IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)
Case No. 09-81224-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN, ESQ., as court appointed Receiver for Creative Capital Consortium, LLC, et. al.,
Plaintiff,

vs.

DOLCE REGENCY, LLC,
Defendant
_____/

****ORAL ARGUMENT ****
****REQUESTED****

JONATHAN E. PERLMAN, ESQ., as court appointed Receiver for Creative Capital Consortium, LLC, et. al.,
Plaintiff,

vs.

FIVE CORNERS INVESTORS I, LLC, FIVE CORNERS INVESTORS II, LLC, CFDREGENCY I, LLC, CFD-REGENCY II, LLC, and BW ASPIRE, LLC,
Defendants.
_____/

DOLCE REGENCY SUITES, LLC'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW

DOLCE REGENCY SUITES, LLC moves for summary judgment pursuant to Fed. R. Civ. Pro. 56(c) on all counts against Plaintiff. Plaintiff cannot demonstrate an "essential element" of its case for which it bears the burden of proof at trial, by any evidence. Specifically, Plaintiff cannot prove any factual basis that the acquisition of the membership interest of Regency Suites I, LLC, by Dolce Regency Suites, LLC, (the "Regency Transaction") was funded by (a) George Theodule; or (b) a Receivership

entity. Absent this connective tissue between Dolce and CCC or Theodule, the entirety of Plaintiff's complaint falls apart, and judgment should be entered against the Receiver in favor of Dolce Regency Suites, LLC.[1]

I. PROCEDURAL HISTORY

This matter is ancillary to the original SEC Receivership Action brought in December, 2008, against Creative Capital Consortium, George Theodule and related entities.

Dolce Regency Suites, LLC, was named as a target of the Receiver's Second Motion to Expand Receivership (Dkt. 22) in the original action. Dolce appeared and defended itself against the Receiver's motion, and engaged in discovery, including numerous depositions and paper discovery. Dolce filed its opposition. Rather than filing a reply, the Receiver withdrew the Motion without prejudice. This ancillary action followed.

This matter has been consolidated with some, but not all of the "downstream" defendants, that is, those parties who were distributees of the Regency Transaction closing, including the former membership interests of Regency Suites I, LLC, and who are now mortgage holders on the subject property in Orlando.

II. STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 7.5(b), Dolce submits this Statement of Material Facts:

1. Dolce Regency Suites, LLC, acquired 100% of the membership interests in Regency Suites I, LLC, from various parties.

[1] Likewise the other "downstream" defendants accused of wrongfully receiving funds as a result of the Regency Transaction should have judgment entered in their favor.

2. At the time of the closing in August, 2008, Dolce Regency Suites, LLC, included Pacific Atlantic Investments, LLC, as a member.

3. At the time of the closing in August, 2008, Pacific Atlantic Investments, LLC, included German Cardona Soler as a member.

4. As part of the closing, Dolce Regency's counsel, Gabrielle Alexis, a Florida attorney, transferred $7 million from her trust account to the closing attorneys, Dean, Meade, Edgerton to be used to satisfy closing obligations.

5. The Answers to Interrogatories and other record evidence demonstrate that the money was transferred to Gabrielle Alexis's trust account by Wells Fargo on behalf of Crowne Gold, Inc.

6. There is no evidence that the money which came from Crowne Gold, Inc. through Wells Fargo to Gabrielle Alexis's trust account came from George Theodule or from any of the Receivership Entities.

7. The Receiver's own financial investigator characterizes Crowne Gold deposits as belonging to "Investment Club" transactions, and not insider transactions or any other categorization.

8. No evidence, pleading, motion, or report indicates Theodule or any Receivership entity gave anything of value of any kind whatsoever, including money, to Crowne Gold, Inc., Pacific Atlantic Investments, LLC, or Dolce Regency Suites, LLC; that is, the evidence shows that all consideration flowed in one direction, from Cardona and Crowne Gold to Theodule and the Receivership entities.

