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

Case No. 12-034121 (04)

P &S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, *et al.*,

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, a charitable trust, *et al.*,

Defendants.

_____/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT ETTOH, LTD'S MOTION TO DISMISS COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P"), *et al.*, (collectively and individually referred to as, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Ettoh Ltd's ("Defendant") Motion to Dismiss Plaintiffs' Complaint and Incorporated Memorandum of Law (the "Motion").

I. STATEMENT OF FACTS

This lawsuit stems from Defendants, and certain other Partners of the Partnerships, receiving and retaining improper distributions from the Partnerships. While some partners lost millions of dollars, Defendants, who invested $510,000 in S&P, received $797,454.40 – a return of approximately 64%. This return was only possible because Defendant received distributions

that it was not entitled to. A portion of those distributions rightfully belong to the Plaintiffs and should be distributed to the Partners through the court-approved distribution method.

Under the Partnership Agreements, all of the Partners were to receive distributions of profits at least once per year. *See* Section 5.02 of **Exhibits B and C** to the Complaint (emphasis added).[1] If the Partnerships distributed any profits to the Partners, those profits had to be distributed in equal proportion to all Partners depending on each Partner's pro rata share in the Partnerships as of the date of the distribution. *Id.*

After approximately one year of litigation because of, *inter alia*, the improper activities of Michael Sullivan ("Sullivan"), the Partnerships' former Managing General Partner, and others, a Conservator was appointed over the Partnerships. It wasn't until after Sullivan was removed as Managing General Partner in 2012 that an investigation of the Partnerships' books and records revealed that Defendant and certain other partners received improper distributions from the Partnerships. For example, in direct contravention of the plain terms of the Partnership Agreements, Defendant and other partners received, on a net basis, more money than they invested; i.e., "Net Winners." At the same time, other partners (the "Net Losers") received less money than they invested.

In November 2012, after extensive litigation that eventually led to Sullivan's removal in August 2012, Margaret Smith, then Managing Partner of the Partnerships, sent a Demand Letter to Defendant, under Section 10 of the Partnership Agreements, notifying it of the improper distributions that it received and requesting the return of the funds in excess of Defendant's

[1] The Partnerships' partnership agreements are identical in all material respects and are collectively referred to as the Partnership Agreements. The Partnership Agreements are attached to the Amended Complaint as **Exhibits B and C,** respectively.

investment. However, Defendant and certain other Net Winners refused to comply with the Demand Letter and this action was filed against them in December 2012.

In January 2013, the Conservator was appointed. The Conservator sought to wind up the Partnerships because the Partnerships could no longer function due to protracted litigation regarding their management and the Net Winners' refusal to return the improper distributions received. In October 2013, the Conservator received Court approval to wind up the Partnerships and sent out new Demand Letters to the Net Winners in October 2013, that again requested that the Net Winners return the amounts in excess of their contributions, as required by Fla. Stat. § 620.8807, due to the winding up of the Partnerships' business. Plaintiffs then filed their Amended Complaint against the Net Winners who refused to return those amounts.

Although Plaintiffs filed an Amended Complaint, Defendant continues to rely on the Motion, which seeks to dismiss the original Complaint. As set forth below, the Motion should be denied because many of the argument set forth therein have been rendered moot.

II. STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). The court is confined to consideration of the allegations found in the four corners of the complaint. *Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998). A motion to dismiss should be denied when a complaint sufficiently states a cause of action. *See Solorzano v. First Union Mortgage Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565-66 (Fla. 1971) (holding error to dismiss a complaint that contains sufficient allegations to

acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO DISMISSAL ON THE GROUNDS OF STATUTE OF LIMITATION.

Defendant argues that Counts I through V should be dismissed because they are time barred.

