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

CASE NO.: 12-034121 (04)

MARGARET J. SMITH, as Managing General Partner on behalf 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, and

Plaintiffs,

v.

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

Defendants.
_____/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT ETTOH, LTD's MOTION TO DISMISS COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs Margaret J. Smith, P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P") (collectively and individually referred to as, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Ettoh, Ltd.'s ("Defendant") Motion to Dismiss the Complaint and Incorporated Memorandum of Law (the "Motion").

BRIEF SUMMARY

Defendant's Motion disregards the standard for a motion to dismiss and should be denied as a matter of course because it is based on mistaken facts and law. In support thereof, Plaintiffs state as follows:

I. STATEMENT OF FACTS

After approximately one year of litigation because of, *inter alia*, the fraudulent and improper activities of Michael Sullivan, their former Managing General Partner, and others, a Conservator was appointed over the Partnerships.

Following Sullivan's removal in August 2012, this lawsuit was commenced, and Plaintiffs are now suing certain Partners that received improper distributions from the Partnerships as a result of the bad acts of Sullivan and others. More specifically, this action names as defendants those particular Partners of the Partnerships who received, on a net basis, more money than they invested; i.e., 'Net Winners.'

Under the Partnership Agreements, the Partners were to receive distributions of profits at least once per year. *See* Section 5.02 of **Exhibits A and B** to the Complaint (emphasis added).[1] If the Partnership distributed any profits to the Partners, those profits had to be distributed in equal proportion to all Partners depending on each Partner's pro rata share in the Partnership as of the date of the distribution. *Id.*

However, an investigation of the Partnerships' books and records revealed that Defendants did not comply with the terms of the Partnership Agreements. The former Managing General Partners breached their fiduciary duties of loyalty and care to the Partners and the

[1] The Partnerships' partnership agreements are identical in all material respects and are collectively referred to as the Partnership Agreements. The Partnership Agreement of S&P and P&S are attached to the Complaint as **Exhibits A and B**, respectively.

Partnerships by making distributions to Defendant that originated from the principal contributions of other Partners and not from the Partnerships' profits, as required.

As a result of these improper distributions, and in direct contravention of the plain terms of the Partnership Agreements, Defendant benefitted from its investments in the Partnerships at the expense of other Partners, certain of whom lost millions of dollars. The distributions rightfully belong to the Plaintiffs and should be distributed to the Partners through a court-approved distribution method.

In total, Defendant Ettoh, Ltd. invested $510,000.00 in the Partnerships and received $797,454.40 from the Partnerships – a return of approximately 63%. This return was only possible because Defendant received distributions that it was not entitled to. On or about July 31, 2013, Defendants filed the Motion seeking to dismiss the Complaint. As set forth below, the Motion should be denied.

II. STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). The court is confined to consideration of the allegations found in the four corners of the complaint. *Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998). A motion to dismiss should be denied when a complaint sufficiently states a cause of action. *See Solorzano v. First Union Mortgage Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565-66 (Fla. 1971) (holding error to dismiss a complaint that contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same).

III. ARGUMENT

A. Paragraph 14.03 Does Not Shield Defendant From Liability

Defendant contends that Plaintiffs claims are barred by Paragraph 14.03 of the Partnership Agreements because Paragraph 14.03 of the Partnership agreement provides that "THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND OMISSIONS INVOLVING INTENTIONAL WRONGING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES[,]" and Defendant argues that it did not engage in such conduct. However, Defendant's interpretation of Paragraph 14.03 is self-serving, and is contrary to Florida law and the axioms of contract interpretation. *Feldman v. Kritch*, 824 So. 2d 274, 277 (Fla. 4th DCA 2002) (reversing a trial court's revision of a contract, where the terms of the contract were plain and unambiguous).

Under Florida law, where the terms of a contract are clear and unambiguous, courts are required to enforce the contract according to its plain meaning. *Id.* "It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties." *Id.*; *accord Pollo Operations, Inc. v. Tripp*, 906 So. 2d 1101, 1106 (Fla. 3d DCA 2005).

Here, Defendant seeks to rewrite ¶ 14.03 to state that it could only be liable for its own acts or omissions. Yet Paragraph 14.03 does not state that a Partner can only be subject to liability for acts that he (or it) committed which involve intentional wrongdoing, fraud, or breaches of fiduciary duty. Instead, the plain text of Paragraph 14.03 states that a Partner may be liable, regardless of who acted intentionally so long as the "acts and/or omissions" "involve[ed]" intentional wrongdoing, fraud, or a breach of fiduciary duties. Under Florida law it is well established that courts cannot modify unambiguous contracts. *See Emergency Assoc. of Tampa, P.A. v. Sassano*, 664 So. 2d 1000, 1002 (2d DCA 1995).