III. EVIDENCE RELIED ON

1. Plaintiff's Response to Dolce Regency Suites, LLC's Requests for Production of Documents – Composite Exhibits

2. Documents produced by Kapila & Company pursuant to Dolce's subpoena duces tecum

3. Plaintiff's Answers to Dolce Regency Suites, LLC's Interrogatories

4. Florida Secretary of State Sunbiz Records

5. Plaintiff's Second Motion to Expand Receivership (original action)

6. Opposition to Second Motion to Expand Receivership (original action)

7. Exhibits to Opposition to Second Motion to Expand Receivership (original action)

IV. MEMORANDUM OF LAW

A. Motion for Summary Judgment Standard for "Essential element"

Rule 56(a)("A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.") and 56(c)("The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.") allow for entry of summary judgment as sought here. Under *Celotex Corp. v. Catrett*, 477 US 317 (1986), a moving party is entitled to judgment under the rule where the non-moving party is unable to prove an essential element for which it bears the burden of proof at trial. Thus, "[a] moving party is entitled to summary judgment if the nonmoving party has 'failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of

proof.' " *In re Walker*, 48 F.3d 1161, 1163 (11th Cir.1995) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Moreover, the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must ... set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2). As the Supreme Court has explained: "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *In re Delco Oil, Inc*., 599 F.3d 1255, 1257-1258 (11th Cir. 2010); *accord Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co*., 483 F.3d 1265, 1268 (11th Cir. 2007).

B. "Essential element" of each cause of action

Plaintiff alleges five counts against Dolce: (I) Avoidance of a fraudulent transfer, pursuant to the Florida Uniform Fraudulent Transfer Act (FUFTA) Chapter 726 Fla. Stat., which requires as an element that Dolce be a "debtor", and the Receiver its "creditor" *see Friedman v. Heart Institute of Port St. Lucie*, 863 So.2d 189 (Fla. 2003); (II) Conversion, which requires as an element that Plaintiff's proof of rightful possession of the interest sought, see *Star Fruit Co. v. Eagle Lake Growers, Inc*., 33 So.2d 858, 860 (Fla. 1948)("Essential element of a conversion is a wrongful deprivation of property to the owner."); (III) Unjust enrichment, which requires as an element proof of Defendant's enjoyment of a benefit conferred by Plaintiff, *see Florida Power Corp. v. City of Winter Park*, 887 So.2d 1237, 1242 (Fla. 2004)(The elements of an unjust enrichment claim are a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances

that make it inequitable for him to retain it without paying the value thereof.); (IV) Equitable lien rights, which require as an element "special rights" inuring to the possessor, *see Havoco of America, Ltd. v. Hill*, 790 So.2d 1018, 1025 (Fla. 2001); and (V) Conspiracy to breach fiduciary duty, which requires as an essential element Dolce's knowing participation with Theodule to cause damage, *see Patten v. Daoud*, 12 So.2d 299, 301 (Fla. 1943)(Conspiracy 1. between two or more persons to do an unlawful act or to do a lawful act by unlawful means, 2. the doing of some overt act in pursuance of the conspiracy, and 3. damage to the plaintiff as a result of the acts done in furtherance of the conspiracy).

C. Legal standard required to prove Alter Ego

1. The Receiver bears the burden of proof.

It is settled that it is the proponent, here the Receiver, who bears the burden of piercing the corporate veil to establish "alter ego" liability. *Matter of Multiponics, Inc.*, 622 F.2d 709 (5th Cir. 1980); *In re Hillsborough Holdings Corp.*, 166 B.R. 461 (Bkrtcy.M.D.Fla., 1994); *Old West Annuity and Life Ins. Co. v. Apollo Group*, 2008 WL 2993958 (M.D.Fla., 2008)(Hodges, J.), *affirmed* 605 F.3d 856, (11th 2010).

2. Florida's alter ego test

The Receiver must meet a "very stringent three-part test" under Florida law to prove Theodule (or for that matter, Creative Capital) is the "alter ego" of the Movant entity, Dolce Regency Suites, LLC. This point is "critical; federal common law and Florida law define alter ego liability quite differently." *Apollo Group*, *supra* at *5. As the Eleventh Circuit held in upholding Judge Hodges in Apollo Group, state law must determine what interest, if any, is held by an entity.

