

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

CASE NO. 12-034123 (07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.

DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES'
JOINT MOTION FOR JUDGMENT ON THE PLEADINGS
AND FOR SUMMARY JUDGMENT AS TO
FRAUDULENT TRANSFER (COUNT IV)

Defendants, Frank Avellino and Michael Bienes (collectively the “Defendants”), by and through their undersigned counsel, move this Court to enter a Judgment on the Pleadings pursuant to Rule 1.140(c), Florida Rules of Civil Procedure on the sole remaining cause of action against Defendants, Count IV for fraudulent transfer (the “Claim”), as Plaintiffs failed to state a viable cause of action for fraudulent transfer. Alternatively, or additionally, Defendants request this Court to enter an order granting summary judgment on the Claim pursuant to Rule 1.510, Florida Rules of Civil Procedure, as there are no material issues of fact and Defendants are entitled to judgment as a matter of law. The grounds upon which each motion is based are as follows:

MOTION FOR JUDGMENT ON THE PLEADINGS

1. A motion for judgment on the pleadings may be granted when the moving party is clearly entitled to a judgment based solely on the content of the pleadings. Rule 1.140(c), Florida Rules of Civil Procedure. In the instant case, taking what Plaintiffs have alleged in the

Claim as true, Plaintiffs have failed to state a cause of action for fraudulent transfer pursuant to Section 726.105(1)(a), *Fla. Stat.*

2. Section 726.105(1)(a), *Fla. Stat.* permits a creditor to avoid a transfer by a debtor that was made with intent to defraud a creditor, to the extent necessary to satisfy the creditor's claim. Plaintiffs have pled that the individual partners were the creditors of the Partnerships at the time of the Fraudulent Transfers¹ (¶¶80)² and that the transfers were made with the actual intent to hinder, delay or defraud a creditor of the Partnerships (presumably the individual partners) (¶¶82). The individual partners are not parties to this action, so the pleading fails as a matter of law. Furthermore, the Partnerships, as a matter of law, cannot bring these claims on behalf of the individual partners, as they are direct claims. *See Alario v. Miller*, 354 So.2d 925, 926 (Fla. 2d DCA 1978); *Karten v. Woltin*, 23 So.3d 839, 840-41 (Fla. 4th DCA 2009).

3. In the same Claim Plaintiffs have alleged that the Partnerships were the creditors of Michael Sullivan ("Sullivan"), Sullivan & Powell/Solutions in Tax ("S&P") and Michael D. Sullivan & Assoc. ("MDS") (¶¶89, 90, 91, 92), who were the debtors who made the Fraudulent Transfers to Avellino and Bienes (¶¶79, 82, 84, 88, 91, 92) and that such transfers were made with the actual intent to defraud their creditors, which included the Partnerships (¶¶91, 92). Plaintiffs also allege that the money which was transferred was owned by the Partnerships and was the property/asset of the Partnerships (¶¶79, 81, 87, 88). However, the Partnerships, as a matter of law, cannot maintain a cause of action both as creditors and debtors for a fraudulent transfer based upon the transfer of their own property.

¹Yet the Fraudulent Transfers are defined as the payments Michael Sullivan made to Defendants, Avellino, Bienes and Steve Jacob ("Jacob") (¶79), and the individual partners are not alleged to be creditors of Sullivan, but of the Partnerships.

² Paragraph citations are to the Fifth Amended Complaint ("5AC").

4. Therefore, taking the allegations as pled by the Plaintiffs as true, Plaintiffs have failed to plead a viable cause of action for fraudulent transfer pursuant to Section 762.105(1)(a), *Fla. Stat.*, and thus, Defendants are entitled as a matter of law to a Judgment on the Pleadings as to Count IV.

MOTION FOR SUMMARY JUDGMENT

5. The grounds upon which Defendants' Motion for Summary Judgment are based are as follows:

- There exists no underlying claim against Sullivan for the transfers to satisfy;
- Plaintiffs cannot satisfy the necessary element that the transfers were made by Sullivan "with actual intent to hinder, delay or defraud a creditor of the Partnerships";
- the Claim is time barred;
- the transfers at issue are the transfer of the Plaintiffs' own property;
- the claimants are individual partners, and not parties to this suit;
- the Partnerships are not Creditors.