A motion to dismiss may only be granted on statute of limitations grounds "where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007). When the defense is not clearly and unequivocally apparent on the face of the complaint, any such matters are property asserted and determined by affirmative defenses. *Pontier v. Wolfson*, 637 So. 2d 39, 40 (Fla. 2d DCA 1994) ("In this case, the appellee did not file an answer containing affirmative defenses and a review of the four corners of the appellant's complaint does not indicate that the applicable statute of limitations bars his action").

Instead of making their own statute of limitations arguments, Defendant adopts the arguments of others, and Plaintiffs similarly adopt herein the arguments they have set forth in response to the other motions.

Nonetheless, it is worth repeating that as Plaintiffs have plad that they have timely served demand letters on Defendant, and as a matter of law, as here "where the contract requires a demand as a condition to the right to sue, the statute of limitations does not commence until such a demand is made" (*Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999)), Defendant

cannot prevail on a motion to dismiss on the grounds of statute of limitations simply by denying that such a demand was timely because any such determination is an issue of fact. Such action is especially inappropriate given the facts of this case, where a Conservator was required to be appointed to pursue the claims of the Plaintiffs. Plaintiffs' refer the Court to Plaintiffs' Response and Memoranda in Opposition to Defendant Ersica P. Gianna's Motion to Dismiss, Motion for More Definite Statement, and Motion to Compel Arbitration and Incorporated Memorandum of Law for a full explanation of why Plaintiffs' claims are timely in this action.

To the extent that Defendant sets forth its own argument, Defendant attempts to defeat Plaintiff's negligence claim and circumvent its obligations under Fla. Stat. § 620.8807 by claiming that it had withdrawn from the Partnerships. However its argument ignores the plain language of section 10.02 of the Partnership Agreements.

Section 10.02 of the Partnership Agreements provides in relevant part that "[n]o assignment, transfer or TERMINATION of a defaulting Partner's INTEREST as provided in this Agreement shall relieve the defaulting partner from any personal liability for outstanding indebtedness, liabilities, liens or obligations relating to the Partnership that may exist on the date of the assignment, transfer, OR TERMINATION." As Defendant is clearly a defaulting partner, by virtue of its failure to remit payment to the Partnerships after receiving notice of the fact that it was not entitled to retain money, its termination does not affect its obligations to the Partnership. Additionally, Defendant's termination does not relieve it of liability because Fla. Stat. § 620.8703, provides that a "partner's dissociation does not, by itself, discharge a partner's liability for partnership obligation incurred before dissociation."

Defendant contends that the provisions of Section 10.02 are inapplicable to it because it was not removed from the partnerships after a default under Section 10.01. However,

Defendant's obligations were still incurred after the transfer of its interest in the Partnerships. Article Nine of the Partnership Agreements defines the circumstances where a partner's interest would be transferred or assigned, and explicitly includes the "Withdrawal of Partners" as a circumstance that constitutes a transfer or assignment as contemplated by the Partnership Agreements. While the terminology used is different because a Partner may withdraw from the Partnerships without a vote of 51% of the other partners, such a withdrawal still constitutes a transfer of the partner's interest. Because Defendant's indebtedness arose at the time of its purported withdrawal or transfer from the Partnerships, Plaintiffs claims are not time barred.

II. SECTION 14.03 OF THE PARTNERSHIP AGREEMENTS DOES NOT SHIELD DEFENDANT FROM LIABILITY.

Defendant contends that Plaintiffs' claims are barred by Section 14.03 of the Partnership Agreement because it provides that "THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND OMISSIONS INVOLVING INTENTIONAL WRONGING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES . . ." However, Defendant's interpretation of the language in Section 14.03 is self-serving, and the ambiguous language of Section 14.03 should instead be interpreted "in the light most favorable to plaintiffs." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980).

