

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 16-CV-62603-WPD

GRISEL ALONSO, AS RECEIVER FOR)
ELM TREE INVESTMENT ADVISORS,)
LLC, ELM TREE INVESTMENT FUND,)
LP, ELM TREE ‘E’CONOMY FUND, LP,)
and ELM TREE MOTION)
OPPORTUNITY, LP,)
)
Plaintiff,)
)
vs.)
)
JAMES BENVENUTO, ET AL.)
)
Defendants.)
)

**DEFENDANTS CONSTANTINO DOS SANTOS AND EDUARDO DOS SANTOS’
MOTION TO DISMISS**

Defendants, Constantino Dos Santos and Eduardo Dos Santos (together, the “Dos Santos Defendants”), pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, move this Court for an order dismissing the Amended Complaint of Plaintiff, Grisel Alonso, as Receiver for Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP, Elm Tree ‘e’Conomy Fund, LP, and Elm Tree Motion Opportunity, LP, as follows:

1. Both Dos Santos Defendants move that the Amended Complaint be dismissed as to each of them under Fed. R. Civ P. 12(b)(2) on the ground that there is no basis for personal jurisdiction over them pursuant to 15 U.S.C. § 78aa.

2. Constantino Dos Santos moves that the Amended Complaint be dismissed as to him under Fed. R. Civ. P. 12(b)(2) on the ground that Plaintiff has failed to plead sufficient facts to establish a prima facie case of personal jurisdiction over him, a non-resident defendant.

3. Eduardo Dos Santos moves that the Amended Complaint be dismissed as to him under Fed. R. Civ. P. 12(b)(2) on the ground that Plaintiff has failed to plead sufficient facts to establish a prima facie case of personal jurisdiction over him, a non-resident defendant.

For the foregoing reasons, and for those reasons stated in the accompanying Memorandum of Law, incorporated herein, the Dos Santos Defendants respectfully request that this Court enter an order dismissing the Amended Complaint as to each of them.

DATED: January 20, 2017

RESPECTFULLY SUBMITTED,

/s/ Elizabeth Lee Beck

By: Elizabeth Lee Beck

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2017, I electronically filed the foregoing

*DEFENDANTS CONSTANTINO DOS SANTOS AND EDUARDO DOS SANTOS'
MOTION TO DISMISS*

with the Clerk of the Court using CM/ECF. I also certify that the foregoing document(s) are being served this day on all counsel of record or pro se parties identified on the following Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Elizabeth Lee Beck
Elizabeth Lee Beck

SERVICE LIST

Alonso v. Benvenuto, et al.

CASE NO. 16-CV-62603-WPD

United States District Court, Southern District of Florida

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and ELM TREE MOTION)
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JAMES BENVENUTO, ET AL.)
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DEFENDANTS CONSTANTINO DOS SANTOS AND EDUARDO DOS SANTOS'
MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Defendants Constantino Dos Santos (“Constantino”) and Eduardo Dos Santos (“Eduardo”) (together, the “Dos Santos Defendants”) submit this Memorandum of Law in support of their Motion for an order dismissing the Amended Complaint of Plaintiff, Grisel Alonso, as Receiver for Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP, Elm Tree ‘e’conomy Fund, LP, and Elm Tree Motion Opportunity, LP (together, the “Receivership Entities”), as to each of the Dos Santos Defendants pursuant to Federal Rule of Civil Procedure 12(b)(2), on the ground that the Court lacks personal jurisdiction over them.

II. FACTUAL ALLEGATIONS

Plaintiff’s Amended Complaint, seeking to claw back funds involved in an alleged “Ponzi” scheme, pleads only minimal facts concerning Defendants Constantino and Eduardo Dos Santos’ purported connection with the alleged scheme. As more fully set forth below, the deficiencies in the Complaint as to a basis for personal jurisdiction mean this Court cannot entertain the claims alleged against Constantino and Eduardo.

The Amended Complaint alleges that Frederic Elm (“Elm”) used the Receivership Entities to engage in a Ponzi “Fraudulent Scheme” between November 2013 and January 2015, offering and selling fraudulent investments then funneling investor money for improper purposes. Compl. ¶¶ 2–4. The Securities and Exchange Commission (“SEC”) eventually commenced an action against Elm and the Receivership Entities on January 15, 2015, and Plaintiff was appointed as Receiver to marshal assets of the Receivership Entities on January 16, 2015. Compl. ¶¶ 1–2, 5–8.

