IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY
CASE NO.: 12-034123 (07)

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

v.

MICHAEL D. SULLIVAN, et al.,
Defendants.
_____/

DEFENDANTS' FRANK AVELLINO AND MICHAEL BIENES MOTION FOR REHEARING ON ORDER ON PLAINTIFF'S MOTION TO STRIKE, DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SANCTIONS

Defendants, Frank Avellino and Michael Bienes, by and through their undersigned counsel, and pursuant to Florida Rule of Civil Procedure 1.530, file this Motion for Rehearing on the Order on Plaintiff's Motion to Strike, Defendants' Motion for Judgment on the Pleadings and Summary Judgment and Plaintiff's Motion for Sanctions and as grounds therefore state as follows:

1. On March 17, 2017, this Court entered an Order on Plaintiffs' Motion to Strike; Defendants' Motion for Judgment on the Pleadings and Summary Judgment and Plaintiffs' Motion for Sanctions ("March 2017 Order").

2. A motion for rehearing is proper to bring to the court's attention a matter which the court may have overlooked or failed to consider. *Balmoral Condominium Association v. Grimaldi*, 107 So.3d 1149, 1151 (Fla. 3rd DCA 2013).

3. In the instant case, the trial court in the March 2017 Order identified and addressed six arguments raised by Defendants in their Motion for Summary Judgment. (March

2017 Order, p. 6). However, the trial court did not include or address Defendants' argument that Plaintiffs cannot recover from Defendants Avellino and Bienes more than its $50,000.00 judgment against Sullivan, and thus, are entitled to a partial summary judgment on this one issue.[1]

4. Defendants argued in their motion and at the hearing that pursuant to Section 726.109, Fla. Stat., Plaintiffs, as a creditor of Sullivan, may only recover a judgment against them for the value of the asset Sullivan transferred to them or the amount necessary to satisfy the Plaintiffs' claim against Sullivan, "**whichever is less.**" 726.109(2), Fla. Stat. (emphasis added) Plaintiffs have reduced their claim against Sullivan, the debtor, to $50,000 as evidenced by the final judgment entered and recorded in the public records. Therefore, based on the language of the statute, and as a matter of law, Plaintiffs cannot recover from Avellino and Bienes more than the $50,000 debt owed by Sullivan. (See pgs 17, 18 and 26 of Defendants' Reply Memorandum and pgs 6-10 of the hearing transcript, copies of which are attached hereto as Exhibits "A" and "B", respectively).

5. This reading of the controlling provision of the Fraudulent Transfer statutes only makes sense – the Fraudulent Transfer statutes provide a method for a creditor (Plaintiffs) to recover on a debt owed them by the debtor (Sullivan) by avoiding conveyances made by the debtor in order to satisfy the debt. The Fraudulent Transfer statutes do not create new claims but rather, provide a remedy to collect on an existing claim. Here, Sullivan's debt to Plaintiffs is $50,000; that is all that can be recovered from Avellino and Bienes to satisfy such debt.

6. Plaintiffs' response to this argument was to rely on bankruptcy cases, which are not applicable, and argue that the definition of a "claim" in the Fraudulent Transfer statutes

[1] This argument was not raised in Defendants' first Motion for Summary Judgment which was decided by this Court's October 17, 2016 order and thus has not been addressed or ruled upon by any earlier orders by the court.

(§726.102(4), Fla. Stat.), is broad, and thus, Plaintiffs' claim against Avellino and Bienes is not limited by the $50,000 agreement with Sullivan. (See pgs 28-30 of the hearing transcript). While it is true the definition of claim in the statute is broad, contrary to Plaintiffs' argument, the claim defined and referred to in the statute is the claim against the debtor. In this case, the claim is against the debtor, Sullivan, not Avellino and Bienes and has been fixed at $50,000 by a settlement agreement between Plaintiff and Sullivan. The Fraudulent Transfer statutes do not create a new "claim" for Plaintiffs against Defendants.

7. It is respectfully submitted that the Court overlooked this specific issue and moves the Court to now consider and rule on this issue. This is a matter of law to which there are no factual issues in dispute and can and should be resolved summarily in order to narrow the issues to be tried.

WHEREFORE, Defendants respectfully request this Court to grant this Motion for Rehearing, and to enter a Partial Summary Judgment finding that Plaintiffs, as a matter of law, may not seek damages in excess of $50,000 against Defendants Avellino and Bienes, in its last remaining fraudulent transfer cause of action and for such other relief as this Court deems just and equitable.

