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

CASE NUMBER: 12-34121 (07)
COMPLEX LITIGATION UNIT

MARGARET SMITH, et al.,

Plaintiffs,

v.

JANET A HOOKER CHARITABLE TRUST, et al.,

Defendants.
_____/

DEFENDANT CATHARINE SMITH'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant, Catharine Smith ("Smith"), pursuant to Florida Rule of Civil Procedure 1.140©, files this Motion for Judgment on the Pleadings as to Plaintiffs' Amended Complaint, and states as follows:[1]

I. INTRODUCTION

Plaintiffs brought numerous claims against Smith for allegedly receiving and retaining improper distributions from the Partnerships, including Count I for Breach of Statutory Duty pursuant to Ch. 620, Count II for Breach of the Partnership Agreements, Count III for Unjust Enrichment, and Count IV for Money Had and Received. However, Exhibit A to the Amended Complaint makes clear that Smith received her last distribution from the Partnerships in 2005 – more than seven years prior to Plaintiffs' filing the Complaint in December 2012. As such, Plaintiffs' claims are time-barred as a matter of law. Plaintiffs' claims are also barred by the exculpatory

[1]Plaintiffs are P&S Associates, General Partnership ("P&S"), S&P Associates, General Partnership ("S&P")(collectively, the "Partnerships"), and Philip von Kahle, as conservator for the Partnerships.

provision in the Partnership Agreements, which limit Smith's liability to her intentional wrongdoing, fraud and/or a breach of fiduciary duty committed by Smith while a partner of the Partnerships. The Amended Complaint does not contain a single allegation of such conduct by Smith.

As such, Smith is entitled to judgment on the pleadings on these counts.

II. STANDARD ON MOTION FOR JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed, but within such time as not to delay the trial." Fla. R. Civ. P. 1.140©. A defendant may raise the defense of failure to state a cause of action prior to trial by filing such a motion. Fla. R. Civ. P. 1.140(h)(2). "A motion for judgment on the pleadings is governed by the same legal test as a motion to dismiss for failure to state a cause of action." *Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 889 (Fla. 4th DCA 2007).

When ruling a motion for judgment on the pleadings, "the trial court must accept as true all well-pled material allegations of the opposing party," and only enter "judgment on the pleadings where, based on the pleadings, the moving party is entitled to a judgment as a matter of law." *Cuccarini v. Rosenfeld*, 76 So.3d 328, 330 (Fla. 3d DCA 2011).

As set forth below, Plaintiffs' claims fail as a matter of law.

III. ARGUMENT

A. Plaintiffs' Claims are Barred by the Statute of Limitations

A court should grant a motion to dismiss 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 Management, Inc. v. Paramount Engineering, Inc.*, 977 So.2d 600, 604 (Fla. 4th DCA 2007); *see also Bott v. City of*

Marathon, 949 So.2d 295, 296 (Fla. 3d DCA 2007)(affirming trial court's dismissal of action on statute of limitations grounds, where the exhibit to the complaint established that the cause of action was filed after expiration of statute of limitations).

Here, as in *Bott*, Plaintiffs attach an exhibit to the Amended Complaint showing that Smith received her last distribution from the Partnerships in 2005 – more than seven years prior to the filing of the Complaint. *See* Exhibit A to the Amended Complaint. The Amended Complaint therefore establishes on its face that Plaintiffs' claims are barred by the respective statutes of limitations for each count.

1. Plaintiffs' Breach of Statutory Duty Claim Pursuant to Section 620.8807, Fla Stat., Is Barred by the Four-Year Statute of Limitations for Statutory Claims

Count I alleges a breach of the statutory duty imposed by Fla. Stat. § 620.8807, covering "Settlement of Accounts and Contributions Among Partners." Plaintiff allege that "Defendants are under a statutory duty to contribute to [the Partnerships] an amount equal to any excess of the charges over the credits in their capital account. *See* Amended Complaint ¶ 78. Plaintiffs allege that Smith is in violation because she received distributions *in excess of* her contributions. *Id. at* ¶¶ 69, 75.

Florida's Revised Uniform Partnership Act does not specify a statute of limitations for bringing a claim under § 620.8807. Therefore, the "default" four-year limitations period applies for "action[s] founded on a statutory liability." *See* Fla. Stat. § 95.11(3)(f). Accordingly, Plaintiffs had to bring their suit within four years of an "excess" distribution.

