2002 WL 31654535
United States District Court,
M.D. Florida.

Otto G. OBERMAIER, as receiver for David M. Mobley, Sr., Maricopa, et. al, Plaintiffs,
v.
Bryan ARNETT, Jennifer Arnett, Halburn Arnett, Theresa Ann Arnett, Lisa Zack, Santo Tomaini, David Parish, Grace Hargrove, and Parlay Partners, Ltd., Defendants.

No. 2:02CV111FTM29DNF.
|
Nov. 20, 2002.

Receiver brought action in state court against beneficiaries of Ponzi scheme alleging fraudulent transfer and unjust enrichment under Florida law. Beneficiaries removed action to federal court. On beneficiaries' motion to dismiss, the District Court, Steele, J., held that claims against beneficiaries of alleged Ponzi scheme, alleging fraudulent transfer and unjust enrichment under Florida law, could be asserted by receiver on behalf of receivership entities.

Motion denied.

West Headnotes (1)

[1] **Commodity Futures Trading Regulation**
Receivership
Securities Regulation
Receivership

Claims against beneficiaries of alleged Ponzi scheme, alleging fraudulent transfer and unjust enrichment under Florida law, could be asserted by receiver on behalf of receivership entities, in action brought by Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC).

15 Cases that cite this headnote

Attorneys and Law Firms

Edward Soto, Robert Berezin, Eric N. Assouline, Weil, Gotshal & Manges, LLP, Miami, FL, for plaintiff Otto G. Obermaier.

Robert I. Cusick, Wyatt, Tarrant & Combs, LLP, Louisville, KY, for defendants Bryan Arnett and Jennifer Arnett.

Charles F. Ketchey, Jr., Akerman Senterfitt, P.A., Tampa, FL, for defendants Halburn Arnett and Teresa Arnett.

Charles F. Ketchey, Jr., Akerman Senterfitt, P.A., Tampa, FL, for defendant Grace Hargrove.

Edward K. Cheffy, Cheffy Passidomo Wilson & Johnson, Naples, FL, for defendant Lisa Zack.

Gary W. Kovacs, Mattlin & McClosky, Boca Raton, FL, for defendant Santo Tomaini.

ORDER

STEELE, J.

***1** This matter comes before the Court on the Motion to Dismiss by Defendants Arnetts, Hargrove, and Zack (Doc. # 14) and Defendant Santo Tomaini's Unopposed Motion to Adopt Defendants' Motion to Dismiss (Doc. # 27). [1] Plaintiff filed a Response Memorandum (Doc. # 30) in opposition to the motion to dismiss. With the Court's permission, the Securities and Exchange Commission filed an *amicus curiae* Statement in Support of Plaintiff Obermaier's Opposition to Defendants' Motion to Dismiss (Doc. # 40), and defendants filed a responsive Memorandum (Doc. # 43). The Court heard oral arguments on November 18, 2002.

I.

In deciding a motion to dismiss, the Court must accept all factual allegations in the Complaint as true and take them in the light most favorable to plaintiff. *Christopher v. Harbury,* 536 U.S. 403, 122 S.Ct. 2179, 2181, 153 L.Ed.2d 413 (2002). A Complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set

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of facts that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (footnote omitted); *Marsh v. Butler County, Alabama,* 268 F.3d 1014, 1022 (11th Cir.2001) (en banc). To satisfy the pleading requirements of Fed.R.Civ.P. 8, a complaint must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). However, dismissal is warranted under Fed.R.Civ.P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. *Neitzke v. Williams,* 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Brown v. Crawford County, Ga. .,* 960 F.2d at 1009–10.

II.