The Complaint alleges that Sullivan acted intentionally, and breached his fiduciary obligations to the Partnerships by using the capital contributions of their partners, instead of the

Partnerships' profits to make distribution to the Partners. Further, and contrary to Defendant's assertion that the Complaint fails to allege any wrongdoing by Defendant, it further provides that as a result of Sullivan's conduct, Defendant improperly received and retained distributions which it would not have otherwise been entitled to. These allegations sufficiently involve intentional wrongdoing, fraud, and breaches of fiduciary duties of care and loyalty such that Defendant may not avoid liability under Paragraph 14.03 of the Partnership Agreements.

B. Counts II and III Are Properly Pled in the Alternative

Defendant claims that Counts II and III of the Complaint should be dismissed because a plaintiff cannot recover for claims of unjust enrichment and money had and received where an express contract exists covering the same matter. (Motion at 5). This argument ignores well settled law allowing a plaintiff to plead in the alternative.

Pursuant to Florida Rule of Civil Procedure 1.110(g), a pleader "may set up in the same action as many claims or causes of action or defenses in the same right as the pleader has, and claims for relief may be stated in the alternative." *Banks v. Lardin*, 938 So. 2d 571, 577 (Fla. 4th DCA 2006) (quoting Fla. R. Civ. P. 1.10(g)); *DiChristopher v. Bd. of Cnty. Com'rs*, 908 So. 2d 492, 493 (Fla. 5th DCA 2005) ("A Plaintiff may set out the facts of the occurrence or transaction and demand judgment in his favor on several bases, even mutually exclusive ones."). Moreover, even if a plaintiff is required to elect a cause of action, "the election of a claim would not logically occur at a pleading stage." *In re Estate of Trollinger*, 9 So. 3d 667, 668 (Fla. 2d DCA 2009); *Banks*, 938 So. 2d at 577 ("[Defendant] argues that . . . no cause of action can exist where there is also alleged to be an express contract concerning the same subject matter . . . The trial court did not grant summary judgment on this ground and we find, at this point in the

proceedings, the trial court may not determine the inconsistency of the claims pled.");[2] *Feldkamp v. Long Bay Partners, LLC*, Case No. 2:09-cv-253-Ftm-29SPC, slip op at 13 (M.D. Fla. Sept. 14, 2010) (denying a Motion to Dismiss because "[w]hile plaintiffs cannot recover under both theories, they need not make an election at this state of the proceedings.") (applying Florida law).[3]

The fact that the terms of the Partnership Agreements provide for certain distributions does not preclude Plaintiffs from asserting claims for unjust enrichment or money had and received in the alternative. Defendant relies on *Berry v. Budget Rent A Car Sys., Inc.*, 497 F. Supp. 2d 1361 (S.D. Fla. 2007), *Hall v. Humana Hosp. Daytona Beach*, 686 So.2d 653 (Fla. 5th DCA 1997) and *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, and argues that a claim for unjust enrichment or for money had and received cannot be maintained where there is an express contract concerning the same subject matter.[4] However, unlike the case at bar, the cases on which Defendant rely involve a simple overpayment without any allegations of fraudulent or inequitable conduct. *See Berry*, 497 F. Supp. 2d 1361 ("Plaintiffs must allege some fraud or imposition through which the money was obtained, and they have failed to so.").

"An action for money had and received or the more modern action for unjust enrichment . . . is an equitable remedy requiring proof that money had been paid due to fraud, misrepresentation, imposition, duress, undue influence, mistake, or as a result of some other

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[2] As courts apply a more stringent standard in granting a motion to dismiss than a motion for summary judgment, the holding in *Banks* is applicable to the instant Motion. *See* Fla. R. Civ. P. 1.510.

[3] Federal Rule of Civil Procedure 8(d)(2), (3) is analogous to Florida Rule of Civil Procedure 1.10(g). *Compare* Fed. R. Civ. P. 8(d)(2), (3) *with* Fla. R. Civ. P. 1.10(g).

[4] Defendant also misstates the law in its selective quotations from *Hall.* Despite Defendant's contentions, the *Hall* Court "affirmed the grant of summary judgment in a case in which excessive medical charges were alleged based on the fact that payment had voluntarily been made[,]" and not because of the existence of an express contract. *Greenfield v. Manor Care, Inc.*, 705 So. 2d 926, 930 (4th DCA 1997) (citing *Hall*, 686 So. 2d at 657).

grounds for intervention by a court of equity." *Hall*, 686 So. 2d at 656 (citing *Moore Handley, Inc. v. Major Reality Corp.*, 340 So. 2d 1238 (Fla. 4th DCA 1976)). As the overpayment at issue in this matter occurred as a result of the managing partners' fraudulent conduct, Plaintiffs may properly assert their claims for unjust enrichment and money had and received. *Id.*; *see also Banks*, 938 So. 2d at 577.