The Amended Complaint, on its face, establishes this claim is time-barred. Exhibit A to the Amended Complaint shows that Smith's capital account was zeroed out in 2005. In other words,

Smith took her last contribution (and ceased to be a partner) in 2005. *See* Ex. A to Amended Complaint. Plaintiffs' filed their initial Complaint on December 10, 2012 – approximately seven years after the last distribution about which they complain. Count 1 is therefore time-barred as a matter of law, and Smith is entitled to judgment on the pleadings.

2. **Plaintiffs' Breach of Contract Claim is Barred by a Four-Year Statute of Limitations**

Count II alleges claims for breach of contract. Specifically, Plaintiffs allege that Smith breached the Partnership Agreements by failing to return the alleged excess distributions after receiving Plaintiffs' October 18, 2013, demand letter. *See* Am. Compl. ¶¶ 44-46, 85-86. Plaintiffs also allege that Smith breached Sections 4.01, 5.01, and 5.02 of the Partnership Agreements by receiving and retaining distributions based upon the capital contributions of other partners rather than the Partnerships' profits. *Id.* at ¶ 87. Thus, Plaintiffs necessarily argue that the acts of receiving the distributions resulted in Smith breaching the Partnership agreements. The first breach, therefore, allegedly occurred over thirteen years ago, when Smith received her first distribution in 2000. *See* Exhibit A to the Amended Complaint. Smith last received a distribution from the Partnerships in 2005, more than eight years ago. *Id.*

The statute of limitations for breach-of-contract is five years. *See* Fla. Stat. § 95.11(2)(b)(providing a five-year limitation period for a legal or equitable action on a contract, obligation, or liability founded on a written instrument). The limitations period begins to run at the time of the breach. *See Medical Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So.2d 576, 578 (Fla. 4th DCA 2006) ("For a breach of contract action, it is well established that a statute of limitations 'runs from the time of the breach, although no damage occurs until later.'").

In this case, Exhibit A to the Amended Complaint shows that Smith received the last (allegedly improper) distribution in 2005. Plaintiffs' filed their initial Complaint on December 10, 2012 – approximately seven years later and two years past the deadline. Plaintiffs cannot revive their time-barred claim by simply sending a demand letter in October 2013; instead, the limitations period runs from the *date of the breach*. *See id.* It does not run from the date that demand for recovery is made. If that were the case, no claim against a former partner would ever be time-barred since a mere demand letter could always revive it. As such, judgment on the pleadings should be entered on Count II in favor of Smith.

3. Plaintiffs' Unjust Enrichment Claim is Barred by a Four-Year Statute of Limitations

Count III is a claim for Unjust Enrichment, asserting that Smith voluntarily accepted these improper distributions and that it would be inequitable and unjust for Smith to retain them. *See* Am. Compl. ¶¶ 90-94. Plaintiffs contend that the Partnerships conferred a benefit on Smith by making distributions from the capital contributions of other Partners. *Id.* at ¶ at 91.

The statute of limitations for unjust enrichment is four years. *See Swafford v. Schweitzer*, 906 So. 2d 1194, 1195 (Fla. 4th DCA 2005); *see also* Fla. Stat. § 95.11(3)(k). An unjust enrichment claim accrues at the time the defendant receives the improper enrichment. *See Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So.2d 571, 577 (Fla. 4th DCA. 2006).

In this case, once again, the Amended Complaint shows that the latest Smith received an allegedly improper distributions was in 2005. Accordingly, Plaintiffs' claim for unjust enrichment was required to be filed no later than 2009. Because Plaintiffs failed to do file timely, Count III is time-barred, and Smith is entitled to judgment on the pleadings.

4. **The Four-Year Statute of Limitations on Claims for Money Had and Received Also Bars Plaintiffs' Claim**

Count IV is a claim for "Money Had and Received," alleging that the Partnerships conferred a benefit on Smith by making distributions from the capital contributions of other Partners rather than from the Partnerships' profits. *See* Am. Compl. ¶¶ 97-102. Plaintiffs allege that Smith voluntarily accepted those distributions and that it would be inequitable and unjust to retain the improper distributions. *Id.*

A claim for "Money Had and Received" carries a four-year statute of limitations. *See* Fla. Stat. § 95.11(3). Because the Amended Complaint alleges that the latest Smith received an allegedly improper distributions was in 2005, that is the latest that the Partnerships could have conferred a benefit. Accordingly, Plaintiffs' claim for money had and received was required to be filed no later than 2009. Because Plaintiffs failed to file timely, Smith is entitled to judgment on the pleadings as to Count IV.

