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**DISTRICT OF COLUMBIA, ex rel. JOHN PAYTON, CORPORATION COUNSEL,
Plaintiff, v. GEORGE BASILIKO, et al., Defendants.**

Civil Action No. 91-2518 (JHG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1992 U.S. Dist. LEXIS 1260; 1992-1 Trade Cas. (CCH) P69,751

**February 10, 1992, Decided
February 10, 1992, FILED**

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant real estate bidders filed motions to dismiss the suit by plaintiff District of Columbia for the failure to state a cause of action based on a lack of specificity in the amended complaint and based on the statute of limitations. The District of Columbia filed suit for bid-rigging in violation of the antitrust laws.

OVERVIEW: The real estate bidders allegedly were involved in a conspiracy to suppress the legitimate bidding process for homes in public auctions. The real estate bidders along with other defendant bidders that had not filed the motions to dismiss pled guilty to conspiring to rig bids. The district court denied the motions. While the amended complaint was not a model of specificity, it sufficiently alleged the conspiracy to survive a motion to dismiss. The amended complaint largely tracked the criminal proceedings. The suit was timely on several grounds. The District of Columbia sufficiently pled fraudulent concealment to toll the limitations period. The motions failed to answer more recent claims that were clearly timely. Further, the District of Columbia was entitled to use the tolling provision of § 5(b) of the Clayton Act, 15 U.S.C.S. § 16(i), which tolled a private action preceded by a government action because the private action tracked the government proceedings.

OUTCOME: The motions to dismiss filed by the real estate bidders for the failure to state a cause of action were denied.

CORE TERMS: auction, bid, real estate, street, rig, conspiring, bidding, secret, conspiracies, payoffs, co-conspirators, foreclosure, rigged, conspirator, nisi, statute of limitations, designated, conspired, bidder, winner, criminal proceeding, competitive, pled guilty, coconspirators, pendency', times, natural persons, informations filed, indictment, settlement

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims

[HN1] In viewing a motion to dismiss, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. The plaintiff is entitled to all favorable inferences which may be drawn from those allegations.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims

[HN2] While the precise amount of damages may be presently incapable of exact ascertainment in determining a motion to dismiss, presumably it will be proved at the time of trial.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Fraud

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Fraudulent Concealment

Governments > Legislation > Statutes of Limitations > Tolling

[HN3] Fraudulent concealment tolls the statute of limitations on fraudulently concealed wrongs until the plaintiff discovers, or by reasonable diligence should have discovered, the illegal activities.

Antitrust & Trade Law > Clayton Act > Penalties***Antitrust & Trade Law > Private Actions > Standing > Clayton Act******Governments > Legislation > Statutes of Limitations > Time Limitations***

[HN4] Under Section 5(b) of the Clayton Act, if a private action has been preceded by a government proceeding and if it is based in whole or in part on any matter complained of in the government's action, then the statute of limitations is tolled during the pendency of the suit by the United States and for one year thereafter. Specifically, § 5(b) provides that whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under 15 U.S.C.S. § 15a, the running of the statute of limitations in respect of every private or state right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter. Provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under 15 U.S.C.S. § 15 or 15 U.S.C.S. § 15c is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

JUDGES: [*1] GREEN

OPINION BY: JOYCE HENS GREEN

OPINION***MEMORANDUM OPINION AND ORDER***

On October 8, 1991, plaintiff, the District of Columbia (the "District"), on behalf of natural persons residing in the District of Columbia whose homes were sold in public auctions between 1976 and 1991, initiated this action against George Basiliko, Eric Adolph Baer, Frank Gittleson, Basil C. Gogos, Douglas Goldsten, Irvin P. Greenbaum ("I. Greenbaum"), Robert Greenbaum ("R. Greenbaum"), George Kalavitinos, George Panagos, Sidney Spiegel, Spartan Investment Company, Inc. ("Spartan"), Sheldon J. Tommer, and others not yet known, alleging bid rigging in violation of the Sherman Antitrust Act.

