IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JASON L. NOHR, Receiver for MSC Holdings USA, LLC, MSC Holdings, Inc., and MSC GA Holdings, LLC,	:	CIVIL ACTION NO. 1:14-CV-02761-SCJ
Plaintiff,	:	
v.	:	
CORRINA JANG, et al.,	:	
Defendants.	:	

ORDER

This matter appears before the Court on Defendant Norma Day's Motion to Dismiss. Doc. No. [19]. For the following reasons, Defendant's motion is **DENIED**.

I. BACKGROUND AND LEGAL STANDARD

Plaintiff, the appointed Receiver for MSC Holdings USA, LLC, MSC Holdings, Inc., and MSC GA Holdings, LLC ("Receivership Defendants"), filed the complaint in this action on August 26, 2014. Doc. No. [1]. Plaintiff alleges that Defendant is liable under O.C.G.A. § 18-2-74, the Georgia Uniform Fraudulent Transfers Act, and for unjust enrichment. Id. at p. 70–73. Specifically, the complaint states that Defendant received $111,564 in false profit payments from

the Receivership Defendants and that equity requires she return these profits so that Plaintiff can make an equitable distribution to all investors. Defendant filed a motion to dismiss on October 24, 2014. Doc. No. [19].

A complaint may be dismissed if the facts as pleaded do not state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 679–80 (2009) (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–62, 570 (2007) (retiring the prior Conley v. Gibson, 355 U.S. 41, 45–46 (1957) standard which provided that in reviewing the sufficiency of a complaint, the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In Iqbal, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678.

In Twombly, the Supreme Court emphasized a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. Factual allegations in a complaint need not

be detailed but "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (internal citations and emphasis omitted).

II. DISCUSSION

Defendant first argues that Plaintiff's claim for fraudulent transfer is barred by the statute of limitations. Doc. No. [19], p. 6–13. The parties both agree that the relevant statute of limitations is O.C.G.A. § 18-2-79(1), which states:

> A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought . . . within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

O.C.G.A. § 18-2-79(1) (2012). The parties also agree that the one year discovery period applies to Plaintiff's fraudulent transfer claim because the latest "transfer" occurred on August 3, 2010—more than four years prior to the date this action was filed. See Doc. No. [1-1], p. 38.

Because there is a "dearth of Georgia decisions construing the provisions of the Georgia UFTA," state courts look to other jurisdictions for guidance. Truelove v. Buckley, 318 Ga. App. 207, 209, 733 S.E.2d 499, 501 (2012). Plaintiff's

reliance on Janvey v. Democratic Senatorial Campaign Comm., Inc., 712 F.3d 185 (5th Cir. 2013), a case that analyzed the similar Texas Uniform Fraudulent Transfers Act, is persuasive. In Janvey, the same one year discovery limitations provision was interpreted to "require[] that a fraudulent-transfer claim must be filed within one year after the *fraudulent nature of the transfer* is discovered or reasonably could have been discovered." Janvey, 712 F.3d at 195 (emphasis added). This is the majority position in jurisdictions that have ruled on the issue. Id. "The crucial issue is when the Receiver knew or could reasonably have known of the fraudulent nature of the transfers, not simply when he knew or could reasonably have known that the transfers had been made." Id. at 196 n.10; see also Janvey v. Suarez, 978 F. Supp. 2d 685, 704 (N.D. Tex. 2013).

The Court appointed Plaintiff as Receiver in the related action on February 11, 2013. See SEC v. McClintock, No. 1:12-CV-04028-SCJ (N.D. Ga.), Doc. No. [19], p. 3. The Court authorized Plaintiff to bring legal action to recover and conserve Receivership Assets, but only after he sought leave of Court to lift a stay on litigation. Id. at p. 19–20. The Court also tolled the statute of limitations "as to a cause of action accrued or accruing in favor of one or more of the Receivership Defendants against a third person or party" until further order of the Court. Id.

at p. 16–17. On June 14, 2013, Plaintiff sought this Court's leave to pursue legal action pursuant to his authority as Receiver, and the Court ordered him to proceed on September 11, 2013. Doc. Nos. [30], [36]. Plaintiff claims that he did not identify the factual basis for his claims, determine which transactions were fraudulent, or identify the recipient or location of fraudulent transfers prior to seeking this Court's leave to bring legal action against third parties. Doc. No. [36], p. 5. The complaint also states that, prior to seeking leave of Court to file third-party actions, Plaintiff conducted a preliminary investigation indicating potential claims he could bring on behalf of the Receivership Defendants. Doc. No. [1], p. 6.

