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

OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS, STATE OF FLORIDA, Plaintiff, -against- BOTFLY, LLC, DAVID R. LEWALSKI, JON J. HAMMILL, and JON J. HAMMILL P.A., Defendants.	Case No: 51-2010-CA-2912-WS/G

MEMORANDUM OF LAW IN SUPPORT OF BOTFLY, LLC AND DAVID R. LEWALSKI'S MOTION TO DISMISS THE COMPLAINT

Defendants, Botfly LLC ("Botfly") and David R. Lewalski ("Lewalski") (collectively, "Movants"), hereby file their Memorandum of Law in Support of their Motion to Dismiss. Plaintiff has failed to state a cause of action against the Movants. Plaintiff cannot recover on its claim arising under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), because securities transactions are not actionable under FDUTPA. *See* § 501.201, Fla. Stat. Furthermore, Plaintiff has failed to satisfy the heightened pleading requirements imposed by Rule 1.120(b) of the Florida Rules of Civil Procedure in pleading its claim arising under the Florida Securities and Investor Protection Act ("FSIPA"), as the Amended Complaint is completely devoid of facts showing that the Movants made a false representation, that the Movants knew the representation was false at the time it was made, and that investors relied upon the Movants' representation. *See* § 517.301, Fla. Stat. Accordingly, Plaintiff's Amended Complaint should be dismissed in its entirety.

BACKGROUND

Plaintiff commenced this action on April 1, 2010 with the filing of a Complaint containing allegations of securities fraud based solely upon the interview of a single individual referred to as "CWA." On the same day based upon Plaintiff's ex parte submissions, the Court granted the appointment of a Receiver and issued a Temporary Injunction freezing all of Movants' assets (as well as the assets of their co-Defendant Jon Hammill). To date, the Receiver has aggressively pursued, and disposed of, Movants' assets without probing the merits of the Complaint. Meanwhile, the asset freeze has severely hampered Movants' ability to mount a meaningful defense against the flimsy allegations contained in the Complaint.

Plaintiff made a feeble attempt to strengthen its allegations by filing an Amended Complaint on July 12, 2010. In the Amended Complaint, Plaintiff alleges that Lewalski devised and operated a Ponzi scheme through Botfly and that people who invested in Botfly executed a promissory note at the time of their investment containing two allegedly false representations. (Am. Compl. ¶¶ 16-18., 20-23.) Plaintiff alleges that Movants falsely represented to investors in the promissory note that the principal amount would be held for "investment and margin purposes only" and then used investor funds for personal expenses and to purchase luxury automobiles. (Am. Compl. ¶ 25, 27-28.) Plaintiff further alleges that Movants recruited persons to invest in Botfly by promising to pay investors a 10% monthly return on their investment, a promise that was reiterated in the promissory note. (Am. Compl. ¶ 19, 24, 26, 37.) Although Plaintiff asserts that this promise was false at the time it was made, there is no allegation, nor is there any evidence, that Movants failed to pay investors as promised.[1]

[1] However, since the Temporary Injunction was entered by the Court on April 1, Botfly investors have not received any return on their investments and have been precluded from accessing their assets for nearly six months – without any sort of hearing on the merits of Plaintiff's claims.

As FDUPTA does not reach securities transactions, Plaintiff's FDUPTA claim must be dismissed. Furthermore, the Amended Complaint fails to satisfy the heightened pleading standard imposed on fraud claims by Rule 1.120(b) of the Florida Rules of Civil Procedure, as it does not contain a single fact establishing that Movants knew these statements were false at the time they were made. The Amended Complaint fatally fails to allege facts demonstrating that Movants had the present intent, at the time the statement was made, to breach the obligations created by the promissory note. Finally, the Amended Complaint completely fails to allege that any investor relied on either of the statements. Given these deficiencies in Plaintiff's Amended Complaint, Plaintiff's FDUPTA and FSIPA claims should be dismissed.

ARGUMENT

The Plaintiff has failed to state a claim upon which relief can be granted pursuant to Rule 1.140(b)(6) of the Florida Rules of Civil Procedure. A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations in the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party. *The Florida Bar v. Green*, 926 So. 2d 1195, 1199 (Fla. 2006). However, for a plaintiff to survive a motion to dismiss he must do more than state legal conclusions; he must "allege some specific factual basis for those conclusions or face dismissal of [his] claims." *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1263 (11th Cir. 2004). "Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *See Jackson,* 372 F.3d at 1263; *Response Oncology, Inc. v. Metrahealth Insurance Co.,* 978 F. Supp. 1052, 1058 (S.D. Fla.1997). Because Plaintiff cannot satisfy the pleading requirements, the Amended Complaint must be dismissed.[2]

[2] The Movants incorporate by reference any grounds for dismissal asserted by Defendant Jon H. Hammill to the extent those grounds are applicable to the Movants.

I. Plaintiff Has Failed To State A Claim Arising Under FDUTPA Because Securities Transactions Are Not Actionable Under FDUTPA.

