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

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

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,

Plaintiffs,

v.

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

Defendants.
_____________________________________/

DEFENDANT, CONGREGATION OF THE HOLY GHOST - WESTERN PROVINCE'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF

The Congregation of the Holy Ghost - Western Province (the "Congregation"), by and through undersigned counsel, hereby files its Response to the Supplemental Brief in Opposition to Motions for Summary Judgment filed by the Plaintiffs, and in support thereof, states as follows:

ARGUMENT

On May 6, 2014, after this Court heard arguments on the Defendants' summary judgment motions, the Plaintiffs submitted a Supplemental Brief. The Supplemental Brief purports to argue two issues that the Court inquired about during the May 2, 2014 hearing. Specifically, the Plaintiffs argue that the appropriate look-back period for fraudulent transfer claims extends beyond five years and that the "reasonably equivalent value affirmative defense" has not been established. The hearing on Defendants' summary judgment motions was held on May 2, 2014.

As the Congregation argued in its summary judgment motion, the Plaintiffs' fraudulent transfer claims are barred by the applicable statute of limitations. While the Plaintiffs have asserted that none of the Defendants briefed the issue of how far back in time Plaintiffs could seek to recover a fraudulent transfer, that look back period is of no consequence to the facts of this case as they relate to the statute of limitations and the one year savings clause contained in Fla. Stat. § 726.110(1). Both of these issues have been fully briefed. In fact, much of the Plaintiffs' Supplemental Brief continue to address the statute of limitations issue rather than the look back period for fraudulent transfer claims. Regardless of how far back in time the Plaintiffs may seek to recover a fraudulent transfer, the fact remains that the Plaintiffs failed to bring a claim within the applicable limitations period. The issues addressed in the Plaintiffs' Supplemental Brief are not necessarily of consequence in ruling on the Defendants' summary judgment motions.

A. Look-Back Period for Fraudulent Transfer Claims

Regardless of whether the look back period for fraudulent transfer claims is distinct from the statute of limitations contained in Fla. Stat. § 726.110(1), and thus extends beyond five years, the Plaintiffs have still failed to file a timely cause of action that is not barred by the statute of limitations. The Plaintiffs also continue to misconstrue the law with respect to when the one year savings clause contained within Fla. Stat. § 726.110(1) begins to run. The Plaintiffs argue that "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." Plaintiffs' Supplemental Brief, p. 3. As has been fully briefed by the Congregation, however, it is clear that the one year savings clause commences upon discovery of the actual transfers, not of the discovery of the fraudulent nature of the transfers. *See Western Hay. Co. v. Lauren Financial Investments, Ltd.*, 77 So. 3d 921 (Fla. 3d DCA 2012). Thus, because the Plaintiffs' fraudulent transfer claim is time barred, the look back period discussed in the Supplemental Brief is not a dispositive issue that will substantively impact the Defendants' motions for summary judgment. The Plaintiffs are simply attempting to devise a new argument for why the statute of limitations for fraudulent transfers does not apply.

Nonetheless, the Plaintiffs' arguments that the fraudulent transfer claims are not time barred are based on case law interpreting facts that are not present here. First, the Plaintiffs cite *Wiand v. Morgan*, 919 F. Supp. 2d 1342 (M.D. Fla. 20103), for the proposition that the fraudulent transfer claims are not barred by the statute of limitations because the complaint was filed within one year of appointment of the conservator. This opinion is not directly on point with the facts of this case as it deals only with the facts surrounding that ponzi scheme. The partnership distributions at issue here can be distinguished in a number of ways. First, the ponzi scheme operated in that case was a hedge fund, not a partnership. Thus, unlike the case at issue where the partners invested in a Partnership governed by a Partnership Agreement that in turn invested in a ponzi scheme, the investors in the *Wiand* case gave their money directly to the ponzi scheme. Further, the partners in this case had the right to inspect the books and records of the Partnership pursuant to the Partnership Agreement. In the *Wiand* case, the investors had no contractual right or opportunity to discover the transfers. In the case at hand, the Partnership Agreement permitted the partners to inspect the books and records, which would have revealed the transfers. Thus, the case cited by the Plaintiffs in arguing that the fraudulent transfers are not time-barred is distinguishable from the facts at issue and not applicable.

