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

MARGARET SMITH, et al.,

Plaintiffs,

v.

JANET A. HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

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

ETTOH, LTD.'S MOTION TO DISMISS THE COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, ETTOH, LTD. ("Ettoh"), through the undersigned counsel and pursuant to Fla. R. Civ. P. 1.100, *et seq.*, and applicable decisional law, hereby moves as follows:

REQUESTED RELIEF

1. **To dismiss the Complaint** for failure to plead ultimate facts showing an act or omission by Ettoh sufficient to defeat the limitation on liability contained in ¶ 14.03, of the controlling Partnership Agreements (hereafter defined);

2. **To dismiss Counts II and III of the Complaint** because these counts rely on quasi-contractual theories that are barred by the existence of an express contract concerning the identical subject matter; and

3. **To dismiss Count IV of the Complaint** because Count IV fails to set forth sufficient ultimate facts in support of the cause of action it asserts.

MEMORANDUM OF LAW

FACTS ALLEGED IN THE COMPLAINT

4. Plaintiff brings this lawsuit against several dozen of individuals and entities (including Ettoh) who were partners in one or more Florida general partnerships – *i.e.*, S&P Associates, General Partnership ("S&P") and P&S Associates, General Partnership ("P&S") (collectively the "Partnerships"). *See* Complaint at ¶¶ 2, 4 – 35. S&P and P&S were created and governed by partnership agreements that are purportedly attached as Exhibits "A" and "B" to the Complaint (the "Partnership Agreements"). *See* Complaint at ¶ 41.

5. Plaintiff asserts "upon information and belief" that the Defendants (collectively) "invested significant funds into one of two investment vehicles, each of which was expected to yield stable, consistent returns: S&P and P&S." *See* Complaint at ¶ 39. However, Plaintiff does not specify in her Complaint the amount of Ettoh's investment into each of the Partnerships, nor, indeed, whether Ettoh in fact invested in both Partnerships.

6. The Complaint acknowledges that the former Managing General Partners of the Partnerships were to oversee both the investment of funds in each partnership and "the withdrawal of funds and distribution of funds from the Partnerships to the Partners." *See* Complaint at ¶ 44.

7. The Complaint does not include any allegation that Ettoh (or any other Defendant) had knowledge of – let alone participation in – the Partnerships' investment strategy, or, indeed, any aspect of its management. Nonetheless, the Complaint asserts that "Defendants [collectively] did not comply with the terms of the Partnership Agreements." *See* Complaint at ¶ 46. No individualized wrongdoing is alleged on the part of Ettoh (or any Defendant), only that

"Defendants reaped profits from their investments in the Partnerships, while other Partners lost millions of dollars." *Id.* at ¶ 47.

8. There is no allegation in the Complaint setting forth which Partnership or Partnerships made distributions to Ettoh, the number of distributions made to Ettoh, the date or dates upon which Ettoh received distributions, or knowledge on the part of Ettoh that the distributions it is alleged to have received violated the terms of the Partnership Agreements.

ARGUMENT

A. Introduction

9. Plaintiff brings this lawsuit to recover distributions made to Ettoh and dozens of other former partners of S&P and P&S. Plaintiff never makes a specific allegation against a specific Defendant, relying instead on a singular allegation made against the Defendants as group that they received distributions taken from "principal contributions of other Partners" rather than the Partnerships' profits. *See* Complaint at ¶ 46. Moreover, there is no allegation – individualized or collective – that the Defendants had knowledge of the "wrongfulness" of the distributions that they allegedly received; the date, time, or amount of any distribution; or which of the Partnerships actually made a distribution.

10. Florida law and the Partnership Agreements require more. Plaintiff must allege a basis upon which she can avoid the exculpatory provisions in the Partnership Agreements; she must explain how she can seek relief in both contract and quasi-contract; and she must allege ultimate facts supporting her fraudulent transfer theory. Ettoh submits, however, that the lack of an adequate factual predicate in the Complaint is intentional. Pleading with the necessary specificity would require the Plaintiff to acknowledge that Ettoh dissociated from the Partnerships over six years ago in accordance with the terms of the Partnership Agreements, and

without any knowledge of the (undefined) wrongdoing that Plaintiff evidently attributes to the former Managing Partners. As it stands, the Complaint should be dismissed.