Background

6. On December 10, 2012, Plaintiffs filed their initial Complaint against Defendants and others. MFS IV³ ¶1. Plaintiffs subsequently filed five amended complaints. On December 18, 2014, the Court dismissed with prejudice Plaintiffs' fraud claims against Defendants on statute of limitations grounds.

7. Plaintiffs' 5AC contained six causes of action against Defendants. On October 28, 2016, this Court entered an order (the "Order") granting Defendants' motion for summary

³ MFS IV refers to the Material Factual Statement as to Fraudulent Transfer Count IV filed contemporaneously with this motion.

judgment as to all but one count as time barred, leaving pending only the fraudulent transfer Claim as to the Defendants and Jacob.⁴

The Fraudulent Transfer Claim

8. The Claim is confusing, at best, and virtually unintelligible, combining different theories in an attempt to somehow, through an impermissible shotgun approach, provide enough information for a cause of action. For example, the Claim treats the Partnerships both as the creditors of Sullivan (¶¶ 89, 90) and as the debtors which made the Fraudulent Transfers (¶¶79, 80, 88). It treats both the individual partners as the creditors (¶80) and the Partnerships as the creditors. (¶¶ 89, 90). Plaintiffs cannot prove either theory, and the facts which have been discovered to date reflect that a fraudulent transfer claim against the Defendants does not, as a matter of law, exist.

9. The Claim seeks to avoid fraudulent transfers under § 726.105(1)(a), *Fla. Stat.*, which provides that a transfer made by a debtor is fraudulent as to a creditor, regardless of whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer or incurred the obligation “with actual intent to hinder, delay, or defraud” a creditor of the debtor.⁵

10. A “claim” is defined as “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;” a “creditor” is “a person who has a claim,” a “debt” is a “liability on a claim,” and a “debtor” is a “person who is liable on a claim.” § 726.102, *Fla. Stat.* (4, 5, 6, 7). There can be no fraudulent transfer without a “right to payment.”

⁴ Count II (Negligence) also remains pending against Steven F. Jacob, CPA and Jacob, individually.

⁵ Plaintiffs apparently brought this Claim under §726.105(1)(a), which requires proof of “actual intent,” rather than under §726.105(1)(b), because only subsection (a) has the additional one year discovery statute of limitations provision in addition to the four year period, while section (b) does not. See, §726.110(1). As this Court has already determined, the four year statute of limitations has run on these claims. Order at 6, 8.

11. The plaintiff in a fraudulent transfer claim must be a “creditor” of a “debtor” which transferred its assets; no claim exists if the plaintiff is the debtor which transferred its own assets.

I. Plaintiffs Have No Existing Underlying Claim against Sullivan

12. The fundamental premise of a fraudulent transfer cause of action is the existence of an underlying claim which a fraudulent transfer could satisfy. Plaintiffs have sought avoidance of the transfers which, pursuant to statute, is only allowed “to the extent necessary to satisfy the creditor's claim,” and only for the *lesser* of the value of the asset transferred, or the amount necessary to satisfy the creditor's claim. ¶¶726.108(1)(a); 726.109(2), *Fla. Stat.* However, there is no “claim” which the Plaintiffs have against Sullivan. Plaintiffs’ claim against Sullivan was reduced to a judgment against him and then was satisfied, and Sullivan and MDS were released from any and all claims Plaintiffs had against Sullivan and MDS. MFS IV ¶7B; Affidavit of Michael Sullivan, sworn to December 5, 2016, submitted in support of Defendants’ motion (“Sullivan Aff.”) ¶4 and Exs. A and B. Without a valid, existing claim against Sullivan, there can be no fraudulent transfer.⁶ Furthermore, the amount necessary to satisfy the Partnerships’ claim against Sullivan and MDS is zero, and judgment can only be recovered up to that amount.