Florida courts require the proponent to meet a "very stringent three-part test, which requires persuasive evidence that: (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact nonexistent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant. *Hillsborough Holdings Corp. v. Celotex Corp*., 166 B.R. 461, 468 (M.D.Fla.1994). *See also Homelands*, 190 B.R. at 670; *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114 (1984). Unlike federal common law which focuses solely on the relationship and level of control between entities, Florida courts "disregard the corporate entity in only the most extraordinary cases," and only where there is "proof of deliberate misuse of the corporate form – tantamount to fraud...." *Hillsborough Holdings*, 166 B.R. at 468. *See also Hobco, Inc. v. Tallahassee Assoc*., 807 F.2d 1529, 1534 (11th Cir.1987) (" '[T]he corporate veil may not be pierced [in Florida] absent a showing of improper conduct.'") (citation omitted); *Lovette v. Happy Hooker II*, 2006 WL 66722, (M.D.Fla.2006) ("[t]he Florida courts have imposed a strict standard upon those wishing to pierce the cor-porate veil."); *Mills v. Webster*, 212 B.R. 1006, 1009 (M.D.Fla.1997) ("Those who seek to pierce the corporate veil ... carry a very heavy burden.") (*citing Hillsborough Holdings*, 166 B.R. at 468). *Apollo Group, supra* at *5-*6.

The Florida Supreme Court has spoken to the issue of when the corporate veil should be pierced as follows:

> Corporations are legal entities by fiction of law. Their purpose is generally to limit liability and serve a business convenience. Courts are reluctant to pierce the corporate veil and only in exceptional cases will they do so. Such instances are for

> fraud as where creditors are misled and defrauded or where the corporation is created for some illegal purpose or to commit an illegal act.

State ex rel. Continental Distilling Sales Co. v. Vocelle, 158 Fla. 100, 27 So.2d 728, 729 (Fla.1946). A party seeking to pierce the corporate veil and hold a parent corporation liable for the actions of its subsidiary must prove: (1) that the subsidiary was a "mere instrumentality" of the parent, and (2) that the parent engaged in "improper conduct" through its organization or use of the subsidiary. *See Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1117-21 (Fla.1984). Improper conduct is present only in " 'cases in which the corporation was a mere device or sham to accomplish some ulterior purpose ... or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.' " *Id*. at 1117 (*quoting Mayer v. Eastwood, Smith & Co*., 122 Fla. 34, 164 So. 684, 687 (Fla.1935)). *Johnson Enters. of Jacksonville, Inc., v. FPL Group, Inc.*, 162 F.3d 1290, 1320 (11th Cir.1998).

A showing of improper conduct, which is required to pierce the corporate veil, "is present only in cases in which the corporation was a mere device or sham to accomplish some ulterior purpose ... or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose." *Johnson Enters. of Jacksonville, Inc*., 162 F.3d at 1320 (internal quotations omitted).

3. Legitimate business interests should be respected

"The law is clear that the mere ownership of a corporation by a few shareholders, or even one shareholder, is an insufficient reason to pierce the corporate veil." *Gasparini v. Pordomingo*, 972 So.2d 1053, 1055 (Fla.3d Dist Ct.App.2008). "[E]ven if a corporation is merely an alter ego of its dominant shareholder or shareholders, the

corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained." *Lipsig v. Ramlawi*, 760 So.2d 170, 187 (Fla.3d Dist.Ct.App.2000).

V. ARGUMENT

A. Plaintiff cannot prove the subject funds came from Theodule or a Receivership Entity

Rather than blithely assuming Dolce is an "alter ego", to prove its case at trial, Plaintiff must prove that the Regency Transaction was funded by George Theodule or a Receivership entity. Plaintiff cannot prove the provenance of the funds such that they belonged to Theodule or a Receivership entity. Absent such proof, Plaintiff lacks the requisite evidence to prevail on an issue for which they bear the burden of proof at trial, *Celotex Corp. v. Catrett*, 477 US 317, 322-323 (1986), and judgment should be entered as a matter of law in favor of Dolce Regency Suites, LLC.

