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

Case No. 12-034121 (07)

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 MOLCHAN DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS WITH INCORPORATED MEMORANDUM OF LAW

Plaintiffs, P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P"), (collectively and individually referred to as, the "Partnerships") and Philip Von Kahle as Conservator on behalf of the Partnerships (the "Conservator" and, with the Partnerships, the "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to the Molchan Defendants' Motion for Judgment on the Pleadings with Incorporated Memorandum of Law (the "Motion"). In support thereof, Plaintiffs state as follows:

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, Defendant Alex Molchan made $51,828.46, Defendant Janet B. Molchan

Revocable Trust made $116,343.91, and Defendant Susan Molchan made $68,077.39 from P&S. These returns were only possible because Defendants received distributions that they were 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 Defendants and certain other partners received improper distributions from the Partnerships. In direct contravention of the plain terms of the Partnership Agreements, Defendants 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 lead to Sullivan's removal in August 2012, Margaret Smith, then Managing Partner of the Partnerships, sent a Demand Letter to Defendants, under Section 10 of the Partnership Agreements, notifying them of the improper

[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.

distributions that they received and requesting the return of the funds in excess of Defendants' investment. However, Defendants 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.

In response, Defendants filed the Motion seeking judgment on the pleadings. As set forth below, the Motion should be denied.

STANDARD OF REVIEW

"A motion for judgment on the pleadings filed pursuant to Florida Rule of Civil Procedure 1.140(c) must be decided wholly on the pleadings and may only be granted if the moving party is clearly entitled to judgment as a matter of law." *Swim Indus. Corp. v. Cavalier Mfg., Co.*, 559 So. 2d 301, 301-2 (Fla. 2d DCA 1990). In assessing whether to grant a such a motion, all of the non-moving party's material allegations are taken as true, and those of the movant are taken as false. *Id.* Otherwise, the standard used in addressing a motion for judgment on the pleadings is the same as a motion to dismiss. *Domres v. Perrigan*, 760 So.2d 1028, 1029 (Fla. 5th DCA 2000) (internal citations omitted).

In reviewing a motion for judgment on the pleadings, courts use the same legal test as a motion to dismiss, and 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); *Domres v. Perrigan*, 760 So. 2d at 1029.

The Court must "accept all well-pleaded facts and reasonable inferences from those facts as true, and confine [itself] to the allegations within the four corners of the complaint[,]" and a motion to dismiss should be denied when a complaint sufficiently states a cause of action. *Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc.*, 119 So. 3d 1288, 1290 (Fla. 4th DCA 2013); *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. DEFENDANTS' ALLEGED WITHDRAWAL DOES NOT DEFEAT PLAINTIFFS' NEGLIGENCE CLAIM RELATED TO DEFENDANTS' BREACH OF FLA. STAT. § 620.8807.

Fla. Stat. § 620.8807 establishes a duty by Defendants to reconcile debts owed the Partnerships upon the winding down of the Partnerships. Defendants breached that duty by failing to "contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account" – as is required by Fla. Stat. § 620.8807 – upon the winding up of the Partnerships, and their breach caused the Partnerships to incur damages, as alleged in the Complaint. Therefore, Count I states a cause of action and the Motion should be denied.

Defendants argue in the Motion that Fla. Stat. § 620.8807 does not apply to them because they allegedly dissociated from the Partnerships.[2] *See* Motion at 3. This argument is without merit and again improperly assumes and alleges facts that are outside the four corners of the Amended Complaint and is not alleged in any of the pleadings. Defendants contend that they are somehow entitled to judgment because they withdrew from the Partnerships by virtue of the fact that they did not receive distributions since 2001, at the latest. However, there is no exhibit attached to any pleadings that conclusively demonstrates that Defendants provided written notice of their intent to withdraw from the Partnership, as contemplated by Section 9.02 of the Partnership Agreements, which means that the Court, cannot, at this juncture, enter judgment on the pleadings based on of Defendants' claims of dissociation.[3] *See Domres v. Perrigan*, 760 So. 2d 1028 (Fla. 5th DCA 2000).

Nevertheless, Fla. Stat. § 620.8807 applies to Defendants regardless of their purported dissociation from the partnership, and there is no indication in Fla. Stat. § 620.8807 that it applies only if any dissociation results in dissolution and winding up of partnership business.

Even if Defendants are no longer partners of the Partnership and thus do not owe any duties to the Partnership — which is contrary to allegations in the Amended Complaint — Defendants' duty to return the improper distributions to the Partnership under Fla. Stat. § 620.8807 is preserved by virtue of Section 10.02 of the Partnership Agreement. Section 10.02 of the Partnership Agreement provides in relevant part that "[n]o assignment, transfer OR TERMINATION of a defaulting Partner's INTEREST as provided in this Agreement shall

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[2] Fla. Stat. § 620.8603(1) states that "[i]f a partner's dissociation results in dissolution and winding up of the partnership business, ss. 620.8801-620.8807 apply; otherwise ss. 620.8701-620.8705 apply.

[3] Section 9.02 of the Partnership Agreements states that "[a]ny partner may withdraw from the Partnership at any given time . . . provided, however, that the withdrawing partner shall give at least thirty days (30) written notice."

