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 DEFENDANT CATHERINE SMITH'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P"), (collectively and individually referred to as, the "Partnerships" or "Plaintiffs") and Philip Von Kahle as Conservator on behalf of the Partnerships (the "Conservator"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Catherine Smith's ("Defendant") Motion for Judgment on the Pleadings.

BRIEF SUMMARY

The Motion should be denied for three reasons. First, Plaintiffs' claims set forth in Counts I-IV of the Complaint are not subject to dismissal on the basis of statute of limitations because those claims did not accrue until the winding up of the Partnerships or Defendant's

receipt of demand letters for the amounts owed. Second, the appointment of the Conservator justifies finding that Plaintiffs' claims are timely. Third, Section 14.03 of the Partnership Agreements does not shield Defendant from liability in this case.

For the above reasons, and as further set forth below, the Motion should be denied. 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 $185,000 in S&P, received $340,572.02 – a return of approximately 54%. 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

[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.

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 her of the improper distributions that she 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 December 19, 2013, Defendant filed the Motion seeking to dismiss the Amended Complaint. 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.

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 1028, 1029 (Fla. 5th DCA 2000) (internal citations omitted).

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 for judgment on the pleadings 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).

I. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO DISMISSAL BASED ON THE STATUTE OF LIMITATIONS.

A motion for judgment on the pleadings, and thus 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").

Defendants argue in the Motion that Fla. Stat. § 620.8807 does not apply to her because she allegedly dissociated from the Partnerships.[2] *See* Motion at 7. This argument is without merit and again improperly assumes and alleges facts that are outside the four corners of the Amended Complaint, which are also not alleged in any of the pleadings. Defendant contends that she is somehow entitled to judgment because she withdrew from the Partnerships by virtue of the fact that she did not receive distributions since 2005. However, there is no exhibit attached to any pleadings that conclusively demonstrates that Defendant provided written notice of her 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

[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.

Defendants' claims of dissociation.[3] *See Domres v. Perrigan*, 760 So. 2d 1028 (Fla. 5th DCA 2000).

A. Plaintiffs' Negligence Claim is Not Barred By the Statute of Limitations.

First, Defendant alleges that Plaintiffs' negligence claim, Count I of the Amended Complaint, is barred by a four year statute of limitations because Plaintiffs allegedly filed this action seven years after the last distribution was made to Defendant. This argument misunderstands Plaintiffs' claim.

As set forth above, Plaintiffs' negligence claim is based on Defendant's breach of the duty imposed by Fla. Stat. § 620.8807, and that statute does not obligate a partner to return the amounts in excess of the charges over the credits in their account until a partnership begins to wind up its business. *See* Fla. Stat. § 620.8807 ("In winding up a partnership's business. . ."). The date of the last distribution to Defendant is therefore irrelevant. As the Partnerships did not begin the process of winding up until at the earliest Margaret Smith was appointed as Managing General Partner in August 2012, or this Court granted the Conservator's Motion for Summary Judgment in October 2013, any claim related to Defendant's breach of its duty to "contribute to the partnership an amount equal to any excess of the charges over credits in the partner's account[,]" did not accrue until after October 2013. *See Clay Elec. Co-Op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). Count I of the Amended Complaint, which was filed on October 29, 2013, is therefore timely because it was asserted less than a month after the cause of action accrued.

[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."

Moreover, even if Defendant's allegation that Defendant is no longer a partner of the Partnership and thus does not owe any duties to the Partnership is true – which is contrary to allegations in the Amended Complaint, and therefore cannot be 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. *See Swim Indus. Corp. v. Cavalier Mfg Co.*, 559 So. 2d 301 (Fla. 2d DCA 1990) (holding judgment on pleadings must be decided wholly on pleadings).

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 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 continuing duty under Fla. Stat. § 620.8807 is also supported by Fla. Stat. § 620.8703(1), 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 S&P arose before Defendant claims she dissociated – due to the improper distributions that she 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.