On October 29, 1991, Goldsten filed a motion to dismiss the complaint although before Goldsten's motion became ripe for review, the District of Columbia filed an amended complaint on November 18, 1991. On January 9, 1992, Tommer also filed a motion to dismiss the amended complaint. For the following reasons, defendants' motions are denied.

I. BACKGROUND

According to the allegations contained in the amended complaint (the "complaint"), at various times between September 30, 1976 and November, 1991, the defendants and unnamed coconspirators [*2] entered into and engaged in combinations and conspiracies to rig bids at public real estate auctions in the District of Columbia, in violation of 15 U.S.C. §§ 1, 3. The substantial terms of the agreements were to suppress competition by refraining from full competitive bidding against one another at public real estate auctions and to make payoffs to one another in return for suppressing the competition at the auctions.

At various times between August, 1990 and the date the amended complaint was filed, each defendant pled guilty in the United States District Court for the District of Columbia to federal charges of conspiring to rig bids. Basiliko, Baer, Gittleson, Goldsten, I. Greenbaum, R. Greenbaum, and Spiegel pled guilty to United States Department of Justice ("DOJ") informations, which were filed on July 26, 1990. Gogos and Panagos pled guilty to DOJ informations filed November 16, 1990, and Tommer also pled guilty to a DOJ information filed on May 29, 1991. Similarly, defendants Kalavitinos and Spartan pled guilty to one count of an indictment, which was filed on May 16, 1991.

According to the complaint, the defendants admitted in the informations and indictment described above [*3] and in open court the following:

Basiliko admitted to conspiring to rig bids at public real estate auctions in the District of Columbia as early as 1968 or 1970 until, at least, April, 1986. In the information filed against him, he admitted to conspiring to rig bids at the auction of 2317 3rd Street, N.E., Washington, D.C., on or about April 9, 1986. And in a memorandum filed December 13, 1990 in aid of sentencing, he identified 67 other properties in the District of Columbia sold at rigged public real estate auctions in which he was involved, along with payments he had made and had received in connection with the auctioned properties.

Baer also admitted to conspiring to rig bids at public real estate auctions in the District of Columbia as early as 1977 and, at least, as late as December 6, 1984; and Gittleson, too, admitted to conspiring to rig bids at the nisi proceeding auction of 22 T

Street, N.W. on or about May 26, 1988.

Similarly, Gogos and Panagos conceded they had conspired to rig bids at the public real estate auctions in the District of Columbia as early as 1977 to, at least, June, 1986. As illustration, they admitted to having rigged bids at the foreclosure auction [*4] of 3411 Holmead Place, N.W., the nisi proceeding auction of 1707 Independence Avenue, S.E. in February, 1983, and the nisi proceeding auction of 136 Randolph Place, N.W. on June 3, 1983.

Defendant Goldsten also admitted to conspiring to rig bids at public real estate auctions in the District of Columbia as early as 1983 until, at least, May, 1985. For example, Goldsten admitted to having rigged bids at the foreclosure auction of 1503 Queen Street, N.E. in January, 1983 and the foreclosure auction of 4255 Eads street, N.E. on February 6, 1985.

In addition, I. Greenbaum conceded he had conspired to rig bids at public real estate auctions in the District of Columbia as early as 1977 and, at least, until May, 1986. Similarly, R. Greenbaum admitted to conspiring to rig bids at public real estate auctions in the District of Columbia in, at least, September, 1987.

Spiegel also admitted he conspired to rig bids at public auctions in the District from 1983 until May 10, 1989. In particular, he admitted to having rigged bids at the auction of 4255 Eads Street, N.E., the auction of 2317 3rd Street, N.E., the auction of 4520 Foote Street, N.E., and the auction of 1524 Howard Road, S.E.

