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

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; Philip von Kahle as Conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership,

Case No. 12-34121 (07)
Complex Litigation Unit

Plaintiffs,

v.

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

Defendants.
_________________________________/

DEFENDANT, CONGREGATION OF THE HOLY GHOST - WESTERN PROVINCE'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant, Congregation of the Holy Ghost - Western Province ("Congregation"), by and through undersigned counsel, and pursuant to Fla. R. Civ. P. 1.510, hereby submits this Reply Memorandum in further support of its Motion for Summary Judgment and argues that the motion be granted. As will be shown, the Third Amended Complaint is barred by the relevant statutes of limitation and by the Congregation's status as former partner. The fact that the Conservator was not appointed until 2013 does not alter the limitations period with respect to the Partnerships on whose behalf this action is being brought. In support of this Motion, the Congregation states as follows:

INTRODUCTION

This Court is now fully conversant with the facts of this case. The Plaintiffs have asserted multiple causes of action against the Congregation arising out of distributions received from the Partnership. It is undisputed that the last such distribution was received by the Congregation in January 2003. Almost a decade later, the Plaintiffs are attempting to revive multiple causes of action which have already expired pursuant to the relevant statutes of limitations.

FACTUAL BACKGROUND

In an attempt to revive its claims, the Plaintiffs allege that the relevant statutes of limitation do not begin to run until the Partnership begins winding down pursuant to Fla. Stat. § 620.8807. The Plaintiffs allege that the Partnerships are in the process of winding down now that the Conservator has been appointed and that the causes of action could not have accrued prior to this appointment.

The Plaintiffs also argue that there are disputed issues of material fact that preclude summary judgment on these issues. The Plaintiffs argue that the Conservator could not have reasonably discovered the transfer of the distributions prior to his appointment and that a demand for the return of those distributions could not have been made prior to the appointment of a Managing General Partner. The Plaintiffs also suggest that there is a disputed issue of fact as to whether the discovery of the Madoff fraud could have reasonably led to the discovery of the Conservator's claims. The Plaintiffs argue that whether the Congregation withdrew from the Partnership is a disputed issue of material fact. As will be demonstrated, these are no disputed issues of material fact with respect.

ARGUMENT

I. Count VI - Avoidance of Fraudulent Transfers

First, the Plaintiffs appear to misunderstand what needs to be reasonably discovered pursuant

to Fla. Stat. § 726.110(1) in order to commence the running of the statute of limitations. Several times in the Response, the Plaintiffs mistakenly suggest that the statute of limitations contained in Fla. Stat. § 726.110(1) is not triggered until the fraudulent nature of the transfers is discovered, rather than the transfers themselves. This is patently false. In fact, the very opinion that the Plaintiffs attempt to cite in support of this position holds the exact opposite. Plaintiffs argue that one of the material issues of fact that precludes the entry of summary judgment on the basis of statute of limitations is "[w]hether Pugatch's statements could have led to the discovery of the fraudulent nature of the transfers because the transfers in and of themselves would not trigger the statute of limitations." (Plaintiffs' Response, p. 5).

The Plaintiffs cite *Western Hay v. Laurel Fin. Invs., Ltd.* in arguing that "[t]he majority of courts that have interpreted statutes which are analogous to Fla. Stat. § 726.110(1), have held that the 'one-year savings provision does not begin to accrue until the discovery of the fraudulent nature of the transfer,' as opposed to when the transfer occurred." Incidentally, the Plaintiffs have cited the dissenting opinion in *Western Hay*. In addition to citing to the dissenting opinion to support its argument, the Plaintiffs have failed to take into account the subsequent history of the case. In reality, there is no precedent opinion for the Plaintiffs' position that the discovery of the fraudulent nature of the transfers triggers the statute of limitations because, subsequent to the issuance of the *Western Hay* opinion, that opinion was withdrawn by the Court. *Western Hay Co. v. Lauren Financial Investments, Ltd.*, 77 So.3d 921 (Fla. 3d DCA 2012). In withdrawing the opinion, the Court summarily affirmed the final judgment under review. *Id.* The final judgment of the trial court correctly applied the statute of limitations set forth in Fla. Stat. § 726.110(1) as beginning to run upon discovery of the transfer, not upon discovery of the fraudulent nature of the transfer.

