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

COMPLEX LITIGATION UNIT

PHILIP J. VON KAHLE, as Conservator of P&S Associates, General Partnership and S&P Associates, General Partnership

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.
_____/

CASE NO.: 12-034123 (07)

PLAINTIFFS' MOTION FOR SUMMARY DENIAL OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS

Plaintiffs, by and through the undersigned counsel, file this Motion for Summary Denial of Defendants' Second Motion for Summary Judgment and in support thereof state:

On March 4, 2016, Defendants Frank Avellino and Michael Bienes (collectively, "Defendants") filed an Amended Joint Motion for Summary Judgment (the "First Motion"), seeking summary judgment based on Defendants' contention that the statute of limitations had expired as it relates to Plaintiffs' claims. Among other arguments, Defendants claimed that Count IV, which sought to avoid fraudulent transfers received by them, was time barred because documents which would have revealed the transfers at issue were allegedly available to partners of the Partnerships.

On October 28, 2016, the Court entered an Order denying the First Motion as it relates to Count IV, based on its finding that "there exist genuine issues of material fact as to when the alleged fraudulent transfers were or reasonably could have been discovered by Plaintiffs." **Exhibit "A".**

Despite the Court's findings, Defendants have moved for summary judgment, a second time, on the issue of when the fraudulent transfers at issue could have been discovered. Such a Motion should be summarily denied because it is a motion for rehearing that does not rely on any newly discovered evidence and constitutes an improper attempt to circumvent the requirements of Fla. R. Civ. P. 1.510(c) and (e). Accordingly the Second Motion must be denied.

The Second Motion is premised on the **same exact argument** as the First Motion, which is Defendants contention that the Partnerships' books and records would have revealed the transfers that Defendants received. Because the issues raised in the First Motion are identical to those raised in the Second Motion, the Second Motion is not a motion for summary judgment but instead is a motion for rehearing Rule 1.540(b).

To the extent that the Second Motion is a motion for rehearing, the Second Motion does not comport with Rule 1.540(b) and must be denied. Rule 1.540(b) permits a party to seek a rehearing, based on, among other issues, newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing. However, all of the evidence submitted in support of the Second Motion was available to Defendants when they filed the First Motion.

The Second Motion relies on the submission of the affidavits of Defendants Steven Jacob and Michael Sullivan who are parties to this action, and are not based on newly discovered evidence.

The Sullivan and Jacob affidavits and any argument derived from them should also be disregarded because Fla. R. Civ. P. 1.510(c) mandates that all evidence to be used in support of the First Motion, including the affidavits of Steven Jacob and Michael Sullivan, be submitted at least 20 days before the time fixed for hearing. Because those affidavits were not timely

submitted, they should not be considered by the Court, even if they relate to a subsequent motion. *Se. Bank, N.A. v. Sapp*, 554 So. 2d 1193, 1196 (Fla. 1st DCA 1989) ("It is not an abuse of discretion for a trial court to refuse to admit affidavits filed with a motion for rehearing concerning a prior summary judgment ruling."); *Suarez v. Space Coast Credit Union*, 150 So. 3d 1246, 1247 (Fla. 3d DCA 2014) ("A summary judgment based on untimely summary judgment evidence upon which the movant relies is subject to reversal.").

WHEREFORE Plaintiffs respectfully request that the Court enter an Order: (i) Granting the Motion; (ii) Summarily denying Defendants' Motion for Summary Judgment on Statute of Limitations Grounds; and (iii) Granting such further relief as the Court deems just and proper.

Dated: February 21, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 21, 2017, a copy of the foregoing was filed with the Clerk of the Court via the E-filing Portal, and served via Electronic Mail by the E-filing Portal upon:

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EXHIBIT A

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

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, PHILIP VON KAHLE as conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership,
Plaintiffs,

vs.