1. Response to Request for Production

The record evidence amply demonstrates that the funds used to close on the Regency Transaction are traced from (i) the Florida attorney escrow account of the Dean Mead law firm, which received the funds from (ii) a Wachovia IOTA trust account held by Florida attorney Gabrielle Alexis, which received the funds from (iii) a wire transfer made by Wells Fargo on the account of Crowne Gold, Inc. Plaintiff simply cannot prove the funding transaction originated with Theodule or a Receivership entity.

Plaintiff's own financial investigator Kapila & Company, throughout its litigation in the underlying receivership action against Theodule and CCC, used an enormous

figure – more than $60 million dollars[2] – to describe the scope of the fraud perpetrated by Theodule and CCC. $23,150,000 of that figure is identified by Plaintiff as being paid to Theodule and CCC entities by Crowne Gold, Inc., by far the largest single contributor of funds to CCC, and by extension, the biggest victim of Theodule's admitted fraud. Of the ten transactions which make up the $23 million Crowne Gold figure, one transaction for $11 million constitutes the "Regency transfer". Of that $11 million, $7 million was transferred to Dean Mead as the amount for the purchase of Regency's membership interests.

The documents excerpted from Plaintiff's document production and the third party production of Kapila & Company describe the following:

- 2/8/08 – Cardona (#1) transfers $150,000 to Wamu 6806
- 4/2/08 – Cardona (#2) transfers $700,000 to Wachovia 4141 "Pago de participacio"
- 4/10/08 – Cardona (#3) transfers $300,000 to Wachovia 4141 "Pago de participacio"
- 4/23/08 - Cardona (#4) transfers $500,000.33 to Wachovia 4141 "Pago de participacio"
- 4/23/08 - Cardona (#5) transfers $500,000.33 to Wachovia 4141 "Pago de participacio"
- 6/16/08 - Alexis/IOLTA account 2027 opened
- 6/17/08 – Cardona (#6) transfers $1,000,000.33 to Wachovia 4141 "Inversion en options"
- 6/23/08 – Cardona (#7) transfers $11,000,000 to Wachovia 2027 IOTA

[2] The figure alleged to be taken in by the scheme has climbed in the course of the past year. Compare original Dkt 22 ("in excess of $40 million") and Plaintiff's Partial motion for summary judgment Dkt 20 ("in excess of $63 million").

- 6/24/08 – Cardona (#8) transfers $5,000,000 to Wamu 6806 "Abono cuenta Capital Consortium"
- 6/27/08 – Cardona (#9) transfers $2,000,000 to Wamu 6806 "Abono cuenta Capital Consortium"
- 6/27/08 – Cardona (#10) transfers $2,000,000 to Wamu 6806

This amounts to a total of ~$23,150,000 in transfers from Crowne Gold, Inc. to Theodule, Creative Capital Consortium, and, entirely separately, the Florida lawyer trust account held by the Law Offices of Gabrielle Alexis. The $11 million transaction, and the $7 million which was transferred from Dean Mead, did not come from Theodule or the Receivership entities.

2. Plaintiff's Interrogatory Answers

Plaintiff's interrogatory answers demonstrate Plaintiff's inability to prove the source of funds as originating with Theodule or a Receivership entity. Plaintiff states in his interrogatory answers that the basis in belief for the Regency Transaction is stated in the Second Motion to Expand Receivership filed February 12, 2009, in the underlying Receivership case at pages 8-10 [Dkt. 22]. The Receiver's basis in belief is thus fatally flawed.

The following are statements taken from the Receiver's motion to expand receivership [Dkt. 22 in the original action], with the false portion in *italics*.

1. "Dolce Regency is another *alter-ego company of Creative Capital*." [Dkt. 22 at 8].

2. "Dolce Regency, through the use of *$7,000,000 in funds belonging to Creative Capital* purchased an *asset* whose sole asset is an unfinished hotel in Orlando, Florida. [Id.]"

3. "The file contained trust account ledgers and corresponding bank statements for funds received *on behalf of Creative Capital*." [Id.]

4. "Ms. Alexis advised counsel for the Receiver that she established a separate trust account for the *exclusive purpose of handling real estate transactions relating to Creative Capital*, no other client funds were deposited into this account (the "Real Estate Transactions Account")." [Id.at 9]

5. "Attached hereto as Composite Exhibit "V" is a copy of the bank statement reflecting the $11,000,000 wire transfer into *Creative Capital's Real Estate Transactions Account* and the bank statement reflecting the *$7,000,000 wire transfer from Creative Capital's Real Estate Transaction Account* to Dean Mead." [Id.]

