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

CASE NO.: 09-CIV-20865-UNGARO/SIMONTON

JONATHAN E. PERLMAN, Esq., as court Appointed Receiver of Creative Capital Consortium, LLC, et al.,

Plaintiff,

v.

GABRIELLE ALEXIS, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

The Defendants, Gabrielle Alexis, Law Office of Gabrielle Alexis, P.A., and Mondesir & Alexis Title Services, Inc., (hereinafter collectively "Alexis Defendants") by and through their undersigned counsel hereby move, pursuant to Rule 12(b)(6), Rule 8(a)(2) and Rule 9(b) of the Federal Rules of Civil Procedure, to Dismiss the Complaint of Jonathan E. Perlman ("Reciever"), in his capacity as Court Appointed Receiver for Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC and Reverse Auto Loan, LLC (hereinafter collectively "Receivership Entities"); or, in the alternative, Motion for More Definite Statement (the "Motion"), and in support thereof, states as follows:

I. PRELIMINARY STATEMENT

1. The Plaintiff, Jonathan E. Perlman, in his capacity as Court Appointed Receiver for Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment

Club, LLC and Reverse Auto Loan, LLC; ("Receiver") filed this lawsuit against the Alexis Defendants raising the following claims: (1) to avoid and recover fraudulent transfers pursuant to Fla. Stat. Chapter 726; (2) unjust enrichment; (3) imposition of a constructive trust, equitable lien, or resulting trust; (4) aiding and abetting and/or conspiracy to breach of fiduciary duty; (5) conversion; (6) professional malpractice; and (7) breach of fiduciary duty.

2. Pursuant to the Complaint, this lawsuit arises out of a pervasive ponzi scheme allegedly orchestrated by an individual named George Theodule ("George"), who concealed his fraudulent scheme from the Alexis Defendants. Specifically, the Complaint alleges that George, through the Receivership Entities violated section 10(b) of the Securities and Exchange Act of 1934.

3. The Receiver alleged that the Receivership Entities had no legitimate business and were operating as a ponzi scheme. The Receiver further contends that George raised in excess of $50 million from investors and that the profits paid to investors were from proceeds of other investors, and that this scheme was allegedly ongoing since at least November of 2007.

4. In March 2008, Alexis executed a retainer agreement with Creative Capital whereby it was agreed that she would provide legal services to Creative Capital relating to real estate transactions. (Comp. ¶ 50). Moreover, the only logical interpretation to be drawn from the allegations in the Complaint is that the Receiver is alleging that Alexis also provided legal services to George individually, as well as another entity, Dolce Regency Suites, LLC ("Dolce"), which is specifically not one of the Receivership Entities. The services provided by Alexis to George individually and Dolce were separate and distinct from the services provided to Creative Capital, and no conflicts of interests ever existed thereto.

5. As will be demonstrated herein, despite conclusory statements by the Receiver, no causes of action exist as to the Alexis Defendants.

II. ARGUMENT AND MEMORANDUM OF LAW

a. Standard of Review

6. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." If a plaintiff fails to provide such a "short and plain statement," then Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes dismissal "for failure to state a claim upon which relief can be granted."

7. Traditionally, when considering a motion to dismiss pursuant to Rule 12(b)(6), the court has been required to accept all allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Castro v. Secretary of Homeland Security, 472 F.3d 1334, 1336 (11th Cir. 2006).

8. It is well settled, however, that in order to "survive a motion to dismiss, a complaint must contain factual allegations which are 'enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true."' Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) Berry v. Budget Rent-A-Car Sys., Inc., 497 F. Supp. 2d 1361, 1364 (S.D. Fla. 2007) (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007)). Thus, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003).

b. All of the Receiver's Claims Against the Alexis Defendants are Barred by the Doctrine of In Pari Delicto.

