U27/13-203

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

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

PHILIP J. VON KAHLE, as Conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP, and S&P ASSOCIATES, GENERAL PARTNERSHIP,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST, et al.,

Defendants. /

DEFENDANT ROBERT A. UCHIN REVOCABLE TRUST'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, ROBERT A. UCHIN REVOCABLE TRUST (the "UCHIN TRUST"), by and through its undersigned counsel, hereby files its Reply in Support of its Motion for Summary Judgment on the Third Amended Complaint (the "Motion") and in opposition to the Response to the UCHIN TRUST's Motion ("Response") filed by Plaintiffs, PHILIP J. VON KAHLE, as Conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership ("P&S"); and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership ("S&P"),[1] (collectively, "Plaintiffs" or "Partnerships"), and in support states:

A. As to S&P:

Plaintiffs have presented no record evidence which counters that the UCHIN TRUST did not have a contract with S&P and the only allegation is that the UCHIN TRUST entered into a partnership agreement with P&S (the "Partnership Agreement"). Plaintiffs have also not responded

[1] There are no allegations on behalf of S&P against the UCHIN TRUST and the UCHIN TRUST seeks summary judgment against this Plaintiff.

to the request for an Order by the UCHIN TRUST granting summary judgment in favor of the UCHIN TRUST against S&P and therefore have implicitly conceded that summary judgment is appropriate at this time, at least, in part, as it relates to S&P only.

B. As to P&S:[2]

1. Creditors were aware of alleged improper distributions in 2008

The statute of limitations does preclude Plaintiff's fraudulent transfer claim as creditors were aware of alleged improper distributions in December of 2008 or at least by January of 2009 or had a duty to inquire by January of 2009. Plaintiffs have not created a genuine issue of material fact as to when P&S became aware of the Madoff Ponzi Scheme and the fraudulent scheme of payments nor provided any record evidence to defeat summary judgment as to the fraudulent transfer claim based on the statute of limitations. Plaintiffs argue that the "Conservator could not have reasonably discovered the transfer of the improper distributions to Defendant prior to his appointment." However, this statement is based on the wrong premise that the knowledge of improper distributions had to be known by the Conservator to bring an action and to begin the running of the statute of limitations. What Plaintiffs ignore is that the Conservator is acting on behalf of creditors or those wronged, which, in this case, is alleged to be the "net losers." It is the creditors that are the real claimants, not the Conservator. It is also irrelevant that Sullivan refused to bring a claim on behalf of the creditors because the only relevant time period is when the creditors became aware of the fraud and when they could have first brought a claim. The Conservator steps in the shoes of those creditors to bring an action. If the creditors waited too long to initiate a lawsuit, after becoming

[2] Robert Uchin, on behalf of the UCHIN TRUST, files the attached affidavit in reply to various arguments made by Plaintiffs in their Response, as further discussed below, and incorporates the affidavit in its entirety into this Reply.

aware of the fraud and are barred from bringing or proceeding in that action because of the expiration of the statute of limitations, so too is the Conservator barred from bringing an action. The question, thus, must be when did the "net losers" become aware that certain alleged partners of the Partnerships "received, on a net basis, more money than they invested; i.e., 'Net Winners'" (Response, p.2). There is un-refuted record evidence by way of the transcript from the January 2009 meeting of the Partnerships that those individuals or entities that were still partners in either of the Partnerships were informed that "net losers" may have a claim to make because some investors were paid more then they were entitled to be paid and others received less in an inequitable distribution. *See also* § 620.8102 (which considers a person to have knowledge and be on notice when reasonable steps are taken to give notice even if that person does not learn of the fact; and which extends knowledge to a partner when notification to the partnership). It is these potential claimants that were on notice and had a duty to further inquire as to such potential claims. *See Cherney v. Moody*, 413 So. 2d 866, 867 (Fla. 1st DCA 1982) (holding that upon "inquiry notice of the accrual of a cause of action...this notice commenced the running of the statute of limitations"). It was at that time in January 2009 that such partners could have discovered any fraudulent activity involving the Partnerships and the statute of limitations began to run.

