IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDCIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 12-24051 (07)
COMPLEX LITIGATION UNIT

MATTHEW CARONE, as Trustee for the Carone Marital Trust # 2 UTD 1/26/00, Carone Gallery, Inc. Pension Trust, Carone Family Trust, Carone Martial Trust #1 UTD 1/26/00 and Matthew D. Carone Revocable Trust, JAMES JORDAN, as Trustee for the James A. Jordan Living Trust, ELAINE ZIFFER as individual and FESTUS AND HELEN STACY FOUNDATION, INC., a Florida corporation,

Plaintiffs,

v.

MICHAEL D. SULLIVAN
Defendant

RESPONSE AND MEMORANDUM OF LAW OPPOSING CONSERVATOR'S FEE REPORT

I, Steven Jacob, a partner in the S&P partnership object to Conservator's Fee Report and state as follows:

The Conservator's fee report states that the Conservator's made the following two-fold determinations:

(i) the chargers were properly chargeable to the Partnerships; and (ii) the fees and costs sought were reasonable.

The conservator has erred in making these determinations because:

1. There is no authority in the partnership agreement (or anywhere else) that permits Berger Singerman LLP, and Glass Ratner Advisory & Capital Group LLC (hereafter, BS and GR, respectively) to charge and/or recover fees from the partnership funds.
2. BS alleges that Margaret Smith was elected as managing general partner. In fact, the election was conducted in a manner that contravenes the Partnership Agreement. BS manipulated the vote by disallowing the vote of the managing partner of a limited partnership, SPJ Limited Partnership, and allowing some of the Limited Partners to vote the remaining percentage of the SPJ Limited Partnerships. The BS election disregarded certain partner and increase the interest of the partners they allowed the vote. The fact that the election of Ms. Smith violates the Partnership Agreement means that all her actions as managing general partner, including hiring BS and GR, are invalid.
3. Notwithstanding the foregoing as to entitlement, fees billed by BS and GR are unreasonable and therefore it is inappropriate to approve the Conservator's Fee Report.

MEMORANDUM OF LAW

1. There is not a single reference in the Conservator's Fee Report to the Partnership Agreement, statute, common law, or other authority that could conceivably provide a basis for BS and GR to charge and/or recover fees from the partnership fund. Absent a contractual or statutory basis, attorneys' fees cannot be awarded. *Cheek v. Bugg*, 639 So.2d 144, 146 (Fla. 5th DCA 1994), see also *Hampton's Estate v. Fairchild Florida Construction Co.,* 341 So.2d 759, 761 (Fla. 1976). Further, the present case contains no facts that would allow for an award of attorneys under *A.J. Richey Corp. v. Garvey*, 132 Fla. 602, 609 (Fla. 1938), because there is no action for dissolution or an accounting. BS is representing Matthew Carone, James Jordan, Elaine Ziffer and Festus and Helen Stacy Foundation hereafter "four partners." in their capacity as individual entities and is not representing the partnership as a whole. It is improper and oppressive to require partners not represented by BS to pay for attorneys' fees incurred by the clients of BS.

2. The election of Ms. Smith as Managing General Partner is invalid and a result of manipulation from BS, GR and four partners. Although this issue has been moot to this Court in matters heard earlier, it is now *highly relevant* to the approval of fees. It should be noted that the Court's Order

Appointing the Conservator, paragraph 6, it specifically provides that any party may raise the validity of the election of Ms. Margaret J. Smith or anyone Ms. Smith allegedly retained on behalf of the partnerships in connection with any application for compensation. (See attached letter from partners Exhibit A objecting to fees). BS supervised an improper partnership meeting to remove the managing general partner from S&P and P&S. BS did not give notice to all partners when it called a special partnership meeting on August 17, 2012. Because the votes of all partners were never counted and the votes of the limited partnership were incorrectly counted in favor of Ms. Smith in determining the required 51% of the required interest, the election of Ms. Smith was invalid and she was never duly elected. The percentage interest for the limited partnership SPJ Investments is 28.43%. BS's calculation of 70.83% in favor of Ms. Smith's election must be reduced by 28.43% to 42.40%. This percentage (42.40%) is woefully short of the 51% required under the partnership agreements. The tally of votes is attached hereto as Exhibit B. BS, with full knowledge of the interpleader action, took matters into their own hands and disenfranchised certain partners without their knowledge. Also, BS counted votes of limited partners that did not have voting rights under the Partnership Agreement. Because Ms. Smith was not the properly elected

Managing General Partner of the Partnerships, she was not authorized to retain BS or GR. Therefore, none of the fees charged by BS and GR are valid and chargeable to the partnership. Attached hereto as Exhibit C are the bills of BS. BS charges in excess of fifty hours after the August 17, 2012 meeting researching the propriety of Ms. Smith's vote. Approval of the Conservator's Fee Report would result in an overcharge to the partnerships in the amount of $216,997.66. BS should be estopped from benefiting by manipulating the vote in a manner that is clearly inconsistent with the Partnership Agreement. The conservator has also erred in reporting his savings to the partnership. The correct savings is $10,806.76, rather than the $75, 546.84 shown in the fee report.

