

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division
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Case No. 09-80190-HURLEY/ROSENBAUM

JONATHAN E. PERLMAN, Esq., as court-)
appointed Receiver of Creative Capital)
Consortium, LLC et al.,)
)
Plaintiff,)
v.)
)
CAPTIN CONSTRUCTION GROUP, INC.,)
a Georgia corporation,)
)
Defendant.)
)

**DEFENDANT CAPTIN CONSTRUCTION’S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Captin Construction Group, Inc. (“Defendant”) hereby opposed Plaintiff’s Motion for Partial Summary Judgment [DE # 21] (“Motion”), filed by Plaintiff, Jonathan Perlman, as Receiver for Creative Capital Consortium LLC et al. (“Plaintiff”), and in opposition thereto, states:

INTRODUCTION

1. On November 20, 2009, Plaintiff filed a Motion for Partial Summary Judgment alleging that there are no genuine issues of material facts as to the existence of a Ponzi scheme purportedly orchestrated by George Theodule (“Theodule”).

2. Plaintiff further alleged that Theodule engaged in fraudulent transfers that included transfers with the Defendant in the above-captioned matter.

ARGUMENT

I. Standard of Review

3. Plaintiff's Motion for Partial Summary Judgment relies on facts alleged in connection with a complaint by the Security and Exchange Commission ("SEC"), which alleged facts must be proven in the instant case. On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. *Whatley v. CNA Ins. Cos.*, 189 F.3d 1310, 1313 (11th Cir.1999). The standard of review for a district court's rulings on motions for summary judgment is *de novo*, and an appellate court is to apply the same legal standards that bound the district court. *Sarfati v. Wood Holly Assocs.*, 874 F.2d 1523, 1525 (11th Cir.1989); *Carlin Communication Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir.1986).

4. In addition, *Rule 56(c) of the Federal Rules of Civil Procedure*, provides that a district court should only grant summary judgment if the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, fails to disclose any genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

II. Plaintiff Must Establish Undisputed Facts As To Chapter 726 Florida Statutes

5. The plaintiff has the burden of proving that no genuine issue of material fact exists. *Waste Service, Inc. v. Waste Management, Inc.*, 2008 WL 2067367 (11 Cir. 2008).

6. Plaintiff fails to meet its burden because it does not provide any evidence establishing the facts alleged in its motion, which facts must be material and undisputed in order the motion to be granted. Supra, at ¶¶ 4 and 5.

7. Much of the facts outlined in Plaintiff's Statement of Undisputed Facts involve activity or conduct that is alleged to be performed by Theodule involving transactions between Theodule and other individuals or entities not a party to the instant cause of action. Accordingly, if the Defendant to the instant action was not involved in said transactions, or is without knowledge of the actual facts alleged thereto, Defendant cannot confirm or contest the facts as alleged in the subject Motion.

8. Notwithstanding the allegations, Defendant denies the facts are undisputed and Defendant reserves the right to contest any facts alleged by Plaintiff to the extent the facts alleged are in connection with the Defendant and within the purview of the Defendant's knowledge, including without limitation, any facts involving transactions between Theodule and the Defendant. Plaintiff's assertion of facts is paramount to establishing the elements of Plaintiff's claim and without sufficient evidence to prove the facts are undisputed, fails to meet the burden required for the entry of an order granting partial summary judgment. *Id.*

WHEREFORE, Defendant Captin Construction respectfully requests the Court deny the Motion for Partial Summary Judgment and provide such other and further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a true and correct copy of the foregoing document using the CM/ECF system and that copies of same, together with proof of filing, will be served by Electronic Mail and to the addressees as indicated below:

Dated: January 22, 2010

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