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

CASE NO. 12-80486-CIV- HURLEY/HOPKINS

JONATHAN E. PERLMAN, Esq.,
as court appointed Receiver of
Creative Capital Consortium, LLC, et al.,

Plaintiffs,

v.

REGENCY REALTY GROUP, INC.,

Defendant/Third-Party Plaintiff,

v.

THOMAS WEISZ, an individual; BARBARA KRAMER, an individual; LAWRENCE KRAMER, an individual; CARLOS BONILLA, an individual; and GEORGE THEODULE, an individual,

Third-Party Defendants.
_____/

RECEIVER'S RESPONSE TO DEFENDANT REGENCY REALTY GROUP, INC.'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc. and Unity Entertainment Group, Inc.[1], files this

[1] Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc. and Unity Entertainment Group, Inc. shall sometimes be collectively referred to as the "Receivership Entities."

[2] All exhibits identified in these undisputed facts are referred to using the exhibit numbers for the supporting

Response to Defendant Regency Realty Group, Inc.'s Motion for Summary Judgment Motion and states as follows:

INTRODUCTION

Defendant's Motion for Summary Judgment should be denied for the following reasons:

1. The transfers to the Defendant were made as part of the Theodule Ponzi scheme and originated from assets controlled by George Theodule and Creative Capital Consortium, LLC ("Creative Capital.") Theodule, Creative Capital, and Dolce Regency, LLC (an entity controlled by Theodule and Creative Capital) had the exclusive power to determine: (i) the amount of the transfers made; (ii) to whom the transfers would be made; and (iii) when the transfers would be made. Contrary to the Defendant's assertions, under the "control test" established in the Eleventh Circuit, the undisputed facts of the case clearly establish that Creative Capital "owned" the funds used to make the transfers.

2. The Receiver's prior settlement with Dolce Regency Suites, LLC ("Dolce Regency") does not in any way preclude the Receiver from pursuing the fraudulent transfer claims against the Defendant in this matter. The Defendant has misconstrued the statutory provisions of the Florida Uniform Fraudulent Transfer Act ("FUFTA") and related controlling Florida case law in the following manner:

a. The Defendant's assertion that the Receiver, due to his settlement and release of Dolce Regency on August 16, 2010, lacks standing as a "creditor" of Dolce Regency for purposes of asserting his fraudulent transfer claim set forth in Count I of the Complaint is entirely without legal merit. FUFTA requires only that the Receiver, standing in the shoes of the Receivership Entities, establish creditor status ***at or prior to the time the transfers were made in***

2008. The Receiver simply has no burden to prove that he remains a creditor at the time a lawsuit is commenced.

b. The Defendant's assertion that the Receiver, due to his settlement and release of Dolce Regency on August 16, 2010, is unable to establish in Count II of the Complaint that the initial transfer to Dolce Regency was a "voidable" transfer is also wholly unsupported at law. The concept of "voidability" differs from actual "avoidance." To recover from the Defendant as a subsequent transferee, the Receiver need only show that the initial transfers to Dolce Regency ***could have been avoided at the time the transfers were made***. By settling with Dolce Regency, the Receiver does not concede the voidability of its initial transfer to Dolce Regency. Instead the settlement merely releases Dolce Regency from liability for the voidable transfer. The Defendant is not an intended beneficiary of the Receiver's settlement with Dolce Regency and cannot use the settlement as a shield in this lawsuit.

3. Disputed material facts exist concerning whether the Defendant received the alleged fraudulent transfers "in good faith." During the due diligence period prior to the sale of the Regency Property, the Defendant received suspicious and wholly unsubstantiated information from George Theodule regarding his financial ability and financial resources. Despite the highly suspicious information, which would have given any ordinarily prudent person reason to further investigate, the Defendant failed to verify Theodule's creditworthiness or financial capacity, and further failed to verify the source of the more than $14 million in funds which Theodule and his business entities allegedly committed to consummate the purchase of the Regency Property.

