

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'S AND MICHAEL BIENES' RESPONSE TO
PLAINTIFF'S MOTION TO STRIKE PORTIONS OF THE AFFIDAVITS OF
MICHAEL SULLIVAN AND STEVEN JACOB**

Defendants Frank Avellino and Michael Bienes, by and through their undersigned counsel, respond to Plaintiff's motion to strike portions of the affidavits of Michael Sullivan ("Sullivan") and Steven Jacob ("Jacob"), stating as follows:

Plaintiffs seek to strike paragraphs 3 and 10 of the affidavit of Michael Sullivan based upon a claim that they contradict prior sworn testimony. Plaintiffs are correct that affidavits may not be used to directly contradict prior sworn testimony. However, Sullivan's affidavit does not contradict his prior sworn testimony. While he did testify during his deposition that the subject transfers would not have been reflected in any records of the Partnerships, he also testified during his deposition testimony that:

The P & S Management Fee Calculation "looks like something I would have produced, but whether this particular document is among those gathered from MDS I do not know. I don't have my records to tell you." March 8, 2016 Sullivan Deposition 29:7 – 18 (Ex. 1).

"I'm not sure [whether] those calculations [were] done on the books and records of MDS or Sullivan & Powell or Solutions in Tax on the one hand, or [whether] they were in the books

and records of” the Partnerships on the other hand. March 8 2016 Sullivan Deposition 29 – 30 (Ex. 1).

In fact, Sullivan explained more than once his uncertainty. When asked, “[d]o you know when management fees were first paid to Frank Avellino or Michael Bienes,” he said that he couldn’t remember; then, when asked, “[w]ould that be in the records of P & S and S & P, he explained, “[i]t would be in records similar to that. They appear somewhere. I can’t tell you what records. Since I don’t have the records, I couldn’t tell you.” December 1, 2015 Sullivan Deposition, pgs. 92-93 (Ex. 2). Plaintiffs have extracted portions of Sullivan’s deposition to make his testimony appear definitive, but a reading of the entire transcript reveals Sullivan’s uncertainty and the reason for same.

Therefore, the affidavit of Sullivan does not “directly” contradict his prior, complete deposition testimony, as would be required to strike it. Nor was his deposition testimony, when taken as a whole, “unequivocal.” Furthermore, the fact that the documents were not provided him when the questions were first asked is a more than credible reason for him not knowing whose documents Plaintiffs’ counsel was referring to during the deposition. The portions of his affidavit relating to the contents of the Partnerships’ documents should, therefore, not be stricken. *See, e.g., Carriage Hills Condo., Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 338 (Fla. 4th DCA 2013) (in addition to certain criteria which must be met to strike the affidavit of a corporate representative, the testimony subject to the motion to strike must “directly” contradict or repudiate “unequivocal” prior testimony regarding matters of fact, with no credible or reasonable explanation for the discrepancy, and striking the testimony must be necessary in order to protect “the integrity of the judicial process”).

Plaintiffs seek to strike paragraphs 6-9, 11 and 13 of Steven Jacob’s (“Jacob”) Affidavit asserting that Jacob is not associated with the Partnerships; that he lacks personal knowledge of

the Partnership's books and records; and that his Affidavit contains hearsay. However, contrary to Plaintiffs' argument, the statements by Jacob in his Affidavit are admissible because they relate to actions Jacob personally took or witnessed, and conversations which he personally heard, and include the facts to support his association with the Partnerships as well as his personal familiarity with the Partnerships' books and records. *See Pawlik v. Barnett Bank of Columbia County*, 528 So.2d 965 (Fla. 1st DCA 1988) (while affidavit was not a model of clarity it showed the testimony was related to actions declarant personally took or conversations in which they were participants and thus personal knowledge requirement was met).