B. Plaintiffs' Claims are Barred by the Terms of the Partnership Agreements

Judgment on the pleadings should also be entered based on an exculpatory clause in the Partnership Agreements attached to the Amended Complaint. Both Partnership Agreements contain a provision limiting liability, which provides, in pertinent part, that:

> LIMITATIONS ON LIABILITY
>
> 14.03 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 AUTHORITY CONFERRED BY THIS AGREEMENT. THE PARTNERS SHALL BE LIABLE ONLY FOR ACTS AND/OR OMISSIONS INVOLVING INTENTIONAL WRONGDOING, FRAUD, AND BREACHES OF FIDUCIARY DUTIES OF CARE AND LOYALTY.

See Partnership Agreements at ¶ 14.03 (capitalization in original). This type of liability limitation is valid and enforceable under Florida law. *See Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008)(recognizing that "unambiguous exculpatory provisions are enforceable"); *Voicestream Wireless Crop. v. U.S. Commc'ns., Inc.*, 912 So. 2d 34, 38 (Fla. 4th DCA 2005) (noting, generally, that "[p]arties can contract to limit their liability.").

As a general rule, the interpretation of a contract is a question of law, not a question of fact. *See Port-a-Weld, Inc. v. Padula & Wadsworth Const., Inc.*, 984 So.2d 564, 568 (Fla. 4th DCA 2008). Thus, "where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only..." *Cox v. CSX Intermodal, Inc.,* 732 So.2d 1092, 1096 (Fla. 1st DCA 1999).

In construing the above provision, the Court should give effect to the plain and ordinary meaning of the terms used and should arrive at an interpretation consistent with logic and reason. *See Golf Scoring Systems Unlimited, Inc. v. Remedio*, 877 So.2d 827, 829 (Fla. 4th DCA 2004); *Royal Oak Landing Homeowners Ass'n, Inc. v. Pelletier*, 620 So.2d 786, 788 (Fla. 4th DCA 1993).

Under such framework, to state any viable claim against Smith, Plaintiffs must defeat the above exculpatory provision by alleging conduct by Smith that amounts to *intentional wrongdoing, fraud and/or a breach of fiduciary duty*. This conduct by definition must have occurred prior to Smith's dissociation from the Partnerships that occurred in 2005 per Exhibit A to the Amended Complaint. Plaintiffs cannot use Smith's failure to make a contribution to the Partnerships in response their October 2013 demand letter as "wrongful conduct" to avoid the exculpatory provision.

The Amended Complaint is bereft of any allegation of wrongdoing by Smith in connection with her receipt of the funds that are the subject of this lawsuit. Indeed, the Amended Complaint

acknowledges that the former Managing General Partners were solely responsible for the management of the Partnerships, and that it was *their* alleged breaches of fiduciary duty that gave rise to the causes of action in the Amended Complaint. *See* Am. Compl. ¶ 49. Under such circumstances, no cause of action can lie against Smith as a matter of law, and she is entitled to judgment on the pleadings as to all claims in the Amended Complaint. *See* Partnership Agreements at ¶ 14.03.

IV. CONCLUSION

Based on the foregoing reasons, Smith requests the Court enter judgment on the pleadings as to all claims in Plaintiffs' Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-mail to Eric N. Assouline, Esq. (ena@assoulineberlowe.com; ah@assoulineberlowe.com) Assouline & Berlowe, P.A., 213 E. Sheridan Street, Suite 3, Dania Beach, FL 33004, 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, (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); 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); Etan Mark (emark@bergersingerman.com) Berger Singerman, 1450 Brickell Avenue, 19th Floor, Miami, Florida, 33131, this 19th day of December, 2013.

McCABE RABIN, P.A.
Attorneys for Defendant, Catharine Smith
1601 Forum Place, Suite 505
West Palm Beach, Florida 33401
Phone: (561) 659-7878
Fax: (561) 242-4848

By: _____
Ryon M. McCabe
Florida Bar No.: 009075
rmccabe@mccaberabin.com;beth@mccaberabin.com
Evan H. Frederick
Florida Bar No.: 064819
efrederick@mccaberabin.com; beth@mccaberabin.com