STEVEN JACOB, an individual, STEVEN F. JACOB, CPA & ASSOCIATES, INC., a Florida corporation, FRANK AVELLINO, an individual, and MICHAEL BIENES, an individual,
Defendants.
_____/

CASE NO: 12-034123 CACE (07)
JUDGE: JACK TUTER

ORDER ON DEFENDANTS', FRANK AVELLINO AND MICHAEL BIENES, AMENDED JOINT MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the court on Defendants', Frank Avellino and Michael Bienes, Amended Joint Motion for Summary Judgment. The court, having considered the motion and responses, having reviewed the summary judgment evidence and applicable law, having heard argument of counsel, and being otherwise duly advised in the premises, rules as follows:

Factual Background

On January 9, 2015, plaintiffs, P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P") (together with P&S "the Partnerships), and Philip von Kahle, as conservator of the Partnerships, filed their fifth amended complaint against defendants, Frank Avellino ("Avellino"), Michael Bienes ("Bienes"), Steven Jacob ("Jacob"), and Steven F Jacob, CPA & Associates, Inc. ("Steven F. Jacob, CPA") (collectively "Defendants"), alleging

causes of action for: (1) breach of fiduciary duty (count I against Defendants Avellino and Bienes); (2) negligence (against Defendants Steven F. Jacob, CPA and Jacob); (3) unjust enrichment (count III against the Defendants); (4) avoidance of fraudulent transfers pursuant to section 726.105(1)(a), Florida Statutes (count IV against the Defendants); (5) unjust enrichment (count V against the Defendants); (6) money had and received (count VI against the Defendants); and (7) civil conspiracy (count VII against the Defendants).

According to the fifth amended complaint, Defendants Avellino and Bienes operated a feeder fund called Avellino & Bienes ("A&B") that pooled money from their customers for investment with BLMIS, a brokerage firm operated by Bernard L. Madoff ("Madoff"). As a result of an inquiry from the Securities and Exchange Commission ("SEC"), A&B was shut down, and Avellino and Bienes consented to a Final Judgment of Permanent Injunction and Other Equitable Relief, which, *inter alia*, "permanently enjoined Avellino and Bienes from selling any securities without a registration statement, making offers to sell or buy securities without a registration statement, and acting as an investment company in violation of the Investment Company Act of 1940." (Pls.' Compl. ¶ 16).

After A&B was shut down, Plaintiffs allege that Michael D. Sullivan ("Sullivan"), met with Avellino and Bienes because Sullivan wanted to continue investing with BLMIS. Since Avellino and Bienes "could not invest or open accounts directly with Madoff," Plaintiffs allege that "Defendants facilitated the creation of a network of 'front men' feeder fund partnerships and charitable foundations throughout the United States to invest in BLMIS." (Id. ¶ 20). The Partnerships were such investment vehicles. Plaintiffs allege that Avellino and Bienes received "kickbacks" as compensation for soliciting individuals to invest with the Partnerships. When

Madoff's Ponzi scheme became public, individuals and entities that had invested in BLMIS, including the Partnerships, incurred substantial losses.

The Plaintiffs filed their initial complaint in the instant action on December 10, 2012. On January 17, 2013, Philip von Kahle was appointed conservator of the Partnerships, and was charged with liquidating, recovering, and distributing the remaining assets of the Partnerships. In the instant action, Plaintiffs seek to recover "kickbacks" that were disguised as management fees that Plaintiffs claim were paid by Sullivan to Avellino and Bienes as a result of their referral of investors to the Partnerships.

On March 4, 2016, Defendants Avellino and Bienes jointly filed the instant amended motion for summary judgment seeking summary judgment as to counts I, III, IV, V, VI, and VII. Defendants Avellino and Bienes argue that Plaintiffs' causes of action are barred by the applicable statute of limitations. Specifically, Defendants Avellino and Bienes argue that the summary judgment evidence reveals that Avellino and Bienes last received kickback payments on October 1, 2008 and October 1, 2007, which dates Avellino and Bienes assert fall outside the applicable statute of limitations. As a result, Defendants argue that Plaintiffs' claims are time-barred because Plaintiffs did not commence the instant action within four (4) years of the last "kickback" payments.

