

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

P&S Associates, General
Partnership, et al.,

CASE NO.: 12-034121(07)

Plaintiffs,

Vs.

Janet A. Hooker Charitable
Trust, et al.,

Defendants.

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ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This action is before me on Motions for Summary Judgment filed by Defendants Abraham and Rita Newman, Gertrude Gordon, Ersica P. Gianna, Holy Ghost Western Province, Ettoh, Ltd., Robert A. Uchin Revocable Trust, Holy Ghost Fathers, Compassion Fund, Holy Ghost Fathers HG-Mombasa, Holy Ghost Fathers HG-Ireland/Kenema, Catherine Smith, and the Molchan Defendants. I have considered the Motions and supportive memoranda, the authorities cited, and the arguments of counsel. For the reasons set forth below, the Motions are granted in part and denied in part.

This action is maintained by Philip J Von Kahle as the conservator of two partnerships who invested with Bernard L. Madoff Investment Securities LLC (Madoff). It is undisputed that Madoff ultimately proved to be a classic Ponzi operation. It is further

alleged that the former managing partner of the partnerships, Michael Sullivan, knew of the fraud and participated in it, concealed the scheme from the remaining partners and delayed turning over the partnership books and records. The fallout of this discovery has migrated to South Florida, spawning several disputes.

In this action, the Conservator attempts to wind down the affairs of the partnerships in a manner consistent with the agreements and statutes that govern the relationship between the partnership and the partners. There should be no net winners once it is determined that the winnings came from the investments of new money by persons who are net losers.

To accomplish this, seven causes of action are alleged in the Third Amended Complaint: Counts I and II are based on the obligations of partners to make capital contributions required upon wind down; Count III asserts a similar obligation in a Breach of Contract cause of action based upon the partnership agreements; Counts IV and V allege unjust enrichment and money had and received claims; Count VI seeks relief to avoid the fraudulent transfers pursuant to Fla. Stat. 726.105 (1)(A); and, Count VII alleges a breach of fiduciary duty.

Each of the moving Defendants say the causes of action are time barred, as no payments were received by them within the applicable limitations period. I agree that Counts IV and V are barred by the four year statute. Plaintiff argues that the last element of the cause of action consists of the demand for payment, which in this case is

November 12, 2012. That would mean that the statute could be extended indefinitely due to inaction by the Plaintiff. The time begins to run upon receipt of the payment under the facts of this case, as it undisputed that these defendants were innocent investors who were unaware of the fraud committed.

Material issues of fact remain in dispute with regard to the remaining causes of action that preclude entry of summary judgment at this time. The issues of significance fall into primarily two categories. The statutory and contractual obligation to make a capital contribution or to return an overpayment continues so long as a partner remains a partner. Certain of the moving Defendants acknowledge that they have not withdrawn as partners. Others assert that they have withdrawn, but they offer as proof a cashing out and the issuance of a zero balance K-1. Whether that constitutes withdrawal remains a triable issue.

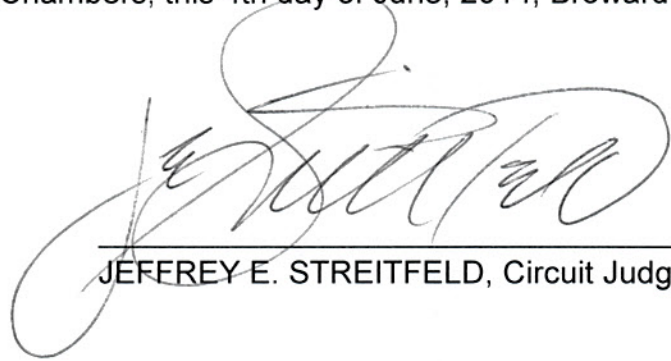
The fraudulent transfer claim presents a different set of issues. It is alleged that Michael Sullivan, as managing partner, participated in the fraud and actively concealed the evidence of the fraud. The time to bring this cause of action is extended to one year after the partnerships, as creditors/victims of the fraud, had the ability to determine the facts and bring the instant claims. Fla. Stat. Sec. 726.110. Sullivan's involvement and concealment remain disputed, as does the date of discovery.

For these reasons, the Motions are granted as to Counts IV and V, and denied as to the remaining counts.

To assist counsel in preparation for the June 16, 2014 Case Management Conference, I have doubts about the continued viability of the tort claims (negligence

and breach of fiduciary duty). Counsel may wish to reconsider the merits of these claims to focus on the remaining causes of action.

DONE AND ORDERED in Chambers, this 4th day of June, 2014, Broward County, Fort Lauderdale, Florida.



JEFFREY E. STREITFELD, Circuit Judge

Copies furnished:

Thomas M. Messana, Esq., who is directed to serve same upon all interested parties
Leonard K. Samuels, Esq.