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' AMENDED MEMORANDUM OF LAW IN SUPPORT OF THEIR JOINT MOTION FOR SUMMARY JUDGMENT

Defendants, Frank Avellino and Michael Bienes (collectively, the "Defendants"), by and through their undersigned counsel, file this Amended Memorandum of Law in Support of their Amended Joint Motion For Summary Judgment.

PRELIMINARY STATEMENT

Plaintiffs, P&S Associates General Partnership and S&P Associates General Partnership (the "Partnerships"), were investment vehicles established by Defendant Michael Sullivan ("Sullivan") and his deceased partner, Michael Powell, that pooled individuals' funds to invest in Bernard L. Madoff Investment Securities, LLC ("BLMIS"). Fifth Amended Complaint ("5AC") ¶¶ 21 and 22. On December 11, 2008, the Madoff Ponzi scheme became public. Individuals and entities that invested in BLMIS, such as the Partnerships, incurred substantial losses.

On December 10, 2012, the Partnerships and Margaret J. Smith, as the then managing general partner of the Partnerships, filed the initial complaint in this action. On January 17,

2013, Philip Von Kahle was appointed as Conservator of the Partnerships (the "Conservator"), charged with liquidating the Partnerships, and recovering and distributing their assets.

The Conservator and the Partnerships (hereinafter, collectively, "Plaintiffs") have amended their complaint five times. The 5AC asserts claims against Defendants for 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.[1]

Plaintiffs' claims against Defendants seek to recover from Avellino and Bienes management fees referred to as, *inter alia*, "kickbacks," including those Sullivan allegedly paid to Avellino and Bienes for referring investors to the Partnerships. Plaintiffs identified these payments in the amounts of $307,790.84 to Avellino and $357,790.84 to Bienes. 5AC, ¶¶ 46 (a) and (b). In response to Defendants' discovery requests, Plaintiffs identified the dates and amounts of such payments. *See* M.F.S.[2] ¶¶ 4 & 5. According to Plaintiffs, the last date that a payment was made to Avellino, or an entity alleged to be controlled by Avellino, was October 1, 2008. *See* M.F.S. ¶ 4, and the last date that a payment was made to Bienes was in 2007. *See* M.F.S. ¶ 5.

All of the alleged payments which Plaintiffs now seek to recover were made more than four years before the filing of the initial complaint in this action and, thus, are time barred.

ARGUMENT

Summary judgment is proper when there is no dispute on the material facts bearing on the issues before the court and the moving party is entitled to a judgment as a matter of law. *See*

[1] On December 18, 2014, the court entered an order granting Defendants' motion to dismiss with prejudice the fraud claims asserted in the Fourth Amended Complaint (Counts II, III and IV) on statute of limitations grounds.

[2] "M F.S." refers to the Amended Material Factual Statement filed contemporaneously by Defendants pursuant to Section 5 of the Complex Litigation Procedures.

Fla.R.Civ.P. 1.510. Determination of the accrual of causes of action, which is the issue in this case, has been held to be "a question of law, not fact." *Bombardier Aerospace Corp. v. Signature Flight Support Corp.*, 123 So. 3d 128, 130 (Fla. 5th DCA 2013). In the instant case, there are no material facts in dispute and the Defendants are entitled to summary judgment dismissing the remaining claims against them based on statute of limitations as a matter of law for the reasons set forth herein.

COUNT I – BREACH OF FIDUCIARY DUTY

Plaintiffs allege that Defendants breached their fiduciary duties when they referred investors to the Partnerships and received unlawful kickbacks in exchange for such referrals. (5AC, ¶57). The statute of limitations for a breach of fiduciary duty cause of action is four years from when the cause of action accrues. *See,* 95.11(3)(o), *Fla. Stat*. A cause of action accrues when the last element constituting the cause of action occurs. *See,* 95.031(1), *Fla. Stat*. The elements for breach of fiduciary duty are the existence of a fiduciary duty, breach of duty, and damages which resulted from that breach of duty. *Patten v. Winderman,* 965 So.2d 1222 (Fla. 4th DCA 2007).

