

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

**MARGARET J. SMITH as Managing General
Partner 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,**

CASE NO.: 12-034121 CA 04

Plaintiff,

v.

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

Defendants.

**DEFENDANT ERSICA P. GIANNA'S MOTION TO DISMISS, MOTION
FOR DEFINITE STATEMENT, AND MOTION TO COMPEL ARBITRATION**

Defendant, Ersica P. Gianna ("EG"), moves to dismiss the Amended Complaint (the "Complaint"), for a more definite statement, and for this Court to compel arbitration, and as grounds sets forth:

A. Generally Applicable Grounds for Dismissal and/or a More Definite Statement

1. All counts in the Complaint should be dismissed, as the Partnership Agreements attached to the Complaint make reference to an Exhibit A,¹ which sets forth who the partners are and their respective interests. This exhibit is missing from the Complaint and without it the Complaint fails to state a claim in that these contracts do not make any reference to any of the

¹ Exhibit A is referred to in the Partnership Agreements in the opening paragraph as well as in Sections 4.01 and 14.06 of the agreements. This exhibit was the subject of the motion to dismiss directed at the initial Complaint and has still not been attached.

individual investor defendants.

2. Moreover, both of the Partnership Agreements attached to the Complaint are unsigned, do not contain any signature block, and appear incomplete. Therefore, all counts in the Complaint should be dismissed, and this case should go no further unless the Plaintiff can attach complete executed copies of the Partnership Agreements upon which they rely.

3. In addition, Exhibits E and G of the Complaint are only relevant to one of the particular named defendants, which is not EG. Plaintiff should be required to attach the demand letters that were sent to EG, so as to show exactly when the distributions were made as to EG, not just a sampling of a letter that was sent to one of the defendants joined.

4. Similarly, all the counts in the Complaint rely on the claim that monies received from the partners were invested with Bernard Madoff investments. However, as stated in paragraph 39 of the Complaint, the former managing partners of the Partnerships invested “the majority of those funds” with Madoff. Exactly what portion of the investment was made with Madoff is not defined. Nor is any timeframe as to when investments were made with Madoff as opposed to other investments is also not defined. Based upon the manner in which the Complaint is drafted it is unclear whether any of the non-Madoff investments generated a profit for the partnership or the amount of that profit.

5. With the inclusion of the amounts invested with Madoff, and the flow of funds in and out by date and amount, which Plaintiff admits was determined (Complaint, ¶ 49), defendant would be able to respond to the allegations. Without this crucial information, it is unclear, which, if any, of the named defendants received any allegedly tainted monies, and when. Therefore, as it relates to this critical overriding aspect of this entire case, Plaintiff should be ordered to specify exactly what portion of the invested funds were made with Madoff and where

the rest of the funds were invested with a more definite statement under Fla.R.Civ.P. 1.140(d).

6. The Complaint should be dismissed as to EG in that the Complaint alleges that EG is a Trustee, but does not specify the basis of the trust. Absent any identifying information regarding EG's representative capacity the Complaint should be dismissed with leave to allow the Plaintiff to articulate the basis upon which it is suing EG.

7. Pursuant to Florida Rule of Civil Procedure 1.070(j), the Complaint was not timely served on EG. The Complaint was filed with the Clerk on December 10, 2012. The date of service on EG was June 21, 2013. More than 120 days lapsed before EG was served, without leave of Court. Therefore, pursuant to Florida Rule of Civil Procedure 1.070(j), the Complaint should be dismissed and EG should be dismissed as a party to this action.

B. The Partnership Agreements Contains a Partner Exculpation Clause

8. Counts I through IV of the Complaint should all be dismissed with prejudice, because Article 14.03 of both of the Partnership Agreements (even if signed copies were ever produced) include an exculpation clause that limits the liability for the investor partners (including EG) for all but fraud and fiduciary duty claims.

9. In particular, Article 14.03, which is titled "Limitations on Liability" addresses the individual partner's personal liability and states:

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 THE AUTHORITY CONFERRED BY THIS AGREEMENT.

Partnership Agreement, § 14.06 (all capitals in original with emphasis added).

The focus of this section is on the limited liability an investor partner has to the other partners and to the partnership. Plaintiff does not allege that EG, or any of the other individual

investor defendant partners for that matter, did not act in good faith. Therefore, the only count that may possibly survive this contractual limitation, if this Court is interpret this section to apply as to the acts of the managing partner, is Count V, (but see statute of limitation discussion below). Therefore, Counts I-IV should all be dismissed with prejudice.

