UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE HEMMERDINGER CORPORATION, d/b/a ATCO,

Plaintiff,

v.

FRANK M. RUOCCO, JR., BORIS A. TOMICIC, WILLIAM S. MCCAMBRIDGE, EARTH TECHNOLOGY, INC., and RECYCLE TECHNOLOGY, LLC,

Defendants.

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MEMORANDUM AND ORDER
12-cv-2650 (WFK)

WILLIAM F. KUNTZ II, United States District Judge:

Following a seven-day jury trial, Defendants Frank M. Ruocco, Jr., Earth Technology, Inc., and Boris A. Tomicic (collectively, "Defendants") filed motions for judgment as a matter of law, motions for a new trial, and motions for a set-off hearing. ECF Nos. 267–68, 271. For the reasons set forth below, the Court DENIES Defendants' motions.

BACKGROUND

This is a civil RICO action about the excavation and removal of "dirty dirt" in the environmental remediation and redevelopment of "The Shops at Atlas Park." *See* Mem. & Order at 2–4, ECF No. 250 (discussing, in the context of summary judgment, the underlying facts of this case). At the heart of the dispute were Defendants' bills for soil removal services and whether the bills derived from fraud and/or racketeering. *See id.* at 1–2.

Following a seven-day trial, a jury found Defendants Tomicic and McCambridge liable for fraud in the amount of $2,000.00, and Defendants Frank M. Ruocco, Jr., Earth Technology,

Inc., Boris Tomicic, and Recycle Technology liable for civil RICO under 18 U.S.C. § 1962(d) in the amount of $334,766.98. Jury Verdict at 6–7, ECF No. 272. The jury found no civil RICO liability under 18 U.S.C. § 1962(c). *Id.* at 4.

The verdict sheet contained a section for claim two, RICO liability under § 1962(c), and a section for claim three, RICO liability under § 1962(d). *See id.* at 4–7. The § 1962(c) section of the verdict sheet asked, "Did a civil RICO enterprise exist among the defendants?" *Id.* at 4. The jury unanimously marked "NO" and, as instructed, continued no further on the § 1962(c) section of the verdict sheet. *Id.* The § 1962(d) section of the verdict sheet asked, "Was there an agreement among two or more persons to participate in an enterprise that would affect interstate commerce through a pattern of racketeering activity?" *Id.* at 6. To this question, the jury answered, "YES." *Id.* The jury found Defendants Earth Technology, Inc., Frank M. Ruocco Jr., Boris Tomicic, and Recycle Technology all "knowingly and willfully" participated as members of "the enterprise," while specifically excluding Defendant William McCambridge from the enterprise. *Id.*

The Court now addresses the post-trial motions filed by Defendants Frank M. Ruocco, Jr., and Earth Technology, Inc., (collectively, the "Ruocco Defendants") and by Defendant Boris A. Tomicic ("Defendant Tomicic"). On May 28, 2016, and again on June 3, 2016, the Ruocco Defendants filed motions for judgment as a matter of law or, alternatively, for a new trial. *See* Ruocco 1st Mot., ECF No. 267; Ruocco 2d Mot., ECF No. 271. On June 1, 2016, Defendant Tomicic filed a similar motion. *See* Tomicic Mot., ECF No. 268. The Hemmerdinger Corporation d/b/a ATCO ("Plaintiff") filed its response to Defendants' motions on July 1, 2016.

ECF Nos. 282–283. Defendants replied on July 6, 2016. Ruocco Reply, ECF No. 284; Tomicic Reply, ECF No. 285.

DISCUSSION

I. Standard of Review

A. Motion for Judgment as a Matter of Law

When evaluating a motion for judgment as a matter of law, a court is required to draw all reasonable inferences in favor of the non-moving party. *Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir. 2007). The court "may not make credibility determinations or weigh the evidence," because those are "jury functions, not those of a judge." *Id.* Accordingly, a court may grant a motion for judgment as a matter of law "only if it can conclude that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a reasonable juror would have been *compelled* to accept the view of the moving party." *Id.* at 370–71; *accord MacDermid Printing Sols. LLC v. Cortron Corp.*, 2016 WL 4204795, *3 (2d Cir. Aug. 10, 2016) (citing *Cash v. Cty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011)). This "high bar" may be met when there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture" or "there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict against it." *Advance Pharm., Inc. v. United States*, 391 F.3d 377, 390 (2d Cir. 2004); *Lavin–McEleney v. Marist College*, 239 F.3d 476, 479–80 (2d Cir. 2001).

B. Motion for a New Trial

A court may grant a new trial in a jury case for any of the reasons "for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). The decision whether to grant a new trial under Rule 59 is "committed to the sound discretion of the trial judge." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992). "A new trial may be granted . . . when the jury's verdict is against the weight of the evidence." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir. 1998). In contrast to a motion for judgment as a matter of law, a court may grant a motion for a new trial "even if there is substantial evidence supporting the jury's verdict." *Id.* at 134. Additionally, "a trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner." *Id.* (citing *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992)). A court considering a Rule 59 motion for a new trial, however, "must bear in mind . . . that the court should only grant such a motion when the jury's verdict is 'egregious.'" *Id.* For this reason, "[a] motion for a new trial ordinarily should not be granted unless the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (quoting *Atkins v. New York City*, 143 F.3d 100, 102 (2d Cir. 1998)). Furthermore, "[w]here the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial." *Fugazy*, 983 F.2d at 363; *see also DLC Mgmt. Corp.*, 163 F.3d at 134 ("[A] court should rarely disturb a jury's evaluation of a witness's credibility.").

II. Analysis

A. Inconsistent Verdict

Congress enacted the Racketeer Influence and Corrupt Organizations Act, known as RICO, 18 U.S.C. §§ 1961–1968, for "the eradication of organized crime in the United States." *Beck v. Prupis*, 529 U.S. 494, 496 (2000) (quoting Pub. L. 91-452, 84 Stat. 923). Congress attempted to achieve this goal "by providing severe criminal penalties for violations of § 1962." *Id.* Sections 1962(c) and 1962(d), the relevant provisions of RICO in this action, provide:

> (c) 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 or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962. Section 1962(c) prohibits a member of a RICO enterprise from conducting enterprise affairs through a pattern of racketeering activity, while § 1962(d) prohibits conspiracy to violate § 1962(c), or any of the other substantive subsections of §1962. In the criminal context, an individual may be found guilty of violating § 1962(d) without having violated § 1962(c). *See Salinas v. United States*, 522 U.S. 52 (1997) (interpreting criminal RICO liability under § 1962(d)).

Congress also granted a private cause of action to "[a]ny person injured in his business or property by reason of a violation of section 1962," 18 U.S.C. § 1964(c), thus creating civil remedies to further enforce violations of § 1962. In *Beck v. Prupis*, the Supreme Court read into § 1962(d), as applied in the civil context via §1964(c), the "widely accepted" civil-conspiracy

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