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

CASE NO.: 12-034121 (04)

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,

Plaintiffs,

v.

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

Defendants.
_____/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT ABRAHAM NEWMAN, RITA NEWMAN, AND GERTRUDE GORDON'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiffs P & S Associates, General Partnership ("P&S"), and S & P Associates, General Partnership ("S&P") (collectively, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Abraham Newman, Rita Newman, and Gertrude Gordon's (collectively, "Defendants") Motion to Dismiss Plaintiff's Complaint (the "Motion").

Defendants' Motion disregards the standard for a motion to dismiss and should be denied as a matter of course because it is based on mistaken facts and law. In support thereof, Plaintiffs state as follows:

STATEMENT OF FACTS

After approximately one year of litigation related to, *inter alia*, the fraudulent and improper activities of Michael Sullivan, their former Managing General Partner, and others, a Conservator was appointed over the Partnerships.

Following Sullivan's removal in August 2012, this lawsuit was commenced. Plaintiffs are suing certain Partners who received improper distributions from the Partnerships as a result of the bad acts of Sullivan and others. Specifically, this action names as defendants those Partners who received, on a net basis, more money than they invested; i.e., 'Net Winners.'

Under the Partnership Agreements, the Partners were to receive distributions of profits at least once per year. *See* Section 5.02 of **Exhibits A and B** to the Complaint (emphasis added).[1] If the Partnership distributed profits to the Partners, those profits had to be distributed in equal proportion to all Partners depending on each Partner's pro rata share in the Partnership as of the date of the distribution. *Id.*

However, an investigation of the Partnerships' books and records revealed that Defendants did not comply with the terms of the Partnership Agreements. The former Managing General Partners breached their fiduciary duties of loyalty and care to the Partners and the Partnerships by making distributions to Defendants that originated from the principal contributions of other Partners and not from the Partnerships' profits, there being none, as required.

As a result of these improper distributions, and in direct contravention of the plain terms of the Partnership Agreements, Defendants reaped profits from their investments in the

[1] The Partnerships' partnership agreements are identical in all material respects and are collectively referred to as the Partnership Agreements. The Partnership Agreement of S&P and P&S are attached to the Complaint as **Exhibits A and B**, respectively.

Partnerships, while other Partners lost millions of dollars. The distributions were improper and rightfully belong to the Plaintiffs (to be distributed to the Partners consistent with applicable law).

Defendants Abraham and Rita Newman invested $89,000.00 in on of the Partnerships and received $168,810.17 from on of the Partnerships – a return of approximately 53%. This return was only possible because Defendant Abraham and Rita Newman received distributions that they should not have received.

Similarly, Defendant Gordon invested $47,000.00 in one of the Partnerships and received $109,180.21 from one of the Partnerships – a return of approximately 43%. Again, this return was only possible because Defendant Gordon received distributions that she was not entitled to receive.

On or about July 22, 2013, Defendants filed the Motion seeking to dismiss the Complaint. As set forth below, the Motion should be denied.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). The court is confined to consideration of the allegations found in the four corners of the complaint. *Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998). A motion to dismiss should be denied when a complaint sufficiently states a cause of action. *See Solorzano v. First Union Mortgage Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *see also Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565-66 (Fla. 1971) (holding error to dismiss a complaint that contains sufficient allegations to

acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same).

ARGUMENT

I. DEFENDANTS' ARGUMENT THAT MARGARET J. SMITH LACKS STANDING SHALL BE MOOT.

Defendants argue that Plaintiff Margaret J. Smith ("Plaintiff Smith") lacks standing because she was not properly appointed as Managing General Partner of the Partnerships.

Plaintiffs intend to file a motion to substitute Plaintiff Smith with Philip J. Von Kahle, as court-appointed Conservator of P&S Associates, General Partnership and S&P Associates, General Partnership, as a party plaintiff, pursuant to Fla. R. Civ. P. 1.260.

Accordingly, once substituted out as a party plaintiff, any arguments that Plaintiff Smith lacks standing shall be moot.

II. PLAINTIFFS' COMPLAINT IS ADEQUATELY PLEAD.

Defendants argue that Plaintiffs are required to affirmatively plead in the Complaint that their claims are not barred the statute of limitations. This is another argument that turns the standard of a motion to dismiss on its head.

In reviewing a motion to dismiss, the Court must construe the allegations of the complaint "in the light most favorable to plaintiffs and the trial court must not speculate what the true facts may be or what will be proved ultimately in trial of the cause." *Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980). A motion to dismiss may only be granted 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 Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007).

Plaintiffs are unaware of any requirement that they must affirmatively allege the timeliness of their claims in their Complaint. And the lone case cited by Defendants in furtherance of this alleged proposition, *Rohatynsky v. Kalogiannis*, 763 So. 2d 1270, 1272 (Fla. 4th DCA 2000), actually supports the reverse.

In *Rohatynsky*, the trial court dismissed the complaint against one of the defendants on the grounds of statute of limitations, even though the plaintiff argued that the complaint on its face did not establish that the action was barred by the statute of limitations. *Id.* at 1272. On appeal, the Fourth District Court of Appeals stated that "the trial court cannot go beyond the four corners of the complaint in deciding the merits of a motion to dismiss" and reversed the trial court. *Id.* at 1273. The *Rohatynsky* Court also remanded the matter for further proceedings because, "it is not apparent from the complaint or attached exhibits that Marco Polo was entitled to judgment as a matter of law." *Id.* at 1273. Contrary to Defendants' belief, the court in *Rohatynsky* did not establish any requirement that a plaintiff must affirmatively state the timeliness of his claims, and there is no requirement to do so. *See Hanano v. Petrou*, 683 So. 2d 637, 639 (Fla. 1st DCA 1996) (reversing trial court's dismissal on statute of limitations grounds when "the facts giving rise to the defense of the statute of limitations do not affirmatively appear on the face of the appellants' complaint").