The Amended Complaint alleges that investors in the Fraudulent Scheme sent funds to Elm, and that most of the funds were used to pay back investors in Ponzi-like fashion. Compl. ¶¶ 43, 45–46. It is alleged that Constantino transferred funds in the amount of \$29,980.00 to one

of the Receivership entities on December 19, 2013 and a different Receivership Entities later transferred \$39,000.00 in funds to Constantino on October 9, 2014. Compl. ¶¶ 107–9. One of the Receivership Entities also allegedly transferred \$126,017.42 in funds to Eduardo on January 8, 2014. Compl. ¶¶ 80–81.

While the Amended Complaint states that “a substantial part of the events giving rise to the claims” occurred in the Southern District of Florida, the SEC Proceeding is pending in the Southern District of Florida, and the Receiver was appointed by the Court in the Southern District of Florida, Compl. ¶ 11, it does not state where any of the specific alleged conduct by Elm, the Receivership Entities, or the Dos Santos Defendants took place. Both Eduardo and Constantino are residents of Ontario, Canada. Compl. ¶¶ 22, 30. Constantino and Eduardo are further alleged to have “knowingly and voluntarily accepted and retained a benefit” in the form of the transfers from the Receivership Entities, Compl. ¶¶ 407, 596, and to have failed to provide anything of value to the Receivership Entities in exchange. Compl. ¶¶ 408, 597.

The Amended Complaint generally alleges that “Defendants have sufficient minimum contacts with the United States to satisfy the Fifth Amendment’s due process requirements,” but does not allege what those contacts are as to Constantino and Eduardo, (or any of the other Defendants). Compl. ¶ 10. It similarly alleges that “Defendants voluntarily participated and engaged in a business venture in [Florida], which is the Fraudulent Scheme from which the Receiver’s claims arise” and “Defendants have sufficient minimum contacts with the State of Florida to satisfy due process requirements, such that the exercise of personal jurisdiction over them is fair and just.” Compl. ¶ 10.

III. ARGUMENT

On the face of the Amended Complaint, this Court cannot exercise in personam jurisdiction over Constantino or Eduardo Dos Santos, and must accordingly dismiss the

Amended Complaint as against them. Pursuant to Fed. R. Civ. P. 12(b)(2): “[a] court must dismiss an action against a defendant over which it has no personal jurisdiction.” Peruyero v. Airbus S.A.S., 83 F. Supp. 3d 1283, 1286 (S.D. Fla. 2014). To withstand a motion to dismiss, a plaintiff must plead sufficient facts to establish a prima facie case of jurisdiction over the non-resident defendant. Id. (citing Virgin Health Corp. v. Virgin Enters. Ltd., 393 Fed.Appx. 623, 625 (11th Cir. 2010)). In considering this Motion, the Court should accept the facts alleged in the Amended Complaint as true, see Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000), but disregard mere legal conclusions that track statutory language. See Ellis v. Celebrity Cruises, Inc., No. 10-20541-CIV, 2010 WL 6730808, at *1 (S.D. Fla. July 15, 2010) (citing Ashcroft v. Iqbal, 556 U.S. 662, 667 (2009)).

Even taking all of Plaintiff’s factual allegations as true, however, the Amended Complaint does not set out a prima facie case for either of its alleged bases for personal jurisdiction: the Securities and Exchange Act, 15 U.S.C. § 78aa, or Florida’s long-arm statute, Fla. Stat. § 48.193. See Compl. ¶ 10. Even if Eduardo and Constantino were properly served in Canada pursuant to Fed. R. Civ. P. 4(f), such service would not establish personal jurisdiction under Fed. R. Civ. P. 4(k) because the Complaint does not support a conclusion that (a) 15 U.S.C. § 78aa authorizes jurisdiction when only state-law claims are asserted, or (b) Florida’s long-arm statute subjects Constantino or Eduardo to personal jurisdiction on the facts alleged.

a. **15 U.S.C. § 78aa IS NOT A BASIS FOR PERSONAL JURISDICTION OVER EITHER OF THE DOS SANTOS DEFENDANTS.**

Plaintiff has not asserted any claims against Constantino or Eduardo for federal securities violations, so service under 15 U.S.C. § 78aa is not a permissible basis to assert personal

jurisdiction pursuant to Fed. R. Civ. P. 4(k)(1)(c).¹ Here, the only claims asserted against Constantino and Eduardo are based in Florida’s Uniform Fraudulent Transfers Act (“FUFTA”) or common law. Compl. ¶¶ 384–410, 573–99.