STATEMENT OF UNDISPUTED MATERIAL FACTS

On December 21, 2012, the Receiver filed his Motion For Partial Summary Judgment Regarding Actual Intent To Hinder, Delay Or Defraud (the "Motion for Partial Summary Judgment") [DE 40.] Rather than repeat verbatim the entire Statement of Undisputed Material Facts set forth therein, the Receiver incorporates those factual statements herein by reference. For purposes of clarity however, the Receiver respectfully refers the Court to the following undisputed material facts pertaining directly to transactions regarding the purchase of the Regency Hotel Property, which transaction forms the foundation for the Receiver's fraudulent transfer claims in this case:

A. The Dolce Regency Transaction

1. On January 8, 2008, George Theodule organized Creative Capital Consortium, LLC ("Creative Capital") as its sole managing member. *(See Articles of Organization for Creative Capital, Ex. 21, Receiver's Motion for Partial Summary Judgment, DE 40.)* [2]

2. During the operation of his Ponzi scheme, Theodule informed a number of investment club presidents and investors in Creative Capital that he was planning to use a portion of Creative Capital investor funds to purchase investments in real property. Theodule described to certain of Creative Capital's investors the company's interest in the purchase of a stalled, uncompleted commercial development project in Orlando, Florida, which had been approved for 325 mixed-use residential and hotel units located on Regency Suites Drive in Orlando, Florida (the "Regency Property.") *(Affidavits of Investors Rock Sanozier and Harold Jean-Pierre, Ex. 19, and Ex. 20, Receiver's Motion for Partial Summary Judgment, DE 40.)*

[2] All exhibits identified in these undisputed facts are referred to using the exhibit numbers for the supporting exhibits filed by the Receiver in connection with the Motion for Partial Summary Judgment.

2. On March 27, 2008, in furtherance of this purported real estate investment strategy, Creative Capital entered into a retainer agreement with attorney Gabrielle Alexis (the "Retainer Agreement"). Under the terms of the Retainer Agreement, Alexis was to provide "general counsel" legal services to Creative Capital relating specifically to real estate related transactions. The Retainer Agreement defined the scope of legal services as being "related to Real Estate Transactions, Mortgage Programs and Contracts; reviewing purchase agreements for accuracies in preparation for closings of the transactions; and preparing agreements between partners of the Real Estate programs." *(Retainer Agreement, Ex. 15 Receiver's Motion for Partial Summary Judgment, DE 40, at Section 1.0.)*

3. In or about May 2008, Theodule, in his capacity as the controlling principal of Creative Capital, formed Dolce Regency, LLC ("Dolce Regency"), a Florida limited liability company. At the time of its formation, George Theodule was the sole member and managing member of Dolce Regency. *(Dolce Regency Articles of Organization, Ex. 16, Receiver's Motion for Partial Summary Judgment, DE 40.*)

4. On June 16, 2008 in contemplation of the purchase of the Regency Property, Alexis opened a Creative Capital client trust account in order to accommodate the contemplated "real estate transactions" (the "Creative Capital Trust Account.") *(Wachovia Account Records, Ex. 17, and Ex. 18, Receiver's Motion for Partial Summary Judgment, DE 40.)*

5. From June through December 2008, Theodule caused Fourteen Million Three Hundred Ninety Thousand Seven Hundred and Seventy Eight ($14,490,778) Dollars belonging to Creative Capital investors to be transferred to the Creative Capital Trust Account. Of this amount, $11 million was funded by an entity known as Crowne Gold Investments, Inc., a prior "investor" in the Theodule Ponzi-scheme. The remaining amounts were funded by Theodule and

the Receivership Entities. *(Wachovia Bank Statements, Ex. 18, Receiver's Motion for Partial Summary Judgment, DE 40.*)

6. On July 24, 2008, the corporate name of Dolce Regency, LLC was amended to rename the company Dolce Regency Suites, LLC ("Dolce Regency"). The amendment also added a new member, Pacific Atlantic Investments, LLC. Theodule, however, continued to retain his interest in the company and continued as the managing member of Dolce Regency. *(Dolce Regency Suites Articles of Organization, Ex. 16, Receiver's Motion for Partial Summary Judgment, DE 40*.)

