

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

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

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

Plaintiff,

v.

ROBERTA P. ALVES, ET AL.,

Defendants.

**CONSERVATOR'S MOTION TO STRIKE
CERTAIN PARTIES AFFIRMATIVE DEFENSES**

Philip J. von Kahle (the “**Conservator**”), as Conservator for P&S Associates, General Partnership (“**P&S**”) and S&P Associates, General Partnership (“**S&P**”) (together, the “**Partnerships**”), by and through undersigned counsel, hereby files this motion to strike pursuant to Florida Rule of Civil Procedure 1.140(b) certain affirmative defenses asserted by Robert A. Uchin Revocable Trust (“**Uchin**”), Kathleen G. Walsh, James R. (deceased) & Kathleen Walsh, Margaret B. Gwinn Trust, Walsh Family Trust #1, Walsh Family Trust #2, Walsh Family Trust #3, Robert G. Walsh Family Trust #1, Robert G. Walsh Family Trust #2, Robert G. Walsh Family Trust #3, Robert G. Walsh Family Trust #4 (collectively, the “**Walsh Family Claimants**”), Dalores Barone, Carl Boschetti, Annette Boschetti, and Denise Bryan (Collectively, the “**Boschetti Defendants**”); Sam and Edith Rosen (the “**Rosen Defendants**”), and states as follows:

Argument

1. To resolve the dispute between various partners as to an appropriate distribution method, in July of 2012, the Partnerships filed the instant interpleader action (the “**Interpleader Action**”).

2. On January 17, 2013, this Court appointed Philip Von Kahle as Conservator of the Partnerships in a parallel proceeding¹ by entering the *Order Appointing Conservator* (the “**Conservator Order**”).

3. The Conservator Order directs the Conservator to, among other things, advance the Interpleader Action.

4. On July 17, 2013, the Conservator filed the Third Amended Complaint in the Interpleader Action. The Third Amended Complaint added certain parties (among others, previously omitted Partners of the Partnerships), to furnish same with notice of the pendency of the Interpleader Action. It did not make substantive changes.

5. Consistent with the Conservator Order, the Conservator has served a majority of the parties in the Interpleader Action. Certain parties have filed responses which assert non-meritorious or frivolous defenses which ought to be struck without dedicating significant resources of the Court, the Partners, and the Partnerships’ estate.

6. On August 28, 2013, Uchin filed his answers and affirmative defenses (the “**Uchin Answer**”).²

7. On August 30, 2013, the Walsh Family Claimants filed their answers and affirmative defenses (the “**Walsh Answer**”).

8. On September 11, 2013, the Boschetti Defendants filed their answers and affirmative defenses. (the “**Boschetti Answer**”).

9. On September 19, 2013, the Rosen Defendants filed their answers and affirmative defenses. (the “**Rosen Answer**”, collectively with the Uchin Answer, Walsh Answer, and the Boschetti Answer, the “**Answers**”).

¹ *Matthew Carone, et. al. v. Michael D. Sullivan*, Case No. 12-24051 (07) (the “**Conservator Suit**”).

² Uchin has subsequently agreed that the Court may resolve the Interpleader Action. Uchin is included in this motion to strike to narrow the issues before the Court.

10. The Answers state, among other things, as an affirmative defense that the Third Amended Complaint “fails to state a cause of action for relief” (the “**Affirmative Defense**”).³

11. Florida Rule of Civil Procedure 1.140(b) provides that “a party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.”

12. The Affirmative Defense ought to be stricken as it is impertinent to the resolution of the Interpleader Action which seeks a determination as to the appropriate method of distribution to the Partners. The presence of the Affirmative Defense, while meritless, is an unnecessary distraction to the Court’s determination of the appropriate distribution methodology.

13. Only Counts 1 and 2 of the Third Amended Complaint are conceivably applicable to Uchin, the Walsh Family Claimants, and the Boschetti Defendants.⁴ Both counts state a cause of action.

14. Count 1 is a count for Declaratory Relief. Fla. Stat. Ch. 86, the Florida Declaratory Judgments Act, authorizes parties to seek judicial determination of their relative rights related to a written document. Fla. Stat. §86.021. The Third Amended Complaint states that the defendants, including: Uchin, the Walsh Family Claimants, the Boschetti Defendants, and the Rosen Defendants, are parties to a written partnership agreement and have a dispute as to their rights under same and request this Court’s direction. Complaint ¶¶ 349-50; 385-86. These allegations are sufficient to state a cause of action for Declaratory Relief under Fla. Stat. §86.021.

³ On June 28, 2013, certain of the Walsh Family Claimants filed a Notice of Non-Objection to the Conservator’s Motion for Summary Judgment in the Interpleader Action (the “**Walsh Notice**”). The Walsh Notice does not contain any affirmative defenses. Accordingly, it is the Conservator’s position that the Walsh Family Claimants waived the Affirmative Defense. Moreover, the Walsh Answer is puzzling given the prior support for the Conservator’s distribution recommendation for the Interpleader Action reflected in the Walsh Notice.

⁴ The Boschetti Defendants refer to Count 3 in their answer, which is a count for an injunction. The Third Amended Complaint provides a list of the defendants it seeks to enjoin in ¶ 393. The Boschetti defendants are not named in the relevant paragraph. Accordingly, the Affirmative Defense is inapplicable to Count 3.

15. Count 2 is a count for Interpleader. Florida Rule of Civil Procedure 1.240 authorizes a party to institute an interpleader. “[A]n interpleader plaintiff is only required to demonstrate that the stakeholder is or may be exposed to double liability for more than one claim to the same funds or property.” *Zimmerman v. Cade Enters. Inc.*, 34 So.3d 199, 202 (Fla. 1st DCA, 2010).

16. Among other things, the Third Amend Complaint states a cause of action for interpleader where it states:

The Plaintiffs are in a position of indifference, having no independent liability to any of the Defendants, are merely a stakeholder of the Defendants’ property, and may be exposed to multiple liabilities unless the property is properly distributed among the Defendants.

(Third Amended Complaint at ¶ 391.)

17. Therefore, the Third Amended Complaint provides necessary facts for declaratory relief and an interpleader action.

18. Accordingly, the Court ought to strike the Affirmative Defense to narrow the issues before the Court and to avoid a waste of the judicial, the Conservator, and the Partners’ resources.

WHEREFORE the Conservator request that this Court enter an Order striking Uchin, the Walsh Family Claimants, the Boshetti Defendants, and The Rosen Defendants’ Affirmative Defense, and for such other relief as the Court deems just and proper.

Respectfully submitted this September 27, 2013.

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