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 Defendants are clearly defaulting partners, by virtue of their receipt of improper distributions and their failure to remit payment to the Partnership after receiving notice of the fact that they was not entitled to retain funds received, any termination or dissociation does not affect their obligations to the Partnership at winding up to "contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account", as is required by Fla. Stat. § 620.8807.

Defendants' duty under Fla. Stat. § 620.8807 is also supported by Fla. Stat. § 620.8703, which provides that a "partner's dissociation does not, by itself, discharge a partner's liability for partnership obligation incurred before dissociation." Because Defendants' obligation to the Partnership arose before Defendants' purported dissociation – due to the improper distributions that they received as partners – Defendants are under a duty to return the improperly retained funds, and that duty is not affected by Defendants' claims that they withdrew or dissociation from the Partnerships.

Defendants contend that the provisions of Section 10.02 are inapplicable to them because their purported dissociation — an argument which should not even be considered at this juncture — does not constitute a transfer of their interest in the Partnerships. However, 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 a partner's

interest under the Partnership Agreements. Because Defendant's indebtedness arose at the time of its purported withdrawal or transfer from the Partnerships, Plaintiffs claims are not time barred.

Accordingly, the Motion should be denied because Count I of the Amended Complaint states a cause of action against Defendants.

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 Defendants here arose from those breaches and wrongdoings. It was those breaches and wrongdoings that lead to the improper distributions received and retained by Defendants, 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, Defendants themselves intentionally wronged the Plaintiffs when they elected to retain distributions which

she would not have otherwise been entitled to by refusing to comply with demand letters that she received in 2012 and 2013. As such, Defendants are not entitled to the protection of Section 14.03.

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

Finally, the Second Amended Complaint unequivocally alleges that Defendants breached their fiduciary duty of loyalty, and accordingly, any argument that Section 14.03 mandates dismissal has been rendered moot.

III. PLAINTIFFS HAVE STANDING TO PURSUE THE INSTANT CLAIMS

Defendants rely on a New York federal appellate Opinion concerning the Trustee in bankruptcy's ability to assert claims on behalf of creditors against third parties, and argue that Plaintiffs lack standing to pursue the instant cause of action. (Motion at 5-6) (citing *In re: Bernard L. Madoff Investment Securities*, 2013 WL 3064848 (2d Cir. June 20, 2013)). However, Defendants' argument misunderstands the nature of the instant cause of action.

Unlike the Madoff avoidance actions described above, which sought to impose liability for breaches of fiduciary duty and loyalty, against third parties and not net winners, and were barred by doctrines of New York Law, Plaintiffs case is premised on the concept that funds, which otherwise constitute property of the P&S and or S&P were improperly distributed to Defendants to conceal the breach of fiduciary duties by the former managing general partners. As those funds, were directly transferred from the Partnerships, and were transferred to

Defendants without providing any reasonable value, and in direct contravention of the Partnership Agreements, they made to enable the former managing general partner to deplete the Plaintiffs' assets and defraud creditors. Accordingly, and because the funds at issue were transferred directly from the Partnerships, the right to recover the funds clearly belongs to the Partnerships. Consequently, Plaintiffs have standing to pursue the instant claims.

Even if Defendants' reliance on *Madoff* was justified in the circumstances, it runs contrary to binding Florida Precedent. Specifically, on January 8, 2014 the Fourth District Court of Appeal issued an opinion in the matter of *Effective Teleservices, Inc. v. Allerd Charles Smith*, Case Nos. 4D-12-3952 and 4D12-3957 (Fla. 4th DCA Jan. 8, 2014), where the Fourth District Court of Appeals held that an assignee for the benefit of creditors held the exclusive authority to pursue fraudulent transfer claims on behalf of an assignment estate. The basis for the *Allerd* opinion was that an assignee, like a Conservator, has obtained all assets of the assignor which includes the right to pursue fraudulent transfer claims, and is obligated to distribute all of the assets of the assignor under a priority scheme set forth by statute, subject to court supervision.[4] The Court therefore found that allowing a creditor to pursue a fraudulent transfer claim would undermine the purpose of the assignment and undermine the priorities established under state law.

The Conservator, like an assignee has taken control of all of the assets of the Partnerships, which includes the fraudulent transfer claims it could pursue. Moreover, abrogating

[4] "An assignment for the benefit of creditors is an alternative to bankruptcy and allows a debtor to voluntarily assign its assets to a third party [assignee] in order to liquidate the assets to fully or partially satisfy creditors' claims against the debtor." *Hillsborough Cnty. v. Lanier,* 898 So. 2d 141, 143 (Fla. 2d DCA 2005); *see also* § 727.104(1)(b), Fla. Stat. (2010). The stated intent of Chapter 727 "is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter." § 727.101, Fla. Stat. (2010).

the Conservator's standing would hinder him from to marshaling the assets of the Conservatorship estate, and distribute them through a court approved means of distribution. Accordingly, and under the holding of *Allerd Charles Smith*, Plaintiffs have standing to pursue Count V of the Amended Complaint.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendants Defendants' Motion for Judgment on the Pleadings, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

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 upon counsel identified below registered to receive electronic notifications and regular U.S. mail upon *Pro Se* parties this 24th day of January, 2014, upon the following:

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