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

CASE NUMBER: 12-34121 (07)
COMPLEX LITIGATION UNIT

MARGARET SMITH, et al.,

Plaintiffs,

v.

JANET A HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

DEFENDANT CATHARINE SMITH'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant Catharine Smith submits this Reply in further support of her Motion for Summary Judgment, which is scheduled to be heard by the Court on **May 2, 2014.**

I. Plaintiff Cannot Save the "Wind Down" Claims

Counts 1 and 2 allege claims related to "winding down" the partnership under § 620.8807, Fla. Stat. On its face, this statute applies only to "partners":

> 620.8807 Settlement of accounts and contributions **among partners**
> . . .
> (2) Each **partner** is entitled to a settlement of all partnership accounts upon winding up the partnership business. . . . A **partner** shall contribute to the partnership an amount equal to any excess of the charges over the credits in **the partner's** account.

See § 620.8807, Fla. Stat. (emphasis added).

In its summary judgment papers, Plaintiff fails to rebut the basic fact that Mrs. Smith is no longer a "partner" in the S&P partnership. In particular, Mrs. Smith's deceased husband provided a written notice of intent to withdraw on March 5, 2004. *See* C. Smith Aff. ¶¶ 3-5. Thereafter, the partnership sent its final distribution to the Smiths on January 25, 2005, and the partnership sent the

Smiths a "Final" K-1, showing a capital account balance of "0.0%" *Id.* These facts cannot be disputed.

Grasping for straws, Plaintiff tries to create an issue of fact by pointing out that Smith pled "without knowledge and therefore denied" in response to Complaint allegations that she was a partner. Setting aside other problems with this argument, non-verified pleading have no evidentiary value at any rate. *See Toyota Tsusho America, Inc v. Crittenden*, 732 So.2d 472, 477 (Fla. 5th DCA 1999) ("mere allegations contained in unsworn pleadings are not evidence").

Given that Mrs. Smith has not been a "partner" in the S&P Partnership for more than eight years, she cannot be sued under the wind down provisions of § 620.8807, Fla. Stat. Summary judgment should be entered on these claims.

II. Plaintiff Cannot Save the Time-Barred Claims

Plaintiff raises numerous arguments to avoid the statute of limitations on Counts 3 through 7. As set forth below, the Court should reject these arguments.

A The Notice Provisions of Section 10.01 do not Apply to Mrs. Smith

In an effort to save Count 3 (breach of contract), Count 4 (unjust enrichment), Count 5 (money had and received) and Count 7 (breach of fiduciary duty), Plaintiff argues these claims accrued only after Plaintiff provided Mrs. Smith with a written notice in November 2013 regarding her alleged defaults (which had taken place eight years earlier!). In support, Plaintiff points to Section 10.01 of the S&P Partnership Agreement, which provides:

> The following events shall be deemed to be defaults by a Partner:
>
> a. the failure to make when due any contribution or advance required to be made under the terms of this agreement and continuing that failure for a period of ten (10) days after

> written notice of the failure from the Managing general Partner.

See Exhibit B to Third Am. Complaint, Partnership Agreement, § 10.01. Plaintiff claims this provision imposes a mandatory notice provision, such that no cause of action can accrue until notice is given and Mrs. Smith has failed to comply with it.

The Court should reject this argument because Section 10.01, on its face, applies only to "Partners." In construing this section, the Court must give effect to the plain and ordinary meaning of the terms used and should arrive at an interpretation consistent with logic and reason. *See Golf Scoring Systems Unlimited, Inc. v. Remedio*, 877 So.2d 827, 829 (Fla. 4th DCA 2004). As set forth above, Mrs. Smith ceased being a "Partner" by January 2005 at the latest. Plaintiff cannot continue to apply the contract term "Partner" to Mrs. Smith **nearly eight years after she disassociated from the partnership**. Once Mrs. Smith ceased being a "Partner," Section 10.01 no longer applied to her. As such, summary judgment should be entered.