Although not verified, Plaintiffs' 5AC against Jacob is based on specific allegations that he was active in the management of the Partnerships (§45); and that he and his company, Steven F. Jacob, CPA, acted as an accountant and bookkeeper for the Partnerships (§61). It therefore defies credulity for Plaintiffs to now contest his ability to testify as to the books of the Partnerships. Plaintiffs cannot rely on allegations to state a cause of action then refute those very allegations in trying to defeat a summary judgment. *See, e.g., Inman vs. Club on Sailboat Key, Inc.*, 342 So.2d 1069 (Fla. 3rd DCA 1977) ("It is axiomatic that a "party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings, admissions, . . . in order to defeat a summary judgment." *Id.* at 1070.)

The facts set forth in the Affidavit which reflect Jacob's association with the Partnerships and his personal knowledge of the Partnerships' books and records are: Jacob sublet office space in the same space as the Partnerships since 2004 (§3); from 1998 through 2008 he regularly reviewed the books and records of the Partnerships, which at all times were in the offices of the Partnerships (§4); he, along with others, received payments from Sullivan (§5); he observed the particular documents referred to in his Affidavit in the Partnership books and records (§8); after the death of Gregg Powell, Jacob assisted Susan Moss, who assisted in maintaining the

Partnerships' books and records (§10); in December 2008 he assisted in responding to numerous calls from the partners, in compiling the records to support the Partnerships' claims filed with Mr. Picard, the BLMIS trustee, in compiling information for the partners who were filing individual claims, and in compiling records of the Partnership to respond to the SEC's document request (§12); and was involved with providing the records of the Partnerships in November 2011 to Ali Ansari, an accountant retained by the Festus & Helen Stacy Foundation, Inc. (the "Foundation ")(§ 13).

The foregoing facts demonstrate Jacob's personal knowledge of the record-keeping by the Partnerships and the contents of their books and records and provides a proper foundation for Jacob's statements as to what documents were provided to those people identified in paragraph 13 of his Affidavit. Accordingly paragraph 13 should not be stricken.

Jacob's statements in paragraph 11 are also admissible. They include a description of what he personally observed, i.e. partners of the Partnerships inspecting the Partnerships' records, and Patrick Kelly, and acting on behalf of the Foundation, visiting the Partnerships' offices and reviewing their books and records. The statements referred to in paragraph 11 of Sullivan's Affidavit were personally heard by Jacob, and were made when Sullivan was the representative of and employed by the Partnerships, and thus come under the hearsay exception pertaining to admissions by party's agent. See Section 90.803(18), Fla. Stat.

Finally, Jacob's statements concerning the records of the Partnerships in paragraphs 6 through 9, like the remainder of Jacobs' statements, do not even constitute hearsay because they are not being used to establish the truth of the contents of the particular documents or the communications, but, rather to provide personal knowledge of what information was contained in the Partnerships' books and records. The particular documents are attached to Jacob's

Affidavit, and thus, the contents of those particular documents speak for themselves. Accordingly, these statements by Jacob should not be stricken.

Jacob did not need to be a record custodian to advise of what he saw within documents, particularly when the documents are simultaneously produced and their content can be easily determined. Whether the documents were prepared “in the ordinary course” of business is not relevant; what is relevant is that the documents would have notified anyone of the subject payments. Jacob’s affidavit is not intended to prove that Avellino and Bienes were actually paid management fees – which may be precluded as out of court statements intended to prove such transfers. The affidavit is only intended to reflect what Plaintiffs already admitted and what a glance at the records reveal – that they provide notice of the payments to Avellino, Bienes, and others.¹

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 1st day of March, 2017.

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¹ This is in stark contrast to the requirements of, for example, the Plaintiffs’ experts’ report and other evidence, the the purpose of which is to prove that the payments were actually made

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and Steven F. Jacob CPA & Associates, Inc.*

1 A. Pardon me?

2 Q. Mr. Sullivan, can you identify what I just
3 marked as Exhibit 3?

4 A. Yeah, it's a document that looks -- I can
5 identify it. It's a P&S Management Fee Calculation.
6 That's what the top of it says.

