

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
MATERIAL FACTUAL STATEMENT IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

Defendants, Frank Avellino and Michael Bienes (collectively the “Defendants”), by and through their undersigned counsel, and pursuant to Section 5 of the Complex Litigation Procedures, provide the following Amended Material Factual Statement (“M.F.S.”) in Support of Defendants’ Amended Motion for Summary Judgment dismissing the Fifth Amended Complaint:

1. Plaintiffs filed their initial Complaint on December 10, 2012. [Docket Sheet].
2. The causes of action asserted against Defendants in the latest complaint (Fifth Amended Complaint) are Count I (breach of fiduciary duty), Counts III and V (unjust enrichment), Count IV (avoidance of fraudulent transfers), Count VI (money had and received) and Count VII (civil conspiracy). Fifth Amended Complaint (“5AC”). The 5AC was filed on January 9, 2015. [Docket Sheet].
3. The factual basis for the causes of action against Defendants is the alleged “kickbacks” paid to Defendants. [5AC, ¶¶ 46, 57, 75, 79, 95, 101 and 108].

4. The management fees (alleged “kickbacks”) paid to Avellino, or an entity alleged to be controlled or directed by Avellino, were paid commencing in 2000, with the last payment made on or about October 1, 2008. M.F.S. ¶ 4A [Plaintiffs’ Third Supplemental Responses to Avellino’s First Set of Interrogatories (Interrogatory Answers 2, 4)] and documents identified therein; and M.F.S. ¶ 4B [Plaintiffs’ Responses to Avellino’s Second Set of Interrogatories (Interrogatory Answer 5)]¹.

5. The alleged “kickbacks” paid to Bienes were paid commencing in 2000 with the last payment made in 2007. [Plaintiff’s Supplemental Response to Bienes’ First Set of Interrogatories (Interrogatory Answers 7 and 8)].

6. On December 11, 2008, the Madoff Ponzi scheme became public. [Defendants’ Request for Judicial Notice].

7. Plaintiffs, P&S and S&P, and their counsel, had corporate records of P&S and S&P and had actual knowledge of the “kickbacks” paid to Avellino and Bienes, which they seek to recover in this action, prior to August 24, 2012. By that time, they had knowledge which caused them to believe that there were discrepancies in the Partnerships’ funds, that management fees had been paid to Sullivan and his co-conspirators, and that Avellino had control over Sullivan and had found Sullivan and other “front men” as a way to raise money for Madoff. [Defendants Request for Judicial Notice, Verified Compliant filed in *Matthew Carone, ET AL. V. Michael D. Sullivan*, Circuit Court, Broward County, Case No. 12-24051-07, ¶¶ 19, 20, 22, 23, 25, 26, 27, 28 and 30, filed August 24, 2012].

8. All of the books and records of P&S and S&P (the “Partnerships”) were at all times available for inspection and review by the general partners of the Partnerships. Deposition

¹ Interrogatory Answers and documents designated in paragraphs 4 and 5 were previously filed on April 14, 2015 with Defendants’ Notice of Filing Confidential Information within Court File.

of Michael D. Sullivan, December 1, 2015, pp. 47-52. [Plaintiffs' Notice of Filing Documents in Support of Motion for Summary Judgment filed contemporaneously with this motion].

9. The Partnerships' books and records disclosed that management fees were paid to a number of individuals and entities, including defendants, Frank Avellino and Michael Bienes. M.F.S. ¶ 4 A (Interrogatory Answers 2 and 4) and ¶ 4 B (Interrogatory Answer 5) and M.F.S. ¶ 5 (Interrogatory Answers 5, 7 and 8), above, reflect that, once the Plaintiffs looked at the Partnership's records, they saw the fees paid to Defendants. The documents referenced in the Interrogatory Answers (i.e. AVE 25- AVE89 RTP)² (M.F.S. ¶ 9A) were partnership records reflecting the management fees paid to A & B (Avellino & Bienes). Furthermore, Plaintiff's Amended Answers and Objections to Defendant Avellino's Fourth Set of Interrogatories (M.F.S. ¶ 9 B; Interrogatory Answers 9, 11, 13, 15) [Plaintiffs' Notice of Filing Documents in Support of Amended Motion for Summary Judgment] admit that the payments to Defendants were reflected within the Partnerships' records.

10. Michael D. Sullivan ("Sullivan"), the managing partner of the Partnerships, was not aware that Bernard L. Madoff Investments Securities ("BLMIS") was operating a Ponzi scheme prior to Madoff's arrest on December 11, 2008. [Confidential Settlement Agreement between Sullivan and Plaintiffs, dated June 26, 2014].

11. Nothing done by the Defendants after December 10, 2008 caused the Partnerships to pay the "kickbacks" which allegedly damaged them, and none of the actions which they contend occurred within the statute of limitations period legally constitute a continuing tort. [Plaintiff's Amended Answers and Objections to Defendant Avellino's Fourth Set of Interrogatories (Interrogatory Answer 13)].

² Documents designated as M.F.S. 9A, 10 and 12 are filed contemporaneously with this motion, within Defendants Frank Avellino and Michael Bienes' Second Joint Motion for Order Granting Approval of Filing Documents Under Seal and Second Notice of Filing Confidential Information Within Court Filing.

12. None of the actions which form the basis of Plaintiff's equitable estoppel argument constitute equitable estoppel as they reflect that Plaintiffs' position is that they did not know the basis of their cause of action rather than that they recognized the basis of their cause of action but were induced by Defendants' conduct to refrain from filing suit on a timely basis. [Plaintiff's Amended Answers and Objections to Defendant Avellino's Fourth Set of Interrogatories (Interrogatory Answer 11); August 10, 2012 letter from Sullivan to partners. (M.F.S. ¶ 12)].

13. The August 10, 2012 letter from Sullivan to the partners was written after the statute of limitations had expired on every "kickback" paid before August 10, 2008 (which was the vast majority of them), and could not have caused any of them to be paid. Just two weeks thereafter, a complaint alleging Avellino & Bienes' involvement with Madoff and the payment of improper management fees was filed, although not against Avellino or Bienes. M.F.S. ¶ 7, above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March, 2016, 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.

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