

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

GRISEL ALONSO, as Receiver for
Dimitrouleas
Elm Tree Investment Advisors, et. al,

Plaintiff,

Case No. 16-cv-62603-

Proceeding Ancillary to
No. 15-CV-60082-Dimitrouleas/Snow

v.

JAMES BENVENUTO, et. al

Defendants.

**REPLY TO [42] PLAINTIFF’S OMNIBUS RESPONSE TO MOTIONS TO
DISMISS AMENDED COMPLAINT**

Defendant, TED GREENWALD, by and through the undersigned counsel, hereby files this Reply to Plaintiff’s Omnibus Response to Motions to Dismiss Amended Complaint filed by the Plaintiff, GRISEL ALONOSO, as Receiver for Elm Tree Investment Advisors, Elm Tree Investment Fund, LP, Elm Tre ‘e’Conomy Fund, LP and Elm Tree Motion Opportunity, LP (collectively “Elm Entities”) (hereinafter “Plaintiff”) and states as follows:

ARGUMENT

The Plaintiff’s Response in Opposition to Defendant Greenwald’s Motion to Dismiss asserts that this case arises out of fraudulent transfers made by Frederic Elm to Defendants resulting from their investment in certain Receivership Entities.

However, as the Response also makes clear, unlike many of the other Defendants, Greenwald, a Canadian citizen who resides in Canada, was not an investor in the Receivership Entities. Instead, the Plaintiff asserts personal jurisdiction over Greenwald in Florida based on Greenwald's purported "beneficial ownership" of a company, which in turn owned a parcel of property in Florida. These constitute new allegations which were not the basis for specific personal jurisdiction asserted in the Amended Complaint. Moreover, the only connection between Greenwald and the Receivership Entities alleged is that Frederic Elm purchased Greenwald's ownership interest in the company with funds he derived from the Receivership Entities. Defendant Greenwald does not contest the Plaintiff's recital of these facts, but rather asserts these facts – that Mr. Greenwald made a passive investment in a company which held a parcel of Florida Real Estate - do not satisfy the Florida long-arm statute or the due process requirements for an exercise of personal jurisdiction.

A. The Receiver has Failed to Allege or Provide Facts Sufficient to Establish a Prima Facie Basis for Specific Jurisdiction over Greenwald.

The Plaintiff's Complaint asserted two alternate grounds for personal jurisdiction over all Defendants, first that the Defendants were subject to Nationwide Service of Process under Federal Securities Laws, and second that the Defendants were subject to personal jurisdiction under Florida's long arm statute. The Plaintiff's response in opposition does not attempt to defend the first basis – which Defendant's Response asserted must fail because no claim under Federal Securities Laws has

been asserted against Greenwald. As such the only allegation regarding personal jurisdiction set forth in the Amended Complaint is the statement with respect to the long-arm statute that the Court has personal jurisdiction over Defendants pursuant to Section 48.193, *Florida Statutes*, because: “(i) Defendants voluntarily participated and engaged in a business venture in this State, ***which is the Fraudulent Scheme from which the Receiver's claims arise***; and (ii) 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.” (emphasis added). [DE 6, p.3]

The above allegation can fairly be read to invoke *Fla. Stat.* §48.193(1)(a)(1) which provides for personal jurisdiction over a defendant when the cause of action relates to, “[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.” However, as the Plaintiff’s own allegations and the affidavit submitted in connection with their Response to the Motion to Dismiss make clear, Greenwald was ***not*** a participant in the business venture identified in the Complaint, *to wit*, the Fraudulent Scheme from which the Receiver’s claims arose. The transfer received by Greenwald was not the repayment of an investment in the Fraudulent Scheme, but rather was payment tendered to Greenwald by Frederic Elm in connection with a separate investment in

a parcel of property. *See* [DE 42], p. 6; *Affidavit of Christopher Cavallo* [DE 42-1], para. 2-5.

