

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

JONATHAN E. PERLMAN, ESQ. as court  
Appointed Receiver for Creative Capital  
Consortium, LLC,

Plaintiff,

CASE NO.: 09-81225-CIV-HURLEY-  
HOPKINS

vs.

FIVE CORNERS INVESTORS I, LLC,  
Et. al,

Defendants.

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**DEFENDANTS' CFD-REGENCY I, LLC AND CFD-REGENCY II, LLC,  
MOTION TO DISMISS AND MEMORANDUM OF LAW**

Defendants, CFD-Regency I, LLC and CFD-Regency II, LLC (hereinafter "CFD I and II"), by and through their undersigned counsel, file their Motion to Dismiss Plaintiff's Complaint. In support thereof, Defendants refer the Court to the following incorporated Memorandum of Law.

**MEMORANDUM OF LAW**

**I. Introduction**

Plaintiff is the Receiver for Creative Capital Consortium, LLC ("CCC"). Complaint at par. 1. CCC was a company entirely controlled by George Theodule ("Theodule") that allegedly acquired over \$60 million from investors through a Ponzi scheme. Complaint at par. 8.

Plaintiff alleges that on May 29, 2008, Theodule, as a sole member manager, formed Dolce Regency, LLC for the purpose of investing in real estate, including the purchase of a condominium and hotel project in Orlando, Florida. Complaint at par. 51. Dolce Regency, LLC was renamed Dolce Regency Suites, LLC (“Dolce Regency”). Id. Plaintiff alleges that CCC was the owner of Dolce Regency. Complaint at par. 52.

Regency Suites I, LLC was the owner and developer of a residential and hotel condominium (the “Regency Project”). Complaint at par. 54. Plaintiff alleges that Dolce Regency acquired a 100% membership interest in Regency Suites I, LLC. Complaint at par. 54. The Defendants in the instant action, including CFD I and II, were members of Regency Suites I, LLC. Complaint at par. 9-12. Plaintiff alleges that the acquisition of Regency Suites I, LLC and the Regency Project was governed by a “Membership Interest Purchase and Sale Agreement” entered into by Dolce Regency and the Defendants, including CFD I and II. Complaint at par. 54.

Plaintiff alleges that on August 13, 2008, CCC transferred \$7 million of funds belonging to CCC investors to Dolce Regency to fund the payment and acquisition of Regency Suites I, LLC (the “Transfer”). Complaint at par. 58. Upon the closing of the purchase of Regency Suites I, LLC, including the Regency Project, the Transfer was directed to third parties “to pay the outstanding financial obligations of Regency Suites I, LLC.” Complaint at par. 58. Plaintiff also alleges

that, at and related to, the closing, Dolce Regency executed a promissory note in the amount of \$7,754,79.40 (the "Promissory Note"). Complaint at par. 59.

Plaintiff alleges that CCC held legal claims against Dolce Regency as a result of the Transfer and were, therefore, creditors of Dolce Regency as defined by the Florida Uniform Fraudulent Transfer Act ("FUFTA"), § 726.101, Fla. Stat. Complaint at par. 61.

Plaintiff on behalf of CCC filed the instant action against CFD I and II, and others, attempting to recover the \$7 million paid for the purchase of Regency Suites I, LLC and avoid the Promissory Note. Plaintiff alleges claims against CFD I and II for: (1) fraudulent transfer by Dolce Regency to CFD I and II in Count I of the Complaint pursuant to § 726.105, Fla. Stat.; (2) fraudulent transfer by CCC to CFD I and II in Count II of the Complaint pursuant to § 726.105, Fla. Stat.; (3) unjust enrichment; and (4) constructive trust.

**II. Counts I and II Must Be Dismissed Because CFD I and II Did Not Receive the Allegedly Transferred Funds**

Section 726.105 states in pertinent part that:

(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; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Fla. Stat. § 726.105. In Counts I and II of the Complaint, Plaintiff attempts to bring a claim under § 726.105(1)(a) and (b) against CFD I and II.

Under Florida law, there is no cause of action under the FUFTA against a party that does not come into possession of the property fraudulently transferred. Freeman v. First Union Nat'l Bank, 865 So. 2d 1272, 1277 (Fla. 2004); Super Vision Int'l, Inc. v. Mega Int'l Commer. Bank Co., 534 F. Supp. 2d 1326, 1344 (S.D. Fla. 2008). The alleged fraudulent transfers in this case were between CCC or Dolce Regency and creditors of Regency Suites I, LLC. There is no allegation that CFD I or II received the fraudulently conveyed assets. Therefore, the claims in Counts I and II of the Complaint against CFD I and II must be dismissed. Danzas Taiwan, LTD v. Freeman, 868 So. 2d 537, 538 (Fla. 3d DCA 2003) (fraudulent transfer claims dismissed against party that never had possession of the funds allegedly transferred); Musselman v. Weising, 2007 Bankr. LEXIS 4443 (Bankr. M.D. Fla. July 30, 2007) (FUFTA claim dismissed where defendant did not receive the funds transferred; claim dismissed because plaintiff did not sue necessary defendants that actually received the funds).

The Plaintiff alleges that the funds were transferred to third parties to pay the outstanding financial obligations of Regency Suites I, LLC. The only parties that may possibly be sued to void or recover the alleged fraudulent transfers, are the persons that received such funds.

**III. Counts I and II Must be Dismissed Because CCC Lacks Standing**

CCC lacks standing and cannot state a claim in Count I of the Complaint for an alleged fraudulent transfer made by Dolce Regency because the alleged Transfer from CCC to its wholly owned subsidiary does not make CCC a creditor of Dolce Regency. See In Re Revco D.S., Inc., 118 B.R. 468, 475 (Bankr. N.D. Ohio 1990) (an equity holder lacks standing to bring a claim for fraudulent transfer).