7. On or about August 2008, Dolce Regency executed a Membership Interest Purchase and Sale Agreement pursuant to which Dolce Regency purchased the entire ownership and membership interests in and of Regency Suites, I, LLC, the owner of the Regency Property (the "Dolce Regency Purchase Agreement"). The Dolce Regency Purchase Agreement vested 100% ownership of the Dolce Property in Dolce Regency. *(Dolce Regency Purchase Agreement, Ex. 25, Receiver's Motion for Partial Summary Judgment, DE 40.)*

8. Creative Capital transferred Seven Million ($7,000,000) Dollars from the Creative Capital Trust Account to Dolce Regency via an escrow account established by the law offices of Dean, Mead, Egerton, Bloodworth, Capuano, and Bozarth, P.A, ("Dean Mead") which served as escrow agent for the sale of the Regency Property (the " Dolce Transfer.") *(Wachovia Bank Statements, Ex. 18, Receiver's Motion for Partial Summary Judgment, DE 40.*)

9. Further in connection with the Dolce Regency Purchase Agreement, Dolce Regency caused Dead Mead to disburse incrementally in excess of $2.4 million dollars of Creative Capital funds to the Defendant (the "Regency Transfers.") *(Suntrust Bank Records, Ex. 26, Receiver's Motion for Partial Summary Judgment, DE 40.)*

LEGAL ARGUMENT AND CITATION TO AUTHORITY

I. Regency Realty Fails To Meet The Summary Judgment Standard.

"Summary judgment is authorized only when the moving party meets its burden of demonstrating . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment ***as a matter of law***." *Corporate Fin., Inc. v. Principal Life Ins. Co., 461 F. Supp. 2d 1274, 1282-1283 (S.D. Fla. 2006.) Emphasis added.* "The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied[.]" *Id. at 1283 (citing Brunswick Corp. v. Vineberg, 370 F.2d 605, 611-12 (5th Cir. 1967))*. In assessing whether the movant has met this burden, the Court must "view the evidence and all factual inferences in the light most favorable to the party opposing the motion." *Id.* As set forth below, even if the Court were to accept the Defendant's version of the undisputed facts in the case, the prevailing case law simply does not support their arguments and summary judgment must therefore be denied.

II. The Cash Transfers to the Defendant Were The "Property" of the Receivership Entities.

Despite Regency Realty's assertions that the fraudulent transfers in question arise from sources unrelated to the Receivership Entities, the facts of the case tell an entirely different story. It remains wholly undisputed by Regency Realty that:

(i) On January 8, 2008, George Theodule organized Creative Capital as its sole managing member. *(See Articles of Organization for Creative Capital, Ex. 21, Receiver's Motion for Partial Summary Judgment, DE 40.)*

(ii) On March 24, 2008 Gabrielle Alexis entered into the Retainer Agreement with Creative Capital. *(See Retainer Agreement, Ex. 15, Receiver's Motion for Partial Summary Judgment, DE 40.)*

(iii) The Retainer Agreement was signed by George Theodule in his capacity as the CEO of Creative Capital and identified the following scope of legal services:

> "advice to Client on issues related to ***Real Estate Transactions***, Mortgage Programs and Contracts; reviewing purchase agreements for accuracy . . [.]; preparing agreements for partners of the Real Estate Programs with Client; [and] preparing contracts and agreements for different individuals desiring to participate in the different mortgage programs." *(Retainer Agreement, ¶1.0)*

(iv) On May 29, 2008 George Theodule organized Dolce Regency, LLC as its sole managing member. *(See Articles of Organization for Dolce Regency, Ex.16, Receiver's Motion for Partial Summary Judgment, DE 40.)*

(v) On June 16, 2008, Alexis opened a client trust account entitled ***"Real Estate Transactions"***, which was funded in June 23, 2008 with a deposit of $11 million dollars from Crowne Gold, Inc., an existing investor in the Theodule Ponzi scheme, and on July 9, 2008 with a deposit of $3 million dollars from George Theodule. *(Wachovia Account Statements, Ex. 17 and 18, Receiver's Motion for Partial Summary Judgment, DE 40.)*

