IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

MICHAEL J. QUILLING, Receiver
for Frederick J. Guilliland,
Plaintiff,

v. **Case No. 3:04CV252**

MARILYNN CRISTELL and the
ESTATE OF RAYMOND R. CRISTELL,
Defendants.
_____/

MOTION TO DISMISS

Comes now defendants Marilynn Cristell and the Estate of Raymond R. Cristell, by and through their undersigned counsel and pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), (3) and (6) hereby move to dismiss the Complaint because this Court lacks jurisdiction to hear and plaintiff lacks standing to bring a claim involving an alleged fraudulent transfer of cash and a used car which apparently occurred almost six years ago in Florida.

I.

BACKGROUND

According to the allegations of the Complaint,[1] this is an action by the Receiver for Frederick J. Gilliland ("Gilliland") against Marilynn Cristell, in her individual capacity and as personal representative of her husband's estate. [Complaint ¶ 1-3]. Plaintiff was appointed as part of a lawsuit that was filed on March 27, 2002 by the

[1] As required, defendants have taken the allegations in the Complaint as true for the purposes of this motion and only for the purposes of this motion. For all other purposes, defendants dispute these allegations.

United States Securities and Exchange Commission. [Complaint ¶ 11]. Plaintiff brings this action as the receiver for Gilliland, an individual.

Plaintiff alleges that shortly after October 9, 1998 Gilliland transferred a used car to the defendants and that on or about October 9, 1998 Gilliland diverted approximately $25,000 to the defendants. [Complaint ¶ 13, 14]. The Complaint alleges that Defendants gave no consideration of value to the investors for these transfers. [Complaint ¶ 15]. Plaintiff alleges that these transfers were "fraudulent transfers pursuant to applicable law." [Complaint ¶ 16].

There is no allegation in the Complaint that the fraudulent transfers were made with actual intent to hinder, delay, or defraud any creditor of Gilliland. In fact, there is no allegation in the Complaint of any wrongdoing by defendants at all. There is also no allegation in the Complaint that the alleged fraudulent transfers occurred in North Carolina. In fact, the Complaint is conspicuously silent as to where the alleged transfers occurred.

Defendants have not had substantial contact with North Carolina and were not in the state of North Carolina during the time period when the allegedly fraudulent transfer occurred. See attached Declaration of Marilynn Cristell.

II.

ANALYSIS

A. The Court Does Not Have Personal Jurisdiction Over The Defendants.

As an initial matter, this Court does not have personal jurisdiction over the defendants. Under well-established principles, the burden is on plaintiff to make a prima

facie showing that personal jurisdiction exists. *See Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989).

State law determines whether this Court has personal jurisdiction over a defendant. *Young v. New Haven Advocate*, 315 F.3d 256, 261 (4th Cir. 2002)("A federal court may exercise personal jurisdiction over a defendant in the manner provided by state law."). Because the North Carolina Supreme Court has liberally construed the North Carolina long-arm statute to extend the full jurisdictional powers permissible under federal Due Process, *see Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062, 1065 (4th Cir. 1982), the "statutory inquiry necessarily merges with the constitutional inquiry and the two inquiries essentially become one." *Young*, 315 F.3d at 261 (*quoting Stover v. O'Connell Assocs., Inc.*, 84 F. 3d 132, 135-36 (4th Cir. 1996)). Thus, the issue is whether the defendants have had sufficient "minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)(*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed.2d 278 (1940).

There are two tests for determining whether a defendant's contacts with the forum state are sufficient to confer personal jurisdiction. A court may assume power over an out-of-state defendant either by a proper "finding of specific jurisdiction based on conduct connected to the suit or by a proper finding of general jurisdiction." *Young*, 315 F.3d at 261 (*quoting ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711 (4th Cir. 2002)).

If the cause of action is related to or arises out of defendant's actions within the state, the plaintiff can establish "specific jurisdiction" by proving that: (1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into account such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff's interest in obtaining relief, (d) the efficient resolution of controversies as between states, and (e) the shared interests of the several states in furthering fundamental substantive social policies." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-46 (4th Cir. 1994).

