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Claims Held Sufficient for Suit to Proceed Over Sewer Service

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Consumers charging a law firm and two other entities with a scheme to fraudulently obtain more than 100,000 default judgments in state court have prevailed in their bid to overcome a motion to dismiss in federal court.

Second Circuit Judge Denny Chin, a former Southern District judge sitting by designation, refused to dismiss claims alleging the use of "sewer service," a process involving the intentional failure to serve a summons and complaint followed by the filing of a phony affidavit attesting to service. The debtor, who has no knowledge of the process, fails to appear and defaults.

The term "sewer service" is named after the practice of throwing the summons and complaint into the sewer outside of a defendant's home and claiming to have effectuated service.

Plaintiffs charged the "massive scheme" was perpetrated by a debt-buying company, Leucadia National Corp.; law firm Mel S. Harris and Associates of 5 Hanover Square, which engaged in debt-collection litigation on behalf of Leucadia and its subsidiaries; and Samserv Inc., a Brooklyn-based process serving agency.

In *Sykes v. Mel Harris and Associates*, 09 Civ. 8486, consumers allege violations of the **Fair Debt Collection Practices Act**, 15 U.S.C. §1692, the **Racketeer Influenced and Corrupt Practices Act**, 18 U.S.C. §1961, New York General Business Law §349, and New York Judiciary Law §487.

The plaintiffs claim that the Harris law firm and Leucadia joined to purchase debt portfolios and begin debt collection en masse, filing 104,341 debt collection actions in New York City Civil Court between 2006 and 2008, and hiring Samserv to serve process. In all, the plaintiffs allege, more than 90 percent of the targets defaulted because they were not actually served.

Once a consumer fails to appear, Leucadia and Mel Harris provide proof of service, proof of additional mailed notice and an "affidavit of merit" swearing to their personal knowledge of facts substantiating their claims.

"Leucadia had limited proof to substantiate its claims because it typically did not purchase documentation of the consumers' indebtedness to the original creditors," Judge Chin said.

"Nonetheless, the Mel Harris defendants' 'designated custodian of records,' Todd Fabacher, signed the vast majority of the approximately 40,000 affidavits of merit they filed each year."

Mr. Fabacher had to aver to personal knowledge that the debt was due and owing, Judge Chin said, and that means he would have had to issue 20 affidavits per hour or "one every three minutes," during the course of an eight-hour work day.

Judge Chin said that two of the eight named plaintiffs had statute of limitations problems, but the statute in their case was "equitably tolled" because the "defendants deprived them of notice of their debt collection actions."

The Mel Harris defendants, which included the law firm, its principals and affiliated individuals, had argued that the Fair Debt Collection Practices Act does not prohibit the filing of debt collection actions and affidavits of merit.

False Affidavits Claimed

But Judge Chin said the plaintiffs alleged far more than simply the claim that the law firm defendants lacked "physical evidence of the debt."

They also allege, he said, "that they knowingly authorized defendant Fabacher to file false affidavits of merit—misleading both the Civil Court and consumer-defendants—to secure default judgments that enabled them to freeze bank accounts, threaten to garnish wages, or pressure individuals into settlements."

Judge Chin dismissed racketeering claims against five individual process servers, Mel Harris manager David Waldman and two officers of Leucadia or its subsidiaries.

He also rejected the plaintiffs' claim that there were three distinct racketeering enterprises. Nonetheless, Judge Chin found that the complaint properly alleged a single racketeering enterprise. The defendants had argued that the plaintiffs' pleadings fell short on the racketeering conspiracy claim, and moved for dismissal.

But Judge Chin said "the pleadings sufficiently allege substantive RICO violations and plausibly establish an agreement among the defendants."

He denied the Samserv defendants' motion to dismiss racketeering conspiracy claims with respect to all Samserv defendants, including five individual process servers, and all other defendants. The lone exception here was his dismissal of racketeering conspiracy claims against Mr. Waldman and the two Leucadia officers.

Judiciary Law Claim

Judge Chin then ruled that, under General Business Law §349, which governs deceptive acts or practices, the plaintiffs' claims were not moot even though the default judgments have been vacated by state courts or by agreement with the defendants.

Finally, he refused to dismiss the claim against the Mel Harris defendants under Judiciary Law §487, under which an attorney can be charged with a misdemeanor and be liable for damages when he engages in "any deceit, or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

A status conference is scheduled for Jan. 11.

The plaintiffs are represented by Matthew D. Brinckerhoff and Elisha Jain of Emery Celli Brinckerhoff & Abady; ***Susan Shin, Claudia Wilner and Josh Zinner of the Neighborhood Economic Development Advocacy Project; and Carolyn E. Coffey, Andrew Goldberg and Anamaria Segura of MFY Legal Services Inc.***

The Mel Harris defendants are represented by Brett A. Scher of Kaufman Dolowich Voluck & Gonzo.

The Leucadia defendants are represented by Lewis Goldfarb of McElroy, Deutsch, Mulvaney & Carpenter.

The Samserv defendants are represented by Jordan Sklar of Babchik & Young.

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