II. Plaintiffs Cannot Prove Intent to Defraud Creditors

13. Forced to bring their Claim under subsection (a) of §726.105(1) to take advantage of the one-year savings clause to try to avoid the Claim from being time barred, Plaintiffs must prove Sullivan’s actual intent to defraud. They cannot. Sullivan had no intent to defraud his

⁶ While referenced in the complaint randomly, “Sullivan & Powell/Solutions in Tax” is not named as a defendant in any capacity, so even if they had made fraudulent transfers, the Plaintiffs do not have an existing claim against them because the statute of limitations as to any claims which the Partnership had against them long since expired. Sullivan & Powell Inc. and Solutions in Tax, Inc. are two distinct entities which were never named as defendants in this suit.

creditors, whoever they might be, and Plaintiff cannot prove – by inference or otherwise – that he did. As reflected in the affidavit of Sullivan, MFS IV ¶7B; Sullivan Aff., ¶¶ 5-9, even if every reasonable inference is drawn in favor of Plaintiffs, and if every conceivable “badge of fraud” is considered, there can be no finding of Sullivan’s actual intent to defraud as a matter of law.⁷

III. The Fraudulent Transfer Claim is Time Barred

14. The statute of limitations expires at the latest either four years from each transfer or one year from when the Plaintiffs knew or could reasonably have discovered the transfers – each of which occurred long before this suit was filed. This Court has previously determined that the four year statute of limitations has run on all of Plaintiffs’ claims. Order, p. 10. Thus, in order to keep their Claim alive, Plaintiffs must satisfy the one year “knew or could reasonably have discovered” savings provision of § 726.110(1), *Fla. Stat.* Order, pp. 5, 9.

15. The Partnerships’ books and records, which were at all times available to the partners to inspect, reflected the payments to Avellino and Bienes. MFS IV 7A, 7B; Jacob Aff., ¶6, Sullivan Aff., ¶2. In order to refute the fact that the Partnerships could reasonably have discovered the transfers about which they now complain long before the expiration of the one year limitations period, Plaintiffs have argued that the Partnerships’ records did not contain information about the “kickbacks.” This argument contradicts Plaintiffs’ sworn evidence to the contrary:

The books and records *of P & S* indicate that Bienes *received a Kickback* (as defined in the operative complaint in this action) in relation to those general partners’ investments with P & S. (emphasis added)

MFS IV ¶9A; Plaintiffs’ Revised Responses to Bienes’ First Set of Interrogatories, pp. 3 and 8

⁷ Section 726.105 (2) (a) through (k), *Fla. Stat.*, identifies the badges of fraud which may be considered in determining actual intent. None of these factors apply.

Every year the partnerships' management fee Ledger contained information concerning *fees* which were accrued or *paid to Avellino or Bienes*. (emphasis added)

MFS IV ¶9B, Interrogatory 8, Plaintiffs' Responses to Frank Avellino's Third Set of Interrogatories. See also, Defendants' Reply to Plaintiffs' Response to Defendants' Amended Joint Motion for Summary Judgment.⁸

16. Plaintiffs have therefore proven through their own sworn evidence that the books of the Partnerships revealed that Avellino and Bienes received the payments, about which they now complain. Furthermore, a letter written in the summer of 2012 by several of the Partnerships' partners to other partners admitted that even a preliminary review of the Partnerships' documents revealed that Sullivan paid management fees to Avellino and Bienes. MFS IV 7A; Affidavit of Steven Jacob, sworn to December 5, 2016, submitted in support of Defendants' motion ("Jacob Aff."), Ex. F. These Partnership documents were turned over to an accountant retained by a partner in November 2011 (more than a year before the filing of the initial complaint) to conduct a forensic audit. MFS IV 7A; Jacob Aff. ¶13.

17. Thus, Partnership records which reflected the payments to Avellino and Bienes were actually in the possession of the Partnerships more than a year before the filing of the initial complaint in this action. Not only were documents turned over in 2011, but in 2008 the documents were made available to a partner who went to the Partnerships' offices to review them, and who was told then of the payments to Avellino and Bienes. MFS IV 7A, 7B; Sullivan Aff., ¶ 10; Jacob Aff., ¶ 11. Furthermore, not only had a partner of the Partnerships been given specific documents referencing the payments to Avellino and Bienes, but also at all times partners had unfettered access to, and therefore knowledge of, records which reflected that

⁸ The Reply to the Plaintiffs' Amended Joint Motion for Summary Judgment, and all documents filed in conjunction with same, are incorporated herein.

