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

CASE NO.: 12-034123 (07)

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

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.
_____/

DEFENDANT FRANK AVELLINO'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS AND TO STRIKE ALLEGATIONS IN THE SECOND AMENDED COMPLAINT AND/OR MOTION FOR MORE DEFINITE STATEMENT

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files this Memorandum of Law in Support of his Motion to Dismiss and to Strike Allegations in the Second Amended Complaint and/or For More Definite Statement and as grounds therefore states as follows:

INTRODUCTION

Plaintiffs, S & P Associates, General Partnership ("S & P"), P & S Associates, General Partnership ("P & S") (together "the Partnerships"), and Philip Von Kahle as Conservator of S & P, and P & S (Conservator) have sued multiple defendants, including Avellino, alleging eight causes of action, six of them include Avellino as a defendant (aiding and abetting a breach of fiduciary duty; negligence; avoidance of fraudulent transfers pursuant to Section 726.105(1)(A); Unjust Enrichment; Money Had and Received; and Civil Conspiracy). Despite the filing of a

Second Amended Complaint to correct the deficiencies of their prior pleading, the Second Amended Complaint fails to do so and should be dismissed.

THE PARTNERSHIP CLAIMS ARE BARRED BY THE DOCTRINE OF *IN PARI DELICTO*

Plaintiffs allege that the Partnership, through its Managing General Partner, Michael Sullivan, engaged in the alleged wrongful conduct and made the alleged payments ("kickbacks"), when they knew or should have known that the payments were improper (See paragraphs 31, 35, and 38). The doctrine of *in pari delicto* prevents a plaintiff who has participated in a wrongdoing from recovering damages which result from the wrongdoing. *In re Gosman*, 382 B.R. 826, 837-38 (S.D. Fl. 2007); *Dorestin v. Hollywood Imports, Inc.*, 45 So.3d 819, 822 (Fla. 4th DCA 2010). Based on the allegations in the Second Amended Complaint since the Partnerships were involved in the alleged wrongdoing they are barred from bringing their causes of action based on the doctrine of *in pari delicto*.

Furthermore the court order appointing the Conservator in this matter also required that the Conservator take possession of all property of the Partnerships as well as review, prosecute, dismiss, initiate and/or investigate any and all potential claims that may be brought or have been brought on behalf of the Partnerships (Paragraphs 4 and 5 of the Order). Accordingly, the Conservator, not the Partnerships, is the proper party to bring and/or maintain the instant lawsuit.

THE NEGLIGENCE CLAIM (COUNT IV) SHOULD BE DISMISSED

Plaintiffs' negligence claim is based on an alleged duty owed by Avellino to the individual investors of the Partnerships to recommend the purchase or sale or exchange of any security which was suitable for the individual customer, as well as to disclose to the individual investors any material conflict of interest, such as compensation that they were receiving. (See Paragraphs 75, 82, 83, and 87). To the extent Avellino owed such duties, which he denies, the

breach of any such duty and resulting damages would be to the individual investors, not the Partnerships. The individual investors, rather than the Partnerships would have the standing to bring such direct actions. *See Fort Pierce Corp v. Ivey*, 671 So.2d 206 (Fla. 4th DCA 1996) (A direct action is a cause of action which seeks an injury suffered directly by the shareholder which is separate from any injury sustained by any other shareholders).

Furthermore, Plaintiffs' negligence claim is based on alleged duties owed by Avellino pursuant to Chapter 517 and Florida Administrative Code 69W-600.0131.[1] However, Plaintiffs are barred by the statute of limitations from bringing any cause of action under Chapter 517. (A claim under Chapter 517 must be brought within two years from the time the facts giving rise to the cause of action was discovered or should have been discovered with the exercise of due diligence but not more than five years from the date such violation occurred. *See* Section 95.11(4)(e), *Florida Statutes*.) Since Plaintiffs are barred from bringing a cause of action under Chapter 517, they should not be allowed to skirt the statute of limitations by calling their cause of action "negligence" when in reality it is based on definitions and duties imposed by Chapter 517. Without the statutory duties set forth in Chapter 517 and Florida Administrative Code, Plaintiffs have failed to state a cause of action for negligence and thus, Count IV should be dismissed. *See Gibbs v. Hernandez*, 810 So.2d 1034, 1036 (Fla. 4th DCA 2002) (To prove a cause of action for negligence, a plaintiff must prove that the defendant had a legal duty, the defendant breached that duty, the breach proximately caused the plaintiff's injury, and the plaintiff incurred damages as a result.)