The 5AC alleges that the damages to the Partnerships incurred as a result of the breach of fiduciary duties (i.e. the last element) were the "kickbacks" received by Avellino and Bienes (5AC ¶58). Plaintiffs identify the first alleged "kickback" paid to both Avellino and Bienes as having occurred in 2000. M.F.S. ¶¶ 4 & 5. The statute of limitations commences when the injury first appears, not when it recurs, even when each recurrence marks a breach of some continuing duty owed by the defendant. *E.g. Phillips v. Amoco Oil, Co.,* 799 F.2d 1464, 1468-69 (11th Cir. 1986); *Kelley v. School Board,* 435 So.2d 804 (Fla. 1983); *PricewaterhouseCoopers LLP v. Cedar Res., Inc.,* 761 So.2d 1131, 1134 (Fla. 2d DCA 1999). Since the initial complaint was filed

on December 10, 2012, more than twelve years from the date of the first payment to both Avellino and Bienes, Plaintiffs' claim for breach of fiduciary duty based on payment of "kickbacks" is time barred.[3]

COUNTS III AND V – UNJUST ENRICHMENT

In their unjust enrichment claims, Plaintiffs allege that Defendants would be unjustly enriched if they were to be able to retain the "kickbacks" allegedly paid to them, for which no value was allegedly received (5AC ¶¶ 76, 98). The statute of limitations for an unjust enrichment claim is four years from when the benefit was conferred (i.e. the transfer of monies). *See*, *Swafford v. Schweitzer*, 906 So.2d 1194, 1195 (Fla. 4th DCA 2005); Section 95.11(3)(k), *Fla. Stat.* Plaintiffs have specified that the last alleged "kickback" paid to Avellino was on October 1, 2008 and the last alleged "kickback" paid to Bienes was in 2007. M.F.S. ¶¶ 4 & 5. Thus, Plaintiffs' claims for unjust enrichment for benefits conferred more than four years prior to December 10, 2012, when the initial complaint was filed, are time barred.

COUNT IV – AVOIDANCE OF FRAUDULENT TRANSFERS

Plaintiffs have alleged that the "kickbacks" paid to Defendants were fraudulent transfers pursuant to Section 726.105(1)(a), *Fla. Stat*., made with the actual intent to hinder, delay or defraud a creditor of the Partnerships and thus should be paid back by the Defendants (5AC ¶¶ 82, 92). Pursuant to Section 726.110, *Fla. Stat*., a claim under Section 726.105(1)(a), *Fla. Stat*., must be brought within four years after the transfer was made or the obligation was occurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. In the instant case, according to Plaintiffs, the last "kickback" paid to Avellino was on October 1, 2008 and the last "kickback" paid to Bienes was in 2007. M.F.S.

[3] Even if each "kickback" were to be considered a new breach of fiduciary duty, which Defendants dispute, the last "kickbacks" paid were October 1, 2008 to Avellino and 2007 to Bienes, which were more than four years prior to the date of the filing of the complaint, and thus, are barred by the four year statute of limitations. M.F.S. ¶¶ 4 & 5.

¶¶ 4 & 5. Thus, Plaintiffs' claim for fraudulent transfer of monies made more than four years prior to December 10, 2012, when the initial complaint was filed, is barred by the statute of limitations.

The one year "saving clause" in Section 726.110 (1), *Fla. Stat.* does not help Plaintiffs. Plaintiffs could have, by exercising minimal effort, discovered the alleged "kickbacks" by asking for and reviewing the Partnerships' books and records. Section 7.03 of the Partnership Agreements specifically provides, "Each Partner or his or her authorized representative shall have access to AND THE RIGHT TO AUDIT AND/OR REVIEW the Partnership books and records at all reasonable times during business hours. (Emphasis included in original document). (5AC, Ex. A). In addition, Plaintiffs had such rights based on Section 620.8403, *Florida Statutes*. The books were available to Plaintiffs; the partners could have reviewed them at "any time they wanted to" M.F.S. ¶8 (Deposition of Sullivan, p. 47). The books revealed the information which Plaintiffs contend was necessary for them to file suit. When Plaintiffs made the effort to request and review the books, they saw the information which they could have seen years earlier had they made the effort to do so. M.F.S. ¶¶ 7, 9.

