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

CASE NUMBER: 12-034121 CA 07
Complex Litigation Unit

PHILIP J. VON KAHLE, as Conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP, and S&P ASSOCIATES GENERAL PARTNERSHIP, MARGARET J. SMITH, as Managing General Partner of P&S ASSOCIATES, GENERAL PARTNERSHIP, AND S&P ASSOCIATES, GENERAL PARTNERSHIP, Florida General Partnerships,

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST, a Charitable Trust, et al.,

Defendants.
_____/

DEFENDANT, ERSICA P. GIANNA'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF

COMES NOW, Defendant, Ersica P. Gianna ("Gianna"), by and through her undersigned counsel, hereby files her Response To Plaintiffs' Supplemental Brief in opposition to Defendants' Motions For Summary Judgment and, in support thereof, states as follows:

ARGUMENTS

On May 2, 2014, after this Court heard arguments on Co-Defendants' Motions For Summary Judgment, Plaintiffs submitted a Supplemental Brief ("Brief"). The Brief argues two issues which the Court inquired about during the May 2, 2014 Co-Defendants' Motions For Summary Judgment Hearings ("May 2 Hearings"). Specifically, 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. Gianna, in additional to the initial Response, also renews her Motion For Summary Judgment of all claims brought by Plaintiffs against her in their Third Amended Complaint ("TAC").

As Gianna has argued in her own Motion For Summary Judgment, Plaintiffs' fraudulent transfer claims are barred by the applicable statute of limitations. While Plaintiffs have argued 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 importance or consequence to the facts of this case, as those facts relate to the statute of limitations and the one year savings clause contained in Fla. Stat. §726.110(1). Both of these issues have previously been fully briefed. Furthermore, Plaintiffs' Brief continues to address the statute of limitations issue, rather than the allowable look-back period for fraudulent transfers. Plaintiffs contend that, as non-moving parties, they consequently did not brief that issue either.

Plaintiffs, as well, maintain 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 period begins as of the date of filing of the Complaint, transfers made beyond four years (looking back) are barred from attack; and, (2) if Plaintiffs look to the one year savings clause, Plaintiffs would have been required to bring the action within one year of the January, 2009 Partnership Meeting at the latest. These issues were all fully briefed and argued at the May 2 Hearings and without deciding how far back to look (the earliest possible date), Plaintiffs' claims are barred by

the statute of limitations. The Response of the Holy Ghost Entities draw the Court's attention to the recent decision in *U.S. Bank Nat'l Ass'n v. Bartram*, No. 5D12-3823, 2014 WL 1632138 (Fla. 3d DCA Apr. 25, 2014). *Bartram* supports the proposition that plaintiffs cannot "claw back" distributions made outside of the limitations period. The holding in *Bartram* is analogous with the facts and legal issues in this case. In *Bartram*, the court examined whether a default occurring after a failed foreclosure attempt creates a new cause of action for both res judicata and statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on the merits. *Id.* at *6. Also in *Bartram*, the court determined that subsequent defaults do trigger a new cause of action, and accrual of a new statute of limitations, so that a new foreclosure action is permissible, which allows the lender to seek recovery for defaulted payments up to five years old, the length of the statute of limitations. *Bartram* relied on *Singleton v. Greymay Associates*, 882 So.2d 1004, 1007 (Fla. 2004), in which that court held that a "subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action". The *Bartram* court concluded that "*Singleton's* analysis is equally applicable to the statute of limitations issue." *Bartram*, 2014 WL 1632138, at *5. *Bartram* further recognized that federal courts previously interpreted *Singleton* in that way, holding that the statute of limitations, while renewed with each subsequent default, barred claims older than five years:

> The foreclosure action at issue here alleged a default of Plaintiff's July 1, 2007 through February 1, 2008 Note and mortgage payments. While any claims relating to individual payment defaults that are now more than five years old may be subject to the statute of limitations, each payment default that is less than five years old, i.e.,

> since October, 2008, created a basis for a subsequent foreclosure and/or acceleration action. *Singleton* 882 So.2d at 1008. *See also* FL[a]. Stat. §95.11(2)(c) (setting a five year statute of limitations for actions to foreclose on a mortgage.) (Emphasis added.)

Bartram 2014 WL 1632138 at *5 (quoting *Kaan v. Wells Fargo Bank, N.A.*, No. 13-80828-CIV, 2013 WL 5944074, *3 (S.D. Fla. Nov. 5, 2013)).

