

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-80190-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN,
Plaintiff,

vs.

CAPTIN CONSTRUCTION GROUP,
INC., et al.,
Defendants.

_____ /

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE is before the court upon the motion of defendant Homeland Title Services, LLC's to dismiss the claim against it [DE # 56]. The first amended complaint alleges that defendant received \$200,000 in allegedly fraudulent transfers in connection with a real estate transaction and then transferred the money to other entities. Plaintiff seeks to avoid and recover the transfers pursuant to the Florida Uniform Fraudulent Transfer Act (FUFTA), Fla. Stat. § 726.101, *et seq.*

Defendant asserts that it merely served as an escrow agent for the real estate transaction and, as such, was simply a "conduit" for the eventual recipients of the transfers. The parties agree that a "mere conduit" of a fraudulent transfer cannot be held liable under FUFTA. *See Super Vision Int'l, Inc. v. Mega Int'l Commercial Bank Co., Ltd.*, 534 F.Supp.2d 1326, 1344 (S.D. Fla. 2008) ("Under Florida law, there is no cause of action under the FUFTA against a party who assists or aids and abets a fraudulent transfer, where that party does not come into possession of the property."); *see also In re Chase & Sandborn Corp.*, 848 f.2d 1196, 1198-1202 (11th Cir. 1988).

The "mere conduit" defense, however, is an affirmative defense requiring proof of facts asserted by the defendant and, as such, must usually be proven at trial or in a motion for summary judgment. *See Steinberg ex rel. Lancer Mgmt. Group LLC v. Alpha Fifth Group*, 2010 WL 1332844, at * 2 (S.D. Fla. Mar. 30, 2010). The defense may be successfully asserted at the pleading stage only

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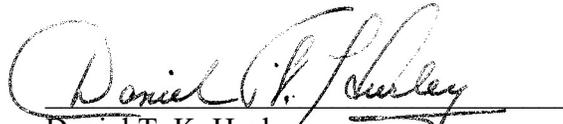
where the allegations in the complaint on their face demonstrate that the affirmative defense bars recovery. *See Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001). Such is not the case here. The amended complaint alleges that defendant received assets and then fraudulently transferred the asserts to other entities; the amended complaint does not establish that defendant was merely a conduit. Thus, the "mere conduit" defense is premature at this stage of the litigation.

Defendant argues that dismissal is appropriate because "[p]laintiff does not allege that [defendant] was an intended recipient of the funds in question, had any discretion regarding the funds in question, or any control over those funds." But assert a claim under FUFTA, a plaintiff must allege only that 1) there was a creditor sought to be defrauded, 2) a debtor intending fraud, and 3) a conveyance of property which could have been available to satisfy the debt. *Nationsbank, N.A. v. Coastal Utils. Inc.*, 814 So.2d 1227, 1229 (Fla. 4th DCA 2002). Those pleading requirements have been met in this case.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant Homeland Title Services, LLC's motion to dismiss [DE # 56] is **DENIED**.

DONE and **SIGNED** in Chambers in West Palm Beach, Florida, this 23rd day of August, 2010.


Daniel T. K. Hurley
U.S. District Judge

Copies provided to counsel of record