9. *In Pari Delicto* is a common law equitable and affirmative defense that prohibits a Plaintiff from recovering damages that are created though that Plaintiff's own wrongdoing. See O'Halloran v. PricewaterhouseCoopers LLP, 969 So. 2d 1039, 1044 (Fla. 2d DCA 2007). The doctrine of *In Pari Delicto* is often used to bar claims asserted by bankruptcy trustees, who like this Receiver, stand in the shoes of complicit officers and directors of the companies they inherit. See e.g.: Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006); E.F. Hutton & Co., Inc. v. Hadley, 901 F.2d 979 (11th Cir. 1990); In re Skyway Communications Holding Corp., 389 B.R. 801 (M.D. Bnkr. Fla. 2008); In re Gosman, 382 B.R. 826 (S.D. Bnkr. Fla. 2007); Feltman v. Prudential Bache Securities, 122 B.R. 466 (S.D. Bnkr. Fla. 1990); O'Halloran v. PricewaterhouseCoopers LLP, 969 So. 2d 1039, (Fla. 2d DCA 2007).

10. The Receiver's attempt to sue the Alexis Defendants because of the Receivership Entities' own Ponzi scheme fraud is foreclosed by O'Halloran v. First Union National Bank of Florida, 350 F.3d 1197 (11th Cir. 2003) ("O'Halloran"); Freeman v. Dean Witter Reynolds, Inc., 865 So. 2d 543 (Fla. 2d DCA 2003) ("Freeman"); and O'Halloran v. PricewaterhouseCoopers LLP, 969 So. 2d 1039 (Fla. 2d DCA 2007) ("Pricewaterhouse Coopers"). These cases stand for the proposition that a receiver is precluded from asserting tort damages claims against third parties for injuries suffered by a receivership entity from the Ponzi scheme when that entity is used exclusively to perpetrate the scheme.

11. In O 'Halloran, the Eleventh Circuit held that damages claims asserted against a third party for aiding and abetting crimes and torts, assisting breach of fiduciary duties, breach of duties to warn and to control, and negligence brought by a bankruptcy trustee could not be asserted on behalf of a debtor-receivership entity that was used solely to perpetrate a Ponzi scheme. In other words, the debtor's bankruptcy trustee could not sue for "damages resulting

from the Ponzi scheme itself." O'Halloran, 350 F.3d at 1202 (in light of allegations the receivership entity existed exclusively to perpetrate the Ponzi scheme, neither the entity nor its trustee could "sue anyone ... for the Ponzi scheme torts.")

12. Similarly, in Freeman, the court concluded that a receiver for an entity created as the centerpiece of a ponzi scheme could not successfully assert damages claims for aiding and abetting fraud, breaches of fiduciary duties, and tortious interference with business relationships; breach of fiduciary duties; conspiracy to commit and aiding and abetting fraudulent transfers; civil conspiracy; negligence; and legal malpractice to recover for economic losses suffered by the receivership entity and investors as a result of the ponzi scheme against defendants that allegedly provided financial or legal services to the receivership entity or the scheme's perpetrators. Freeman, 865 So. 2d at 545-48.

13. In Pricewaterhouse Coopers the Second District Court of Appeals considered claims brought by a court appointed receiver against the Auditor of a Financial Services Company, alleging that the Auditor was negligent in allowing the Company to pursue a futile merger strategy which allowed the company to "become increasingly insolvent and . . . [it's] assets to be looted, squandered, or otherwise dissipated [by management]." Id at 1041. The trial court dismissed the claims on the application of the *in pari delicto* defense. Although the appellate court reversed due to factual issues involving the imputation of acts to the company, these factual distinctions do not exist in this case.

14. The Pricewaterhouse Coopers court performed a typical agency analysis to determine if the acts of the corporation's officers and directors could be imputed to the company. To that end, the Pricewaterhouse Coopers court asked if the actions taken by the agents of the company "were adverse to the Corporation's interests?" The answer to this question controlled

whether the adverse interest exception to the imputation of acts of agents would apply. See Seidman & Seidman v. Gee, 625 So. 2d 1 (Fla. 3d DCA 1992). If the actions of the officer and directors were wholly adverse to the company, then the "adverse interest exception" would prevent the imputation of the criminal acts to the company and thus block the application of the in pari delicto defense. There also, however, exists an exception to this adverse interest exception, the "sole actor doctrine" whereby an adverse act can still be imputed to the company when the adverse actor has sole control over the transaction in question. This sole actor doctrine has also been held to apply when "there are no innocent members of management who could act to thwart the wrongdoing." See Pricewaterhouse Coopers, 969 So. 2d at 1045.

