

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'
AMENDED JOINT MOTION FOR SUMMARY JUDGMENT

Defendants, Frank Avellino and Michael Bienes (collectively the “Defendants”), by and through their undersigned counsel, move this Court, pursuant to Rule 1.510, Florida Rules of Civil Procedure, for an order granting summary judgment on the remaining causes of actions of Plaintiffs’ Fifth Amended Complaint (Counts I, III, IV, V, VI and VII) and as grounds therefore state as follows:

1. There are no disputed material facts relating to the statute of limitations defense and the Defendants are entitled to a judgment as a matter of law as set forth herein.
2. On December 10, 2012, Plaintiffs filed their initial Complaint against Defendants and others. Defendants’ Amended Material Statement of Facts (“M.F.S.,” filed contemporaneously with this motion and incorporated herein) ¶1. Plaintiffs subsequently filed five amended complaints each of which asserted new, different and at times contradictory claims against Defendants. On December 18, 2014, an order was entered granting, in part, Defendants’ motion to dismiss Plaintiffs’ Fourth Amended Complaint, which dismissed with prejudice Plaintiffs’ fraud claims against Defendants on statute of limitations grounds.

3. On January 9, 2015, Plaintiffs filed their Fifth Amended Complaint (“5AC”) which asserts the following claims against Defendants: Count I – Breach of Fiduciary Duty; Count III – Unjust Enrichment; Count IV – Fraudulent Transfer; Count V – Unjust Enrichment; Count VI – Money Had and Received; and Count VII – Civil Conspiracy. M.F.S., ¶ 2.

4. The claims asserted by Plaintiffs are all based on management fees which have been characterized with such terms as distributions, “kickbacks” or funds “funneled” to Defendants. 5AC, ¶¶46, 57, 75, 79, 95, 101 and 108. According to Plaintiffs, the first alleged “kickback” “funneled” to Defendants was made in 2000 and the last payment was made on October 1, 2008. M.F.S. ¶¶ 4 and 5.

5. The last payments of October 1, 2008 to Avellino and in 2007 to Bienes were made more than four years before the filing of the initial Complaint on December 10, 2012.

6. All of Plaintiffs’ claims are time barred. Except as provided in paragraph 7 below, the statute of limitations for all of the remaining causes of action brought by Plaintiffs against Defendants is four years.

7. The only cause of action whose corresponding statute of limitations is based in part upon the date of discovery rather than strictly upon when the “tort” occurred is Count IV, the fraudulent transfer cause of action. The deadline for that particular count is four years after the transfer was made or, if later, within one year after the transfer was or “could reasonably have been discovered.” Fla. Stat. § 726.110. As a matter of law, the management fees characterized by Plaintiffs as “kickbacks” were or “could reasonably have been discovered” longer than a year before the suit was filed on December 10, 2012. Not only were the Partnerships’ records legally and contractually available to the Partnerships and all of their general partners, but at all times they were physically available for inspection and review as well,

and a review of such records would have revealed the payment of management fees to a number of individuals and entities, including defendants, Frank Avellino and Michael Bienes. M.F.S. ¶¶ 8 and 9. Ultimately, the Plaintiffs took the time to review the Partnerships' records and saw the information reflecting payments to Avellino and Bienes which was readily apparent and available at all times. M.F.S. ¶¶ 4, 5, 8 and 9.

8. In Plaintiffs' reply to the Defendants' statute of limitations defense set forth in their affirmative defenses they raised the doctrines of delayed discovery, equitable estoppel and continuing torts as grounds to extend the applicable statute of limitations. However, as more fully set forth in Defendants' Amended Memorandum of Law filed contemporaneously with this motion, these doctrines are not applicable.

9. Delayed discovery applies only to professional malpractice, medical malpractice and intentional torts based on abuse, and is inapplicable as a matter of law to the causes of action asserted by Plaintiffs in this action. M.F.S. ¶ 2.

10. Similarly, even under Plaintiffs' theory of the case, equitable estoppel is not a viable defense because it applies only to situations in which claimants recognized that they had a basis for suit, but were delayed from filing their suit because of defendants' conduct. The facts upon which Plaintiffs rely for their assertion of equitable estoppel revolve around their contention that the information necessary for them to file suit was concealed from them. M.F.S. ¶ 9B (Interrogatory Answer #11); M.F.S. ¶¶ 12, 13. Plaintiffs deny having any knowledge of the basis for suit from which they could have "recognized" the causes of action. Therefore, Plaintiffs fail to satisfy the requisite elements of such defense.

11. The continuing torts doctrine is similarly legally inapplicable as, even accepting the facts upon which Plaintiffs rely, there were no tortious acts committed by Defendants after 2008 which caused damages to Plaintiffs. M.F.S. ¶ 11.

12. Assuming, *arguendo*, that the continuing torts doctrine applied, it would not revive Plaintiffs' barred actions because it only permits recovery of damages incurred during the limitations period immediately prior to suit. Therefore, only management fees paid in the statutory four years between December 10, 2008 and December 10, 2012 would be recoverable. There were no such fees. M.F.S. ¶¶ 4, 5.

13. Not only are the doctrines of delayed discovery, equitable estoppel and continued tort inapplicable as a matter of law, but, even were they legally applicable, they are unsupported by any admissible evidence. Inadmissible evidence, and mere unsupported conclusions made without any personal knowledge such as those alleged by Plaintiffs throughout this case cannot be used to defeat motions for summary judgment.

WHEREFORE, Defendants respectfully request this Court to enter an order granting summary judgment dismissing Plaintiffs' Fifth Amended Complaint as to Defendants, Avellino and Bienes. Alternatively, Defendants request partial summary judgment as to any distributions, management fees ("kickbacks") and other payments made, and as to any damages incurred, prior to December 10, 2008.

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 4th day of March, 2016.

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