Defendants' instant argument regarding the statute of limitations is merely yet another attempt by Defendants' to improperly defend against Plaintiffs' claims outside of the four corners of the complaint through a motion to dismiss. Defendants should instead be required to file an answer and assert any statute of limitations defense through affirmative defenses. *Green*

v. Palatka Daily News, 108 So. 3d 739, 740 (Fla. 5th DCA 2013) ("The statute of limitations is an affirmative defense and can only be raised in a motion to dismiss if the applicability of the defense is clear from the face of the complaint").

Accordingly, Defendants' arguments should be denied.

III. DEFENDANTS' ARGUMENT REGARDING INDISPENSABLE PARTIES IGNORES THAT MICHAEL SULLIVAN IS ALREADY A PARTY TO THIS ACTION.

Defendants argue that the Complaint should be dismissed because Plaintiffs allegedly failed to name the former Managing General Partner, Michael Sullivan, as an indispensable party to this action, and that Plaintiffs should properly any claims here against him.

As an initial matter, Sullivan is already a defendant in this action. As set forth in the Complaint, "Defendants Ann or Michael Sullivan invested $108,239.66 in the Partnerships and received $283,284.00 from the Partnerships." Complaint ¶ 35. Accordingly, Sullivan is a party to this action and any contention that Plaintiffs have failed to name him as a party are meritless.

Second, even if Sullivan were not named as a defendant here, he would not qualify as an "indispensable party" to this action. An indispensable party is defined "as one whose interest in the controversy is of 'such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'" *Stevens v. Tarpon Bay Moorings Homeowners Ass'n Inc.*, 15 So. 3d 753, 754 (Fla. 4th DCA 2009).

Here, Plaintiffs have brought suit against the Defendants because they received improper distributions from the Partnerships. As a result of Defendants receiving and retaining those improper distributions, Plaintiffs are entitled to recover those amounts. They have asserted claims against Defendants to do so. Any other wrongdoings committed by Sullivan against the

Partnerships are independent of the improper distributions received and retained by Defendants and would by the subject of separate causes of action – indeed Plaintiffs have asserted additional claims against Sullivan in a separate lawsuit. Accordingly, a judgment may be entered against the Defendants in this action with respect to the funds that were improperly distributed to them "without affecting any interest" of Sullivan or leaving "the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Stevens v. Tarpon Bay Moorings Homeowners Ass'n Inc.*, 15 So. 3d 753, 754 (Fla. 4th DCA 2009).

Accordingly, because Sullivan is already a party to this action, Defendants' motion to dismiss for failure to join alleged indispensable parties should be denied.

IV. PLAINTIFFS HAVE PROPERLY PLEAD THAT THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION.

Defendants appear to argue that this Court does not have subject matter jurisdiction over this action because the total amount recoverable from some of defendants *may* be less than $15,000 and Plaintiffs cannot aggregate their claims to confer jurisdiction. However, Defendants misunderstand the law and the relevant pleadings.

Despite Defendants' contentions, Plaintiffs have properly established this Court has subject matter jurisdiction over this action. With respect to the amount in controversy, in the Complaint, Plaintiffs affirmatively alleged an amount of controversy with respect to each of the defendants in this action – not in the aggregate – is over $50,000. Complaint ¶¶ 4-35. Such allegations are sufficient to establish subject matter jurisdiction over this action. *See* Fla. Stat. §§ 26.012, 34.01.

Defendants' reckless speculation as to what Plaintiffs "may" ultimately recover from each of the defendants is irrelevant at this juncture. The amount in controversy to establish jurisdiction is determined by what is plead in the operative complaint. *Haueter-Herranz v. Romero*, 975 So. 2d 511, 515 (Fla. 2d DCA 2008) ("The Investors adequately alleged that the amount in controversy is sufficient to confer subject matter jurisdiction in the trial court"); *Baldwin Sod Farms, Inc. v. Corrigan*, 746 So. 2d 1198, 1202-03 (Fla. 4th DCA 1999) ("It is well settled that where the jurisdiction of the circuit court is dependent on the amount in controversy the test is the amount claimed and put into controversy in good faith"); *Soler v. Indep. Fire Ins. Co.*, 625 So. 2d 905, 906 (Fla. 3d DCA 1993) ("The valuations fixed by the pleadings ought to be accepted as true if made in good faith and not for the purpose of conferring jurisdiction, notwithstanding it might ultimately develop at trial that the amount recoverable was less than the jurisdictional limit of the circuit court"). Here, Plaintiffs have set forth the required amounts in the Complaint.

As set forth above, and contrary to Defendants' assertion, Plaintiffs do not need to aggregate the claims against the Defendants in order to establish jurisdiction. However, even if Plaintiffs did need to aggregate their claims (and they do not), they would be permitted to do so because, as Defendants' own authority recognizes, claims may be aggregated to confer jurisdiction in the Circuit Court when "the claims are related to one another or arise from the same 'transaction or circumstances or occurrence.'" *Ben-David v. Educ. Res. Inst., Inc.*, 974 So. 2d 1138, 1139 (Fla. 3d DCA 2008). Plaintiffs' claims against Defendants are related to one another because each Defendant received improper distributions from the Partnerships. Therefore, if it were needed (and it is not), their claims may be aggregated to confer jurisdiction.

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Abraham Newman, Rita Newman, and Gertrude Gordon's Motion to Dismiss Plaintiff's Complaint, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: August 26, 2013

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