To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON 10-1 2009 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

JOHN CHAMBERS AND MARSHA CHAMBERS,

Plaintiffs,

- against -

ANDREW BACH, A.R. BACH CONSULTING, LTD., MICHAEL SCHUDROFF, CARRIAGE HOUSE MOTOR CARS, LTD., AUTOSTYLE LEASING, LTD., a/k/a AUTO STYLE LEASING, LTD.,

Defendants.

---X

DECISION AND ORDER
Sequence No. 1

Index No. 2516/09

LIEBOWITZ, J.

The following documents numbered 1 to 33 were read in connection with the motion of defendants Michael Schudroff, Carriage Motor Cars, Ltd. and Autostyle Leasing, Ltd. a/k/a Auto Style Leasing, Ltd. ("collectively "Schudroff"), and the cross-motion of Andrew Bach and A.R. Bach Consulting Ltd. (collectively "Bach") for an Order pursuant to CPLR §3211(a)(7) dismissing the ninth and tenth causes of action for failure to state a cause of action.

Notice of Motion, Affidavits and Supporting Papers	1-5
Notice of Cross-Motion, Affidavits and Supporting Papers	6-8
Opposing Affidavits and Supporting Papers	9-20
Reply Affidavits and Supporting Papers	21-27; 28-33

The within action was commenced by plaintiffs John Chambers and Marsha Chambers, against Bach and Schudroff seeking redress for actions allegedly committed by Bach and Schudroff against plaintiffs in connection with transactions surrounding a classic/collector motor vehicle collection owned by plaintiffs. Plaintiffs have asserted variously, that Bach and Schudroff are liable to them for breach of contract, fraudulent misrepresentation and conversion. Plaintiffs also allege that Bach and Schudroff have violated 18 U.S.C.A. §1962, the Racketeer Influenced and Corrupt Organizations Act ("RICO") and therefore are liable to plaintiffs for damages and attorney's fees pursuant to that statute.

Schudroff and Bach each move to dismiss the ninth cause of action, which asserts that Bach and Shudroff violated RICO, and the tenth cause of action, which seeks attorney's fees and treble damages pursuant to 18 U.S.C.A. §1964 for the alleged RICO violation.

On a motion to dismiss pursuant to CPLR §3211(a)(7) , the pleading is to be afforded a liberal construction. CPLR §3026. The court shall accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. In assessing a motion under CPLR 3211 (a)(7), however, the Court may consider affidavits submitted by a plaintiff to remedy any defects in the complaint. *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 (1976) . "The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Guggenheimer v. Ginzburg, 43 NY2d 268 at 275 (1977); See also, Rovello v Orofino Realty Co.,* supra, at 636.

"In evaluating the sufficiency of a RICO pleading, the Court must 'read the facts alleged in the complaint in the light most favorable to plaintiffs.'" Polycast Technology Corp. v.

Uniroyal, Inc., 728 F.Supp. 926, 948 (S.D.N.Y. 1989) quoting H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989). "A RICO claim may be dismissed at this stage of the litigation only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations ...." (quotations omitted)." Polycast Technology Corp. v. Uniroyal, Inc., *supra* at 948 quoting H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).

18 USC § 1962 (c)in pertinent part, states that " [it] shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ...." "To allege a violation of section 1962(c), 'a plaintiff must show that he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" Manhattan Telecommunications Corporation, Inc. v. Dial America Marketing, Inc., 156 F.Supp.2d 376, 380 (S.D.N.Y. 2001) quoting Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229, 242 (2d Cir.1999).

Bach and Schudroff contend that plaintiffs have not properly alleged either an enterprise or a pattern of racketeering activity, and therefore have failed to state a claim for which relief can be granted.

It is not disputed that Bach introduced plaintiffs to Schudroff and, whenever plaintiffs purchased, sold, or traded a vehicle upon the recommendation of Bach, those transactions were arranged by Bach to be handled by Schudroff. Plaintiffs have asserted that Bach arranged for the transfer of a 1957 Mercedes Benz 300 SL Gullwing from Schudroff's businesses, with the assistance and knowledge of Schudroff, to plaintiffs for a misrepresented and vastly inflated value much more than it was actually worth. As a result, plaintiffs maintain that they were defrauded and suffered financial harm. Plaintiffs allege that this enterprise was formed for the benefit of both Bach and Schudroff, who conspired together on this and other occasions to misrepresent the values of classic motor vehicles to the detriment of plaintiffs.

