

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

MARGARET J. SMITH, et al.,

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

Plaintiffs,

vs.

JANET A. HOOKER CHARITABLE TRUST,
et al.,

Defendants.

_____ /

MOTION TO AWARD ATTORNEY'S FEES
TO DEFENDANTS SUSAN E. MOLCHAN OR THOMAS A. WHITEMAN, JANET B.
MOLCHAN TRUST DTD 05/19/94 AND ALEX E. MOLCHAN TRUST DTD 05/19/94
PURSUANT TO FLA. STAT. §57.105

Defendants SUSAN E. MOLCHAN OR THOMAS A. WHITEMAN ("SUSAN MOLCHAN"), JANET B. MOLCHAN TRUST DTD 05/19/94 ("JANET MOLCHAN") and ALEX E. MOLCHAN TRUST DTD 05/19/94 ("ALEX MOLCHAN" and, collectively with SUSAN MOLCHAN and JANET MOLCHAN, the "Defendants"), pursuant to Fla. Stat. §57.105(1)(a) and (b), hereby move the Court to award them a reasonable attorney's fee, including prejudgment interest, against the Plaintiffs, MARGARET J. SMITH, P&S ASSOCIATES, GENERAL PARTNERSHIP ("P&S") and S&P ASSOCIATES, GENERAL PARTNERSHIP ("S&P"), and/or the Plaintiffs' attorneys, due to the fact that they knew or should have known that the claims against the Defendants presented in the Complaint:

- (a) Were not supported by the material facts necessary to establish such claims; or
- (b) Would not be supported by the application of then-existing law to those material facts.

Material Facts:

The Plaintiffs and their attorneys knew or should have known when they filed the Complaint on December 10, 2012 (which was just before the fourth anniversary of Bernard Madoff's confession), that the Defendants had been partners in P&S, but were never partners in S&P and had never invested any money in or received any money from S&P.¹

Similarly, the Plaintiffs and their attorneys knew or should have known when they filed the Complaint that the Defendants had gotten their last distributions of money from P&S and had ceased to be partners in P&S on or about the following dates, respectively:

ALEX MOLCHAN – last withdrawal: 02/10/1998

SUSAN MOLCHAN – last withdrawal: 03/16/1999

JANET MOLCHAN – last withdrawal: 01/29/2001

Law:

The claims presented in the Complaint allegedly arise out of the Defendants receiving money from P&S and S&P. Those claims are set forth in the following Counts: Count I – Breach of Contract (written agreement); Count II – Unjust Enrichment; Count III – Money Had and Received; and Count IV – Avoidance of Fraudulent Transfers Pursuant to Section 726.105(1)(a) of the Florida Statutes.

The applicable statutes of limitations for these Counts are as follows:

Count I: under Fla. Stat. §95.11(2)(b), within five (5) years;

¹ Consequently, even though all material allegations of the Complaint lumped the "Partnerships" together, there was clearly no basis in law or fact for S&P to sue the Defendants.

Count II: under Fla. Stat. §95.11(3)(p), within four (4) years;

Count III: under Fla. Stat. §95.11(3)(p), within four (4) years; and

Count IV: Under Fla. Stat. §726.11(1), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant.²

In the present case, the all of the distributions to the Defendants occurred more than 12 years before the filing of the Complaint, with the exception of the last distribution to JANET MOLCHAN, which occurred more than 11 years prior to filing of the Complaint. Furthermore, P&S knew about its distributions to the Defendants all along, so the “delayed discovery” provisions of Fla. Stat. §726.11(1) are of no avail to the Plaintiffs with regard to Count IV.

Similarly, the “delayed discovery” provisions of Fla. Stat. §95.031(2)(a)³ are inapplicable to the other Counts of the Complaint because none of them is “an action founded upon fraud” under Fla. Stat. §95.11(3); there are no allegations of fraud or constructive fraud against the Defendants. Likewise, there is no “common law” or “equitable” basis for the application of a “delayed discovery” exception to the operations of the statutes of limitations in barring the various Counts of the Complaint. *Davis v. Monahan*, 832 So.2d 708 (Fla. 2002).

In view of the foregoing, it clearly appears that all of the claims presented in this case against the Defendants were already barred by the applicable statutes of limitations when the Complaint was filed. This should have been known by the Plaintiffs and must have been

² P&S cannot have a valid claim to avoid its own distributions to the Defendants as “fraudulent transfers” under this statute – P&S is not a creditor of itself.

³ Even claims for fraud would be barred absolutely after 12 years.

known by their attorneys. Consequently, they should be sanctioned accordingly under Fla. Stat. §57.105(1).

Dated: July 18, 2013

Respectfully submitted,

Michael R. Casey
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon counsel for the Plaintiffs by email and hand delivery to their offices at the following addresses this 18th day of July 2013:

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