

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY, FLORIDA

CASE NO.: 2017-029358

THE HOLLYWOOD BEACH RESORT
CONDOMINIUM ASSOCIATION, INC.
and HOLLYWOOD BEACH HOTEL OWNERS
ASSOCIATION, INC.

Vs.

KW PROPERTY MANAGEMENT, LLC.,

Defendant.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STAY

COMES NOW Defendant, KW PROPERTY MANAGEMENT, LLC ("KWPM"), by and through its undersigned counsel, and pursuant to Rule 1.140(b)(6), Fla. R. Civ. P., files this, its Motion to Dismiss or, in the alternative, Motion to Stay and, in support thereof, states as follows:

Introduction

Plaintiffs, a master association and a condominium association for a mixed-use property, attempt to state two causes of action against KWPM for alleged: a) breach of fiduciary duty (for failure to properly perform certain duties as property manager in connection with the accounting of Plaintiffs' funds and a lease agreement between Plaintiffs and a third party for a commercial unit and allowing the Associations' President and Vice-President to violate their fiduciary duties to the Associations) and, in the alternative; b) breach of contracts (for the same matters alleged in Plaintiffs' claim for breach of fiduciary duty).

While Plaintiffs' do not attach the very documents that form the gravamen of their complaint, Plaintiffs' claims arise out of: 1) KWPM's accounting of the Plaintiffs' funds for the Associations' twelve (12) month balance sheet dated November 20, 2012; and 2) leases drafted and witnessed by Plaintiffs' counsel, Joshua D. Krut, Esq. of Weiss Serota et. al, and executed on July 13, 2012 and October 5, 2012.¹

For the reasons set forth below with greater specificity, Plaintiffs fail to state a cause of action against KWPM for breach of fiduciary duty because, among other matters, KWPM does not owe a fiduciary duty to either Plaintiff. Rather, the Board Members owe a fiduciary duty to the Associations (and the complaint is riddled with instances in which the former president and vice president of the Board of Directors, Michel Jelic and Laura Welliver, breached their fiduciary duties to the Associations).

Moreover, Plaintiffs' claims for breach of fiduciary duty and breach of contract are barred by the Statute of Limitations. Plaintiffs' causes of action arise out of: 1) KWPM's accounting of the Plaintiff's funds for the Associations' twelve (12) month balance sheet dated November 20, 2012; and 2) leases drafted and witnessed by Plaintiffs' counsel, Joshua D. Krut, Esq. of Weiss Serota et. al, executed on July 13, 2012 and October 5, 2012. However, Plaintiffs' complaint was filed on December 23, 2017, more than **five (5) years** after the alleged acts at issue.

Furthermore, the gravamen of the complaint concerns alleged improper actions including breach of fiduciary duty and misappropriation by former board members of the associations, Michel Jelic and Laura Welliver – the president and vice-president respectively, and that KWPM allegedly allowed to occur. However, the Associations do

¹ Plaintiff's failure to attach the very documents that form their cause of action require dismissal.

not add the former board members as parties to the instant action even though they are necessary parties.

As a result of the forgoing, the Complaint should be dismissed with prejudice.

In the alternative, the alleged improper actions by former board members of the Associations that form the gravamen of the instant action against KWPM are the subject of an action filed in the Broward County Circuit Court that was filed by the Associations against Michel Jelic, Laura Welliver, and the commercial condominium tenants, Case No. 2015 CA 017778.

Because most, if not all, of the alleged improper acts alleged in the instant action (which are the gravamen of the instant action) will be adjudicated by the Circuit Court in Broward County, this Court should, in the alternative, stay the instant action until the conclusion of the Broward action.

Facts Alleged

The Hollywood Beach Resort ("HBR") is a mixed-used resort that consists of residential, commercial, and time-share units. (Complaint ¶ 3). There are two associations within the HBR. (Complaint ¶ 6). Plaintiff, Hollywood Beach Hotel Owners Association, Inc., is the master association (the "Master Association") responsible for the operation, maintenance and management of the common elements for the entire HBR and for the operation, maintenance, and management of the time-share units, and for levying assessments on unit owners. (Complaint ¶¶ 7, 8). Plaintiff, Hollywood Beach Resort Condominium Association, Inc. (the "Condominium Association") is responsible for the operation and maintenance of the residential condominium units, including levying assessments on unit owners. (Complaint ¶¶ 10, 11). (The "Master Association"

and the "Condominium Association" are collectively the "Plaintiffs" or "Associations").

On or about March 11, 2011, KWPM entered into written contracts² with Plaintiffs to manage HBR (collectively the "Management Contracts"). In the Management Contracts, KWPM allegedly agreed to act as the property manager for Plaintiffs and:

- i. collect and allocate all assessments and funds;
- ii. account for the expenditure of funds;
- iii. negotiate all service contracts;
- iv. take all such actions necessary to ensure compliance by the Master Association with all applicable laws;
- v. assist in creating, adopting, funding and complying with a proper budget;
- vi. prepare and provide the Master Association with complete financial and accounting records, including, but not limited to, a general ledger, a budget report, a delinquency report, monthly and annual balance sheets, and profit and loss statements;
- vii. direct all association activities;
- viii. oversee all work undertaken regarding the common areas; and
- ix. take such action as to ensure compliance with all laws.