Here, Plaintiffs' claims are not precluded by Section 14.03. The Amended Complaint alleges that Sullivan intentionally wronged the Partnerships, and breached his fiduciary obligations to the Partnerships, by making improper distributions to certain Partners, and that the damages sought against Defendant here arose from those breaches and wrongdoings. It was those breaches and wrongdoings that lead to the improper distributions received and retained by Defendant, and the plain text of Section 14.03 states that a Partner may be liable, regardless of

who acted intentionally so long as the "acts and/or omissions" "involv[ed]" intentional wrongdoing, fraud, or a breach of fiduciary duties[,]" – as they do here. Further, Defendant itself intentionally wronged the Plaintiffs when it elected to retain distributions which it would not have otherwise been entitled to by refusing to comply with demand letters that it received in 2012 and 2013. As such, Defendant is not entitled to the protection of Section 14.03.

Moreover, Plaintiffs' Second Amended Complaint unequivocally states that Defendant breached its fiduciary duties by failing to return the improper distributions received or hold those funds in trust. Accordingly, the Second Amended Complaint alleges that Defendant breached its fiduciary duty, and therefore renders Defendant's arguments concerning Section 14.03 moot.

In sum, the allegations in the Amended Complaint unequivocally demonstrate that Defendant performed, or that the harm caused by Defendant was sufficiently related to, "acts and omissions involving intentional wronging, fraud, and breaches of fiduciary duties", such that Defendant may not avoid liability as a result of Section 14.03.

III. COUNTS III AND IV ARE PROPERLY PLED IN THE ALTERNATIVE.

Defendant claims that Counts III and IV of the Complaint should be dismissed because a plaintiff cannot recover for claims of unjust enrichment and money had and received where an express contract exists covering the same matter. (Motion at 7). This argument ignores well settled law allowing a plaintiff to plead in the alternative.

Pursuant to Florida Rule of Civil Procedure 1.110(g), a pleader "may set up in the same action as many claims or causes of action or defenses in the same right as the pleader has, and claims for relief may be stated in the alternative." *Banks v. Lardin*, 938 So. 2d 571, 577 (Fla. 4th DCA 2006) (quoting Fla. R. Civ. P. 1.10(g)); *DiChristopher v. Bd. of Cnty. Com'rs*, 908 So. 2d 492, 493 (Fla. 5th DCA 2005) ("A Plaintiff may . . . demand judgment in his favor on several

bases, even mutually exclusive ones."). Moreover, even if a plaintiff is required to elect a cause of action, "the election of a claim would not logically occur at a pleading stage." *In re Estate of Trollinger*, 9 So. 3d 667, 668 (Fla. 2d DCA 2009); *Banks*, 938 So. 2d at 577 ("[Defendant] argues that . . . no cause of action can exist where there is also alleged to be an express contract concerning the same subject matter . . . The trial court did not grant summary judgment on this ground and we find, at this point in the proceedings, the trial court may not determine the inconsistency of the claims pled.");[2] *Feldkamp v. Long Bay Partners, LLC*, Case No. 2:09-cv-253-Ftm-29SPC, slip op at 13 (M.D. Fla. Sept. 14, 2010) (denying a Motion to Dismiss because "[w]hile plaintiffs cannot recover under both theories, they need not make an election at this state of the proceedings.") (applying Florida law).[3]

The fact that the terms of the Partnership Agreements provide for certain distributions does not preclude Plaintiffs from asserting claims for unjust enrichment or money had and received in the alternative. Defendant relies on *Berry v. Budget Rent A Car Sys., Inc.*, 497 F. Supp. 2d 1361 (S.D. Fla. 2007), *Hall v. Humana Hosp. Daytona Beach*, 686 So.2d 653 (Fla. 5th DCA 1997) and *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, and argues that a claim for unjust enrichment or for money had and received cannot be maintained where there is an express contract concerning the same subject matter.[4] However, unlike the case at bar, the cases on which Defendant rely involve a simple overpayment without any allegations of

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[2] As courts apply a more stringent standard in granting a motion to dismiss than a motion for summary judgment, the holding in *Banks* is applicable to the instant Motion. *See* Fla. R. Civ. P. 1.510.