Even though Plaintiff does not assert federal claims against Defendants, 28 U.S.C. § 1367(a) permits the Court to exercise supplemental jurisdiction over the subject-matter of the state law claims against Defendants because the state law claims arise from the same common nucleus of operative facts as the SEC Proceeding. See Compl. ¶ 9; Gill v. Three Dimension Sys., Inc., 87 F. Supp. 2d 1278, 1283 fn. 3 (M.D. Fla. 2000). This was traditionally known as “pendent party jurisdiction.” Gill, 87 F. Supp. 2d at 1283 fn.3. While the Court has such pendent party jurisdiction over the *subject matter* of the state law claims, 15 U.S.C. § 78aa is not a basis for *personal jurisdiction* over a defendant when only state law claims are raised against the defendant and federal securities law claims are not. Id. at 1283. Instead, the Plaintiff must “plead and prove sufficient facts to establish a basis for personal jurisdiction over the pendent parties independent of nationwide service of process provisions,” and the Court must review the exercise of personal jurisdiction under the applicable state long-arm statute and the Due Process Clause of the Fourteenth Amendment Id. at 1284 (citing Morley v. Cohen, 610 F. Supp. 798, 823 (D. Md. 1985)).

In Gill, an inventor sued former business partners after being “frozen out” of a corporation he formed with them; the inventor raised state law claims against all four of the defendants, but only asserted federal securities law claims against two of them. 87 F. Supp. 2d at 1280–81. When the defendants moved to dismiss, the Court held that service under 15 U.S.C.

¹ While the Amended Complaint only refers to “nationwide service of process” despite alleging that sixteen defendants are residents of Canada, Compl. ¶¶ 10, 22–37, the Dos Santos Defendants acknowledge that service may be had in a foreign country under 15 U.S.C. § 78aa, subject to the limits of the Fifth Amendment’s Due Process Clause. Alki Partners, L.P. v. Vatas Holding GmbH, 769 F. Supp. 2d 478, 487 (S.D.N.Y. 2011).

§ 78aa could only be a basis for personal jurisdiction over the federal securities law defendants. Id. at 1284. For the state-law only defendants, the court was obligated to analyze personal jurisdiction under Florida's long-arm statute and the Fourteenth Amendment, and dismissed the complaint as to those defendants after it concluded that the alleged conduct did not fall within Fla. Stat. § 48.193, were not purposefully directed at Florida, and did not lead defendants to reasonably anticipate being hauled into a Florida court. Id.

Here, like the state-law only defendants in Gill, no federal securities law claims are being asserted against Constantino or Eduardo Dos Santos along with the Florida law claims. Accordingly, service under 15 U.S.C. § 78aa cannot be this Court's basis for exercising personal jurisdiction over Constantino and Eduardo, and the Court must look to the Florida long-arm statute and the Due Process Clause of the Fourteenth Amendment instead. See id.

b. PLAINTIFF HAS FAILED TO PLEAD SUFFICIENT FACTS SHOWING A PRIMA FACIE CASE OF PERSONAL JURISDICTION OVER CONSTANTINO DOS SANTOS

The Amended Complaint does not meet Plaintiff's burden of pleading sufficient facts to establish a prima facie case of jurisdiction over non-resident defendant Constantino Dos Santos. See Peruyero, 83 F. Supp. 3d at 1286. For this Court to exercise in personam jurisdiction over Constantino, Plaintiff must show that (i) the Florida long-arm statute is satisfied and (ii) exercising jurisdiction over Constantino Dos Santos would not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Id. at 1287. As set forth below, the factual assertions in the Amended Complaint do not support a prima facie case that either element is satisfied; The Amended Complaint must thus be dismissed as to Constantino.

i. Plaintiff Has Not Plead Sufficient Facts Showing A Prima Facie Case Of Personal Jurisdiction Over Constantino Dos Santos Under The Florida Long-Arm Statute

The Amended Complaint asserts that the Florida long-arm statute, Fla. Stat. § 48.193 is satisfied because “Defendants voluntarily participated in and engaged in a business venture in this State, which is the Fraudulent Scheme” from which the Receiver’s claims arise. Compl. ¶ 10. The facts alleged do not support this legal conclusion: Plaintiff has not plead sufficient facts showing a prima facie case that Constantino engaged in a business venture in Florida under the meaning of Fla. Stat. § 48.193(1)(a)(1).