These statements of fact are false, and Plaintiff cannot prove otherwise.

B. Plaintiff cannot prove alter ego liability

Dolce is not an alter ego entity, but rather, a legitimate, separate company whose membership interests are managed and owned by Pacific Atlantic Investments, LLC, a limited liability company owned by German Cardona Soler. PAI was a member at the time of the Regency Transfer.

The $7 million used to accomplish the transaction was not Theodule's money, and was not any Receivership entities' money; rather, it was held in a Florida lawyer's trust account for the benefit of Dolce Regency Suites, a separate legal entity, with separate membership, and a separate legal relationship with Alexis as its lawyer.

Plaintiff cannot explain the deposits to Theodule and CCC from Crowne Gold without also acknowledging and accepting that Cardona is Victim #1 of Theodule's admitted fraud. The evidence demonstrates that Theodule succeeded in obtaining more than $23 million dollars from Cardona to invest in two legitimate deals (Regency Suites phase I and phase II), while, as it turns out, stealing Cardona blind as part of his Ponzi scheme.

What cannot be concluded from the evidence, however, is that Dolce Regency Suites, LLC, a separate legal entity, is the same as CCC or Theodule. Cardona's involvement in Dolce through PAI and the irrefutable conclusion that Crowne Gold cash funded the Regency Transaction preclude any conclusion that Dolce was somehow in on the fraud. To the contrary, its backer has been defrauded by millions of dollars it will never get back.

It would be a sad irony indeed if the Receiver and his private law firm, as a result of a Government investigation into Ponzi scheme fraud initiated by the SEC, succeeded in creating even more victims, for the sake of recovering legal fees. Or worse, that in seeking to recover funds to pay the Receiver and experts, the result is exchanging one class of victims for another.

VI. CONCLUSION

The final chapter in the Theodule affair is yet to be written, but for now it is sufficient to put an end to the Receiver's chase after Dolce's private property. The Receiver cannot prove any right to Dolce's separate property, no matter how artful or awful Theodule's fraud, because Dolce was itself defrauded. As much as the Receiver wishes Dolce could be absorbed as part of the Receivership, the simple truth is Plaintiff

cannot prove it is entitled to any relief against Dolce. Dolce is a separate legal entity, and Dolce was separately funded for the Regency Transfer. Plaintiff cannot prove an essential element of the claims at trial – that the source of the Regency Transfer funds was Theodule and the Receivership Entities – and therefore, judgment must be entered against the Receiver and in favor of Dolce Regency Suites, LLC.

LAW OFFICES OF BRADFORD A. PATRICK PA

/s/ Bradford A. Patrick

Bradford A. Patrick, Esq.
Florida Bar No.: 529850
3001 North Rocky Point Drive East
Suite 200
Tampa, FL 33607
Telephone: (813) 454-3420
Fax: (813) 333-7321
E-mail: bap@baplegal.com

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that the foregoing document is being served on all counsel of record or pro se parties as listed on the attached service list below, via transmission of Notices of Electronic Filing generated by CM/ECF.

SERVICE LIST

David P. Lemoie, Esquire
Genovese Joblove & Battista, P.A.
4400 Bank of America Tower
100 Southeast Second Street

Miami, Florida 33131
Attorneys for Plaintiff

John J. Kozak, Esquire
Vincent Lynch, Esquire
Lynch Robbins, P.A.
2639 Dr. MLK Jr. Street N.
St. Petersburg, Florida 33704

David E. Peterson, Esq.
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
E-mail: David.peterson@lowndes-law.com
Michael V. Elsberry, Esq.
Michael.elsberry@lowndes-law.com
215 North Eola Drive
P.O. Box 2809
Orlando, FL 32802-2809
Attorneys for Defendants Five Corners Investors I, LLC,
Five Corners Investors, II, LLC, and BW Aspire, LLC

/s/ Bradford A. Patrick, Esq.

Bradford A. Patrick, Esq.
Florida Bar No.: 529850