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

CASE NO.: 12-034121 (04)

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

Plaintiffs,

v.

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

Defendants.
_____/

PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, P&S Associates, General Partnership ("P&S" or the "Partnership"), S&P Associates, General Partnership ("S&P") (collectively with P&S, the "Partnerships") and Philip Von Kahle as Conservator on behalf of P&S and S&P ("Conservator" or with the Partnerships, as the "Plaintiffs"), by and through their undersigned attorneys, hereby this supplemental brief in opposition to Defendants' Motion for Summary Judgment.

SUMMARY OF BRIEF AND ARGUMENT

This supplemental brief addresses two issues raised by the Court at oral argument that were not raised by any defendant in their motions for summary judgment.

On May 2, 2014, the Court conducted a hearing on seven motions for summary judgment that were filed by various defendants (collectively, "Defendants") in relation to the above captioned case (the "Motions"). Among other issues, all of the Motions sought dismissal of the instant action on the basis of the statute of limitations with respect to Count VI (Plaintiffs'

fraudulent transfer claim) because Defendants claimed that the fraudulent nature of the transfers at issue should have been reasonably been discovered in 2009 when Chad Pugatch, Esq. discussed the discovery of the Bernard L. Madoff Investment Securities, LLC ("BLMIS") fraud with Partners of P&S and S&P. As Defendants argued that the assertion of Plaintiffs' fraudulent transfer claims was untimely as of 2009, none of the Defendants briefed the issue of the relevant look back period as it relates to Plaintiffs fraudulent transfer claims — or put another way, how far back in time Plaintiffs could seek to recover a fraudulent transfer. Plaintiffs, as the non-moving parties, consequently did not brief that issue either.

Although the issue was not raised in any of the pleadings, the Court expressed concern during oral argument on the Motions that the look back period was too expansive as it relates to Plaintiffs' fraudulent transfer claim. The Court stated that the fraudulent transfer claim may not permit Plaintiffs to recover any funds that were transferred to Defendants prior to 2007, or five years prior to the filing of the complaint, because the statute of limitations for a breach of contract claim is five (5) years under Florida law. The Court also stated that it would not permit Plaintiffs to recover any funds earlier than 2007 because there was no evidence that Defendants knew or should have known of the improper nature of the transfers received.

As such a ruling would prevent Plaintiffs' from obtaining a meaningful recovery for investors in the Partnerships, and Plaintiffs were not provided with an opportunity to brief the issues raised by this Court, they respectfully request that the Court consider this supplemental brief and the authorities attached hereto.

THE APPROPRIATE LOOK-BACK PERIOD EXTENDS BEYOND FIVE YEARS

Plaintiffs have asserted a claim under Fla. Stat. § 726.105(a)(1), which provides in relevant part that "a transfer made . . . by a debtor is fraudulent if *the debtor made the transfer* . .

. with the actual intent to hinder delay or defraud any creditor of the *debtor*." (Emphasis added.) The applicable statute of limitations for a claim brought under that statute is the later of 4 years after the transfer was made, "or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant." *See* Fla. Stat. Ann. § 726.110(1). Thus, the statute of limitations begins to run, regardless of the date of a particular transfer, once the fraudulent nature of a transfer could reasonably been discovered.[1] *See Wiand v. Morgan*, 919 F. Supp. 2d. 1342, 1346, 1370 (M.D. Fla. 2013) (holding that fraudulent transfer claims seeking recovery of transfers that took place between 2003 through 2009 were not time barred because complaint was properly filed within one year of appointment of the receiver on August 9, 2010.)

While the statute of limitations for a fraudulent transfer claim may seem at first glance to be analogous to that of a breach of contract or other claim, in cases such as this one, where the transfers are made as part of a concealed transaction with an intent by the transferor (Sullivan) to defraud creditors (such as the Partnerships and its Partners), a longer, delayed discovery statute of limitations is applied to fraudulent transfer claims because such transfers cannot be discovered shortly after they are made — and, Defendants have not argued otherwise. *See Wiand v. Morgan*, 919 F. Supp. 2d at 1370 (finding fraudulent transfers claims timely filed because "[w]hile Nadel controlled Traders and the hedge funds, the scheme and fraudulent transfers were concealed and could not reasonably have been discovered as a matter of law").

[1] While it is Plaintiffs' position that there is an issue of fact as to whether the fraudulent nature of the transfers at issue could have reasonably been discovered that issue has fully been briefed, by the parties and is therefore not addressed in this supplemental brief.