B. Plaintiffs' Breach of Contract, Unjust Enrichment, and Money Had and Received Claims are Not Barred By the Statute of Limitations.

Defendant similarly argues that Plaintiffs' claims for Breach of Contract (Count II), Unjust Enrichment (Count III), and Money Had and Received (Count IV) are barred by the statute of limitations because the statute of limitations for those claims accrued when Defendant last received a distribution in 2005, and the longest of the statute of limitations for those claims is five years. This argument fails for three reasons.

First, Article 10.01 of the Partnership Agreement sets forth the instances when a partner materially breaches the Partnership Agreement. Among other events, Article 10.01(b) states that "the violation of any of the other provisions of this Agreement and failure to remedy or cure that violation within (10) days after written notice of the failure from the Managing General Partners" shall be deemed to be a default by a Partner. In other words, a material breach of the Partnership Agreements does not occur until a partner fails to remedy or cure the conduct specified by notice under Article 10.01(b), as they are under no obligation to remedy or cure their violation until they receive that notice.

"[W]hen a default clause contains a notice provision, it must be strictly followed." *In re Colony Square Co*, 843 F.2d 479, 481 (11th Cir. 1988); *Abecassis v. Eugene M. Cummings, P.C.*, 09-81846-CIV, 2010 WL 9452252, *5 (S.D. Fla. June 3, 2010) ("The Agreement specifically required notice of any alleged breach, as well as an opportunity to cure said breach. A party may not sue for breach of contract where the party failed to comply with the requirements of the contract's default provision"). "As a general rule of contract law, 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) (reversing a trial court's order granting summary judgment).

In this case, Plaintiffs' claims for breach of contract, unjust enrichment, and money had and received did not accrue until November 23, 2012 – ten days after receiving the demand from Defendant. Specifically, on November 13, 2012, Margaret J. Smith, in her capacity as Managing General Partner, sent Defendant a letter that stated Defendant's receipt of funds in excess of contributions constituted a violation of the Partnership Agreements. The letter further provided that Defendant had the opportunity to cure her violation of those Agreements by remitting payment within 10 days. Until Defendant received that notice, she was under no legal obligation to repay the improper distributions she received. When Defendant refused to return the improper distributions she received by November 23 (ten days after the November 13 demand letter), she materially breached the Partnership Agreements, and Plaintiffs' claims accrued from that date.

Defendant's contention that the limitations runs from the date of her receipt of distributions and not the date of the demand, is simply without support. Defendant's citation to *Medical Jet, S.A. v. Signature Flight Support Palm Beach, Inc.*, 941 So.2d 576, 578 (Fla. 4th DCA 2006) considers the general time for accrual and not the time of accrual where the contract requires a demand, such as here, and the Complaint has plead such a demand was timely made. *Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999) ("As a general rule of contract law, 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").

Second, and as a matter of law, it was not until Defendant refused to return the improper distribution in response to Ms. Smith's demand letter that the last element necessary to complete a cause of action for breach of contract, unjust enrichment and money had and received occurred.

Bedwell v. Rucks, 4D11-3532, 2012 WL 5349381 (Fla. 4th DCA Oct. 31, 2012) ("A cause of action accrues when the last element necessary to complete it occurs") (citing § 95.031(1), Fla. Stat. (2010)). With respect to Plaintiffs' claim for unjust enrichment, Defendant did not accept and retain the improper distribution under circumstances that made it inequitable for Defendant to retain it without paying the value thereof until Defendant was notified by Ms. Smith that she received improper distributions and refused to return them. *See AMP Servs. Ltd. v. Walanpatrias Found.*, 73 So. 3d 346, 350 (Fla. 4th DCA 2011) ("The elements of an unjust enrichment claim are 'a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'").