> It is too well-settled to require the citation of authorities that one who has either actual or constructive information and notice sufficient to put him on inquiry is bound, for his own protection, to make that inquiry which such information or notice appears to direct should be made, and, if he disregards that information or notice which is sufficient to put him on inquiry and fails to inquire and to learn that which he might reasonably be expected to learn upon making such inquiry, then he must suffer the consequence . . .

Brooks Tropicals, Inc. v. Acosta, 959 So. 2d 288, 295-96 (Fla. 3d DCA 2007) (finding that the trial court erred in sending the statute of limitations issue to the jury and ordering that judgment be entered in favor of the defendant). Knowledge of the contents of accessible records is

imputed. See, e.g., *Univ. of Miami v. Bogorff*, 583 So. 2d 1000, 1004 (Fla. 1991) (regarding medical records; *holding modified by Tanner v. Hartog,* 618 So. 2d 177 (Fla. 1993).

It is not necessary that a plaintiff know the extent of his damages or even all elements of the alleged cause of action in order to trigger the statute of limitations. *Breitz v. Lykes-Pasco Packing Co.,* 561 So. 2d 1204, 1205 (Fla. 2d DCA 1990). "Mere ignorance of the easily discoverable facts which constitute the cause of action will not postpone the operation of the statute of limitations as to the party plaintiffs." *Nardone v. Reynolds*, 333 So. 2d 25, 40 (Fla. 1976) *holding modified by Tanner v. Hartog*, 618 So. 2d 177 (Fla. 1993). *See, also, Suarez v. City of Tampa*, 987 So. 2d 681 (Fla. 2d DCA 2008) (the idea "that the filing of a lawsuit can be postponed until the full extent of the damage is known has been soundly rejected." *Id*. at 685.)

Therefore, any one of the partners of the Partnerships, and the Partnerships themselves, as a matter of law "could reasonably have discovered" the facts needed for filing this lawsuit substantially more than a year before they did so[4]. When asked for "all facts which support" all reasons why the statute of limitations would not bar their suit, the only information that Plaintiffs could provide were unsubstantiated conclusions that Sullivan prevented Plaintiffs from accessing all of the books and records, and that Sullivan was controlled by Defendants. M.F.S. ¶ 11 (Interrogatory Answer ¶ 15). Plaintiffs have provided no evidence to refute the inescapable conclusion that they could have reasonably discovered the transfers a year before they filed suit; nor have they provided any admissible evidence of Sullivan's prevention of access of the Defendants' control over Sullivan.[5] It is axiomatic that summary judgment cannot be defeated by mere paper issues or by inadmissible conclusions. *Bared v. Miami Prof'l Sports, Ltd.,* 353 So.

[4] Since the Partnerships were general partnerships, the knowledge of any partner is imputed to the Partnerships. § 620.8102, Fla. Stat. Ann.

[5] Even had Sullivan taken any action, it could not be used to defeat the cause of action against Avellino and Bienes. *Univ. of Miami v. Bogorff* at 1004-1005.

2d 167 (Fla. 3d DCA 1977) (affirming a summary judgment despite issue of equitable estoppel); *Leaseco, Inc. v. Bartlett*, 257 So. 2d 629 (Fla. 4th DCA 1971) (on "motion for summary judgment factual issues may not be created by reference to matters which at trial would be wholly inadmissible in evidence." *Id*. at 632). The mere assertion that the plaintiff was not aware of the cause of action is not sufficient to create an issue barring summary judgment. *Almand Const. Co., Inc. v. Evans*, 547 So. 2d 626 (Fla. 1989) (finding that summary judgment had been properly entered because knowledge that the plaintiffs "might have had a cause of action" was sufficient to satisfy the "discovery component" of a statute of limitations triggered when a defect could have been discovered with the exercise of due diligence. *Id*. at 628).

