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

Case No. 09-81225-CIV

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, CFD-REGENCY I, LLC, CFD-REGENCY II, LLC, and BW ASPIRE, LLC,

Defendants.
_____/

MOTION OF DEFENDANTS, BW ASPIRE, LLC, TO DISMISS PLAINTIFF'S COMPLAINT, AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendant, BW ASPIRE, LLC (called "BW Aspire"), by and through its undersigned attorneys, move this Court to dismiss this action, and state as follows:

Review of Allegations and Relief Sought

1. The salient factual allegations of the Complaint are that:

a. Plaintiff was appointed as receiver for Creative Capital Consortium, LLC ("Creative Capital"). See ¶8.[1]

b. Plaintiff alleges that Creative Capital was a company controlled by George Theodule, who acquired more than $60 million from investors in connection with a Ponzi scheme. See ¶¶14 through 48.

[1] All paragraph references are to Plaintiff's Complaint.

c. Plaintiff alleges that Creative Capital was the owner of Dolce Regency, LLC ("Dolce Regency"). See ¶¶51-52.

d. Plaintiff alleges that on August 12, 2008, Dolce Regency purchased from Defendants a 100% membership interest in Regency Suites I, LLC, the owner and developer of a 325 unit residential and hotel condominium ("Regency Property"). See ¶54.

e. Plaintiff alleges that in contemplation of the foregoing transaction, Creative Capital transferred $7,000,000 to its subsidiary, Dolce Regency, via an escrow account established by the law offices of Dean, Mead, Edgarton, Bloodworth, Capuano, and Bozarth, P.A., as escrow agent. See ¶¶57 and 58.

f. Plaintiff alleges that the $7,000,000 was "used, to and for the benefit of the Defendants, to pay the outstanding financial obligations of Regency Suites at the closing of the sale of the Regency Property…" See ¶59.

2. Based on the common allegations, Plaintiff alleges in conclusory fashion:

a. That Dolce Regency was unable to pay its claims, and that the alleged transfer of the $7,000,000 by Dolce Regency to pay the expenses of Regency Suites constitutes a fraudulent transfer to Defendants under Chapter 726, Florida Statutes. See Count 1.

b. That Creative Capital was unable to pay its claims, and that the transfer of the $7,000,000 to Dolce Regency constitutes a fraudulent transfer which may be recovered from Defendants as "subsequent transferees" pursuant to Chapter 726, Florida Statutes. See Count 2.

c. That the $7,000,000 was property of Creative Capital wrongly appropriated by Theodule, and Defendants have been unjustly enriched by the payment of expenses of Regency Suites. See Count 3.

d. That the $7,000,000 was property of Creative Capital wrongly appropriated by

Theodule, and that Plaintiff is therefore entitled to a constructive trust or equitable lien against Defendants because of the payment of expenses of Regency Suites. See Count 4.

DISCUSSION

Plaintiff bases his Complaint upon Chapter 726, Florida Statutes (the Florida version of the Uniform Fraudulent Transfer Act), and the law of unjust enrichment. Section 726.105, Florida Statutes, provides that a "creditor" may avoid a transfer if the debtor made the transfer:

> (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.

Section 726.109(2), Florida Statutes, allows the suing creditor to recover from the "first transferee" of the asset, or in some instances, from a "subsequent transferee." Plaintiff seeks to recover from Defendants on the theory that Defendants are the first transferee (Count 2), and also on the conflicting theory that Defendants are the subsequent transferee (Count 1).

Grounds for Dismissal

1. Plaintiff fails to allege that Defendants participated in any fraud, and so the entire Complaint should be dismissed. The bulk of Plaintiff's Complaint (essentially the first 10 pages, through ¶48) alleges facts relating to Theodule's fraud against the Ponzi scheme investors. However, there is no allegation that BW Aspire had anything to do with the Ponzi scheme, or with Theodule's fraud upon the investors. Read in the light most favorable to Plaintiff, the sole allegation made against BW Aspire is that when Defendants sold their interests in Regency