Similarly, with respect to the money had and received claim, Defendant was not required to return the improper distributions to the Partnerships in good conscience until she received the demand letter from Ms. Smith. *Calhoun v.Corbisello*, 100 So. 2d 171, 173 (Fla. 1958) (stating cause of action for money had and received as "the recovery of money which the appellees, in good conscience, should pay to appellant").

Accordingly, Plaintiffs' above claims accrued when Defendant refused to return the distributions in response to Ms. Smith's demand letter, and not when Defendant received her improper distributions, and it cannot be said "conclusively that the statute of limitations bars the action as a matter of law." *Aquatic Plant Mgmt., Inc.*, 977 So. 2d at 604.

II. THE APPOINTMENT OF THE CONSERVATOR JUSTIFIES FINDING THAT THE CLAIMS ASSERTED ARE TIMELY.

Even if this Court rejects the aforementioned arguments, it cannot be said that "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." Here, the statute of limitations on Plaintiffs' claims should be tolled until the appointment of the Conservator because the Amended Complaint makes clear that Sullivan would not, and did not, direct the Partnerships to bring the claims asserted herein (which claims necessarily implicate Sullivan), and that such claims could not be pursued in earnest until after the Conservator's appointment.

Although Florida law does not yet recognize the doctrine of equitable tolling for all claims (Fla. Stat. § 95.051), federal courts widely find that the appointment of a receiver renders the application of equitable tolling appropriate in circumstances where the receiver is appointed as a result of the fraudulent conduct of the directors of a corporation. *FDIC v. Jackson,* 133 F.3d 694, 698 (9th Cir.1998); *FDIC v. Dawson,* 4 F.3d 1303 (5th Cir.1993); *Farmers & Merchants Nat'l Bank v. Bryan,* 902 F.2d 1520 (10th Cir.1990); *Shapo v. O'Shaugnessy*, 246 F.Supp.2d 935, 953 (N.D. Ill. 2002) (citing *Resolution Trust Corp. v. Gallagher,* 800 F.Supp. 595, 600 (N.D.Ill.1992), *aff'd,* 10 F.3d 416 (7th Cir.1993)); *Janvey v. Democratic Senatorial Campaign*, 793 F.Supp.2d 825, 835 (N.D. Tex. 2011); *Klein v. Abdulbaki*, 2:11-CV-00953, 2012 WL 2317357 (D. Utah 2012). And so should this forward-looking Court.

The basis for such holdings is that where, as here, an entity is being used for the purpose of defrauding its investors, the entity is unlikely to bring suit against itself. "Under those circumstances, the entity is paralyzed to defend itself against the wrongdoers and the doctrine [of equitable tolling] ensures that the statute of limitations begins to run only once the wrongdoing directors lose control of the entity." *Warfield v. Carnie*, 2007 WL 1112591, at *14 (N.D. Tex. April 13, 2007); *Quilling v. Cristell,* 2006 WL 316981 *6 (W.D.N.C.2006) ("Equitable tolling principles recognize that so long as a corporation remains under the control of wrongdoers, it cannot be expected to take action to vindicate the harms and injustices perpetrated by the

wrongdoers."); *Martin Marietta Corp. v. Gould, Inc.,* 70 F.3d 768, 772 (4th Cir.1995) ("[T]he wrongdoers' control results in the concealment of any causes of action from those who otherwise might be able to protect the corporation").

Here, once a receiver – or in this case, the Conservator – was appointed over the Partnerships, he and the Partnerships should be able to assert claims against wrongdoers and those who were unjustly enriched. Indeed, such a result is especially justified here given that it appears Defendant concedes that she should return the amounts owed to the Partnerships absent the statute of limitations defense – which was made possible only because of years of mismanagement by the now forcibly removed former Managing General Partner, and prior to the appointment of the Conservator.

Accordingly, it is improper to grant a motion to dismiss at this juncture based on the defense of statute of limitations because the Amended Complaint makes clear that it was only after the Conservator was appointed that Plaintiffs' claims could be pursued.

III. 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.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Catherine Smith's 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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