[*5] George Kalavitos and Spartan also conceded they had conspired to rig bids at public real estate auctions in the District from 1978 to, at least, 1988. For example, they admitted they had unreasonably restricted full competitive bidding at the auctions of 1242 Florida Avenue, N.E. on or about April 17, 1979; the auction of 1346 Queen Street, N.E. on or about October 9, 1980; the auction of 607 Florida Avenue, N.E. on or about June 16, 1981; the auction of 917 L Street, N.E. on or about March 19, 1982; the auction of 1707 Independence Avenue, S.E. on or about February 17, 1983; the auction of 801 Webster Street, N.W. on or about April 20, 1983; the auction of 3027 Sherman Avenue, N.W. on or about February 27, 1984; the auction of 3103 Street, S.E. on or about November 6, 1985; the auction of 2317 3rd Street, N.E. on or about April 8, 1986; the auction of 1205 Gallatin Street, N.W. on or about April 21, 1986; the auction of 1932 Capitol Avenue, N.E. on or about November 24, 1987; and the auction of 132 Thomas Street, N.W. on or about March 2, 1988.

Finally, Sheldon J. Tommer admitted he had conspired to rig bids at public real estate auctions in the District of Columbia as early as [*6] 1978 until, at least, January, 1988.

The complaint further alleges that for the purpose of forming and carrying out the charged combinations and conspiracies, the defendants and the co-conspirators discussed and agreed, at selected public real estate auctions, not to compete with one another to win the bid; selected a designated bidder to act for the conspirators at public real estate auctions; discussed and agreed on specific payoffs that conspirators present would receive for not bidding, or discussed and agreed to hold a private, secret auction among themselves after the designated bidder won the public real estate auction; had the designated bidder make a bid to seek to win the public real estate auction; purchased auctioned property at artificially low and non-competitive prices and thereby deprived homeowners of the full, competitive price of the property; in many instances, held a secret auction in which the conspirators bid solely among themselves to acquire the property for a price higher than the price paid by the designated bidder at the public real estate auction and agreed to divide the difference between the public real estate auction price and the secret auction price [*7] by making payoffs among the conspirators; arranged by contract or other means for the secret auction winner to take title or ownership of the property; and made the payoffs that they had agreed to make.

The District further contends that neither the plaintiff nor the owners of the homes sold at the rigged auctions had any knowledge of their right of action against the defendants for the combinations and conspiracies alleged in plaintiff's complaint. Rather, plaintiff learned for the first time about the combinations and conspiracies from the informations, the indictment, and the pleadings filed in this Court during August, 1990 to May, 1991 in Criminal Nos. 90-0309 through 90-0315, 90-0506, 90-0507, 91-0286, 91-0319, and 91-0397. According to the complaint, defendants had fraudulently concealed their unlawful activities by the following means: 1) when bidding at public real estate auctions, defendants and other conspirators would secretly agree among themselves who would place the winning bid and that the rest would refrain from bidding; 2) at nisi proceeding auctions, the defendants would deliberately sit in different parts of the auction room to give the impression that they [*8] were competitive bidders; 3) at nisi proceeding auctions, the alleged conspirator designated to place the winning bid would declare to those present that he was bidding on his own behalf when, in fact, he was bidding on behalf of both himself and his co-conspirators; 4) the winner of a public real estate auction, whether a nisi proceeding or a foreclosure auction, would later make secret payoffs to those who had refrained from bidding, and in other instances, the winner of the auction and the coconspirators would hold a secret auction among themselves to determine the final purchaser, and the winner would then make secret payoffs to the co-conspirators; and 5) at settlement, the winner of the public or secret auction would ask the settlement agent to write checks to the co-conspirators and would state to the settlement agent that the payments were finder's fees or commissions when, in fact, they were illegal payoffs. The complaint further alleges that

because of the fraudulent concealment, neither plaintiff nor those whom it represents discovered or could have discovered the combinations and conspiracies prior to 1990 or 1991 through the exercise of due diligence.

As a result [*9] of the conspiracies, the District further contends that prices for homes at public real estate auctions in the District have been fixed, reduced, or maintained at artificial and non-competitive levels; price competition among defendants and their co-conspirators have been restrained; natural persons residing here have been denied the benefits of free and open competition among the defendants and their coconspirators; and, as a result, owners have received lower prices for their homes than they would have received in untainted auctions. In addition, plaintiff asserts, natural persons in the District have sustained injury to their property in amounts presently undetermined.