If the cause of action is unrelated to the defendant's activities in the forum state, plaintiff must prove that the contacts are "continuous and systematic" to support the exercise of "general jurisdiction" over the defendant. *Helicopteros Nationales de Colombia v. Hall*, 466 U.S. 408, 415-16 (1984). The threshold level of minimum contacts required for general jurisdiction is "significantly higher than for specific jurisdiction" and is "very substantial, indeed." *EASB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623-24 (4th Cir. 1997)(*quoting* 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1067, at 295-98 (1987)).

In the case at bar, there is no basis for specific or general jurisdiction. There is no allegation in the Complaint that the alleged transfer occurred in North Carolina. In fact, it appears that the conduct at issue all occurred in Florida. There is also no allegation that defendants have ever engaged in "continuous and systematic" activities in North Carolina

that would provide a basis for jurisdiction. In fact, as detailed in the attached affidavit of Marilynn Cristell, defendants have not had continuous and systematic activities in North Carolina.

In addition, the exercise of jurisdiction over defendants in this matter would offend traditional notions of fair play and substantial justice. No one who received a used car in 1998 would expect to be hauled into court seeking to challenge the transfer in a different state and almost 6 years later.

B. The Fact That Defendant Is A Receiver Does Not Impact Upon The Jurisdictional Requirement

In the Complaint, it appears that plaintiff asserts that this Court has jurisdiction because 28 U.S.C. § 754 allows a receiver to obtain *in rem* jurisdiction over receivership property and because 28 U.S.C. § 1692 authorizes extraterritorial service of process for *in rem* actions. However, neither section 754 nor section 1692 provides for nationwide service of process nor do they provide this Court with jurisdiction.

In *Gilchrist v. GE Capital Corp.*, 262 F.3d 295, 301 (4th Cir. 2001), the Fourth Circuit held that section 754 provides that the receiver may sue and be sued in any district where such property is located without leave of the appointing court. However, the Fourth Circuit specifically held that "such *in rem* jurisdiction over property in other districts does not give a district court personal jurisdiction over persons in such other districts absent an express congressional grant of personal jurisdiction." *Id.* In this case, there is no "express congressional grant."

Other courts have confronted the exact issue that this Court faces, a receiver appointed at the request of the SEC in an alleged Ponzi seeking personal jurisdiction over defendants relying upon sections 754 and 1692. *See Stenger v. Leadenhall Bank & Trust*

Co. Ltd., 2004 U.S. Dist. LEXIS 4692 (N.D. Ill. Mar. 19, 2004) and *Stenger v. World Harvest Church, Inc.*, 2003 U.S. Dist. LEXIS 15108 (N.D. Ill. Aug. 29, 2003). In these cases, the courts have held that the mere appointment of a receiver does not provide a basis for jurisdiction.

Interestingly, in *Stenger*, the court contrasted section 1692, which plaintiff in the case at bar relies upon, with the statutes that do allow for nationwide service of process, like the R.I.C.O. statute, 18 U.S.C. § 1965(b), mass accident cases, 28 U.S.C. § 1697, the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and the Clayton Act, 15 U.S.C. § 22. Unlike these other statutes, section 1692 simply does not provide for nationwide service of process and therefore, does not create personal jurisdiction under Rule 4(k)(1)(D). *Id.*[2]

In addition, it would be illogical for defendants' due process rights to depend upon the plaintiff's status as a receiver. The fundamental issues of due process discussed above simply do not disappear just because the plaintiff is a receiver. The defendants' rights exist independent of plaintiff's status.

C. Plaintiff Does Not Have Standing To Assert This Claim.

The claim is also barred because the plaintiff does not have standing to assert it. "Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. Doctrines like standing . . . and ripeness are simply subsets of Article III's

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[2] In *Terry v. June*, 2003 U.S. Dist. LEXIS 16080 (W.D. Va. Sept. 12, 2003), the trial court allowed jurisdiction over an out-of-state defendant. However, in *Terry*, unlike the present case, there was an allegation in the defendant knew, or should have known, that the benefits he derived from his investment were the proceeds of a fraudulent scheme. In the case at bar, there is no allegation that the defendants are anything other than innocent third parties. *See also Haile v. Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981)(holding that defendant need only have minimum contacts with the nation and not with the forum state or district in order to exercise jurisdiction); *but see Smith v. Pittsburg Nat'l Bank*, 674 F. Supp. 542, 545 (W.D. Va. 1987)(referring to the opinion in *Haile* as "of doubtful viability.").

command that the courts resolve disputes, rather than emit random advice." *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991). Standing concerns "whether the plaintiff is the proper party to bring the suit. . . ." *Raines v. Byrd*, 521 U.S. 811, 818, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997). The burden of establishing ripeness and standing rests upon the party asserting the claim. *Renne v. Geary*, 501 U.S. 312, 316, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991); *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002).

