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

CASE NO: 12-34123 (07)

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

Plaintiffs,

vs.

MICHAEL SULLIVAN et. al.,

Defendants.

ORDER ON PLAINTIFF'S MOTION TO STRIKE; DEFENDANT'S MOTION FOR JUDMENT ON THE PLEADINGS AND SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SANCTIONS

The following motions were heard by the court on March 7, 2017.

> Plaintiffs' Motion to Strike Paragraphs 3 and 10 of the Affidavit of Michael Sullivan and Paragraphs 6, 7, 9, 11, and 13 of the Affidavit of Steven Jacob
>
> Defendants, Frank Avellino and Michael Bienes' Joint Motion for judgment on the Pleadings and for Summary Judgment as to Fraudulent Transfer (Count IV)
>
> Plaintiffs' Motion for Sanctions for Fraud on the Court

Factual Background

On January 9, 2015, plaintiffs, P&S Associates ("P&S"), General Partnership, S&P Associates, General Partnership ("S&P") (together with P&S "the Partnerships), and Philip von Kahle as conservator of the Partnership filed their fifth amended complaint alleging, *inter alia*, a cause of

action for avoidance of fraudulent transfers pursuant to section 726.105(1)(A) (count IV).

According to the fifth amended complaint, Defendants Avellino and Bienes operated a feeder fund called Avellino & Bienes ("A&B") that pooled money from their customers for investment with BLMIS, a brokerage firm operated by Bernard L. Madoff ("Madoff"). As a result of a SEC inquiry, A&B was shut down and Defendants Avellino and Bienes' consented to a Final Judgment of Permanent Injunction and Other Equitable Relief, which, *inter alia*, "permanently enjoined Avellino and Bienes from selling any securities without a registration statement, making offers to sell or buy securities without a registration statement, and acting as an investment company in violation of the Investment Company Act of 1940." (Pls.' Compl. ¶ 16).

After A&B was shut down, Michael D. Sullivan ("Sullivan") met with Defendants because he wanted to continue investing with BLMIS. Since Defendants Avellino and Bienes "could not invest or open accounts directly with Madoff," Plaintiffs allege that "Defendants facilitated the creation of a network of 'front men' feeder fund partnerships and charitable foundations throughout the United States to invest in BLMIS." (Id. ¶ 20).

The Partnerships were such investment vehicles. Plaintiffs allege that Defendants received "kickbacks" as a result of Defendants soliciting investors for the Partnerships. When Madoff's Ponzi scheme became public, individuals and entities that had invested in BLMIS, including the Partnerships, incurred substantial losses. The Plaintiffs filed the initial complaint in the instant action on December 10, 2012. On January 17, 2013, Philip von Kahle was appointed as conservator of the Partnership, and charged

with liquidating and recovering and distributing the remaining assets of the Partnership.

Plaintiffs' seek to recover management fees ("kickbacks") that were allegedly paid by Sullivan to Defendants Avellino and Bienes as a result of Defendants referring investors to the Partnerships.

- **Plaintiffs' Motion to Strike Paragraphs 3 and 10 of the Affidavit of Michael Sullivan and Paragraphs 6, 7, 9, 11, and 13 of the Affidavit of Steven Jacob**

On February 20, 2017, Plaintiffs filed the instant motion to strike certain paragraphs of the affidavits of Michael Sullivan and Steven Jacob. Both of these affidavits were submitted in support of the Defendants' joint motion for summary judgment as to count IV of the fifth amended complaint.

Affidavit of Michael Sullivan

Plaintiffs argue that paragraphs 3 and 10 of Sullivan's affidavit should be stricken because such averments contradict Sullivan's prior deposition testimony. Specifically, Plaintiffs argue that during his deposition Sullivan testified that the records of the Partnership did not reflect "management fees" or "kickbacks" being paid to Avellino and Bienes, but that the records of his company, MDS Associates, reflected such payments. In the subject affidavit, Sullivan avers that the Partnership records reflect such "management fees" and "kickbacks." Plaintiffs contend that Sullivan's affidavit in this regard contradicts his earlier deposition testimony. It is this change in testimony and the claim that Sullivan was not presented with documents evidencing such "management fees" or "kickbacks" during his deposition that is the subject of Defendants' motion for sanctions for fraud on the court. The applicable standard for that motion will be discussed herein.

