IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

P&S ASSOCIATES,
GENERAL PARTNERSHIP, et al.,

CASE NO. 12-034123 (07)

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.
_______________________________________/

DEFENDANTS KELCO FOUNDATION INC.'S AND VINCENT T. KELLY'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants KELCO FOUNDATION, INC. ("Kelco") and VINCENT T. KELLY ("Kelly") (collectively, "Defendants") move to dismiss the amended complaint filed by Plaintiffs P&S ASSOCIATES, GENERAL PARTNERSHIP; S&P ASSOCIATES, GENERAL PARTNERSHIP; and PHILIP VON KAHLE, CONSERVATOR OF P&S ASSOCIATES, GENERAL PARTNERSHIP and S&P ASSOCIATES, GENERAL PARTNERSHIP ("Plaintiffs") and, in support, state:

INTRODUCTION

In this action, Plaintiffs seek to recover payments made by P&S Associates, General Partnership and S&P Associates, General Partnership (collectively, the "Partnerships") to certain – though not all – individuals and entities. Two named defendants are Kelco, a dissolved non-profit charitable corporation, and Kelly, a Catholic priest.

The operative pleading, Plaintiffs' amended complaint, is a model of imprecision. In some places, Plaintiffs provide great detail, thereby reflecting that Plaintiffs know and have access to the salient facts, at least when it suits them. For example, Plaintiffs are capable of alleging the amounts of payments down to the last penny, such as Plaintiffs' allegation that Kelco received "$744,799.08 from P&S." (Am. Compl. ¶ 28(f).) In most other areas, however, Plaintiffs' amended complaint lacks fundamental details, such as when those supposed payments were made (indeed, most were made many years ago and are, as Plaintiffs must recognize, long barred by the statute of limitations) or whether certain defendants even received any payments at all (for example, Kelly is not alleged to have received anything).

At any rate, the four corners of the Plaintiffs' amended complaint reveal a host of pleading defects that necessitate dismissal of the claims. Those defects are set forth below.

ARGUMENT

1. The Amended Complaint Fails to State a Cause of Action Against Kelly Because There Is No Allegation That Kelly Received Any Payment.

The essence of the amended complaint is that the Partnerships made improper disbursements – what the Plaintiffs baldly characterize as "kickbacks" – to certain individuals and entities. The payments at issue and their recipients are specified in paragraph 28 of the amended complaint. Plaintiffs allege that "[t]he Kelco Foundation, which was operated by Father Kelly, received $744,799.08 from P&S…" (Am. Compl. ¶ 28(f).) Plaintiffs do not allege or identify any payment received by Kelly individually, nor do they have a good faith basis to make such an allegation. Instead, Plaintiffs merely lump Kelly together with the other "Kickback Defendants" and allege wrongdoing collectively.[1]

[1] Plaintiffs also allege, in conclusory fashion, that "[u]pon information and belief, in addition to soliciting investors, the Kickback Defendants [i.e., Kelco and Kelly, among others] were active in the management of the Partnerships themselves." (Am. Compl. ¶ 27.) However, this conclusion is not supported by allegations of ultimate fact and is thus not well-pled. See Price v. Morgan, 436 So. 2d 1116, 1121 (Fla. 5th DCA 1983) ("a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action"), rev. denied, 447 So. 2d 887 (Fla. 1984); Alvarez v. E & A Produce Corp., 708 So. 2d 997, 999-1000 (Fla. 3d DCA 1998) ("Whether a prima facie case has been pled depends on the sufficiency of the plaintiff's allegations of fact, excluding the bare conclusions of the plaintiff."). Indeed, this conclusory allegation is belied by the exhibits to the amended complaint, which both state unequivocally that "the management and control of the day-to-day operations of the Partnership and the maintenance of the Partnership property **shall rest exclusively with the Managing**

Plaintiffs' failure to allege that Kelly received any payment dooms all of the claims asserted against him. Although each of these claims is predicated on the alleged receipt of "kickbacks" (see Am. Compl. ¶¶ 56, 73, 92, 96, 99, 108, 117-18), Plaintiffs' amended complaint contains no well-pled allegation that Kelly actually received any "kickback" or any payment whatsoever. For instance, in order to state a cause of action for unjust enrichment, Plaintiffs must allege, *inter alia*, that Plaintiffs conferred a benefit upon Kelly. See AMP Services Ltd. v. Walanpatrias Foundation, 73 So. 3d 346, 350 (Fla. 4th DCA 2011). Likewise, in order to state a cause of action to avoid a fraudulent transfer, Plaintiffs must allege a "transfer made or obligation incurred...." § 726.105(1), Fla. Stat.; Oginsky v. Paragon Properties of Costa Rica LLC, 784 F. Supp. 2d 1353, 1369 (S.D. Fla. 2011). To state a cause of action for money had and received, Plaintiffs must allege that money was received by Kelly. See Berry v. Budget Rent A Car Systems, Inc., 497 F. Supp. 2d 1361, 1370 (S.D. Fla. 2007). These necessary allegations, however, do not appear in Plaintiffs' amended complaint. As a result, all of the claims asserted against Kelly individually should be dismissed.