7 Q. And these P&S Management Fee Calculations,
8 were these - were these documents belonging to
9 Michael D. Sullivan & Associates or Michael
10 Sullivan?

11 A. I do not know.

12 Q. Okay. So you don't know whether these
13 were gathered from Michael D. Sullivan or your
14 personal computers?

15 A. It looks like something I would have
16 produced, but whether this particular document is
17 among those I do not know. I don't have my records
18 to tell you.

19 Q. In terms of the management fee calculation
20 that were made.

21 A. Yes.

22 Q. Were those calculations done on the books
23 and records of Michael D. Sullivan & Associates or
24 Sullivan & Powell or Solution & Tax on the one hand,
25 or were they in the books and records of P&S or S&P

1 on the other hand?

2 A. I'm not sure.

3 Q. Okay. Now, let's just -- I just want to
4 go over a couple of these sheets with you, if I can.

5 A. Sure.

6 Q. This is for 2002.

7 A. Uh-huh.

8 Q. So at the bottom here it says Kelco
9 clients and year-to-date management fees. Do you
10 see that?

11 A. Can you point to that.

12 Q. I'm sorry, in the lower column.

13 A. Oh, yes. Yes, yes, yes.

14 Q. It has year-to-date management fees for
15 Kelco and that totals \$90,473.25, correct?

16 A. That's what it says.

17 Q. And that would be one half of your
18 management fee would be, therefore, payable to Kelco
19 for the clients that Kelco brought into the
20 partnership; is that true?

21 A. That's what it appears, yes.

22 Q. Okay. So there's a total of 90,473.25 of
23 which 45,236.62 would go to Kelco, correct?

24 A. Correct.

25 Q. And then in the upper right-hand corner.

1 Q. -- "accrued A&B year to date"?

2 A. Uh-huh.

3 Q. Do you know what that represents?

4 A. No, I don't.

12:03:54

5 Q. If you would just look through these next
6 several pages which are similar to the documents we
7 have just discussed.

8 A. Uh-huh.

12:04:04

9 Q. And let me ask you whether or not you had
10 any knowledge of these documents or involvement in
11 reviewing or calculating these documents?

12 A. I am looking through them as we speak.
13 They all appear to be similar type documents. And
14 I could tell you I have never prepared any of
15 these. I have seen things like these, but I am not
16 familiar with these documents.

12:04:24

17 Q. Do you know when management fees were
18 first paid to Frank Avellino or Michael Bienes?

19 A. I can't remember.

12:04:39

20 Q. Would that be in the records of P&S and
21 S&P?

22 A. It would appear in records similar to
23 that. They appear somewhere. I can't tell you
24 what records. Since I don't have the records, I
25 couldn't tell you.

12:04:55

1 Q. Would those be included in the records
2 that were provided to Berger Singerman?

3 A. Yes. Oh, absolutely.

12:05:28

4 MR. WOODFIELD: Mark this next document,
5 one-page document as Defendant's 6.

6 (Defendant's Exb. No. 6, Report, July 13,
7 2005, 0014452.)

8 BY MR. WOODFIELD:

12:05:47

9 Q. Mr. Sullivan, I will show you what I have
10 marked as Defendant's 6, and ask you to take a look
11 at that, and ask if you can identify this document?

12 A. Yes, I can.

13 Q. And what is it?

12:05:59

14 A. This would have been a typical report that
15 we would have sent on a quarterly basis to one of
16 our investors.

17 Q. And in this case the investor is?

18 A. Ersica Gianna.

19 Q. And do you recall that individual?

12:06:16

20 A. I know her very well.

21 Q. And how did it come about that you knew
22 her?

23 A. I represented her on an IRS matter. Her
24 husband had left her. We had become dear friends.
25 She had known my mother. And she just got to be a

12:06:28