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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION DIVISION

CASE NO. 9:09-CV-80190-DTKH

JONATHON E. PERLMAN, ESQUIRE, as Court Appointed Receiver of CREATIVE CAPITAL CONSORTIUM, LLC, CREATIVE CAPITAL CONCEPTS$, LLC, UNITED INVESTMENT CLUB, LLC and REVERSE AUTO LOAN, LLC, all Florida Limited Liability Companies,

Plaintiff,

v.

CAPTIN CONSTRUCTION GROUP, INC., a Georgia Corporation, HOMELAND TITLE SERVICES,L LC., a Georgia Limited Liability Company, and VALENTIN ARDELEAN,

Defendants.
_____/

HOMELAND TITLE'S MOTION TO DISMISS

Defendant, HOMELAND TITLE SERVICES, LLC (HOMELAND TITLE), by and through its undersigned attorney, hereby moves to dismiss Plaintiff's First Amended Complaint for the reasons set forth herein.

INTRODUCTION

In an effort to recover funds pursuant to an enforcement action initiated by the Securities and Exchange Commission (SEC), Plaintiff, as the appointed Receiver, has filed suit against HOMELAND TITLE, *inter alia,* alleging it fraudulently transferred property to the co-defendants in violation of Florida's Uniform Fraudulent Transfer Act (FUFTA), § 726.101, et seq., Fla. Stat. Specifically, Plaintiff alleges HOMELAND TITLE was given Two Hundred Thousand Dollars ($200,000.00) as earnest money deposits by Creative Capital Consortium,

LLC and A Creative Capital Concept$, LLC (Creative Capital) towards the purchase of two pieces of property. Thereafter, HOMELAND TITLE transferred all of the money to co-defendants, Captin Construction Group, Inc. (CCG) and Valentin Ardelean (Ardelean). Plaintiff does not allege that HOMELAND TITLE was the intended recipient of these funds - which it was not - nor does Plaintiff allege that HOMELAND TITLE actually controlled the funds- which it did not.

As a title company, HOMELAND TITLE was not in control of these funds, had no right or title to the earnest money deposits, was not the intended recipient of any portion of these funds and was not holding it for itself. Rather, HOMELAND TITLE was simply holding this money as the agent for one of the real parties to the transaction, as it was legally obligated to do under the escrow agreement. Then, consistent with its duties, HOMELAND TITLE disbursed these funds in compliance with the agreement of the buyer and seller. As such, HOMELAND TITLE was not an "initial transferee" of the earnest money deposits, but served merely as a commercial conduit of it.

Under Florida (and Georgia) law, there is no cause of action under the respective fraudulent conveyance statutes against an entity, such as HOMELAND TITLE that was not in control of the funds, had no right or title to the money, was not the intended recipient of any portion of the funds and was not holding it for itself. Here, HOMELAND TITLE was simply holding the money as the agent for one of the real parties to the transaction. . FUFTA was not intended to serve as a vehicle by which a creditor may bring suit against a party , like HOMELAND TITLE, for monetary damages under circumstances such as this. In that HOMELAND TITLE was not the intended recipient of the transferred funds and never actually

controlled the funds, Plaintiff's claim against HOMELAND TITLE should be dismissed with prejudice.

FACTUAL ALLEGATIONS

In or about 2006 and 2007, CCG was the owner, builder and developer of two improved residential properties in Loganville, Georgia (CCG Properties). Am. Comp. ¶49. During 2008, Creative Capital allegedly paid co-defendant, CCG the total sum of $250,000 of which $150,000 was paid directly to CCG and $100,000 was paid to HOMELAND TITLE as earnest money deposit for the property and then transferred to CCG. Id. at ¶¶50-51.

Creative Capital also allegedly paid Ardelean the total sum of $100,000 towards the purchase of another property. This money was initially given to HOMELAND TITLE as earnest money deposit and thereafter transferred to Ardelean. Id. at ¶52. HOMELAND TITLE was paid "the total sum of $200,000," all of which was transferred to the co-defendants. *See,* id. at ¶¶51-53.