It therefore remains uncontradicted by any admissible evidence that the Plaintiffs could reasonably have discovered the facts upon which this suit is based. Accordingly, the one year delayed discovery provision of Section 726.110(1), *Fla. Stat.* is inapplicable and Plaintiffs' fraudulent transfer claim is time barred.

COUNT VI – MONEY HAD AND RECEIVED

Plaintiffs' "money had and received" claim alleges that Defendants were not entitled to receive the "kickbacks" and that it would be inequitable and unjust for them to retain these monies (5AC ¶¶ 102, 103). The statute of limitations for a "money had and received" cause of action is four years. Section 95.11(3), *Fla. Stat*. Again, based on Plaintiffs' responses to interrogatories, the last "kickback" paid to Avellino was on October 1, 2008 and to Bienes was in 2007. M.F.S.¶¶ 4 & 5. Thus, Plaintiffs' claim for unjust enrichment for benefits conferred more than four years prior to December 10, 2012, when the initial complaint was filed, is time barred.

COUNT VII – CIVIL CONSPIRACY

Plaintiffs allege that Defendants conspired with Defendants Steven Jacob, Steven F. Jacob, CPA & Associates, Sullivan and Michael D. Sullivan & Associates, Inc. to distribute and receive the "kickbacks" (5AC ¶108). The statute of limitations for a civil conspiracy claim is four years from when the cause of action accrues. Section 95.11(3)(p), *Fla. Stat.*; *Young v. Ball*, 835 So.2d 385, 386 (Fla. 2d DCA 2003). The civil conspiracy cause of action accrues when the alleged conspirators engage in their last actions, not when their actions are discovered. *Young*, 835 So.2d at 385-386. The statute of limitations commences when the injury first appears, not when it recurs, even when each recurrence marks a breach of some continuing duty owed by the defendant. *E.g. Phillips*, 799 F.2d at 1468-69; *Kelley*, 435 So.2d at 805-806; *PricewaterhouseCoopers LLC*, 761 So.2d at 1134. In the instant case, Plaintiffs alleged that the Defendants "…conspired and entered into an agreement to do an unlawful act, the distribution and receipt of the Kickbacks." 5AC ¶108. The "kickbacks" commenced in 2000, which was more than twelve years prior to December 10, 2012, when the initial complaint was filed, and which is therefore time barred.[6] *See* M.F.S. ¶¶ 4 & 5.

PLAINTIFFS' REPLY

Plaintiffs have replied to the statute of limitations defense by pleading that delayed discovery, continuing tort theory and equitable estoppel apply to extend the applicable statute of limitations. However, these doctrines, previously rejected by the court, do not apply to Plaintiffs' remaining claims.

[6] Even if the last act for the statute of limitations in the conspiracy cause of action is the last "kickback" which was received, which Defendants dispute, the last "kickbacks," were paid in October 1, 2007 (to Bienes) and October 2008 (to Avellino). The fact that the last management fees were paid in 2008 is also supported by the fact that they had to have been paid prior to December 11, 2008, since that is the date Madoff's Ponzi scheme was made public. M.F.S. ¶ 6. *See* Defendants' Request to Take Judicial Notice filed April 14, 2015.

Delayed Discovery

The delayed discovery rule only operates to delay the accrual of specifically enumerated causes of action, none of which have been alleged in the instant case. *Davis v. Monahan*, 832 So.2d 798 (Fla. 2002) (delayed discovery applies only to professional malpractice, medical malpractice and intentional torts based on abuse); *Young v. Ball*, 835 So.2d 385 (Fla. 2d DCA 2003) (delayed discovery doctrine does not apply to a cause of action for civil conspiracy). The delayed discovery rule, thus, has no application to Plaintiffs' remaining claims in the 5AC.

