

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

OFFICE OF THE ATTORNEY
GENERAL, DEPARTMENT OF LEGAL
AFFAIRS, STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 51-2010-CA-2912-WS/G

BOTFLY L.L.C., DAVID R. LEWALSKI,
and JON J. HAMMILL,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT JON J. HAMMILL'S
MOTION TO DISMISS**

Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida ("OAG"), by and through its undersigned attorneys, hereby files this Response to the Motion to Dismiss filed by Defendant Jon J. Hammill ("Hammill"), and states as follows:

Introduction

Plaintiff adequately pled its claims for relief against Defendant Hammill as a result of Defendant Hammill's alleged participation in a Ponzi scheme involving at least \$23 million of investor funds. Plaintiff attached the pertinent exhibit to the Complaint and pled its claims sufficiently. Defendant Hammill attempts to impose a pleading standard on Plaintiff that exceeds the requirements of the Florida Rules of Civil Procedure. Defendant Hammill's arguments for dismissal lack merit and therefore, the Motion to Dismiss should be denied.

Facts

Plaintiff filed a Complaint alleging that Defendants orchestrated a Ponzi scheme, in which Defendants solicited and collected at least \$23 million in investor funds. (Complaint, ¶ 14). The Complaint alleges that Defendants Lewalski and Hammill recruited persons to invest in their company Botfly, L.L.C. (“Botfly”) and promised to pay investors a 10% per month return on their investments. (Complaint, ¶¶ 16-17 and Exhibit A). Defendants signed and provided to at least one investor a Promissory Note when that consumer invested money in Botfly. (Complaint, ¶ 18 and Exhibit A). The Promissory Note used by Defendants contains representations that investors would receive 10% interest per month on their investments. (Complaint, ¶ 24 and Exhibit A). This equates to an interest rate of 120% per year using simple interest. The Promissory Note contained misrepresentations that the Defendants knew were false at the time that they made the statements. (Complaint, ¶ 19).

The Complaint alleges that Defendants failed to invest most of the money provided by investors to Defendants. (Complaint, ¶ 28). Instead, Defendants appropriated investor funds for their own use, including payments to Hammill and his company Jon J. Hammill, P.A. of more than \$1.1 million of investor funds without investing the funds. (Complaint, ¶ 25). Moreover, Defendants spent huge amounts of investor money on personal expenditures such as more than \$616,000 on luxury automobiles, more than \$155,000 on resort hotels, more than \$475,000 on private jet charter services, as well as the expenditure of at least \$244,000 on retailers such as Gucci, Cartier, and Hermes of Paris (Complaint, ¶ 26). As a result, the Complaint alleges Defendants violated the Florida Securities and Investor Protection Act and the Florida Deceptive and Unfair Trade Practices Act. (Complaint, ¶¶ 32-57).

Argument

It is well established that “[w]hen ruling on a motion to dismiss for failure to state a cause of action, the trial court must accept the material allegations as true and is bound to a consideration of the allegations found within the four corners of the complaint.” *Murphy v. Bay Colony Property Owners Ass'n*, 12 So. 3d 924, 926 (Fla. 2d DCA 2009) (citations omitted). A motion to dismiss merely “tests the legal sufficiency of the complaint” and is not an avenue for making factual findings. *In re Forfeiture of 2007 Ford F350 Pickup Truck, Identification No. 1FTWW31P27EA46254*, 987 So. 2d 148, 149 (Fla. 2d DCA 2008) (quoting *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000)). “For ... purposes of a motion to dismiss for failure to state a cause of action, allegations of the complaint are *assumed to be true* and *all reasonable inferences arising therefrom are allowed in favor of the plaintiff.*” *Wallace v. Dean*, 3 So. 3d 1035, 1042-3 (Fla. 2009) (emphasis in original) (quoting *Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983)) (citations omitted).

Plaintiff has stated a claim upon which relief can be granted against Defendant Hammill for violations of both the Florida Securities and Investor Protection Act (“FSIPA”) and the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). Plaintiff is authorized to obtain injunctive and other relief under FSIPA when it “has reason to believe that a person has engaged or is engaged in any act or practice constituting a violation of s. 517.275, s. 517.301, s. 517.311, or s. 517.312, or any rule or order issued under such sections.” Fla. Stat. § 517.191(5) (2009). Pursuant to Fla. Stat. § 517.191(5), the OAG has sued Defendants for injunctive relief and other relief as a result of Defendants’ violations of Fla. Stat. § 517.301. Section 517.301(1), Florida Statutes, declares that it is unlawful for any person to “employ any device, scheme, or artifice to defraud” in connection with the offer or sale “of any investment or security.” Further, Section

517.301(1)(c), Florida Statutes, declares that it is unlawful for a person to “knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry.”