HAILE, SHAW & PFAFFENBERGER, P.A.
Attorneys for Defendants
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Phone: (561) 627-8100
Fax: (561) 622-7603
gwoodfield@haileshaw.com
bpetroni@haileshaw.com
syoffee@haileshaw.com
mstringer@haileshaw.com

By: /s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 2017, 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.

/s/ Gary A. Woodfield
Gary A. Woodfield

SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
MICHAEL O. WEISZ, ESQ.
ZACHARY P. HYMAN, ESQ.
BERGER SIGNERMAN
350 EAST LAS OLAS BOULEVARD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
mweisz@bergersingerman.com
zhyman@bergersingerman.com
mvega@bergersingerman.com
DRT@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
THE HERMAN LAW GROUP, P. A.
1401 E. BROWARD BLVD., STE 206
FORT LAUDERDALE, FL 33301
pgh@thglaw.com
Attorneys for Defendants Steven F. Jacob and Steven F. Jacob CPA & Associates, Inc.

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.
_____/

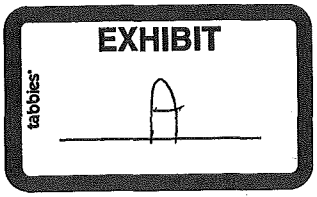
DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' JOINT MOTION FOR JUDGMENT ON THE PLEADINGS AND FOR SUMMARY JUDGMENT AS TO FRAUDULENT TRANSFER

Defendants, Frank Avellino and Michael Bienes (collectively, the "Defendants"), by and through their undersigned counsel, file this Reply to Plaintiffs' Response to Defendants' Joint Motion for Judgment on the Pleadings and for Summary Judgment ("MSJ") as to Fraudulent Transfer (Count IV).

Judgment on the Pleadings

In their response, although Plaintiffs argue that a judgment on the pleadings should not be entered because they have standing to pursue the fraudulent transfer claims, Plaintiffs have not even addressed the argument that they failed to properly plead a fraudulent transfer cause of action, and thus, a judgment on the pleadings should be entered.[1]

[1] Plaintiffs also argue that this and other issues have been decided by the Court in prior orders. However, an order which merely grants or denies a motion does not resolve the issue conclusively and a trial judge has the right and authority to change the ruling at any time before a final judgment is entered. *Garcia v. M & T Mortgage Corporation*, 980 So.2d 538 (Fla. 4th DCA 2008). In addition, "[t]here is no prohibition on the presentation of successive motions for summary judgment." *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101, 109 (Fla. 2001).



the information about payments to Avellino and Bienes.[15] Their argument that Kelly was not acting as agent for the partner on whose behalf he inspected the documents is similarly irrelevant – Kelly's knowledge, too, is unnecessary to prove the fact that partners inspected the books, Sullivan's testimony in that regard was not disputed, one of the partner's CPA's reviewed the records both with Kelly and years earlier, and the records were later delivered to another CPA of a partner.[16]

Plaintiffs rely on an order entered in the case of *P & S Associates v Janet A Hooker Charitable Trust*, Case No. 12-034121 (07). However, without proof in that case of evidence of the subject payments being contained within the Partnerships' records, as there is in this case, this order has no precedential value in reference to the fraudulent transfer count. Furthermore, as pointed out by Plaintiffs, the *Hooker* court indicated that "the time to bring this cause of action is extended to one year after the *partnerships*, as creditors/victims of the fraud, had the ability to determine the facts...." Response at 10 (emphasis added). Contrary to Plaintiff's position in this case, the court did not indicate that the statute of limitations was extended to one year after the "Conservator" learned the facts.

II. Unsatisfied Claim Against Sullivan

The existence of the second judgment against Sullivan does not negate the facts that Plaintiffs had no claim against him as of the time they filed suit, or that the judgment against him is only for $50,000.00. Pursuant to the only statute that gives them a remedy, Plaintiffs may

---

[15] As set forth more fully in the Response to Plaintiffs' Motion to Strike the Affidavit of Jacob, its contents are admissible and it should not be stricken for containing hearsay as he is not affirming, for example, the truth of the matter contained in those records; the purpose of his testimony is to show that payments to Avellino and Bienes were mentioned – not that that the payments were actually made.

