UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 05-61471-CIV-MORENO

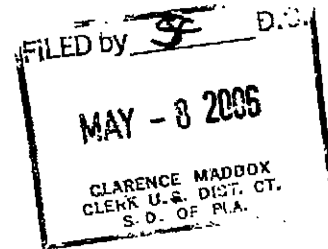
ROBERTO MARTINEZ, as court-appointed Receiver for MUTUAL BENEFITS CORPORATION and VIATICAL BENEFACTORS, LLC,

Plaintiff,

vs.

JOEL STEINGER, *et al.*,

Defendant.



ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

The Receiver brings suit on behalf of Mutual Benefits Corp. ("MBC") and Viatical Benefactors, LLC ("VBLLC") to recover funds he alleges the Defendants siphoned directly and indirectly from MBC and VBLLC. He claims that Joel Steinger and Leslie Steinger, to whom he refers as Insider Defendants, unjustly enriched themselves by extracting tens of millions of dollars in "consulting fees" from MBC and VBLLC and by converting millions of dollars from MBC and VBLLC for their personal benefit. According to the Receiver, he seeks damages for the injuries inflicted upon the Receivership entities, separate from the damages MBC's investors seek in *Scheck Investments, LP, et al. v. Viatical Benefactors, LLC, et al.*, 04-21160-CIV-MORENO.

Presently before the Court is the Motion to Dismiss filed by Defendants Joel Steinger, Leslie Steinger, Kensington Management, Inc., Rainy Consulting Corp., and Twin Groves Investment, Inc. **(D.E. No. 35)** on **January 20, 2006**. The Receiver filed his response **(D.E. No. 50)** on **March 6,**

2006, and the Defendants filed a reply **(D.E. No. 69)** on **March 31, 2006**. For the reasons set forth below, the Motion to Dismiss is GRANTED in PART and DENIED in PART and Counts II and III are DISMISSED.

I. Background

In support of his authority to bring this suit, the Receiver cites to the second paragraph of the Receivership order in which the Court directed the Receiver to institute legal proceedings for the benefit of, and on behalf of, the Receivership entities. According to the Receiver, Defendant Joel Steinger was a principal of MBC, and Defendant Leslie Steinger was one of the principals of MBC and was involved in running its sales force. Amended Complaint at ¶¶ 7, 8. The Receiver asserts that the Steingers improperly received both direct and indirect payments from MBC and VBLLC.

A. Direct Payments

The Receiver alleges that Defendant Kensington Management, Inc. ("Kensington") has its principal office at Joel Steinger's home address and that Kensington served as a conduit through which Joel Steinger received millions of dollars in "consulting fees" directly from MBC. *Id.* at ¶ 14. According to the Receiver, Defendants Rainy Consulting Corp. ("Rainy") and Twin Groves Investments, Inc. ("Twin Groves") have their principal offices located at Leslie Steinger's home address, and they served as conduits through which Leslie Steinger received millions of dollars in "consulting fees" from MBC. *Id.* at ¶¶ 15, 16. The Receiver attached schedules of these payments to the Amended Complaint, and he asserts that the Insider Defendants did not submit invoices, bills, or details for any consulting services provided to MBC and VBLLC. *See id.* at ¶¶ 32, 34 and Exs. A, B, & C (schedules for fees received by Kensington, Rainy, and Twin Groves, respectively). The Receiver alleges that these direct payments were made at the oral direction of Joel Steinger, that they

came from investors' funds, and that the Insider Defendants failed to provide any value in return. *Id.* at ¶¶ 35-36.

B. Indirect Payments

The Receiver also alleges that Joel and Leslie Steinger caused MBC to make indirect payments for their benefit. *Id.* at ¶ 37. According to the Receiver, the Steingers have "used MBC's and VBLLC's operating accounts as if they were personal bank accounts." *Id.* For example, according to the Receiver, the Steingers used the operating accounts to make payments to fund their horse farms, Majestic Farms, LLC, Triple Crown Farms, LLC, and Runnin' Horse Farms, Inc. *Id.* at ¶ 38. Similarly, the Receiver alleges that the Steingers used the operating accounts to pay vendors for various fees related to the horse farms, and to pay vendors for home renovation and private jet service. *Id.* at ¶¶ 45-50. Finally, the Receiver asserts that the Steingers caused MBC to pay thousands of dollars of their (and their spouses') personal expenses on their credit cards. *Id.* at ¶ 52. According to the Receiver, the Steingers received over $3 million in indirect payments, but they concealed the true nature of the payments on MBC's and VBLLC's books by describing them as purchaser commissions and by using abbreviations. *Id.* at ¶¶ 51, 53.

