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

CASE NUMBER: 12-34121 (07)
COMPLEX LITIGATION UNIT

MARGARET SMITH, et al.,

Plaintiffs,

v.

JANET A HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

DEFENDANT CATHARINE SMITH'S REPLY IN SUPPORT OF HER MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant, Catharine Smith ("Smith"), files this Reply in Support of her Motion for Judgment on the Pleadings as to Plaintiffs' Amended Complaint, and states as follows:[1]

A. Counts I-IV are Barred by the Statute of Limitations

1. Plaintiffs Cannot Use Section 620.8807, Florida Statutes, to Collect From Former Partners for an Indefinite Period of Time

Plaintiffs argue that their claim for violating Section 620.8807, Florida Statutes (Count I), did not begin to run until August 2012, when the Plaintiff partnerships started to wind up their business. *See* Motion p. 6. If the Court accepts Plaintiffs' argument, however, no claim against a former partner would *ever* be time-barred so long as the partnership remained a going-concern. In other words, Plaintiffs' claim under Section 620.8807 is a thinly-veiled attempt to true up with *former* partners for an *indefinite time* and beyond any applicable statute of limitations. Such an

[1]Plaintiffs are P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P")(collectively, the "Partnerships"), and Philip von Kahle, as conservator for the Partnerships.

attempt must fail because the partners could be called upon years after they disassociate from a partnership. *See Vrchota Corp. v. Kelly*, 42 So. 3d 319, 322 (Fla. 4th DCA 2010) ("The legislature is not presumed to enact statutes that provide for absurd results.").

In sum, Exhibit A to the Amended Complaint shows that Smith took her last contribution (and ceased to be a partner) in 2005. Because Plaintiffs' filed their initial Complaint on December 10, 2012 – approximately seven years after the last distribution about which they complain – Count 1 is time-barred as a matter of law. Smith, therefore, is entitled to judgment on the pleadings.

2. Plaintiffs Cannot Circumvent the Statute of Limitations By Sending a Demand Letter 7 Years After the Last Alleged Breach of Contract

Plaintiffs argue that their breach of contract claim (Count II) did not accrue until November 23, 2012 – ten days after Smith received the demand to return the alleged improper distributions from Plaintiffs. *See* Response p. 9. Plaintiffs rely on *Greene v. Bursey*, 733 So.2d 1111, 1115 (Fla. 4th DCA 1999), which states that "[a]s a general rule of contract, where the contract requires a demand as a condition to the right to sue, the statue of limitations does not commence until such demand is made."

Plaintiffs fail to mention, however, that the *Greene* court conditioned the above general contract principal by ruling that a plaintiff:

> "may not suspend indefinitely the running of the statute of limitations by delaying performance of this [demand.] In other words, the plaintiff may not, by failing or refusing to perform the condition, toll the running of the statute and reserve the right to sue within the statutory period from such time as he decides to make a demand."

Id.

Here, Plaintiffs cannot circumvent the expired statute of limitations by waiting over seven

(7) years to send a demand letter regarding the improper distributions, last received by Smith in 2005. To rule otherwise would essentially allow Plaintiffs to "suspend indefinitely the running of the statute of limitations" – a maneuver specifically proscribed by the *Greene* court.

In sum, Exhibit A to the Amended Complaint shows conclusively that Smith received the last allegedly improper distribution in 2005. Because Plaintiffs filed their initial Complaint on December 10, 2012 – approximately two years after the 5-year statute of limitations expired – Smith is entitled to judgment on the pleadings on Count II.

3. The Four-Year Statute of Limitations for Unjust Enrichment and Money Had and Received Began to Run in 2005, When Plaintiffs Conferred the Last Alleged Benefit on Smith

Plaintiffs attempt to avoid the expired statute of limitations on their claims for unjust enrichment (Count III) and money had and received (Count IV) by arguing that the benefit Plaintiffs conferred on Smith, *i.e.*, the improper distributions (last received in 2005), only became inequitable on November 23, 2012 – when Smith allegedly failed to comply with the demand to return the alleged improper distributions.