The Plaintiffs again cite the *Wiand* case in arguing that a longer, delayed discovery statute of limitations is applied to fraudulent transfer claims where the transfers are made as part of a concealed transaction with an intent by the transferor to defraud creditors. Again, the facts at issue in the *Wiand* case are not directly analogous and thus not applicable. The *Wiand* court found that the fraudulent transfer claims were timely 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." *Wiand v. Morgan*, 919 F. Supp. 2d at 1370. In the Partnership context, however, the partners effectively controlled the Partnership. Even though Sullivan served as the Managing General Partner, the other partners still possessed the right under the Partnership Agreement to inspect the books and records and to receive information regarding the Partnership's investments. Further, the Madoff fraud became public in 2008 and the partners were directly informed of the presence of net winners and net losers in January 2009. After the partners could have reasonably discovered the transfers in 2009, the argument that the transfers were concealed became moot and the statute of limitations began to run. In the *Wiand* case, because the investors invested directly in a scheme as opposed to a partnership, they were never informed of the transfers to other investors.[1] The only person with access to the records of the transfers was the person perpetrating the fraud. In contrast, the Partnership Agreement granted each partner the right to inspect the books and records.

[1]The *Wiand* court also noted that the Ponzi scheme, in which the defendant, *Morgan*, invested ceased doing business in January 2009. (*Morgan* at p. 1348) and the case itself bears a 2010 docket number. So it appears that the one year savings clause likely was not an issue in that case, unlike the instant matter.

The Plaintiffs also argue that where the transfers are made as part of a concealed transaction, a delayed discovery statute of limitations is applied. However, what the Plaintiffs fail to understand is that the one year savings clause contained in Fla. Stat. § 726.110(1) provides that delayed discovery statute of limitations. Since the transfers occurred outside of the four year statute of limitations period, the delayed discovery provision in the form of the one year savings clause became applicable. The investors in the Nadel hedge fund did not have the same contractual rights as the present and former partners to the Partnership. The partners were not at the complete mercy of Sullivan in the same manner that the investors were at the mercy of Nadel in the context of the hedge fund ponzi scheme. Those were just schemes, not partnerships that had invested in schemes. Thus, as was previously argued, the partners were on notice of the transfers at the Partnership meeting (to which the Congregation was not invited) held in January 2009. The applicable one year delayed discovery statute of limitations began to run on that date, regardless of when the distributions were received.

Moreover, the precise question addressed in the *Wiand* case was whether Nadel operated the hedge funds as a ponzi scheme when he made the distributions to the defendant. There was little analysis in the opinion as to whether the plaintiff's fraudulent transfer claims were time barred by the statute of limitations period contained in Fla. Stat. § 726.110(1). The *Wiand* opinion focuses on the discovery rule whereby the statute of limitations does not begin to run until the plaintiff has been put on notice of his right to a cause of action. *See Wiand v. Morgan,* 919 F. Supp. 2d at 1370. Here, Fla. Stat. § 726.110(1) provides for a statutory discovery rule in the form of the one year savings clause. The *Wiand* court focused on the appointment of the receiver as being the earliest that the plaintiff could have discovered the transfer. In this case, however, the undeniable facts are that the partners could have reasonably discovered the transfers following the 2009 partnership meeting. As has been previously briefed by the Congregation, the knowledge of the partners is imputed to the partnership. Further, the purpose of the discovery rule invoked by the *Wiand* court, and of the savings clause contained in Fla. Stat. § 726.110(1), is not necessarily to provide a one year savings clause from the moment a receiver is appointed. Rather, the purpose is to provide a one year savings clause from the moment the facts giving rise to a cause of action should reasonably have been discovered. It just so happens that in the *Wiand* case, those facts giving rise to a cause of action could not reasonably have been discovered until the receiver was appointed. This is true because, until that time, the ponzi scheme operator still controlled the hedge fund. As the Congregation's motion for summary judgment makes clear, the Partnership should have discovered the transfers in January 2009, well before the conservator was appointed.