I. DISCUSSION

[HN1] In viewing a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. *Shear v. National Rifle Association*, 606 F.2d 1251, 1253 (D.C. Cir. 1979); [*10] 5A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1357, p. 304 (1990). The plaintiff is entitled to all favorable inferences which may be drawn from those allegations. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

As a preliminary matter, it is clear that Goldsten's motion to dismiss must be denied because it was submitted before plaintiff had filed its first amended complaint and thus, is based only on the allegations proffered in the original complaint. In any event, even were the Court to consider both Goldsten's and Tommer's contentions that the complaint is insufficiently detailed and the claims stated therein are precluded by the applicable statute of limitations, it is apparent that their arguments must be rejected.

While the amended complaint is not a model of specificity, the factual allegations of the complaint, which must be presumed true and liberally construed in favor of the District, state claims against both defendants. First, plaintiff indicates that the circumstances that give rise to the instant civil action are, for the most part, the same as, or similar to, the events surrounding the criminal prosecutions of Tommer and Goldsten. [*11] As illustration, plaintiff alleges that Tommer admitted to conspiring to rig bids at public real estate auctions between 1978 and 1988. Similarly, the District asserts that Goldsten conceded that he had rigged bids at the foreclosure auction of 1503 Queen Street, N.E. in January, 1983 and the foreclosure auction of 4255 Eads Street, N.E. on February 6, 1985. Moreover, [HN2] while the precise amount of damages is "presently incapable of exact ascertainment," presumably it "will be proved at the time of trial." See, e.g., *Noerr Motor Freight v. Eastern Railroad Presidents Conference*, 113 F. Supp. 737, 744-45 (E.D. Pa. 1953). Accordingly, defendants' motions to dismiss based on lack of specificity must be denied.

The Court also cannot conclude, at this juncture, that plaintiff's claims are barred as untimely. As an initial matter, the complaint alleges with sufficient particularity fraudulent concealment, [HN3] which tolls the statute of limitations on fraudulently concealed wrongs until the plaintiff discovers, or by reasonable diligence should have discovered, the illegal activities. See *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985). [*12] In addition, defendants' motions to dismiss ignore the allegations against Tommer of illegal conduct in 1987 and 1988 and the more general allegation against both defendants that "at different times between September 30, 1976 and the present, the exact dates being unknown to the plaintiff, each defendant and co-conspirators, some of whom are named as defendants herein, entered into and engaged in various combinations and conspiracies to rig bids at public real estate auctions in the District of Columbia." Complaint, para. 9 (emphasis supplied).

It also appears that the District may be able to utilize the tolling provision described in Section 5(b) of the Clayton Act, 15 U.S.C. § 16(i). [HN4] Under Section 5(b), if a private action has been preceded by a government proceeding and if it is based in whole or in part on any matter complained of in the government's action, then the statute of limitations is tolled during the pendency of the suit by the United States and for one year thereafter. Specifically, Section 5(b) provides:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not [*13] including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter. Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

It is clear from the face of the complaint that plaintiff's action is "based . . . in part on . . . matter[s] complained of" in the government's criminal proceedings against both Tommer and Goldsten. Moreover, "the 'pendency' of the government's

criminal proceeding continues for a period of one year from after the date of entry of judgment of conviction against the last remaining defendant in the related criminal proceeding." *Marine Firemen's Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 249 (9th Cir. 1974) [*14] (emphasis in original). The entry of judgment of conviction generally follows the oral sentencing, and Goldsten, at least, was not orally sentenced until October 10, 1990. Under these circumstances, the Court cannot conclude that the District's claims against Goldsten and Tommer are time-barred.

III. CONCLUSION

Accordingly, for the reasons expressed above, it is hereby

ORDERED that Goldsten's motion to dismiss is denied; it is

FURTHER ORDERED that Tommer's motion to dismiss is denied; it is

FURTHER ORDERED that the Court will schedule a status conference after all of the parties have been served.

IT IS SO ORDERED.

February 10, 1992.

JOYCE HENS GREEN

United States District Judge