(Complaint. ¶¶ 16-19).

In addition to the aforesaid duties under the Management Contracts, Plaintiffs allege that, pursuant to Fla. Stat. § 468.431, KWPM was an agent for Plaintiffs and owed Plaintiffs fiduciary duties that required it to discharge its duties to Plaintiffs "loyally, skillfully, and diligently; dealing honestly and fairly; in good faith, with care and full

² A copy of the contract between KWPM and the Master Association is attached to Plaintiffs' Complaint as Exhibit "A." Plaintiffs do not attach the contract between KWPM and the Condominium Association but allege that it is identical to the contract between KWPM and the Master Association. Complaint ¶ 19.

disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.” (Complaint. ¶ 22).

Plaintiffs set forth a number of allegations against KWPM, that relate to two (2) principal alleged occurrences that constitute a breach of contract/fiduciary duty, to wit: 1) KWPM's accounting of the Plaintiff's funds for the Associations' twelve (12) month balance sheet dated November 20, 2012; and 2) two leases drafted and witnessed by Plaintiffs' counsel, Joshua D. Krut, Esq. of Weiss Serota et. al, and executed on July 13, 2012 and October 5, 2012. (Complaint. ¶¶ 25-29 and 40-59).

In direct support of their claim for breach of fiduciary duties, Plaintiffs specifically state that “[p]ursuant to Fla. Stat. § 468.431, Florida Administrative Code 61E14-2.001 and the common law, [KWPM] owed to Plaintiffs fiduciary duties loyally, skillfully, and diligently; dealing honestly and fairly; in good faith; with care and full disclosure to the community association; accounting for all funds; and not charging unreasonable or excessive fees.” (Complaint. ¶71). Plaintiffs allege that KWPM breached its alleged fiduciary duties owed to Plaintiffs by:

- i. not properly collecting and allocating all assessments and funds;
- ii. not properly accounting for the expenditure of funds;
- iii. not properly assisting in creating and adopting a proper budget;
- iv. not overseeing all work undertaken regarding the common areas;
- v. not taking such action as to ensure compliance with all laws;

- vi. participating in the diversion of reserve funds and special assessment funds over the years;
- vii. repeatedly utilizing the 'due to/due from' accounting entries for years;
- viii. allowing and facilitating the secret 'closed door' meetings of the board members without noticing meetings regarding the discussions to start the hotel, restaurant and bar business and enter into the leases;
- ix. allowing and facilitating the execution of the secret July lease;
- x. allowing and facilitating the created of HHBR, LLC, and its use to attempt to circumvent the Florida Condominium Statutes; allowing and facilitating the execution of the October Lease, without disclosure of its material terms, a vote by unit owners, any due diligence, and granting a 41.09% rebate in assessments to the owner of Commercial Unit 100;
- xi. continuing to allow and facilitate the unlawful diversion of funds to support the failing hotel, bar and restaurant business;
- xii. utilizing the improper set-off of rent;
- xiii. allowing and facilitating the failure to have audited financials; allowing and facilitating the failure to spend money in accordance with the approved budgets; and
- xiv. doing absolutely nothing to alert, prevent or protect the unit owners and the Master Association and Condominium Association regarding these improprieties and unlawful conduct, and doing nothing to notify and legal authority, such as Florida Division of Condominiums, Timeshares and Mobile Homes.

The foregoing allegations stem from the improper acts of the Associations' prior Board of Directors and, specifically, its President and Vice-President, Michel Jelic and Laura Welliver, including, but not limited to, their misappropriation of Associations funds,

secret meetings, improper execution of leases, lack of audits and other intentional and negligent acts (Complaint. ¶¶23-24, 26, 27, 31, 33, 35, 36, 38, 40-42, and 44-60).

Argument

I. MOTION TO DISMISS STANDARD

When considering a motion to dismiss, the trial court must only look to the four corners of the complaint, assume all allegations contained therein to be true, and draw all reasonable inferences in favor of the pleader, except for the allegations that are neutralized by exhibit(s) attached to the Complaint. *Bolz v. State Farm Mut. Ins. Co.*, 679 So.2d 836 (Fla. 2d DCA 1996); *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996); and *Shahid v. Campbell*, 552 So.2d 321 (Fla. 1st DCA 1989).

Rule 1.110(b)(2) of Florida Rules of Civil Procedure requires a plaintiff to allege "a short and plain statement of ultimate facts showing that the pleader is entitled to relief." Fla. R. Civ. P. 1.110(b)(2). While the standard is liberal, it is "axiomatic that a complaint must allege ultimate facts establishing each and every essential element of a cause of action in order to entitle the pleader to the relief sought." *Sanderson v. Eckerd Corp.*, 780 So. 2d 930, 933 (Fla. 5th DCA 2001).