Sullivan and MDS had made the payments to Avellino and Bienes which constitute both the “claim” Plaintiffs allege Sullivan had, and the fraudulent transfer which now they seek to avoid. MFS IV §§7A, 7B, 9A, 4A, 4B, and 5. Additionally, all individual partners were sent the documents which reflected the payment of management fees at least as far back as 1999. MFS IV §§7A, 7B; Jacob Aff., ¶ 7. Notice to any single partner is notice to the Partnerships. § 620.8102(6), *Fla. Stat.* The ability to access the partnerships’ records meant that partners and, therefore, the Partnerships, had a reasonable opportunity to discover the transfers to Avellino and Bienes. The fact that the records were delivered to an accountant for a partner in 2011 and shown to a partner on site in 2008 constitutes proof of actual knowledge.

IV. Transfers of the Plaintiffs’ Assets Cannot Constitute Fraudulent Transfers

18. According to specific allegations within the Claim, it is apparently premised, at least in part, upon the theory that the Partnerships (i.e. plaintiffs) transferred their own assets. The Kickbacks are the fraudulent transfers and “constituted the transfer of *an interest of the Partnerships* in property” (¶79); this action brings claims that “are *owned by the Partnerships*” (¶81) “All of the money transferred to Avellino and Bienes, as subsequent transferees, was improperly diverted assets of one or more *of the Partnerships*”; (¶87) “The Fraudulent Transfers were made from funds of the *Partnership...*”; (¶88, emphasis added). To the extent that the Partnerships seek damages based upon a transfer of their own property, the claim cannot be maintained. These allegations, at best, are superfluous and would be impossible to maintain because the Partnerships cannot assert a claim for fraudulent transfer of *their own* property. If judgment on the pleadings is not granted as to these claims, then Defendants request partial summary judgment as to all allegations and requests for relief based upon the transfers of the Partnerships’ own assets.

V. The Claim is asserted on behalf of Nonparties

19. Furthermore, those allegations, and others, are premised upon the theory that the individual partners are the creditors entitled to maintain the Claim. Paragraph 80 of the 5AC explicitly alleges that the “partners of the Partnerships were creditors of the Partnerships at the time when the Fraudulent Transfers occurred.” However, the individual partners are not parties to this action, and to the extent that the Claim is based upon their status as creditors of the Partnerships or of any other person or entity, it cannot be maintained. The Conservator as a plaintiff does not have standing to assert claims on behalf of the individual partners of the Partnerships. These allegations, too, are superfluous and cannot form the basis of the Claim brought by the Partnerships. To the extent judgment on the pleadings is not entered, partial summary judgment is therefore warranted as to all allegations and requests for relief based upon the status of anyone other than Partnerships themselves as creditors.

VI. The Partnerships are not the Creditors

20. Another theory espoused in the Claim is that the Partnerships were creditors of Sullivan, S&P and MDS, “as a result of their receipt of improperly transferred funds”. (¶¶ 89, 90, 91, 92). This theory, too, fails as a matter of law because:

A. The “fraudulent transfers” constitute both the “claim” and the “transfer” and is nothing but a circular argument made in an effort to create both, independently required, elements of the cause of action.

B. Under this theory, the transferred assets must be those of the debtor Sullivan, yet according to Plaintiffs’ own theory, the assets are those of the Partnerships themselves. (¶81) (this action brings claims that “are owned by the Partnerships”). The transfer

of the Partnerships' own assets does not, as a matter of law, constitute a fraudulent transfer cause of action in favor of the Partnerships.

21. The only "evidence" which could be used to defeat the summary judgment constitutes inadmissible evidence, mere unsupported innuendo and conclusions, and evasive, impermissible attempts to contradict Plaintiffs' own previous sworn testimony, none of which creates a reasonable inference of the existence of a fraudulent transfer cause of action, even when interpreted in the light most favorable to the Plaintiffs.

WHEREFORE, Defendants respectfully request this Court to enter an order granting summary judgment totally dismissing Count IV against Defendants. Alternatively, Defendants request partial summary judgment as to any portions of, and issues raised within, Count IV so that the issues to be tried are appropriately narrowed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 7th day of December, 2016.

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