3. The fees billed by BS and GR are unreasonable. For approximately four years, Rice, Pugatch, Robinson & Schiller, P.A. and Helen Chaitman (an attorney nationally recognized as protecting the victims of Madoff) acted as attorneys for the partnerships. In only four months, BS and GR have inappropriately billed the partnership a similar amount. One partner, Burt Moss, submitted a memorandum to this Court contains that further evidence of BS's inappropriate billing. Mr. Moss correctly points out that three to five attorneys from BS appear at every meeting/hearing related to this Partnership. It is difficult to imagine that

it is reasonable to have multiple attorneys attend simple hearings and meetings where only one is necessary. In addition, many of the matters for which BS billed were already addressed by other attorneys that represented the Partnerships. When reviewing fee and cost claims, the conservator must carefully review all entries included because there are many items claimed that are not compensable. For example, attorney travel and secretarial tasks are not recoverable regardless of the reason it was incurred. *Mandel v. Decorator's Mart, Inc.*, 965 So.2d 311, 315 (Fla. 4th DCA 2007). Further, BS and GR are attempting to recover costs that are not taxable. The following items are not taxable and cannot be considered by the court: postage, delivery services, travel expenses, telephone charges, undifferentiated copies, facsimile charges, fees for depositions and witnesses not utilized at trial or unrelated to benefits obtained and legal research. *Robbins v. McGrath,* 955 So.2d 633, 635 (Fla. 1st DCA 2007.) BS bill claims at least $25,000.00 in such costs. GR billed hundreds of hours for accounting services but never produced a written report or Review regarding the Partnership account. It is inconceivable that GR should present a bill attached hereto as Exhibit D to the conservator in excess of five hundred hours on behalf of the

partnership and not present schedules, reports or reviews to the partnership.

Notwithstanding the foregoing, Article 14.08 of the Partnership Agreement requires arbitration to resolve disputes or claims. The claims against Mike Sullivan are a clearly a dispute and/or claim and it was a violation of Article 14.08 for BS to commence litigation in the 17th Judicial Circuit. The animating purpose of arbitration agreements is to reduce the costs associated with litigation. By ignoring the clear mandate contained in Article 14.08, BS has managed to bill exorbitant fees that could have been avoided by adhering to the clear language of the Partnership Agreement. BS should not be rewarded for needlessly billing the partnership for fees that could have been avoided by honoring the arbitration clause.

Further, the Conservator is requesting this Court to approve BS litigating claw-back proceedings on a contingency fee basis. However, some of the BS billing, submitted to the Conservator for approval already includes preparation and research related to the contingency suits in questions. (Exhibit C – BS bill) It is very unusual to for a law firm to bill hourly in addition to collecting a contingency fee. This is evidence that BS is attempting to obtain a double-recovery.

The letters attached hereto as Exhibit A demonstrate the frustration of the Partners who have been victimized by Madoff and are now being victimized again by unreasonable and unnecessary fees. If approved, the fee report would unjustly deplete the partnership funds from being used to compensate the Madoff victims.

RELIEF REQUESTED

I respectfully request that this Court deny the Conservator's approved fees for BS and GR.

April 26, 2013

Respectfully Submitted

Steven Jacob
Partner of S &P

Copies Furnished To:

Leonard K. Samuels, Esq., lsamuels@bergersingerman.com
William G. Salim, Jr., Esq., wsalim@mmsslaw.com; cleibovitz@mmsslaw.com
Gary C. Rosen, Esq., grosen@becker-poliakoff.com
Domenica L. Frasca, Esq., dfrasca@mayersohnlaw.com
Brett D. Lieberman, Esq., blieberman@messana-law.com
Burt Moss, burtmoss@broadsmart.net
Frank Walker, Esq., fwalker@fcwalker.net
Helen Chaitman, Esq., HChaitman@becker-poliakoff.com
Thomas Messana, Esq., tmessana@messana-law.com