[1] Florida Administrative Code 69W-600.0131 refers to and obtains its authority from Chapter 517.

THE ALLEGATIONS IN COUNT IV RELATING TO CHAPTER 517 AND FLORIDA ADMINISTRATIVE CODE 69W-600.0131 SHOULD BE STRICKEN

Florida Rule of Civil Procedure 1.140(f) provides that "A party may move to strike or the court may strike redundant, immaterial, impertinent or scandalous matter from any pleading at any time. As set forth above, because any claim based on Chapter 517 is barred by the statute of limitations, any allegations relating to Chapter 517 is immaterial to this litigation, and should be stricken. *See Rice-Lamar v. City of Florida Lauderdale*, 853 So.2d 1125, 1134 (Fla. 4th DCA 2003) (A motion to strike matter as redundant, immaterial or scandalous should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision.).

THE NEGLIGENCE CLAIM BASED ON SECTION 475.41 (COUNT V) SHOULD BE DISMISSED

Plaintiffs have alleged that pursuant to Section 475.51, *Florida Statutes*, the "Kickback Defendants", including Avellino, had a duty to not act as a broker without possessing the necessary license, and therefore breached their duty by receiving "Kickbacks" in exchange for recruiting or procuring additional partners for the Partnerships without possessing the necessary license. However, Section 475.51, *Florida Statutes* is not applicable to Avellino or the facts alleged in this action. Chapter 475 governs real estate brokers, sales associates, schools and appraisals. There is no allegation, nor can Plaintiffs allege, that Avellino acted as a real estate broker, or that the transactions at issue involved real property. Accordingly, Plaintiffs' Count V should be dismissed with prejudice.

AVOIDANCE OF FRAUDULENT TRANSFERS PURSUANT TO SECTION 726.105(1)(A) OF THE FLORIDA STATUTES (COUNT V) SHOULD BE DISMISSED OR MORE DEFINITE STATEMENT ORDERED

A creditor may bring a claim under Florida's Uniform Transfers Act (FUFTA) to avoid a transfer or obligation to the extent it is necessary to satisfy the creditor's claim. Sections 726.101-726.112, *Florida Statutes*. In the instant case, Plaintiffs failed to identify the creditor who has the right to bring such claim as well as the specific debtor against whom the claim can be brought. Paragraph 113 of the Second Amended Complaint alleges that some of the partners of the Partnerships received distributions which were less than their actual contributions to the Partnerships. It is clear based on this allegation that the Partnership is not the creditor, and does not have the standing to bring such claims; to the extent some of the partners have the right to such claims they would have to bring a direct action. *See Alario v. Miller*, 354 So 2d 925, 926 (Fla. 2d DCA 1978); *Karten v. Woltin*, 23 So. 3d 839, 840-841 (Fla. 4th DCA 2009).

Paragraph 114 of the Second Amended Complaint further confuses who might be the proper party to bring such claim, because it alleges that the distributions made to the "Kickback Defendants" were made to hinder, delay or defraud the Partners, who are and were creditors of the Partnerships, as well as the Partnerships themselves, which are also creditors. Under this allegation the Partnership would be debtor of some of the partners, and clearly the Partnership cannot be both a creditor and a debtor. *See* 726.102, *Florida Statutes*.[2]

Furthermore, pursuant to Section 726.110, *Florida Statutes*, the statute of limitations for claims brought under Section 726.105(1)(a) is within four years after the transfer was made or one year after the transfer was or could reasonably been discovered. Plaintiffs filed this action