Plaintiffs do not dispute these dates or the four-year statute of limitations, but rather, argue that their claims are timely because: (1) the delayed discovery doctrine applies to Plaintiffs' cause of action for avoidance of a fraudulent transfer (count IV); (2) Plaintiffs' remaining claims are timely because they were prevented from filing suit earlier because Sullivan did not step down as the managing partner of the Partnerships until August 2012; (3) equitable tolling applies to toll the statute of limitations until the time the Conservator was appointed over the Partnerships; (4)

equitable estoppel preserves Plaintiffs' claims; and (5) the continuing tort doctrine applies to preserve Plaintiffs' civil conspiracy and breach of fiduciary duty claims. A hearing was held on August 23, 2016 on the instant motion.

Summary Judgment

Summary judgment is appropriate "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fla. R. Civ. P.* 1.510 (c). The party moving for summary judgment has the burden of showing the absence of a genuine issue of fact. All inferences must be drawn from the proof in favor of the party opposing the motion. *Liberty Mutual Ins. Co. v. Stuckey*, 220 So. 2d 421 (Fla. 4th DCA 1969).

It is well settled that summary judgment should be sparingly granted, and if there are issues of fact and the slightest doubt remains, summary judgment cannot be granted. *See Campbell v. Anheuser-Busch, Inc.*, 265 So. 2d 557 (Fla. 1st DCA 1972). The burden to prove the non-existence of genuine triable issues is on the moving party, and the burden does not shift to the opposing party until the movant has successfully met his burden. *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966). Doubts and inferences as to the existence or nonexistence of material facts must be resolved against the movant. *Id.*

If the moving party meets this initial burden, summary judgment is appropriate as a matter of law against the nonmoving party if they fail to make a showing sufficient to establish the existence of an essential element of that party's case. *DeMesne v. Stephenson*, 498 So. 2d 673 (Fla. 1st DCA 1986). The evidence presented by the nonmoving party is to be believed and all reasonable inferences are to be drawn in his favor. *Holl,* 191 So. 2d at 43. Additionally, it is well-settled Florida law that

> [w]hen a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove his cause of action. Rather, the court's function is solely to determine whether the record conclusively shows that the moving party proved a negative, that is, "the nonexistence of a genuine issue of a material fact." If the record reflects even the possibility of a material issue of fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party.

Bender v. CareGivers of Am., Inc., 42 So. 3d 893, 894 (Fla. 4th DCA 2010) (*quoting Winston Park, Ltd. v. City of Coconut Creek,* 872 So.2d 415, 418 (Fla. 4th DCA 2004)).

Furthermore, "[w]hen expiration of the statute of limitations is the basis of a summary judgment motion, the movant has the burden of showing 'conclusively that there was no genuine issue of fact that the statute of limitations had expired before the filing of the [complaint].' " *Baxter v. Northrup*, 128 So. 3d 908, 909 (Fla. 5th DCA 2013) (*quoting Green v. Adams,* 343 So. 2d 636, 637 (Fla. 4th DCA 1977)).

Statute of Limitations

It is undisputed that Plaintiffs' claims for breach of fiduciary duty, unjust enrichment, money had and received, and civil conspiracy are governed by a four (4) year statute of limitations. *See* § 95.11 (3), Fla. Stat. Additionally, Plaintiffs' claim for avoidance of a fraudulent transfer is subject to a four (4) year statute of limitations. *See* § 726.110 (1), Fla. Stat. However, section 726.110 (1), Florida Statutes, allows for a claim based on an alleged fraudulent transfer to be brought "within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant." § 726.110 (1), Fla. Stat.

Equitable Estoppel

The doctrine of equitable estoppel was succinctly discussed by the Fourth District Court of Appeal in *Ryan v. Lobo de Gonzalez* 841 So. 2d 510, 519-20 (Fla. 4th DCA 2003):