Suites to Dolce Regency, money that Theodule misappropriated from Creative Capital was used to pay expenses of Regency Suites. Even though Regency Suites was then a subsidiary of Dolce Regency, Plaintiff claims that this somehow benefited the prior owners, including BW Aspire. Irrespective, however, Plaintiff makes no allegation in Counts 1 or 2 that Defendants knew that Creative Capital was running a Ponzi scheme or in any way participated in or knew of the fraud by Theodule. Clearly, as a matter of law, no cause of action arises against Defendants pursuant to Chapter 726, Florida Statutes, merely because they sold their membership interests in Regency Suites to Dolce Regency. Pleadings must allege with particularity circumstances constituting fraud, and Plaintiff has failed to do so. See Rule 9(b), Fed.R.Civ.Proc. Accordingly, the Complaint should be dismissed in its entirety. *See In re Receivership Estate of Indian Motorcycle Mfg., Inc.*, 299 B.R. 36 (D.Mass. 2003).

2. The entire Complaint should be dismissed because Plaintiff's own allegations show that BW Aspire received no transfer of money or benefit from the alleged transfer.

On Plaintiff's own allegations, the money allegedly transferred was not paid to BW Aspire, either as the "first transferee" or a "subsequent transferee," as required by Section 726.109(2), Florida Statutes, but rather was used to pay Regency Suites' expenses (see ¶58). Thus, Plaintiff has not and cannot state a cause of action against BW Aspire as a "transferee" of the money. Plaintiff seeks to plead around this defect in his case by alleging in Counts 1 and 2 that BW Aspire received a "benefit" from the transfer and was therefore "the entity for whose benefit such transfer was made," as that phrase is used in Section 726.109(2)(a), Florida Statutes. See ¶¶65 and 74. Also, Counts 3 and 4 are based on the allegation that the payment of Regency Suites' expenses "conferred a benefit on the Defendants." See ¶¶78 and 86. In short, the entire Complaint hinges on the allegation that BW Aspire received a "benefit" from the transfer.

However, based on Plaintiff's own allegations, Dolce Regency was the parent of Regency Suites (see ¶54), and Creative Capital was the parent of Dolce Regency (see ¶51-52), so that if any benefit was to be had by the owners of Regency Suites from the payment of its expenses, then it was Dolce Regency and Creative Capital that received that benefit—not BW Aspire. Plaintiff does not explain how using Creative Capital's or Dolce Regency's money to pay expenses of their own subsidiary would "benefit" or cause unjust enrichment to BW Aspire, much less make BW Aspire "the entity for whose benefit such transfer was made."

Thus, Plaintiff's entire Complaint should be dismissed because it does not allege facts sufficient to show that a transfer was made to BW Aspire or that BW Aspire benefited from a transfer sufficiently to make it "the entity for whose benefit such transfer was made."

3. Plaintiff fails to allege facts sufficient to show that it has standing to assert a claim under Chapter 726, Florida Statutes, based on a fraudulent transfer by Creative Capital to Dolce Regency, and so Count 2 should be dismissed. In Count 2, Plaintiff proceeds on the theory that Defendants were "subsequent transferees" of property that Creative Capital fraudulently transferred to its own subsidiary, Dolce Regency. In this claim, Plaintiff stands in the shoes of the receivership defendant, Creative Capital,[2] which is alleged to have committed this fraudulent

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[2] *See e.g. Marandola v. Marandola Mechanical, Inc.*, 2005 WL 1331198 (R.I. S.Ct. 2005)("It is a bedrock principle of receiverships that a receiver stands in no better shoes than the debtor company and has no higher rights than that which the company has. *White v. Ewing*, 159 U.S. 36, 39 (1895); *Vitterito v. Sportsman's Lodge & Restaurant, Inc.*, 102 R .I. 72, 80, 228 A.2d 119, 124-25 (1967)"); *Francis v. Buttonwood Realty Co*, 765 A.2d 437 (R.I. S.Ct. 2001)("the status of a receiver has been described as that of one who 'stands in the shoes of the person over whose estate he has been appointed, and is clothed with only such rights of action as might have been maintained by such person.' *Frank v. Broadway Tire Exchange Co.*, 42 R.I. 27, 31, 105 A. 177, 178 (1918)"); *Ottarson v. Dobson & Johnson, Inc.*, 52 Tenn.App. 280, 372 S.W.2d 777 (C.A.Tenn. 1963)("The receiver, of course, stands in the shoes of the insolvent, and has no higher right or claim against the defendant than would the insolvent corporation itself. Clearly if the Harrison corporation were suing for these alleged overcharges, any recovery would be off-set against its indebtedness to the defendant; the same result must follow in the receiver's suit.").

transfer and to have participated in the Ponzi scheme.