Courts have held that the relevant look back period in the context of a fraudulent transfer may extend beyond the relevant statute of limitations for related claims. In *DESAK v. Vanlandingham*, 98 So. 3d 710, 713 (Fla. 1st DCA 2012) the court found that a fraudulent transfer claim was not time barred with respect to a transfer that occurred more than 7 years prior to the filing of a complaint because the complaint was filed within one year after the transfer was reasonably discovered by the plaintiff. While the Court appeared to reject the holding of *DESAK* during oral argument on the Motions because the *DESAK* case involved the murder of an individual and subsequent conveyance of property from Lawrence Taylor to Vanlandingham Farms, Inc., the opinion did not state that Vanlandingham Farms, Inc. acted improperly.

Moreover, to the extent that any outer limit may be placed on the look back period, any such limit should be based on the Florida Statute of Repose. *See* Fla. Stat. § 95.031(2)(a); *In re Valente*, 360 F. 3d 256, 266 (1st Cir. 2004) (citing cases) (holding that state law concerning claims based in fraud apply to fraudulent transfer claims).[2] Florida's Statute of Repose states that "an action founded upon fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." *See* Fla. Stat. § 95.031(2)(a). Thus, even though the Fla. Stat. 726.110 specifically provides that an action under the Florida Uniform Fraudulent Transfer Act – such as this one – may be brought within one year from the discovery of the fraudulent nature of a transfer (without any outer boundary), the Florida Statute of Repose would set the maximum look back of 12 years from the date that the transfer was discovered to the extent that such a limit is necessary. Fla. Stat. § 95.031(2)(a). While Plaintiffs do not necessarily agree that the Florida

[2] *See also*, *Picard v. Madoff*, 2011 WL 4434632, at *8 (S.D. N.Y. Sept. 22, 2011).(Holding that the relevant look back period was defined by N.Y.C.P.L.C. § 213(8) which governs actions in fraud.); *see Picard v. Katz*, 2011 WL 4448638, at * 2 (S.D. N.Y. Sept. 27, 2011) (citing N.Y.C.P.L.C. § 213(8)).

Statute of Repose applies to fraudulent transfer claims, limiting the look back period of a fraudulent transfer claim under Fla. Stat. 110(1) to five years would effectively nullify the one year discovery rule promulgated under the 726.110 and such a result cannot be permitted under Florida law. *See Dep't of Children Family Servs. v. Leons*, 948 So. 2d 988, 992 (Fla. 4th DCA 2007) (courts "are required to read statutes *in pari material* to give meaning to all provisions") (quoting *Young v. Progressive Se. Ins. Co.*, 753 So. 2d 80, 84 (Fla. 2000)).

Finally, a look back period beyond five years is consistent with Florida jurisprudence, where Courts have avoided fraudulent transfers that have occurred more than 5 years prior to the assertion of a claim. *See Wiand v. Morgan*, 919 F. Supp. 2d. at 1346; *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299 (M.D. Fla. 2009) (avoiding fraudulent transfers that occurred in 2003, when fraudulent conveyance was discovered by receiver appointed in 2010); *Tabas v. GIGI Advertising Partnership*, 188 B.R. 309, 312 (Bankr. S.D. Fla. 1995) ("Given that the alleged fraudulent transfers occurred in 1987, 1988, and 1989, the latest an action could be brought under Florida law was 1993 *or* one year after the transfer could have been discovered.").[3]

THE "REASONABLY EQUIVALENT VALUE AFFIRMATIVE DEFENSE" HAS NOT BEEN ESTABLISHED

In determining that Plaintiffs may only be permitted to recover transfers made within 5 years of the filing of the Complaint, the Court seems to have implicitly determined that because Plaintiffs allegedly conceded that Defendants did not know of the fraudulent nature of the transfers at issue, Plaintiffs could not assert a fraudulent transfer claim premised on an actual intent to defraud creditors.[4] However, in the context of a fraudulent transfer claim, "the

[3] While in Bankruptcy Court the applicable statute of limitations is tolled upon the filing of a bankruptcy petition, the bankruptcy petition at issue was filed on January 3, 1994. *Id.*

[4] Moreover, Plaintiffs have presented evidence which demonstrates — and Defendants have not disputed the fact — that the transfers at issue were made with the actual intent to hinder delay or defraud creditors of the Partnerships.