It was already known in December 2008, prior to the meeting, that all of the money invested into P&S was invested into Madoff funds. At the time of Madoff's arrest and as late as January 2009, the remaining investors in the Partnerships were aware of the "fraudulent nature of the transfers" of funds and their potential claims. It was then that a demand could have been and should have been made to the alleged "net winners" to return any amounts alleged to have been "improperly received by Defendant." Any money paid to the UCHIN TRUST, as alleged, was prior to that January 2009 meeting of the partners and thus any fraudulent transfers were discoverable at least as late as January

2009. Plaintiffs correctly argue, in part, that what Chad Pugatch or Sullivan "knew in January 2009 is irrelevant because the determining fact for purposes of the statute of limitations on the fraudulent transfer claim is whether the transfer could have been discovered by 'the claimant'" -- yet, while Plaintiffs argue "the claimant" is the Conservator, this ignores that the Conservator is stepping in the shoes of the "net-losers" who are the real claimants and the "could have been discovered" does not depend on the date the Conservator was appointed.[3]

Plaintiff's submission of the Affidavit of Chad Pugatch (Exhibit 2 to Plaintiff's Response) does not create an issue of fact which prevents summary judgment. While Mr. Pugatch avers that he did not know the names of any "net winners" this does not as a matter of law prevent a claim from being made against "net winners" by the "net losers," i.e. the creditors (whether they knew the names of all or any "net winners" or not). Mr. Pugatch is only testifying that he did not have access to the books or account statements which were available to and accessible by the partners themselves.

Plaintiffs also argue that "[p]rior to the appointment of the Conservator, the Partnerships could not have been claimants because they did not have standing to pursue their claims because they were not their own creditors" (*see* Response, p. 7)—Plaintiffs offer no case citation. Plaintiffs do though cite to *Sallah* in the next sentence and provides the following quote: "after a **corporation** has been placed into a receivership, it becomes a creditor with respect to assets which were fraudulently transferred away" (Response, p.7 citing *Sallah ex rel. MRT. LLC v. Worldwide Clearing LLC*, 860 F. Supp. 2d 1329, 1335 (S.D. Fla. 2011) (emphasis added) and *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003) (citing *Scholes v. Lehmann*, 56 F. 3d 750, 754 (7th Cir. 1995); *Schact v. Brown*, 711 F.2d 1343 (7th Cir. 1983)). Plaintiffs then take the leap to assert

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[3] The term "claimant" is not defined in Chapter 726 and is in fact only used once in Chapter 726 in § 726.110(1).

"the Partnerships could not become claimants as defined by Fla. Stat. § 726.105 until after the Conservator's appointment" (Response, p. 7). Yet, there is no definition of "claimant" in § 726.105 and *Sallah* , *Freeman*, *Scholes*, and *Schact*[4] are distinguishable from the facts in our case. Aside from any differences between a "receiver" and a "conservator" as those terms appear to be used interchangeably at times, all of the cases cited by Plaintiffs discuss a situation when a corporation's assets have been fraudulently transferred and the funds at issue belong to the corporation and in turn the corporation becomes a creditor. This is not the situation here wherein the alleged fraudulent transfer involves a general partnership wherein there are individual creditors who have individual claims which can be brought, instead of and separate and apart from any claims brought by an appointed conservator (or receiver).[5]

The UCHIN TRUST has met its burden and Plaintiffs have failed to create a genuine issue of material fact which would prevent the Court from finding that as to Plaintiffs' claim for fraudulent transfer, the Conservator acting on behalf of the "net losers" can only proceed on a claim if the "net losers" can proceed. As the "net losers" were on notice of potential claims in December of 2008 or

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[4] In *Schact*, the court specifically noted:

> a century of interpretation of this and its predecessor provisions has established the basic rule that "where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders....He takes only the rights of the corporation such as could be asserted in its own name, and that upon that basis, only, can he litigate for the benefit of other shareholders or creditors."

Schacht v. Brown, 711 F.2d 1343, 1347 n.3 (7th Cir. 1983)

[5] There is also a distinction between the facts in our case and in *Sallah* and in *Freeman* (cited in *Sallah* and by Plaintiffs) in regards to the equitable doctrine of unclean hands and *in pari delicto*. While *Freeman* holds that a receiver may not be prevented from proceeding based on the unclean hands of the corporation, there is no holding that carries this forward to the unclean hands of a general partner in a General Partnership.

as late as January 2009, the statute of limitations ran and expired prior to the filing of the Complaint on December 10, 2012.

