,  
Plaintiff,

v.

CIVIL ACTION NO. 11-12000-RBC<sup>1</sup>

RANDOM HOUSE, INC.,  
MEZCO, INC.,  
BENJAMIN MEZRICH,  
COLUMBIA PICTURES INDUSTRIES, INC.  
a/k/a SONY PICTURES  
a/k/a COLUMBIA TRISTAR MOTION  
PICTURE GROUP,  
Defendants.

## ***MEMORANDUM AND ORDER ON MOTION FOR LEAVE TO FILE FIRST AMDENDED [sic] COMPLAINT (#41)***

COLLINGS, U.S.M.J.

While motions to dismiss were under advisement, plaintiff Aaron Greenspan (“Greenspan”) filed a motion for leave to file an amended complaint.

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With the parties’ consent, this case was reassigned to the undersigned for all purposes, including trial and the entry of judgment, pursuant to 28 U.S.C. § 636(c).

(#41) The defendants all oppose the plaintiff's motion. (## 42, 44) The First Circuit has repeatedly stated that:

Rule 15(a) of the Federal Rules of Civil Procedure provides in part that leave to amend pleadings 'shall be freely given when justice so requires.' The leave sought should be granted unless the amendment would be futile or reward undue delay. *Adorno v. Crowley Towing & Transp. Co.*, 443 F.3d 122, 126 (1st Cir.2006). '[I]f the proposed amendment would be futile because, as thus amended, the complaint still fails to state a claim, the district court acts within its discretion in denying the motion to amend.' *Boston & Me. Corp. v. Hampton*, 987 F.2d 855, 868 (1st Cir.1993); *see also Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir.1996)(finding that "[f]utility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted").

*Abraham v. Woods Hole Oceanographic Institute*, 553 F.3d 114, 117 (1 Cir., 2009).

Bearing in mind that "pro se pleadings are to be liberally construed," *Donovan v. Maine*, 276 F.3d 87, 94 (1 Cir., 2002), a review of Greenspan's proposed amended complaint and all of the relevant pleadings reveals that the motion for leave to file an amended complaint must be denied because the amendment would be futile.

Familiarity with the Memorandum and Order on Motion Of Random House, Inc., Mezco, Inc., And Benjamin Mezrich To Dismiss With Prejudice

(#17) and Defendant Columbia Pictures Industries, Inc.'s Motion To Dismiss Complaint (#22) entered this date is presumed, and the Memorandum and Order is incorporated herein by reference.

Nothing added in the proposed amended complaint alters the analysis in the Memorandum and Order with respect to the copyright claims<sup>2</sup>, the Lanham Act claim<sup>3</sup> or the defamation claim<sup>4</sup>.

Turning now to the claims added in the proposed amended complaint, Count V is a claim for violation of RICO, 18 U.S.C. § 1962(c), against all of the defendants. As detailed by the First Circuit:

To state a RICO claim, plaintiffs must allege four elements: '(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.' *Kenda Corp. v.*

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The new allegation that "[r]eviews of the *Accidental Billionaires*, such as a review in *The New York Times* by Jane Maslin...frequently highlighted the almost unending problems with the author's writing style, sloppy editing, and propensity to exaggerate and invent material" (#41, Exh. 1 ¶ 48) adds nothing to the substantial similarity analysis.

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In the proposed complaint the plaintiff alleges that "[c]onsumers are likely to be misled and deceived by advertorial [*sic*], falsified and/or paid 'five-star' reviews of *The Accidental Billionaires* in flagrant violation of FTC advertising guidelines. Such reviews were written and published only because Defendants were compensating or otherwise closely affiliated with the reviewers." (#41, Exh. 1 ¶ 137) Greenspan has alleged no facts to show that these reviews were factually inaccurate; his complaint seems to be that the authors of the reviews did not reveal their purported connections to the defendants. (#41, Exh. 1 ¶¶ 107-112) This is not a Lanham Act violation.

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For example, the new allegation that "[t]o the extent that Defendant Mezrich's actions and insistence on being referred to as a non-fiction author defame all non-fiction authors, his actions defame Plaintiff, who is a non-fiction author by virtue of his authorship of *Authoritas*" does nothing to remedy the defects in the defamation claim. (#41, Exh. 1 ¶ 106)

*Pot O'Gold Money Leagues, Inc.*, 329 F.3d 216, 233 (1st Cir. 2003) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)). 'Racketeering activity' means any act that violates one of the federal laws specified in the RICO statute, *see* 18 U.S.C. § 1961(1), including the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. At least two acts of racketeering activity must occur within ten years of each other to constitute a 'pattern.' *Id.* § 1961(5). The Supreme Court has construed the pattern element as additionally requiring a showing that 'the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.' *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). This is the so-called 'continuity plus relationship' standard. *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 15 (1st Cir. 2000).

*Giuliano v. Fulton*, 399 F.3d 381, 386-87 (1 Cir., 2005).