FDUTPA prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1), Fla. Stat.[3] However, courts have consistently found that FDUPTA does not apply to securities transactions. In *Rogers v. CISCO Systems, Inc.*, 268 F. Supp. 2d 1305, 1316-17 (N.D. Fla. 2003), the court dismissed plaintiff's FDUTPA claim premised on alleged misrepresentations urging investors to hold on to securities. The Court found in *Rogers* that FDUPTA should be interpreted consistently with the Federal Trade Commission Act, which has been held inapplicable to securities claims. *Id.* The court in *Crowell v. Morgan, Stanley, Dean Witter Services, Co., Inc.*, 87 F. Supp. 2d 1287, 1295 (S.D. Fla. 2000), referred to interpretations of the Federal Trade Commission Act, cited numerous cases declining to apply state consumer protection statutes to securities fraud cases and relied upon the fact that securities are already heavily regulated by other state and federal laws in finding that alleged misrepresentations in the sale of securities do not give rise to a FDUPTA claim.

In both *Rogers* and *Crowell*, the court dismissed the FDUPTA claim at the pleading stage. Likewise, Plaintiff's FDUPTA claim should be dismissed pursuant to Rule 1.140(b)(6) because the allegations in the Amended Complaint relate solely to securities transactions – the purchase and sale of Botfly promissory notes – and the alleged representations in connection with securities transactions do not give rise to a FDUPTA claim.

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[3] The heightened pleading standard of Rule 1.120(b) of the Florida Rules of Civil Procedure also applies to FDUPTA claims. *See Fla. Digital Network v. N. Telecom, Inc.*, 2006 WL 2523163 at *2 (M.D. Fla. Aug. 30, 2006) (FDUTPA claim must meet the more stringent pleading standard for fraud). In pleading its FDUPTA claim, Plaintiff merely concludes FDUPTA is violated by the Movants' representations concerning the 10% rate of return and the investment of principal. (Am. Compl. ¶¶ 53-54.) Plaintiff completely fails to identify the particular part of FDUPTA which the Movants' conduct allegedly violates. Such conclusory and speculative statements fail to satisfy Rule 1.120(b) of the Florida Rules of Civil Procedure and therefore, Plaintiff's FDUPTA claim should be dismissed.

II. Plaintiff's FSIPA Claim Fails To Satisfy The Heightened Pleading Standard Of Rule 1.120(b) of the Florida Rules of Civil Procedure

Plaintiff's FSIPA claim is subject to the stringent pleading requirements of Rule 1.120(b) of the Florida Rules of Civil Procedure. *See Fine v. First Southwest Co.*, 2005 WL 2063832 at * 3 (M.D. Fla. Aug. 18, 2005) (applying the heightened pleading requirements to a claim brought under FSIPA); *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 371 (S.D. Fla. 1991) (requiring proof of common law fraud elements to establish a claim under FSIPA, because it is a "fraud-related claim"). Rule 1.120(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit." Failure to adequately plead a specific element of a claim subject to Rule 1.120(b) is fatal when challenged on a motion to dismiss. *See Strack v. Fred Rawn Const. Inc.*, 908 So. 2d 563, 565 (Fla. 4th DCA 2005) (failure to adequately plead fraud). The Amended Complaint fails to allege the essential elements of the Plaintiff's FSIPA claim and therefore, such claim must be dismissed.

A. Plaintiff Has Failed To Adequately Plead A Claim Arising Under FSIPA

Plaintiff alleges that Movants' representation that investors would receive a 10% monthly return on their investment violates section 517.301(1)(a)(1), Florida Statutes. (Am. Compl. ¶¶ 42, 46.) To state a claim for securities fraud under section 517.301(1)(a)(1), the Plaintiff must allege (i) fraud, (ii) by any person, (iii) in connection with the rendering of investment advice or the offer, sale, or purchase of any investment or security. To adequately plead the fraud element of a FSIPA claim, the Plaintiff must allege (i) that the defendant made a representation in the securities transaction that was designed to prompt action by the plaintiff, (ii) that the representation was false, (iii) that the defendant knew it was false at the time it was made, and

(iv) that the plaintiff relied on the representation to his or her detriment. *In re Sahlen & Assocs.*, 773 F. Supp. at 371.

Plaintiff further alleges that Movants' representation concerning the 10% monthly return and the representation that investor's principal investment would be held for "investment and margin purposes only" violated section 517.301(1)(c), Florida Statutes. To state a claim for securities fraud under section 517.301(1)(c), a plaintiff must allege a knowing and willful false representation or the knowing and willful use of a document containing false information.

