

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

CASE NO. 12-028324 (07)
Complex Litigation Unit

P & S ASSOCIATES, GENERAL
PARTNERSHIP and S & P ASSOCIATES,
GENERAL PARTNERSHIP,

Plaintiff,

v.

ROBERTA P. ALVES, ET AL.,

Defendants.

**DEFENDANT, CONGREGATION OF THE HOLY GHOST, WESTERN PROVINCE'S
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendant, Congregation of the Holy Ghost, Western Province, by and through undersigned counsel, and pursuant to Fla. R. Civ. P. 1.510, submits its Opposition to Plaintiffs' Motion for Summary Judgment, and in support thereof, states as follows:¹

INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs' Motion seeks to approve the Partners' determination claims and establish the Net Investment Method as the proper method of distribution for determining the Partners' allowed claims. Plaintiffs have determined that each Partner generally falls within one of two classes, depending on the amount of distributions received by the Partnerships. Net Losers are Partners who contributed more cash to the Partnerships than they received in distributions. Net Winners are

¹ This Defendant has moved for Summary Judgment in the related case, Smith v. Hooker, also known as the "net winners" case, on statute of limitations grounds.

Partners who received more in distributions from the Partnerships than they made contributions. The Motion recommends that the Net Losers be entitled to an allowed claim in the amount of their net losses. As such, the Plaintiffs propose to distribute the Partnership Property on a *pro rata* basis to the Net Losers based on their allowed claims. Accordingly, the Plaintiffs object to all claims of the Net Winners.

Plaintiffs argue that the only source of the Partnerships' purported profits was derived from the Madoff ponzi scheme. As a result of the Partnerships' investments in the ponzi scheme, Plaintiffs argue that any Partnership profits are fictitious. As such, Plaintiffs seek to establish an equitable method of distribution that accepts the premise that no profits were ever earned by the Partnerships or their respective Partners. In Plaintiffs' view, the method of distribution should be an equitable one because any other method would only serve to "legitimize" the ponzi scheme.

However, Plaintiffs' argument ignores the distribution method as described in the Partnership Agreements. As noted in the Motion, the Partnership Agreements specifically describe the proper method of distribution of Partnership assets. In distributing Partnership assets, liabilities are paid first. Following payment of any liabilities, each Partners' capital is to be returned in accordance with their partnership interests. Next, it is necessary to determine each Partners' partnership interest so that they may receive a *pro rata* share. Finally, no evidence is of record as to the propriety or impropriety of distributions that were, in fact, made to partners who have long since withdrawn from the partnership.

STANDARD OF REVIEW

It is well established that a summary judgment should be granted only when there is a complete absence of genuine issues of material fact. *Copeland v. Florida New Investments Corp.*, 905 So. 2d 979, 980 (Fla. 3d DCA 2005). Summary judgment is proper if there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Florida Rule of Civil Procedure 1.510(c) provides that summary judgment:

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The movant carries a heavy burden. “In reviewing a summary judgment, [the court] must consider all record evidence in a light most favorable to the non-moving party. *Mills v. State Farm Mut. Auto. Ins. Co.*, 27 So. 3d 95, 96 (Fla. 1st DCA 2009). If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issue, it should be submitted to the jury as a question of fact. *DiMarco v. Colee Court, Inc.*, 33 Fla. L. Weekly D 751 (Fla. 4th DCA 2008) (reversing grant of summary judgment) (quoting *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). “If the pleadings, discovery, depositions, and admissions ‘reveal the possibility of genuine issues of material fact, or **even the slightest doubt**, summary judgment should be **denied**.’” *Rakusin Law Firm v. Estate of Dennis*, 27 So. 3d 166, 167 (Fla. 3d DCA 2010) (emphasis added).

I. The method of distribution is governed by the Partnership Agreements

In the Motion, the Plaintiffs appear to be arguing that the Partners invested directed in the ponzi schemes. However, there is no evidence to support this argument. As far as the Partners are concerned, their contributions to the Partnerships were not investments in a ponzi scheme. Rather, the Partners invested in either of the Partnerships. In turn, the Partnerships took the Partners' contributions and invested these contributions in what turned out to be the Madoff ponzi scheme.² The Plaintiffs have not introduced any evidence to support the inference that the Partnerships themselves were a part of the Madoff scheme. The Plaintiffs have only demonstrated that the Partnerships made investments in the Madoff scheme which were unprofitable for the remaining partners. As such, since the Partnership Agreements are still in effect, they still govern the method of distribution of the Partnership Property.

The Plaintiffs have introduced no evidence that would allow for a distribution of the partnership assets outside of the method of distribution described in the Partnership Agreements. Plaintiffs are quick to reference the method of distribution chosen by the Madoff Trustee in the Madoff litigation. Plaintiffs also argue that the Net Investment Method has become the preferred method for distribution of Ponzi assets. While this may be true, as noted above, the distinction is that in those cases cited by the Plaintiff, the assets were actually monies that were invested in a ponzi scheme. There was no other agreed-upon method, such as a Partnership Agreement, governing the

² This analysis is further bolstered by the fact that, as Plaintiffs admit, the Madoff Trustee has approved claims made by the Partnerships against the Madoff fund. If the Plaintiff Partnerships were, themselves, ponzi schemes, then it would follow that no funds, or minimal amounts, would have been invested in the Madoff funds and the Trustee would have denied claims. This is not the case in the matter at bar.

distribution of the fraudulent assets. In the instant case, however, the assets to be distributed are Partnership assets that were separately invested in the Madoff scheme. Because the Partnerships were victims of the ponzi scheme, and the Partners derivatively, the assets should be distributed in accordance with the Partnership Agreements.

The existence of valid Partnership Agreements renders summary judgment as to any alternative method of distribution of Partnership Property improper. As Plaintiffs point out in their Motion, Article Four, Article Eleven, Article Five, and Article Twelve of the Partnership Agreements address the contribution and distribution of Partnership assets. The Plaintiffs have introduced no evidence to suggest that a deviation from the Partnership Agreements is warranted. As such, the Partnership assets should be distributed in accordance with the method agreed upon by the Partners in the Partnership Agreement.

CONCLUSION

Based on the foregoing, the Plaintiffs have failed to satisfy their burden that there are no genuine issues of material fact. To the contrary, the evidence here is conflicting, permits different reasonable inferences, and tends to prove the issues in this case. Clearly, there is a question of fact as to whether Partnership assets should be distributed in accordance with the Partnership Agreements. Accordingly, Plaintiffs' Motion for Summary Judgment for distribution in any manner other than in accordance with the Partnership Agreement should be denied.

DATED: September 27, 2013

Respectfully Submitted,

/s/ Marc S. Dobin

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P&S Associates, General Partnership, et al. v.
Alves, et al.
Case No. 12-028324 (07)
Page 6

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email
this 3rd day of September, 2013, to:

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