The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) each filed an action against David M. Mobley, Sr. and twelve related entities in the United States District Court for the Southern District of New York. In due course Otto G Obermaier was appointed as the Receiver pursuant to an Amended Order Appointing Receiver on Consent (the Order of Appointment) entered by the district court in the Southern District of New York. (Doc. # 2, Exhibit A). The Order of Appointment granted Obermaier "the full power of an equity receiver" for Mobley and the twelve related entities named in those cases. (Doc. # 2, Exhibit A, p. 2). The Order of Appointment specifically empowered the Receiver, among other things, to: (1) take and retain immediate possession, custody, and control of all assets and property in which any defendant held a direct or indirect interest (Doc. # 2, Exhibit A, § I.A); (2) take all steps the Receiver deems necessary to secure and protect the assets and property of the defendants (Doc. # 2, Exhibit A, § I.B); (3) acquire and retain all rights, powers, and privileges that defendants have to manage, control, operate and maintain their businesses, and to commence, maintain, defend, or participate in legal proceedings to sue for, collect, receive and take into possession all goods, chattels, rights, general intangibles, choses in action, credits, and monies with a view to preventing loss, damage and injury to investors and preserving assets of defendants (Doc. # 2, Exhibit A, § I.D); (4) bring any claim or cause of action on behalf of any defendant or any interest that any defendant has (Doc. # 2, Exhibit A, § I.E); and (5) institute, prosecute and defend, compromise, adjust, intervene in, or become party to such actions or proceedings in state or federal court as may, in the Receiver's opinion, be necessary and appropriate for the collection, marshaling, protection, maintenance, and preservation of the assets of any defendant or the recovery of assets transferred by any defendants, including fraudulent transfer actions (Doc. # 2, Exhibit A, § I.E).

***2** The Complaint (Doc. # 2) in this case was originally filed in state court by the Receiver for the twelve (12) entities (the Receivership Entities), and was removed by defendants to federal court. The Receiver cited to the Order of Appointment as his authority to bring the action. (Doc. # 2, ¶¶ 1, 20). The Complaint alleges that "Mobley conceived and carried out a massive fraud on a group of investors in various hedge funds he created, managed and controlled," and that the Receivership Entities derived virtually all their income from investor contributions made into three of the Receivership Entities collectively referred to as the Hedge Funds. The Complaint alleges that Mobley carried out a fraud on the Hedge Funds and its investors, and concealed the fraud from the employees, officers, and directors of the Receivership Entities and the investors of the Hedge Funds. The Complaint further alleges that Mobley engaged in a Ponzi scheme and misappropriated at least $9.5 million from the Hedge Funds and Receivership Entities and transferred them as "profits" of other investors. This money was paid from the capital contributions made by other investors to the Hedge Funds, and was effectively stolen by Mobley in order to be used to pay the "false profits" to other investors. Each of the defendants in this action is alleged to have received such "false profits" from Mobley as returns on investment, although in fact there was no legitimate return on investment.

The Complaint sets forth claims of fraudulent transfer pursuant to Florida statutes against each defendant under alternative theories of actual or constructive fraud, as well as a claim of unjust enrichment against each defendant. The intentional fraud counts allege that defendants received the false profits from a Hedge Fund entity at Mobley's direction "with Mobley's actual intent to hinder, delay, or defraud the Receivership Entities and their investors and creditors;" that Mobley intended to defraud the Receivership Entities and their investors and creditors; that defendants knew the funds were going to

be derived from one of the Receivership Entities; and that the Receivership Entities did not receive reasonably equivalent consideration for the value of the false profits transferred to defendants. The alternative constructive fraud counts allege that defendants received the false profits from Mobley without the Receivership Entities receiving reasonably equivalent value in exchange for the false profits; that the net assets of the Receivership Entities were unreasonably small in relation to the transaction; that at the time the false profits were transferred to defendants, Mobley knew or should have known that the hedge funds and other Receivership Entities were insolvent and that the other investors would not be able to obtain the return on their investment as they came due; and that at the time of the false profits, Mobley knew or reasonably should have believed that the Receivership Entities would incur debts beyond their ability to pay as they became due. The unjust enrichment claims allege that defendants have been unjustly enriched at the expense of the Receivership Entitles, the Hedge Funds, and the defrauded investors by receiving false profits from Mobley; that defendants were not entitled to the false profits because they were obtained from the Hedge Funds through Mobley's fraudulent and illegal conduct; and that it would be inequitable to permit defendants to benefit from the false profits because the Receivership Entities did not earn any profits and the false profits were in reality other investors' capital contributions to the Hedge Funds.

III.

***3** Defendants assert that the Receiver does not have standing to bring an action to remedy losses incurred by investors in the Receivership Entities. Defendants argue that this case is controlled by *E.F. Hutton & Co., Inc. v. Hadley,* 901 F.2d 979 (11th Cir.1990) and *Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972), both of which addressed the standing of a bankruptcy trustee. In *Hadley,* the bankruptcy trustee conceded that he was asserting the claims of creditors of the bankrupt entity, rather than the bankrupt entity he represented. The Eleventh Circuit held that "the bankruptcy trustee does not have standing to assert claims of creditors of the bankrupt. We emphasize that our holding is restricted to the specific facts in this case." 901 F.3d at 985. Similarly, in *Caplin* the Court held that a bankruptcy trustee does not have standing to assert claims on behalf of the bankrupt estate's creditors. Since the current action does not involve a bankruptcy trustee or bankruptcy law, *Hadley* and *Caplin* are not controlling precedent, although they do provide guidance.