In regards to the motion to strike, under Florida law,

> "[a] party may not file his or her own affidavit, or that of another, baldly repudiating his or her own deposition testimony to avoid the entry of a summary judgment." *Ouellette v. Patel,* 967 So. 2d 1078, 1082 (Fla. 2d DCA 2007). The *Ouellette* court applied this rule to a non-party affidavit that allegedly contradicted that same non-party's prior deposition. *Id.* at 1083. The court explained that " '[a] party may file a subsequent affidavit for the purpose of explaining testimony given at a prior deposition, provided the explanation is credible and not inconsistent with the previous sworn testimony, even though it creates a jury issue on the opponent's motion for summary judgment.' " *Id.* at 1082–83 (quoting *Jordan v. State Farm Ins. Co.,* 515 So. 2d 1317, 1319 (Fla. 2d DCA 1987)). However, the non-moving party is still "entitled to all reasonable inferences in his or her favor, [which] 'includes giving to the previous deposition any reasonable meaning which will not conflict with the subsequently filed affidavit.' " *Id.* at 1083 (quoting *Koflen v. Great Atl. & Pac. Tea Co.,* 177 So. 2d 529, 531 (Fla. 3d DCA 1965)).

Slominski v. Citizens Prop. Ins. Corp., 99 So. 3d 973, 977 (Fla. 4th DCA 2012).

In paragraph 3 of his affidavit, Sullivan explains that during his deposition he was not presented with nor had any occasion to review the records of the Partnership that demonstrated the payment of any "management fees." However, Sullivan explains in paragraph 3 that since his deposition, he has been shown Partnership records demonstrating the payment of such "management fees."

Affidavit of Steven Jacob

Plaintiffs argue that paragraphs 6, 7, 9, 11, and 13 of Jacob's affidavit should be stricken because Jacob's averments are not based on personal knowledge. Additionally, Plaintiffs argue that the averments in these paragraphs are based on hearsay.

Pursuant to Florida Rule of Civil Procedure 1.510 (e), "affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein." Fla. R. Civ. P. 1.510 (e). "The purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for summary judgment . . . and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." *Florida Dep't of Fin. Servs. v. Associated Indus. Ins. Co., Inc.*, 868 So. 2d 600, 602 (Fla. 1st DCA 2004) (quoting *Pawlik v. Barnett Bank of Columbia Cnty.,* 528 So. 2d 965, 966 (Fla. 1st DCA 1988)).

Defendants, Frank Avellino and Michael Bienes' Joint Motion for Judgment on the Pleadings and for Summary Judgment as to Fraudulent Transfer (Count IV)

On December 7, 2016, Defendants Avellino and Bienes filed the instant motion for judgment on the pleadings and for summary judgment as to count IV of Plaintiffs' fifth amended complaint (avoidance of fraudulent transfer).

As an initial matter, Defendants previously sought summary judgment as to this cause of action. On October 26, 2016, this Court entered an order denying Defendants' motion for summary judgment as to count IV, specifically determining that there are factual issues as to when the alleged fraudulent transfers were or could reasonably have been discovered by

Plaintiffs. This is so because the claim for fraudulent transfers is subject to a one-year savings clause. *See* § 726.110 (1), Fla. Stat. (providing that a fraudulent transfer claim must be brought "within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant").

Because this is a successive motion for summary judgment, on February 21, 2017, Plaintiffs filed a motion requesting that the court summarily deny the newly filed motion for summary judgment because it is premised on the same exact arguments already raised and determined by the court (this motion does not appear to be noticed for today). Under Florida law, there is no prohibition against successive motions for summary judgment. *See Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 109 (Fla. 2001) (noting that " '[t]here is no prohibition on the presentation of successive motions for summary judgment' " (quoting *Bakker v. First Fed. Sav. & Loan Ass'n of Hammonton, New Jersey*, 575 So. 2d 222, 224 (Fla. 3d DCA 1991)).

Judgment on the Pleadings

Defendants Avellino and Bienes argue that Plaintiffs fail to state a cause of action for fraudulent transfer pursuant to section 726.105(1)(a), Florida Statutes. Under Florida law, a motion for judgment on the pleadings may be made at any time after the pleadings have closed. *See Fla. R. Civ. P.* 1.140 (c) ("After the pleadings are closed, but within such time as not to delay trial, any party may move for judgment on the pleadings."). Such a motion "**is governed by the same legal test as a motion to dismiss for failure to state a cause of action**." *Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 889 (Fla. 4th DCA

2007) (emphasis added). The Fourth District has stated the standard as follows:

> Under Rule 1.140 (c) . . . all material allegations of the opposing party's pleading are to be taken as true, and all those of the movant which have been denied are taken as false. . . . Since an answer requires no responsive pleading, all allegations contained therein are deemed denied. . . . Such a motion is to be decided wholly on the pleadings, without the aid of outside maters. . . . Judgment on the pleadings may be granted only if, on admitted facts, the moving party is clearly entitled to judgment as a matter of law. . . . It is improper for a trial court to enter judgment on the pleadings where a factual question is involved.