The Court finds that Plaintiff's fraudulent transfers claim against Defendant is not barred by the statute of limitations. The Court tolled the statute of limitations during the period it ordered a stay of litigation beginning on February 11, 2013, and it did not lift that stay as to the Receiver until September 11, 2013. Nothing in the complaint or any evidence that Defendant puts forward indicates that Plaintiff discovered or reasonably could have discovered the fraudulent nature of her transfers before the stay began and Plaintiff was appointed Receiver on February 11, 2013. Plaintiff obviously learned of the

fraudulent nature of the transfers at some time after February 11, 2013, and the evidence tends to show that he discovered or reasonably could have discovered the fraudulent nature of the transfers on or after September 11, 2013 – the day the Court lifted the stay. In any event, neither party has requested this motion to be converted into one for summary judgment, and Defendant failed to carry her burden on a motion to dismiss regarding this statute of limitations argument because Plaintiff did not actually discover nor could he reasonably have discovered the fraudulent nature of Defendant's transfers prior to February 11, 2013. He then filed the action within one year after the Court lifted the stay.

Defendant next argues that Plaintiff's unjust enrichment claim is barred by the statute of limitations. Doc. No. [19], p. 13–14.[1] The unjust enrichment claim is subject to the four year limitations period found in O.C.G.A. § 9-3-26. See Hays v. Adam, 512 F. Supp. 2d 1330, 1346 (N.D. Ga. 2007). "When the question is raised as to whether an action is barred by the statute of limitations, the true test to determine when the cause of action accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result." Pridgen v. Auto-Owners Ins. Co., 204 Ga. App. 322, 322, 419 S.E.2d 99, 100 (1992) (internal

[1] The Court is unclear whether Defendant withdrew this argument in her reply brief, but it will address the argument for the sake of clarity. See Doc. No. [41], 13–14.

quotations omitted). Plaintiff could not bring his action against Defendant until first, he was appointed as receiver, and second, he received an order from the Court removing the litigation stay. Plaintiff filed this action within four years from both of those dates. The earliest conceivable time Defendant could argue that her cause of action accrued is November 19, 2012—the date the complaint was filed by the Securities and Exchange Commission in the related enforcement action—but Plaintiff filed the instant action within four years from that date as well. See Hays, 512 F. Supp. 2d at 1346.

Defendant's third argument is that Plaintiff's unjust enrichment claim must fail because there is an adequate remedy at law, namely, the statutory cause of action for fraudulent transfer. Doc. No. [19], p. 15–20. Plaintiff failed to respond to this argument, but it is still meritless. Under Federal Rule of Civil Procedure 8, a party may plead in the alternative regardless of consistency. Fed. R. Civ. P. 8(d), (e). Defendant is correct that a claim for unjust enrichment is unavailable when there exists an adequate remedy at law. See WESI, LLC v. Compass Envtl., Inc., 509 F. Supp. 2d 1353, 1362–63 (N.D. Ga. 2007). Although Plaintiff may be barred from recovering under both counts, it is too early at this stage to dismiss Plaintiff's claim for unjust enrichment should he elect to proceed with that claim

throughout the remainder of the litigation. Id.; see also Manhattan Constr. Co. v. McArthur Electric, Inc., No. 1:06-cv-1512-WSD, 2007 WL 295535, at *8–10 (N.D. Ga. Jan. 30, 2007).

Defendant's final argument is that Plaintiff's unjust enrichment claim is barred because there was a legal contract between the parties. Doc. No. [19], p. 20–22.[2] It is true that a claim for unjust enrichment is unavailable if a valid, legal contract exists between the parties. Morris v. Britt, 275 Ga. App. 293, 294, 620 S.E.2d 422, 424 (2005). But, "in Georgia, a contract to do an immoral or illegal thing is void." Hays, 512 F. Supp. 2d at 1342; see also O.C.G.A. § 13-8-1 (2012). The complaint clearly alleges that the contracts entered into between Defendant and the Receivership Defendants, including Dianne Alexander, were in furtherance of an illegal Ponzi scheme that violated federal securities laws. Thus, the Court declines to dismiss Plaintiff's claim for unjust enrichment under Federal Rule 12(b)(6) at this stage of the litigation.[3]

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[2] Again, the Court is unclear whether Defendant withdrew this argument in her reply brief, but it will address the argument for the sake of clarity. See Doc. No. [41], p. 15.

[3] Defendant also raises an entirely new argument in her reply brief regarding disgorgement and Plaintiff's lack of evidence of fraud or wrongdoing against her. Doc. No. [41], p. 2–4. The Court will not address this argument, however, because Defendant failed to raise it in her initial brief. See Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1342 (11th Cir. 2005); Rindfleisch v. Gentiva Health Servs., Inc., 22 F. Supp. 2d 1295,

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss (Doc. No. [19]) is **DENIED**.

IT IS SO ORDERED, this 16th day of September, 2015.

Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

1301 (N.D. Ga. 2014).