This argument fails, however, because "[s]tatutes of limitations on unjust enrichment or quantum meruit claims generally begin to run upon the occurrence of the event that created the uncompensated benefit in the defendant, i.e., the plaintiff performed the labor that benefitted the defendant or the defendant obtained the subject property or goods." *Beltran v. Vincent P. Miraglia*, M.D., P.A., 125 So.3d 855, 859 (Fla. 4th DCA 2013).

Here, Exhibit A to the Amended Complaint makes clear that the latest the Plaintiffs could have conferred a purported benefit on Smith was in 2005, when she received the last of her allegedly improper distributions. As such, Plaintiffs' claims for unjust enrichment and for money had and

received were required to be filed no later than 2009. Smith, therefore, is entitled to judgment on the pleadings as to Counts III and IV.

B. The Limitation of Liability Clause in the Partnership Agreements Protects Smith From the Allegations in the Amended Complaint

Plaintiffs attempt to avoid the limitation of liability clause in the Partnership agreements by arguing that Smith is liable for Michael Sullivan's intentional wrongdoing, not her own. *See* Response p. 13. The Court, however, must give effect to the plain and ordinary meaning of the terms used and arrive at an interpretation consistent with logic and reason. *See Golf Scoring Systems Unlimited, Inc. v. Remedio*, 877 So.2d 827, 829 (Fla. 4th DCA 2004); *Royal Oak Landing Homeowners Ass'n, Inc. v. Pelletier*, 620 So.2d 786, 788 (Fla. 4th DCA 1993); *see also King v. Bray*, 867 So. 2d 1224, 1227 (Fla. 5th DCA 2004) ("The courts generally agree that where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner.").

Here, Plaintiffs' interpretation of the limitation of liability clause defies logic and reason. Plaintiffs would have the Court read ¶ 14.03 as subjecting all of the partners to liability for the conduct of *any other partner* so long the conduct involved "intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty."[2] Under this interpretation, liability would exist even where there is no allegation that a defendant partner engaged in any improper conduct or any conduct in connection with the management of the Partnerships at all. Plaintiffs' interpretation violates the fundamental tenets of contract interpretation, as it would lead to an "absurd result." *See King*, 867

[2]The Amended Complaint makes clear that the former Managing General Partners were solely responsible for the management of the Partnerships, and that it was *their* alleged breaches of fiduciary duty that gave rise to the causes of action in the Amended Complaint. *See* Am. Compl. ¶ 49.

So. 2d at 1227.

Instead, the only reasonable reading of ¶ 14.03 of the Partnership Agreements is that Smith is only liable for her own conduct involving "intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty." *See* Partnership Agreements at ¶ 14.03. Because there are no such allegations as to Smith, Smith is entitled to judgment on the pleadings as to all claims in the Amended Complaint.

C. Section 620.8807, Florida Statutes, Does Not Apply to Smith

Plaintiffs are trying to mask an alleged statutory violation as a common-law negligence claim to get around the four year statute of limitations for claims based on statutory liability. Plaintiffs' "negligence" claim (Count I) is based on Smith allegedly violating section 620.8807(2), Fla. Stat., which states that a partner "shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account." *See* Response p. 6.

The plain language of section 620.8807, however, does not create an independent statutory cause of action for an alleged violation. As such, the Court should not infer an independent statutory cause of action where none has been provided by the Florida Legislature. Smith, therefore, is entitled to judgment on the pleadings as to Count I on this basis alone.

Count I also fails as a matter of law because Section 620.8807 does not, and cannot, apply to Smith based on the allegations in the Amended Complaint. In particular, Section 620.8603, Florida Statutes, provides in relevant part, "If a partner's dissociation results in a dissolution and winding up of the partnership business, ss. 620.8801-620.8807 apply; otherwise, ss. 620.8701-620.8705 apply."