1. Plaintiff has failed to plead facts establishing the falsity of the alleged representations.

The Amended Complaint fails to articulate specific facts establishing the falsity of the representations relied upon by the Plaintiff as the basis for its FSIPA claims. The Plaintiff merely alleges that the Movants knew the statements were false at the time they were made. (Am. Compl. ¶¶ 25-26.) In fact, it appears that investors did receive their 10% monthly returns (at least up until the Temporary Injunction was entered) as Plaintiff has not alleged that investors were not being paid. The Amended Complaint is utterly insufficient to carry Plaintiff's burden under Rule 1.120(b) of the Florida Rules of Civil Procedure. Indeed, "[p]articularity requires identifying the representation of fact and how the representation is false." *Battlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 238 (Fla. 5th DCA 1992); *Gordon v. Etue, Wardlow & Co. P.A.*, 511 So. 2d 384, 388 (Fla. 1st DCA 1987), *declined to follow on other grounds by First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990). A mere conclusory statement alleging the falsity of the representation is insufficient as "[f]raud is never presumed." *Reina v. Gingerale Corp.*, 472 So. 2d 530, 531 (Fla. 3d DCA 1985). Because of the lack of a single factual averment demonstrating the falsity of the alleged representations, Plaintiff's FSIPA claims arising under both sections 517.301(1)(a)(1) and 517.301(1)(c), Florida Statutes should be dismissed.

2. Plaintiff's conclusory allegations that Movants knew the representations were false at the time they were made fail to satisfy Rule 1.120(b) of the Florida Rules of Civil Procedure.

The Amended Complaint does not include any specific facts demonstrating Movant's knowledge that the alleged representations were false at the time they were made. The Amended Complaint fails to make anything more than speculative, conclusory allegations about Movant's knowledge. The Amended Complaint merely alleges that the promissory note "contains representations, which Defendants knew where false at the time they made the representations." (Compl. ¶ 21). Without more, the FSIPA claims are insufficient under Rule 1.120(b) of the Florida Rules of Civil Procedure and should be dismissed. *See Gordon*, 511 So. 2d at 388 (finding a cause of action to be insufficient where it merely sets forth conclusory statements of ultimate fact, *i.e.*, that false statements were made).

The requirement that the Plaintiff plead with particularity Movant's knowledge that the representations were false at the time they were made carries even greater weight here. The representations upon which the Plaintiff relies were made as a part of a promissory note, or in other words, a contract. *See Complete Interiors, Inc. v. Behan*, 558 So. 2d 48, 52 (Fla. 5th DCA 1990) (enforcing the specific clauses of a promissory note as a contract). The Amended Complaint purports that the promise to pay 10% interest and the promise to hold the principal for investment and margin purposes only were expressly made as a part of a promissory note that was given to Botfly investors. (*See* Compl. ¶¶ 20-21, 23, 25, 38, and 55(c).)

"As a general rule, fraud cannot be predicated upon a mere promise not performed." *Alexander/Davis Properties, Inc. v. Graham*, 397 So. 2d 699, 706 (Fla. 4th DCA 1981). One of the risks that each party assumes when a contract is made is that the other party may breach the contract. In a sense, a party has a "right" to breach a contract if they desire. *Id.* As a result, the "fraudulent breach of a contract does not give rise to an action for fraud, and therefore where the

only fraud charged relates to a breach of the contract, and not to its inducement or making, no action for fraud exists." *Id.* However, under certain circumstances "a promise may be actionable as fraud where it can be shown that the promissor had a specific intent not to perform the promise at the time the promise was made, and the other elements of fraud are established." *Id.* at 706.

All of the factual allegations in the Amended Complaint relate to the purported breach of the obligations set forth in the promissory note. Not a single fact alleged in the Amended Complaint addresses Movants' intent regarding the two representations that form the basis for the causes of action under FSIPA. No amount of parroted language from section 517.301, Florida Statutes, or hollow averments stating that Movants knew or should have known the representations were false can substitute for well-pled facts of specific intent. As a result, the FSIPA causes of action should be dismissed in their entirety.

3. Plaintiff has failed to adequately plead reliance by investors.

Again, Plaintiff relies entirely on conclusory allegations in a half-hearted attempt to track the statutory language to plead reliance. The only averment in the Amended Complaint remotely related to investor reliance is that "[i]nvestors tendered money to Defendant Botfly at the request and solicitation of Defendants Lewalski and Hammill based upon promises of 10% monthly interest returns . . ." (Am. Compl. ¶ 37.) Indeed, Plaintiff fails to satisfy with any particularity the requirement that a plaintiff must allege justifiable reliance upon the purportedly false representations. As a result, the pleading is insufficient and should be dismissed.

In addition, the Plaintiff has already amended the complaint. As such, Plaintiff's failure to sufficiently allege fraud with the proper level of particularity is especially egregious and should not be overlooked by the court. *Robertson v. PHF Life Insurance Co.*, 702 So. 2d 555, 556 (Fla. 1st DCA 1997) (affirming dismissal of the complaint with prejudice where defendants

had been given several opportunities to cure the complaint's specificity defects). Plaintiff's failure to adequately plead reliance is fatal to its FSIPA claims and, as such, Plaintiff's FSIPA claims should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs allegations under FSIPA and FDUTPA should be dismissed in their entirety against the Defendants.

Dated: September 23, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished via U.S. Mail this 22d day of September, 2010

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