If there is an inconsistency between the general allegations of material fact and the contents of an exhibit, the exhibit neutralizes the allegation, thus rendering the complaint objectionable.

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTIES AND BREACH OF CONTACT AND THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

1. Plaintiffs failed to state a cause of action upon which relief may be

granted for breach of fiduciary duties.

"A fiduciary relationship may be either express or implied." *Maxwell v. First United Bank*, 782 So.2d 931, 933 (Fla. 4th DCA 2001) (quoting *Capital Bank v. MVB, Inc.*, 644 So.2d 515 (Fla. 3d DCA 1994). An express fiduciary relationship is created by contract, such as an attorney hired by a client or a professional trustee hired by a personal representative of a trust. Alternatively, a fiduciary relationship can be created by legal proceedings in the case of a guardian and a ward.

An implied fiduciary relationship "is based on the circumstances surrounding the transaction and the relationship of the parties and may be found when confidence is reposed by one party and a trust accepted by the other." *Id.* at 933-34 (citations and quotations omitted).

A. Plaintiffs do not allege an express fiduciary relationship.

Nowhere in the Management Contracts, Fla. Stat. § 468.431, Florida Administrative Code 61E14-2.001, or the common law, does it expressly hold that KWPM, as a property manager, owes a fiduciary duty to the Associations. Fla. Stat. § 468.431 specifically states that a [property] manager acts "within the scope of authority authorized by a written contract."

The fact that the Associations' Board of Directors, via Florida Statutes, are fiduciaries to the Association does not alone cause the Board's fiduciary duty to flow up to and include a property manager. Neither would the property manager acting as the Association's agent for the purposes of coverage under the Association's general liability insurance policies [as the policies standard real estate manager/agent endorsement].

"To establish an [actual] agency-principal relationship, a party must show: (1)

acknowledgement by principal that agent will act for him, (2) the agent's acceptance of undertaking, and (3) control by the principal over actions of the agent." *Merriman Investments, LLC v. Ujowundu*, 123 So.3d 1191, 1193 (Fla. 3d DCA 2013) (quotations omitted). Simply because two parties attempt to create an agency status in the contract, the provision does not necessarily control; instead it is the actual relationship which determines whether there is an agency. See *Robinson v. Linzer*, 758 So.2d 1163 (Fla. 4th DCA 2000).

In *Robinson*, a hospital district alleged that an emergency room physician and his employer, an emergency services company, were agents of the hospital district. The contract between the hospital district and the emergency services company stated that the physician, shall at all times be acting as the agent of the hospital district and that the hospital district shall exercise exclusive control or direction over the method and manner by which the physician performs his services. The court ruled that the contract provisions were "inconsistent with other provisions" because the contract also provided that the emergency room medical director, who was employed by the emergency services company, was responsible for the day-to-day management and supervision of the physician and that the emergency services company hired and paid the salaries of the physicians. *Id.*

Similarly, the Management Contracts between KWPM and Plaintiffs contained provisions that reference KWPM as agent for Plaintiffs for the sole purpose of insurance coverage in order to be covered under the Associations' general liability coverage [as a "Real Estate Agent"]. (See Exhibit "A," Section 9).

However, like in *Robinson*, the Management Contracts also contained numerous

provisions, some of which Plaintiffs allege themselves, that were inconsistent with the Management Contract's designation of KWPM as Plaintiffs' agent (for insurance purposes), including, but not limited to, the following:

- i. negotiations of all service contracts;
- ii. responsibility for the overseeing of all standard services provided to the Association;
- iii. work in conjunction with an accountant to prepare reports and returns required by law;
- iv. coordinate with accountant the filing of all Internal Revenue Service Returns and year-end statements upon receipt of completed accounting work;
- v. supervise and instruct Manager's Representative to direct all association operations;
- vi. hire and supervise on-site maintenance and janitorial personnel in their day to day responsibilities; and
- vii. hire, train, and direct any other on-site personnel or subcontractors that may be required to successfully operate the association property.

Complaint Exhibit "A."

Therefore, when analyzing the Management Contracts as a whole, it is clear that KWPM is not the Plaintiffs' agent or owe any fiduciary duty because Plaintiffs lack the legal requisite control over KWPM. See *Robinson*, 758 So.2d at 1164; *Merriman Investments, LLC*, So.3d at 1194. Moreover, because there is an inconsistency between Plaintiffs' allegations that KWPM is their fiduciary and the Management Contracts' provisions to the contrary, the Management Contracts neutralizes Plaintiffs' allegations that KWPM is a fiduciary as a result of any principle/agent relationship. See *Hillcrest Pacific Corp. v. Yamamura*, 727 So.2d 1053 (Fla. 4th DCA 1999) (ruling that if there is