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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 RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF

Defendant, ROBERT A. UCHIN REVOCABLE TRUST (the "UCHIN TRUST"), by and through its undersigned counsel, hereby files its Response in Opposition to Plaintiff's Supplemental Brief (the "Brief") and in further Support of its Motion for Summary Judgment on the Third Amended Complaint (the "Motion") and renews the UCHIN TRUST's Motion for Summary Judgment on all claims brought 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:

At the outset, as Plaintiffs have limited their Brief to only additional argument as to Count VI - Fraudulent Transfer, so too has the UCHIN TRUST limited their argument in this Response.

[1] There are no allegations on behalf of S&P against the UCHIN TRUST nor have Plaintiffs made any arguments in the Brief specific to S&P against the UCHIN TRUST.

A. The Appropriate Look-Back Provided by the Statute

While Plaintiffs claim that "none of the Defendants briefed the issue of the relevant look back period," this wholly misses the arguments made by all Defendants that: 1) if the look back begins at the time of the filing of the Complaint, the payments made beyond 4 years (looking back) are barred from attack; and 2) if Plaintiff looks to the 1 year savings clause, Plaintiff would have needed to bring the action within one year of the January 2009 Partnership Meeting, at the latest. This was all fully briefed and argued at the Hearing and without deciding how far back to look (the earliest possible date), Plaintiffs' claims are barred by the statute of limitations.

The crux of Plaintiffs' Brief focuses on *Wiand v. Morgan*, 919 F. Supp. 2d. 1342 (M.D. Fla. 2013). This case is wholly distinguishable from the facts of our case as the court in *Wiand* seemed to be convinced that "[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." *Id.* at 1370. This quote from *Wiand* (quoted by Plaintiffs) is based on the court's citation to *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) ("Now that the corporations created and initially controlled by Douglas are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by Douglas."); *Fla. Dep't of Ins. v. Blackburn* (*In re Blackburn*), 209 B.R. 4, 13 (M.D. Fla. 1997) (while not a Ponzi scheme, holding that neither the insurance company nor the receiver could have discovered the claims until the receiver's appointment because of the officer/director's wrongdoing); and *Wing v. Kendrick*, 2009 U.S. Dist. LEXIS 41923, 2009 WL 1362383, *3 (D. Utah 2009) (discussing a Ponzi scheme run by the principal of various corporations whereby "so long as a corporation remains under the control of wrongdoers, it cannot be expected to take action to

vindicate the harms and injustices perpetrated by the wrongdoers," quoting *Quilling v. Cristell*, 2006 U.S. Dist. LEXIS 8480, 2006 WL 316981, at *6 (W.D.N.C. Feb. 9, 2006)). None of those cases are controlling and all of those cases are distinguishable as they deal with corporations in which the Ponzi schemer was the principal of the corporation. As previously discussed in the UCHIN TRUST's Motion and Reply, the distinction between "corporations" and "general partnerships" is not just the use of different terms, but different "terms of art" and the cases make this clear distinction.

Plaintiffs, in our case, seem to model their entire argument on the *Wiand* set of facts. However, the facts in our case present a Ponzi scheme very different from the one in *Wiand*—a scheme that became known to the world in or about December 2008 with the arrest of Bernard Madoff. There is no dispute in our case that all of the funds in the Partnerships were invested with Madoff (this is also confirmed in Mukamal's Report). Thus, in our case there is no reasonable belief that any due diligence in December 2008 or as late as the January 2009 Partnership Meeting would not have led to the discovery of the fraudulent transfers by Michael Sullivan. We must remember that the language in the statute is "within 1 year after the transfer or obligation was or *could reasonably have been discovered* by the claimant." Fla. Stat. § 726.110(1) (emphasis added). While the scheme in *Wiand* may not have led the "net-losers" to discover the transfer, there is no genuine issue of material fact that the **"**transfer or obligation was or could reasonably have been discovered" at the latest by January 2009 in our case. Thus, making Plaintiffs' claims beyond the statute of limitations.

Plaintiffs again cite to *Desak v. Vanlandingham*, however that case is not helpful to Plaintiffs as the facts are once again entirely distinguishable from the facts in our case. *See Desak*, 98 So. 3d 710 (Fla. 1st DCA 2012). In *Desak*, the court was focused on whether the "mere recording" of a

deed starts the limitations period for a claim under the Uniform Fraudulent Transfer Act and whether that could be ruled as a matter of law at the motion to dismiss stage. *Id.* at 713. The court, in fact, held that as it found "no Florida case holding that merely recording a deed that accomplishes a fraudulent transfer causes the § 726.110 limitations period to begin to run" and thus, "the act of recording a deed does not without more, as a matter of law, start the 'savings clause year'." *Id.*

Similarly to *Wiand*, the facts in *Desak* do not compare or allow for a reasonable analogy to the facts in our case. Our case does not question whether the net-losers had reason to check "UCC statements" or check documents "recorded" with various counties. As discussed above, our case involves investments in the largest Ponzi scheme in the world which became known to the world, and Partners, in or about December 2008 with the arrest of Bernard Madoff or as late as the January 2009 Partnership Meeting. Thus, in our case there is no reasonable belief that any due diligence in December 2008, in response to the news about Madoff's arrest, or as late as the January 2009, at the Partnership Meeting where Partners were informed that the Partnership's investments were wholly involved in the Madoff fraud, would not have led to the discovery of the fraudulent transfers by Michael Sullivan.

