

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 12-034123 (07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,
Plaintiffs,
vs.

MICHAEL D. SULLIVAN, et al.
Defendants.

DEFENDANTS' FRANK AVELLINO AND MICHAEL BIENES
JOINT MOTION TO DISMISS PLAINTIFFS' FIFTH AMENDED COMPLAINT

Defendants, Frank Avellino (“Avellino”) and Michael Bienes (“Bienes”) file this Joint Motion to Dismiss Plaintiffs’ Fifth Amended Complaint (“5AC”), and in support thereof, state as follows:

1. On December 18, 2014 this Court entered an Order dismissing with prejudice Counts II, III and IV of the Fourth Amended Complaint (“4AC”) and dismissing Count I with prejudice, with leave for Plaintiffs to file an amended complaint as to Count I only and only as to the alleged “kickbacks”.

2. Plaintiffs’ 5AC not only amends Count I, but it also amends factual allegations which are then incorporated in all counts, as well as includes changes to Counts III, IV, V and VII. Plaintiffs’ improper and unauthorized amendments included in the 5AC beyond the limited leave to amend granted by the Court’s December 18, 2014 order is the subject of Defendant’s motion to strike filed simultaneously with this motion. This motion to dismiss addresses not only the newly amended Count I, but also the other claims which were amended by the 5AC.

3. Count I (breach of fiduciary duty) should be dismissed because it improperly seeks damages jointly and severally against Avellino and Bienes without factual or legal support.

Furthermore, it fails to allege the necessary elements for a breach of fiduciary duty claim, including failing to allege the basis for a fiduciary duty and the scope of the fiduciary relationship which was allegedly breached. The allegations relied upon by Plaintiffs are conclusory and insufficient, as well as are inconsistent with the specific allegations intended to substantiate them and to exhibits attached to the 5AC.

4. Count III and Count V (unjust enrichment) should be dismissed because, as alleged by Plaintiffs, in exchange for bringing and/or finding investors for the Partnerships, monies were paid to Avellino and Bienes, and thus, the Plaintiffs derived a benefit from the payments, and there was no unjust enrichment. In addition, Plaintiffs have pled an express agreement between Plaintiffs and Defendants which precludes a claim for unjust enrichment. Furthermore, Plaintiffs' allegations that the payments were improper because they were in violation of Section 475.41, *Fla. Stat.*, and the Partnership Agreements and facilitated Sullivan's breach of fiduciary duty and misappropriation of Partnerships' assets are inconsistent with the exhibits attached, and are not supported by law. (Section 475.41, *Fla. Stat.* is only applicable to real estate transactions and/or business ventures which relate and/or involve real estate transactions.) Finally, the four year statute of limitations bars any claim for alleged "kickbacks" paid prior to December 10, 2008.¹

5. Count IV (fraudulent transfer) should be dismissed because it is factually and legally insufficient. Based on the allegations, the Partnerships are both the debtors who transferred their funds and the creditors who are attempting to bring the action for the fraudulent transfers. Clearly such inconsistent allegations do not support a claim for fraudulent transfer.

¹ The complaint was filed on December 10, 2012. The 4AC included a chart showing payments from 1995 through 2008. Even though Plaintiffs deleted the chart in the 5AC, the facts remain the same as to when the alleged payments were made.

6. Count VI (money had and received) should be dismissed because it fails to state a cause of action. Plaintiffs base their claim on allegations that the Defendants received the monies in violation of the Partnership Agreements and unspecified securities laws. There is nothing in the Partnership Agreements which bar the payments of monies to Defendants. Furthermore, as in the unjust enrichment claims, any payments made prior to December 20, 2008 would be barred by the four year statute of limitations.

7. Count V (civil conspiracy) should be dismissed because without the underlying claims for torts or wrongdoing there can be no claim for conspiracy.

8. The claims by the Partnership are barred by the doctrine of *in pari delicto*. Specifically since the 5AC alleges that the Partnerships participated in the alleged “kickback” scheme, and thus, are wrongdoers, the Partnerships are not permitted to obtain relief for the alleged wrongdoing and their claims should be dismissed.

WHEREFORE Defendants respectfully request this Court enter an Order dismissing Counts I, III, IV, V, VI, and VII with prejudice.

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