2. § 620.8807 does not create a statutory cause of action

Plaintiffs do not respond to the UCHIN TRUST's argument that § 620.8807 does not provide for an independent statutory cause of action in the body of Plaintiffs' Response but makes some cursory arguments in footnotes (*see* Response, pp. 9-10 n.3). However, in Plaintiffs' own note, Plaintiffs argue that the "intent is also established by Fla. Stat. § 620.8405 which provides in relevant part that '[a] partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership'" (Response, p. 10 n.3). Thus, the cause of action is not statutory but a breach of contract or some other breach of a duty established in law. The statute provides a remedy of set aside if one is successful in proving the elements of the cause of action but not an independent tort in and of itself. *See Freeman v. First Union Nat'l Bank*, 865 So. 2d 1272, 1276 (Fla. 2004) (finding the "FUFTA was intended to codify an existing but imprecise system whereby transfers that were intended to defraud creditors could be set aside" and "[w]e simply can see no language in FUFTA that suggests an intent to create an independent tort for damages."). As there is no statutory cause of action for an alleged violation of § 620.8807, summary judgment must be granted as to Counts I and II as a matter of law.

3. Record evidence supports that the UCHIN TRUST withdrew from P&S in 2007

If the Court does find that Plaintiffs can proceed under Count I or Count II for a cause of action relying on § 620.8807, Plaintiffs have not created a genuine issue of material fact through record evidence that refutes that Robert Uchin, on behalf of the UCHIN TRUST, terminated his

interest in P&S and dissociated from P&S by sending his November 26, 2007 letter to P&S c/o Sullivan & Powell. Such dissociation makes Florida Statutes § 620.8807 inapplicable as the UCHIN TRUST is no longer a partner nor was the UCHIN TRUST a partner at the time the Complaint was filed. The UCHIN TRUST's dissociation also prevents Plaintiffs' additional claims of the applicability of various sections of the Partnership Agreement as the UCHIN TRUST is no longer a partner and has not been since 2007. The record evidence also establishes that Robert Uchin did not receive notice of the January 2009 meeting of then current partners in the Partnerships and did not even become aware of that meeting until recently during the course of this litigation which also supports that he was no longer a partner at that time. Plaintiffs have not refuted this testimony. Dissociation also does not constitute a "default" which Plaintiffs refer to in Section 10 of the Partnership Agreement and that Section so too does not apply.

If the Court agrees with Plaintiffs that the "winding up" (as referred to in the statute) or "winding down" (as referred to by Plaintiffs) only began upon the appointment of the Conservator, UCHIN TRUST was also not a partner at that time; thus, § 620.8807 would still not have been applicable. If Plaintiffs' argument that the winding down of the Partnership did not begin until the Conservator was appointed, then when the UCHIN TRUST dissociated in November 2007, that dissociation did not result in the winding up which, pursuant to § 620.8603, forces us to look to §§ 620.8701-620.8705 to determine the effect of the UCHIN TRUST's dissociation. *See* Fla. Stat. § 620.8603(1).

Because the UCHIN TRUST was bought out by the Partnership and because a dissociation occurred and there is no record evidence to the contrary, Plaintiffs cannot support this argument that Section 10 of the Partnership Agreement is still in force and preserves any liability or that any duties still existed or breaches occurred based on the Partnership Agreement. The UCHIN TRUST cannot

be a defaulting partner in 2012 when the trust was no longer a partner as of 2007.

The testimony of Robert Uchin supports that following the UCHIN TRUST's letter to Michael Sullivan requesting all of its investment to be sold, the Partnership determined a buyout price and the UCHIN TRUST's interest was purchased with a check sent out more than 30 days later in December 2007 and with an additional check for interest sent less than three weeks later to correct an accounting error made by P&S. The buyout of the UCHIN TRUST's investment which followed the November 2007 letter are consistent with § 620.8701(1) and there is no testimony from Michael Sullivan or any other person in record evidence that creates an issue of fact or contradicts the testimony of Robert Uchin. While Plaintiffs may argue a waiver or a different intent shown by certain lawyer created documents, Plaintiffs have not provided record evidence that counters the testimony of Robert Uchin on behalf of the UCHIN TRUST.