15. Pursuant to the allegations raised in the Complaint, it is clear that there is no innocent director at the Creative Capital Entities. (Comp. ¶ 8)("At all times material hereto, George Theodule ("Theodule") was an officer, director, managing agent and/or control person of each of the Creative Capital Entities). The actions of George must be imputed to the Receivership Entities and the Receiver. Based on the imputation of these acts to the Receiver, claims arising from the fraudulent actions of George in operating a ponzi scheme and misappropriating monies for the personal benefit of himself, his friends and family and the responsibility for the resulting damages are barred by the *in pari delicto* defense. Moreover, the fraudulent actions of George allowed the Creative Capital Entities to continue to operate.

16. Thus, all of the Receiver's claims are barred by the doctrine of *in pari delicto*, and the Receiver's Complaint must be dismissed with prejudice.

c. The Receiver's Complaint Fails to State a Claim for Fraudulent Transfer as the Receiver Lacks Standing to Pursue Such Claim.

17. To allege the elements of a fraudulent transfer claim a plaintiff must show that: "(1) there was a creditor to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property which could have been applicable to the payment of the debt due." Special Purpose Accounts Receivable Cooperative Corp. v. Prime One Capital Company, LLC, Case No. 00-06410-CIV, 2007 WL 4482611, at * (S.D. Fla. Dec. 19, 2007) (citing § 726.105, Fla. Stat.).

18. Additionally, the goal of a receivership is to protect the rights of the creditors, and a receiver is empowered to bring *only* those causes of action that actually belong to the entities that have been placed in receivership. The Receiver is without power to pursue causes of action owned by the *creditors* of those entities. See, e.g., Freeman v. Dean Witter, 865 So. 2d 543, 550 (Fla. 2d DCA 2003); see also Steinberg v. Alpha Fifth Group, 2008 WL 906270, *4-5 (S.D. Fla. March 31, 2008) (noting the well-established law that a receiver may not pursue claims that are owned directly by creditors of the receivership entities, but he may bring those causes of action previously owned by the entities in receivership).

19. The Florida Uniform Fraudulent Transfer Act, ("FUFTA") requires: (1) a creditor with a claim against a debtor; (2) a debtor that makes a transfer to a third party, which renders the debtor unable to pay the creditor's claim; and (3) a third party that receives the transfer from the debtor/transferor. See, e.g., Nationsbank N.A. v. Coastal Utilities, Inc., 814 So. 2d 1227, 1229 (Fla.4th DCA 2002); Gulf Coast Produce, Inc. v. American Growers, Inc., 2008 WL 660100, *6 (S.D. Fla. March 7, 2008); In re Burton Wiand, 2008 WL 818509, *6 (M.D. Fla. Jan. 8, 2008); Steinberg v. Alpha Fifth Group, 2008 WL 906270, *3 (S.D. Fla. March 31, 2008) (noting that "FUFTA was promulgated to prevent an insolvent debtor from transferring assets out of reach of its creditors when the debtor's intent is to hinder, delay, or defraud any of its creditors" and, therefore, "FUFTA specifically permits creditors to pursue claims against debtor-

transferors"); see also The Florida Bar 2003 Creditors' and Debtors' Practice in Florida, Chapter 7, Fraudulent Transfers, Rod Anderson, (Overview and Scope) (explaining that FUFTA provides a creditor with a powerful right to set aside many transactions by its debtor that reduce the creditor's chances of getting paid).

20. FUFTA thereby provides a statutory scheme by which a creditor may attack a debtor's transfer of assets to third parties when the transfer renders the debtor insolvent and thus unable to pay the creditor's claim (and provided that certain other statutory criteria are satisfied). Florida Supreme Court, in Friedman v. Heart Institute of Port St. Lucie, stated that "a plaintiff suing under FUFTA must show he has a 'claim' which qualifies him as a 'creditor' of the entity or individual who is transferring or attempting to transfer funds" to thwart the creditor. 863 So. 2d 189, 191-92 (Fla. 2003).

