UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-80480-CIV-HURLEY/HOPKINS

JONATHAN E. PEARLMAN,

Plaintiff,

v.

DOROTHY DELISFORT-THEODULE, et al.,

Defendants.

_____/

ORDER GRANTING RECEIVER'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE comes before the court upon the Receiver's motion for partial summary judgment [DE # 11]. For the reasons given below, the court will grant the motion.

BACKGROUND

On December 12, 2008, the Securities and Exchange Commission initiated a civil enforcement action against George Theodule, alleging that he had been operating a multimillion-dollar Ponzi scheme in violation of federal securities laws.[1] *See SEC v. Creative Capital Consortium, LLC*, Case No. 08-81565-CIV-HURLEY/HOPKINS. At the Commission's request, the court appointed Jonathan E. Perlman as the Receiver over the following entities, which Theodule allegedly controlled and used to operate his scheme: Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC, Reverse Auto Loan,

[1] The term Ponzi scheme refers to a fraudulent scheme in which, rather than paying investor returns from investment income, initial investors are paid off with new contributions from additional investors. Black's Law Dictionary 1198 (8th ed. 2004).

LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc., and Unity Entertainment Group, Inc. (collectively, the "Receivership Entities"). The order establishing the receivership specifically authorizes the Receiver to initiate litigation on behalf of the Receivership Entities in order to preserve and maintain their assets for the benefit of those who invested with Theodule.[2] To date, the Receiver has initiated twenty-six suits before this court, seeking to recover millions in fraudulent transfers.

The details of the alleged Ponzi scheme are as follows. In late-2007, Theodule began soliciting funds from Haitian American investors, mostly through face-to-face meetings but also through word of mouth. He promised potential investors that he could double their money in 90 days by making risk-free investment in well-known companies, such as Google, John Deere, Monsanto, Best Buy, among others. To gain the trust of investors, he touted his trading acumen and experience in the financial field, saying he brought "over 20 years experience as an investor in the stock market and other ventures." He promised to use a portion of the trading profits to fund start-up businesses in the Haitian American community as well as in Haiti and Sierra Leon.

Investors were asked to sign "Investor Group Agreements." The agreements authorized Theodule to serve as the investors' agent and "attorney-in-fact," allowing him to "buy and sell stocks, bonds, options, and other securities, including short sells, on margin or in a cash account." The agreements also promised investors that their "initial deposit [was] guaranteed zero loss after 90 days of start up."

[2] Although Thoedule operated the alleged Ponzi scheme through the Receivership Entities, in the interest of simplicity, this order will refer to both Theodule and the Receivership Entities as just Theodule.

To allay investors' fears about the safety of their money, Theodule encouraged them to create so-called "investment clubs" through a purported self-regulatory agency, Smart Investment Management Services, LLC ("SIMS"). Theodule promised investors that SIMS would independently monitor and ensure the safety of their investments. Over 100 investment clubs were formed in Florida, New Jersey, Georgia, and other states.

The investment clubs would pool investor funds and remit them to Theodule, after charging a 10% commission. The investment clubs required a minimum investment of $1,000, and investments could not be withdraw during the 90-day investment period. At the end of the 90-day investment period, Theodule returned what he claimed to be principal and profits to the investment clubs, minus a commission on the profits. Before returning the proceeds to the investors, the investment clubs typically charged a second 10% commission.

In total, Theodule raised approximately $63 million from thousands of Haitian American investors nationwide.

In 2008, Theodule sent investors account statements showing significant returns. For instance, one investor received an account statement for January 2008 showing that he had doubled his money within two months. Another investor received an account statement for August 2008 showing that his $10,000 investment had doubled in three months.

In actuality, however, there were no trading profits. Of the $63 million he raised, Theodule transferred approximately $24 million to third parties, including his relatives and SIMS; transferred $2.1 million to his personal bank account to pay for traveling expenses, luxury cars, a wedding, and credit card bills; lost roughly $18 million in the stock market; and used $19 million to pay returns to then-existing investors.

Eventually, the investment scheme collapsed, as the flow of new funds could no longer support the payments on the funds previously invested. In late-2008, Theodule started to prohibit investors from withdrawing their funds after the 90-day investment period. In December 2008, Theodule sent them a letter, telling them to "rest assured that your money is secure and not lost [and] will maintain its gain as long as you opt to not withdraw for one year." The same month the SEC brought its enforcement action against Theodule.

The Receiver's investigation has uncovered numerous misrepresentations regarding the use of investor funds. First, Theodule's pledge that investing in him was risk-free and his claims of trading profits were manifestly false. Theodule lost 98% of the $18 million he invested in bad stock market investments. He transferred $2.1 to his personal banking account and $24 million to third parties. The money returned to investors as principal and profit was, in fact, money raised from other investors. Second, Theodule's promise to fund start-up businesses domestically and abroad never materialized. There were simply no profits to lend. Finally, SIMS was not a independent regulatory agency, but instead a private entity that was created by Theodule's brother and, until recently, was headed by an associate of Theodule.[3] Theodule paid SIMS and its employees, transferring at least $122,000 to them.