In addition, while Plaintiffs have argued for a 12 year look back period as provided in the Florida Statute of Repose, § 95.031(2)(a), Plaintiffs also candidly concede they "do not necessarily agree that the Florida State of Repose applies to fraudulent transfer claims." *See* Brief at pp. 4-5. We agree with Plaintiffs on this point.

Finally, there is no need to determine a finite period of time which creates outer limits to look back or cut off the look back as application of the statutory time period of 4 years from when the transfer was made, or if later, then 1 year after the transfer could reasonably have been discovered provides a bar to Plaintiffs claim for avoidance of fraudulent transfers.

B. Plaintiffs Did Concede Defendants Did Not Intend to Defraud Creditors

The question of whether there was an "actual intent to hinder, delay, or defraud any creditor of the debtor" does not need to be reached once it is determined that Plaintiffs' claims are barred by the applicable statute of limitations. This was also rendered moot and became unnecessary for the Defendants to argue the lack of intent based on arguments made by counsel for the Plaintiffs at the Hearing and based on the briefs filed by the parties. Most importantly, specifically, at the Hearing Plaintiffs responded to the Court's questions by affirmatively stating there was no record evidence that even suggested Defendants knew of the alleged fraudulent nature of the transfers at issue when they occurred (it is not clear what evidence Plaintiffs refer to in footnote 4 of their Brief). There was no "allegedly conceded"—it was conceded by Plaintiffs at the Hearing.

In the case of the UCHIN TRUST, Plaintiffs present no record evidence which supports that "the debtor made the transfer or incurred the obligation: (a) with actual intent to hinder, delay, or defraud any creditor of the debtor." *See* Fla. Stat. § 726.105(1)(a).

After backtracking from the concession, Plaintiffs now argue "the transferees lack of actual knowledge of the debtor's fraudulent intent . . . is not dispositive." *See* Brief, at p. 6 citing *Wiand* [sic], 611 F. Supp. 2d at 1319-20. However, Plaintiffs' use of the ellipsis is misleading as the court actually describes such knowledge as "relevant" and Plaintiffs misquote the case: "the transferee's lack of actual knowledge of the debtor's fraudulent *purpose* is *relevant* to the good faith inquiry, but not dispositive." *Id.* (emphasis added). In that case, the court goes on to describe all of the testimony submitted and record evidence which it held went towards the defendant's "good faith defense."[2]

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[2]In *Wiand*, "the Receiver argues that Mrs. Waxenberg should have been on notice of Mr. Waxenberg's previous discipline from the NASD, which was public record, and the fact that he was not registered with the SEC as an investment advisor. Based on these facts, the Receiver contends that Mrs. Waxenberg should have conducted a further inquiry into Mr. Waxenberg's business, and

The affirmative defense of "good faith" was not argued and is not relevant to the statute of limitations argument which was the only focus of the Hearing on Defendants' Motions for Summary Judgment.

C. "Reasonably Equivalent Value" Was Not Plead

Plaintiffs next argue, for the first time, a response to a "reasonably equivalent value" affirmative defense; yet, this was not an affirmative defense of the UCHIN TRUST as Plaintiffs only plead a cause of action under § 726.105(1)(a) in Count VI which does not call into question whether there was "reasonably equivalent value." Plaintiffs did not plead a cause of action pursuant to § 726.105(1)(b) or (2) which discuss a "reasonably equivalent value." While Plaintiffs aver "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 the availability of the transfer," this is not an affirmative defense claimed by the UCHIN TRUST and thus not at issue.

All other arguments and cases cited in Plaintiffs' Brief in the section discussing "Reasonably Equivalent Value" do not apply to the UCHIN TRUST nor do they provide further argument by Plaintiffs which defeat Defendants' statute of limitations arguments.

D. Conclusion

The UCHIN TRUST met its burden at the Hearing on its Motion for Summary Judgment through its record evidence and Plaintiffs have provided no record evidence that creates a genuine issue of material fact that: 1) the UCHIN TRUST dissociated from the Partnership in November 2007; and 2) Plaintiffs' claims are barred by the applicable statute of limitations.

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her failure to do so eliminates her ability to invoke the good faith defense." *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1320 (M.D. Fla. 2009).

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 May 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 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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