

IN THE CIRCUIT COURT FOR THE
SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD COUNTY, FLORIDA

COMPLEX LITIGATION UNIT

PHILIP J. VON KAHLE, as Conservator of
P&S Associates, General Partnership and
S&P Associates, General Partnership

CASE NO.: 12-034123 (07)

Plaintiffs,

v.

STEVEN F. JACOB, et al.,

Defendants.

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES

Plaintiffs P & S Associates, General Partnership ("P&S"), S & P Associates, General Partnership ("S&P") (collectively, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this motion to strike Defendants' affirmative defenses and states as follows:

I. Brief Background

1. On January 9, 2015, Plaintiff filed its fifth amended complaint ("5th A.C.").
2. On September 8, 2015, Michael Bienes and Frank Avellino filed his Answer and

Affirmative Defenses which identifies the following purported affirmative defenses:

- i. Statute of limitations;
- ii. Statute of repose;
- iii. In pari delicto;
- iv. Lack standing;

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- v. Laches;
- vi. Reduction based upon Florida's Tort Reform Act, Chapter 768;
- vii. Estoppel or waiver; and
- viii. Unclean hands.

(the "Affirmative Defenses").¹

3. After the Avellino and Bienes Affirmative Defenses were filed, certain claims in the 5th AC were dismissed by the Court. Presently, the only count remaining against Avellino and Bienes is Count IV which seeks to avoid fraudulent transfers.² As a result of the Court's rulings, several of Avellino and Bienes' affirmative defenses are no longer applicable.

4. Accordingly, and in an attempt to narrow issues for trial, Plaintiffs respectfully request that the Court strike Affirmative Defense Numbers 3, 5, 6 and 8.

II. ARGUMENT

As set forth in further detail below, Avellino and Bienes' Affirmative Defenses should be stricken in order because they are inapplicable to Plaintiffs' fraudulent transfer claims. Fla. R. Civ. P. 1.140(f) ("[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.").

- i. Affirmative Defenses 3 and 8, In Pari Delicto and Unclean Hands do not apply and should be stricken*

In this case *in pari delicto* and unclean hands does not apply to the fraudulent transfer action. Therefore it is immaterial and should be stricken.

¹ Avellino and Bienes' Affirmative Defenses are identical.

² Plaintiffs reserve the right to appeal the orders which dismissed the prior counts.

The defense of *in pari delicto* and unclean hands may only be asserted against common law tort claims, but not against statutory claims. *In re Skyway Communications Holding Corp.*, 389 B.R. 801, 809 (Bankr. M.D. Fla. 2008) (citing *In re Burton Wiand*, 2007 WL 963165, at *6–7 (M.D.Fla.2007) (citing *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543 550–51 (Fla. 2d DCA 2003))). Thus the defenses are inapplicable to Counts IV of the Fifth Amended Complaint, which are statutory claims. Accordingly, Defendants’ Third and Eighth Affirmative Defenses must be stricken.

ii. *Affirmative Defense 6, Comparative Negligence, does not apply to the Fraudulent Transfer Claim*

Defendants claim that any damages attributable to them should be reduced pursuant to Fla. Stat. § 768.81. However, that statute only applies to “negligence actions”. Fla. Stat. §768.81(c). A negligence action is a civil action for damages based upon a theory of negligence. Because a fraudulent transfer claim is statutory claim which is not based on a theory of negligence it is not a negligence action. *Id.* Therefore, Affirmative Defense 6 is inapplicable and should be stricken.

iii. *Affirmative Defense 5, Laches, does not apply to the Fraudulent Transfer Claim*

Defendants argue that the equitable doctrine of laches bars Plaintiff’s claims. However, Fla. Stat. § 726.110 governs the timeliness of a fraudulent transfer claim, and provides in relevant part that a fraudulent transfer action must be commenced within one year of the discovery of the transfer. Because laches requires proof that the plaintiff has knowledge of the defendants conduct, and a defendant must prove that it was injured or prejudiced by the alleged delay, the

defense of laches is displaced by Fla. Stat. §726.110.³ See Fla. Stat. § 726.111. Therefore the equitable doctrine of laches is inapplicable. *Matter of Freedom Ford, Inc.*, 140 B.R. 585, 587 (Bankr. M.D. Fla. 1992) (“Since there is a statute of limitations applicable here, the equitable defense of laches is unavailing.”); see also *Biel Reo, LLC v. Barefoot Cottages Dev. Co., LLC*, 156 So. 3d 506 (Fla. 1st DCA 2014) (noting that Florida statutes of limitations supersede the doctrine of laches). Accordingly, Defendants’ Fifth Affirmative Defense should be stricken.

WHEREFORE Plaintiffs respectfully request the Court enter an Order Striking Avellino and Bienes’ Affirmative Defense Numbers 3, 5, 6, and 8; and Grant any further relief the Court deems just and proper.

Dated: March 15, 2017

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³ Laches has four elements: (1) conduct on the part of the defendant giving rise to the situation of which the complaint is made; (2) failure of the plaintiff to assert his or her rights by suit, even though the plaintiff has had knowledge of the defendant's conduct and has been afforded the opportunity to institute suit; (3) lack of knowledge on the defendant's part that the plaintiff would assert the right on which he or she bases the suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the plaintiff or the suit is held not to be barred. *Dep't of Revenue ex rel. Thorman v. Holley*, 86 So. 3d 1199, 1203 (Fla. 1st DCA 2012).

and

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2015, a true and correct copy of the foregoing document was served on the following parties:

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