Plaintiff alleges in Count I that the $200,000 earnest money deposits that HOMELAND TITLE transferred to CCG and Ardelean constitute "initial transfers" which Plaintiff is entitled to recover for the benefit of the estate pursuant to Chapter 726, Florida Statute. Am. Comp at ¶¶ 54-63. Nowhere in the Amended Complaint, however, is it alleged that HOMELAND TITLE was in control of the earnest money transfers, had right or title to this money, was the intended recipient of any portion of these funds and/or was holding all or some of the money for itself. Rather, HOMELAND TITLE was simply holding this money as the agent for one of the real parties to the transaction, as it was legally obligated to do as a title agency under the escrow agreement.

MEMORANDUM OF LAW

I. Standard on Motion to Dismiss

The United States Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly*, sets forth the circumstances under which a Court should grant a motion to dismiss. 550 U.S. 544 (2007). As this Court emphasized in *Perlman v. Five Corners Investors I, LLC,* Case No. 09-81225-CIV-Hurley [DE 34], "to survive a motion to dismiss, a complaint must contain factual allegation that 'raise a reasonable expectation that discovery will reveal evidence'" in support of the claim and that plausibly suggest relief is appropriate," Case No. 09-81225-CIV-Hurley [DE 34](quoting *Bell Atlantic Corp*., 550 U.S. 544.). Moreover, it is well established that a Court may dismiss a complaint on a dispositive issue of law, regardless of the alleged facts. *See Marshall County Bd. Of Educ.,* 992 F.2d at 1174. Here, it is the combination of a lack of reasonable expectation that discovery will reveal evidence in conjunction with a dispositive issue of law that mandates the dismissal of HOMELAND TITLE from this litigation.

II. Legal Argument

A. HOMELAND TITLE was not an "initial transferee."

The Eleventh Circuit has adopted the "control" or "conduit" test to determine whether a defendant is an "initial transferee." *Nordberg v. Societe Generale,* 848 F.2d 1196, 1199 (11th Cir. 1988). "When trustees seek recovery of allegedly fraudulent conveyances from [third parties], the outcome of the cases turns on whether the [third party] actually controlled the funds or merely served as conduits, holding money that was in fact controlled by either the transferor or the real transferee." *Id.*. As explained by the Eleventh Circuit,

> The control test, then, as adopted by this circuit, simply requires courts to step back and evaluate a transaction in its entirety to make sure that their conclusions are logical and equitable. This approach is consistent with the equitable concepts underlying bankruptcy law. (citations omitted.)

Societe Generale, 848 F.2d at 1199. "In order to incur liability as a transferee, a party must have exercised a degree of dominion and control over the property transferred, or held some sort of beneficial right to it." *In re Harwell,* 414 B.R. 770, 780 (M.D. Fla. 2009)(citing *In re Paramount Citrus, Inc.,* 268 B.R. 620 (M.D. Fla. 2001)).

> The "mere conduit" defense immunizes a good faith recipient of an otherwise avoidable transfer who acts as a mere intermediary and who cannot exercise dominion or control over the transferred property, where equitable principles justify such an exception. (citations omitted).

Id. at 782. In considering the question of whether a defendant is an initial transferee, courts have evaluated the defendant's status in light of the entire transaction and have refused to allow trustees to recover property from defendants who simply held the property as agents or conduits for one of the real parties to the transaction. *Id.* at 781. Consequently, the focus has not been on whether a defendant just received funds from a debtor, but rather whether the defendant actually *controlled* the funds concluding the inequity in recovering from such a defendant. *Id.(*emphasis in original). This test takes on particular significance when the defendant is an agent or fiduciary of the debtor-transferor, such as banks, insurance brokers and, as here, title agents who are duty-bound to take only limited actions with respect to the funds received. *See In re Pony Express Services, Inc. v. Pony Express Delivery Services, Courier Express, Inc.,* 440 F.3d 1296, 1300-1303 (11th Cir. 2006)(citing *Societe Generale,* 848 F.2d at 1200)(finding that bank which received funds by wire transfer from Chapter 11 debtor's account in another bank, and used funds to partially cover transferee bank customer's existing overdraft, was not "initial transferee" or "entity for whose benefits such transfer was made," but, rather was mere commercial conduit, and thus trustee could not avoid transfer as constructively fraudulent); *see In re Ogden,* 314 F.3d 1190, 1202 (finding that escrow agent was not an initial transferee); *In re Harwell,* 414 B.R. at 770 (finding that an attorney who represented Chapter 7 debtor was not "initial transferee," of

