

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,

vs.

CASE NO.: 09-81221-CV-HURLEY

MILLENIU EXECUTIVE REALTY, INC.
and NILDA RIVERA-CRUZ,

Defendants.

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW

Defendants, MILLENIU EXECUTIVE REALTY, INC. and NILDA A. RIVERA-CRUZ (hereinafter "Millenium and Rivera-Cruz"), 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. 48. Dolce Regency, LLC was renamed to Dolce Regency Suites, LLC. Id. Plaintiff alleges that CCC was the owner of Dolce Regency Suites, LLC (“Dolce Regency”). Complaint at par. 49.

Regency Suites I, LLC was the owner and developer of a residential and hotel condominium (the “Regency Project”). Complaint at par. 51. Plaintiff alleges that Dolce Regency acquired a 100% membership interest in Regency Suites I, LLC. Complaint at par. 51. 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. Complaint at par. 51.

Plaintiff alleges that on or about 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. 55. Plaintiff alleges that on or about August 29, 2008, Dolce Regency transferred \$500,000.00 of the original Transfer to and for the benefit of the Defendants “in the form of closing disbursements associated with the sale of the” Regency Project”. Complaint at par. 56.

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 the Defendants for: (1) fraudulent transfer by Dolce Regency to the Defendants in Count I of the Complaint pursuant to § 726.105, Fla. Stat.; (2) fraudulent transfer by CCC to the Defendants 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 CCC Lacks Standing

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 the Defendants.

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 the Defendants 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 cannot be a fraudulent transfer because CCC wholly owned Dolce Regency. § 726.102, Fla. Stat.

II. 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 the Defendants. Plaintiff alleges that it would be unjust for the Defendants to retain the benefit of the Transfer made in connection with the acquisition of Regency Suites I, LLC and the Regency Project. Plaintiff asks the Court to imply a remedy and impose a

constructive trust when the transactions complained of were governed by express contracts between the parties.

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. 4th 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 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. Complaint at par. 51. The rights and obligations of the parties in connection with the Transfer, including the payment of commissions to the Defendants as part of the closing on the Regency Project are governed by 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.

WHEREFORE, Defendants, MILLENIUM EXECUTIVE REALTY, INC. and NILDA A. RIVERA-CRUZ, 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **November 30, 2009**, I electronically filed the foregoing, Defendants' 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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