C. As Alleged, the Statute of Limitations Bars Most of Plaintiff's Claims

10. As to Counts I and II, which at best have a five (5) year statute of limitations (if not less for the fabricated statutory negligence claim under Count I), any claim for return of any distributions made to partners can only have a look back of five years from the date this action was initially filed on December 12, 2012.² Looking at the chart attached to the Complaint referencing EG, it appears that in the five year time frame before the filing of this action only \$14,775.47 in transfers was received by EG in 2008. This amount falls below the minimum jurisdictional threshold of the Circuit Court and constitute grounds to dismiss this action for lack of subject matter jurisdiction.

11. Counts III (for Unjust Enrichment), IV (for Money Had and Received), and V (for Fraudulent Transfers) all have a four (4) year statute of limitations and should be dismissed *in toto*. In fact, as alleged in the Complaint and its attachment, none of the distributions were made within four years of the filing of the Amended Complaint or the initial Complaint for that matter. Therefore, Counts III through V should all be dismissed with prejudice.

12. Moreover, as to Count V (for Fraudulent Transfers), the "Savings Clause" in Fla. Stat. § 726.110(1) provides that a claim for fraudulent transfers may be raised within one year of the time the transfer or the obligation was or could have been discovered by the claimant.

² This five year look back is presuming the Court extends the same look back on the new theories included in the Amended Complaint that were not included in the initial Complaint. If not, then the look back would be from November 4, 2013, the date this Court granted Plaintiff's motion to amend the Complaint.

According to the Complaint, the transfers at issue all occurred no later than some time in 2008. At the time, and thereafter, the managing partners as well as those that stepped into their shoes had more than ample information and years of time to address these alleged claims between the partners. At this stage, the Savings Clause is of no moment to this litigation and does not save the Plaintiff's claims from dismissal.

D. Particular Grounds to Dismiss Counts

13. Count I for Breach of Statutory Duty (Negligence) should be dismissed, in that it is not clear from the count what statutory duty the Plaintiff is relying on to establish a recognized cause of action. From the title of Count I it appears that the Plaintiff is relying on a duty to not be negligent. However, the only statute referred to in Count I is Fla.Stat. § 620.8807, which is not a statute that provides for any statutory cause of action to the Plaintiff. Rather, the statute provides that partners that are determined to have paid more than their share of the partnership's losses to seek such apportionment from the other partners. Even if the Plaintiff sought to enforce this provision of the statute, he cannot because he does not have the standing to bring any such claim. Moreover, Count I is missing any Wherefore clause to provide the defendants with any guidance as to the relief the Plaintiff is seeking. Therefore, Count I should be dismissed.

14. Count II for Breach of Contract should be dismissed in that this count, like the others, is based upon an unspecified claim of excessive distributions. The Complaint does not articulate how much was processed through Madoff, or when, and rather lumps all the defendants in the same group of alleged recipients regardless of time or amount. Therefore, Count II, for breach of contract as to an unspecified amount should be dismissed.

15. As to Count V for fraudulent transfer, this is a count that must allege the fraud that occurred with particularity. There is no allegations as to who, what, where, and when in this

count. In particular, the count should state which partners committed the fraud, with the requisite intent, and who received what amount of money, and when, and details of the transaction. This count is conclusory in its nature, and subject to dismissal.

E. The Claims are Subject to Arbitration

16. The Complaint should be dismissed because the Partnership Agreements referenced in the Complaint contain an arbitration provision, and this matter must be heard by arbitration. In particular, section 14.08 of both agreements, titled "Disputes", contains a mandatory arbitration provision. Therefore, this Court should dismiss this action and the Plaintiff should be compelled to file an arbitration if she seeks to enforce the agreements.

17. Pursuant to the Local Rules of the Complex Litigation Division of Broward County, a good faith effort has been made to address the issues set forth in this motion in advance of its filing.

WHEREFORE, Defendant Ersica P. Gianna respectfully requests this Court dismiss the Complaint as set forth herein, and/or order the Plaintiff to provide a more definite statement, and/or compel arbitration of the claims alleged, and for such other reasons as this Court finds just, fair, and equitable.

Dated: December 3, 2013

Respectfully submitted,

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Attorney for Ersica P. Gianna

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing was furnished Via Electronic mail this 3rd day of December, 2013 to the following Service List:

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Courtesy copies of the foregoing is being delivered to the court immediately upon being filed with the Clerk of the Court at the following address:

The Honorable Jeffrey E. Streitfeld
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By: /s/ Eric N. Assouline
Eric N. Assouline