As to whether Constantino engaged in a business venture pursuant to § 48.193(1)(a)(1), the only factual allegations are that Constantino transferred \$29,980.00 to one of the Receivership entities and then another of the Receivership Entities transferred \$39,000.00 in funds derived from the Fraudulent Scheme to Constantino several months later. Compl. ¶¶ 107–9. Even if this constituted voluntary participation in Elm and the Receivership Entities’ Fraudulent Scheme, the only reasonable conclusion to draw from the transfers is that Constantino was another investor. However, making a single investment as might be concluded from the factual allegations is not engaging in a business venture under the Florida long-arm statute. See Uible v. Landstreet, 392 F.2d 467, 470 (5th Cir. 1968).

In Uible, a Florida resident who was an organizer of a Florida corporation attempted to sue five investors from Tennessee to recover money owed under a promissory note the Tennessee investors gave in purchasing the organizer’s stock in the company. Id. at 468. Even though the Tennessee investors had traveled to Florida to close the deal, transferred some funds to the Florida organizer, and periodically conferred with company officers concerning the corporation, the court held that purchasing stock and holding it as an investment, even executing a promissory note, did not constitute a business venture in Florida where the investors exercised no direct or indirect control over the corporation. Id. at 471.

“The cases in which Florida courts have interpreted the long-arm statute do not support the theory that a nonresident's passive investment of money in Florida provides a basis for jurisdiction.” Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889, 892 (11th Cir. 1983) (holding that investing in federal funds through a corresponding banking relationship with a Florida bank was not “conducting business in Florida”).

The Amended Complaint thus fails to plead that Constantino engaged in a business venture under Fla. Stat. § 48.193—his alleged conduct is even less active than what courts still found insufficient in Uible and Oriental Imports & Exports, Inc.. Even if his conduct was sufficient in character, there is no allegation that Constantino did anything in Florida at all. The only references to Florida in the Amended Complaint are (1) statements about the litigation over the Receivership Entities, see Compl. ¶¶ 1,5, 11; (2) residences of some co-defendants, Compl. ¶¶ 13–15, 18–20; and (3), bare assertions tracking the language of the Florida long-arm and Federal venue statutes. Compare Compl. 10–11 with Fla. Stat. § 48.193(1)(a)(1) and 29 U.S.C. § 1391(b)(2). Plaintiff thus failed to plead sufficient facts showing a prima facie case of personal jurisdiction over Constantino Dos Santos under the Florida long-arm statute.

ii. Plaintiff Has Not Plead Sufficient Facts Showing That Constantino Dos Santos Has Sufficient Minimum Contacts To Satisfy Due Process Requirements

Even if the factual allegations in the Amended Complaint were sufficient to satisfy the Florida long-arm statute, exercising personal jurisdiction over Constantino Dos Santos in Florida would violate due process requirements under the Fourteenth Amendment. See Virgin Health Corp., 393 Fed. App'x at 626. While the Amended Complaint states that “Defendants have sufficient minimum contacts with the State of Florida to satisfy due process requirements, such that the exercise [of] personal jurisdiction over them is fair and just,” unsupported legal

conclusions as to the elements for personal jurisdiction do not withstand a motion to dismiss. See Ellis, 2010 WL 6730808 at *1.

“The due process inquiry consists of asking whether (1) the nonresident defendant has purposefully established minimum contacts with the forum and (2) the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice.” Flick Mortg. Inv'rs, Inc. v. Metropolis Promotion Investments & Properties (1993) Ltd., 212 F. App'x 775, 777 (11th Cir. 2006). “Minimum contacts involve three criteria: First, the contacts must be related to the plaintiff’s cause of action or have given rise to it. Second, the contacts must involve some purposeful availment of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws. Finally, the defendant’s contacts within the forum state must be such that she should reasonably anticipate being hauled into court there.” Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 631 (11th Cir. 1996). Relevant factors as to whether exercise of personal jurisdiction will offend traditional notions of fair play and substantial justice include “the burden on the defendant, the interests of the forum, and the plaintiff’s interest in obtaining relief.” Id.