Here, the Amended Complaint shows that Smith dissociated from the Partnerships in 2005 (as according to Exhibit A, the distributions stopped then and the capital account was zeroed out), but this did not result in dissolution and winding up of the Partnerships (as the Partnerships continued operating and making distributions to partners until 2008). *See* Amended Complaint, Ex. A. In fact, the Amended Complaint states that as of October 2013 when it was filed, " . . . the Partnerships are in the process of winding up . . ." Amended Complaint, ¶69. Applying the plain language of Section 620.8603 of the Florida Statutes, Smith is not, and cannot, be subject to the provisions in Section 620.8807. Because Count I of the Amended Complaint is based on allegedly violating Section 620.8807, Smith is entitled to judgment on the pleadings on this claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail to Eric N. Assouline, Esq. (ena@assoulineberlowe.com; ah@assoulineberlowe.com) Assouline & Berlowe, P.A., 213 E. Sheridan Street, Suite 3, Dania Beach, FL 33004, Joseph P. Klapholz,, Esq. Joseph P. Klapholz, P.A., 2500 Hollywood Blvd., Suite 212, Hollywood, FL 33020, (jklap@klapholzpa.com; dml@klapholzpa.com), Peter G. Herman, Esq., Tripp Scott, 110 SE Sixth Street, Suite 1500, Fort Lauderdale, FL 33301, (PGH@trippscott.com); Michael R. Casey, Esq., 1831 NE 38th St., # 707, Oakland Park, FL 33308, (mcasey666@gmail.com); Michael C. Foster, Esq., Annette M. Urena, Esq., Daniels Kashtan, 4000 Ponce de Leon Blvd., Suite 800, Coral Gables, FL 33146, (Mfoster@dkdr.com; aurena@dkdr.com); Marc S. Dobin, Esq., Dobin Law Group, PA 500 University Boulevard, Suite 205, Jupiter, FL 33458, (service@DobinLaw.com); Julian H. Kreeger, Esq., 2665 South Bayshore Drive, Suite 2220-14, Miami, FL 33133 (Juliankreeger@gmail.com); Thomas M. Messana, Esq., Brett Lieberman, Esq., Messana, P.A., 401 East Las Olas Boulevard, Suite 1400, Fort Lauderdale, FL 33301, (tmessana@messana-law.com blieberman@messana-law.com); Daniel W. Matlow, Esq., Daniel W. Matlow, P.A., Emerald Lake Corporate Park, 3109 Stirling Road, Suite 101, Fort Lauderdale, FL 33312, (dmatlow@danmatlow.com; assistant@danmatlow.com); Richard T. Woulfe, Esq., Bunnell & Woulfe P.A., One Financial Plaza, Suite 1000, 100 SE Third Avenue, Fort Lauderdale, FL 33394 (Pleadings.RTW@bunnellwoulfe.com); Joanne Wilcomes, Esq., McCarter & English, LLP, 100 Mulberry Street, Four Gateway Center, Newark, NJ 07102, (jwilcomes@mccarter.com); Thomas L. Abrams, Esq., 1776 N. Pine Island Road, Suite 309, Plantation, FL 33322, (tabrams@tabramslaw.com); Zach Hyman (zhyman@bergersingerman.com) Berger Singerman, 350 E. Las Olas Blvd., Ste. 1000, Ft. Lauderdale, Florida, 33301-4215, this 24 day of February, 2014.

McCABE RABIN, P.A.
Attorneys for Defendant, Catharine Smith
1601 Forum Place, Suite 505
West Palm Beach, Florida 33401
Phone: (561) 659-7878
Fax: (561) 242-4848

By: _____

Ryon M. McCabe
Florida Bar No.: 009075
rmccabe@mccaberabin.com; e-filing@mccaberabin.com
Evan H. Frederick
Florida Bar No.: 064819
efrederick@mccaberabin.com; e-filing@mccaberabin.com