(vi) On August 13, 2008, $7 million dollars was transferred to an escrow account established for Dolce Regency Suites, LLC the successor company of Dolce Regency, LLC, via the law offices of Dean Mead Egerton Bloodworth Capuano and Bozarth, P.A. ("Dean Mead.") ***George Theodule was the sole managing member of Dolce Regency Suites, LLC and the CEO and managing member of Creative Capital at the time the $7 million was transferred***. *(Dolce Regency Articles of Organization and Wachovia Account Statement, Ex. 16, 17 and 18, Receiver's Motion for Partial Summary Judgment, DE 40.)*

(vii) From August 2008 through January 2009, the Regency Transfers in the amount of $2.4 million dollars, were made to Regency Realty from the $7 million in in funds escrowed with Dean Mead.

The above chain of events appears to suggest nothing more than complete control by George Theodule, the CEO of Creative Capital and managing member of Dolce Regency, over all accounts and all entities related to the transfers at issue in this case. Moreover, Theodule had begun touting the purchase of the Regency Property to his investors as one of the "investments" associated with Creative Capital, further confirming that all of the transfers were made in connection with and in furtherance of the Theodule Ponzi scheme. *See Affidavits of Investors Rock Sanozier and Harold Jean-Pierre, Ex. 19 and 20, Receiver's Motion for Partial Summary Judgment, DE 40.)*

In the case of *In re: Bankest Capital Corp., 374 B.R. 333, (Bankr.S.D.Fla.2007)*, the Court explained the "control test" utilized in this Circuit to determine whether funds subject to a fraudulent transfer claim under FUFTA were in fact the "property of the debtor." The *Bankest* court reasoned as follows:

> In this circuit, courts "must look beyond the particular transfers in question to the entire circumstance of the transactions" in determining whether property is "property of the debtor" for fraudulent transfer purposes. *Nordberg v. Sanchez (In re Chase & Sanborn Corp.), 813 F.2d 1177, 1181–1182 (11th Cir.1987).* The dispositive question is whether the Debtor had control over the subject funds. *Id.* Application of the "control" test, as adopted in 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." *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.), 848 F.2d 1196, 1199 (11th Cir.1988).*
>
> In *In re Safe–T–Brake of South Florida, Inc., 162 B.R. 359 (Bankr.S.D.Fla.1993)*, this Court (Ginsberg, J.) articulated the elements of "control" for purposes of this analysis:
>
> [C]ontrol has two components: first, the power to designate which party will receive the funds; and, second, the power to actually disburse the funds at issue to that party. In other words, control means control over identifying the payee, and control over whether the payee will actually be paid. *Id. at 365 (quoting Matter of Smith, 966 F.2d 1527, 1539 (7th Cir.1992)(*dissenting opinion of Flaum, J.)).

In re: Bankest Capital Corp., 374 B.R. 333, (Bankr.S.D.Fla.2007)

Applying the control test analysis described in *Bankest* to the facts of this case yields only one reasonable conclusion - the funds comprising the transfers at issue in this case were clearly the property of Creative Capital and/or Dolce Regency. George Theodule formed Creative Capital and entered into an agreement with Gabrielle Alexis for the stated purpose of conducting ***"real estate transactions."*** Throughout the entire course of the purchase transaction for the Regency Property, Theodule remained at the helm of both Creative Capital and of Dolce Regency as the ultimate "buyer" of the Regency Property.

Indeed, Regency Realty admits Theodule's significant connection to the purchase transaction. John Ibach, attorney for Regency Realty sates the following in his affidavit in support of Regency Realty's Motion for Summary Judgment:

> On July 9, 2008, ***Mr. Bozarth sent me background information on Mr. George Theodule, the person identified as the managing member of the entity that would buy Regency Suite I's membership interests. Mr. Bozarth also sent me the personal financial statement of Mr. Theodule for March, April, and May 2008***, and a Loan Approval letter by Southeastern Funding.

(Affidavit of John Ibach, Esq. Ex. 1 to Regency Realty's Motion for Summary Judgment, DE 38; emphasis added.)