2. The Claims by the Partnerships are Barred by the Doctrine of *In Pari Delicto*.

The amended complaint (and each of its counts) is brought by three plaintiffs: the Conservator[2] and the two Partnerships. The claims brought by the Partnerships, however, are plainly barred by the doctrine of *in pari delicto*.

The amended complaint repeatedly alleges that the payments at the heart of this action were made by *the Partnerships*:

General Partners, Michael D. Sullivan and Greg Powell." (Am. Compl. Ex. A at 5; Am. Compl. Ex. B at 5) (emphasis provided). "Exhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control." Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490, 494 (Fla. 3d DCA 1994).

[2] The Conservator is the functional equivalent of a receiver, who does not necessarily inherit the sins of the entities placed in receivership. See Freeman v. Dean Witter Reynolds, Inc., 865 So. 2d 543, 550 (Fla. 2d DCA 2003). The same is not true, however, for the entities themselves.

- "The Kelco Foundation, which was operated by Father Kelly, received $744,799.08 **from P&S** in kickbacks." (Am. Compl. ¶ 28(f)) (emphasis provided);

- "Defendant Michael D. Sullivan & Associates received $3,734,106.41 **from S&P** and $1,747,025.92 **from P&S** in kickbacks." (Am. Compl. ¶ 29) (emphasis provided);

- "The Kickback Defendants received kickbacks **from S&P and/or P&S**, without actually earning such kickbacks." (Am. Compl. ¶ 92) (emphasis provided); and

- "**[T]he Partnerships** conferred a benefit on the Kickback Defendants by virtue of the Kickbacks that they received." (Am. Compl. ¶¶ 99, 108) (emphasis provided).

The amended complaint further alleges that these payments were improper or illegal:

- "Sullivan and the Kickback Defendants knew or should have known that the Kickbacks and distributions to themselves and non-partners were improper because they were made without any correlation to the Partnership Agreements." (Am. Compl. ¶ 32); and

- "Payment of Kickbacks is prohibited under Florida law." (Am. Compl. ¶ 118).

The Partnerships' participation in these allegedly improper activities, however, will prevent them from recovering in this action. The equitable doctrine of *in pari delicto* holds that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." Dorestin v. Hollywood Imports, Inc., 45 So. 3d 819, 822 (Fla. 4th DCA 2010) (quoting Black's Law Dictionary 806 (8th ed. 2004)). "Under Florida law, the doctrine of *in pari delicto* operates to bar legal remedies when both parties are equally in the wrong…or where the plaintiff had greater responsibility for the wrongdoing than defendant." In re Gosman, 382 B.R. 826, 837-38 (S.D. Fla. 2007) (citations omitted).

Here, the amended complaint plainly alleges that the Partnerships themselves participated in the alleged "kickback" scheme; indeed, the supposed kickbacks were alleged to have been paid by the Partnerships, thus making the Partnerships the primary actor in the process. Because they are, under Plaintiffs' own theory, wrongdoers in the supposed wrongdoing at issue, the

Partnerships will not be permitted to obtain relief for that wrongdoing and their claims must be dismissed.

3. The Negligence Count Fails to State a Cause of Action.

In Count IV, Plaintiffs purport to assert a negligence claim against Kelly and Kelco on the basis that, by allegedly recommending partners to invest in the Partnerships, they acted as "investment advisers" under Florida's Blue Sky laws. Plaintiffs further allege that Kelly and Kelco failed to register as investment advisers and "recommended that individuals and entities purchase an interest in the Partnerships…without reasonable grounds to believe that the recommendation was suitable for those individuals and entities." (Am. Compl. ¶ 79.)

Plaintiffs' negligence claim fails for two reasons. First, Plaintiffs lack standing to assert it. A claim for negligence requires that the defendant owe *the plaintiff* a duty. Robert-Blier v. Statewide Enterprises, Inc., 890 So. 2d 522, 523 (Fla. 4th DCA 2005) ("A threshold issue in negligence is whether defendant owed any duty to the plaintiff."). However, the duties alleged in Count IV – all of which are contained in Florida Administrative Code 69W-600.0131 – are designed to protect *the customer of the investment adviser* (i.e., the individuals to whom the recommendation was made), not the Plaintiffs:

> Florida Administrative Code 69W-600.0131 prohibits an investment adviser from:
>
> > (a) "[r]ecommending **to a customer** the purchase sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable **for the customer**[;]"
> >
> > (b) "charging **a customer** an unreasonable advisory fee;" or
> >
> > (c) "failing to disclose **to customers** in writing before any advice is rendered any material conflict of interest relating to the adviser…which could be reasonably be expected to impair the rendering of unbiased and objective services including:...[c]ompensation arrangements connected with advisory

> services to customers which are in addition to compensation from such customers for such services."