4. Breaches of contract cannot be construed as continuing torts

While Plaintiffs argue that the UCHIN TRUST's basis for summary judgment on the breach of contract claim is "nonsensical," Plaintiffs also argues to the Court that a *breach of contract* which is based on alleged improper distributions made more than five years before the filing of the Complaint should be considered timely "because Defendant's receipt of distributions constituted a *continuing tort*" (Response, p. 14, emphasis added). This reasoning is necessary to Plaintiffs' argument in order to avoid the statute of limitations. However, in our case if a breach occurred by the UCHIN TRUST, it is alleged to have been a contractual breach not tortious. "A continuing tort is established by continual *tortious acts*, not by continual harmful effects from an original, completed act. 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*." *Black Diamond Properties, Inc. v. Haines*, 69 So.3d 1090,

1094 (Fla. 5th DCA 2011) (internal quotations and citations omitted) (emphasis added). If a breach occurred, the breach was the alleged single act of receiving the alleged improper funds; the refusal to return funds in 2012 was not a continual act.

Plaintiffs' allegation is that a breach of contract occurred which by its very name is distinct from a tort and Plaintiffs cannot now usurp tort law to assist in reviving failed contract claims. In order to have breached the contract and for the UCHIN TRUST to have taken more money in disbursements then it was entitled to, the Court must look back to the September 31, 2007 disbursement, the first disbursement received by the UCHIN TRUST; yet, this date cannot serve as the basis for the breach because it is 5 years prior to the filing of the Complaint.

Plaintiffs also argue that because the Partnership Agreement has a notice or demand provision in Article 10.01(b), the statute of limitations does not run until November 23, 2012 when Margaret Smith sent a letter to the UCHIN TRUST. However, Plaintiffs' argument presupposes that the Partnership Agreement still applies to the UCHIN TRUST even though it was no longer a partner at the time the demand was made and if it did apply, Plaintiffs assume that the UCHIN TRUST was in default under the terms of the Partnership Agreement. This contract interpretation is for the Court to rule upon as a matter of law.

Plaintiffs also rely on Sections 10.01(g) to explain why the breach of contract claim did not begin to run until November 2012. However, as discussed above, the Partnership Agreement did not apply to the UCHIN TRUST in 2012 because the UCHIN TRUST had already dissociated. 10.01(g) sets out under what circumstances a partner can be held in "default"; however, the UCHIN TRUST had dissociated by that time and was never and cannot be now held in default. In addition, even if the Court was to find that the Partnership Agreement was still in force as to the UCHIN TRUST, the language quoted in 10.01(g) refers to an intentional act and gross negligence which

there is no allegation of or record evidence of against the UCHIN TRUST. In fact, the only allegation of such actions is made by the Conservator against Michael Sullivan (*see* Complaint, ¶¶ 48, 104). Plaintiffs also argue the UCHIN TRUST is liable under 14.03 of the Partnership Agreement which requires intentional acts of a partner---this basis for liability fails as well for the same reasons discussed above.

Plaintiffs cannot point to a breach of contract by the UCHIN TRUST that occurred while the UCHIN TRUST was still a partner or which was brought within the five year statute of limitations. Summary judgment must be granted on Count III for Breach of Contract.

5. No dispute that a valid contract existed, thus no claims can succeed for unjust enrichment

At the summary judgment stage when there is no genuine issue of material fact that a valid contract existed between the parties, in this case a Partnership Agreement, Plaintiffs cannot proceed on an equitable claim for unjust enrichment. "[A] plaintiff cannot pursue an equitable theory, such as unjust enrichment or *quantum meruit*, to prove entitlement to relief if an express contract exists." *Ocean Communs., Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007); *White Holding Co., LLC v. Martin Marietta Materials, Inc.*, 423 F. App'x 943, 946 (11th Cir. 2011) (affirming district court's summary judgment on unjust enrichment claim based on the existence of a valid express contract). While Plaintiffs may have been permitted to proceed at the motion to dismiss stage with alternative causes of action, at the summary judgment stage there is no issue of genuine material fact that a valid agreement existed between the UCHIN TRUST and P&S; thus, Count III for Unjust Enrichment fails as a matter of law.