Perhaps recognizing this deficiency, the Plaintiff has submitted affidavit testimony regarding Greenwald's interest in a separate Florida company, his "ownership" of a residential property in Fort Lauderdale, and the possibility that Greenwald "may have been included on a Mortgage for the Property." These arguments are problematic in two respects. First, while each of these acts could – under other circumstances - serve as an independent basis for *specific* personal jurisdiction under *Fla. Stat.* §48.193(1)(a), that subsection requires that personal jurisdiction be asserted in connection with a cause of action which arises from the enumerated acts. *See e.g. United Credit Recovery, LLC v. Bexten*, No. 6:11-CV-1714-ORL-31, 2012 WL 5055231, at *2 (M.D. Fla. Oct. 18, 2012)(citing *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir.2000)). Plaintiff's cause of action does not arise out of Greenwald's inclusion on a mortgage, his collection of rents from the Property, his interest in Crarit International Investments, LLC, or any of the other facts related by the Plaintiff's affidavit, but rather arises solely out of the buy-out payment made to Greenwald by Frederic Elm from the Receivership Entity. Plaintiff makes no allegation that Greenwald was involved in an ongoing basis in any of the business activities of that entity. The Eleventh Circuit has recognized that "[i]n order to establish that a defendant is "carrying on business" for

the purposes of the long-arm statute, the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit. *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 627 (11th Cir.1996). The Plaintiff has not asserted, or produced evidence sufficient to demonstrate specific personal jurisdiction over Greenwald arising from the transaction described in the Amended Complaint.

The second problem with the Plaintiff's arguments concerning specific jurisdiction is that, even if the Court determined these facts *did* relate to cause of action asserted against Greenwald, the Plaintiff did not plead *any* of these grounds for jurisdiction in the Amended Complaint, other than the participation in a business venture as described in *Fla. Stat.* 48.193(1)(a)(1). Before the Court can engage in a review of the sufficiency of evidence, the first inquiry must be whether the claim of personal jurisdiction is sufficiently pled. *See B.C.S., S.r.l. v. Wise*, 910 So. 2d 871, 873 (Fla. 5th DCA 2005)("In ruling on a motion to dismiss, [...] the trial court [must first] determine whether a complaint alleges sufficient facts to bring it within the ambit of section 48.193")(citing *Wendt v. Horowitz*, 822 So.2d 1252, 1256 (Fla.2002)). Plaintiff's arguments with respect to *Fla. Stat.* §48.193(1)(a)(3) and §48.193(2) are therefore improper, as these theories of personal jurisdiction were not pled in the Amended Complaint.

B. The Receiver has Failed to Allege or Provide Facts Sufficient to Establish a Prima Facie Basis for General Jurisdiction over Greenwald.

Even if the Court were to permit the Plaintiff's arguments for general jurisdiction based on *Fla. Stat.* 48.193(2) and "substantial and not isolated activity within this state", despite that theory being completely absent from the Amended Complaint, the facts alleged by Plaintiff and Plaintiff's supporting affidavits do not support a finding of general jurisdiction either.

As an initial matter, the Plaintiff conflates the activities of Greenwald in his individual capacity with the acts of a corporate entity in which Greenwald is alleged to have a beneficial interest. However, courts recognize that the "actions of a corporation cannot be imputed to its shareholders for purposes of establishing long arm personal jurisdiction over the shareholder." *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1140 (S.D. Fla. 2007)(citing *Suroor v. First Inv. Corp.*, 700 So.2d 139, 141 (Fla. 5th DCA 1997)). Thus, while a corporate entity's ownership of real property and collection of rents may be sufficient to subject that entity to general jurisdiction in Florida, those acts do not give rise to general jurisdiction over Greenwald *individually* with respect to any cause of action which may arise in the state.

Likewise, the facts that Greenwald invested in a Florida business and held property in the state of Florida are not sufficient to give rise to *general* jurisdiction

in the State of Florida. *See Mother Doe, supra* at 1142, (citing *Newberry v. Rife*, 675 So.2d 684, 685 (Fla. 2d DCA 1996) (“The mere fact that one holds shares in or is a director of a corporation is not the functional equivalent of doing business in the state.”); and *Nichols v. Paulucci*, 652 So.2d 389, 392 n. 5 (Fla. 5th DCA 1995) (“By itself, ownership of property is insufficient to subject a nonresident defendant to the jurisdiction of the courts of this state, unless the cause of action arose out of such ownership.”)).

Greenwald’s investments do not support a finding of the kind of “continuous and systematic general business contact” which is required to support a finding of general jurisdiction. Rather, they demonstrate his involvement with a single Property in Florida, which is not the subject of any of the Plaintiff’s claims. Mr. Greenwald should not be haled into court from another country on the basis of these isolated and insubstantial contacts.

Conclusion

WHEREFORE, for the foregoing reasons, Defendant TED GREENWALD respectfully requests that this Court enter an Order dismissing all counts against him, and granting such further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 17, 2017 a true and correct copy of the foregoing was served via electronic transmission on all counsel or parties of record.

Respectfully Submitted,

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