> "The doctrine of equitable estoppel has been recognized and applied in numerous contexts by the Supreme Court since the inception of statehood." *See Morsani v. Major League Baseball,* 739 So. 2d 610, 614 (Fla. 2nd DCA 1999), *approved in part,* 790 So. 2d 1071 (Fla. 2001) (citations omitted). "The doctrine has also been recognized as a valid defense to a limitations-period defense." *Id.* (citations omitted). However, equitable estoppel "*presupposes that the plaintiff knows of the facts underlying the cause of action* but delayed filing suit because of the defendant's conduct." *See Bell v. Fowler,* 99 F. 3d 262, 266 n.2 (8th Cir. 1996) (*citing Dring v. McDonnell Douglas Corp.,* 58 F. 3d 1323, 1329 (8th Cir. 1995)) (emphasis added). Stated another way, "*[e]quitable estoppel arises where the parties recognize the basis for suit,* but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has lapsed." *Cook v. Deltona Corp.,* 753 F. 2d 1552, 1563 (11th Cir. 1985) (*quoting Aldrich v. McCulloch Props., Inc.,* 627 F. 2d 1036, 1043 n.7 (10th Cir. 1980)) (emphasis added).

Ryan, 841 So. 2d 510, 519-20 (Fla. 4th DCA 2003).

After careful review, the court determines the doctrine of equitable estoppel has no application to the circumstances of the instant action. For instance, Plaintiffs' arguments that its claims are timely are premised on the assertion that Plaintiffs did not have knowledge of the alleged "kickbacks" until May or August 2012. As noted above, the doctrine of equitable estoppel "*presupposes that the plaintiff knows of the facts underlying the causes of action* but delayed filing suit because of the defendant's conduct." *Id.* at 518 (citation omitted) (emphasis in original). As a result, the court determines that the summary judgment evidence does not support the application of equitable estoppel to the circumstances of the instant action.

Continuing Tort Doctrine

Plaintiffs argue the continuing tort doctrine renders their claims timely. After review of the summary judgment evidence, the court determines the continuing tort doctrine has **no** application to the facts of the instant action. Under Florida law,

> [a] continuing tort is "established by continual tortious *acts,* not by continual harmful effects from an original, completed act. . . . When

> a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort.

Suarez v. City of Tampa, 987 So. 2d 681, 686 (Fla. 2d DCA 2008) (citations omitted). Under this doctrine, "the statute of limitations begins to run from the date the tortious conduct ceases and the plaintiff may recover based on all the tortious acts committed within the limitations period prior to the filing of the action." *Woodward v. Olson*, 107 So. 3d 540, 544 (Fla. 2d DCA 2013) (citations omitted) (emphasis removed).

In the instant action, it is undisputed the last tortious act was the payment of the final "kickback" to Avellino and Bienes on October 1, 2008 and October 1, 2007, respectively. It is further undisputed that the instant action was not commenced until December 10, 2012, which is outside the four-year statute of limitations period. Moreover, the delayed discovery rule does not operate to save Plaintiffs' causes of action for breach of fiduciary duty and civil conspiracy. *See Davis v. Monahan*, 832 So. 2d 708, 710 (Fla. 2002) ("Aside from the provisions . . . for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, there is no other statutory basis for the delayed discovery rule."). Therefore, the court determines that the continuing tort doctrine **does not** operate to save Plaintiffs' claims for breach of fiduciary duty and civil conspiracy.

Equitable Tolling

Plaintiffs' argue their claims are timely based on the doctrine of equitable tolling. In this regard, the court determines that this issue was not properly raised by Plaintiffs in their reply to Defendants', Avellino and Bienes, affirmative defenses. Under Florida law, "a reply is required only if the pleader wishes to avoid the affirmative defense. A reply is activated only by an affirmative defense that can be avoided. Stated differently, a reply pleads an affirmative defense

to an affirmative defense." *Hertz Commercial Leasing Corp. v. Seebeck*, 399 So. 2d 1110, 1111 (Fla. 5th DCA 1981). The failure of a party to include an avoidance in his or her reply constitutes a waiver. *Burton v. Linotype Co.*, 556 So. 2d 1126, 1128 (Fla. 3d DCA 1989) ("However, the contention that the limited warranty failed of its essential purpose was an avoidance which Burton and MLG waived by failing to plead in a reply."). Plaintiffs' failure to assert equitable tolling as an avoidance to Defendants', Avellino and Bienes, statute of limitations affirmative defenses constitutes a waiver of such avoidance.

