

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.

**DEFENDANT FRANK AVELLINO'S MOTION TO DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT AND TO STRIKE ALLEGATIONS AND/OR MOTION FOR
MORE DEFINITE STATEMENT**

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files his Motion to Dismiss Plaintiffs' Second Amended Complaint and to Strike Allegations and/or Motion for More Definite Statement and as grounds therefore states as follows:

INTRODUCTION

Seeking to remedy the deficiencies in their amended complaint as revealed in defendants' motions to dismiss, Plaintiffs filed a Second Amended Complaint seeking the recovery of monies allegedly paid by P & S Associates, General Partnership ("P & S") and S & P Associates, General Partnership ("S & P") (collectively "the Partnerships") to Defendants, including Avellino. However, the Second Amended Complaint does not adequately address such deficiencies and, accordingly, should be dismissed.

The Partnership Claims are Barred by the Doctrine of *In Pari Delicto*

1. In the instant case, the Partnerships, through their Managing General Partner, Michael Sullivan, engaged in the alleged wrongs they are seeking damages for and, therefore,

they are barred by the doctrine of *in pari delicto* from bringing such claims against Defendant Avellino.

The Negligence Claim (Count IV) Should be Dismissed and the Allegations Relating to Chapter 517 and Florida Administrative Code Should be Stricken

2. Plaintiffs alleged that the “Kickback” Defendants, including Avellino, acted as investment advisors and thus had a duty to the investors, which they breached. To the extent Avellino owed such duty, which he denies, or breached such duty, which he denies, the duty would be owed to individual investors, not to the Partnerships (i.e. a direct action) and, therefore, Plaintiffs do not have standing to bring the negligence claim against Avellino.¹

3. Additionally, Plaintiffs have tried to skirt the statute of limitations issues relating to Chapter 517 actions by attempting to use the definitions and duties set forth in Chapter 517 as a basis for their negligence claims. However, Plaintiffs should not be allowed to avoid the statute of limitations by calling their cause of action “negligence” when, in fact, it is based on an alleged violation of Chapter 517 which they cannot bring based as they are barred by the applicable statute of limitations.

4. Since Plaintiffs are barred by the statute of limitations from bringing a claim based on Chapter 517, the allegations relating to Chapter 517 and Florida Administrative Code 69W-600.0131 are immaterial and should be stricken.

The Negligence Claim Based on Section 475.41 (Count V) Should be Dismissed

5. Plaintiffs added a negligence count based on Section 475.41, Florida Statutes. However, Chapter 475 governs real estate brokers, sales associates and schools and therefore is inapplicable to the instant litigation. Accordingly, Count V should be dismissed.

¹ In the Second Amended Complaint, Plaintiffs added paragraphs 20 and 21 which allege in a conclusory fashion that Avellino allegedly gave advice to the Partnerships, but all the remaining allegations in the Second Amended Complaint relate only to the individual investors.

**The Fraudulent Transfer Claim (Count VI) Should be Dismissed
And/or More Definite Statement Ordered**

6. Plaintiffs failed to allege that they are the creditors entitled to bring a fraudulent transfer claim. They allege that there are individual partners who did not receive their actual contributions, but those individual partners are not parties to this action, and would need to bring their own direct action. Additionally, Plaintiffs failed to allege when the alleged transfers took place which makes it difficult for Avellino to form a responsive pleading. Plaintiffs should be ordered to provide a more definite statement to include the time of the alleged transfer to Avellino.

Breach of Fiduciary Duty (Count IX) Should be Dismissed

7. Plaintiffs failed to state a cause of action against Avellino for breach of fiduciary duty, because they have failed to allege a factual or legal basis for any alleged duty owed by Avellino to the Plaintiffs.

Civil Conspiracy (Count X) Should be Dismissed

8. Plaintiffs alleged a civil conspiracy to engage in negligence; however, two parties cannot conspire to commit or engage in negligence and, therefore, Count X should be dismissed. Furthermore, as set forth above, Plaintiffs failed to plead an actionable cause for negligence and therefore, without an underlying wrong, there can be no conspiracy.

WHEREFORE, Defendant Frank Avellino respectfully requests this Court to enter an order dismissing Plaintiffs' P & S and S & P claims, as well as dismiss Counts IV, V, VI, IX and X against him, or alternatively to order a more definite statement relating to Count VI, and for such other relief as this Court deems just and necessary.

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 3rd day of March, 2014

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