

**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
HERBERT IRWIG REVOCABLE TRUST'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 Herbert Irwig Revocable Trust's ("Defendant") Motion to Dismiss Plaintiffs' 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:

5186607-2

BERGER SINGERMAN
attorneys at law

Boca Raton Fort Lauderdale Miami Tallahassee

350 East Las Olas Boulevard, Suite 1000 Fort Lauderdale, Florida 33301 Telephone 954-525-9900 Facsimile 954-523-2872

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 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

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.

rightfully belong to the Plaintiffs and should be distributed to the Partners through a court-approved distribution method.

In total, Defendant invested \$50,369.58 in the Partnerships and received \$182,798.16 from the Partnerships – a return of approximately 28%. This return was only possible because Defendant received distributions that it was not entitled to. On or about August 6, 2013, Defendant filed the Motion seeking to dismiss the Complaint. As set forth below, the Motion should be denied.

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).

ARGUMENT

I. PARAGRAPH 14.03 OF THE PARTNERSHIP AGREEMENTS DOES NOT SHIELD DEFENDANT FROM LIABILITY.

Defendant contends that Plaintiffs’ claims are barred by Paragraph 14.03 of the Partnership Agreements because it 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 (Fla. 2d DCA 1995).

The allegations in the Complaint do not fall under the ambit of protection provided by Paragraph 14.03. 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 any Partnership 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 provides that as a result of Sullivan’s conduct, Defendant improperly received and retained distributions which it would not have otherwise been entitled to. As a result, these allegations

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.

**II. PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO
DISMISSAL ON STATUTE OF LIMITATION
GROUNDS.**

Next, Defendant Irwig argues that Counts I through IV should be dismissed because Plaintiffs have not affirmatively plead facts to demonstrate the timeliness of their claims and that such claims are barred by the applicable statutes of limitations. This argument disregards the standard of review on a motion to dismiss.

First, a motion to dismiss may only be granted on statute of limitations grounds “where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law.” *Aquatic Plant Mgmt., Inc. v. Paramount Eng’g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007); *Goodwin v. Sphatt*, 114 So. 3d 1092, 1094 (Fla. 2d DCA 2013) (“A motion to dismiss should only be granted ‘under extraordinary circumstances where the facts in the complaint, taken as true, conclusively show that the action is barred by the statute of limitations’”).

Unless a statute of limitations defense is clearly and unequivocally apparent on the face of the complaint, any such matters are property asserted and determined by Defendants’ affirmative defenses. *Green v. Palatka Daily News*, 108 So. 3d 739, 740 (Fla. 5th DCA 2013) (“The statute of limitations is an affirmative defense and can only be raised in a motion to dismiss if the applicability of the defense is clear from the face of the complaint”); *Vause v. Bay Med. Ctr.*, 687 So. 2d 258, 261 (Fla. 1st DCA 1996) (“Even a relatively straightforward affirmative defense, such as one based upon the statute of limitations, is not a basis for dismissal unless the complaint affirmatively and clearly shows the conclusive applicability of the defense.”); *Pontier v. Wolfson*, 637 So. 2d 39, 40 (Fla. 2d DCA 1994) (“In this case, the appellee

did not file an answer containing affirmative defenses and a review of the four corners of the appellant's complaint does not indicate that the applicable statute of limitations bars his action").

Plaintiffs are unaware of any requirement that they must affirmatively allege facts and attached documents that establish the timeliness of the claims in their Complaint. *See Hanano v. Petrou*, 683 So. 2d 637, 639 (Fla. 1st DCA 1996) (reversing trial court's dismissal on statute of limitations grounds when "the facts giving rise to the defense of the statute of limitations do not affirmatively appear on the face of the appellants' complaint"). Nor have Defendants cited to any law setting forth such a requirement.

Second, Defendant's argument that Plaintiff's claims are barred by the applicable statute of limitations relies on facts that are improperly asserted through their motion to dismiss. In furtherance of their argument, Defendant injects numerous facts outside of the Complaint in an effort to poison this Court's adjudication of this motion. Defendant's conduct is improper on a motion to dismiss. *See Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998) ("in ruling on a motion to dismiss a complaint the trial court is confined to consideration of the allegations found within the four corners of the complaint"). Defendant should instead be required to file an answer and assert any statute of limitations defense through affirmative defenses. *Green v. Palatka Daily News*, 108 So. 3d 739, 740 (Fla. 5th DCA 2013) ("The statute of limitations is an affirmative defense and can only be raised in a motion to dismiss if the applicability of the defense is clear from the face of the complaint").

Accordingly, Defendant's argument regarding the statute of limitations should be rejected.

III. PLAINTIFF'S MOTION FOR A MORE DEFINITE STATEMENT.

Defendant alternatively moves for a more definite statement because the Complaint is allegedly vague. Specifically, Defendant claims that because the Complaint does not contain allegations concerning the timing of the distributions at issue, that it must be re-pled. However, that argument holds no water because, under the relevant law identified above, Plaintiffs do not need to affirmatively plead that their claims are not barred by the applicable statute of limitations. Defendant's argument for a more definite statement under Florida Rule of Civil Procedure 1.140(e) is therefore meritless.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Herbert Irwig Revocable Trust'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: September 13, 2013

BERGER SINGERMANN 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 13th day of September, 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

5186607-2

-8-

BERGER SINGERMAN
attorneys at law

Boca Raton Fort Lauderdale Miami Tallahassee

350 East Las Olas Boulevard, Suite 1000 Fort Lauderdale, Florida 33301 Telephone 954-525-9900 Facsimile 954-523-2872

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