

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-62603-CIV-DIMITROULEAS/Snow

GRISEL ALONSO, as Receiver for Elm Tree
Investment Advisors, LLC and Elm Tree
Investment Fund, LP,

Plaintiff,

v

JAMES BENVENUTO, an individual, *et al.*,

Defendants.

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REPORT AND RECOMMENDATION

THIS CAUSE is before the Court following a March 27, 2018 hearing on damages following the Court's entry of summary judgment against Someswari Nukala and Ted Greenwald¹ and in favor of the Receiver.

I. PROCEDURAL HISTORY

On January 15, 2015, the SEC commenced an action in this court for injunctive and other relief against Defendants Frederic Elm and a number of Elm Tree Investment entities (the "Receivership Entities"), which were engaged in a securities ponzi scheme in which they sold fraudulent investments raising more than \$17 million from more than 50 investors. On January 16, 2015, the Court appointed Plaintiff as Receiver for the Receivership entities. Pursuant to that order, the Receiver was ordered to, among other things, "[t]ake immediate possession of all property, assets and estates of every kind of [the Receivership Entities]. . . and institute such actions and legal proceedings . . . as the Receiver deems necessary . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in [the Receivership Entities]." This action

¹ This Report and Recommendation addresses the claimed damages with respect to Someswari Nukala only. The undersigned is deferring a recommendation with respect to Ted Greenwald as more fully explained by separate Order.

was filed pursuant to the Receivership Order, which charged the Receiver with marshaling the assets of the Receivership Estate for the benefit of the defrauded investors.

The Receiver alleges that Someswari Nukala received funds from the Receivership entities which were derived from the fraudulent scheme. The Receivership Entities did not receive reasonably equivalent value in exchange for transfers to Nukala in the amount of \$16,910. This action against Nukala seeks to "claw back" the funds pursuant to a theory of unjust enrichment and Florida's fraudulent transfer statutes, Fla. Stat. §§ 726.105 and 106, which are a means by which a creditor can avoid transfers made with actual intent to hinder, delay, or defraud creditors and transfers made without reasonably equivalent value in exchange, respectively. The Amended Complaint also alleges unjust enrichment. In addition to recouping the funds distributed to investors which were derived from the fraudulent scheme, the Receiver seeks prejudgment interest, which she contends she entitled to pursuant to Florida law.

II. FINDINGS OF FACT

The Receiver utilized the services of Dick Haslan, a financial analyst, to review the books and records of the Receivership Entities. Mr. Haslan submitted a declaration in support of the Receiver's motion for summary judgment. (ECF No. 166-1) Based upon his review of the records, Mr. Haslan discovered that Someswari Nukala transferred a total of \$119,965.00 to receivership entities² and received \$136,875.00³ via wire transfer either from the receivership entities or directly from Frederic Elm. Thus, as a result of the fraudulent scheme, Sumsari Nukala received \$16,910.00 more than she contributed.

² This amount is comprised of two transfers: \$79,980.00 on April 4, 2014, and \$39,985.00 on July 7, 2014. (ECF No. 166-1, ¶¶ 9, 10)

³ This amount is comprised of four transfers: \$6,750.00 on July 21, 2014 and \$2,125.00 on September 23, 2014 via wire transfer directly from the Receivership Entities; and \$88,000.00 on October 9, 2014 and \$40,000.00 on October 29, 2014 from Frederic Elm. According to the Receiver, Ms. Nukala does not dispute that she received the monies.

III. RECOMMENDATIONS OF LAW

Fla.Stat. § 726.108 supplies the remedies in this type of action. Where a fraudulent transfer has been proven, a creditor may, among other things, avoid the transfer to the extent necessary to satisfy a creditor's claim. In this case, the evidence on record reveals that Someswari Nukala received \$16,910.00 which is subject to claw back. See Popular Auto, Inc. v. M/V Cukina, 2012 WL 368134 at *1 (D. Puerto Rico, Feb. 3, 2012) (where the amount of damages are a sum certain, evidentiary hearing is not needed).

Additionally, the Receiver is entitled to recover prejudgment interest in this action, so long as its exaction would be equitable. Wiand v. Lee, 753 F.3d 1194, 1204 (11th Cir. 2014). The Court should consider three factors:

(1) in matters concerning government entities, whether it would be equitable to put the burden of paying interest on the public in choosing between innocent victims; (2) whether it is equitable to allow an award of prejudgment interest when delay between injury and judgment is the fault of the prevailing party; [and] (3) whether it is equitable to award prejudgment interest to a party who could have, but failed to, mitigate its damages."

Id. citing, Blasland, Bouck & Lee, Inc. v. City of Miami, 283 F.3d 1286, 1297 (11th Cir. 2010). Florida treats prejudgment interest as an element of pecuniary damages and, ordinarily it is awarded in unjust enrichment claims as a matter of course. Id. at 1205. In this case, there is no evidence that the Receiver delayed in pursuing its judgment, or that it could have, but failed to mitigate its damages. Nor should the public incur the burden of paying the interest required to make the victims in this case whole. Therefore, the Receiver should be awarded prejudgment interest.

IV. CONCLUSION

This Court having considered carefully the pleadings, arguments of counsel, and the applicable case law, it is hereby

RECOMMENDED that judgment be entered on the Receiver's behalf and against Someswari Nukala in the amount of \$16, 910.00 plus prejudgment interest.

The parties will have 14 days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, for consideration by The Honorable William P. Dimitrouleas, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained therein, except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 4th day of April, 2018.


LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to:
All Counsel of Record