However, Creative Capital does not have standing pursuant to Chapter 726, Florida Statutes, to avoid a fraudulent transfer made by itself because, as noted above, pursuant to the plain language of Chapter 726, Florida Statutes, fraudulent transfers are not avoidable by the debtor that made the fraudulent transfer, but only by the debtor's creditors. Plaintiff is not himself a creditor of Creative Capital, and standing in the shoes of Creative Capital, may not avoid a fraudulent transfer made by Creative Capital. Thus, Count 2 of the Complaint should be dismissed because it relies upon the specious legal argument that Plaintiff may avoid a fraudulent transfer made by his own predecessor in interest, Creative Capital, to its own subsidiary.

Moreover, Creative Capital's alleged $7,000,000 transfer to Dolce Regency should not be deemed a fraudulent transfer in any event because Creative Capital would have retained an indirect interest, control, and benefit over the monies by virtue of the fact that it owned 100% of the membership interests in Dolce Regency (see ¶51). For the proposition that a capital contribution to a wholly owned subsidiary is deemed to be for fair value, see *Gardner v. Haines*, 19 S.D. 514, 104 N.W. 244 (S.D. 1905); *Homestead Min. Co. v. Reynolds*, 30 Colo. 330, 70 P. 422 (Colo. 1902); *Estridge v. Denson*, 270 N.C. 556, 155 S.E.2d 190 (N.C. 1967); *Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co.*, 23 S.D. 221, 121 N.W. 620 (S.D. 1909); *Scheck v. Bowne*, 12 Backes 51, 113 N.J. Eq. 51, 166 A. 189 (N.J. App. 1933). Accordingly, Count 2 should also be dismissed on the separate grounds that as a matter of law, a transfer by a debtor to its own wholly owned subsidiary is not a fraudulent transfer.

4. Plaintiff fails to allege facts sufficient to show that it has standing to assert a claim under Chapter 726, Florida Statutes, based on a fraudulent transfer by Dolce Regency, and so Count 1 should be dismissed. In an effort to circumvent the foregoing legal bar against an action

by Plaintiff based upon the theory of a fraudulent transfer by Creative Capital, Plaintiff alleges in Count 1 as his primary cause of action that it was Dolce Regency (allegedly Creative Capital's subsidiary) which made the fraudulent transfer, and that Creative Capital is a "creditor" of Dolce Regency which may maintain an action pursuant to Chapter 726, Florida Statutes. See ¶61.

The theory upon which Plaintiff relies for his allegation that Creative Capital is a "creditor" of Dolce Regency is that Creative Capital transferred the $7,000,000 to Dolce Regency (see ¶61). However, this allegation is not legally sufficient to establish that Creative Capital is a "creditor" of Dolce Regency. Plaintiff has not attached a copy of a promissory note or other documentation to his Complaint that would show the alleged transfer by Creative Capital was anything other than a contribution to the capital of its alleged subsidiary, Dolce Regency. A capital contribution by Creative Capital to its subsidiary, Dolce Regency, would not make Creative Capital a "creditor" of Dolce Regency, and thus Creative Capital does not have standing to assert a claim under Chapter 726, Florida Statutes, as a creditor of Dolce Regency. *See In re Revco D.S., Inc.*, 118 B.R. 468, 475 (Bankr. N.D. Ohio 1990)("This Court concludes that New York Life is not a "creditor" of Revco or Anac, but rather an equity holder and therefore has no standing to prosecute a state fraudulent conveyance action").[3]

Accordingly, Count 1 of Plaintiff's Complaint should be dismissed.