funds that he received in fiduciary capacity, and that he placed in client trust account while awaiting instructions from his debtor-client as to how funds were to be disbursed; Florida does not recognize cause of action against non-transferee for aiding and abetting a fraudulent transfer; and attorney was not liable under Florida law for conspiring with client to disburse funds from client trust account in advance of service of writ of garnishment on attorney by a known judgment creditor of client.)

The case of *In re Ogden* is of particular significance here as it also involved both a Ponzi scheme and an escrow agency. Wayne Ogden(Ogden) was the center of a Ponzi scheme in Utah. As part of the scheme, Ogden convinced two investors to purchase property in exchange for a large return on their investment. The investors gave the required $400,000 minus a 1% loan fee to Avis & Archibald Title Insurance Agency, L.C. (Avis), an escrow company, with specific escrow instructions directing Avis when and under what circumstances to disburse the funds. Then, after problems and misrepresentations by Ogden concerning the escrow instructions, Avis ultimately returned the investors $400,000 to them. After Ogden's creditors filed an involuntary Chapter 7 bankruptcy proceeding against him, the trustee filed adversary proceedings seeking to recover the $400,000.

In analyzing whether Avis, an escrow company, was the "initial transferee" of these funds, the Tenth Circuit discussed its adoption of the "dominion and control test and its minimum requirement of "dominion over the money or other asset, the right to put the money to one's own purposes." *Id.* at 1202 (citations omitted). Under this approach, "those who act as mere 'financial intermediaries,' 'conduits' or 'couriers' are not initial transferees under § 550."*and cases cited therein.*[1] The Tenth Circuit went on to explain,

[1] Here, the Tenth Circuit cited with approval to the Eleventh Circuit's decision in *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.),* 848 F.2d 1196, 1202 (11th Cir. 1988)(affirming a bankruptcy court's determination that

> Although these intermediaries, couriers and conduits may have physical control over the disputed funds at some point, they are generally deemed not to be transferees under § 550 because they lack the necessary dominion and control over the funds."

Id. In conclusion, the court emphasized that while Avis received the funds, it did not "have *full* dominion and control over them for [their] own account, *as opposed to receiving them in trust or as agent for someone else."*(emphasis in original). *Id*. at 1204. Further, as an escrow agent, Avis was governed by Utah law and was obligated to follow Ogden's instructions concerning the deposition of the funds. Consequently, because Avis did not have full dominion and control over the funds and was not free to invest the funds wherever it chose, it was a mere "conduit" rather than an "initial transferee" of the $400,000. *Id.*

In the instant case, HOMELAND TITLE, in its capacity as an escrow agent, collected $200,000 in earnest money deposits for the sale of two properties from the buyer, Creative Capital. Am. Comp. at ¶¶50-53. It is well settled that as a title company, HOMELAND TITLE was legally obligated to comply with its duties under the escrow agreement, and the failure to do so could make it liable in damages. *See Five Hundred North Atlantic, Inc. v. Ritter,* 475 So.2d 1264, 1266 (Fla. 5th DCA 1985)(citing *Armbruster v. Alvin,* 437 So.2d 725, 726 (Fla. 3d DCA 1983)).

Consistent with its duties, once HOMELAND TITLE was given the earnest deposit money, it was legally obligated to disburse those funds in compliance with the agreement of the buyer and seller. According to Plaintiff's Amended Complaint, HOMELAND TITLE was paid the total sum of $200,000 in earnest money deposits and thereafter, transferred the entire $200,000 to the sellers - $100,000 to co-defendant, CCG and $100,000 to co-defendant,

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a bank "never became any kind of transferee of this debtor under any view of § 550" because "bank was a conduit that credited [an] account with the transferred funds expressly earmarked for that purpose") (internal quotation marks omitted)..