In Count II of the Complaint, CCC pursues a claim against CFD I and II for a transfer made by CCC. CCC lacks standing to challenge a transfer made by itself. § 726.102 (3), (4) and (6). CCC cannot be a creditor and debtor under the FUFTA. Fraudulent transfers are not avoidable by the debtor, but only by a creditor of the debtor. § 726.102, Fla. Stat. CCC is not a creditor of itself and lacks standing to bring its claim in Count II of the Complaint. Moreover, CCC's transfer to Dolce Regency, LLC cannot be a fraudulent transfer because CCC wholly owned Dolce Regency, LLC. § 726.102, Fla. Stat.

**IV. Count III and IV Must be Dismissed Because Express Contracts Exist Governing the Same Subject Matter**

Plaintiff attempts to state equitable claims in Count III of the Complaint for unjust enrichment and Count IV for constructive trust against CFD I and II. Complaint at par. 75-90. Plaintiff alleges that it would be unjust for CFD I and II to retain the benefit of the Transfer and Promissory Note made in connection with the acquisition of Regency Suites I, LLC and the Regency Project. Id. Therefore, Plaintiff asks the Court to imply a remedy and a constructive trust in favor of the Plaintiff.

Plaintiff cannot state a claim for unjust enrichment or constructive trust because express contracts exist governing the same subject matter. See Ocean Communications, Inc. v. Bubeck, 956 So.2d 1222 (Fla. 4<sup>th</sup> DCA 2007). A plaintiff cannot pursue an equitable claim, such as unjust enrichment or constructive trust, to prove entitlement to relief if an express contract exists. Moynet v. Courtois, 8 So. 3d 377, 379 (Fla. 3d DCA 2009)(unjust enrichment claim dismissed); White Constr. Co. v. Martin Marietta Materials, Inc., 633 F. Supp. 2d 1302, 1332 (M.D. Fla. 2009)(all equitable claims dismissed where contract existed governing the subject matter); R.E. Loans, LLC v. Eagle Group Broker, LLC, 2009 U.S. Dist. LEXIS 30889 (N.D. Fla. Mar. 30, 2009).

An unjust enrichment claim is precluded by the existence of an express contract between the parties concerning the same subject matter. Diamond "S" Dev.

Corp. v. Mercantile Bank, 989 So. 2d 696, 697 (Fla. 1st DCA 2008). A constructive trust claim is also an equitable remedy that must be based upon an established cause of action other than unjust enrichment. Collinson v. Miller, 903 So. 2d 221, 228 (Fla. 2d DCA 2005). Because Plaintiff cannot advance the theory of unjust enrichment for recovery, it has no constructive trust remedy. Diamond "S" Dev. Corp. v. Mercantile Bank, 989 So. 2d 696, 697 (Fla. 1st DCA 2008).

The transaction complained of in Counts III and IV of the Complaint is governed by the Membership Interest Purchase and Sale Agreement and Promissory Note. The rights and obligations of the parties in connection with the Transfer and the Promissory Note are governed by those express contracts and cannot form the basis of an equitable claim for unjust enrichment or constructive trust. Accordingly, Counts III and IV of the Complaint must be dismissed with prejudice.

**V. Count IV Must be Dismissed Because No Specific Property Ever Came into the Possession of CFD I and II**

Plaintiff fails to state a claim in Count IV of the Complaint for imposition of a constructive trust or equitable lien. A constructive trust or equitable lien can only be imposed where the trust *res* is specific and identifiable property in the possession of the defendant or traceable to specific assets of the defendant. Gersh v. Cofman, 769 So.2d 407, 409 (Fla. 4<sup>th</sup> DCA 2000); Able v. Sawyer, 750 So.2d 70 (Fla. 4<sup>th</sup> DCA 1999); Cole Taylor Bank v. Shannon, 772 So.2d 546 (Fla. 1<sup>st</sup> DCA 2000)(where there are no allegations in the Complaint or evidence in the record that

there exists a distinct *res* or that the proceeds can be traced to the defendant plaintiff's claim for a constructive trust fails; summary judgment entered against plaintiff where no identifiable *res* exists and the funds were used to pay debts of the defendant).

In Gersh, there was no evidence that any funds held by the defendant derived from property of the plaintiff. 767 So.2d at 409. Thus, there was no specific and identifiable trust property that could be traced in the assets of the defendants and the trial court correctly directed a verdict for defendant on the constructive trust count. Id.

Plaintiff does not allege that any portion of the \$7 million was, or is, in the possession of CFD I or II or can be traced as part of their assets. Plaintiff admits that the \$7 million was paid to third parties to satisfy the outstanding financial obligation of Regency Suites I, LLC. Accordingly, Plaintiff fails to state a claim upon which relief can be granted in Count IV of the Complaint against CFD I and II and the Court should dismiss Count IV of the Complaint with prejudice.

WHEREFORE, Defendants, CFD-Regency I, LLC and CFD-Regency II, LLC, respectfully asks the Court to dismiss Plaintiff's claims against these Defendants with prejudice.



Respectfully submitted this 30th day of November, 2009.

/s/ Dennis A. Creed, III

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And CFD-Regency II, LLC*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on **November 30, 2009**, I electronically filed the foregoing, Defendants', CFD-Regency I, LLC and CFD-Regency II, LLC, Motion to Dismiss and Memorandum of Law, with the Clerk of the Court by using the CM/ECF system, which will serve copies on counsel for Plaintiff or pro se parties as listed on the attached service list, via transmission of Notices of Electronic Filing generated by CM/ECF:

/s/ Dennis A. Creed, III

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