C. The Receiver's Claims

On the basis of these allegations, the Receiver brings several claims. In Count I, the Receiver brings a claim for unjust enrichment against all of the moving Defendants. In Counts II and III, the Receiver brings claims for fraudulent transfer under Florida law against all of the moving Defendants. In Count IV, the Receiver brings a claim for conversion against Joel and Leslie Steinger. In Count V, the Receiver brings a claim for civil theft against the Steingers. Finally, in Count VI, the Receiver brings a claim for breach of fiduciary duty against the Steingers.

II. Legal Standard

Standing is a threshold inquiry, and lack of standing is a proper basis on which to dismiss a complaint. *See, e.g.*, *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 983 (11th Cir. 1990).

A court will not grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) unless the plaintiff fails to allege any facts that would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Bradberry v. Pinellas County*, 789 F.2d 1513, 1515 (11th Cir. 1986). When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiffs well-pleaded facts as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986).

III. Analysis

In support of their motion to dismiss, the Defendants primarily focus on the Receiver's standing to bring this suit. They assert that this case is just like the Receiver's case against the MBC sales representatives, *Martinez v. Traina, et al.*, 05-60906-CIV-MORENO, which the Court dismissed *sua sponte*. In particular, they argue that the Receiver cannot satisfy either the constitutional or prudential requisites for standing because (1) any injury is to the investors rather than to MBC or VBLLC, (2) MBC and VBLLC are not distinguishable from the Steingers and were central to any fraud, and (3) any potential claims properly belong to the investors,. In his response, the Receiver argues that he is only seeking to recover damages on behalf of the Receivership entities for the Defendants' siphoning of assets from MBC's operating accounts and that he is litigating in concert with the investors. Further, he states that MBC was not a sham corporation but a real company. In sum, he argues that he has satisfied both constitutional and prudential requirements for

standing. Finally, he states that he has sufficiently pleaded all of his claims, and thus, they should survive the Defendants' motion to dismiss.

A. Standing

Article III of the United States Constitution limits the judicial power of federal courts to deciding "cases" or "controversies." The doctrine of standing is derived from this provision, as "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As the Eleventh Circuit has explained, the Supreme Court has outlined a two-part inquiry for analyzing standing questions, consisting of constitutional requirements and prudential considerations. *See E.F. Hutton*, 901 F.2d at 984. To meet the constitutional requirements for standing, a plaintiff must show: (1) injury in fact; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that the requested relief is likely to redress the injury. *O'Halloran v. First Union Nat'l Bank of* Florida, 350 F.3d 1197, 1202 (11th Cir. 2003) (citations omitted). In addition to satisfying these constitutional requirements, a plaintiff must demonstrate that prudential considerations do not prevent the court from hearing the matter. *Id.* The Supreme Court recognizes three prudential considerations discouraging judicial action: (1) assertion of a third party's rights; (2) allegation of a generalized grievance as opposed to an injury particular to the plaintiff; and (3) assertion of an injury outside the zone of interests protected by the applicable law. *E.F. Hutton*, 901 F.2d at 984 (citations omitted).

The Defendants first argue that the Receiver is bringing claims that properly belong to the investors. A receiver stands in the shoes of the corporations and can only bring those claims that the corporations could have asserted themselves. *See, e.g.*, 16 Fletcher, Cyclopedia of Private Corporations § 7840 (2005); *Obermaier v. Arnett*, 02-CV-111-FTM-29-DNF, 2002 WL 31654535,

at *3 (M.D. Fla. Nov. 20, 2002). Thus, the Receiver may bring claims that would belong to MBC and VBLLC, even if those claims may ultimately benefit investors and creditors, but he has no standing to represent creditors and investors in their individual claims. *Obermaier*, 2002 WL 31654535 at *3.