Simply put, plaintiff does not have standing to assert this claim, because Gilliland would not have standing to assert this claim. As receiver, plaintiff "obtained the rights of action and remedies that were possessed by the person in receivership." *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. 2d DCA 2003)(holding that a receiver lacked standing to pursue claims under Florida law). In *Freeman*, the District Court of Appeal for the Second District noted that a receiver could not being claims as the receiver for an individual in a ponzi scheme. The court stated: "The reason for this is obvious: the [individuals] are the insiders who actually committed the fraud and thefts. They suffered no economic losses. As intentional tortfeasors, they clearly are not entitled to contribution from these defendants that they rightfully owe to the customers." *Id.* at 551.

In the case at bar, plaintiff only brings this action as the receiver for Gilliland who was a principle in the ponzi scheme. Plaintiff does not represent the creditors or investors in their individual claims. Under Florida law, he does not have standing to assert this claim for fraudulent transfer because Gilliland was *in pari delecto*. *See Feltman v. Prudential Bache Securities*, 122 B.R. 466, 474 n.9 (S.D. Fla. 1990). In *Feltman*, the

Court noted that under Florida law, neither a participant in a sham transaction, nor a receiver appointed for the participant would be able to assert a claim. *See id.* (*citing Whitelock v. Geiger*, 368 So. 2d 372, 374 (3d DCA 1979)("when both parties are *in pari delicto*, the court will leave them to settle their disputes without aid of court.")).

In *Troelstrup v. Index Futures Group*, 130 F.3d 1274, 1277 (7th Cir. 1997) the Seventh Circuit examined the concept of standing in a receivership proceedings flowing from an alleged ponzi scheme where the receiver was appointed for an individual.[3] The Court held that the receiver did not have standing to pursue claims because the individual that he was the receiver for did not have standing to pursue the claims. *Id. see also, E. F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990).

It is important to note that in the case at bar plaintiff is only proceeding as the receiver for an individual, not a corporation. Therefore, the cases that allow claims to proceed where the receiver has been appointed for a corporation do not apply. *See e.g., Quilling v. National City of Michigan/Illinois*, 2001 U.S. Dist. LEXIS 19424, * 13, 46 U.C.C. Rep. Serv. 2d (Callaghan) 207 (N.D. Ill. Nov. 27, 2001) ("Since the defrauder had no claim against the defendant, logic dictated the receiver, as a representative of the defrauder, lacked standing. Such is clearly not the case here, where Quilling has been appointed as the receiver of the defrauder's corporation (Lennox), not the defrauder himself (Law)."

D. The Court Does Not Have Subject Matter Jurisdiction Over This Suit.

In asserting that this Court has jurisdiction over this matter, plaintiff relies upon 28 U.S.C. §§ 1331 and 1332. [Complaint ¶ 9]. However, a review of these statutes shows that they do not provide this Court with jurisdiction over this matter.

Section 1331 provides that federal district courts have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 1331. However, the complaint contains absolutely no reference to any federal law that impacts upon this alleged fraudulent transfer. The mere fact that the Court appointed the receiver does not make this case a matter arising under the laws of the United States. *See United States v. Todel*, 512 F.2d 245, 251 (2d Cir. 1975)(it is "clear that the presence of a federally appointed receiver does not make the case one arising under the laws of the United States.")(*citing Gableman v. Peoria, D & E. Ry.*, 179 U.S. 335, 21 S.Ct. 171, 45 L.Ed. 220 (1900)).

Section 1332 confers original jurisdiction on a federal court if there is complete diversity between the parties and the claim satisfies the amount in controversy requirement of $75,000.00, exclusive of interests and costs. 28 U.S.C. § 1332. In the case at bar, plaintiff is apparently a resident of Texas and defendants are residents of Florida, so there is complete diversity between the parties. However, based upon the allegations in the Complaint, the amount in controversy does not exceed $75,000.