Notwithstanding Plaintiffs' waiver to assert equitable tolling, the court determines that equitable tolling **does not** apply to the instant action. Under Florida law, "the plain language of the tolling statute limits its reach to conditions that actually 'toll' the statute of limitations." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001). Specifically, the tolling statute, section 95.051, Florida Statutes, provides that "[n]o disability or other reason shall toll the running of any statute of limitations except those specified in this section, s. 95.091, the Florida Probate Code, or the Florida Guardianship Law." § 95.051 (2), Fla. Stat.

Plaintiffs do not assert any of the grounds contained in any of these authorities as support for their equitable tolling argument. Rather, Plaintiffs rely on federal case law applying the doctrine of equitable tolling to toll the statute of limitations in circumstances where a receiver is appointed as a result of fraudulent conduct of the directors of a corporation. The court declines to accept Plaintiffs' argument to extend the doctrine of equitable tolling to the circumstances involved in the instant action. *See HCA Health Servs. of Fla., Inc. v. Hillman*, 906 So. 2d 1094, 1100 (Fla. 2d DCA 2004) (noting that "[i]mplicit in the court's holding [in *Major League Baseball*] is the conclusion that in order for a doctrine to 'toll' the statute of limitations, it must be included in the exclusive list of conditions set forth in section 95.051(1)").

Delayed Discovery Doctrine / Section 726.110, Florida Statutes, Savings Clause

The court determines the delayed discovery doctrine **does not** apply to Plaintiffs' claims for breach of fiduciary duty, unjust enrichment, money had and received, or civil conspiracy. *See Davis*, 832 So. 2d at 710 ("Aside from the provisions . . . for the delayed accrual of a cause of action in cases of fraud, products liability, professional and medical malpractice, and intentional torts based on abuse, there is no other statutory basis for the delayed discovery rule.").

However, as noted above, Plaintiffs' claim for fraudulent transfer **is** subject to the one-year "savings clause" set forth in section 726.110 (1), Florida Statutes. As noted above, section 726.110, Florida Statutes, provides, in pertinent part:

> [a] cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought:
>
> > (1) Under s. 726.105(1)(a), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant.

§ 726.110 (1), Fla. Stat. "[T]he plain language of th[is] clause requires that the one-year period begin on the date the transfer was or could reasonably have been discovered, *not* on the date that the fraudulent nature of the transfer was or could have been discovered." *See Nat'l Auto Serv. Ctrs., Inc. v. F/R 550, LLC*, 192 So. 3d 498, 504 (Fla. 2d DCA 2016) (emphasis added). After review of the summary judgment evidence and argument, the court determines there exist genuine issues of material fact as to when the alleged transfers were or could reasonably have been

discovered by Plaintiffs. Therefore, Defendants' motion for summary judgment as to Plaintiffs' avoidance of fraudulent transfer claim (count IV) is **DENIED.**

Conclusion

Based on the summary judgment evidence and undisputed facts that Avellino and Bienes last received a "kickback" payment on October 1, 2008 and October 1, 2007, respectively, the court determines that summary judgment in favor of Defendants is appropriate as to counts I, III, V, VI, and VII. As noted above, based upon the summary judgment evidence, the doctrine of equitable estoppel, the continuing tort doctrine, and the doctrine of equitable tolling do not operate to save Plaintiffs' causes of action for breach of fiduciary duty, unjust enrichment, money had and received, and civil conspiracy. Therefore, Defendants' motion for summary judgment is **GRANTED** as to these claims. The court determines there exist genuine issues of material fact as to when the alleged fraudulent transfers were or reasonably could have been discovered by Plaintiffs. As such, Defendants' motion for summary judgment is **DENIED** as to count IV.

Accordingly, it is hereby:

ORDERED that Defendants, Frank Avellino and Michael Bienes, Amended Joint Motion for Summary Judgment is **GRANTED** as to counts I, III, V, VI, and VII, and **DENIED** as to count IV.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 28th day of October, 2016.

JACK TUTER
CIRCUIT COURT JUDGE

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