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").

BRIEF SUMMARY

The Motion should be denied for five reasons: (i) Defendant's denial that it received the distributions at issue is an affirmative defense and is not properly raised by a motion to dismiss; (ii) all material portions of the Partnership Agreements have been attached and incorporated into the Complaint, and the lack of the signature page to the Partnership Agreement is irrelevant; (iii)

Section 14.03 of the Partnership Agreements does not shield Defendant from liability in this case; (iv) contrary to Defendant's belief, Plaintiffs are not asserting an independent cause of action under Fla. Stat. § 620.8807; and (v) Plaintiffs' claims are not subject to dismissal on the basis of statute of limitations because the Complaint alleges that Plaintiffs' fraudulent transfer claim was brought within one year of when it reasonably could have been discovered and the remainder of Plaintiffs' claims did not accrue until the winding up of the Partnerships or Defendant's receipt of demand letters for the amounts owed.

In support thereof, Plaintiffs state as follows:

STATEMENT OF FACTS

This lawsuit stems from Defendant, and certain other Partners of the Partnerships, receiving and retaining improper distributions from the Partnerships. While some partners lost millions of dollars, Defendant, who invested $180,000 in S&P, received $260,000 – a return of approximately 69%. 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.*

[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.

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 lead 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 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.

In response, on or about November 14, 2013, Defendant filed the Motion seeking to dismiss the Amended Complaint. As set forth below, the Motion should be denied.

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 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 DEFENDANT'S BREACH OF FLA. STAT. § 620.8807.

Fla. Stat. § 620.8807 establishes a duty by Defendant to reconcile debts owed the Partnerships upon the winding down of the Partnerships. Defendant 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 its 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.

Defendant argues in the Motion that Fla. Stat. § 620.8807 does not apply to it because its alleged dissociation did not result in the winding down of the Partnerships.[2] *See* Motion at 7. This argument is also without merit and again improperly assumes and alleges facts that are outside the four corners of the Amended Complaint.

Nevertheless, Fla. Stat. § 620.8807 does apply to Defendant because it applies without limitation at the winding up of a partnership's business – 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.

Moreover, even if Defendant is no longer a partner of the Partnership and thus does not owe any duties to the Partnership – which is contrary to allegations in the Amended Complaint, and is therefore not properly considered at this juncture — Defendant's 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 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 receipt of improper distributions and its failure to remit payment to the Partnership after receiving notice of the fact that it was not entitled to retain funds received, any termination or dissociation does not affect its obligations to

[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.

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.

Defendant's 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 Defendant's obligation to the partnership arose before Defendant's dissociation – due to the improper distributions that it received while a partner – Defendant is under a duty to return the improperly retained funds, and that duty is not affected by Defendant's purported withdrawal or dissociation from the Partnerships.

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.

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

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 herself intentionally wronged the Plaintiffs when she 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, Defendant is not entitled to the protection of Section 14.03.

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.

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

PLAINTIFFS HAVE STANDING TO PURSUE THE INSTANT CLAIMS

Defendant relies on an unpublished Second Circuit Opinion concerning the Trustee in the Madoff Bankruptcy's ability to assert claims on behalf of creditors against third parties, and argues 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, Defendant's argument misunderstands the nature of the instant cause of action.

Unlike the Madoff avoidance actions described above, 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, The transfers were therefore made to enable the former managing general partner to deplete the Partnerships 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 , Plaintiffs have standing to pursue the instant claims which is distinguishable from the case cited by Defendant, in that this case seeks to reconcile direct harms to the Partnerships that were, at least in part, caused by Defendant.

Even if Defendant's 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 Appeals issued an opinion in the matter of *Allred Charles Smith v. Effective Teleservices, Inc.*, where it 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 opinion was that an assignee, has obtained all assets of the assignor which include the right to pursue fraudulent transfer claims, and 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 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 *Allred Charles Smith*, Plaintiffs have standing to pursue Count V of the Amended Complaint.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Herbert Irwig Revocable Trust's Motion to Dismiss Plaintiffs' Amended Complaint Or In The Alternative, Motion For More Definite Statement, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: December 20, 2013

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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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