C. Plaintiff's Claim for Fraudulent Transfer Is Adequately Pled

Defendant lastly contends that Count IV of the Complaint must be dismissed because it must be pled with particularity under Florida Rule of Civil Procedure 1.120(b). Defendant's contention is misplaced.

First, Fla. R. Civ. P. 1.120(b) states 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. Malice, intent, knowledge, mental attitude, and other condition of mind of a person may be averred generally." However, the particularity requirement relied upon by Defendant in Fla. R. Civ. P. 1.120(b) does not apply where, as here, the causes of action arise out of fraudulent transfer claims. Analogous Federal case law shows particularity is not required for fraudulent transfer claims.

Fed. R. Civ. P. 9(b) is materially similar to Fla. R. Civ. P. 1.120(b) and states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

Although there is a split in the Eleventh Circuit, many courts that have considered whether Fed. R. Civ. P. 9(b)'s particularity requirement applies to the Florida Uniform Fraudulent Transfer Act find that it is inapplicable. *See Steinberg ex rel. Lancer Mgmt. Group LLC v. Alpha Fifth Group,* Case No. 04–60899–CIV, 2010 WL 1332840, at *2 (S.D. Fla. March

30, 2010) (Marra, J.) (finding UFTA claims are "significantly different from other fraud claims to which Rule 9(b) is directed," and that Rule 9(b) therefore does not apply to claims brought under the Florida UFTA); *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, 07-80633-CIV, 2008 WL 660100, at *6 (S.D. Fla. Mar. 7, 2008) ("The Court concludes that the heightened pleading standard of Rule 9(b) does not apply to claims brought under the FUFTA").

Additionally, "Courts relax Rule 9(b)'s heightened pleading requirement for plaintiffs who are trustees or receivers who are 'third party outsiders to the fraudulent transactions' with only second-hand knowledge of the fraudulent acts." *Allstate Ins. Co. v. Fed. Sav. Bank*, 12-60077-CIV, 2012 WL 2953656, at *3 (S.D. Fla. July 19, 2012).

Such is the case here.

Second, in support of its argument, Defendant cites to numerous cases referring to the heightened pleading requirements for common law fraud claims. However, those cases are inapposite because a fraudulent transfer claim is materially different than a claim for fraud.

To state a common law claim for fraud, a plaintiff must "specifically identify misrepresentation or omissions of fact, as well as the time, place or manner in which they were made," because one of the elements of an action in fraud is the making of a false statement or omission. *See Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 2d 914, 917 (Fla. 3d DCA 2009). A fraudulent transfer claim, on the other hand, does not contain the element of false representations or omissions. *See, e.g.*, *Steinberg ex rel. Lancer Management Group LLC v. Alpha Fifth Group*, 2010 WL 1332840, at *2 (S.D. Fla. Mar. 30, 2010) (quoting *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, 07-cv-80633, 2008 WL 660100, at *5 (S.D. Fla. Mar 7 2008)). Further, in the context of fraudulent transfer actions, "[t]he fraudulent act, the clandestine act of hiding money, is allegedly committed by a defendant and another, to the

exclusion of the plaintiff." *Id.* Thus, the plaintiff cannot plead with particularity the facts and circumstances which constitute fraudulent acts. Moreover, as stated by the Florida Supreme Court, "[w]hen the legal effect of a conveyance is to hinder or delay creditors, the intent [to defraud] will be presumed, regardless of the actual motives of the parties." *Ajad Munim, MD, PA v. Azar*, 648 So. 2d 145, (Fla. 4th DCA 1994) (citing *J.I. Kelly Co. v. Pollock & Bernheimer*, 49 So. 934, 935 (Fla. 1909) (internal citations omitted)) (alterations in original). Accordingly, it is inappropriate to import the 1.120(b) pleading requirements that apply to common law fraud claims into fraudulent transfer actions as well.[5]

Defendant also contends that Count IV fails to meet the general pleading requirements of Fla. R. Civ. P. 1.110. Specifically, Defendant claims that there are no allegations that it caused the distributions at issue, and that the Complaint does not specifically allege the indicia of its fraudulent conduct established in Fla. Stat. § 726.105(2). However, Defendant's argument is not supported by the law.