Ardelean. Am. Comp. at ¶¶50-53. Consequently, HOMELAND TITLE did not receive the earnest deposit money for its own account, was not in control of these funds, had no right or title to this money and did not keep any of the $200,000 given to it by the buyer, but instead, transferred the entire amount to the sellers. There is no question here that HOMELAND TITLE received the earnest money in escrow for the benefit of the parties to the purchase and sale agreement. Therefore, HOMELAND TITLE was simply a commercial conduit of this money for which it is not liable to Plaintiff.

B. HOMELAND TITLE is not liable under FUFTA because there is no cause of action under the FUFTA against a non-transferee party who aides-abets a fraudulent transfer.

Under Florida law, there is no cause of action under the FUFTA against a party who assists or aid and abets a fraudulent transfer, where that party is not the intended recipient of the property and does no control it. *Super Vision International, Inc. v. Mega International Commercial Bank Co., Ltd.,* 534 F.Supp.2d 1326, 1344 (S.D. Fla. 2008)(citing *Freeman v. First Union Nat'l Bank,* 865 So.2d 1272, 1277(Fla.2004)("[W]e conclude that FUFTA was not intended to serve as a vehicle by which a creditor may bring suit against a non-transferee party (like First Union in this case) for monetary damages arising from the non-transferee party's alleged aiding-abetting of a fraudulent money transfer."))[2]; *Danzas v. Taiwan, Ltd. v. Freeman,* 868 So.2d 537 (Fla. 3d DCA 2004)(same).

In *Mega International Commercial Bank,* the plaintiff brought an action against Mega Bank alleging that it was involved in a scheme with the judgment debtor, Samson Wu(Wu) to

[2] HOMELAND TITLE is a Georgia corporation with its principal offices in Georgia. Am. Comp. at ¶10. Moreover, the properties at issue are located in Georgia and the earnest deposit money was paid to HOMELAND TITLE in Georgia. Id. at ¶¶49, 51-53. As such, there is a question of whether Florida law or Georgia law applies here; however, because Georgia is in agreement with Florida on this issue, the question of which law applies is of no moment. *See Chepstow Ltd. v. Hunt,* 381 F.3d 1077, 1089 (11th Cir. 2004)(citing with approval to the reasoning in *Freeman v. First Union National Bank* in holding that Georgia's fraudulent transfer statute does not create an independent cause of action against a third party for aiding and abetting a debtor in carrying out a fraudulent transfer.)

defraud the plaintiff/creditor out of its $50 million judgment against Wu. Allegedly, after plaintiff obtained the judgment, Wu was ordered to make disclosures in aid of execution, and gave plaintiff a consent form to verify funds he had with Mega Bank. Although Mega was presented with the consent form, it did no acknowledge the extent of Wu's holdings, and other pertinent information concerning him. Moreover, Mega met with Wu several times a year, and gave Mega checks, deposit slips and financial reports and statements regarding Wu's business operations. In its lawsuit, Plaintiff alleged Mega Bank intended to defraud Wu's creditors and, *inter alia,* was liable for fraudulent transfer in violation of FUFTA because it allegedly had knowledge of Wu's obligations to plaintiff, but still accepted Wu's transfers of funds into accounts held by Wu or Wu's entities or insiders. 534 F.Supp.2d at 1343. Judge Gold granted Mega's motion to dismiss because plaintiff had failed to allege Mega was the intended recipient of the transferred funds and/or that it controlled the funds at issue. *Id.* at 1344.

Here, taking the allegations in the Amended Complaint as true, Plaintiff has also not alleged that HOMELAND TITLE was the intended recipient of the earned money deposits or that it controlled this money. To the contrary, HOMELAND TITLE simply received and disbursed all of this money in conformity with its duties as a title agent. The fact that its actions in returning this money to the sellers may have somehow aided in the fraudulent transfer of this money is of no consequence under Florida law. Therefore, Plaintiff fails to state a cause of action against HOMELAND TITLE and is not liable to Plaintiff under FUFTA.

DATED: April 8, 2010

/s/ Dale L. Friedman
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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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