The plaintiff has not alleged any misconduct<sup>5</sup> in the proposed amended complaint (*see* #41, Exh. 1 ¶ 153 (a)-(f)) that would be indictable under federal law for violation of the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 respectively. Moreover, in large measure the allegations are legal conclusions that need not be credited. *Soto-Torres v. Fraticelli*, 654 F.3d 153, 157 n. 2 (1 Cir.,

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The acts alleged are "misconduct" based on Greenspan's view that his copyright was infringed and that the defendants' works should be designated as fiction. To the extent that the RICO claim is merely a rehash of the copyright claims, it is not actionable. *See Smith v. Jackson*, 84 F.3d 1213, 1217 (9 Cir., 1996) ("Because appellants' RICO counts do no more than allege copyright infringement under the label of mail and wire fraud, and copyright infringement is not a predicate act under RICO, the district court properly concluded that appellants failed to state a claim.").

2011). Further, Greenspan has failed to plead fraud with the requisite particularity as required: “[U]nder 9(b), [Fed. R. Civ. P.] a pleader must state the time, place and content of the alleged mail and wire communications perpetrating that fraud... [and the plaintiff’s] complaint supplies no times, places, or contents.” *Ahmed v. Rosenblatt*, 118 F.3d 886, 889 (1 Cir., 1997), *cert. denied*, 522 U.S. 1148 (1998). Having failed adequately to allege the requisite predicate acts, the plaintiff’s RICO claim must fail.

Count VII is a claim for unjust enrichment against all of the defendants. By definition, unjust enrichment is the “retention of money or property of another against the fundamental principles of justice or equity and good conscience.” *Santagate v. Tower*, 64 Mass. App. Ct. 324, 329, 833 N.E.2d 171, 176 (Mass. App. Ct., 2005)(internal citations and quotations marks omitted). In order to state a claim for unjust enrichment under Massachusetts law, it is incumbent upon Greenspan to allege “that (1) [the defendants] knowingly received a benefit (2) at his expense (3) under circumstances that would make retention of that benefit unjust.” *Frappier v. Countrywide Home Loans, Inc.*, 645 F.3d 51, 58 (1 Cir., 2011)(citing *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 57 (1 Cir., 2009)). The “[p]laintiff must

show that he bestowed a benefit on defendant, that defendant's retention of that benefit is unjust and that equity requires that this court shift the benefit back to plaintiff." *Fernandes v. Havkin*, 731 F. Supp.2d 103, 114 (D. Mass., 2010).

Greenspan alleges that the "[d]efendants have been unjustly enriched by their respective unauthorized, unlawful and unjust misappropriation of [p]laintiff's intellectual property." (#41, Exh. 1 ¶ 169). To the extent this allegation is premised upon copyright infringement, the claim must fail. Moreover, although the plaintiff argues that his unjust enrichment claim "is not limited to copyright infringement" (#43 at 12), the remaining allegations upon which he relies, i.e., "Defendants Benjamin and Tonya Mezrich have been unjustly enriched by Defendant Tonya Mezrich's fraudulent five-star pseudonymous reviews of Defendant Benjamin Mezrich's work" and "Defendant Benjamin Mezrich has been unjustly enriched by earning speaking fees and other fees for public appearances" (#41, Exh. 1 ¶¶ 170, 171), do not suggest that the defendants were unjustly enriched *at Greenspan's expense*. The unjust enrichment claim must fail.

Finally Count VIII of the proposed amended complaint is a claim for fraud against all the named defendants. Under Massachusetts law,

The basic elements of a claim sounding in fraud or deceit are set forth in *International Totalizing Sys. v. PepsiCo, Inc.*, 29 Mass. App. Ct. 424, 431, 560 N.E.2d 749 (1990):

‘[T]o recover in an action for deceit, “the plaintiff must prove ‘that the defendant [or its agent], made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to [its] damage.’” *Danca v. Taunton Sav. Bank*, 385 Mass. 1, 8, 429 N.E.2d 1129 (1982) (citations omitted). See also Restatement (Second) of Torts § 525 (1977) (“One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation”).’

*Reisman v. KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 108-09, 787 N.E.2d 1060, 1066-67 (Mass. App. Ct.), *rev. denied*, 439 Mass. 1105 (2003)(Table); *Chan v. Chen*, 70 Mass. App. Ct. 79, 82, 872 N.E.2d 1153, 1157 (Mass. App. Ct., 2007).

The plaintiff alleges that the “[d]efendants have knowingly misrepresented, omitted, and/or concealed material facts in their pleadings and representations before this Court, and in their communications to their investors, shareholders, financial analysis, and the media” (#41, Exh. 1 ¶ 173) and “[t]he false representations made by [d]efendants have been heavily relied upon, even if

implicitly, by financial analysts, lawyers, the media, and the general public in the context of Facebook, Inc.'s \$100 billion initial public offering.” (#41, Exh. 1 ¶ 176<sup>6</sup>) What Greenspan does not allege is that any misrepresentations were made for the purpose of inducing him to act, and that he relied on the purported misrepresentations to his detriment. To the contrary, the gist of the allegations of the proposed amended complaint is that the plaintiff knew the truth about the events that transpired and that it is others who have been misled. Greenspan has failed to allege a claim for fraud.

For all the reasons stated, it is ORDERED that the Motion For Leave To File First Amdended [sic] Complaint (#41) be, and the same hereby is, DENIED.

*/s/ Robert B. Collings*

ROBERT B. COLLINGS  
United States Magistrate Judge

May 9, 2012.

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The fraud allegations also run afoul of the strictures Rule 9(b), Fed. R. Civ. P.

