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

CASE No: 12-34121 (07)
Complex Litigation Unit

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

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST, a charitable trust, et al,

Defendants.
_____/

DEFENDANTS, HOLY GHOST FATHERS, COMPASSION FUND, HOLY GHOST FATHERS HG-MOMBASA, HOLY GHOST FATHERS INTERNATIONAL FUND #1, HOLY GHOST FATHERS INTERNATIONAL FUND #2, AND HOLY GHOST FATHERS HG-IRELAND/KENEMA, REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO THIRD AMENDED COMPLAINT

Defendants, Holy Ghost Fathers HG-Kenema, Holy Ghost Fathers International Fund #1, Holy Ghost Fathers International Fund #2, Holy Ghost Fathers Compassion Fund, and Holy Ghost Fathers HG-Mombasa (collectively, the "Holy Ghost Entities"), by and through undersigned counsel, and pursuant to Fla. R. Civ. P. 1.5101, hereby submits this reply memorandum in further support of its motion for an order of summary judgment against the Plaintiffs and to grant an order dismissing the Plaintiffs' claims.[1] In further support of this Motion, the Holy Ghost Entities state as follows:

[1] The Holy Ghost Entities hereby incorporate by reference any applicable arguments set forth by co-defendants in support of summary judgment.

PRELIMINARY STATEMENT

A close examination of plaintiffs' arguments reveals that the crux of plaintiffs' logic is fatally flawed. Plaintiffs argue essentially that no action accrued for purposes of the statute of limitations until the Conservator was put in place. That argument, however, relies upon law pertaining to corporations that is inapposite. Partners to a general partnership, unlike shareholders of a corporation, have the right to assert claims to enforce their partnership rights, including seeking an accounting, directly against the Partnership. Moreover, under Florida law, the knowledge of a partner is imputed to the partnership. Accordingly, any claims accrued well before the appointment of a Conservator.

Plaintiffs' attempt to conjure up issues of fact by submitting a "Counter-Pugatch Affidavit" is unavailing. It is undisputed that, in January, 2009, a meeting of the partners to the Partnerships was convened by Rice Pugatch Robinson & Schiller, P.A. to discuss the effect of the Bernard Madoff Ponzi scheme on the Partnerships. During this meeting, the partners were advised that some partners may be "net winners" and some may be "net losers," and a clawback action may have to be commenced. Specifically, at the meeting, Mr. Pugatch addressed the possibility that there might be a basis for asserting individual clawback actions against partners in the Partnership who were net winners. Accordingly, the partners, and consequently the Partnership, was on notice in January, 2009 that there were possible claims related to individual partners being "net winners" in the Partnership. That a Conservator was not appointed until 2012 is of no moment since under Florida law the only exception to imputing a partner's knowledge of fraud to a partnership is if the knowledge sought to be imputed is knowledge of the wrongdoing partner. That is not the case here. Likewise, that the claim may not have been precisely identified or the exact amount of alleged loss quantified in 2009 is immaterial under

Florida law. Moreover, it is sophistry to pretend that this case is not about the Madoff fraud. There is no doubt that the complained-of distributions in this case and the resulting distinction between net winners and net losers are a direct result of the Madoff fraud, of which the partners were on notice in 2008 when Madoff was arrested or no later than January 2009 when a Partnership meeting was convened.

It was not until 2012 that non-managing partners took action that resulted in the removal of Managing General Partner Michael Sullivan and ultimately resulted in the appointment of a conservator.[2] Plaintiffs cannot assert that the Partnerships lacked knowledge until the appointment of a conservator in January, 2013, as the Partnership was on notice in January of 2009, and each of the partners had the ability to pursue claims, but failed to do so prior to the 2012 investigation and removal of Michael Sullivan as Managing General Partner.

Plaintiffs' attempt to raise questions of fact regarding whether the demand letter from Ms. Smith was sent within a reasonable time for purposes of the statute of limitations also is as misguided as it is transparent. Plaintiffs argue that the Partnership Agreement requires that a demand be made to partners as a condition of a right to sue. While that may be true as a general proposition, the "demand" requirement under the Partnership Agreement unambiguously provides that it only applies when there is an Event of Default (as defined in the Partnership Agreement) by the Partner to whom notice is sent. The bridge that plaintiffs cannot cross is that they cannot point to any event of default by the Holy Ghost Entities under the Partnership

[2] Specifically, non-moving partners of the Partnerships retained GlassRatner Advisory and Capital Group, LLC to investigate certain matters pertaining to the operation and management of the Partnerships. See Pls. Br. at Ex. 5, Affidavit of Margaret J. Smith, at ¶ 2. In conducting the investigation, GlassRatner did not receive documents until May of 2012. Id. at ¶ 3. On August 17, 2012, the partners of the Partnership held a meeting during which Mr. Sullivan was replaced and Ms. Smith was elected Managing General Partner. Id. at ¶ 2.

