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 REPLY TO PLAINTIFF'S OPPOSITION TO HOMELAND TITLE'S MOTION TO DISMISS

Defendant, HOMELAND TITLE SERVICES, LLC ("Homeland Title"), respectfully submits this Reply to Plaintiff's Opposition to Homeland Title's Motion to Dismiss. In his Opposition, Plaintiff cavalierly asserts that the defense raised by the motion to dismiss is an affirmative defense, requiring "factual proof." In so arguing, Plaintiff ignores the allegations of his own Amended Complaint and offers no facts outside of those asserted in the Amended Complaint to be determined at a later time by the Court.

Of course, an affirmative defense may appear on the face of a complaint, entitling the defendant to a dismissal upon a motion to dismiss. *See, e .g, Smith v. Regional Director Of Florida Department Of Corrections*, 2010 WL 447014 , *2 (11th Cir. 2010) ("The Supreme

Court has recognized that, where an affirmative defense appears on the face of a complaint, it may be dismissed for failure to state a claim.") (citing, *Jones v. Bock,* 549 U.S. 199, 215 (2007); *Quiller v. Barclays American/Credit, Inc.,* 727 F.2d 1067, 1069 (11th Cir.1984), *en banc reh'g*, 764 F.2d 1400, 1400 (11th Cir.1985) (per curiam) (reinstating panel opinion) ("[A] complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint.")

In this case, Plaintiff's own allegations reveal that Homeland Title had absolutely no control of the subject funds, but was merely a title/escrow agent, i.e., a conduit for the transactions in question. Indeed, Plaintiff does not allege that Homeland Title was an intended recipient of the funds in question, had any discretion regarding the funds in question, or any control over those funds. Instead, Plaintiff alleges that the funds were paid to the sellers of those properties, a part of which passed through the title company to facilitate the transaction and none of which remained or was taken by the title company: "Creative Capital paid CCG the total sum of $250,000" (Am. Com. at ¶ 51) and "Creative Capital paid defendant Ardelean the total sum of $100,000" (Am. Com. at ¶ 52), which was all transferred to the indented recipients of those funds. *Id.*

As explained in Homeland Title's motion to dismiss, "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)). Moreover, as the Second Circuit held in *In re Ogden,* 314 F.3d 1190, 1202 (10th Cir. 2002), under the control test, "the minimum requirement of status as a transferee [under § 550] is dominion over the money or other asset, the right to put the money to one's own purposes." The Court elucidated:

> Under this approach, "those who act as mere 'financial intermediaries,' 'conduits' or 'couriers' are not initial transferees under § 550." *Rupp,* 95 F.3d at 941 (citing *Bonded,* 838 F.2d at 893); *see also Christy v. Alexander & Alexander of New York, Inc. (In re Finley Kumble, Wagner, Heine, Underberg, Manley, Myerson, & Casey),* 130 F.3d 52, 57 (2d Cir.1997) (rejecting the contention that "couriers and other mere conduits" constitute initial transferees under § 550); *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.),* 848 F.2d 1196, 1201 (11th Cir.1988) (affirming a bankruptcy court's determination that 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). 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 legal dominion and control over the funds. *See Bowers v Atlanta Motor Speedway, Inc. (In re Southeast Hotel Props. Ltd. P'ship),* 99 F.3d 151, 156 (4th Cir.1996) ("To hold that a party needs only physical dominion and control over the funds to constitute an 'initial transferee' is to hold every agent or principal of a corporation to be the initial transferee when he or she effects a transfer of property in his or her representative capacity. As stated by the court in *Bonded* ... the term 'transferee' as used in § 550 'must mean' something different from 'possessor' or 'holder' or 'agent.' " (quoting *Bonded,* 838 F.2d at 894)).

Id.

In the instant Amended Complaint, Plaintiff does not allege that Homeland Title had "dominion over the money or other asset, the right to put the money to one's own purposes." *Id.* To the contrary, the allegations confirm that Homeland Title merely received funds to be, and which were, paid over to the intended recipients, CCG and Ardelean. (Am. Com. at ¶¶ 51-52.)

Plaintiff has not and cannot assert that Homeland Title was anything more than a "financial conduit" for the transactions with the two sellers. It is unconscionable to allow this matter to proceed against this title agent without alleging, consistent with Rule 11, that Homeland Title had control over these funds and the right to "put the money to [its] own purposes."

Homeland Title respectfully requests that the Court dismiss the Amended Complaint against Homeland Title.

DATED: June 7, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 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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PERLMAN V. CAPTIN CONSTRUCTION GROUP, INC. ET AL
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