Continuing Tort

The continuing tort doctrine is also inapplicable to Plaintiffs' remaining claims in the 5AC. "A continuing tort is 'established by continual tortious acts, not by continual harmful effects from an original, completed acts." *Black Diamond Properties v. Haines*, 69 So.3d 1090, 1094 (Fla. 5th DCA 2011). "When a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort (citations omitted)." *Id.* at 1094.

In the instant case, accepting all of Plaintiffs' "facts" as true, all "damage causing" acts ceased when the last payment was made. By definition, an action which followed a payment could not have "caused it." The last payment was in 2008; no actions which occurred after that could have "caused" the 2008 payment. Similarly, no conduct in 2008 could have caused payments made in 2007 or earlier. Nothing upon which Plaintiffs base their continuing tort defense caused any payments to be made after 2008. M.F.S. ¶ 11; Interrogatory Answer ¶ 13. The only "facts" upon which the "continuing tort" argument rely are inadmissible conclusions made with no personal knowledge about Defendants' "control" over Sullivan and insignificant

allegations of communications and relationships. Even if this evidence were sufficient to establish control, which Defendants dispute, such control would be legally irrelevant to the causes of action based upon improperly paid fees – particularly as to the timeliness of bringing such causes of action.

Under the continuing tort doctrine, the statute of limitations begins to run "from the date *the* tortious conduct ceases. *Woodward v. Olson*, 107 So. 3d 540, 544 (Fla. 2d DCA 2013) (emphasis added). In this case, "the" tortious conduct is the acceptance of management fees, which did not "continue" past October 2008. No other conduct legally constituted a "continuation" of the payment of management fees. Only continued elements of each cause of action can constitute the continuation of the cause of action sufficient to defeat the statute of limitations. *Bloom v. Alvereze*, 498 Fed. Appx. 867 (11th Cir. 2012). ("The conspiracy cause of action was complete when Mr. Bloom was injured by his arrest on July 31, 2002. The property deprivation claims in Counts IX and X accrued when the property was seized on July 31, 2002. We reject the Blooms' argument that the torts in Counts IX and X are continuing because the property has not been returned, as return of the property is not an element of either tort." *Id*. at 876.). The continuing tort doctrine, if otherwise applicable, could have, at most, been used to permit a suit on the fees paid within four years of the suit being filed. It has no application to extend the statute of limitations on payments made between 2000 and October 2008 to December 2012.

Equitable Estoppel

Finally, the equitable estoppel doctrine is also inapplicable. The doctrine of equitable estoppel "… arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has elapsed." *Haines*, 69

So.3d at 1094; *Acoustic Innovations, Inc. v. Schafer*, 976 So.2d 1139, 1144 (Fla. 4th DCA 2008). Yet the entire basis of Plaintiffs' equitable estoppel argument is actually the opposite of what is required. The defense requires that the Plaintiffs "recognize the basis for the suit;" but the only "facts" upon which the Plaintiffs have relied attempt to show that Plaintiffs did not know the basis for the suit. M.F.S. ¶ 12, Interrogatory Answers ¶ 11. When asked to identify "all facts which support" their contention that equitable estoppel is applicable, the Plaintiffs never even implied a fact from which it could be inferred that they recognized their right to suit but were convinced not to file. To the contrary, they argue vehemently that Avellino maintained a relationship with Sullivan after 2008 in order to "prevent disclosure of Defendants' wrongdoings," and that the impropriety of the management fees "could not have been discovered" until August of 2012. M.F.S. ¶12, Interrogatory Answers ¶11. They allege nothing that occurred thereafter – or at all – which reflects that, *after* they recognized the basis for the suit, they were convinced to delay filing it.

The Plaintiffs rely upon a letter of August 10, 2012 from Sullivan to the partners which denied Defendants' control over Sullivan or their receipt of partnership funds. Yet that document does not acknowledge any cause of action. To the contrary, Plaintiffs imply that it was written to dissuade them from believing that there was a cause of action – not to help them recognize the cause of action but to dissuade them from filing. In fact, the facts reflect that, as a matter of law, this letter could have had no relevant effect whatsoever on the timeliness of Plaintiffs' claims.