(Am. Compl. ¶ 77) (emphasis provided). In other words, while an aggrieved investor may be entitled to avail themselves of the duties and remedies set forth in the securities regulations, the investment funds – that is, the Plaintiffs – cannot.

Second, Plaintiffs fail even to allege the necessary elements of a negligence claim. At no point do Plaintiffs allege that Kelly and Kelco owed Plaintiffs a duty. To the contrary, the negligence count makes clear that the duties upon which Plaintiffs rely (found in Florida's securities laws) relate only to investors, not the Partnerships. And at no point do Plaintiffs allege that Kelly and Kelco breached this supposed duty to Plaintiffs. As a result, the negligence claim (Count IV) must fail.

4. The Fraudulent Transfer Count Fails to State a Cause of Action.

Count V of the amended complaint is a claim to avoid fraudulent transfers under section 726.105(1)(a), Florida Statutes. Florida's Uniform Fraudulent Transfer Act (FUFTA) permits the avoidance of transfers by a "debtor" that were made with intent to defraud a "creditor." A transfer is considered fraudulent if "the debtor made the transfer…with actual intent to hinder, delay, or defraud any creditor of the debtor." § 726.105(1)(a), Fla. Stat. FUFTA permits <u>creditors</u> to obtain avoidance of such transfers. § 726.108(1)(a), Fla. Stat. ("In an action for relief against a transfer or obligation under ss. 726.101-726.112, <u>**a creditor**</u>…may obtain…[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.") (emphasis provided).

But the amended complaint is conspicuously vague regarding the identity of the creditor and the debtor under Plaintiffs' theory. In some places, the amended complaint contends that the "creditors" in this situation are some individual partners of the Partnerships. For example, Plaintiffs allege that "[o]ther partners of the Partnerships received actual distributions from P&S and/or S&P that are less than their actual contributions to the Partnerships" (i.e., "net losers") and that "the distributions the Kickback Defendants received were made with the actual intent to hinder, delay or defraud the Partners, who are and were creditors of the Partnerships…." (Am. Compl. ¶¶ 94-95.) But the "net loser" partners are not parties to this action, and the amended complaint at no point suggests that the Plaintiffs are acting in some representative capacity on their behalf. Nor can they; through these allegations, Plaintiffs demonstrate that the "net losers" are merely a subset of partners that allegedly suffered individualized harm that is distinct from any harm suffered by the Partnerships. Such direct claims must be brought by the "net losers" themselves, not derivatively by the Partnerships. See Alario v. Miller, 354 So. 2d 925, 926 (Fla. 2d DCA 1978); Karten v. Woltin, 23 So. 3d 839, 840-41 (Fla. 4th DCA 2009).[3]

In other places, Plaintiffs curiously allege that "the distributions the Kickback Defendants received were made with the actual intent to hinder, delay or defraud…**the Partnerships themselves**," (Am. Compl. ¶ 95), which is completely nonsensical because it suggests that the Partnerships were simultaneously the "creditors" (the parties against whom the fraud was perpetrated) and the "debtors" (the parties who made the transfers). A quick reading of the statute demonstrates that, under FUFTA, a party cannot be both the creditor and the debtor at the same time. See § 726.102, Fla. Stat. (defining "creditor" as "a person who has a claim" and "debtor" as "a person who is liable on a claim").[4]

[3] Further, it is unclear how counsel for the Partnerships (the alleged debtors) could ethically represent the interests of the partners (the alleged creditors) when, under the statutory text, the interests of the debtors and creditors are necessarily adverse. See § 726.102, Fla. Stat.

[4] Plaintiffs' amended complaint also neglects to identify when the alleged transfers occurred, thus making it difficult for Defendants to frame a responsive pleading. Plaintiffs should be required to file a more definite statement which includes the dates of the supposedly fraudulent transfers, and Defendants alternatively request such relief under Rule 1.140(e).

Because Count V is a misapplication of the fraudulent transfer statute, it should be dismissed.

CONCLUSION

For the reasons set forth above, Defendants respectfully request this Court to dismiss Plaintiffs' amended complaint.

Date: January 8, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that, on January 8, 2014, a copy of the foregoing was served by e-mail (via e-filing) upon:

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