The Plaintiffs further suggest that since the partners were not informed of the specific identity of any of the "net winners" and "net losers" during the January 2009 meeting, that the statute of limitations contained in Fla. Stat. § 726.110(1) did not begin to run at that time. "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." *City of Miami v. Brooks*, 70 So. 2d 306, 308 (Fla. 1954).

Courts have held that there is a distinction between notice of the negligent act and notice of its consequences. *Id.* Specifically, notice of the consequences of an act is not necessary to commence the running of the statute of limitations. Rather, it is notice of the act and of a right of a cause of action that causes the statute to run. *Id.* Thus, while the net loser partners may not have been notified of the exact identities of the net winners and net losers, or of the exact amounts, they were notified that some partners were net winners and some were net losers. At this point, the partners were on notice that certain partners received distributions in excess of contributions while others contributed more than they received. It is that act of the Partnership in providing distributions that commences the running of the statute of limitations pursuant to Fla. Stat. § 726.110(1). "In other words, the statute attaches where there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action." *Id.* at 309. When the partners were notified of the existence of net winners and net losers, they were put on notice of the Partnership's right to a cause of action. At that point in time the statute of limitations attaches.

In interpreting statutes of limitations with delayed discovery provisions similar to the savings

clause at issue in Fla. Stat. § 726.110(1), courts have routinely relied upon the plaintiff's notice of the accrual of the cause of action. Specifically, courts examine the moment at which the plaintiff received inquiry notice of the accrual of a cause of action. *See Cherney v. Moody*, 413 So. 2d 866 (Fla. 1st DCA 1982) (holding that the plaintiffs were on inquiry notice of the accrual of a cause of action and that this notice commenced the running of the applicable malpractice statute of limitations). "In order to charge a person with notice of a fact which he might have learned by inquiry, the circumstances known to him must be such as should reasonably suggest inquiry and lead him to inquiry." *Sheres v. Genender*, 965 So. 2d 1268 (Fla. 4th DCA 2007) (quoting *Chatlos v. McPherson*, 95 So. 2d 506, 509 (Fla. 1957). Fla. Stat. § 726.110(1) provides that the statute of limitations begins running when the allegedly fraudulent transfers themselves could reasonably have been discovered. In this case, the Plaintiffs have alleged that the distributions to certain former partners constituted fraudulent transfers. Therefore, the statute of limitations contained in Fla. Stat. § 726.110(1) begins to run when the Partnership could have reasonably discovered the distributions.

The distributions could have reasonably been discovered in January 2009, at the very latest. As the affidavit of Chad Pugatch demonstrates, the "net loser" partners were informed in January 2009 that the Partnerships were impacted by the Madoff fraud. The Plaintiffs have attempted to distinguish the discovery of the Madoff fraud from the discovery of the allegedly improper distributions to certain partners. Such an argument cannot be sustained. For purposes of notice, the Madoff fraud and the allegedly improper distributions are inextricably intertwined. At this point, the business of the Partnership, including any distributions, was readily ascertainable to the partners. It is not reasonable for the net loser partners who learned of the Madoff fraud to sit back and dismiss the idea that there might also be issues with the Partnerships that required possible action. If a partner

had learned that the Partnership in which that partner was invested lost money in conjunction with the Madoff fraud, it would be reasonable for that partner to investigate the partnerships' books and records. In fact, it would be unreasonable for that partner to ignore knowledge of the Madoff fraud. Further, the partners in attendance at that meeting were informed that certain partners were net losers while others were net winners. After receiving this information, the net loser partners should have made inquiry into the Partnership. Upon doing so, the partners, and the Partnerships, would have discovered that the difference between net losers and net winners was the amount of distributions. With the discovery of the actual distributions by the net loser partners, those partners could have requested to review the books and records of the partnerships. In fact, at the 2009 meeting, it was suggested that the individual partners might want to think about retaining their own lawyers.[1] Had this been done, the partners could have appointed a Conservator at that time.