The letter was not written until August 10, 2012. By that time, the causes of action based upon any management fee but those paid after August 10, 2008 were already barred by the respective statutes of limitation. Plaintiffs cannot possibly argue that that letter prevented them

from filing suit before it was written. Furthermore, to the extent that Plaintiffs are relying on that letter to convince this Court that it induced them not to file suit, such an argument can be negated even on summary judgment. Just fourteen days after the date of that letter, many general partners, through Plaintiffs' current law firm in this case, filed suit against Sullivan in which they alleged that they had the right to manage the affairs of the Partnerships (¶¶ 5-10)[7], that they were aware of a discrepancy between the funds invested in the Partnerships and the funds invested by the Partnerships in BLMIS (¶¶ 19-20, 27, 28), that Sullivan had already by then produced books and records of the partnerships which reflected that approximately $8 million of investor funds had been disbursed to pay "'management fees' and 'commissions' to co-conspirators;" (¶¶22, 23, 26), that Sullivan had "earmarked hundreds of thousands of dollars in 'accrued fees' to Frank Avellino and Michael Bienes, two individuals who are prohibited by the SEC from participating in the sale of securities;" and that "Mr. Avellino was given a significant, and inappropriate, level of control over the Partnerships." (¶30(a)(b)). The complaint continued by alleging that the Trustee for the Liquidation of BLMIS had filed a lawsuit alleging that Mssrs. Avellino and Bienes "found people such as Sullivan who were willing to act as 'front men' to operate partnerships so that they could continue to raise money and pool money from others to invest with BLMIS but avoid the scrutiny of the regulators." (¶30(b)). M.F.S. ¶7. Therefore, just two weeks after the letter, Plaintiffs had sufficient knowledge to make substantial allegations of Defendants' alleged wrongdoings. That two week period has no effect on the timing of Plaintiffs' efforts as the statute of limitations had long since passed. Nothing occurred within those two weeks, or even within the four months between the letter and the filing of this suit, which would render this letter effective to defeat the statute of limitations defense.

[7] References to paragraph numbers are those found within the Complaint in *Carone v. Sullivan.* M.F.S. ¶7.

Not only could the letter have had no material impact on the timing of the complaint, but the letter wasn't even from Avellino or Bienes. The action of a third person cannot be imposed upon other parties in order to obtain an extension of the statute of limitations. *See, e.g.* *Univ. of Miami v. Bogorff* ("Any conduct of Dr. Koch which may have tolled the running of the statute of limitation as to him cannot be imputed to Lederle so as to toll the statute to it." *Id*. at 1004-05).

Futility of Reply/ Motion for Partial Summary Judgment

Assuming, *arguendo*, that Plaintiffs' reply could survive the motion for summary judgment and that the continuing tort doctrine, for example, applies, then Defendants should nonetheless be awarded partial summary judgment as to all management fees paid before December 10, 2008. This is because, even when that doctrine applies, the only damages recoverable are those which were incurred during the period of limitations (in this case four years) immediately prior to suit being filed. The law is clear; even when the doctrine applies, it results in recovery only for any damages resulting from tortious acts committed within the limitations period prior to the filing of suit. *Black Diamond Properties, Inc. v. Haines*, 69 So. 3d 1090 (Fla. 5th DCA 2011). This restriction on the recovery has been applied across the board, regardless of the type of case; *Black Diamond* was brought by golf club membership purchasers against the developer. *See, also, Suarez v. City of Tampa* (trespass), *Woodward v. Olson*, 107 So. 3d 540 (Fla. 2d DCA 2013) (medical malpractice).

CONCLUSION

Based on the foregoing, summary judgment should be entered in favor of Defendants dismissing Plaintiffs' Fifth Amended Complaint with prejudice.

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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