B. Plaintiff's claims against Ettoh are barred by the terms of the Partnership Agreements.

11. Both of the Partnership Agreements contain a provision limiting liability, which provides, in pertinent part, that:

> LIMITATIONS ON LIABILITY
>
> 14.03 THE PARTNERS SHALL HAVE NO LIABILITY TO THE PARTNERSHIP OR TO ANY OTHER PARTNER FOR ANY MISTAKES OR ERRORS IN JUDGMENT, NOR FOR ANY ACT OR OMISSIONS BELIEVED IN GOOD FAITH TO BE WITHIN THE SCOPE OF AUTHORITY CONFERRED BY THIS AGREEMENT. THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY.

Partnership Agreements at ¶ 14.03 (capitalization in original). This type of liability limitation is valid and enforceable under Florida law. *See Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008 (recognizing that "unambiguous exculpatory provisions are enforceable"); *Voicestream Wireless Crop. v. U.S. Commc'ns., Inc.*, 912 So. 2d 34, 38 (Fla. 4th DCA 2005) (noting, generally, that "[p]arties can contract to limit their liability."). Thus, to state a claim against Ettoh, Plaintiff must defeat the foregoing provision by alleging conduct by Ettoh that amounts to intentional wrongdoing, fraud and/or a breach of fiduciary duty.

12. The Complaint is bereft of any allegation of wrongdoing on the part of Ettoh in connection with its receipt of the funds that are the subject of this lawsuit. Indeed, the Complaint acknowledges that the former Managing General Partners were solely responsible for the management of the Partnerships, and that it was their alleged breaches of fiduciary duty that gave rise to the causes of action in the Complaint. *See* Complaint at ¶ 46 (alleging that the "former

Managing General Partners breached their fiduciary duties of loyalty and care to the Partners and the Partnerships by making distributions to the Defendants"). Under such circumstances, no cause of action can lie against Ettoh and the Complaint should be dismissed. *See* Partnership Agreements at ¶ 14.03.

C. <u>Counts II and III of the Complaint should be dismissed because they allege conduct covered by an express contract</u>.

13. Counts II of the Complaint alleges a cause of action for "Unjust Enrichment" and Count III of the Complaint alleges a cause of action for "Money Had and Received." *See* Complaint at pp. 11 – 12. Both of these causes of action rely on the factual assertion that Defendants (evidently, including Ettoh) received distributions "from the capital contributions of other Partners rather than from the Partnerships' profits." *See* Complaint at ¶¶ 53, 56. This alleged conduct is "improper" because – Plaintiff asserts – it is a breach of the Partnership Agreements, which only permit the distribution of profits (not funds from capital contributions) on a *pro rata* basis. *See id.* at ¶¶ 42, 43. Moreover, this is precisely the same conduct that Plaintiff alleges supports its claim in Count I, Breach of Contract. *C.f. id.* at ¶ 53.

14. Settled law recognizes that the claims set forth in Counts II and III of the Complaint sound in quasi-contract, and that a plaintiff may not recover for both these theories and for breach of an express contract. *See Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008) ("Florida Courts have held that a plaintiff cannot pursue a quasi-contractual theory for unjust enrichment if an express contract exists concerning the same subject matter."); *see also Ocean Commc'ns, Inc. v. Bubeck*, 956 So. 2d 1222 (Fla. 4th DCA 2007); *and see Berry v. Budget Rent A Car Systems, Inc.*, 497 F. Supp. 2d 1361, 1370 (S.D. Fla. 2007) ("[T]he presence of an express contract precludes recovery on a quasi-contractual remedy such as money had and received."). Moreover, decisional law recognizes that: "The mere fact

that an overpayment of some sort has been demanded and payment made will not support the [causes of] action." *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 656 (Fla. 5th DCA 1997); *Berry*, 497 F. Supp. 2d at 1370 ("The mere fact that an overpayment has been demanded and payment was made will not support an action for money had and received.").

15. The Complaint alleges the existence of an express contract that covers the subject matter of Counts II ("Unjust Enrichment") and III ("Money Had and Received") – indeed, the contract purportedly has a specific provision precluding the conduct which forms the basis of these claims. *See* Complaint at ¶ 53. Under such circumstances, Counts II and III must be dismissed. *See Diamond "S" Dev. Corp.*, 989 So. 2d at 697; *Ocean Commc'ns, Inc.*, 956 So. 2d 1222; *Berry*, 497 F.Supp.2d at 1370.

D. <u>Count IV should be dismissed because it is vague and wholly fails to allege ultimate facts in support of the cause of action it purports to state</u>.