While the Plaintiffs cite *Wiand v. Morgan*, there are related cases that were not treated in a similar manner. Another case in which Wiand served as the receiver in a clawback action did not find the plaintiff's fraudulent transfer claims to be timely. *See Wiand v. Catholic Charities, Diocese of Venice, Inc.*, Case No. 8:10-CV-247-T-17MAP (M.D. Fla. 2011) (granting defendant's motion to dismiss with respect to the plaintiff's constructive fraudulent transfer claim as being time barred). In that case, the plaintiffs proceeded under a constructive fraud claim pursuant to Fla. Stat. §§ 726.105(1(b) and 726.106(1). The constructive fraud claim, which does not require actual intent to defraud creditors, simply provides for a four year statute of limitations period, with no savings clause or delayed discovery provision. As such, the court held that the fraudulent transfer claims were not timely filed.

The Plaintiffs continue to argue that 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 doing so, the Plaintiffs cite to a case that 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. *See DESAK v. Vanlandingham*, 98 So. 3d 710, 713 (Fla. 1st DCA 2012). First of all, the *DESAK* case did not address the relevant look back period for fraudulent transfer claims. Rather, the court analyzed the statute of limitations period for fraudulent transfer claims, which has already been briefed and argued. Thus, there is no value in citing *DESAK* as support for the Plaintiffs' contention that the look back period extends beyond 5 years. Further, the look back period in the context of fraudulent transfer claims cannot extend the statute of limitations for fraudulent transfers. Thus, the Plaintiffs' statement that the relevant look back period may extend beyond the relevant statute of limitations for related claims is meaningless.

The substantive look back period for avoidance actions is not necessarily the same as the statute of limitations period within which a plaintiff must bring a claim after a cause of action accrues. Thus, the substantive look back period has no impact on the procedural effect of a statute of limitations. The question raised in the Supplemental Brief is whether the look back period for fraudulent transfer claims pursuant to Fla. Stat. § 726.105(1)(a) extends beyond the four year limitations period. The Plaintiffs have not provided a single controlling case for why the look back period for fraudulent transfer claims should be extended beyond the statute of limitations period for those same transfers. Instead, the Plaintiffs have provided cases interpreting the statute of limitations for fraudulent transfer claims and have attempted to frame those as cases supporting an extended look back period. Regardless, even if there were no outer limit on the look back period, as the Plaintiffs argue, it would not change the fact that the Plaintiffs failed to bring a fraudulent transfer claim with respect to the Congregation within the applicable statute of limitations period. If, as the Congregation thoroughly briefed in its motion for summary judgment, the Plaintiffs have not filed a timely claim then the question of how far back the Plaintiffs could seek to recover a fraudulent transfer is moot. Nothing in the Supplemental Brief alters the fact that the Plaintiffs failed to bring a timely fraudulent transfer claim pursuant to Fla. Stat. § 726.110(1).