In light of the substantial evidence and controlling authority supporting the Receiver's claims that that the funds comprising the transfers at issue in this case are in fact the "property of the debtor"[3], Regency Realty's motion for summary judgment must be denied.

III. The Receiver's Settlement and Release of Dolce Regency Simply Has No Legal Impact Whatsoever Upon the Fraudulent Transfer Claims Against Regency Realty.

A. The Receiver's Standing As A Creditor of Dolce Regency Is Not Compromised By The Settlement.

The very language of FUFTA defeats the Defendant's arguments that the Receiver's standing as a creditor is somehow defeated by his settlement with Dolce Regency. FUFTA broadly defines a creditor as any person having a "claim." A "claim" is further defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Fla. Stat. § 726.102.*

[3] There are two "debtors" to consider in this case. Count I of the Receiver's Complaint seeks the avoidance of the $2.4 million dollars in Regency Transfers by Dolce Regency to the Defendant as the "initial transferee", in which case, Dolce Regency would be deemed the "debtor" for control purposes. Count II of the Receiver's Complaint seeks the avoidance of the $7 million dollar Dolce Transfer from Creative Capital to Dolce Regency, and seeks recovery in the amount of the Regency Transfers from the Defendant as a subsequent transferee, in which case, Creative Capital would be deemed the debtor.

Moreover, FUFTA makes no distinction regarding the timing of a plaintiff's status a "creditor" or claimant. Any creditor having a claim prior to or after an alleged fraudulent transfer can acquire standing to recover a fraudulent conveyance. Florida Statutes § 726.105 provides in relevant part as follows:

> 726.105. Transfers fraudulent as to present and future creditors
>
> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, ***whether the creditor's claim arose before or after the transfer was made*** or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor

Fla.Stat. §726.105, emphasis added.

Pursuant to FUFTA, in order to maintain an action for the avoidance and recovery of a fraudulent transfer, a creditor need only show that a claim existed prior to (or after) the occurrence of the alleged fraudulent transfer. Standing, thus obtained by establishing creditor status, vests the creditor with the right to proceed directly against the transferee of a fraudulent conveyance. *Id.*

The Defendant, the Receiver's targeted initial transferee in Count I of the Complaint, is not a party to the release granted by the Receiver in the Settlement Agreement.[4] The parties to the Settlement Agreement did not intend to release the Defendant, and the Defendant therefore cannot claim the benefit of the release. "The intent of the parties controls interpretations of their releases." *Rosen v. Fla. Ins. Guar. Ass'n, 802 So.2d 291, 295 (Fla.2001.)* In *Stephen Bodzo Realty, Inc. v. Willits International Corp., 428 So.2d 225, 227 (Fla.1983)*, a case involving a written agreement releasing one of two joint and several obligors but not the other on the same obligation, the Florida Supreme Court stated that "[t]o allow these respondents to escape this

[4] (See the Settlement Agreement among the Receiver and Dolce Regency et al., Defendant's Motion for Summary Judgment [DE 38], Ex. 9.)

obligation by relying on a document executed by others who had no intention of releasing them is the epitome of manifest injustice." *Id*.

Finally, the Settlement Agreement among the Receiver and Dolce Regency makes no statements or admissions that the Receiver's claims against the Dolce Regency were in any way paid or satisfied. To the contrary, the Receiver's lawsuit against Dolce Regency was dismissed ***without prejudice.*** [5] While the Receiver admittedly cannot recover or sue upon his claim against Dolce Regency[6], the claim itself against the Defendant in the context of a fraudulent transfer remains very much alive.

B. The $7 Million Dollar Transfer To Dolce Regency Is A "Voidable" Transfer For Purposes Of Recovery Against The Defendant As A Subsequent Transferee Under FUFTA.

The Eleventh Circuit does not "does not mandate a plaintiff to first pursue recovery against the initial transferee and successfully avoid all prior transfers against a mediate transferee." *IBT International, Inc. v. Northern (In re Int'l Admin. Servs., Inc.), 408 F.3d 689, 708 (11th Cir.2005.)* In reaching this conclusion, the Court in *IBT International* addressed the ambiguity of certain provisions of the Bankruptcy Code at 11 U.S.C. § 550 (a) which could have required actual litigation and avoidance of initial transfers prior to successful recovery against a subsequent transferee[7]. Determining that there is a distinction between avoiding the transaction

[5] (See the Settlement Agreement among the Receiver and Dolce Regency et al., Defendant's Motion for Summary Judgment [DE 38], Ex. 9.)