Agreement which could justify any demand. It is here where the circular argument of plaintiffs is exposed. They claim the statute of limitations runs from the date of Smith's demand letter, but Smith's demand letter can only serve that purpose if the Holy Ghost Entities were indeed in default of a particular provision of the Partnership Agreement. And plaintiffs cannot identify any breach. They only can assert that because defendants ignored Ms. Smith's letter they are in default. But there has to be an event of default independent of failure to comply with Ms. Smith's demand.

Plaintiffs' assertion that the Holy Ghost Entities' failure to respond to the November 13, 2012 demand letter sent by Ms. Smith seeking a return of funds after finding a purported deficiency upon examination of "funds contributed and funds disbursed from your capital account" somehow triggered an "event of default" pursuant to the Partnership Agreement and consequently commenced the running of the statute of limitations is similarly misplaced. The November 13, 2012 letter seeks a return of capital, which, pursuant to the Partnership Agreement, cannot be sought without the agreement of all partners. See 3d Am. Compl., Ex. C, at Section 4.02. Accordingly, since there was no such agreement of all partners, no default is triggered. Moreover, even if there were an event of default, to proceed with termination of the purported defaulting Partner's interest, the Partnership Agreement specifically provides for a remedy in the event of default. Section 10.02 requires that there be an agreement of 51% of the Partnership to terminate the defaulting party's interest. No such agreement exists. Plaintiffs cannot pick and choose which provisions of the Partnership Agreement are applicable to suit their needs.

The Holy Ghost Entities are entitled to summary judgment.

LEGAL ARGUMENT

I. PLAINTIFFS' CLAIM FOR AVOIDANCE OF FRAUDULENT TRANSFERS FAILS AS BARRED BY THE STATUTE OF LIMITATIONS.

Count VI is a claim for Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(a) of the Florida Statutes. Plaintiffs contend that the appointment of a conservator on January 17, 2013 is the point at which the statute of limitations began to accrue, asserting that the Partnerships "could not become claimants as defined by Fla. Stat. § 726.105 until after the Conservator's appointment," as up until that point, the Partnerships "did not have standing to pursue their claims because they were not their own creditors," and "after a corporation has been placed into a receivership, it becomes a creditor with respect to assets which were fraudulently transferred away." See Pl. Br. at 7 (citations omitted). That is simply incorrect. Plaintiffs' argument is flawed in that: (i) their arguments are founded on law involving corporations, making suppositions based on facts not applicable to general partnerships; and (ii) the Partnerships were on actual and inquiry notice of the alleged fraud in January, 2009.[3]

Each case relied upon by plaintiffs asserting that the statute of limitations did not accrue until after the Conservator's appointment because the Partnership was not its own creditor involved the appointment of a receiver over a corporation. See Sallah ex rel MRT LLC v. Worldwide Clearing LLC, 860 F. Supp. 2d 1329, 1335 (S.D. Fla. 2011) (receiver appointed as part of class action settlement of claims asserted by defrauded shareholders against corporation and its principals); Freeman v. Dean Witter Reynolds, Inc., 865 So.2d 543, 551 (Fla. 2d DCA

[3] Plaintiffs cite Western Hay v. Lauren Fin. Invs. Ltd., No. 3D10-1071 (Fla. 3d DCA May 4, 2011) in support of their argument. However, the cited proposition actually is from the dissent in that case, and should have no persuasive effect on this Court. Moreover, the opinion in its entirety was later withdrawn and the trial court's decision summarily affirmed. See 77 So.3d 921 (Fla. 3d DCA 2012).

2003) (corporation "was controlled exclusively by persons engaging in its fraudulent scheme and benefitting from it"); Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995) (same); Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983) (same). Here, however, the entities at issue are partnerships, not corporations. Plaintiffs ignore the fact that the claimant is the Partnership, not the Conservator. The Conservator merely acts on behalf of creditors or those allegedly wronged, which, in this case, are a subset of partners who were "net losers."