B. Section 10.02 Does not Extend the Statute of Limitations

Plaintiff next argues that Section 10.02 of the S&P Partnership Agreement acts as an indefinite tolling of the statute of limitations for all former partners. That section provides:

> No . . . TERMINATION of a defaulting partner's INTEREST as provided in the Agreement shall relieve the defaulting Partner from any personal liability for outstanding Indebtedness, liabilities, liens or obligations relating to the partnership that may exist on the date of the assignment transfer OR TERMINATION.

See Exhibit B to Third Am. Complaint, Partnership Agreement, § 10.02. Plaintiff argues that this clause "preserves" the claims against Mrs. Smith.

Plaintiff's argument presents a basic issue of contract interpretation for this Court. *See Port-a-Weld, Inc. v. Padula & Wadsworth Const., Inc.*, 984 So.2d 564, 568 (Fla. 4th DCA 2008) (interpretation of a contract is a question of law, not a question of fact). In construing this provision, the Court should, once again, give effect to the plain and ordinary meaning of the terms used and should arrive at an interpretation consistent with logic and reason. *See Golf Scoring Systems Unlimited*, 877 So.2d at 829.

No logical reading of Section 10.02 would lead to a conclusion that former partners had agreed to waive or indefinitely toll the statutes of limitations for claims against them. Instead, Section 10.02 clarifies the (unremarkable) proposition that partners do not absolve themselves of liability for existing claims merely by leaving the partnership. The clause says nothing, however, about relieving the Partnership of the obligation to pursue those claims in a timely manner. Plaintiff cannot ask the Court to rewrite Section 10.02 or to insert provisions that simply do not exist. *See Keystone Creations, Inc. v. City of Delray Bch.*, 890 So.2d 1119, 1127 (Fla. 4th DCA 2004)("it is never the role of the trial court to rewrite a contract"). Summary judgment should be granted.

C. The Pugatch Counter-Affidavit Does not Save Count 6

As to Count 6, for fraudulent transfer, the undisputed facts show that, by January 2009, the Partnership was aware of "net winners" and "net losers." *See* Affidavit of Chad Pugatch and transcript, (noting that the Partnerships conducted a meeting in January 2009 to discuss the Madoff fraud, "net" winners and losers, and a potential clawback case). The statue of limitations began to run at that point.

To avoid summary judgment, Plaintiff has produced a counter-affidavit of Craig Pugatch. According to Plaintiff, summary judgment cannot be entered because the Pugatch meeting failed

to answer numerous questions, including the identity of the net winners. This argument misses the point.

A plaintiff need not have **every** question answered concerning its cause of action before the limitations period begins to run. Instead, the statute begins to run once "there has been notice of an invasion of legal rights." *See Haskins v. City of Fort Lauderdale*, 898 S.2d 1120, 1123 (Fla. 4th DCA 2005). Put another way, the limitations period begins to run once a Plaintiff has been placed on "inquiry notice" of the claim. *See Cherney v. Moody*, 413 So.2d 866, 867 (Fla. 1st DCA 1982)(statute of limitations began to run once plaintiff was on "inquiry notice" of claim).

In this case, the S&P Partnership was clearly put on notice as to "net winners" as of January 2009. Under § 726.110(1), Fla. Stat., the Partnership had one year from that point to bring a suit for fraudulent transfer. Given that the Partnership failed to do so, the claim is now barred.

III. Plaintiff's Claims are Barred by the Exculpatory Clause

Summary judgment should also be entered based on the exculpatory clause set forth in Section 14.03 of the S&P Partnership Agreement, which provides:

> LIMITATIONS ON LIABILITY
>
> 14.03 THE PARTNERS SHALL HAVE NO LIABILITY TO THE PARTNERSHIP OR TO ANY OTHER PARTNER FOR ANY MISTAKES OR ERRORS IN JUDGMENT, NOR FOR ANY ACT OR OMISSIONS BELIEVED IN GOOD FAITH TO BE WITHIN THE SCOPE OF AUTHORITY CONFERRED BY THIS AGREEMENT. THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY.