[6] In this regard, Dolce Regency is not a party to this action, nor is it required to be under Florida law. Nor does a judgment for avoidance entered in this case in the Receiver's favor "revest" the fraudulently conveyed property with Dolce Regency to invoke the release granted in the Settlement Agreement. *(See, Ex parte HealthSouth Corp., 974 So.2d 288 (Ala. 2007.)*

[7] 11 U.S.C. § 550(a) provides: to the extent that a transfer ***is avoided*** under section 544 ... the trustee may recover for the benefit of the estate property transferred, or if the court so order, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee

and actually recovering the property or the value thereof, the Court concluded that "applicable case law and statutes do not require suit against the initial transferee before seeking to recover an avoidable transfer against subsequent transferees. Section 550 of the Bankruptcy Code provides that a plaintiff may recover a fraudulent transfer from the initial transferee or any immediate or mediate transferee. ***The provision contains no language that suggests that recovery from immediate transferees is in any way dependent upon a prior action or recovery against the initial transferee.***" *Id. at p. 328, emphasis added.*

Unlike the Bankruptcy Code, there exists no ambiguity within FUFTA regarding the benchmark for successful claims against subsequent transferees. When a statute is clear, a court may not look behind the statute's plain language or resort to rules of statutory construction to determine the legislative intent. *Overstreet v. State, 629 So.2d 125, 126 (Fla.1993)* (noting that legislative intent must be determined primarily from the language of a statute). This is so because the Legislature is assumed to know the meaning of the words used in the statute and to have expressed its intent through the use of the words. *Id.* It is only when a statute is ambiguous that a court may resort to the rules of statutory construction.

FUFTA does not contemplate whether or not an initial transfer must actually be avoided in order to pursue claims against a subsequent transferee. Instead the FUFTA statute uses the word "voidable" to describe those transfers pursuant to which recovery may be obtained. FUFTA further allows a plaintiff to choose which transferee to pursue, the initial transferee or those later in line. Specifically Fla. Stat. §726.109 provides:

> 726.109. Defenses, liability, and protection of transferee
>
> (1) A transfer or obligation is not ***voidable*** under s. 726.105(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

> (2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under s. 726.108(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made; or
>
> (b) ***Any subsequent transferee*** other than a good faith transferee who took for value or from any subsequent transferee.

Fla. Stat. §726.109, emphasis added.

More importantly, section 726.109 specifically refers to transfers which are "voidable" under section 726.105(a), which as previously cited, states that a transfer made with "actual intent to hinder, delay, or defraud any creditor" is ***fraudulent*** as to a creditor, "***whether the creditor's claim arose before or after the transfer was made."*** *Fla. Stat. §726.105(a), emphasis added*. Thus the clear language of the FUFTA statute defeats the Defendant's arguments that the $7 million dollar initial Dolce Transfer is not a "voidable" transfer because of the Settlement Agreement entered into by the Receiver and Dolce Regency. The statute clearly contemplates that ***any transfer*** made with actual fraudulent intent is a "voidable" transfer with respect to ***any creditor*** having a claim arising prior the transfer having been made.

It is important to note the apparent policy behind the FUFTA legislation with regard to the recovery of "voidable" transfers from subsequent transferees. A subsequent transferee does not forfeit its right to argue against the "voidability" of an initial transfer whether a creditor first proceeds against the initial transferee or not. Thus, even if the Receiver had successfully actually avoided the Dolce Transfer by proceeding to trial as opposed to settling with Dolce Regency, the Defendant could still defend against Count II of the Receiver's Complaint by arguing anew that that the initial Dolce Transfer was not fraudulent. *See Leshin v. Welt (In re Warmus), 276 B.R. 688, 694–95 (S.D.Fla.2002)* (subsequent transferee not collaterally estopped

from contesting avoidability following settlement between trustee and initial transferee); *Thompson v. Jonovich (In re Food & Fibre Prot., Ltd.), 168 B.R. 408, 416 (Bankr.D.Ariz.1994)* (trustee who obtained a default judgment against the initial transferee was required to prove every element of preference or fraudulent transfer against the subsequent transferee.)