In addition, Plaintiffs maintain that Bach and Schudroff perpetrated a similar scheme when defendants traded a vastly overvalued 1962 Bentley for plaintiffs' 1955 Gullwing. Plaintiffs assert that they transferred their 1955 Gullwing to Schudroff, while Bach transferred his 1962 Bentley to Schudroff, in exchange Schudroff would then transfer the Bentley to plaintiffs, a Porsche to Bach and Schudroff would keep the Gullwing. Plaintiffs allege that Bach and Schudroff had worked together as an enterprise to effectuate the transfer of a vehicle whose value that they had purposefully misrepresented which benefitted Bach and Sschudroff, and harmed plaintiffs.

Bach and Schudroff maintain that plaintiffs' pleadings are insufficient to support either a finding of closed-ended or open-ended continuity in the alleged racketeering scam. In support of their position, Bach and Schudroff point to the fact of their limited dealings with plaintiffs regarding the transfers of the motor vehicles in question.

Plaintiffs have described at least three completed transactions which plaintiffs maintain were fraudulent relating to the purchase of the 1957 Mercedes Gullwing, the purchase of the 1963 Roadster, the sale of the 1955 Gullwing and the purchase of the 1962 Bentley. These three separate transactions took place over the course of plaintiffs' business relationship with defendants.

Additionally, plaintiffs contend that they have already identified another victim of Bach and Schudroff's illegal enterprise. Plaintiffs maintain that this fact lends credence to their allegation that this scheme is open-ended, and that Bach and Schudroff are still operating an enterprise that is doing business with the unwary. According to plaintiffs, the enterprise between

Schudroff and Bach has allegedly defrauded plaintiffs, and will continue to defraud others like plaintiffs.

The acts described in the complaint and in the supporting affidavit of John Chambers, assert a pattern to the extent that the allegations show the same fraudulent scheme, involving the same participants, which may be said to be so related to each other as to be considered part of a pattern of racketeering activity. In addition, the complaint asserts that there is a continued threat of the specified unlawful conduct, as Bach and Schudroff's alleged enterprise may in fact extend to other unknowing collectors of classic cars, which would support a finding of open-ended continuity. Therefore, that branch of the motion and cross-motion seeking to have the ninth cause of action dismissed is denied.

In civil cases, RICO plaintiffs may recover damages under18 U.S.C. § 1964(c). §1964 (c)provides that "[a]ny person injured in his business or property by reason of a violation of § 1962 has the right to "recover threefold the damages he sustains ...." 18 U.S.C. § 1964(c). To recover damages pursuant § 1964(c), a civil RICO claimant must show: (1) a substantive RICO violation under § 1962; (2) injury to the plaintiff's "business or property," and (3) that such injury was "by reason of" the substantive RICO violation. <u>See</u> <u>Lerner v. Fleet Bank, N.A.</u>, 318 F.3d 113, 120 (2d Cir. 2003), cert. denied, 540 U.S. 1012, (2003); <u>City of New York v. Smokes-Spirits.com, Inc.</u>, 541 F.3d 425, 439 (2d Cir. 2008). In the case at bar, since plaintiffs have sufficiently alleged a substantive violation of RICO, that branch of the motion and cross-motion to dismiss the tenth cause of action is also denied.

On the basis of the foregoing, it is hereby

ORDERED that the motion of defendants Michael Schudroff, Carriage House Motor Cars, Ltd., Autostyle Leasing, Ltd., a/k/a Auto Style Leasing, Ltd. For an Order pursuant to CPLR §3211(a)(7) dismissing the ninth and tenth causes of action against them is denied; and it is further

ORDERED that the cross-motion of defendants Andrew Bach and A.R. Bach Consulting, Ltd. for an Order pursuant to CPLR §3211(a)(7) dismissing the ninth and tenth causes of action against them is denied; and it is further

ORDERED that defendants serve and file their respective Answers to the Complaint within twenty (20) days of today's date; and it is further

ORDERED that the parties comply with the Westchester Supreme Court Differentiated Case Management Part Rules, which rules were promulgated by the Hon. Alan D. Scheinkman, Administrative Judge of the Ninth Judicial District, and which rules were effective as of September 14, 2009.

This constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 30, 2009

Richard B. Liebowitz

RICHARD B. LIEBOWITZ
SUPREME COURT JUSTICE

Sweeney, Cohn, Stahl,
Spector & Frank
200 East Post Road
White Plains, New York 10601

Robert G. Cucinell, Esq.
399 Knollwood Road
Suite 206
White Plains, New York 10603

Silverberg Zalantis LLP
3 Barker Avenue
White Plains, New York 10601