

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

CASE NO.: 12-034121 CA 04

**MARGARET J. SMITH as Managing General
Partner of P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership,
and S&P ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership;
P&S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership; and S&P
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership,**

Plaintiff,

v.

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

Defendants.

**DEFENDANT ERSICA P. GIANNA'S
MOTION TO DISMISS AND MOTION TO COMPEL ARBITRATION**

Defendant, Ersica P. Gianna (“EG”), moves to dismiss the Complaint and for this Court to compel arbitration, and as grounds sets forth:

1. The Complaint should be dismissed because the Partnership Agreements referenced in the Complaint contain an arbitration provision, and this matter must be heard by arbitration. In particular, section 14.08 of both agreements, titled “Disputes”, contains a mandatory arbitration provision. Therefore, this Court should dismiss this action and the Plaintiff should be compelled to file an arbitration if she seeks to enforce the agreements.

2. All counts in the Complaint should be dismissed, as the Partnership Agreements attached to the Complaint reference to a respective Exhibit A, which sets forth who the partners are and their respective interests. This exhibit is missing and without it the Complaint fails to

state a claim. Therefore, all counts in the Complaint should be dismissed.

3. Count I for breach of contract should be dismissed in that this count does not allege any provision of the Agreements that was allegedly breached by EG. Therefore, it should be dismissed.

4. Counts I through III should all be dismissed, because Article 14.03 of the Partnership Agreements include a limitation on liability for all but fraud and fiduciary duty claims. The only count that may possibly survive this contractual limitation is Count IV (but see below). Therefore, Counts I-III should all be dismissed.

5. Count III appears to be duplicative in substance as Count II and should be dismissed.

6. As to Count IV for fraudulent transfer, this is a count that must allege the fraud that occurred with particularity. There is no allegations as to who, what, where, and when in this count. In particular, the count should state which partners committed the fraud, with the requisite intent, and who received what amount of money, and when, and details of the transaction. This count is conclusory in its nature, most likely because alleging the particulars will subject the count to facial statute of limitations defense. Therefore, this count should be dismissed.

7. Pursuant to Florida Rule of Civil Procedure 1.070(j), the Complaint was not timely served on EG. The Complaint was filed with the Clerk on December 10, 2012. The date of service on EG was June 21, 2013. More than 120 days lapsed before EG was served. Therefore, pursuant to Florida Rule of Civil Procedure 1.070(j), the Complaint should be dismissed and/or EG should be dismissed as a party.

8. Pursuant to the Local Rules of the Complex Litigation Division of Broward County, a good faith effort has been made to address the issues set forth in this motion in advance of its

filing.

WHEREFORE, Defendant Ersica P. Gianna respectfully requests this Court dismiss the Complaint as set forth herein, and for such other reasons as this Court finds just, fair, and equitable.

Dated: July 10, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished Via Electronic mail this 10th day of July, 2013 to:

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By: /s/ Eric N. Assouline

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