Plaintiff has alleged that Defendants’ actions described above violated Section 517.301(1), Florida Statutes. Specifically, Plaintiff alleged that Defendants offered and sold securities and/or investments to persons in Florida and elsewhere. (Complaint, ¶ 34). Plaintiff alleged that Defendants solicited investors to invest in Botfly and promised investors returns of 10% per month interest. (Complaint, ¶ 35). Plaintiff alleged that the Promissory Note constituted a security (Complaint, ¶ 36). Next, Plaintiff alleged that Defendants made false statements to investors, including that investors would earn 10% per month interest on their investment and that the money would be used for investment or margin purposes only. (Complaint, ¶ 40, 42). However, Defendants failed to invest most of the money received from investors and instead used the money for personal payments and expenditures. (Complaint, ¶¶ 37, 42). Further, Defendants concealed from investors that they relied upon funds received from new investors to pay any returns to existing investors. (Complaint, ¶¶ 40, 43). Accordingly, Plaintiff alleged that Defendants violated Sections 517.301(1)(a) and 517.301(1)(c), Florida Statutes. (Complaint, ¶¶ 40, 42-43). These allegations state a claim upon which relief can be granted under FSIPA.

In addition, Plaintiff is statutorily authorized to seek injunctive and other relief pursuant to FDUTPA, Section 501.207(3), Florida Statutes (2009). FDUTPA prohibits unfair or deceptive acts or practices in the conduct of any business or trade and provides remedies for the Attorney General. Plaintiff has specified several acts by each Defendant that violate FDUTPA.

(Complaint, ¶¶ 50-52). These allegations state a claim upon which relief can be granted under FDUTPA.

Defendant Hammill claims without merit that the Complaint is contradicted by Affidavits submitted in support of the Motion for Temporary Injunction and Appointment of Receiver (“Affidavits”). The Affidavits are outside the four corners of the Complaint and may not be considered on a Motion to Dismiss. ““A motion to dismiss a complaint is not a motion for summary judgment in which the court may rely on facts adduced in depositions, affidavits, or other proofs.”” *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000)) (quoting *Mancher v. Seminole Tribe of Fla., Inc.*, 708 So. 2d 327 (Fla. 4th DCA 1998)). Further, “factual conflicts cannot be resolved by motions to dismiss because all allegations in the complaint must be accepted as true. Such conflicts are better addressed in summary judgment proceedings.” *Nat Weaver, Inc. v. Fencl*, 701 So. 2d 121, 122 (Fla. 5th DCA 1997). Therefore, the Affidavits should not be considered for purposes of the instant Motion.

However, even if the Affidavits are considered in connection with Defendant Hammill’s Motion to Dismiss, the Affidavits support the allegations of the Complaint. Defendant Hammill mischaracterizes the allegations in the Complaint in his Motion. The only example of an alleged contradiction provided by Defendant Hammill is his assertion that the Complaint alleges that “all” investor funds were siphoned into personal accounts of Defendants Hammill and Lewalski or were used for the personal expenses of Hammill and Lewalski. However, the Complaint does not allege that “all” investor funds went into personal accounts of Defendants Hammill and Lewalski or were used for the personal expenses of Hammill and Lewalski. Further, Hammill attempts to interject issues outside of the four corners of the Complaint, such as whether the personal payments and expenditures were salary payments. This is improper on a Motion to

Dismiss.

Next, Defendant Hammill argues for dismissal because he claims that Plaintiff omitted Exhibit A from the Complaint. However, Exhibit A is attached to the Complaint and is on file with the Complaint. Plaintiff has provided an additional copy of Exhibit A to counsel for Defendant Hammill. Accordingly, this argument lacks merit.

Moreover, Defendant Hammill complains that other proofs were not attached to the Complaint including a Promissory Note, bank account records, website pages, an investor statement, and documents containing false statements. (Motion to Dismiss, ¶ 2). As noted above, a Promissory Note given by Defendants to at least one investor is attached to the Complaint as Exhibit A. (Complaint, ¶¶ 18-20). The Complaint alleges that the Promissory Note contains false statements made by Defendants to at least one investor and likely hundreds of others. (Complaint, ¶¶ 18-21). As for the other records requested by Defendant Hammill, they are available for production in discovery and are not required to be attached to the Complaint.

A complaint is designed to provide a short and plain statement of the grounds for relief. Fla. R. Civ. P. 1.110(b). A complaint must provide a defendant with notice of the claims asserted against him. Nothing more than this is required. The proofs sought by Defendant Hammill are readily obtainable through discovery. Rule 1.130(a), Florida Rules of Civil Procedure, states, "No papers shall be unnecessarily annexed as exhibits." Not every document germane to a cause of action must be attached to an initial pleading. Indeed, Defendant Hammill is attempting to impose a pleading standard that is foreign to the Florida Rules of Civil Procedure. Further, Defendant Hammill attempts to transform the standard on a motion to dismiss into a summary judgment standard. The Second District Court of Appeal has

admonished litigants against such an approach. “[A] motion to dismiss should not be used as a substitute for a motion for summary judgment or a motion for judgment on the pleadings.” *Wilson v. News-Press Publishing, Co.*, 738 So. 2d 1000, 1001-02 (Fla. 2d DCA 1999) (citing *Lowery v. Lowery*, 654 So. 2d 1218, 1219 (Fla. 2d DCA 1995)).