Further, the pertinent question in the *DESAK* case, which is inapplicable to the facts at issue, was whether the recording of a deed was sufficient to put the plaintiff on notice of the transfer. Although the *DESAK* case does involve the issue of when the plaintiff should have reasonably discovered the conveyance of property, that is where the similarities end. Clearly, the recording of a deed for purposes of reasonably discovering the accrual of a cause of action is distinguishable from the issue of whether a meeting in which the partners were directly informed of the presence of net winners and net losers is sufficient notice of the accrual of a cause of action. The Court in *DESAK* reasoned that the plaintiff had no reason to examine the records to determine whether a conveyance had occurred because the recording of a deed is intended to put potential purchasers on notice. Filing deeds to real property puts third persons who have reason to examine the records, such as subsequent purchasers or would-be lienors, on constructive notice that the conveyance has occurred. *Id.* "Indeed, 'the purpose of recording a deed is to give notice to third parties, rather than validate an otherwise properly executed instrument between the parties.'" *Id.* (citing *Townsend v. Morton*, 36 So. 3d 865, 869 (Fla. 5th DCA 2010). The plaintiff in that case was not a potential purchaser of the property, but was the estate of the victim that was attempting to obtain relief from the defendant for a fraudulent transfer. In that context, the court reasoned that the mere recording of a deed is insufficient to alert a reasonably diligent person of a possible fraudulent transfer. *Id.* at 714. The court narrowly held that the act of recording a deed does not, as a matter of law, start the "savings clause year." *Id.* In contrast, the partners were informed during a partnership meeting, by a lawyer for the Partnership, that some of the partners were net winners while some were net losers. Thus, the partners were put on notice to inquire into the status of the Partnerships. Equipped with that notice, the partners could have reasonably discovered the alleged transfers. At that time, the one year savings clause of the statute of limitations began to run. The Plaintiffs' fraudulent transfer claim was thus untimely since it failed to bring suit within one year after the transfer was reasonably discovered.

The Plaintiffs argue that the outer limit placed on the look back period for fraudulent transfer claims should be based on the Florida statute of repose. As support, the Plaintiffs cite to Fla. Stat. § 95.031(2)(a) and *In re Valente*, 360 F. 3d 256 (1st Cir. 2004). First, *In re Valente* was analyzed in the context of a bankruptcy proceeding. Second, *In re Valente* deals with whether a state fraudulent transfer statute preempted an applicable common law cause of action. In that case, the creditor was not seeking to recover property fraudulently transferred in violation of the Uniform Fraudulent Transfer Act ("UFTA"). Instead, it was seeking to enforce a lien on the equitable interest that arose in the debtor when he conveyed title to the property to his son for no consideration. *Id.* The court ruled that the UFTA does not preempt common law causes of action and that the debtor in fact did retain an equitable interest in the transferred property that could be attached under the resulting trust doctrine. *Id.* That issue is not germane to the Defendants' motions for summary judgment. The Defendants have not argued that the Plaintiffs' common law causes of action are preempted by the Florida Uniform Fraudulent Transfer Act. Nor are the Plaintiffs seeking to enforce a lien on any equitable interest retained by the Congregation. The Supplemental Brief deals only with the Plaintiffs' fraudulent transfer claims, not with the applicability of any common law causes of action. Moreover, the court held that the UFTA did not govern the creditor's claims. Thus, *In re Valente* is not applicable to the issues contained in the motions for summary judgment.

Additionally, the Plaintiffs are seemingly attempting to argue that the 12 year statute of repose for the common law action in fraud also applies to fraudulent transfer claims, preempting the 4 and 1 year periods in the FUFTA. The Plaintiffs argue that any outer limit placed on the look back period for fraudulent transfer claims should be based on the statute of repose. This argument is misguided. The statute of repose does not apply because the Plaintiffs are not attempting to establish something akin to the resulting trust doctrine that the creditor in *In re Valente* was attempting to establish. Rather, the statute of repose is a strict cutoff of a right of action after a specified period of time. Further, the statute of repose is not a look back statute. Similar to the statute of limitations, the statute of repose serves to extinguish certain rights of action. Unlike the statute of limitations, however, the statute of repose bars a right of action even before any cause of action accrues. "Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work." *Bauld v. J.A. Jones Construction Co.*, 357 So. 2d 401, 402 (Fla. 1978). "They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right." *Id.*

"A statute of limitation begins to run upon the accrual of a cause of action except where there are provisions which defer the running of the statute in cases of fraud or where the cause of action cannot be reasonably discovered." *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992). A statute of repose generally begins to run at an earlier date and is unaffected by any discovery accrual rule. *Id.* Statutes of repose may begin to run from the time of the defendant's act or neglect and, by their nature, may impose on some plaintiff's the hardship of having a claim extinguished before it is discovered or even before it exists. *Id.* Where applicable, a statute of repose and a statute of limitations both serve as obstacles to a cause of action. In many instances, a statute of repose and statute of limitations are contained within the same statute. *See* Fla. Stat. § 95.031(2)(a). That the Plaintiffs are attempting to interpret the look back period for fraudulent transfer claims by citing to the statute of repose is not persuasive. Thus, the statute of repose cited by the Plaintiffs has no bearing on whether the look back period for fraudulent transfer claims pursuant to Fla. Stat. § 726.105(1) should be extended beyond five years.