[16] Regardless of whether Kelly told his partners what he learned while speaking with Sullivan and while looking through Sullivan's records, the partnerships are charged with his knowledge, *Brooks v. Acosta* 295 (Fla. 3d DCA 2007); he was acting for the partnership when reviewing the records as that is the only reason he was granted permission to do so – the fact that he asked a question which could have provided information helpful to him does not negate the fact that he was reviewing the records for his partners.

recover "to the extent necessary to satisfy the creditor's claim," and are specifically limited to the *lesser* of the amount required to satisfy their claim against Sullivan or the amount transferred. §§ 728.108(1) (a), 726.109(2), *Fla. Stat.*

Florida case law is as unequivocal as the statute on this point:

> The cause of action in this case was based solely on Florida [as opposed to bankruptcy] law. Under section 726.109(2), the creditor may recover 'judgment for the value of the asset transferred, as adjusted under [section 726.109] subsection 3, or the amount necessary to satisfy the creditor's claim, whichever is less.' The court's instruction to the jury tracked this language. The jury found that over $600,000 had been fraudulently conveyed; but the evidence established that, at the time of trial, the amount of Bredlau's judgment was $183,716.27. Therefore, the statute required the entry of judgment in the amount of the claim.

Myers v. Brook, 708 So. 2d 607, 611 (Fla. 2d DCA 1998). The cases cited by Plaintiffs did not involve a statute such as §726.109 which explicitly limits the amount of recovery to the "lesser" of the amount transferred or the amount of the claim. Again, their reliance on bankruptcy cases is misplaced. *In re Tronox Inc.*, 464 B.R.606 (Bankr. S.D.N.Y. 2012), for example, involved 11 U.S.C. § 550(a), which provides that the trustee or debtor-in-possession "may recover for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property." The *Tronox* Court correctly noted that there is no support "in the plain words of the statute" for the argument that the amount which can be recovered against the transferees is capped at the total claims of the creditors. Having enough to make the creditors whole is not the same as making the debtor's estate whole as a greater sum may have been transferred than is owed to creditors. In fact, the *Tronox* Court specifically distinguished its ruling under bankruptcy law from the law of Oklahoma, on which the transferee wanted to rely, when it said, "[l]ike many other state fraudulent transfer laws, the Oklahoma statute provides that the creditor in a fraudulent transfer action may not recover more than 'the amount necessary to satisfy the

known about the transfers, Plaintiffs would have had to have filed suit by December 2009. A letter written in 2012 and a conservator being appointed in 2013 did not revive the statute for them.[18]

- **Plaintiffs cannot maintain this action to collect a claim when the claim didn't exist at the time the suit was filed, or to recover more than its current $50,000.00 judgment against Sullivan.** As established by statute, Plaintiffs recovery from Avellino and Bienes is limited to the amount of their claim against Sullivan; their claim against Sullivan is their "right to payment." Their right to payment is, at most, the $50,000.00 judgment.

- **Even construing all "evidence" relating to indicia of fraud in the light most favorable to Plaintiffs, their "evidence" consists of nothing but conjecture and improperly drawn inferences which cannot overcome Sullivan's testimony and does not satisfy Plaintiffs' burden of proving actual intent.**

Plaintiffs ignore controlling Florida law and rely instead upon bankruptcy and out-of-state cases which specifically distinguish themselves from Florida state law.

> It is well settled that the law favors the defense of statute of limitations. The United States Supreme Court has stated to that effect: The defense of the statute of limitations is not a technical defense but substantial and meritorious.... Statutes of limitation are vital to the welfare of society and are favored in the law.

Brandt v. Lazard Freres & Co., 1997 WL 469325, at *2 (citations omitted).

Based on the foregoing, judgment on the pleadings or summary judgment should be entered in favor of Defendants dismissing Plaintiffs' Count IV of Fifth Amended Complaint with prejudice. Alternatively, in order to narrow the issues to be tried, partial judgment on the pleadings or summary judgment should be entered dismissing any portion of the claims as the

[18] This Court has already ruled that the statute of limitations based upon the four years from the transfers had elapsed, so the only issue remaining is whether this suit was filed more than a year from when the Plaintiffs knew or should have known about the transfers.

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.
_____/

HEARING BEFORE THE HONORABLE JACK TUTOR

Tuesday, March 7th, 2017
10:32 o'clock a.m. - 11:25 o'clock a.m.