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[3] Attempting to avoid this conclusion, Plaintiff alleges in ¶61 that it is a "creditor" of Dolce Regency by virtue of its equity membership interest in Dolce Regency. However, this contradicts Section 726.102(4) and (3) in that a member's interest is not a "right to payment." *See Brown v. Superior Pontiac-GMC, Inc.*, 352 So.2d 576, 577 (Fla. App. 2d Dist. 1977) (Plaintiff "occupied the status of a stockholder rather than a creditor and, as such, could not be a bulk transfer creditor"); *TSA International Limited, v. Shimizu Corporation*, 92 Hawai'i 243, 990 P.2d 713 (Ha. 1999)(same, applying Uniform Fraudulent Transfer Act); *Boxwell v. Lion Oil Company*, 250 Ill.App. 127, 1928 WL 4121 (Ill.App. 1 Dist. 1928); *Oklahoma Hotel Bldg. Co. v. Houghton*, 202 Okla. 591, 216 P.2d 288 (Okla. 1950). Indeed, Section 608.4211, Florida Statutes, is clear that payment of a contribution to capital is the member's obligation to the company, not the company's obligation to the member.

5. Count 4 should be dismissed for failure to state a cause of action.

In Count 4, Plaintiff seeks an equitable lien or constructive trust against Defendants based on unjust enrichment. As argued above, Plaintiff has not sufficiently alleged the elements of unjust enrichment because it has not alleged facts sufficient to show that the transfer benefited Defendants. More fundamentally, however, Plaintiff fails to allege a claim for an equitable lien or constructive trust because Plaintiff fails to state what it is that the equitable lien or constructive trust would be impressed upon. See Count 4. By Plaintiff's own allegations, the money was not paid to Defendants, but was used to pay expenses of Dolce Regency's subsidiary, Regency Suites (see ¶58). Accordingly, Defendants do not have the money, never had the money, and there is no *res* in the hands of Defendants upon which to impress an equitable lien or constructive trust. See *Gersh v. Cofman*, 769 So.2d 407, 409 (Fla.App. 4th Dist. 200)("A constructive trust may be imposed only where the trust *res* is specific and identifiable property, or can be clearly traced in assets of the defendant"); *Abele v. Sawyer*, 750 So.2d 70, 74 (Fla.App. 4th Dist. 1999)("the Dantos are not, nor were they ever, in possession of the property to which the Abele Group seeks to attach a constructive trust. A court will not impose a constructive trust over a defendant's general assets"); *Cole Taylor Bank v. Shannon*, 772 So.2d 546, 553 (Fla.App. 1st Dist. 2000)("there is no allegation in the complaint or evidence in the record that proceeds of the convenience checks exist as a distinct *res* or that such proceeds can be traced. In fact, Cole Taylor admits in its brief that the funds drawn by Thomas Shannon with the convenience checks were used to pay debts of the Shannons. Accordingly, Cole Taylor's allegations and the evidence in the record are also insufficient as a matter of law to establish a *res* on which to impose a constructive trust"); *Yorgan, v. Durkin,* 290 Wis.2d 671, 715 N.W.2d 160, 169 (Wis. 2006)("The essential elements of equitable liens include (1) a debt, duty or obligation owing by one person to

another[,] and (2) a *res* to which that obligation fastens, which can be identified or described with reasonable certainty"); *In re the Marriage of Keener*, 728 N.W.2d 188, 197 (Ia. 2007)(equitable lien "requires a debt, a duty of one person to pay another person, and a *res* to which that obligation attaches"); *Ethridge v. Tierone Bank*, 226 S.W.3d 127 (Mo. 2007). Indeed, it appears that if Plaintiff wants to recover the money or impose an equitable lien or constructive trust upon it, then he should bring an action against Dolce Regency or its subsidiary, Regency Suites, which was the actual recipient of the money.

Accordingly, Count 4 should be dismissed for failure to state a cause of action.

WHEREFORE, Defendant, BW ASPIRE, LLC, respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

DATED this 2nd day of ~~September,~~ October 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on ~~September~~ October 2, 2009, 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.

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