

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup>  
JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA  
CASE NO. 12-034123 (07)

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.  
\_\_\_\_\_ /

**DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES'**  
**RESPONSE TO PLAINTIFFS' MOTION FOR AN EXTENSION OF TIME TO**  
**RESPOND TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants, Frank Avellino and Michael Bienes (collectively the "Defendants"), by and through their undersigned counsel, file this response to Plaintiffs' motion for an extension of time to respond to Defendants' motion for summary judgment and in support thereof, state:

1. On April 14, 2015, Defendants filed their Joint Motion for Summary Judgment premised on the sole ground that Plaintiffs' claims are time barred. That is, the remaining claims asserted in Plaintiffs' Fifth Amended Complaint are all subject to a four year statute of limitations and such claims accrued more than four years before the filing of the initial complaint.

2. Rather than timely respond to Defendants' motion, Plaintiffs seek to extend their time to respond from the required filing date of May 19, 2015, for nine months until February 15, 2016, well after the close of fact discovery of October 9, 2015, proposed in the Case Management Order the parties have submitted to the Court.

3. Plaintiffs premise their motion on the Court's statement at a recent hearing that it would not "hear" the summary judgment motion until the Defendants are deposed. Further, Plaintiffs' argue that they may need to conduct discovery "as to any genuine issues of material fact that might arise after those depositions." Motion, ¶ 3.

4. There are no genuine issues of material fact relating to the basis for the summary judgment motion – the claims are either time barred or they are not – and Plaintiffs have failed to identify any material facts or pending discovery that relates to any issue raised in the summary judgment motion.

5. In response to the summary judgment motion, Plaintiffs may assert defenses such as delayed discovery, continuing tort theory or equitable estoppel, to attempt to avoid dismissal of their claims as time barred as they previously unsuccessfully did in opposition to Defendants' motion to dismiss the Fourth Amended Complaint. It is Plaintiffs, not defendants that have knowledge of any facts supporting such defenses. Unless and until Plaintiffs are required to respond to Defendants' summary judgment motion, the existence of such defenses and the need for discovery as to such defenses by either party remains unknown. Requiring Plaintiffs to timely respond to the summary judgment motion will determine and identify whether any discovery is required.

6. Case law cited by Plaintiffs in their motion undercuts their argument. While the court in *Osorto v. Deutsche Bank Nat. Trust Co.*, 88 So.3d 261 (Fla. 3<sup>rd</sup> 2012), made the general statement that a summary judgment motion should not be entertained until discovery was complete, it went on to state: "However, if the incomplete discovery will not raise future disputed issues of material fact, summary judgment may be properly granted." *Id* at 263; *see*,

*Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Company*, 105 So.3d 602, 607-08 (Fla. 4<sup>th</sup> DCA 2013) (affirming trial court's granting summary judgment while discovery was outstanding).

7. Until Plaintiffs respond to the Defendants' summary judgment motion, the necessity for discovery is unknown. Consequently, Plaintiffs should be required to respond to the summary judgment motion in a timely manner so that ample time exists for the parties to conduct discovery with regard to the defenses raised to the summary judgment motion, if necessary.

8. Plaintiffs' recital of Defendants' response to their request for the relief sought in their motion is incomplete and misleading. Defendants advised Plaintiffs that they would be willing to extend the time for Plaintiffs to respond to the motion until ten days after the completion of the Defendants' depositions. That provides Plaintiffs ample opportunity to develop whatever facts they believe exist to defend the summary judgment motion and satisfies the court's statement that it not hear the motion until Defendants' depositions are conducted. Plaintiffs rejected this proposal and seek nine months to respond to Defendants' motion.

9. Plaintiffs' request for a nine month extension to respond to Defendants' motion is disingenuous, at best, and further evidences their continued tactic to avoid revealing their position while they delay and frustrate Defendants' discovery efforts. Plaintiffs have addressed similar summary judgment motions that raised statute of limitations in related actions in this Court in which they are parties. See Plaintiffs' Response to Defendant Congregation of the Holy Ghost – Westlaw Providence's Motion for Summary Judgment and Incorporated Memorandum of Law filed October 15, 2013, *P&S Associates v. Janet A. Houker Charitable Trust*, Case No.

12034121(04).<sup>1</sup> Nothing prevents Plaintiffs from filing their opposition to the Defendants' motion after conducting Defendants' depositions. If after such depositions Plaintiffs believe further discovery is required, they should be required to specifically identify the discovery, it can be accomplished within the proposed discovery deadline of October 9, 2015, and Defendants motion can then be heard.

WHEREFORE, Plaintiffs' motion for extension of time to respond to Defendants' joint motion for summary judgment should be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25 day of May 2015, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

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<sup>1</sup> Plaintiffs have refused to produce documents requested by Defendants from these related proceedings claiming they are irrelevant, necessitating Defendants to file a motion to compel such production.

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