Under Florida law, a partner has a right to assert a direct action against a partnership.

> A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:
> (a) Enforce such partner's rights under the partnership agreement;
> (b) Enforce such partner's rights under this act …or
> (c) Enforce the rights and otherwise protect the interests of such partner, including rights and interests arising independently of the partnership relationship.

Fla. Stat. § 620.8405(2).

Unlike in the cases relied upon by plaintiffs, where the shareholders were unable to assert an action as a result of the collusion of the corporate principals, here, the partners were unambiguously made aware of potential claims in January, 2009 at the Pugatch meeting. That meeting was called by memorandum addressed to "All Partners of P&S Associates, General Partnership." See Ex. C, Pugatch Aff., at ¶ 4 and Ex. A. Moreover, while the meeting generally discussed liability as to the Bernard Madoff Ponzi scheme, it also addressed the potential individual liability of the partners to the Partnership to claw back funds for net losers.

> [Y]es, you did hear correctly that there's a possibility that individuals could have liability if they were net winners and net losers, but there are a lot of factors that go into that…
> * * *
> Now, whether the partnership would then say, okay, the following eight people, you're the guys that were up that caused this and then

> have a claim back against them was a question that was asked earlier, and it's a possibility, but we don't have an answer to that right now.

Tr. at 80:17-21; 127:15-20.

Accordingly, the individual partners were on notice of a potential claim to claw back funds from the "net winners" at the time of the January, 2009 Pugatch meeting.

Further, that the damages were not precise or quantified at that time is irrelevant for purposes of the statute of limitations.

> The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

Kellermeyer v. Miller, 427 So. 2d 343, 346 (Fla. 1st DCA 1983) (citing City of Miami v. Brooks, 70 So.2d 306, 308 (Fla. 1954)). Accordingly, as a result of the January, 2009 Pugatch meeting, the partners and the Partnership were on notice of potential claims, regardless whether they were aware of the exact amount of any net loss.[4]

Because individual partners were aware of the potential claims relating to clawbacks to benefit net losers, this knowledge is imputed to the Partnership:

> A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except

[4] At a minimum, as a result of the Pugatch meeting, the partners were on "inquiry notice" of the potential claim against net winners. See Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA 1982) (in a legal malpractice action, which permits a delayed accrual of limitations, plaintiffs' claims were barred by the two-year limitations period, as they were deemed to be on inquiry notice based on their letter to counsel three years prior to filing of action articulating their displeasure with counsel's representation).

> in the case of a fraud on the partnership committed by or with the consent of that partner.

Fla. Stat. 620.8102(6).[5]

Accordingly, the Partnership was aware in January, 2009 that there were potential claims against net winners for the benefit of net losers. Unlike in the cases relied upon by plaintiffs, involving corporations under the control of corrupt individuals and shareholders without a direct claim, here the partners had the ability to seek an accounting, or otherwise enforce their rights.

As a result, Plaintiffs' claim for the avoidance of the fraudulent transfers is barred by the applicable limitations period.

II. PLAINTIFFS' CLAIMS DID NOT ACCRUE WITH THE SERVICE OF THE DEMAND LETTERS.

Plaintiffs assert that certain of their claims were triggered by the service of demand letters by newly-appointed Managing General Partner Margaret J. Smith on November 13, 2012. However, "[w]here the plaintiff's cause of action depends on an act that he himself must perform, as here, he may not suspend indefinitely the running of the statute of limitations by delaying performance of this act." See Greene v. Bursey, 733 So.2d 1111, 1115 (Fla. 4th DCA 1999). As previously set forth, the Partnerships were on aware of potential claims at the time of the Madoff discovery in December, 2008, and certainly no later than January, 2009, at the time of the Partnership meeting, as the knowledge of a partner is imputed to a partnership. Plaintiffs cannot delay the accrual of the statute of limitations by failing to act.

Plaintiffs summarily assert that the Holy Ghost Entities "are clearly defaulting partners by virtue of their receipt of improper distributions and failure to remit payment to P&S after

[5] There is no suggestion that the Holy Ghost Entities, religious entities which used distributions from the Partnership to build schools and hospitals in Africa committed any fraud or consented to any fraud.

receiving notice of the fact that it was not entitled to retain funds received…" Pls. Br. at 12. But plaintiffs fail to identify any provision of the Partnership Agreement breached by the Holy Ghost Entities. Plaintiffs circular reasoning is readily transparent. The Holy Ghost Entities "are clearly defaulting partners" because they didn't pay up when plaintiffs told them they were in default.