6. The 4 year statute of limitations bars Counts I, II, IV, V, VI, and VII

Plaintiffs have not created a genuine issue of material fact as to when the statute of

limitations began to run in any of the causes of action which have a four year statute of limitations. As discussed above and without dispute, the Complaint was filed on December 10, 2012 and the distributions at issue were made more than four years before that date. Plaintiffs solely rely on its interpretation of the Partnership Agreement as to a notice provision in the event a partner defaults which the applicability of is for the Court decide as a matter of law.[6] *See Smith v. Shelton*, 970 So. 2d 450, 451 (Fla. 4th DCA 2007) (holding it is for the court to decide if the interpretation or construction of a contract is clear and unambiguous as a matter of law); *Lambert v. Berkley South Condominium Assoc.*, 680 So. 2d 588, 590 (Fla. 4th DCA 1996) (holding "a true ambiguity does not exist merely because a document can possibly be interpreted in more than one manner").

The UCHIN TRUST renews and further relies on its arguments made in its Motion for Summary Judgment and adopts and joins co-Defendants' Motions for Summary Judgment and Replies which argue in opposition to the same or similar arguments made by Plaintiffs against the UCHIN TRUST.

WHEREFORE, the Defendant, ROBERT A. UCHIN REVOCABLE TRUST, respectfully renews its request for an Order granting Summary Judgment as to all claims against it and enter a Final Judgment in its favor, and for the Court to award costs and such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 21, 2014, I electronically filed the foregoing document with the Clerk of the Court and I also certify that the foregoing document is being served this day

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[6] As discussed above, the equitable claims cannot survive based on the existence of an express contract (in which the parties do not dispute) and surely Plaintiffs cannot rely on a notice provision in the contract to defeat the statute of limitations for an equitable claim which is based on the lack of an express contract.

on all counsel of record in the manner specified, either via the Florida Courts E-Filing Portal or in some other authorized manner for those counsel or parties who are not authorized to receive electronic filings.

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Philip J. Von Kahle, etc., vs. Janet A.
Hooker Charitable Trust, etc., et al
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CERTIFICATE OF SERVICE LIST

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EXHIBIT

U27/13-203

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

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

PHILIP J. VON KAHLE, as Conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP and S&P ASSOCIATES, GENERAL PARTNERSHIP,

Plaintiffs,

vs.

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

Defendants. /

AFFIDAVIT OF ROBERT A. UCHIN

STATE OF FLORIDA)
)ss
COUNTY OF BROWARD)

BEFORE ME, the undersigned authority, personally appeared ROBERT A. UCHIN, who, first being duly sworn, deposes and states as follows:

1. My name is ROBERT A. UCHIN. I am over the age of eighteen and I have personal knowledge of the matters set forth below in this Affidavit. My testimony is on behalf of the Robert A. Uchin Revocable Trust as its trustee.

2. My November 26, 2007 letter (already a part of the Court's record) to P&S Associates was my notice to the Partnership requesting all of my investment to be sold and for the Partnership to establish a buyout price and purchase all of my interest in P&S that remained at that time.

3. P&S did not disburse my final check in response to my November 26, 2007 letter until more than thirty (30) days had passed, on December 31, 2007, which to my understanding was consistent with the terms of the Partnership Agreement.

4. During the course of this litigation I became aware that in January 2009 there was a meeting called of all partners of S&P and P&S Associates, General Partnerships. I never received notice of this meeting in 2009, nor do I believe I would have received notice of this meeting, as I was no longer a partner as of the acceptance by the Partnership of my November 26, 2007 letter to Mike Sullivan requesting all of the trust's investment to be sold.

5. The last check which the trust received in January 2008 was a small amount and it was not requested by me and it was my understanding that it was due to an accounting error made by P&S and was interest payment that should have been paid with my December 2007 check. It was not a separate distribution.

6. Under penalty of perjury, I state the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

ROBERT A. UCHIN, On behalf of
ROBERT A. UCHIN REVOCABLE TRUST

Sworn to and subscribed before me this 21st day of April, 2014, by ROBERT A. UCHIN, on behalf of ROBERT A. UCHIN REVOCABLE TRUST, who is personally known to me or has produced _____ as identification.

(Signature of Notary)
Kicha Campbell
(Name of Notary Typed or printed or stamped)
NOTARY PUBLIC
EE096786
(Commission Number)

KICHA M CAMPBELL
MY COMMISSION # EE096786
EXPIRES May 23, 2015
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