The allegation in the Complaint is that sometime soon after October 9, 1998, defendants received $25,000 and a used car; therefore, the value of the car is a component of jurisdiction. When called upon to value used cars, courts frequently take judicial notice of the value available in Kelley's Blue Book. *See ITT Commercial Finance Corp., v. Unlimited Automotive, Inc.*, 814 F. Supp. 664, 668 (N.D. Ill. 1992)(taking judicial notice of Kelley's Blue Book as an authoritative guide to the

valuation of vehicles and citing other courts that have done the same).[4] The Blue Book value of the used car allegedly fraudulently transferred is $26,465.[5] When added to the $25,000 that was also allegedly fraudulently transferred, plaintiff's total claim is for $51,465. This is far below the required $75,000.

E. The Claim Has Been Extinguished By The Statute Of Limitations On Fraudulent Transfers.

Plaintiff's claims are also barred because they have been extinguished by the applicable statutes of limitations.

The Complaint alleges is that sometime soon after October 9, 1998, Gilliard transferred a used car to the defendants and that he diverted approximately $25,000 to the defendants on October 9. 1998. Under the Uniform Fraudulent Transfers Act ("UFTA") this claim is extinguished.

Although the Complaint is conspicuously silent as to where the alleged transfer occurred, it appears that the alleged fraudulent transfers occurred in Florida. However, regardless of whether the allegedly fraudulent transfer occurred in Florida or North Carolina, it is extinguished. This is because both Florida and North Carolina have adopted the UFTA, Fla. Stat. §§ 726.101-726.112; N.C. Stat., §§ 39-23.1 – 39-23.12.

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[4] Although this matter is before the Court on a motion to dismiss, the Court can take judicial notice of facts outside the Complaint. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 268 n.1, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record...."); *Kostrzewa v. City of Troy*, 247 F.3d 633, 644 (6th Cir. 2001) ("A district court may consider public records in deciding a motion to dismiss without converting the motion to one for summary judgment."); *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

[5] As noted in *ITT Commercial Finance Corp.*, 814 F. Supp. at 668, the wholesale price is utilized in evaluating used cars for jurisdictional purposes because a "creditor's interest in a vehicle is equivalent to what the creditor could receive upon a reasonable disposition of the collateral."

Under the UFTA, generally a claim for a fraudulent transfer must be brought within a four-year statute of limitations. *See* Fla. Stat. 726.110(2). Where the allegedly fraudulent transfer was made with "actual intent to hinder, delay, or defraud any creditor of the debtor," the claim must be brought within four years of the transaction or within 1 year of when the transfer was or could reasonably have been discovered. *See* Fla. Stat. § 726.105(1)(a) and § 726.110(1). Under UFTA this is referred to as the "extinguishment of cause of action." *Paragon Health Services, Inc., v. Central Palm Beach Community Health Center, Inc.*, 859 So.2d 1233, 1235 (Fla. 4th DCA 2003) ("The Fraudulent Transfer Act contains its own statute of limitations which 'extinguishes' a cause of action under the act.").

In the case at bar, the claim is not timely and therefore it has been extinguished. First, there is no allegation in the Complaint of "actual intent to hinder, delay, or defraud any creditor of the debtor." Therefore, the claim is barred by the four-year statute of limitations, which ran on or about October 9, 2002. Second, even assuming *arguendo* there was an allegation of actual intent and some provision which allowed plaintiff to bring this claim, the claim is still barred, because the filing of this suit was more than two years after the initiation of the SEC litigation on March 27, 2002. [Complaint ¶ 11]. Clearly, as of the time of the filing of the SEC litigation the alleged fraudulent transfer was or could reasonably have been discovered. Therefore, this matter should be dismissed.

III.

CONCLUSION

As detailed above, this Court does not have jurisdiction over defendants or plaintiff's claim. In addition, plaintiff lacks standing to assert this claim. Further, plaintiff's claim has been extinguished. Therefore, defendants request that the Court dismiss the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the above has been furnished this 23rd day of July 2004 by regular U.S. Mail to:

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