"Ordinarily, the statute of limitations under an installment contract starts to run on the date each payment becomes due. As such, the statute of limitations may run on some installments and not others." *See Greene v. Bursey*, 733 So.2d 1111, 1114-15 (Fla. 4th DCA 1999). Because installments are due at different times under a note mature or accrue, the day after each is to be paid, the statute of limitations may run on some and not others. *See Central Home Trust Co. of Elizabeth v. Lippincott*, 392 So.2d 931, 933 (Fla. Dist. Ct. App. 1980) (*citing* General Capital Corporation v. Tel Service Co., 212 So.2d 369 (Fla. 2d DCA 1968), (*modified*, 227 So.2d 667 (Fla. App. 1969)). SEE PAGE 4 This is similar to the present case, where any claims against the annual payments made to Gianna which fall outside of the applicable statue of limitations are barred. In *Central Home Trust*, the Court determined that installments due more than five years before the filing of the suit may be barred by the statute of limitations, but the balance of the payments due within the limitations period would not be barred. If this Court determines Plaintiffs are entitled to any sort of recovery at all again Gianna, which shouldn't be the case, any such recover by Plaintiffs is limited to disbursements made to Gianna within four years of the filing of the Complaint in this action and precluding the recovery of any disbursements made to Gianna by S&P prior to December 10, 2008.

Any attempt by Plaintiffs to require Gianna to repay any distributions made to her by S&P outside of the statute of limitations or, in this case, prior to December 10, 2008, should be barred. Plaintiffs have made a claim, under Fla. Stat. §726.105(1)(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." The applicable statute of limitations for a claim brought under that Statute is the later of four 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). This issue has been fully briefed by Defendants and it's clear that the one year savings clause commences upon discovery of the actual transfers, not upon 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).

Plaintiffs' Supplemental Brief's focus on *Wiand v. Morgan*, 915 F. Supp. 2d. 1342 (M.D. Fla. 2013) is misplaced. The *Wiand* case is wholly distinguishable from the facts and issues of law in the instant case, since it involves corporate entities and not partnership entities. Plaintiffs also cite *Desak v. Vanlandingham*, 98 So.3d 710 (Fla. 1st DCA 2012). This case is in no way helpful to Plaintiffs, as the facts in this case are, once again, entirely distinguishable from the facts in the instant case.

Plaintiffs conceded, at the May 2 Hearings, that Defendants, including Gianna, didn't intend to defraud creditors. At any rate, the question of whether there was an "actual intent to hinder, delay, or defraud any creditor of the debtor", doesn't need to be reached, once it's been determined that

Plaintiffs' claims are barred, by the applicable statute of limitations. Plaintiffs responded specifically to questions put to them by the Court, at the May 2 Hearings, by affirmatively answering and stating that there was no record evidence to even suggest that Defendants, including Gianna, knew of the alleged fraudulent nature of the transfers at issue when they occurred or, in Gianna's case, when they were made by S&P to her in 2008 and prior to 2008.

The "reasonably equivalent value affirmative defense" was not pled by Defendants, including Gianna, because Plaintiffs only pled a cause of action, under Fla. Stat. §726.105(1)(a)(6), which doesn't call into question whether "reasonably equivalent value" was provided. This isn't an affirmative defense that was raised by Gianna and, as such, it's not an issue in her case. All of the arguments raised and cases cited in Plaintiffs' Brief, in connection with the issue of "reasonably equivalent value", don't apply to Gianna, nor do they provide any further grounds or basis for any arguments by Plaintiffs, which would serve to defeat Gianna's statute of limitations arguments.

Each of the cases relied upon by Plaintiffs which argued that the statute of limitations didn't accrue, until after the Conservator's appointment, because the Partnerships weren't their own creditor, involved the appointment of a Receiver over a corporation. In the instant case, however, the entities at issue are General Partnerships, not corporations. Plaintiffs ignore the fact that the claimant here is the Partnerships, not the Conservator. The Conservator acts on behalf of creditors who were allegedly wronged which, in this case, are a subset of the Partners who were "Net Losers".

CONCLUSION

For all the reasons set forth herein, and more fully in Defendant, Ersica P. Gianna's Motion For Summary Judgment, Co-Defendants' Motions For Summary Judgment and any applicable

arguments set forth by Co-Defendants in support of the entry of their Motions For Summary Judgment, are incorporated by reference herein, and any arguments raised by Co-Defendants in their Responses To Plaintiffs' Supplemental Brief are also incorporated by reference herein. Defendant, Ersica P. Gianna, respectfully requests, for all of the reasons set forth herein, that this Honorable Court enter a Summary Judgment in favor of Defendant, Ersica P. Gianna, and against Plaintiffs on all Plaintiffs' causes of action brought in their Third Amended Complaint.

I HEREBY CERTIFY that on May 23, 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 EFiling Portal or in some other authorized manner for those counsel or parties who are not authorized to receive electronic filings.