Plaintiff has not shown that Constantino has purposefully established minimum contacts with Florida. As discussed above, the Amended Complaint does not indicate where any of the alleged activity took place other than the SEC Proceeding in the Southern District of Florida, and there is no allegation that Constantino Dos Santos had any role in that litigation. Even if the transfer of funds between Constantino and the Receivership Entities took place in Florida, there is no suggestion from the Amended Complaint that Constantino should reasonably anticipate being hauled into court in the state based on the single transfers in either direction.

Instead, the allegations against Constantino contrast with cases where non-resident investors were found to have sufficient minimum contacts. In Am. Fin. Trading Corp. v. Bauer, 828 So. 2d 1071, 1074 (Fla. Dis. Ct. App. 2002), a Texan investor subjected himself to personal jurisdiction in Florida for breach of a settlement agreement with his Florida broker by engaging in a general course of business activity with the broker in Florida for pecuniary benefit. The investor “clearly availed himself of the privilege of conducting business in Florida” when he contracted with the broker, initiated more than 120 commodities transactions through the broker, and all services were performed in Florida with payment due in Florida. Id. at 1075. In Sculptchair, Inc., the Eleventh Circuit found that exercising personal jurisdiction in a patent infringement case over a Permanent Canadian Resident would comport with fair play and substantial justice, despite the “unique burdens placed upon one who must defend oneself in a foreign legal system,” where the foreign defendant actually temporarily resided in Florida for several years and intended to establish a permanent residency, and Florida had an interest in stamping out the “nefarious economic chicanery” alleged in the complaint. 94 F.3d at 632.

Unlike Am. Fin. Trading Corp. and Sculptchair, Inc. there is no indication from Plaintiff’s factual allegations that Constantino’s single transfers to and from the Receivership entities availed him of the privilege of conducting business in Florida, or that being hauled in to a foreign and geographically distant legal system would not offend traditional notions of fair play and substantial justice. Plaintiff has not plead sufficient factual matter as to Constantino showing that personal jurisdiction in Florida would not offend due process, so the Complaint must be dismissed as to him.

c. **PLAINTIFF HAS FAILED TO PLEAD SUFFICIENT FACTS SHOWING A PRIMA FACIE CASE OF PERSONAL JURISDICTION OVER EDUARDO DOS SANTOS**

Plaintiff's Amended Complaint makes an even weaker case for satisfaction of the long-arm statute or due process in Eduardo's case: it utterly fails to allege that he took any affirmative action at all, much less any action in Florida. There is no allegation that Eduardo transferred any funds to one of the Receivership entities or directed any conduct towards Florida. If Eduardo merely acquiesced to receiving funds, it is even less likely that he engaged in a business venture in Florida so as to satisfy Fla. Stat. § 48.193(1)(a)(1).

The larger transfer of funds to Eduardo in January of 2014 does not weigh in favor of extending personal jurisdiction. See Compl. ¶¶ 80, 107–08. The inquiry as to “whether a nonresident is conducting business in Florida concerns the nature, not the extent, of the nonresident's activities in Florida,” so a larger dollar amount does not alter the analysis. Oriental Imports & Exports, Inc., 701 F.2d at 892 (11th Cir. 1983). Plaintiff thus failed to plead sufficient factual matter as to Eduardo showing satisfaction of the long-arm statute or that personal jurisdiction in Florida would not offend due process, so the Complaint must be dismissed as to him as well.

IV. CONCLUSION

For the foregoing reasons, the Dos Santos Defendants respectfully request that this Court enter an order dismissing the Amended Complaint as to each of them.

~signature page follows~

DATED: January 20, 2017

RESPECTFULLY SUBMITTED,

/s/ Elizabeth Lee Beck

By: Elizabeth Lee Beck

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2017, I electronically filed the foregoing

DEFENDANTS CONSTANTINO DOS SANTOS AND EDUARDO DOS SANTOS'
MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

with the Clerk of the Court using CM/ECF. I also certify that the foregoing document(s) are being served this day on all counsel of record or pro se parties identified on the following Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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