Particularly instructive here, in *O'Halloran*, the Eleventh Circuit examined whether a trustee could bring claims against a bank on behalf of the corporate debtor, which was central to a Ponzi scheme to defraud investors. While acknowledging that the trustee was not the proper party to seek damages for the Ponzi scheme itself, the Court observed:

> Where, as here, the trustee is litigating in concert with investors, and the trustee may be able to assert injuries not duplicative of those suffered by the investor plaintiffs, we find the concern that the trustee is somehow displacing the rights of the investors to be misplaced. *See also Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) ("[I]f in place of the receiver's actions the investors had brought a class action against the present defendants . . ., the defendants would no doubt be arguing that the action was improper because the injury was to the corporations and only derivatively to investors in the corporations.").

O'Halloran, 350 F.3d at 1202-03.

Accepting the Receiver's allegations in the complaint as true for purposes of this motion, he has demonstrated that he is seeking to recover for harms suffered by MBC and VBLLC related to the siphoning of funds from the companies' accounts. He alleges that the Defendants caused wrongful transfers from the companies themselves, not from the investors or the polices in which they invested. Further, the Receiver indicates that he is litigating in concert with the investors. Accordingly, following the reasoning of *O'Halloran*, the Defendants' position that the claims asserted by the Receiver properly belong to the investors is unpersuasive

Second, the Defendants argue that MBC and VBLLC suffered no injury because the corporations were themselves at the center of the fraudulent scheme. Citing to *O'Halloran*, this Court's dismissal in *Traina*, and other cases, the Defendants state that a corporation that was central to a fraudulent scheme cannot sue the individual defendants for their wrongs against the investors or creditors. *See, e.g.*, Defendants' Mot. at 7-8. While this is indeed a correct statement of black letter law, here, viewing the complaint in the light most favorable to the Receiver, he is not suing on behalf of the investors or creditors for claims arising out of the allegedly fraudulent scheme. Those claims would fail, for as the court explained in *O'Halloran*, where a corporation's primary existence was as a perpetrator of a fraudulent scheme, it cannot be said to have suffered injury from the scheme it perpetrated. *O'Halloran*, 350 F.3d at 1203. Here, however, as explained above, reading the complaint in the light most favorable to the Receiver compels the conclusion that he is bringing claims for injuries suffered by the Receivership entities, and those claims do not arise out of the allegedly fraudulent scheme. The Receiver may maintain these claims, because where a corporation was "one of the principal culprits in the [fraudulent] scheme," a trustee [or receiver] may bring claims on behalf of the corporation to remedy an injury suffered by the corporation. *Id.* Even though the Receiver's claims, if successful, may ultimately benefit the investors and creditors, he is asserting claims that belong to MBC and VBLLC.

Moreover, the Receiver's claims in this case are distinguishable from those in *Traina*. In *Traina*, the Receiver brought an unjust enrichment claim, seeking to recover commissions that the sales representatives received out of investors' funds for selling unregistered securities. Thus, the Receiver was seeking to recover commissions that came directly from investors' funds, and his claim based on underlying violations of the federal securities laws rightly belonged to the investors. Here,

on the other hand, the Receiver seeks to recover money the Defendants allegedly took from the MBC operating accounts. Furthermore, neither the investors nor the creditors could likely bring all of the claims asserted by the Receiver in this case on behalf of the Receivership entities.

Third, the Defendants assert that the Receiver is precluded from recovering damages here because the complaint makes clear that the Receivership entities were the alter egos of the Steingers. Accordingly, they argue that, given the absolute identity of interests between the Steingers and the corporations, the Receiver cannot pursue claims against the individual Defendants on behalf of the corporations.

While the Receiver alleges that the individual Defendants controlled the companies, he does not assert that the companies were sham corporations or that they lacked any identity apart from the Steingers. Rather, he alleges that the Receivership entities were functioning companies and that the investors' funds were invested in actual insurance policies. Thus, this case is unlike the case upon which the Defendants primarily rely, *Feldman v. Prudential Bache Sec.*, 122 B.R. 466 (S.D. Fla. 1990). In *Feldman*, the trustee alleged that the corporations were sham corporations, without corporate identity apart from the individual behind the illegal activity. As the court explained,