transferees lack of actual knowledge of the debtor's fraudulent intent . . . is not dispositive." *Waind v. Waxenberg*, 611 F. Supp. 2d at 1319-20. Instead, the Defendant's intent coupled with its provision of reasonably equivalent value are both necessary to establish an affirmative defense. *See Picard v. Merkin*, 2011 WL 3897970, at *7-8 (S.D.N.Y. Aug. 31, 2011) ("No allegations of fraudulent intent on the part of the transferee-Funds needed to be pleaded for these claims."). So this Court may ignore the Defendants' intent at this juncture and order the return of funds because no consideration was provided for the net winning that Defendants received. *Schneider v. Barnard*, 13-CV-4901 JFB, 2014 WL 1320007, at *14 (E.D.N.Y. 2014) ("Without even reaching the issue of Schneider's good faith, the Bankruptcy Court [correctly] concluded that the good faith defense was not available to Schneider because debtors received nothing of value in exchange for the Rent Transfers and 2009 Transfers.").

Under Florida law, "[w]hen a purchase of goods is made in **[both]** good faith *and for valuable consideration* from the owner who is subject to a creditor's claim, no fraud is imputed to the purchaser." *Orlando Light Bulb Servs. v. Laser Lighting and Elec. Supply, Inc.*, 523 So. 2d 740, 744 (Fla. 5th DCA 1988) (emphasis added). Accordingly, a defendant in a fraudulent transfer action is entitled to an affirmative defense under Fla. Stat. § 726.109, if it can show that it provided reasonably equivalent value, so long as it did not know of the avoidability of the transfer. *Id.*; Fla. Stat. § 726.109(1) ("A transfer or obligation is not voidable under 726.105(1)(a) against a person who took in good faith *and* for a reasonably equivalent value.") (emphasis added); *see also Picard v. Merkin*, 2011 WL 3897970, at * 8; *Waind v. Waxenberg*, 611 F. Supp. 2d at 1319-20.

See Mukamal Aff. at ¶¶ 3-5 (establishing that from 2002 and on, Sullivan made transfers to partners from capital contributions from other partners to conceal cash deficiencies.)[4]

In the context of schemes like the one at issue here, defendants without knowledge of the fraudulent nature of such transfers are often required to return amounts received to the extent that they did not provide value. *See Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011); *see Sender v. Buchanan (In re Hedged–Inv. Assoc., Inc.),* 84 F.3d 1286, 1290 (10th Cir.1996) (holding payments in excess of original investment do not provide any value, and avoiding transfer even though transferee had no knowledge of underlying misconduct); *Scholes v. Lehmann,* 56 F.3d 750, 757 (7th Cir.1995) ("The paying out of profits to [the defendant] not offset by further investments by him conferred no benefit on the corporations...."); *In re ATM Fin. Services, LLC*, 6:08-BK-969-KSJ, 2011 WL 2580763, at *7 (Bankr. M.D. Fla. 2011) (denying motion for summary judgment where transferee received a transfer without knowledge of wrongdoing, but issues of fact remained as to whether it provided value.).

Thus, where parties receive more than their investment and there are false profits, those parties are only required to return the amounts in excess of their investment because they did not provide value for those amounts. *Terry v. June*, 432 F. Supp. 2d 635, 643 (W.D. Vir. 2006). Plaintiffs are not seeking the return of Defendants' investment but are only seeking the return of amounts received in excess of those investments.

Here, no Defendant has alleged that it provided the requisite reasonable consideration to avoid liability for a fraudulent transfer, and it is unlikely that Defendants will be able to demonstrate that they have provided value for the "net winnings," they received. *See Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011) ("any transfers over and above the amount of principal — i.e. fictitious profits— are not made for 'value[.]'"). Accordingly, Plaintiffs should be permitted to proceed with their fraudulent transfer claims.

CONCLUSION

Even if Plaintiffs prevail on their claims, Defendants will still be in a better position than the majority of investors in the Partnerships who have lost their entire investment. Although Plaintiffs do not bear the burden of proof as it relates to Defendants' motions for summary judgment, the Court was rightfully concerned with the issues that were not addressed in the motions for summary judgment. In the hopes of obtaining the equitable result of recovering funds for general partners in the Partnerships, Plaintiffs respectfully request that the Court consider this supplemental brief.

Dated: May 6, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail upon counsel identified below registered to receive electronic notifications and regular U.S. mail upon *Pro Se* parties this 6th day of May, 2014, upon the following:

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