IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

Case No. 09-81225-CIV

JONATHAN E. PERLMAN, ESQ., as court appointed Receiver for Creative Capital Consortium, LLC, et. al.,

Plaintiff,

vs.

FIVE CORNERS INVESTORS I, LLC, FIVE CORNERS INVESTORS II, LLC, CFD-REGENCY I, LLC, CFD-REGENCY II, LLC, and BW ASPIRE, LLC,

Defendants.
_____/

BW ASPIRE, LLC'S REPLY TO PLAINTIFF RECEIVER'S RESPONSE IN OPPOSITION TO BW ASPIRES, LLC'S MOTION TO DISMISS (D.E. #14)

Defendant, BW ASPIRE, LLC (called "BW Aspire"), by and through their undersigned attorneys, reply to the Plaintiff Receiver's Response in Opposition to BW Aspire, LLC's Motion to Dismiss (D.E. #14, called "Response"), and states as follows:[1]

REPLY TO RECEIVER'S ARGUMENT WITH RESPECT TO COUNTS 1 AND 2

In his Response, the Receiver makes no effort to argue that his allegations implicate the Defendant in the participation in any fraud. On the contrary, the Receiver relies exclusively upon his statement that, "There simply is no requirement that the Receiver plead the Defendant's participation in the fraud." See Response, page 3, par. (i).

[1] Because the substance of the Receiver's Response is the same as the substance of the Receiver's Response to Five Corners' Motion to Dismiss, the substance of this Reply is the same as the substance of the Reply filed by Five Corners.

Having acknowledged his failure to allege Defendant's participation in the fraud, the Receiver relies instead solely on the arguments that:

(1) the payment of Regency Suites' expenses owed to third parties from the sale proceeds "sufficiently alleges a transfer made 'for the benefit of' the Defendant." See Response, Section A on page 8.

(2) the grant by Dolce Regency of the purchase money security interest in the membership interests assigned to it is a direct transfer to the Defendant which may be avoided under the FUFTA. See Response, Section B on page 10.

1. The Receiver has not alleged facts sufficient to show that Defendant benefited from the payment of Regency Suites' expenses.

With respect to the first argument, while the Receiver repeatedly states that the payment of Regency Suites' expenses was made "for the benefit of Defendant," he has offered no factual basis from which one could draw such an illogical conclusion. He admits that we are talking about the payment of Regency Suites' expenses—not the expenses of the Defendant. See Complaint, ¶58. Moreover, he alleges that the receivership entities own Regency Suites, and indeed his entire cause of action is dependent upon his ability to prove as much. See Complaint, ¶¶52, 54, 61. These allegations would seem to conflict with his unsupported conclusion that Defendant benefited. Because the receivership entities allegedly own Regency Suites, either directly or indirectly, the fact that Regency Suites' expenses were paid at closing reflects a benefit to Regency Suites and its new owner, Dolce Regency—not the Defendant, who no longer had an ownership interest in Regency Suites. Clearly these payments were not paid to the Defendant, and the Receiver makes no attempt to argue that they were. They were presumably

paid to the third parties to whom the expenses were owed, and the Receiver makes no allegation that those persons were the Defendant.

The Receiver engages in very circuitous allegations in an attempt to fit within the requirements of the FUFTA, but as shown above, he ignores the major disconnect between his conclusory allegations and the actual facts, including the facts which he himself has alleged. His Complaint does not adequately allege a factual basis upon which one could conclude that the payment of Regency Suites' expenses at closing was made for the benefit of Defendant, and in fact, the Complaint seems to affirmatively refute that conclusion. Accordingly, the Complaint should be dismissed insofar as it seeks relief from Defendant based upon the "Regency Suites Expense Transfer."