Respectfully submitted,

ROTELLA LAW, P.A.
1500 North Federal Highway, Suite 250
Fort Lauderdale, Florida 33304
Telephone: (954) 763-2500
Facsimile: (954) 467-2231
E-Mail: rotellagar@aol.com

By: /s/ Gary J. Rotella, Esquire
GARY J. ROTELLA, ESQUIRE
Florida Bar Number: 281115

CASE NUMBER: 12-034121 CA 07

SERVICE LIST

Thomas M. Messana, Esquire
Brett Lieberman, Esquire
Messana, P.A.
Attorneys for Plaintiffs//Conservator
401 East Las Olas Boulevard
Suite 1400
Fort Lauderdale, FL 33301
(954) 712-7400
(954) 712-7401 fax
tmessana@messana-law.com
blieberman@messana-law.com

Leonard K. Samuels, Esquire
Etan Mark, Esquire
Steven d. Weber, Esquire
Berger Singerman
Special Counsel for Plaintiffs
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, FL 33301
(954) 525-9900
(954) 712-5138 direct
(954) 523-2872 fax
Lsamuels@bergersingerman.com
emark@bergersingerman.com
Sweber@bergersingerman.com

Gary J. Rotella, Esquire
Rotella Law, P.A.
Attorneys for Def/Ersica P. Gianna
1500 N. Federal Highway, Suite 250
Fort Lauderdale, Florida 33304
(954) 763-2500
(954) 467-2231 fax
rotellagar@aol.com

Joseph P. Klapholz, Esquire
Joseph P. Klapholz, P.A.
Attorneys for Defs/Abraham Newman,
Rita Newman and Gertrude Gordon
2500 Hollywood Boulevard, Suite 212
Hollywood, FL 33020
(954) 925-3355
(954) 923-0185 fax
jklap@kldapholzpa.com
dmig@klapholzpa.com

Julian H. Kreeger, Esquire
Attorneys for Defs/James Bruce Judd
and Valeria Judd
2665 S. Bayshore Drive, Suite 220-14
Miami, FL 33133-5402
iuliankreeger@gmail.com

Michael R. Casey, Esquire
Attorneys for Defs/Susan E. Molchan or
Thomas A. Whiteman, Janet B. Molchan
Trust DTD 05/19/94 and Alex E. Molchan
Trust DTD 05/19/94
1831 N.E. 38 Street, #707
Oakland Park, FL 33308
(954) 444-2780
mcasey666@gmail.com

Daniel W. Matlow, Esquire
Daniel W. Matlow, P.A.
Attorney for Def/Herbert Irwig Revocable
Trust
Emerald Lake Corporate Park
3109 Stirling Road, Suite 101
Fort Lauderdale, FL 33312
(954) 842-2365
(954) 337-3101 fax
dmatlow@danmatlow.com
assistant@danmatlow.com

Marc S. Dobin, Esquire
Jonathan T. Lieber, Esquire
Dobin Law Group, PA
Attorneys for Defs/Congregation of the Holy Ghost - Western Providence and Carmelo and Bertha SantaMaria
500 University Boulevard, Suite 205
Jupiter, FL 33458
(561) 575-5880
(561) 246-3003 fax
service@DobinLaw.com

Peter G. Herman, Esquire
Tripp Scott
Attorneys for Def/Steve Jacobs
110 S.E. Sixth Street, Suite 1500
Fort Lauderdale, FL 33301
(954) 525-7500
(954) 761-8475 fax
PGH@trippscott.com

Joanne Wilcomes, Esquire
McCarter & English, LLP
Attorneys for Def/Holy Ghost Fathers HG-Ireland/Kenema
100 Mulberry Street
Four Gateway Center
Newark, NJ 07102
(973) 848-5318
(973) 297-3928 fax
jwilcomes@mccarter.com

Michael C. Foster, Esquire
Daniels Kashtan
Attorneys for Def/Ettoh Ltd.
4000 Ponce de Leon Boulevard, Suite 800
Coral Gables, FL 33146-1436
(305) 448-7988
(305) 448-7978 fax
mfoster@dkdr.com
aurena@dkdr.com

Michael C. Foster, Esquire
Tripp Scott, P.A.
Attorneys for Def/Ettoh Ltd.
110 S.E. Sixth Street, 15th Floor
Fort Lauderdale, FL 33301
(954) 525-7500
(954) 761-8475 fax
mcf@trippscott.com

Thomas L. Abrams, Esquire
Attorneys for Defs/Sam Rosen and Edith Rosen
1776 N. Pine Island Road, Suite 309
Plantation, FL 33322
(954) 523-0900
(954) 915-9016 fax
tabrams@tabramslaw.com

Ryon M. McCabe, Esquire
Evan H. Frederick, Esquire
McCabe Rabin, P.A.
Attorneys for Def/Catharine Smith
1601 Forum Place, Suite 505
West Palm Beach, FL 33401
(561) 659-7878
(561) 242-4848 fax
rmccabe@mccaberabin.com
e-filing@mccaberabin.com
efrederick@mccaberabin.com

Robert J. Hunt, Esquire
Debra D. Klingsberg, Esquire
Hunt & Gross, P.A.
Attorneys for Def/Hampton Financial Group, Inc.
185 N.W. Spanish River Boulevard, Suite 220
Boca Raton, FL 33431-4230
(561) 997-9223
(561) 989-8998 fax
bobhunt@huntgross.com
clklingsberg@huntgross.com
eService@huntgross.com
Sharon@huntgross.com