201 Southeast Sixth Street
Courtroom 970
Fort Lauderdale, Florida 33301

Susan D. Fox, Florida Professional Reporter
Notary Public, State of Florida

APPEARANCES:
ON BEHALF OF THE PLAINTIFF:
BERGER SINGERMAN, LLP
LEONARD K. SAMUELS, ESQUIRE
ZACHARY P. HYMAN, ESQUIRE
350 East Las Olas Boulevard
Suite 1000
Fort Lauderdale, Florida 33301
ON BEHALF OF THE DEFENDANTS:
HAILE, SHAW & PFAFFENBERGER, P.A.
GARY A. WOODFIELD, ESQUIRE
SUSAN BECKER YOFFE, ESQUIRE
660 U.S. Highway One
Third Floor
North Palm Beach, Florida 33408

(Thereupon, the following proceedings were had.)

THE COURT: Okay. Good morning, folks.

I've got a multiplicity of motions and I have exactly one hour before my next meeting.

I don't care how you all argue these in whatever order.

MR. WOODFIELD: Your Honor, Gary Woodfield on behalf of the defendants.

We filed our motion back in December and got this hearing date quite awhile ago. We's like to be heard first.

THE COURT: It's your motion on the summary judgment for fraudulent transfer?

MR. WOODFIELD: Yes.

THE COURT: You can be heard first.

MR. WOODFIELD: Thank you.

Judge, let me, if I may, we've raised a number of arguments on our --

THE COURT: What is it, Lenny?

MR. SAMUELS: Yes. We just have a couple of motions that could be dispositive and would assist the Court in

analyzing this.

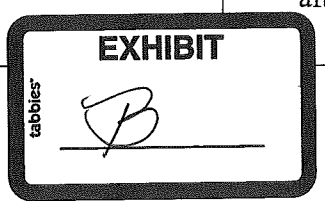
We have got a motion for summary denial, but we also have a motion to strike certain portions of affidavits that they are going to be relying upon in their argument, and I think it would be helpful if we address that first in terms of the affidavits in particular, because the affidavits are not just some hearsay issues, but we also have an issue of its prior -- it explicitly contradicts prior testimony in deposition and should not be relied upon in this hearing. The law is very clear on that.

MR. WOODFIELD: Judge? This is the motion that was filed last Friday afternoon, 122 pages, and they noticed it for hearing yesterday.

I will suggest that if I may proceed, if they have issues as to those affidavits, they can raise them in response.

THE COURT: I will let you attack it after he argues, Lenny.

MR. SAMUELS: Okay.



Page 5

THE COURT: Go ahead.
MR. WOODFIELD: Judge, let me hit two -- I mean, as I've said, we've raised a number of issues in support of our motion. Let me address two which I think are very straight forward and simple.
The first is, just looking at the Uniform Fraudulent Conveyance Act, just sort of going back to step one here, that's a remedial statute which enables a creditor to void a transfer to a third party to satisfy a debt of the debtor. So what we have here is the plaintiff is the creditor. Sullivan --
THE COURT: Can I ask a basic question first, Gary?
MR. WOODFIELD: Yes, please.
THE COURT: On October 26th, 2016 didn't I enter an order denying a similar motion like this?
Why am I hearing it for the second time would be my question.
MR. WOODFIELD: Judge, you did enter an order that dismissed all of the counts except this one count with regard to the

Page 6

one-year savings clause, saying that there was an issue of fact.
We're raising points now that really weren't fully addressed because of the magnitude of the issues that existed to the multiple counts that we addressed last year. Now we are just focusing on one count and just a couple of issues with regard to that count. There is nothing to preclude us from making multiple summary judgment motions.
THE COURT: All right.
Go ahead.
MR. WOODFIELD: Judge, again, with regard to fraudulent conveyance, here the creditor is -- the plaintiffs are the creditor, the debtor is Sullivan, and they are attempting to satisfy transfers that Sullivan made to Avellino and Bienes.
Chapter 726 is clear as to what their relief is. Section 108 says, quote: Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim. Close quote.
And, again, 109 states, quote: The

