

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' 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 Memorandum of Law in Support of their 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, 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, 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 “kickbacks” 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.S.F.² ¶¶4 & 5. The last date identified in Plaintiff’s Responses 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. The last date identified in Plaintiff’s Responses 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 Fla.R.Civ.P.* 1.510. In the instant case, there are no material facts in dispute and the Defendants

¹ On December 18, 2014, the court entered an order granting Defendants’ motion to dismiss 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 Material Factual Statement filed contemporaneously by Defendants pursuant to Section 5 of the Complex Litigation Procedures.

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 an investor to the Partnerships and received an unlawful kickback 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 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 identify 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, based on Plaintiffs' interrogatories responses, the last "kickback" paid to Avellino was on October 1, 2008 and the last "kickback" paid to Bienes was in 2007. M.F.S. ¶¶ 4 & 5. Thus, Plaintiffs' claim for fraudulent transfer of

³ Even if the Plaintiffs allege that each "kickback" was 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 date of the complaint, and thus, are barred by the four year statute of limitations. M.F.S. ¶¶ 4 & 5.

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 a minimal of due diligence, discovered the alleged “kickbacks” by asking for and reviewing the Partnerships’ books and records. Section 7.03 of the Partnership Agreements specifically provide, “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*. Other than a conclusory allegation that “A number of general partners sought access to the complete books and records of the Partnership”, (5AC, ¶ 20), Plaintiffs have provided no evidence of any timely due diligence they exercised in attempting to identify the facts underlying their claim within the limitations period. “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). 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 it would be inequitable and unjust for them to retain these monies (5AC ¶¶102, 103). The statute of limitations for 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, thus is time barred.⁴ *See* M.F.S. ¶¶4 & 5.

PLAINTIFFS' REMAINING ARGUMENTS

Plaintiffs previously unsuccessfully raised in their response to Defendants' Motion to Dismiss the Fourth Amended Complaint arguments that delayed discovery, continuing tort

⁴ Even assuming Plaintiffs argue that the last act for statute of limitations in the conspiracy cause of action is the last “kickback” which was received, which Defendants dispute, the last “kickback” could only have been paid prior to December 11, 2008, as that is the date Madoff's Ponzi scheme was made public. *See* Defendants' Request to Take Judicial Notice filed contemporaneously with this Motion.

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.

The delayed discovery rule only operates to delay the accrual of the specific causes of action set forth in the statute, none of which have been alleged in the instant case. Section 95.11(7), *Fla. Stat.*; *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 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 act.'" *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, Plaintiffs have failed to allege continuing tortious acts committed by Defendants, which caused damages to Plaintiffs. At most, Plaintiffs allege that Defendants continued to be active in the management of the Partnerships (5AC ¶50), which acts did not cause damages to Plaintiffs. (The alleged damages caused by Defendants according to Plaintiffs' allegations were the taking of "kickbacks", which actions ceased by October 1, 2008). Accordingly, the continuing tort doctrine is not applicable herein.

Finally, 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). Plaintiffs have pled no factual allegation that Plaintiffs knew they had a basis for the suit, but delayed filing their suit because of Defendants' conduct. Accordingly, equitable estoppel doctrine is not applicable herein.

In fact, the opposite is true. Plaintiffs had actual knowledge of the payments to Avellino and Bienes before the expiration of the statute of limitations. Plaintiffs and their counsel had corporate records of P&S and S&P that disclosed the payment of the fees to Avellino and Bienes which they seek to recover in this action before August 24, 2012, months before the expiration of the statute of limitations under the most favorable interpretation to Plaintiffs. M.F.S., ¶ 8; Verified Complaint in *Matthew Carone, et al v. Michael D. Sullivan*, Circuit Court, Broward County, Case No. 12-24051-07, ¶¶ 22, 25 and 30. Assuming the payment of the last "kickback" to Avellino on October 1, 2008 was the trigger date for the statute of limitations, which Defendants dispute, Plaintiffs had actual knowledge of the payments of the kickbacks within four years of such date yet failed to timely commence this action. Plaintiffs' claims are time barred.

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 14th day of April, 2015.

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