In other words, a creditor must always prove the "voidability" of the initial transfer in his case as against the subsequent transferee unless collateral estoppel or res judicata applies. FUFTA, by its clear language, achieves the logical result of allowing a creditor to settle with an initial transferee and pursue the subsequent transferees, or to pursue a subsequent transferee when he is unable to sue the initial transferee.

IV. The Defendant Did Not Receive the Regency Transfers In Good Faith.

It is the Defendant's burden at trial to prove its affirmative defense that it was a good faith transferee. Good faith is an objective standard. *In re World Vision Entertainment, Inc., 275 B.R. 641, 659 (Bankr. M.D. Fla. 2002).* In defining conduct which constitutes good faith in connection with the receipt of alleged fraudulent transfers, the District Court will be guided by the cases decided under 11 U.S.C § 548(c) of the Bankruptcy Code. In this regard, courts have determined whether good faith is established by looking at the actions and knowledge, both actual knowledge and imputed knowledge, of the recipient. *In re World Vision Entertainment, Inc., 275 B.R. at p. 641.* Willful ignorance of a debtor's fraudulent purpose is fatal to a good faith defense asserted under Section 548(c). *In re Model Imperial, Inc., 250 B.R. 776, 801 (Bankr. S.D. Fla. 2000).* A transferee may not put on blinders where circumstances place it on inquiry notice "of the debtor's fraudulent purpose or insolvency. *In re Cannon, 230 B.R. 546, 592 (Bankr.W.D.Tenn.1999).*

Moreover, to determine whether a transferee has acted in good faith, courts look to what the transferee objectively "knew or should have known", such that a transferee does not act in good faith when it has sufficient knowledge to place it on inquiry notice of the voidabilty of the transfer. *In re Model Imperial, Inc., 250 B.R. 776, 798 (S.D. Fla. 2000) (quoting In re Sherman, 67 F.3d 1348, 1355 (8th Cir.1995) (emphasis added)*(noting further that both the nature of the transaction and transferee's lack of knowledge of facts which cause a reasonable person to make further investigation is applied in the context of the good faith defense).

Recently, on January 8, 2013, counsel for the Receiver conducted the depositions of the Defendant's principals, David McNulty and Paul Maxwell, as well as the deposition of John Ibach, the attorney who represented the Defendant in connection with the purchase of the Regency Property (collectively, the "Regency Witnesses.") The testimony of the Regency Witnesses revealed the following facts and information[8]:

- In connection with the due diligence required pursuant to the purchase of the Regency Property, Theodule presented the following business information to the Defendants, (all of which is untrue):

  (i) Theodule acquired a Masters Degree in Finance from Stanford University.

  (ii) Theodule served as the Finance Director of Chrysler, Ford and Honda.

  (iii) Creative Capital Consortium has a portfolio of over $100,000,000.00 which is managed by Mr. Theodule

- In connection with the due diligence required pursuant to the purchase of the Regency Property, Theodule presented unaudited financial statements indicating a false net worth of more than $50 million dollars, and further falsely indicating net monthly income in 2008 of in excess of $2.5 million dollars per month.

[8] The Receiver has not yet received the sworn transcripts in connection with the depositions of the Regency Witnesses and respectfully requests that he be allowed to supplement this Response by filing copies of the deposition transcripts upon receipt. The Receiver does not otherwise have access to witnesses having personal knowledge of the facts and information provided by the Regency Witnesses during their depositions.

- In connection with the due diligence required pursuant to the purchase of the Regency Property, Theodule presented three separate false "letters of intent" from illegitimate construction lenders for the Regency project for proposed construction loans exceeding $52 million dollars. The "letters of intent" were replete with grammatical errors and in no way resembled valid instruments from legitimate lenders. The Defendant performed a limited background check on at least one of the "lenders" and determined that the lender did not exist.