Page 7

creditor may recover judgment for the value of the asset transfer or the amount necessary to satisfy the creditor's claim, whichever is less.
Here, Judge, quite frankly, I don't believe they have any claim or had any client against Sullivan because when Your Honor dismissed all of these counts last October, those were the same counts that were raised against Sullivan, and so I don't think they have a claim to even pursue. But in any event, the reason Sullivan wasn't an issue last October was because they entered into a settlement agreement with Sullivan, so Sullivan is the debtor, they are the creditor.
The settlement agreement they reached is, they resolved all claims against Sullivan in exchange for the entry of a 50,000-dollar judgment.
Consequently -- and that remains outstanding.
Based on the statutes I just read, plaintiffs may not seek to recover the transfer made to Avellino and Bienes in

Page 8

excess of the amount of the claim they have against Sullivan. The statutes I just read couldn't be clearer. It says whichever is less, the claim you have against the debtor or the transfers of the property. Here, the claim against the debtor has been reduced to 50,000 dollars, so at the very least a partial judgment, a partial summary judgment should be granted reducing this fraudulent conveyance claim down to that 50,000-dollar judgment. It couldn't be clearer.
I cited a case, Myers vs. Brook, which is a second department case which did exactly that; it reduced a judgment, applying the statute that it should be the lesser of the two, the underlying debt or the amount of the transfer.
Now, to refute this, what plaintiffs have done is cited to bankruptcy cases, and that is just simply not applicable because the bankruptcy statutes has a specific statute that states that you can pursue a transfer of a debtor even if it is in excess of the amount of the debt.

Page 9

That's unique to bankruptcy law. There is no comparable statute in the Uniform Fraudulent Conveyance Act, no comparable statute in Florida.

A case that they cite really hits that right on the head, this In Re: Tronox case, which is a bankruptcy case, and argue it -- they specifically distinguish the state law which has a cap, as I just stated, of the lesser of the two, and they distinguish the bankruptcy code which has no such cap, so clearly that is applicable here.

There is no argument and they have produced no cases that refute this argument. What they have alleged is, oh, when we settled with Sullivan in our settlement agreement and in our judgment, we put in self-serving language that this doesn't release any other claims we may have, and we can pursue all of our rights. Well, that's fine, but that -- you can't negate a statute by self-serving language.

726.109 could not be clearer. You can only recover the lesser of the two,

Page 10

the amount of debt you have with the debtor, which is 50,000 dollars, or the transfer, whichever is less. There is simply no argument that is viable to negate those statutes which are applicable here.

Now, I'm going to move on to another subject unless you have a question on that issue, Judge.

THE COURT: No.

Go ahead.

MR. WOODFIELD: The other argument I would like to make is regard to the one-year savings clause, and as Your Honor indicated last year, last October when you dismissed all of these cases, you held that there were fact issues concerning this one-year statute which provides that they have -- the statute of limitations ran on these claims but this has a, just this unique fraudulent conveyance statute has the one-year savings clause after the transfer or obligation was or could reasonably have been discovered by the claimant.

Page 11

Now, and we are now -- we've introduced substantial evidence that plaintiffs had both constructive and actual knowledge of the transfers. The issue is, did they know or should they have become aware of the transfers that Sullivan made to Avellino and Bienes between the years 2002 and 2008? So the first question is, do the partnership books and records reflect those payments?

We have put in page six of our reply the various sworn statements that the plaintiffs made repeatedly in interrogatory answers in this case with a conservator who specifically, repeatedly stated that the books and records of the partnerships reflected the payments to Avellino and Bienes. We cite three or four times when those sworn statements by the plaintiff were made, and they are not vague, they are not ambiguous, they couldn't be clearer. This was a couple of years ago when apparently no one was focused on this particular one-year statute. Now, confronted with their clear

Page 12

sworn statements they -- they don't even address -- maybe they will today -- but in their opposition to our motion they don't even address those sworn statements. They are sworn statements in the record by the plaintiff. They couldn't be clearer.

What they have offered are three affidavits -- actually, one, Margaret Smith, is an unsworn statement. But, again, these are -- they submitted an affidavit of Von Kahle, Margaret Smith, and their expert, Mukamal. These, aside from being inadmissible hearsay and unsubstantiated conclusions, and without personal knowledge, by the way, are artfully-drafted but do not refute their prior sworn statements, and if they refute the prior sworn statements they would be inadmissible.

What they say is with regard to the conservator's affidavit is that he didn't receive, quote, unquote, complete records, and he didn't know, quote, unquote, the exact amount of the damages. Well, you don't need complete records and you don't