In this case, the Receiver sues Theodule's wife, Dorothy Delisfort-Theodule. The amended complaint alleges that Theodule transferred at least $545,200 of investor funds to Delisfort-Theodule for less than reasonably equivalent value. The complaint asserts that Delisfort-Theodule participated in Theodule's scheme scheme by, among other things, soliciting

[3] Whether SIMS actually monitored investors' deposits is unclear.

money from investors and misappropriating invested funds for her personal use and benefit. The amended complaint asserts claims for aiding and abetting and/or conspiracy to commit breach of fiduciary duty (Count I), aiding and abetting and/or conspiracy to commit conversion (Count II), to avoid and recover fraudulent transfers pursuant to Florida's Uniform Fraudulent Transfer Act, Fla. Stat. § 726.101, *et seq.* (Count III), for unjust enrichment (Count IV), and for imposition of constructive trust or equitable lien (Count V).

JURISDICTION

The court has subject-matter jurisdiction over the state-law claims asserted in the amended complaint pursuant to 28 U.S.C. § 1367 because they are ancillary to the SEC enforcement action brought in Case No. 08-81565, over which this court has jurisdiction pursuant to 28 U.S.C. § 1331. *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008).

Venue is proper in this district pursuant to 28 U.S.C. § 754. *See SEC v. Bilzerian*, 378 F.3d 1100, 1107 (D.C. Cir. 2004); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir.1995).

DISCUSSION

A. Standard on Motion for Summary Judgment

Summary judgment is warranted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Cattrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In determining whether summary judgment is appropriate, the facts and inferences from

the record are viewed in the light most favorable to the non-moving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Matsuhita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of his claims, such that a reasonable jury could return a verdict in his favor. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002). In response to a properly supported motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The existence of a mere scintilla of evidence in support of the non-movant's position is insufficient; there must be evidence on the basis of which a jury could reasonably find for the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). A complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial and entitles the moving party to summary judgment. *See Celotex*, 477 U.S. at 323; *Gonzalez v. Lee County Housing Authority*, 161 F.3d 1290, 1294 (11th Cir. 1998).

B. Delisfort-Theodule's Response to the Motion for Summary Judgment

Delisfort-Theodule has filed a one-page response in opposition to the Receiver's motion, claiming generally that issues of material fact preclude the award of summary judgment, but citing no record evidence or specific factual issues for trial. A party opposing a properly supported motion for summary judgment must set forth specific facts showing that there is genuine issue for trial. *See* Fed. R. Civ. P. 56(e). Where, as here, a "party's response consists of

nothing more than . . . conclusory allegations, the district court must enter summary judgment in the moving party's favor." *Barfield v. Brierton*, 883 F.2d 923, 934 (11th Cir. 1989).

C. The Receivers' Motion to Dismiss

Count III of the amended complaint is for avoidance or recovery of fraudulent transfers pursuant to Florida's Uniform Fraudulent Transfer Act ("FUFTA"). The Receiver moves for partial summary judgment on the issue of whether Theodule operated a Ponzi scheme. This is a important issue because, as explained below, the existence of a Ponzi scheme establishes, as a matter of law, actual intent to defraud for purposes of the Receiver's FUFTA claim.

FUFTA was adopted to prevent an insolvent debtor from transferring assets away from creditors when the debtor's intent is to hinder, delay, or defraud any of its creditors. *See* Fla. Stat. § 726.105(1). To establish a cause of action, the plaintiff must allege 1) there was a creditor sought to be defrauded, 2) a debtor intending fraud, and 3) a conveyance of property which could have been available to satisfy the debt. *Nationsbank, N.A. v. Coastal Utils. Inc.*, 814 So.2d 1227, 1229 (Fla. 4th DCA 2002).

Section 726.105(1) of FUFTA provides two theories by which a creditor may avoid or recover fraudulent transfers: an actual fraud theory, under subsection (a), and a constructive fraud theory, under subsection (b). The instant motion focuses on the actual fraud section of the statute, which reads:

> 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

Fla. Stat. § 726.105(1). If a transfer is proven to be fraudulent, the creditor "may obtain . . . avoidance of the transfer . . . to the extent necessary to satisfy the creditor's claim." Fla. Stat. 726.108(1).