[3] Federal Rule of Civil Procedure 8(d)(2), (3) is analogous to Florida Rule of Civil Procedure 1.10(g). *Compare* Fed. R. Civ. P. 8(d)(2), (3) *with* Fla. R. Civ. P. 1.10(g).

[4] Defendant also misstates the law in its selective quotations from *Hall.* Despite Defendant's contentions, the *Hall* Court "affirmed the grant of summary judgment in a case in which excessive medical charges were alleged based on the fact that payment had voluntarily been made[,]" and not because of the existence of an express contract. *Greenfield v. Manor Care, Inc.*, 705 So. 2d 926, 930 (4th DCA 1997) (citing *Hall*, 686 So. 2d at 657).

fraudulent or inequitable conduct. *See Berry*, 497 F. Supp. 2d 1361 ("Plaintiffs must allege some fraud or imposition through which the money was obtained, and they have failed to so."). Specifically, the Amended Complaint alleges that due to the inequitable conduct of the Managing General Partners, Defendant received more money than it was entitled to. Moreover, Defendant acted inequitably because it refused to return funds to the Partnerships, despite being aware of the fact that it was not entitled to retain them.

"An action for money had and received or the more modern action for unjust enrichment . . . is an equitable remedy requiring proof that money had been paid due to fraud, misrepresentation, imposition, duress, undue influence, mistake, or as a result of some other grounds for intervention by a court of equity." *Hall*, 686 So. 2d at 656 (citing *Moore Handley, Inc. v. Major Reality Corp.*, 340 So. 2d 1238 (Fla. 4th DCA 1976)). As the overpayment at issue in this matter occurred as a result of the managing partners' fraudulent conduct, Plaintiffs may properly assert their claims for unjust enrichment and money had and received. *Id.*; *see also Banks*, 938 So. 2d at 577.

IV. PLAINTIFF'S CLAIM FOR FRAUDULENT TRANSFER IS ADEQUATELY PLED

Defendant lastly contends that Count V of the Complaint must be dismissed because it must be pled with particularity under Florida Rule of Civil Procedure 1.120(b). Defendant's contention is misplaced.

First, Fla. R. Civ. P. 1.120(b) states that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit. Malice, intent, knowledge, mental attitude, and other condition of mind of a person may be averred generally." However, the particularity requirement relied upon by Defendant in Fla. R. Civ. P. 1.120(b) does not apply where, as here, the causes of action arise

out of fraudulent transfer claims. Analogous Federal case law shows particularity is not required for fraudulent transfer claims.

Fed. R. Civ. P. 9(b) is materially similar to Fla. R. Civ. P. 1.120(b) and states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

Although there is a split in the Eleventh Circuit, many courts that have considered whether Fed. R. Civ. P. 9(b)'s particularity requirement applies to the Florida Uniform Fraudulent Transfer Act find that it is inapplicable. *See Steinberg ex rel. Lancer Mgmt. Group LLC v. Alpha Fifth Group,* Case No. 04–60899–CIV, 2010 WL 1332840, at *2 (S.D. Fla. March 30, 2010) (Marra, J.) (finding UFTA claims are "significantly different from other fraud claims to which Rule 9(b) is directed," and that Rule 9(b) therefore does not apply to claims brought under the Florida UFTA); *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, 07-80633-CIV, 2008 WL 660100, at *6 (S.D. Fla. Mar. 7, 2008) ("The Court concludes that the heightened pleading standard of Rule 9(b) does not apply to claims brought under the FUFTA").

Additionally, "Courts relax Rule 9(b)'s heightened pleading requirement for plaintiffs who are trustees or receivers who are 'third party outsiders to the fraudulent transactions' with only second-hand knowledge of the fraudulent acts." *Allstate Ins. Co. v. Fed. Sav. Bank*, 12-60077-CIV, 2012 WL 2953656, at *3 (S.D. Fla. July 19, 2012).