See Exhibit B to Third Am. Complaint, Partnership Agreement, § 14.03. To avoid summary judgment, Plaintiff argues that genuine issues of fact remain whether Mrs. Smith falls within the provisions of the carve out portion of the clause. Specifically, Plaintiff alleges that Mrs Smith

"intentionally wronged" the Partnership and "breached her fiduciary duties" in 2012 and 2013 by improperly retaining distributions after she received the Partnership's demand letters.

The Court should reject this argument for two reasons. First, Mrs. Smith's conduct in 2012 and 2013 is irrelevant, as she was no longer a "Partner" at that time. Section 14.03, on its face, applies only to "Partners," and it only covers Mrs. Smith's conduct while she was a "Partner." Plaintiff cannot avoid the exculpatory clause by pointing post-Partnership conduct.

Second, the facts are undisputed that, during the years Mrs. Smith was still a member of the Partnership, she received and retained her distributions in good faith. Neither she, nor anyone else (other than Bernard Madoff) knew of the Madoff fraud until late 2008 or early 2009. *See* Affidavit of Chad Pugatch and transcript, (noting that the Partnerships conducted a meeting in January 2009 to discuss the Madoff fraud, "net" winners and losers, and a potential clawback case). There is no dispute on this issue.

IV. Defendant Never Invested in P&S

Plaintiff did not even attempt to rebut Mrs. Smith's motion, as it applied to the P&S partnership. Mrs. Smith never even invested in that partnership, and summary judgment should be entered in her favor.

IV. Conclusion

Based on the foregoing reasons, Defendant Catharine Smith requests the Court enter summary judgment as to all claims in Plaintiffs' Third Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been e-filed and served through the court's e-filing portal to Gary J. Rotella (rotellagar@aol.com), Rotella Law, PA, 150 N. Federal Highway, Ste. 250, Fort Lauderdale, FL 33304; Joseph P. Klapholz,, Esq., Joseph P. Klapholz, P.A., 2500 Hollywood Blvd., Suite 212, Hollywood, FL 33020, (jklap@klapholzpa.com; dml@klapholzpa.com), Peter G. Herman, Esq., Tripp Scott, 110 SE Sixth Street, Suite 1500, Fort Lauderdale, FL 33301, (PGH@trippscott.com); Michael R. Casey, Esq., 1831 NE 38th St., # 707, Oakland Park, FL 33308, (mcasey666@gmail.com); Michael C. Foster, Esq., Annette M. Urena, Esq., Daniels Kashtan, 4000 Ponce de Leon Blvd., Suite 800, Coral Gables, FL 33146, (Mfoster@dkdr.com; aurena@dkdr.com); Marc S. Dobin, Esq., Dobin Law Group, PA, 500 University Boulevard, Suite 205, Jupiter, FL 33458, (service@DobinLaw.com); Julian H. Kreeger, Esq., 2665 South Bayshore Drive, Suite 2220-14, Miami, FL 33133 (Juliankreeger@gmail.com); Thomas M. Messana, Esq., Brett Lieberman, Esq., Messana, P.A., 401 East Las Olas Boulevard, Suite 1400, Fort Lauderdale, FL 33301, (tmessana@messana-law.com; blieberman@messana-law.com); Daniel W. Matlow, Esq., Daniel W. Matlow, P.A., Emerald Lake Corporate Park, 3109 Stirling Road, Suite 101, Fort Lauderdale, FL 33312, (dmatlow@danmatlow.com; assistant@danmatlow.com); Richard T. Woulfe, Esq., Bunnell & Woulfe P.A., One Financial Plaza, Suite 1000, 100 SE Third Avenue, Fort Lauderdale, FL 33394, (Pleadings.RTW@bunnellwoulfe.com); Joanne Wilcomes, Esq., McCarter & English, LLP, 100 Mulberry Street, Four Gateway Center, Newark, NJ 07102, (jwilcomes@mccarter.com); Thomas L. Abrams, Esq., 1776 N. Pine Island Road, Suite 309, Plantation, FL 33322, (tabrams@tabramslaw.com); Zach Hyman (zhyman@bergersingerman.com) Berger Singerman, 350 E. Las Olas Blvd., Ste. 1000, Ft. Lauderdale, Florida, 33301-4215, this 21 day of April, 2014.

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