In evaluating whether a transfer was made with the intent to defraud, "courts generally consider the totality of the circumstances and determine whether any 'badges of fraud' are present in connection with a particular transfer." *In re Ramsurat*, 361 B.R. 246, 254 (Bankr. M.D. Fla. 2006); Fla Stat. § 726.105(2)(a)-(k). However, fraudulent intent can be established as a matter of law in cases where the debtor operated a Ponzi scheme, because transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay or defraud creditors. As explained by the District Court of Utah:

> One can infer an intent to defraud future undertakers from the mere fact that a debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. The perpetrator nevertheless makes payments to present investors, which, by definition, are meant to attract new investors. He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money. Knowledge to a substantial certainty constitutes intent in the eyes of the law, and a debtor's knowledge that future investors will not be paid is sufficient to establish his actual intent to defraud them.

In re Independent Clearing House, Co., 77 B.R. 843, 860 (D.Utah 1987) (citations omitted). Thus, "establishing the existence of a Ponzi scheme is sufficient to prove a Debtor's actual intent to defraud" for purposes of FUFTA. *In re McCarn's Allstate Finance, Inc.*, 326 B.R. 843, 850 (Bankr. M.D. Fla. 2005); *see Wiand v. Waxenberg*, 611 F.Supp.2d 1299, 1312 (M.D. Fla. 2009) ("[T]he existence of a Ponzi scheme suffices, as a matter of law, to prove actual intent to defraud for the purposes of the Receiver's § 725.105(l)(a) FUFTA claims."); *In re World Vision Entm't,*

Inc., 275 B.R. 641, 656 (Bankr. M.D. Fla. 2002) ("A Ponzi scheme is by definition fraudulent.").

A Ponzi scheme is "a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors." *United States v. Silvestri*, 409 F.3d 1311, 1317 n.6 (11th Cir. 2005) (quotation omitted). "[T]o prove the existence of a Ponzi scheme, the Receiver must establish that: (1) deposits were made by investors; (2) the Receivership Entities conducted little or no legitimate business operations as represented to investors; (3) the purported business operations of the Receivership Entities produced little or no profits or earnings; and (4) the source of payments to investors was from cash infused by new investors." *Waxenberg*, 611 F.Supp.2d at 1312.

The record evidence in this case establishes that Theodule operated a classic Ponzi scheme. Theodule raised $63 million from thousands of investors by promising exorbitant, risk-free returns and making numerous misrepresentations to gain their trust. Of the money he raised, Theodule invested only $18 million, and lost 98% of it in risky options trading. He transferred $2.1 million to himself to pay for luxury vehicles, credit card bills, vacations, and a wedding. He transferred $24 million to third parties, including his family. The rest of the funds were used to make interest and principal payments to earlier investors, who were led to believe that the returns were profits, rather than money supplied by new investors. Theodule produced no profits or earnings. He conducted little, if any, legitimate business operations.

Because the Receiver has proven that Theodule operated a Ponzi scheme, he has established, as a matter of law, that any transfer made to Delisfort-Theodule during the operation of the scheme was fraudulent. The record demonstrates that Delisfort received two transfers: one for $400,000 and another for $145,200, for a total of $545,200. Where, as here, a creditor

proves that a transfer was fraudulent, he may obtain "avoidance of the transfer . . . to the extent necessary to satisfy [his] claim." Fla. Stat. 726.108(1)(a).

But simply "because a debtor conducts its business fraudulently does not make every single payment by the debtor subject to avoidance." *See In re World Vision Entm't, Inc.*, 275 B.R. at 658. Rather, FUFTA provides a "good faith defense": "A transfer or obligation is not voidable under s. 726.105(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." Fla. Stat. 726.109(1). The good faith defense is an affirmative defense, and Delisfort-Theodule bears the burden of proving her good faith at trial. *See Waxenberg*, 611 F.Supp.2d at 1319.

CONCLUSION

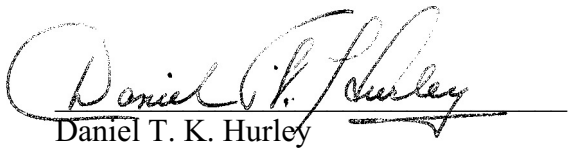
In sum, the Receiver has proven that Theodule operated a Ponzi scheme and made transfers totaling $545,200 to Delisfort-Theodule during the operation of the scheme. Transfers made in furtherance of a Ponzi scheme are fraudulent for purposes of FUFTA and subject to avoidance. To avoid that result, Delisfort-Theodule must prove, at trial, that she took the transfers in good faith and for reasonably equivalent value.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. The Receiver's motion for partial summary judgment [DE # 11] is **GRANTED**. The court finds that the Receiver has established the following:
    a. George Theodule operated a Ponzi scheme.
    b. During the operation of the Ponzi scheme, George Theodule made two transfers to Dorothy Delisfort-Theodule: one for $400,000 and another for $145,200, for a total of $545,200.

c. The transfers to Dorothy Delisfort-Theodule in the amount of $400,000 and $145,200 were made with the actual intent to hinder, delay, or defraud creditors.

DONE and **ORDERED** in Chambers in West Palm Beach, Florida, this 28th day of September, 2010.



Daniel T. K. Hurley
U.S. District Judge