One principle relating to inquiry notice that can be applied to the savings clause is that negligent ignorance of a fact is treated the same as actual knowledge.

> Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. And wherever facts put a person on inquiry notice will be imputed to him if it is made to appear that he has designedly abstained from inquiry for the purpose of avoiding notice. A person has no right to shut his eyes or ears to information, and then say that he has no notice. The law will not permit him to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. If he has either actual or constructive information and notice sufficient to put him on inquiry, he is bound, for his own protection, to make that inquiry which such information or notice appears to direct should be made. If he disregards that information or notice which is sufficient to put him on inquiry and fails to inquire and to learn that which he might reasonably be expected to learn upon making such

[1] Noticeably absent from the Pugatch affidavit is any affirmative statement that the Congregation was given notice of the special January 2009 meeting. If the Congregation was believed to be a partner, as the Plaintiff maintains, there is no good explanation for why was it not treated like one when the Madoff fraud was disclosed.

inquiry, then he must suffer the consequences of his neglect.

Donner's Estate, In re, 364 So. 2d 742, 750 (Fla. 3d DCA 1978) (quoting 23 Fla. Jur. Notice and Notices § 6 (1959). In *Donner's Estate*, the Court, in the context of fraud in an antenuptial agreement, held that without a duty to inquire, the concept of negligent ignorance no longer has the same effect in law as actual knowledge.

While the net loser partners did not have a literal duty to act on the information they received during the January 2009 meeting and to inquire as to the effect of the Madoff fraud on their investments, they certainly had a duty pursuant to Fla. Stat. § 726.110(1) to bring suit within one year of discovering the transfers. In that sense, the net loser partners did have an obligation to inquire as to the effect of the Madoff fraud on the Partnership if they intended to preserve their right to bring a claim for avoidance of fraudulent transfers. It is certainly reasonable to believe that, where a partnership was invested in a known Ponzi scheme, there might be potentially fraudulent transfers within the partnership itself. The partners were therefore on notice that they should inquire into the business of the Partnership.

In turn, such knowledge of the net loser partners is imputed to the Partnership. *See* Fla. Stat. § 620.8102. "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 in the case of a fraud on the partnership committed by or with the consent of that partner." Fla. Stat. § 620.8102(6). Here, the Conservator is effectively bringing claims on behalf of the net loser partners. Since the net loser partners were on inquiry notice of the transfers to other partners, that notice is effective as to the Partnership. Therefore, the Partnership was on notice of the transfers immediately when the net loser partners were informed of the Madoff fraud and advised

that they may need to talk to a lawyer in January 2009. Fla. Stat. § 620.8102(6) makes an exception when there is a fraud committed on the partnership by, or with the consent of, that partner with the knowledge or notice. However, there was no fraud committed by the net loser partners on the Partnership that would prevent the Partnership from acquiring the inquiry notice of those partners.

The Plaintiffs argue that prior to the appointment of the Conservator, the Partnerships could not have been claimants because they did not have standing to pursue their claims. The Plaintiffs are essentially arguing that a Partnership, or individual partners, can never bring a claim pursuant to Fla. Stat. § 726.105(1) without the appointment of a Conservator. The Plaintiffs' new strategy to avoid the statute of limitations is belied by the Partnerships' own actions. The claims that the Partnerships are now pursuing are the same as those that accrued before the Conservator was appointed. The original lawsuit was brought on behalf of the Partnerships by Margaret Smith. At the time of the initiation of the lawsuit by Ms. Smith, the Conservator had not yet been appointed. There were no allegations that Margaret Smith was an acting conservator. However, this did not stop the Partnerships from bringing a cause of action for Avoidance of Fraudulent Transfers. Yet now, the Plaintiffs are claiming that they did not have standing to bring that claim in December 2012 because they were not their own creditors at the time. Thus, the Plaintiffs have been filing admittedly frivolous claims until the Conservator was appointed in 2013. Certainly, the Court will see through these attempts to avoid the statute of limitations.