2. The Receiver has not alleged facts sufficient to show that he is a creditor of Dolce Regency.

With respect to his second argument, *i.e.* that the grant of the purchase money security interest is itself a direct transfer, it is worthy of note that the Receiver here is trying to avoid a purchase money obligation. The Receiver seeks to accept the benefit of the membership interests transferred by Defendant to Dolce Regency, while at the same time avoiding the obligation of Dolce Regency to pay for those same membership interests. Aside from the obvious unfairness such relief would entail, and the air-tight affirmative defenses that could likely be asserted by Defendant under Section 726.109, Florida Statutes, the Receiver's own Response shows that he does not have standing to seek avoidance of the purchase money security interest in any event.

The only Count of the Complaint in which he seeks to avoid this alleged transfer under the FUFTA is Count 1 of the Complaint. However, the Receiver does not have standing to assert

any claim under Count 1 because those allegations are based upon the assertion that Dolce Regency was the transferor—not Creative Capital—and the Receiver is admittedly not a receiver for Dolce Regency, nor is he a creditor of Dolce Regency, as is required to maintain an action under FUFTA. See Section 726.105, Florida Statutes. While the Receiver states in his Response that some courts have held that a receiver has standing to avoid a fraudulent transfer, or that a receiver might be considered a creditor, those cases were crucially unlike the instant case in that in those cases, the plaintiff was the receiver for the debtor entity that made the transfer.[2] In this case, the Plaintiff is a receiver for Creative Capital and some of its affiliates, but it is NOT a receiver for Dolce Regency. Under Count 1, it is Dolce Regency which is the alleged transferring debtor as to which the "creditor" requirement must be established—not Creative Capital.[3] (See Section 726.105, requiring that the plaintiff be a "creditor," Section 726.102(4) requiring that a "creditor" have a "claim," and Section 726.102(6) requiring that the "claim" be against the alleged transferring debtor, in this case Dolce Regency).

In an effort to avoid the conclusion that he is not a receiver for Dolce Regency, the Receiver makes the absurd argument that it his FUFTA claim in this case makes him a "creditor," thereby qualifying him to sue under FUFTA. See Response, first full paragraph on

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[2] The Receiver also cites Sections 671.201(13) and 679.1021(1)(zz), Florida Statutes, for the same proposition. Those citations are inapposite for the same reasons: Plaintiff is not a receiver for Dolce Regency. While he may be a receiver for Creative Capital, it is not his status as "creditor" of Creative Capital that is in question in Count 1, but rather, his status as "creditor" of Dolce Regency, or lack thereof. Also, this argument suffers from the additional point that Sections 671.201(13) and 679.1021(zz) are not part of the FUFTA, but rather, apply only to the Uniform Commercial Code. The legislature expressly provided in Section 671.201(13) that the term "creditor" includes a receiver. It could have done so in Section 726.102(4), but did not.

[3] In fact, it appears that the Receiver attempted to expand the receivership to Dolce Regency, but then abandoned efforts to expand the receivership when a competing claimant for ownership of Dolce Regency came forward and resisted expansion of the receivership to Dolce Regency. See D.E. #154 in the main receivership action, Case No.: 08-81565-CIV.

page 14. That is clearly wrong. First, under the plain language of the statute, the predicate "claim" must be against the debtor transferor, Dolce Regency—not the Defendant. See Section 726.102(6), Florida Statutes. Second, a cause of action that requires a predicate claim cannot itself be the claim upon which the cause of action is predicated. The whole idea of a predicate cause of action implies a separate cause of action. The Receiver's nonsensical argument on that point merely underscores the illogical circuity that the Receiver has undertaken in a desperate effort to subject this innocent Defendant to spurious claims.

The Receiver also repeats the argument made in his Complaint that the receivership entities' investments constitute a "claim" for the purpose of FUFTA. See Response, first full paragraph on page 14. In doing so, the Receiver does not respond to the cases cited previously in Defendant's Motion to Dismiss, which stand for the proposition that an equity investment in the debtor entity DOES NOT constitute a "claim" which would give standing to avoid a fraudulent transfer.[4] The Receiver has offered no contrary authority for this point, nor does the Receiver's argument make sense inasmuch as the owner of a membership interest in the debtor entity has no "right to payment" at all by the debtor entity (as required by Section 726.102(4), Florida Statutes).[5]

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[4] See *Gardner v. Haines*, 19 S.D. 514, 104 N.W. 244 (S.D. 1905); *Homestead Min. Co. v. Reynolds*, 30 Colo. 330, 70 P. 422 (Colo. 1902); *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (N.C. 1967); *Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co.*, 23 S.D. 221, 121 N.W. 620 (S.D. 1909); *Scheck v. Bowne*, 12 Backes 51, 113 N.J. Eq. 51, 166 A. 189 (N.J. App. 1933).