Such is the case here.

Second, in support of its argument, Defendant cites to numerous cases referring to the heightened pleading requirements for common law fraud claims. However, those cases are inapposite because a fraudulent transfer claim is materially different than a claim for fraud.

To state a common law claim for fraud, a plaintiff must "specifically identify misrepresentation or omissions of fact, as well as the time, place or manner in which they were made," because one of the elements of an action in fraud is the making of a false statement or omission. *See Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 2d 914, 917 (Fla. 3d DCA 2009). A fraudulent transfer claim, on the other hand, does not contain the element of false representations or omissions. *See, e.g.*, *Steinberg ex rel. Lancer Management Group LLC v. Alpha Fifth Group*, 2010 WL 1332840, at *2 (S.D. Fla. Mar. 30, 2010) (quoting *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, 07-cv-80633, 2008 WL 660100, at *5 (S.D. Fla. Mar 7 2008)). Further, in the context of fraudulent transfer actions, "[t]he fraudulent act, the clandestine act of hiding money, is allegedly committed by a defendant and another, to the exclusion of the plaintiff." *Id.* Thus, no plaintiff can plead with particularity the facts and circumstances which constitute fraudulent acts in the context of an action seeking to avoid a fraudulent transfer. Moreover, as stated by the Florida Supreme Court, "[w]hen the legal effect of a conveyance is to hinder or delay creditors, the intent [to defraud] will be presumed, regardless of the actual motives of the parties." *Ajad Munim, MD, PA v. Azar*, 648 So. 2d 145, (Fla. 4th DCA 1994) (citing *J.I. Kelly Co. v. Pollock & Bernheimer*, 49 So. 934, 935 (Fla. 1909) (internal citations omitted)) (alterations in original). Accordingly, it is inappropriate to import the 1.120(b) pleading requirements that apply to common law fraud claims into fraudulent transfer actions as well.[5]

[5] This conclusion is also supported by Fla. Stat. § 726.106 which provides in relevant part that:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Defendant also contends that Count IV fails to meet the general pleading requirements of Fla. R. Civ. P. 1.110. Specifically, Defendant claims that there are no allegations that it caused the distributions at issue, and that the Complaint does not specifically allege the indicia of its fraudulent conduct established in Fla. Stat. § 726.105(2). However, Defendant's argument is not supported by the law.

Fla. Stat. § 726.105(2) sets forth specific circumstances which indicate that Defendant acted with the requisite intent to maintain a cause of action. Here, the Complaint contains allegations of many of those indicia. The allegations include statements that: (1) Defendant was an insider; (2) the transfer was concealed from the Partnerships; (3) the value of consideration received was not reasonably equivalent to the value of the asset transferred; and (4) the transfer occurred shortly before and shortly after a substantial debt was incurred. *See* Fla. Stat. § 725.105(2). The aforementioned allegations provide evidence of the indicia of fraud set forth in Fla. Stat. § 725.105(2). As such, Defendant's Motion should be denied.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Ettoh, Ltd's Motion to Dismiss Plaintiff's Complaint, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Fla. Stat. § 726.106. The fact that nowhere in the statute's definition of "fraudulent" is the term "misstatement," or "omission" demonstrates that showing mandated under Fla. R. Civ. P. 1.120(b) is not required. *See Eagletech Communs., Ins. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 861-62 (Fla. 4th DCA 2012) ("In order for a claim of fraud . . . to survive a motion to dismiss it must allege fraud with the requisite particularity required by Florida Rule of Civil Procedure 1.120(b), including who made the false statement, the time frame in which it was made and the context in which the statement was made."). Bankruptcy law also provides for the same result. *See In re F &C Servs., Inc.* 44 B.R. 863, 868-69 (Bankr. S.D. Fla. 1984) (citing cases).

Dated: January 24, 2014

By: s/ Leonard K. Samuels

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail on this 24 day of January, 2014 upon the following:

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