> Yet, Plaintiffs also unambiguously state that the debtors were only sham corporations, created for the sole purpose of defrauding creditors.
>
> The Court agrees with Plaintiffs that an "artificial and fraudulently prolonged life . . . and . . . consequent dissipation of assets" constitutes a recognized injury for which a corporation can sue under certain conditions. *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 698 (1983). The Court finds, however, that under the circumstances alleged in the complaint, the corporations were not injured by their prolonged life.
>
> All corporations are legal fictions. In this case, however, FIP and FFP were simply fictitious. The complaint alleges that FIP and FFP were sham corporations, alter egos with no corporate identity separate from Henry Gherman. As the corporations were essentially only conduits for stolen money, any injury to the debtors in this case must be substantially coterminous with the injury to the defrauded

> creditors. Everything Gherman stole from the debtor corporations, the debtors had stolen from the creditors. Thus, any alleged injury to the debtors is as illusory as was their corporate identity.

Id. at 474 (footnote omitted). Unlike in *Feldman*, in this case MBC was a functioning business, it invested investors' money in real insurance policies, and it maintained a corporate identity apart from the individual Defendants. Further, the Receiver does not allege that the individual Defendants simply funneled all of the invested funds through MBC into their own pockets, as the complaint alleged in *Feldman*. Accordingly, reading the complaint in the light most favorable to the Receiver, the Receivership entities were not mere alter egos of the Steingers, and the Receiver is not precluded from bringing this suit.

Finally, the Defendants argue that prudential concerns weigh in favor of dismissing this case for lack of standing, as they again argue that the Receiver is asserting rights that properly belong to the Plaintiffs. Thus, they assert that this case is just like *Traina*. As discussed above, however, the Receiver is not suing to recover damages for torts arising out of the alleged fraudulent scheme. Those claims rightfully belong to the investors, and, indeed, the investors are pursuing those claims in a separate action. Here, rather than suing for torts arising out of the fraudulent scheme, the Receiver is suing the Defendants for siphoning money from the Receivership entities. Especially given that the Receiver is litigating in concert with the investors, prudential concerns do not weigh in favor of dismissal for lack of standing.

B. Other Pleading Defects

In addition to arguing that the Receiver lacks standing, the Defendants assert in two final paragraphs of their motion that the complaint contains other defects requiring dismissal. First, the Defendants maintain that the Receiver's unjust enrichment claim in Count I fails because he has not

alleged the lack of an adequate legal remedy. As the Florida courts have recently made clear, however, this doctrine does not apply to claims for unjust enrichment. *Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla. Dist. Ct. App. 1998). It is only when an express contract is proven that an unjust enrichment claim must fail. *Id.*; *Mobil Oil Corp. v. Dade County Esoil Mgmt. Co.*, 982 F. Supp. 873, 880 (S.D. Fla. 1997) ("Until an express contract is proven, a motion to dismiss a claim for . . . unjust enrichment [because an adequate legal remedy exists] is premature."); *see also Mario v. Centex Homes*, No. 06-CV-131-T-23, slip. op. 2006 WL 560150, at *1 (M.D. Fla. March 7, 2006) (existence of contract precludes action for unjust enrichment). Thus, dismissal at this stage is premature.

Second, the Defendants assert that the fraudulent transfer counts, Counts II and III, must fail because the Receiver does not allege sufficiently that MBC and VBLLC are creditors who can sue under Fla. Stat. § 726.105(1)(a) and § 726.108. As the Defendants point out in their reply, the Complaint states that the payments at issue were made "from MBC and VBLLC with the actual intent to hinder, delay and defraud the creditors of MBC and VBLLC" rather than to hinder, delay and defraud MBC. *See* Complaint at ¶ 75. The Receiver does not address this argument in his response. Given the lack of response from the Receiver, Counts II and III are DISMISSED.

Third, the Defendants argue that the Court must dismiss the civil theft claim, Count V, because the Receiver did not issue a written demand to the person liable before filing suit. As the Receiver demonstrates in an attachment to his response, however, he did make a written demand. Further, the demand requirement is not an element of proof that the Receiver must plead in his complaint. Accordingly, dismissal of Count V is inappropriate.

IV. Conclusion

For the reasons stated above, Defendants' Motion to Dismiss **(D.E. No. 35)**, filed on **January 20, 2006** is GRANTED in PART and DENIED in PART. The fraudulent transfer claims, Counts II and III, are DISMISSED

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of May, 2006.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

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