21. The facts recited in the Receiver's Complaint clearly demonstrates that the fraudulent transfer claims at issue belong to the creditors of the Receivership Entities, not to the Receivership Entities themselves. Simply, the allegations on the Complaint are that the Receivership Entities, more specifically Creative Capital, was the debtor/transferor that made the allegedly fraudulent transfers at issue. (Comp. ¶ 77)("During 2008, Creative Capital (or Thodule [George], by and through funds received from Creative Capital) made the Alexis transfer…" The Receiver further recognizes that the right to recover fraudulent transfers rests in the creditors of Creative Capital, stating "Creative Capital made the Alexis Transfer with the actual intent to hinder, delay or defraud *creditors* of Creative Capital…(Comp. ¶ 82)(emphasis added). Thus, the Receiver lacks standing to bring such claims.

22. The Receiver's claim that it has standing pursuant to the Receivership Order (Comp. ¶ 76) is unavailing, as the Order's language simply does not support the Receiver's

interpretation. The Order neither grants the Receiver the standing to bring FUFTA claims that belong to the Receivership's creditors, nor is a district court empowered to grant a receiver standing to bring claims that the receiver otherwise lacks standing to bring. See, e.g. Marwil v. Farah, 2003 WL 23095657 (S.D. Ind. Dec. 11, 2003); Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 429-34 (1972); B.E.L.T., Inc. v. Lacrad Int'l Corp., 2002 WL 1905389, *2 n. 3 (N.D. Ill. Aug. 19 2002); Scholes v. Tomlinson, 1991 WL 152062, *2 (N.D. Ill. July 29, 1991); Scholes v. Schroeder, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990); Canut v. Lyons, 450 F. Supp. 26, 29 (C.D. Cal. 1977); Liberte Capital Group, LLC v. Capwill, 248 Fed. Appx. 650 (6th Cir. 2007).

23. In light of the foregoing, the Receiver's claim to set aside and recover allegedly fraudulent transfers must be dismissed with prejudice.

d. The Receiver's Complaint Fails to State a Claim for Aiding and Abetting and/or Conspiracy to Breach of Fiduciary Duty.

24. The Receiver's allegations against the Alexis Defendants for aiding and abetting and/or conspiracy to breach of fiduciary duty fails to state a claim upon which relief can be granted. Pursuant to Florida law, no such cause of action exists. As discussed herein, courts recognize that aider and abettor liability in the civil context does not exist without the basis for liability being predicated upon the actual wrongdoer's violation of a criminal statute.

25. There is no liability for aiding and abetting a tort. Cenco Inv. v. Seidman & Seidman, 686 F.2d 449 (7th Cir 1982). In dismissing the notion of the tort of aiding and abetting, Judge Posner, in the often-cited Cenco decision, stated:

> There is no tort of aiding and abetting under Illinois law or, so far as we know, the law of any other state; all the cases that Cenco has cited with regard to this count are criminal cases. This is not a gap in tort law. Anyone who would be guilty in a criminal proceeding of aiding and abetting a fraud would be liable under tort law as a participant in the fraud, since aider-abettor liability requires participation in the criminal venture. The only utility of a separate tort of aiding and abetting in the commission of a tort would be to give plaintiffs' lawyers one more charge to fling at the jury in the hope that if enough charges are made the jury may accept at least one. *Id.* at 453 (citations omitted).

26. The Cenco court identified the problem with imposing aider and abettor liability on persons who merely know of facts that do not constitute a criminal act.

27. The United States Court of Appeals for the Third Circuit in Electronic Labor Supply v. Cullen, 977 F.2d 798, 805 (3d Cir. 1992), also declined to create a cause of action for aiding and abetting a tort in the absence of an underlying criminal act. The Third Circuit stated that "it is significant that all of the above federal statutes under which civil aiding and abetting liability has been found are criminal statutes." Id. at 805. The court stated that "[s]uch liability has only been applied to civil actions under federal criminal statutes, which were already subject to criminal aiding and abetting liability under 18 U.S.C. § 2." Id. at 808.

28. The Receiver has failed to plead facts which demonstrates the Alexis Defendants' participation, but merely seeks to impute the bad acts of George to them, notwithstanding the lack of basis to do so.