[5] Payments of distributions to LLC members are purely discretionary, and in fact, any discretionary distribution to which a member of an LLC might be entitled by virtue of his membership interest would be subordinate to the rights of creditors, including the rights of Defendants as creditors of Dolce Regency. See Sections 608.426 and 608.444, Florida Statutes. By arguing that his alleged membership interest should be treated as a "claim," the Receiver is attempting to subvert these statutory provisions, which are designed to ensure that the Defendant creditors receive payment of their claims against Dolce Regency before the members of Dolce Regency may be repaid their investments.

As such, the Receiver has no standing to assert any claim to avoid a transfer by Dolce Regency, and Count 1 should be dismissed in its entirety.

REPLY TO RECEIVER'S ARGUMENT WITH RESPECT TO COUNTS 3 AND 4

The Receiver acknowledges that, "To be entitled to an equitable lien, there must be circumstances such as fraud or misrepresentation of material facts upon which the plaintiff specifically relied in good faith." See Response, second full paragraph of page 15. Yet, as noted previously, the Receiver has made no effort whatsoever to allege that Defendant engaged in any fraud, either against the receivership entities or against anyone else. On the contrary, the Receiver relies exclusively upon the argument that allegation of fraud by the Defendant is not required. Yet on page 15 of his Response, as quoted above, he acknowledges that it is required.

The Receiver's argument that he need not allege Defendant participated in fraud is based solely on his interpretation of the FUFTA. The allegations of Counts 3 and 4 are not based on the FUFTA, but rather upon equitable principles, and so the Receiver's argument is inapplicable to those Counts, even if it did have validity with respect to FUFTA. In addition, the Receiver's assertion that Rule 9(b), Fed.R.Civ.Proc., requiring specific allegations relating to fraud, does not apply in this case is also based entirely on his interpretation of the FUFTA and upon his citation of *Special Purpose Accounts Receivable Co-op Corp. v. Prime One Capital Co.,* L.L.C., No. 00-cv-06410, 2007 WL 4482611, *4 (S.D. Fla. Dec. 19, 2007), which in turn is itself based entirely upon the FUFTA. Thus, the idea that the Receiver can avoid the necessity of alleging fraud by Defendant, and the necessity of specifically alleging the factual basis for such allegations of fraud, is simply wrong. By the Receiver's own admission, Counts 3 and 4 require an allegation of fraud by Defendant, and the Receiver has not made such an allegation, nor has he given any specific factual allegations upon which a conclusion of fraud might be based, as required by

Rule 9(b), Fed.R.Civ.Proc.[6] Accordingly, Counts 3 and 4 should be dismissed.

WHEREFORE, Defendant, BW ASPIRE, LLC, respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

DATED this 06 day of November, 2009.

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[6] It should also be noted that in footnote 8 of the Receiver's Response, he argues that the heightened pleading standard should not apply to this case because in a fraudulent transfer action, the defendant is more likely than the plaintiff to possess knowledge of particularized information. However, in this case, the Receiver does not even allege that Defendant participated in a fraud. Why should one expect then that this Defendant has knowledge of matters to which they were not a party? It is the Receiver who is bringing these allegations against the Defendant. If he does not have knowledge of the facts upon which his Complaint is based, then he should not be filing it, and the case should be dismissed.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that the foregoing document is being served on all counsel of record or pro se parties as listed on the attached service list below, via transmission of Notices of Electronic Filing generated by CM/ECF.

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