[2] Plaintiffs again rely on Chapter 517 and Florida Administrative Code to form the basis for the alleged improper transfers to Avellino. However as argued above since Plaintiffs would be barred by the statute of limitations for bringing a claim pursuant to these provisions, Plaintiffs should not be allowed to rely on these provisions to state a fraudulent transfer cause of action.

on December 10, 2012, and therefore only transfers which were made four years previously (i.e. December 10, 2008) are not barred by the statute of limitations. Although Plaintiffs have not pled the exact dates that the alleged fraudulent transfers occurred to Avellino, they have pled that the Partnerships were formed in 1992, and clearly any transfers from 1992 through December 10, 2008 would not be actionable based on statute of limitations. Accordingly, Plaintiffs' fraudulent transfer cause of action should be dismissed to the extent it includes transfers prior to December 10, 2008, or alternatively, Plaintiffs should be ordered to provide a more definite statement of when the alleged transfers were made to Avellino so he can know what specific allegations/claims he is to respond to in the Amended Complaint. *See* Florida Rule of Civil Procedure 1.140(e) (if a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, a party may move for a more definite statement).

BREACH OF FIDUCIARY DUTY (COUNT IX) SHOULD BE DISMISSED

Plaintiffs allege that Avellino was a partner in the Partnerships or owed fiduciary duties to the Partnerships based on his relationship with the Partnerships (Paragraph 135). In order to properly plead a breach of fiduciary duty cause of action Plaintiffs must plead the existence of a fiduciary duty. *Reed v. Long*, 111 So.3d 237, 239-240 (Fla. 4th DCA 2013). Plaintiffs' pleading of a breach of fiduciary duty cause of action is insufficient because it fails to set forth ultimate facts to support each element of the cause of action. *See Price v. Morgan*, 436 So.2d 1116 (Fla. 5th DCA 1983) (pleading is insufficient if it contains merely conclusions and no ultimate facts); *Alvarez v. E & A Produce Corp*, 708 So.2d 997 (Fla. 3d DCA 1998).

Plaintiffs have failed to allege a factual basis to support their conclusory statements that Avellino owed a fiduciary duty. In fact, the allegations which are alleged are either inconsistent with the exhibits, and therefore, a nullity, or do not support the conclusion that Avellino had a

relationship with the Partnerships which would create a fiduciary duty. (See paragraphs 24 and 30).[3] Accordingly, Count IX should be dismissed.

CIVIL CONSPIRACY (COUNT VIII) SHOULD BE DISMISSED

To prove a civil conspiracy a plaintiff must show a conspiracy between two or more persons by concerted action to accomplish an unlawful purpose or to accomplish a purpose by unlawful means. *See Segal v. Rhumbline Intern. Inc.*, 688 So.2d 397, 400 (Fla. 4th DCA 1977). Plaintiffs have alleged a civil conspiracy to engage in negligence. However, a civil conspiracy requires an agreement between two or more parties to do an unlawful act or to do a lawful act by unlawful means. Two parties cannot conspire to commit or engage in negligence, and therefore Count VIII should be dismissed.[4]

WHEREFORE, Defendant, Frank Avellino, respectfully requests this Court to enter an order dismissing Plaintiffs S & P, and P & S as Plaintiffs; and further dismissing Counts IV and V against him, or alternatively to order a more definite statement regarding the fraudulent transfer cause of action and for such other relief as this court deems necessary.

[3]Paragraph 30 of the Second Amended Complaint, which alleges Avellino was active in the management of the Partnerships themselves is also inconsistent with the exhibits attached to the Second Amended Complaint, which explicitly provides that "the management and control of the day-to-day operations of the Partnership and the maintenance of the Partnership property shall rest exclusively with the Managing General Partners, Michael D. Sullivan and Greg Powell. (Article Eight of Exhibit B). The language in the exhibit controls when there is an inconsistency with the pleadings. *American Seafood Inc. v. Clawson*, 598 So.2d 273 (Fla. 3rd DCA 1992).

[4] Even if negligence could be the underlying tort or wrong, as set forth above Plaintiffs have failed to plead an actionable cause of action for negligence, and therefore, have failed to plead all the essential elements of a civil conspiracy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March 2014, the foregoing document is being served on those on the attached service list by email.

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