The Plaintiffs continue to argue that a look back period beyond five years is consistent with Florida jurisprudence. However, the cases cited by the Plaintiffs again address the statute of limitations with respect to fraudulent transfer claims, not the look back period. In *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299 (M.D. Fla. 2009), the Middle District of Florida court did not avoid the transfers as fraudulent, as the Plaintiffs contend. Rather, the Court denied the Receiver's motion for summary judgment and remanded the case for trial. Further, the case did not even deal with the issue of a look back period or the statute of limitations for fraudulent transfer claims. Thus, the Plaintiffs' inclusion of this case in the discussion of a look back period for fraudulent transfer claims is not determinative.

B. "Reasonably Equivalent Value" Defense

The question of whether the Congregation received the transfers in good faith and for a reasonably equivalent value so as to establish an affirmative defense that the transfer is not voidable is an issue separate and distinct from whether the Plaintiffs commenced a lawsuit within the applicable statute of limitations period. Thus, whether or not the Congregation provided reasonably equivalent value is not determinative of the Congregation's motion for summary judgment. Nevertheless, there are two instances under the Florida Uniform Fraudulent Transfer Act in which reasonably equivalent value can be applied.

The first is pursuant to a theory of constructive fraud pursuant to Fla. Stat. §§ 726.105(1)(b) and 726.106. Unlike the theory of actual fraud alleged by the Plaintiffs pursuant to Fla. Stat. § 726.105(1)(a), constructive fraud does not require that actual fraudulent intent be proven. Rather, the creditor must show, among other elements, that the transfer was made without receiving reasonably equivalent value in exchange for the transfer. *See* Fla. Stat. §§ 726.105(1)(b) and 726.106. "To establish *constructive* fraud, the plaintiff must show that the debtor did not receive reasonably equivalent value in exchange for the transfer. *Myers v. Brook*, 708 So. 2d 607, 610 (Fla. 2d DCA 1998) (emphasis added). The Plaintiffs' fraudulent transfer claim has alleged actual fraud pursuant to Fla. Stat. § 726.105(1)(a), not constructive fraud. Thus, the reasonably equivalent value is not a necessary element of Plaintiffs' fraudulent transfer claim.

The second scenario in which the reasonably equivalent value can be applied is in establishing a defendant's affirmative defense to receiving a transfer. "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." Fla. Stat. § 726.109(1). The defense of reasonably equivalent value is not necessarily determinative of the Congregation's motion for summary judgment on statute of limitations grounds. The Plaintiffs' argument, then, that this Court should "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" is not applicable to the fraudulent transfer claim provided for in Fla. Stat. § 726.105(1)(a). As the Plaintiffs' Supplemental Brief makes clear, the reasonably equivalent value at issue here is an affirmative defense that has no direct impact on the motions for summary judgment. Thus, for the Plaintiffs to argue that the funds should be returned due to a lack of consideration or reasonably equivalent value is misguided. The only effect of not finding a reasonably equivalent value in this situation would be to disallow the Defendants' affirmative defense that the transfers are not voidable. The absence of a reasonably equivalent value here would not entitle the Plaintiffs to an order at this stage of the proceeding that the funds be returned because the reasonably equivalent value analysis is for purposes of establishing one of the Defendants' defenses. Whether or not the transfers are voidable as an affirmative defense is not an issue that was addressed in the motions for summary judgment, nor is it a necessary element of Plaintiffs' fraudulent transfer claim pursuant to Fla. Stat. § 726.105(1)(a).

I HEREBY CERTIFY that a true copy of the foregoing was served via the e-filing portal on all registered parties May 20, 2014.

/s/ Jonathan T. Lieber

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