

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
Elm Tree Investment Fund, LP,
Elm Tree 'e'conomy Fund, LP, and
Elm Tree Motion Opportunity, LP,

Plaintiff,

v.

JAMES BENVENUTO, *et al.*,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court following a hearing held on March 27, 2018, on damages following the Court's entry of summary judgment against Ted Greenwald 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. See Securities and Exchange Commission v. Frederic Elm f/k/a Frederic Elmaleh, et al., Case No. 15-cv-60082. On January 16, 2015, the Court appointed Plaintiff as Receiver for the Receivership entities. Pursuant to that Receivership 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]." The instant action 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 Ted Greenwald received a total of \$110,000 in funds from one of the Receivership entities, Elm Tree Motion Opportunity, LP, and that such funds were derived from the fraudulent scheme. The Receivership Entities did not receive reasonably equivalent value in exchange for the transfers to Greenwald. This action against Greenwald 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 (Counts 64-66). 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 is entitled to pursuant to Florida law.

II. FINDINGS OF FACT

The Receiver utilized the services of Dick Haslam, a financial analyst, to review the books and records of the Receivership Entities. Mr. Haslam submitted a declaration in support of the Receiver's motion for summary judgment (ECF No. 168-1). Based upon his review of the records, Mr. Haslam discovered that Elm Tree Motion Opportunity, LP, one of the Receivership Entities, transferred funds in the amount of \$110,000 to Ted Greenwald during the time that the entity was conducting the fraudulent scheme. Specifically, on July 1, 2014, a wire transfer was sent to Greenwald in the amount of \$55,000, and on August 21, 2014, another wire transfer was sent to Greenwald in the amount of \$55,000 (ECF No. 168-1, ¶ 8). Thus, as a result of the fraudulent scheme, Greenwald received \$110,000 in false profits (ECF No. 168-1, ¶¶ 10-11). The books and records of the Receivership do not reflect that Greenwald provided reasonably equivalent value in exchange for the \$110,000.00 he received (ECF No. 168-1, ¶ 12).

Greenwald filed an Answer and Affirmative Defenses (ECF No.131), through counsel, on June 1, 2017, in which he denied that he received \$110,000 from the Receivership Entities. According to Greenwald's first Affirmative Defense:

[A] wire transfer in the amount of \$55,000 was returned to Plaintiff's bank and did not credit to the account of Defendant Greenwald. The actual amount returned was \$54,975 which resulted from the bank deducting \$25.00 for the wire transfer fee. This transaction and the return of the funds should be evidenced in the Plaintiff's bank records.

Greenwald also asserts that "any payments he received were a contemporaneous exchange for value and constituted settlement of a claim for funds which had been fraudulently procured from the Defendant by the principal of the Plaintiff." (ECF No. 131, at 7).

On October 6, 2017, the Receiver issued discovery to Greenwald regarding the facts alleged in the Amended Complaint, including requests that Greenwald admit that he received the wire transfers and that he did not provide anything of value to any Receivership Entity. (ECF No. 168-2). The Requests for Admission were never responded to and, thus, the matters therein are deemed admitted by Defendant Greenwald. Fed. R. Civ. P. 36, U.S. v. 2204 Barbara Lane, 960 F.2d 126, 129 (11th Cir. 1992).

On November 6, 2017, counsel for Greenwald moved to withdraw, which was granted on November 15, 2017 (ECF Nos. 161, 165).

Plaintiff's Motion for Summary Judgment against Greenwald was filed on December 27, 2017 (ECF No. 168). No response was filed, and the Court granted summary judgment on February 12, 2018 (ECF No. 177).

On March 27, 2018, this Court held a hearing on the amount of damages to award pursuant to the entry of summary judgment in favor of Plaintiff. Defendant Greenwald appeared, without counsel, and asserted that he had evidence that he never received the \$110,000.00. As described in detail in this Court's Order of April 4, 2018, it is likely that Greenwald did not receive

the motion for summary judgment when it was first sent to him, due to confusion about Greenwald's address in the Court's docketing system. As a result, on April 4, 2018, the Court entered an Order providing Greenwald with an additional thirty days to file a motion to reconsider the Court's Order granting summary judgment against him (ECF No. 186). The Court cautioned Greenwald that "[f]ailure to do so likely will result in a recommendation that the Court enter final judgment against him in the amount of \$110,000.00 plus prejudgment interest." Id. As of this date, Greenwald has failed to seek reconsideration, nor has he submitted any evidence to support his allegations that he did not receive the funds which the Receiver seeks to claw back.

III. RECOMMENDATIONS OF LAW

According to Fla.Stat. § 726.108, 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, no evidentiary hearing is required as to the amount of the claim because the uncontroverted evidence on record reveals that Ted Greenwald received \$110,000.00 from one of the Receivership Entities, without providing reasonably equivalent value in exchange. 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). Plaintiff having met her burden of showing a basis for the entry of summary judgment, it was Defendant's burden to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Defendant has failed to present any evidence to the Court to support his position, and his denials and assertions in his pleading are insufficient to avoid the entry of summary judgment. Id.

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 Ted Greenwald in the amount of \$110,000.00 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 ___ day of May, 2018.


LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to:

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