UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

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,

v.

JAMES BENVENUTO, an individual, NGU INVESTORS, LLC, a Florida limited liability company; JEAN BENVENUTO, an individual, *et. al.*,

Defendants.
_____/

Case No. 16-62603-CIV-DIMITROULEAS
Proceeding Ancillary to
No. 15-CV-60082-Dimitrouleas/Snow

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Receiver's Motion for Summary Judgment as to Timothy Hartmann (the "Motion") [DE 183], filed herein on March 19, 2018. The Court has carefully reviewed the Motion, the Response [DE 185], the Reply [DE 188], and is otherwise fully advised in the premises.

I. Background

Plaintiff, Receiver Grisel Alonso, filed this action on November 2, 2016. *See* [DE 1]. Plaintiff is Receiver for Elm Tree Investment Advisors, LLC ("ETIA"), Elm Tree Investment Fund, LP ("ETIF"), Elm Tree 'e'Conomy Fund, LP ("ETEF"), Elm Tree Motion Opportunity, LP ("ETMO"), and Etopia, LP ("Etopia"). This action is ancillary to an SEC Action, involving a Ponzi scheme. *See* 15-CV-60082-Dimitrouleas/Snow. Plaintiff alleges that Defendant Timothy Hartmann ("Hartmann") was the recipient of a fraudulent transfer related to the Ponzi Scheme. Plaintiff moves for summary judgment against Hartmann to obtain $44,000 for the Receivership

Estate.

On January 15, 2015, the SEC filed its complaint, alleging that between approximately November 2013 to January 2015, Defendants Frederic Elm f/k/a Frederic Elmaleh ("Elm") and ETIA, ETIF, ETEF, and ETMO (collectively, the "Recievership Entities") engaged in a Ponzi scheme through offer and sale of fraudulent investments that raised more than $17 million from more than 50 investors (the "Fraudulent Scheme").

The SEC alleged that Fred Elm raided at least $17 million from more than 50 investors through the sale of securities in ETIF, ETEF, and ETMO. Elm was the founder and managing director of ETIA and general partner and manager of Elm Tree Funds. Elm and ETIA invested only apportion of the investor funds raised. Elm and ETIA used the majority of funds to pay back investors as part of the Ponzi scheme; Elm also used investor funds for his own personal use. Investors sent funds to Elm by wire transfer or by mailing a check.

From November 26, 2012 to December 31, 2014, millions of dollars from investors in the Elm Tree Funds were deposited into the Receivership Entities' accounts. Elm commingled investor funds among various accounts and used investor funds to pay third parties, including the named Defendants in this action. Plaintiff alleges that all the money Elm and the Receivership Entities wrongfully transferred to Defendants was diverted and misappropriated by Elm in furtherance of his fraudulent scheme.

From December 3, 3013 to August 25, 2014, the Elms and ETIA transferred $44,000 to Hartmann, which Plaintiff alleges is a fraudulent transfer. SOF ¶ 8.[1] Plaintiff alleges that the transfers to Hartmann were from the Receivership Entities, derived from the Ponzi scheme, and made in furtherance of the scheme. SOF ¶ 10. Furthermore, Plaintiff argues that Hartmann did

[1] Plaintiff's statement of undisputed facts and Defendant's response thereto includes various citations to specific portions of the record. Any citations herein to the statement of facts ("SOF") and response thereto should be construed as incorporating those citations to the record.

not provide reasonably equivalent value to the Elms or ETIA in exchange for the $44,000. SOF ¶ 12. In the instant Motion, Plaintiff seeks summary judgment against Hartmann to obtain $44,000 on behalf the Receivership Estate.

II. Standard of Review

Under Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013)

(citation omitted).

III. Discussion

Counts 16 and 17 of the Amended Complaint states a cause of action against Hartmann for fraudulent transfer under Fla. Stat. 726.105.

Relief is available under this statute when:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Fla. Stat. § 726.105.

Count 18 of the Amended Complaint states a cause of action against Hartmann for unjust enrichment. Under Florida law, the elements of unjust enrichment are: "'(1) a benefit conferred upon a defendant by the plaintiff, (2) the defendant's appreciation of the benefit, and (3) the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.'" *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1270 (11th Cir. 2009) (quoting *Rollins, Inc. v. Butland*, 951 So.2d 860, 876 (Fla. 2d DCA 2006)).

In this case, Plaintiff argues that Hartmann received $44,000 in transfers from the Elms and ETIA, and the transfers were in furtherance of the Ponzi scheme, such that there is a presumption of actual intent to defraud and a presumption that the debtors were, by definition,

insolvent. Furthermore, Plaintiff argues that Hartmann provided no value in exchange for the transfers.

Hartmann has produced a promissory note dated June 21, 2010 indicating that Hartmann loaned Cyber Investments International, Inc. ("Cyber") $40,000. Hartmann argues that the promissory note, signed by Elm on behalf of Cyber, evidences a loan which is reasonably equivalent value he gave in exchange for the transfers at issue and evidence that there was no intent to defraud.

Plaintiff notes that Hartmann does not produce evidence that he ever actually loaned any money to Elm or Cyber. Plaintiff also recounts a history of inconsistent responses from Hartmann. For example, during his deposition, Hartmann testified that he did not know what Cyber is and he did not remember what, if anything, Elm told him about the company. 2/1/18 Depo. Tr. at 71:1-8. In Response to the instant Motion, Hartmann argues that Cyber was "engaged in substantial legitimate and revenue-generating business operations at the time it entered into the loan with Hartmann." [DE 185 at 4]. These issues of credibility are for the fact-finder, not the Court on summary judgment.

Hartmann's promissory note is enough to create a material issue of disputed fact about whether there was reasonable value given in exchange for the transfers or whether there was an actual intent to defraud. Therefore, summary judgment is inappropriate.

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Motion [DE 185] is **DENIED**.

DONE AND ORDERED at Fort Lauderdale, Florida this 10th day of May, 2018.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of record