16. Count IV of the Complaint purports to allege a cause of action for fraudulent transfer pursuant to § 726.105(1)(a). *See* Complaint at p.13. The specific statutory predicate is important because it requires a showing of *actual fraud*. *See* § 726.105(1)(a) (setting out a cause of action for fraudulent transfer for those claims made "[w]ith actual intent to hinder, delay, or defraud the any creditor of the debtor"). Although Plaintiff makes a bare recitation of the statutory language, she fails to allege the elements of a claim under the statute. *See Nations Bank, N.A. v. Coastal Utils., Inc.*, 814 So. 2d 1227, 1229 (Fla. 4th DCA 2002) (noting that a claim under § 726.105(1)(a) requires that a party demonstrate "(1) there was a creditor to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property which could have been applicable to the payment of the debt due.").

17. Moreover, Plaintiff fails to comply with the most modest requirements contained in the Florida Rules of Civil Procedure that she allege "ultimate facts" in support of her cause of

action – let alone comply with the heightened pleading requirements for cases involving claims of fraud. *See* Fla. R. Civ. P. 1.110 (requiring, *inter alia*, that a pleader set forth "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief"); Fla. R. Civ. P. 1.120(b) (stating that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit."); *see also, generally, Eagletech Commc'ns., Inc. v. Bryn Mawr Inv. Group*, 79 So. 3d 855, 862 (Fla. 4th DCA 2012)(recognizing that a party claiming fraud must set forth the claim with particularity); *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009) (noting that factual allegations in support of a fraud claim must "specifically identify misrepresentations or omissions of fact, as well as time, place or [the] manner in which they were made"); *but see and compare Oginsky v. Paragon Props. of Costa Rica LLC*, 784 F. Supp. 2d 1353, 1369 (S.D. Fla. 2011) (recognizing a split of authority concerning application of the heightened pleading requirements for fraud in the context of claims under § 726.105(1)).[1]

18. The entirety of Plaintiff's proffer in support of her cause of action is that *the former Managing General Partners* made distributions to the Defendants (collectively) that were made from "the principal contributions of other Partners" (collectively), at some point during the eighteen years between the formation of the Partnerships and the commencement of this lawsuit, such that Defendants (collectively) received profited while other Partners (collectively) did not. *See* Complaint at ¶¶ 46, 47.

19. Moreover, the Complaint does not allege and cannot allege – based on the terms of the Partnership Agreements which vest total control of the management of the Partnerships in the former Managing Partners – that Ettoh caused any distributions to be made or participated in

[1] Undersigned counsel has been unable to locate any definitive pronouncement on the issue under Rule 1.120(b). However, as in *Orginsky*, Plaintiff here has failed to comply with even the general requirements of notice pleading and, thus, Count IV should be dismissed.

management of the Partnerships in any way. There is no allegation of any wrongdoing specific to Ettoh or any other Defendant; Plaintiff simply claims that the receipt by a group of several dozen Defendants of certain distributions (presumably of varying amounts and at different times) exceeded the distributions permitted by contract. Put simply, the "who," "what," and "when" of the purportedly wrongful conduct giving rise to Ettoh's liability remains a mystery. Florida law requires more. *See, e.g., Eagletech Commc'ns.*, 79 So. 3d at 862 (finding that a fraud count was insufficiently pled and criticizing, in particular, the fact that the conduct of the Defendants was lumped together); *see also Cedars Healthcare Group, Ltd.*, 16 So. 3d at 917.

20. Indeed, Florida law is not blind to the challenges involved in pleading and proving a claim under § 726.105(1)(a) and thus *the statute itself* provides a guide to the types of conduct that a party may plead and prove to support its claim. *See* § 726.105(2), Fla. Stat. (setting forth certain indicia of fraudulent conduct). Plaintiff fails to cite to any of these facts – let alone any independently "fraudulent" conduct on the part of Ettoh – relying entirely on the same conduct that is alleged to be a breach of the Partnership Agreements as support for its claim. *See, e.g.*, Complaint at ¶¶ 46, 53 and 68. Count IV should therefore be dismissed.

WHEREFORE, Defendant ETTOH, LTD respectfully requests that the Court dismiss the Complaint as more sully set forth in the body of this motion and for such other relief as is deemed just and proper.

Dated this 31st day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via email this 31st day of July, 2013 on: Leonard K. Samuels, Esq., Etan Mark, Esq. and Steven D. Weber, Esq., Attorneys for Plaintiff, Berger Singerman, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, Florida 33301.

s/Michael C. Foster
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