29. Thus, applying Cullen to this case, this Court should find that a cause of action for aiding and abetting and/or conspiracy breach of fiduciary duty does not exist.

30. Additionally, recent precedent calls into question aider and abettor liability based upon statutory criminal and quasi-criminal schemes. The once common civil action for aiding and abetting § 10(b) securities violations has been abrogated by the Supreme Court in Central

Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994). The Central Bank Court was disturbed by the fact that the third party whose improper act predicated aider and abettor liability for the defendant had only been accused of reckless behavior. Id. at 190. Just as the Supreme Court in Central Bank noted the difficulty in finding aiding and abetting liability for something less than criminal behavior, this Court should find that there cannot be aiding and abetting liability to the Alexis Defendants for the acts of George.

31. The Receiver has failed to plead facts which demonstrates the Alexis Defendants' participation, but merely seeks to impute the bad acts of George to them, notwithstanding the lack of basis to do so.

32. Moreover, a claim for breach of fiduciary duty requires "a repose of trust and confidence and an express acceptance of that repose of trust and confidence by Defendant." Argonaut Development Group, Inc. v. SWH Funding Corp., 150 F.Supp.2d 1357, 1363 (S.D.Fla. 2001) (citing McIntosh v. Harbour Club Villas Condominium Association, 468 So. 2d 1075, 1078 (Fla. 3d DCA 1985). That is, the plaintiff must allege that it placed confidence in the defendant and that the defendant expressly acknowledged this trust. Doe v. Evans, 814 So. 2d 370, 374 (Fla. 2002) (fiduciary relationship is based on trust and confidence between the parties where "confidence is reposed by one party and trust accepted by the other"). In the instant matter, Creative Capital Enterprises, through George, was the vehicle through which the ponzi scheme was operated. Thus, as with the doctrine of *in pari delicto,* the Creative Captital Enterprises cannot establish that there was a fiduciary duty, let alone one that was broken, where they perpetrated the alleged wrongdoing.[1]

[1] This too provides a basis for which the Reliever's claim for breach of fiduciary duty should be dismissed with prejudice.

33. In light of the foregoing, this Court should dismiss Count 4 of the Complaint because it fails to allege a predicate criminal act for aider and abettor liability.

e. The Receiver's Complaint Should be Dismissed as it Fails to Plead Fraud with the Requisite Specificity.

34. Rule 9(b) of the Federal Rules of Civil Procedure provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The requirement of specificity is only satisfied once a claim for fraud sets forth the following:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
> (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
> (3) the content of such statements and the manner in which they misled the plaintiff, and
> (4) what the defendants obtained as a consequence of the fraud.

Ziemba v. Cascade International, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001) (citing Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1371 (11th Cir. 1997)). Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the 'precise misconduct with which they are charged' and protecting defendants 'against spurious charges of immoral and fraudulent behavior.' " Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1370-71 (11th Cir. 1997) (citations omitted).

35. The Receiver's' Complaint fails to comport with the specificity requirement in Rule 9(b). The allegations throughout the Complaint are replete with the usage of the word "false," "falsely," "fraudulent" and "fraudulently" without factual basis or specificity.

36. Additionally, under Rule 9(b), it is improper for a plaintiff to lump defendants together in fraud allegations. A plaintiff must make specific allegations as to how each defendant

individually committed the alleged fraud. Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1381 (11th Cir. 1997) (citing Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 778 (7th Cir. 1994)); Cordova v. Lehman Brothers, Inc., 526 F.Supp.2d 1305, 1313 (S.D. Fla. 2007). Here, the Receiver lumps all of the Alexis Defendants together, thereby failing to provide fair notice of what alleged acts underlie the Receiver's allegations. Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1381 (11th Cir. 1997) (citations omitted).

f. The Receiver's Complaint Should be Dismissed as it Fails to Provide a Sufficient Factual Background to Support any Claims.

37. The Receiver's Complaint is based upon conclusory and unsupported statements, thereby warranting its dismissal. It is well settled that "a court will not accept, without more, conclusory allegations or legal conclusions masquerading as factual conclusions." S.E.C. v. Dunlap, No. 01-8437-CIV, 2002 WL 1007626, at *1 (S.D. Fla. Mar. 27, 2002) (quoting Robinson v. Jewish Ctr. Towers, 993 F. Supp. 1475, 1476 (M.D. Fla. 1998)).