Plaintiffs further assert that Fla. Stat. § 620.8603 "does not limit Defendants' obligations in this case because that statute was waived by Section 10.02 of the Partnership Agreements." Id. at 13. However, Section 10.02 of the Partnership Agreement only is triggered in the event of default which is a defined term under the Partnership Agreement. See 3d Am. Compl., Ex. C. Again, no event of default is present here.

Ms. Smith's November 13, 2012 letter advises that attached to the letter is the detail of the "funds contributed and funds disbursed from your capital account," and then seeks a return of funds. Section 4.02 of the Agreement, however, provides that "No Partner shall be required to contribute any capital or lend any funds to the Partnership except as provided in Section 4.01[6] or as may otherwise be agreed on by all of the Partners." (Emphasis added). There was no agreement by all the partners to require a return of capital and therefore no breach of Section 4.02. Thus, in the absence of any independent "event of default" as defined in the Partnership Agreement, the Holy Ghost Entities' failure to comply with the Smith demand letter does not start the running of the statute of limitations.

III. PLAINTIFFS' CLAIMS PURSUANT TO FLORIDA'S PARTNERSHIP LAWS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiffs' Complaint asserts claims pursuant to Florida's Revised Uniform Partnership Act that the Holy Ghost Entities are responsible for contributing to the partnership "an amount

[6] Section 4.01 involves initial contributions of capital. See 3d Am. Compl., Ex. C.

equal to any excess of the charges over the credits in the partner's account." Fla. Stat. § 620.8807. Plaintiffs' reading of the partnership statute would allow partners to sit on claims for years and revive time-barred claims through the appointment of a conservator or the sending of a demand ostensibly pursuant to a partnership agreement requiring the return of amounts distributed years earlier and precluded by the applicable statutes of limitations in the absence of such a demand. Plaintiffs cannot claim that they only recently discovered the claim, as the delayed discovery doctrine does not apply with respect to statutory claims. See, Davis v. Monahan, 832 So. 2d 708 (Fla. 2002). The last distribution to a Holy Ghost Entity was made on June 23, 2008. The Complaint was filed on December 10, 2012, more than four years after the final distribution. The Complaint therefore is time-barred.

Moreover, it is clear from the record that HG-Kenema withdrew from P&S Associates by letter dated August 21, 2006, that International Fund No. 1 withdrew by letter dated September 11, 2007, and that International Fund No. 2 withdrew by letter dated November 14, 2006. See Wilcomes Aff., ¶ 6 and Ex. B. Although plaintiffs attempt to set up a smokescreen regarding those withdrawals, they concede that these entities received their final distributions on January 24, 2007, January 31, 2008, and January 24, 2007, respectively, shortly after their letters seeking withdrawal were sent. See Pls. Br. at 11. Plaintiffs' attempt to characterize mere receipt of final distributions as evidence that these entities remained partners is disingenuous.

Further, the remaining two Holy Ghost Entities ceased receiving distributions approximately six months prior to the discovery of the Madoff fraud in December, 2008. Mombasa has not received a distribution since June 23, 2008, and Compassion Fund has not received a distribution since March 31, 2008. See Wilcomes Aff., Ex. A.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY THE LIMITATION OF LIABILITY PROVISION OF THE PARTNERSHIP AGREEMENT.

Section 14.03 of the Partership Agreement provides, in block capital letters:

> LIMITATIONS ON LIABILITY
>
> THE PARTNERS SHALL HAVE NO LIABILITY TO THE PARTNERSHIP OR TO ANY OTHER PARTNERS 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.

(Emphasis added). There is no suggestion that the Holy Ghost Entities participated in any intentional wrongdoing. Accordingly, plaintiffs' claims are barred by the Partnership Agreement.

CONCLUSION

For all the reasons set forth herein and more fully in the Holy Ghost Entities' Motion for Summary Judgment, the Holy Ghost Entities respectfully request that the Court enter summary judgment in favor of the Holy Ghost Entities.

I HEREBY CERTIFY that a true copy of the foregoing was served via the e-filing portal on all registered parties this 21st day of April, 2014.

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