Krieger v. Ocean Properties, Ltd., 387 So. 2d 1012, 1013-14 (Fla. 4th DCA 1980) (internal citations omitted). Moreover, **where a defendant makes a motion for judgment on the pleadings, the court's determination of the motion is limited to whether the allegations within the complaint state a cause of action**. *See Shay v. First Fed. of Miami, Inc.*, 429 So. 2d 64, 65 (Fla. 3d DCA 1983) ("A motion for judgment on the pleadings . . . is appropriate where the complaint fails to state a cause of action.").

Section 726.105, Florida Statutes, provides, in pertinent part:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (a) [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.

§ 726.105 (1) (a), Fla. Stat.

Summary Judgment

In support of their motion for summary judgment, Defendants argue: (1) there is no existing underlying claim against Sullivan because such claim was reduced to a judgment, which was satisfied; (2) Plaintiffs cannot prove intent to defraud creditors; (3) Plaintiffs' claim is time-barred (this issue was raised in the Defendants' prior motion for summary judgment, and was denied in the October 28, 2016 order); (4) the alleged fraudulent transfers are transfers involving Plaintiffs' own property; (5) the claimants of the alleged fraudulent transfers are the individual partners of the Partnership who are not parties to the instant action; and (6) the Partnerships are not creditors.

In opposition, Plaintiffs argue that these same arguments have been previously presented to and denied by the court.

It is important to note the applicable standard for summary judgment when a defendant seeks such relief. Specifically,

> "[w]hen a defendant moves for summary judgment, the court is not called upon to determine whether the plaintiff can actually prove his cause of action. Rather, the court's function is solely to determine whether the record conclusively shows that the moving party proved a negative, that is, 'the nonexistence of a genuine issue of a material fact.'

Le, 57 So. 3d 283, 285 (Fla. 4th DCA 2011) (quoting *Fla. Atl. Univ. Bd. of Trs. v. Lindsey*, 50 So. 3d 1205, 1206 (Fla. 4th DCA 2010)).

Many of the arguments set forth by Defendants are claims that Plaintiffs cannot or may not be able prove their cause of action. These types of arguments do not support entry of summary judgment.

Plaintiffs' Motion for Sanctions for Fraud on the Court

As noted above, Plaintiffs filed this motion as a result of issues raised by Sullivan's affidavit, including false testimony and false claims that he was not provided documents during his deposition. Under Florida law,

> [t]he requisite fraud on the court occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.

Herman v. Intracoastal Cardiology Ctr., 121 So. 3d 583, 588 (Fla. 4th DCA 2013) (citations and internal quotations omitted).

Moreover, "[w]hen imposing the sanction of dismissal for fraud upon the court, trial courts should weigh the 'policy favoring adjudication on the merits' with the need to 'maintain the integrity of the judicial system.' " *Id.* (quoting *Arzuman v. Saud*, 843 So. 2d 950, 952 (Fla. 4th DCA 2003)). In this regard, "[t]rial courts should reserve this sanction 'for instances where the defaulting party's misconduct is correspondingly egregious.' " *Id.* (quoting *Arzuman*, 843 So. 2d at 952)). The moving party bears the burden of proving, by clear and convincing evidence, "that the non-moving party has engaged in fraudulent conduct warranting dismissal." *Gilbert v. Eckerd Corp. of Florida, Inc.*, 34 So. 3d 773, 776 (Fla. 4th DCA 2010).

Where the basis for a motion to dismiss for fraud is premised on a party's false testimony or failure to accurately respond to discovery, "the court must find the 'false testimony' was directly related to the central issue in the case.' " *Id.* at 775.

> Except in the most extreme cases, where it appears that the process of trial has itself been subverted, factual inconsistencies, even false statements are well managed through the use of impeachment and traditional discovery sanctions. . . . The mere conflict between discovery depositions, interrogatories and records disclosed during the discovery process should not warrant dismissal. Factual inconsistencies or even false statements are better managed through the use of impeachment or other discovery sanctions.

Id. at 776.

After consideration, the Defendant's Motion for Judgment on the Pleadings is **DENIED.**

The Defendant's Motion for Summary Judgment (Renewed) is **DENIED.**

The Plaintiff's Motion to Strike portions of Affidavits of Sullivan and Jacob is **DENIED** as moot based on this order.

The Plaintiff's Motion for to Sanctions based on Fraud on the Court is **DENIED** as moot based on this order.

DONE and **ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida this 14th day of March 2017.

JACK TUTER
CIRCUIT COURT JUDGE

Copies: All counsel of Record