38. In the instant matter, the Receiver fails to provide any factual basis to support any of its conclusory remarks. The Receiver does not provide any factual basis to demonstrate that the Alexis Defendants knew about the ponzi scheme. Moreover, the Receiver makes claims such as "the Defendants, in bad faith…received fraudulent transfers…for little or no consideration," (Comp. ¶ 48); "…ALEXIS has recently falsely claimed…" (Comp. ¶ 52); "…ALEXIS, meanwhile, has filed falsely executed…" (Comp. ¶ 67); "ALEXIS…for no consideration and without any legitimate business purpose…" (Comp. ¶ 69); "ALEXIS…fraudulently transferred…") (Comp. ¶ 70); "The Defendants received…fraudulent transfers…" ((Comp. ¶ 72). Yet there are absolutely no facts to support these assertions. Quite simply, the Receiver has

no facts to support its inflammatory allegations, but is trying to impute the knowledge of George to Alexis without any basis to do so.

39. Similarly, the Receiver fails to plead any facts which would demonstrate that the Alexis Defendants were not acting on behalf of George and Dolce, or any facts to support that such actions were impermissible. Rather, the Receiver alleges that since the Alexis Defendants were engaged to handle real estate matters for Creative Capital, they were precluded from handling real estate transactions for anyone else.[2] (Comp. ¶ 61).

40. Thus, pursuant to both Rule 8(a)(2) and 9 (b) of the Federal Rules of Civil Procedure, the Receiver's Complaint should be dismissed.

g. The Receiver's Claim for Attorney's Fees Should be Stricken

41. Under Florida law, it is well established that "each party bears its own attorney's fees unless a contract or statute provides otherwise." U.S. v. Pepper's Steel & Alloys, Inc., 289 F.3d 741, 742 (11th Cir. 2002)(citing Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1148 (Fla. 1985); see also Bloco, Inc. v. Porterfield Oil Co., Inc., 2008 WL 2986655 *3 (Fla. 2d DCA 2008) (reversing an award of attorney's fees finding no appropriate contractual or statutory basis); Attorney's Title Ins. Fund, Inc. v. Landa-Posada, 984 So. 2d 641, 643 (Fla. 3d DCA 2008)(reversing an order awarding attorney's fees to appellee who had responded to a subpoena duces tecum and claimed attorney's fees as a matter of equity). Florida's follows the so-called "American Rule," awarding attorney's fees only by an entitling statute or a contractual provision, and not as a matter of equity. Attorney's Title Ins. Fund, Inc., 984 So. 2d at 643.

[2] Under Florida law, "[v]iolation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." See Florida Bar re: Rules Regulating the Florida Bar, 494 So. 2d 977, 1023 (Fla.), op. corrected, 507 So. 2d 1366 (Fla. 1986); Lane v. Sarfati, 676 So. 2d 475, 475 (Fla. 3d DCA 1996)(Gersten, J., concurring). Thus, no basis for the Receiver's claim for legal malpractice or breach of fiduciary duty exists to the extent it is premised upon an alleged violation of the Rules Regulating the Florida Bar.

42. There is no statutory or contractual provision which would entitle the Receiver to recover attorney's fees. As such, the Receiver's request for such should be stricken.

III. CONCLUSION

It is respectfully submitted that the Alexis Defendants have met their burden establishing that the Receiver has failed to state a cause of action against them and in establishing that the Complaint should be dismissed with prejudice. In essence, the Complaint is nothing more than an attempt to manufacture a cause of action against the Alexis Defendants that does not otherwise exist through crafty allegations and erroneous implications and suggestions. Since these deficiencies cannot be cured through an amendment, the Complaint must be dismissed with prejudice or, in the alternative be amended to include more a definitive statement.

WHEREFORE, it is respectfully requested that this Court enter an Order dismissing the Complaint, with prejudice, and such other and further relief as this Court deems just and appropriate.

DATED: June 22, 2009
Boca Raton, Florida

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, on this 22nd day of June, 2009. 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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