Further, many of the documents sought by Defendant Hammill, such as investor statements and bank records, are primarily in the custody or control of Defendant Hammill. These documents are also voluminous and unnecessary to an initial pleading. The Complaint has sufficiently placed Defendants on notice of the allegations against them. Here, no additional documents are necessary to the Complaint because Defendants are adequately informed of the allegations against them. *See, e.g., Beach TV Properties, Inc. v. Bellsouth Mobility, LLC*, 2006 WL 2982874, *2 (N.D. Fla. 2006) (applying Florida law) (“The failure to attach the equipment drawings was not fatal because the Complaint (and the exhibits already attached thereto) were sufficient to inform Cingular of the allegations at issue. To the extent Cingular may not already have, and may need to obtain, the equipment drawings contained in “Exhibit A,” that is what discovery is for.”). The documents sought by Defendant Hammill should be obtained through discovery and not via a Motion to Dismiss.

Defendant Hammill argues without merit that Plaintiff is required to attach to the Complaint permission from the Florida Office of Financial Regulation. The pertinent statute, Fla. Stat. § 517.191(5) (2009), does not require permission to be attached to a Complaint. Plaintiff pled that all conditions precedent had been satisfied or waived. (Complaint, ¶ 31). This allegation satisfies Plaintiff’s pleading requirement. If Hammill disagrees, he can deny the allegation in his answer or raise the issue as an affirmative defense. “Affirmative defenses and the existence of facts which have bearing on the viability of an action are best fleshed out in the

litigation process by way of motions for summary judgment or judgment on the pleadings.” *Value Rent-A-Car, Inc. v. Grace*, 794 So. 2d 619, 621 (Fla. 2d DCA 2001) (citing *Wilson v. News-Press Publishing, Co.*, 738 So. 2d 1000, 1001-02 (Fla. 2d DCA 1999)).

Finally, Defendant Hammill argues that Plaintiff’s claim for violation of FSIPA contradicts its claim for violation of FDUTPA. Plaintiff disputes this assertion. However, Plaintiff is entitled to plead all of its claims for relief in the Complaint, even if the claims are later deemed to be in the alternative. Rule 1.110(b), Florida Rules of Civil Procedure, expressly provides, “Relief in the alternative or of several different types may be demanded.” Further, Rule 1.110(g), Florida Rules of Civil Procedure, provides, “A party may also state as many separate claims or defenses as that party has, regardless of consistency and whether based on legal or equitable grounds or both.” Plaintiff alleged two claims in the Complaint—one for violation of FSIPA and one for violation of FDUTPA. Each count is properly pled and separate from the other. Accordingly, Defendant Hammill’s Motion to Dismiss should be denied.

If this Court deems the Complaint to be deficient, and it should not, Plaintiff requests leave to amend the Complaint. Indeed, “the plaintiff should be given an opportunity to amend the complaint” if the Court finds the Complaint deficient. *Wilson v. News-Press Publishing, Co.*, 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

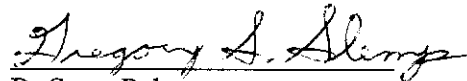
Conclusion

Plaintiff has satisfied its pleading obligations in the Complaint. Plaintiff attached Exhibit A to the Complaint and sufficiently pled its claims against Defendant Hammill. Defendant Hammill has attempted to introduce to the Court facts that are outside the four corners of the Complaint and impose a pleading standard above and beyond what is required by the Florida Rules of Civil Procedure. Accordingly, this Court should deny Defendant Jon J. Hammill’s

Motion to Dismiss and require Defendant Hammill to file an Answer to the Complaint.

WHEREFORE, Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida, prays this Court enter an Order denying the Motion to Dismiss filed by Defendant Jon J. Hammill and requiring Defendant Hammill to answer the Complaint forthwith.

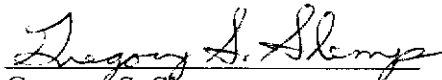
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jeffrey W. Warren and Karen Cox, Bush Ross, P.A., P.O. Box 3913, Tampa, FL 33601-3913, Todd Foster and Michael Gold, Cohen, Foster & Romine, P.A., 201 East Kennedy Boulevard Suite 1000, Tampa, FL 33602, David R. Lewalski, 2515 Southwest 35th Place, Apt. #112, Gainesville, FL 32608, and Botfly, L.L.C., c/o David R. Lewalski, Registered Agent, 2515 Southwest 35th Place, Apt. #112, Gainesville, FL 32608 on this 25th day of May, 2010.


Gregory S. Slemp