It is settled that an equity receiver has the power to bring ancillary actions to recover assets which were fraudulently transferred to investors in a Ponzi scheme. *Commodity Futures Trading Commission v. American Commodity Group Corp.,* 753 F.2d 862, 866 n. 6 (11th Cir.1984), citing *Commodity Futures Trading Commission v. Chilcott Portfolio Mgmt., Inc., et al.,* 713 F.2d 1477 (10th Cir.1983). As *Chilcott Portfolio Mgmt* stated, however, having the power to initiate suit is a distinct issue from having standing to do so in a particular instance. *Id.* 713 F.2d at 1482–83.

The general standing principles discussed in *Hadley* accurately state the law which controls this case. When standing is contested, the party claiming standing must plead and ultimately prove injury in fact, causation, and redressability. If these constitutional requirements are satisfied, the party must show that prudential considerations (the assertion of third party's rights, allegation of generalized grievance rather than an injury particular to the litigant, and assertion of an injury outside the zone of interests of the statute or constitutional provision) do not restrain the court from hearing the cases. *Hadley,* 901 F.2d at 984–85.

Plaintiff, as an equity receiver, "may sue only to redress injuries to the entity in receivership." *Scholes v. Lehmann,* 56 F.3d 750, 753 (7th Cir.), *cert. denied sub nom. African Entr. Inc. v. Scholes,* 516 U.S. 1028, 116 S.Ct. 673, 133 L.Ed.2d 522 (1995). "Like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, an equity receiver may sue only to redress injuries to the entity in receivership, corresponding to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit." *Id.* The First Circuit stated the rule in an unpublished opinion as: "An equity receiver, like a bankruptcy trustee, has standing for all claims that would belong to the entity in receivership, and which would thus benefit its creditors and investors, but no standing to represent the creditors and investors in their individual claims." *Miller v. Harding,* 248 F.3d 1127 (1st Cir.2000), 2000 WL 1792990. In short, "[t]he Receiver lacks standing to assert claims on behalf of the defrauded investors and has standing to assert claims on behalf of the receivership entities, ..." *Knauer v. Jonathon Roberts*

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Financial Group, Inc., 2002 WL 31431484 (S.D.Ind.2002). *See also Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274 (7th Cir.1997).

***4** In this case, the Receiver purports to sue on behalf of the Receivership Entities, but not Mobley. The Receiver, as an equity receiver, clearly has standing to bring claims if the causes of action attempt to redress injuries to the Receivership Entities. The issue, therefore, is whether the state causes of actions asserted by the Receiver may be brought by the receivership entities, or only by the investors. This is a matter of state law. *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 348 (3rd Cir.2001).

The Receiver has set forth two basic causes of action: Fraudulent transfer under Fla. Stat. Chapter 726 and unjust enrichment under Florida common law. The facts which are pled in the Complaint, which the Court must assume are true at this stage of the proceedings, adequately allege causes of action under Florida law which can be prosecuted by the Receivership Entities.

The Court concludes that the Receiver has sufficiently plead both the constitutional and prudential requirements of standing in this case. The Court further concludes that it need not determine whether the anticipated equitable defenses can be asserted against a receiver or preclude successful prosecution of the case. Those matters may be appropriate for a summary judgment motion, but must be rejected at the motion to dismiss stage because the facts pled do not compel a finding in defendants' favor on such defenses.

Defendants' final argument is that the allegations in the Complaint about the Order of Appointment are insufficient to establish the Receiver's standing. The Court disagrees. While the Court agrees that the Order of Appointment grants the Receiver no power or right to represent the investors or creditors, the Complaint on its face does not do so, and does not exceed the powers granted the Receiver.

Accordingly, it is now

ORDERED:

1. Defendant Santo Tomaini's Unopposed Motion to Adopt Defendants' Motion to Dismiss (Doc. # 27) is DENIED as moot;

2. The Motion to Dismiss by Defendants Arnetts, Hargrove, and Zack (Doc. # 14) is DENIED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31654535, 16 Fla. L. Weekly Fed. D 43

Footnotes

1 Defendants Zack and Tomaini have settled the case, therefore the motions are moot as to them.

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