II. Plaintiffs' claims under Fla. Stat. § 620.8807 are barred

The Plaintiffs argue that the statute of limitations for Counts I and II starts to run only when the Partnership begins winding down rather than when the statutory duty is allegedly breached. This is not what the statute of limitations provides. In fact, the Plaintiffs fail to provide any support for

this position. As has been thoroughly briefed in the Congregation's motion, Fla. Stat. § 620.8807 does not apply to the Congregation. Rather, Fla. Stat. § 620.8807 only applies to Partners who dissociate from the Partnership when such dissociation causes dissolution and winding up of the Partnership assets. Fla. Stat. § 620.8603(1).

III. The Congregation did withdraw from the Partnership

The Plaintiff argues that there are disputed issues of fact as to whether the Congregation withdrew from the Partnership. As noted in the Motion, however, the Congregation unequivocally withdrew from the Partnership in 2002 when the Provincial Treasurer requested that the Partnership terminate the Congregation's Partnership account. Despite the Plaintiffs' argument that the letter does not state that the Congregation wished to withdraw from the Partnership, there can be no dispute that the Congregation intended to close its capital account and withdraw from the Partnership. The Plaintiffs' semantic argument that the Congregation did not actually withdraw, despite its clear intent to do so, is belied by the Partnership's own actions. There is no justification for providing a current partner with a Schedule K-1 marked "final" and liquidating that partner's capital account if there was no withdrawal.

Further, the Plaintiffs argue that the Congregation waived its intent to withdraw by receiving a final distribution in connection with the dissociation. By the Plaintiffs' logic, it is impossible for a partner with a net gain in its capital account to ever withdraw from a partnership with its investment intact because the very act of receiving that final distribution waives the partners' prior intent to withdraw. Such an interpretation strains the imagination and is not supported by the law.

Similarly, the Plaintiffs argue that the Congregation waived its intent to dissociate because it participated in the related interpleader action. The Congregation was forced to defend itself in a

case that, depending on the outcome of this matter, could impact the Congregation's rights. For the Plaintiffs to suggest that by entering into the interpleader case, a case filed by the Plaintiffs, the Congregation waived its right to claim that it dissociated from the partnership is a clear attempt to deflect this Court from the very real issues concerning the relevant statutes of limitations.

Further, the Plaintiffs argue that the Congregation violated the Partnership Agreement. However, the Plaintiffs fail to provide support for any act of default on the part of the Congregation. Pursuant to Fla. Stat. § 620.8807, the Plaintiffs argue that the Congregation defaulted by not contributing to the winding down of the partnership. The Managing General Partner's demand was made in connection with the Congregation's alleged failure to contribute. However, as has been more fully briefed in the Congregation's Motion, any violation for the failure to contribute to the winding down applies to **current** partners who fail to contribute. There is no support for the Plaintiffs' position that a former partner is in default for failing to contribute pursuant to Fla. Stat. § 620.8807.

CONCLUSION

For all the reasons set forth herein and more fully in the Congregation's Motion for Summary Judgment, the Congregation respectfully requests that the Court grant the Motion on the grounds that the Third Amended Complaint is barred by the relevant statutes of limitation and by the Congregation's status as dissociated from the Partnership. .

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.

*_/s/ Marc S. Dobin_*
Marc S. Dobin
Florida Bar No. 997803
Jonathan T. Lieber
Florida Bar No. 92837
service@DobinLaw.com

Dobin Law Group, PA
500 University Boulevard, Suite 205
Jupiter, Florida 33458
561-575-5880; 561-246-3003 - Facsimile
Attorneys for Congregation of the Holy Ghost
- Western Province