Fla. Stat. § 726.105(2) sets forth specific circumstances which indicate that Defendant acted with the requisite intent to maintain a cause of action. Here, the Complaint contains

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[5] This conclusion is also supported by Fla. Stat. § 726.106 which provides in relevant part that:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Fla. Stat. § 726.106. The fact that nowhere in the statute's definition of "fraudulent" is the term "misstatement," or "omission" demonstrates that showing mandated under Fla. R. Civ. P. 1.120(b) is not required. *See Eagletech Communs., Ins. v. Bryn Mawr inv. Group, Inc.*, 79 So. 3d 855, 861-62 (Fla. 4th DCA 2012) ("In order for a claim of fraud . . . to survive a motion to dismiss it must allege fraud with the requisite particularity required by Florida Rule of Civil Procedure 1.120(b), including who made the false statement, the time frame in which it was made and the context in which the statement was made."). Bankruptcy law also provides for the same result. *See In re F &C Servs., Inc.* 44 B.R. 863, 868-69 (Bankr. S.D. Fla. 1984) (citing cases).

allegations of many of those indicia. The allegations include statements that: (1) Defendant was an insider; (2) the transfer was concealed from the Partnerships; (3) the value of consideration received was not reasonably equivalent to the value of the asset transferred; and (4) the transfer occurred shortly before and shortly after a substantial debt was incurred. *See* Fla. Stat. § 725.105(2). The aforementioned allegations provide evidence of the indicia of fraud set forth in Fla. Stat. § 725.105(2). As such, Defendant's Motion should be denied.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Abraham Newman, Rita Newman, and Gertrude Gordon's Motion to Dismiss Plaintiff's Complaint, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: August 30, 2013

BERGER SINGERMAN LLP

Attorneys for Plaintiffs P & S Associates, General Partnership and S & P Associates, General Partnership

350 East Las Olas Blvd, Suite 1000
Fort Lauderdale, FL 33301
Telephone: (954) 525-9900
Direct: (954) 712-5138
Facsimile: (954) 523-2872

By: /s/ Leonard K. Samuels
Leonard K. Samuels
Florida Bar No. 501610
Etan Mark
Florida Bar No. 720852

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail on this 30th day of August, 2013, upon the following:

Eric N. Assouline, Esq.
Assouline & Berlowe, P.A.
213 E. Sheridan Street, Suite 3
Dania Beach, FL 33004
ena@assoulineberlowe.com
ah@assoulineberlowe.com

Joseph P. Klapholz,, Esq.
Joseph P. Klapholz, P.A.
2500 Hollywood Blvd., Suite 212
Hollywood, FL 33020
jklap@klapholzpa.com
dml@klapholzpa.com

Peter G. Herman, Esq.
Tripp Scott
110 SE Sixth Street, Suite 1500
Fort Lauderdale, FL 33301
PGH@trippscott.com

Michael R. Casey, Esq.,
1831 NE 38th St., # 707
Oakland Park, FL 33308
mcasey666@gmail.com

Michael C. Foster, Esq.
Annette M. Urena, Esq.
Daniels Kashtan
4000 Ponce de Leon Blvd., Suite 800
Coral Gables, FL 33146
Mfoster@dkdr.com
aurena@dkdr.com

Marc S. Dobin, Esq.
Dobin Law Group, PA
500 University Boulevard, Suite 205
Jupiter, FL 33458
service@DobinLaw.com

Julian H. Kreeger, Esq.
2665 South Bayshore Drive
Suite 2220-14
Miami, FL 33133
Juliankreeger@gmail.com

Thomas M. Messana, Esq.
Brett Lieberman, Esq.
Messana, P.A.
401 East Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Tel.: 954-712-7400
Fax: 954-712-7401
tmessana@messana-law.com
blieberman@messana-law.com

Daniel W. Matlow, Esq.
Daniel W. Matlow, P.A.
Emerald Lake Corporate Park
3109 Stirling Road, Suite 101
Fort Lauderdale, FL 33312
dmatlow@danmatlow.com
assistant@danmatlow.com

Richard T. Woulfe, Esq.
Bunnell & Woulfe P.A.
One Financial Plaza, Suite 1000
100 SE Third Avenue
Fort Lauderdale, FL 33394
Pleadings.RTW@bunnellwoulfe.com

Joanne Wilcomes, Esq.
McCarter & English, LLP
100 Mulberry Street
Four Gateway Center
Newark, NJ 07102
jwilcomes@mccarter.com

Thomas L. Abrams, Esq.
1776 N. Pine Island Road, Suite 309
Plantation, FL 33322
tabrams@tabramslaw.com

By: s/ Leonard K. Samuels
Leonard K. Samuels