- Attorney Steven Bozarth, the lead attorney for the seller in connection with sale of the Regency Property, having received information during due dilgence identical to what had been received by the Defendant, expressed deep concern and suspicion regarding the financial information provided by Theodule and Theodule's qualifications as the principal for the buyer of the Regency Property.

- The Regency Witnesses admitted at their depositions that they did virtually nothing to verify Theodule's financial or business information, and further failed to verify the source of the $7 million dollars used by Theodule to fund the Regency Property purchase.

By virtue of the grossly false and inconsistent information provided by Theodule, the Defendant had a duty to inquire into Theodule's financial background and business information. *In re Model Imperial, Inc., 250 B.R. 776, 798 (S.D. Fla. 2000.)* Had the Defendant conducted even the most limited inquiry regarding Theodule's affairs, it would have quickly determined that Theodule was a fraud. Instead, the Defendant ignored all of the warning signs and accepted the payments without question.

V. The Regency Transfers Were Not Made As Payment For An Antecedent Debt.

The Defendant cannot argue that the Regency Transfers were received as payment on account of an antecedent debt[9]. Prior to the sale of the Regency Property in 2008, the Defendant's mortgage debt was owed by Regency Suites I, LLC. *(Affidavit of John Ibach, Esq. Ex. 1 to Regency Realty's Motion for Summary Judgment, DE 38, ¶ 13.)* Pursuant to the Membership Interest Purchase Agreement governing the sale of the Regency Property, the

[9] The Defendant argues for a broader "good faith" defense standard pursuant to *Miles v. Katz, 405 So.2d 750 (Fla. 4th DCA 1981.)* Pursuant to *Miles*, a debtor may convey its assets to a creditor to satisfy its antecedent debts, even if the debtor intended to defeat the claims of other creditors and the creditor had knowledge of such intention.

membership interests of Regency Suites I, LLC were purchased by Dolce Regency. In connection therewith, in August of 2013, a new debt was created among the Defendant and the "new" company, now controlled by Theodule as its new principal. The Defendant's existing mortgage loan was amended and extended as part of the purchase of the Regency Property and held a new maturity date of December 23, 2008. *(Affidavit of John Ibach, Esq. Ex. 1 to Regency Realty's Motion for Summary Judgment, DE 38, ¶ 33, 34.)* The new debt was entirely created as a consequence of the Regency Property purchase transaction.

CONCLUSION

For the reasons set forth above, the Defendant's Motion for Summary Judgment should be denied.

Dated: January 22, 2013

Respectfully submitted,

By: /s/ David P. Lemoie
David C. Cimo
Florida Bar No.: 775400
dcimo@gjb-law.com
David P. Lemoie
Florida Bar No.: 188311
dlemoie@gjb-law.com
Carmen Contreras-Martinez
Florida Bar No.: 093475
GENOVESE JOBLOVE & BATTISTA, P.A.
4400 Miami Tower
100 Southeast Second Street
Miami, Florida 33131
Tel: (305) 349-2300
Fax: (305) 349-2310
Attorneys for Receiver
Jonathan E. Perlman, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2013, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record 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.

/s/ David P. Lemoie
David P. Lemoie

SERVICE LIST

John A. Tucker, Esq.
Florida Bar No. 0356123
E-mail: jtucker@foley.com
Amber L. Rumancik, Esq.
Florida Bar No. 0044888
arumancik@foley.com
FOLEY & LARDNER LLP
One Independent Drive, Suite 1300
Jacksonville, FL 33307-5017
Tel: 904 359-2000
Fax: 904 359-8700
Attorneys for Defendant Regency Realty Group, Inc.

Shyamie Dixit, Esq.
E-mail: sdixit@dixitlaw.com
Sara Albert, Esq.
E-mail: salbert@dixitlaw.com
DIXIT LAW FIRM, P.A.
6921 Pistol Range Road
Suite 103
Tampa, FL 33635
Cell: (813) 992-8118
Fax: (813) 855-8836
Attorneys for Third-Party Defendants