DAVID M. GARTEN

Third Party Liability For Breach Of Trust

Sec. 736.1002(2), F.S. reads in relevant part: "[I] f more than one person, including a trustee or trustees, is liable to the beneficiaries for a breach of trust, each liable person is entitled to pro rata contribution from the other person or persons."

The following legal theories support a third party's liability for breach of trust:

A. Restatement 2d of Trusts, §326

Restatement 2d of Trusts, §326 reads: "§326 Other Dealings with Trustee. A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust."

The Comments & Illustrations to §326 read: **a. Knowledge of breach of trust.** If a third person participates with the trustee in committing a breach of trust, knowing that he is committing a breach of trust, he is liable to the beneficiary for participation in the breach of trust. Thus, if the trustee directs an agent to sell trust property, which the agent knows the trustee is not authorized to sell, and he does sell it, he is liable for participation in the breach of trust. Similarly, if the trustee purchases through a stockbroker securities which it is a breach of trust for him to purchase and the broker knows that the purchase is in breach of trust, the broker is liable for participation in the breach of trust. **b. Notice of breach of trust.** If a customer deposits with a broker securities standing in the name of the customer as trustee as security for speculative transactions on margin, the broker is chargeable with notice that the customer is a trustee and is committing a breach of trust. The mere fact, however, that an account is opened with the broker in the name of the customer as "trustee" does not put the broker upon inquiry as to the existence and terms of the trust; and if the broker does not know facts from which he could conclude that the customer is a trustee and that he is committing a breach of trust, he is not liable. If the customer deposits with the broker securities standing in the name of the customer as trustee, for the purpose of selling the securities and investing the proceeds, the broker is not bound to inquire as to the authority of the trustee to sell or as to his authority to make investments, and the broker is not liable for participation in a breach of trust, although the trustee did not in fact have a power of sale, and although the customer invested the proceeds in securities which are not ordinarily proper trust investments and which were not proper investments under the terms of the trust.

In *International Community Corp. v. Young*, 486 So. 2d 629 (Fla. 5th DCA 1986), the attorney for a corporation, at the request of a corporate officer, prepared promissory notes, mortgages, deeds, and bills of sale for execution by the corporate officer encumbering and conveying corporate property to a trust of which the corporate officer was the sole beneficiary. The corporation sued the corporate officer and the corporate attorney for damages for breach of fiduciary duty, negligence, and slander of title. The trial court entered a summary judgment in favor of the attorney and the appellate court reversed. The court held that the allegations in the complaint were sufficient to state a cause of action against the corporate attorney for damages resulting from participation in a breach of trust by the corporate officer *citing* Restatement (Second) of Trusts § 326 (1959), G. Bogert, The Law of Trusts and Trustees, § 901, et. seq., (rev. 2d ed. 1982), and the cases collected; IV A.W. Scott, The Law of Trusts, § 326.4 (1967), and *Centrust Savings Bank v. Barnett Banks Trust Company*, 483 So.2d 867 (Fla. 5th DCA 1986). The court stated that whether or not the corporate attorney knew, or should have known, that he was assisting in a breach of trust by the corporate officer is a question of fact to be resolved by a fact finder and not by summary judgment.

In *Wolf v. Knupp*, 76 Cal. App. 4th 1030, 90 Cal. Rptr. 2d 792 (Cal. App. 1999), a trust beneficiary sued the trustee's attorneys for actively participating with the trustee in breaches of fiduciary duty that essentially looted the trust. The beneficiaries alleged that the attorneys were aware that the assets of the trust were being commingled with non-trust assets and were being dissipated in breach of the provisions of the trust; that they performed legal services intended to prevent the beneficiary from discovering these facts; that they advised the beneficiary to waive his rights to on-going accountings that would have revealed the trustee's wrongful conduct; that they made misrepresentations of material fact concerning the trust; that they facilitated the dissipation of the trust by preparing legal documents that provided the trustee with access to the principle of the trust; and that they drafted a codicil to the decedent's will (providing that any questioning of the decedent's acts as trustee would be a contest of his will) to discourage the beneficiary from taking legal action as a beneficiary of the trust upon learning what had happened to trust assets. The Trustee's attorneys filed a motion for summary judgment arguing that the damages sought were damages for injury to the trust and that the beneficiary lacked standing to sue to recover those damages. The court denied the motion for summary judgment, in part, based on the Restatement Second of Trusts, §326.

B. Civil Conspiracy

The essentials of a complaint for civil conspiracy are: (a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts performed pursuant to the conspiracy. *See Walters v. Blankenship*, 931 So. 2d 137 (Fla. 5th DCA 2006); *Fla. Fern Growers Ass'n v. Concerned Citizens*, 616 So. 2d 562 (Fla. 5th DCA 1993); *Nicholson v. Kellin*, 481 So. 2d 931 (Fla. 5th DCA 1985) (A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. Each act done in pursuance of a conspiracy by one of several conspirators is an act for which each is jointly and severally liable); Donofrio v. Matassini, 503 So. 2d 1278 (Fla. 2d DCA 1987) (the existence of a conspiracy and an individual's participation in it may be inferred from circumstantial evidence).

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In *Kent v. Kent*, 431 So. 2d 279 (Fla. 5th DCA 1983), the trust beneficiaries sued the trustee and the buyer of trust property for civil conspiracy. The beneficiaries alleged that the property was a major asset of the trusts and that it had been transferred by the trustee to the buyer for less than fair consideration. They further alleged that the trustee and buyer conspired to deplete the trust assets and to convert those assets to themselves, and that the trustee leased and sold trust assets to the buyer for consideration which they both knew was inadequate in a scheme to defraud the beneficiaries. The appellate court found that these allegations, if proven, would constitute conduct amounting to a civil wrong.

In *Blatt v. Green, Rose, Hahn & Piotrkowski*, 456 So. 2d 949 (Fla. 3rd DCA 1984), the residuary beneficiaries of the testator/husband's estate entered into an agreement with the testator's surviving spouse pursuant to which the beneficiaries assigned to the surviving spouse a certain percent of the residual estate in return for the surviving spouse's relinquishment of any claims against the estate. The surviving spouse subsequently died and the personal representative of her estate ("PR") brought an action alleging in part that the attorney for the beneficiaries conspired with the beneficiaries/personal representatives of the estate to deprive the surviving spouse of the agreed upon percentage of the residuary estate. The PR further alleged that the attorney obtained court orders and took other various steps to have the assets of the estate distributed without regard to the agreement, and that the residuary beneficiaries distributed all of the assets of the estate to themselves without regard to the previously entered agreement. The trial dismissed the complaint. The appellate court reversed and found that the complaint stated a cause of action for a civil conspiracy based upon an alleged violation of their fiduciary duty imposed by §733.815, F.S., i.e., private contracts among interested persons. Under the allegations of the complaint, such an agreement was executed and therefore, the beneficiaries/personal representatives had a duty imposed by statute to abide by the terms of the agreement. The beneficiaries and attorney allegedly breached their duty in bad faith when they ignored the agreement and improperly had all the assets distributed to themselves. The court held that if these allegations are ultimately proved, the personal representatives would be liable to the PR for the damages or loss which resulted from the breach of this fiduciary duty.

In *Smyrna Developers, Inc. v. Bornstein*, 177 So.2d 16 (Fla. 2d DCA 1965), the plaintiff stated a cause of action for civil conspiracy where the complaint alleged that the defendants, attorneys who had been retained by plaintiff corporation and who were informed of the corporation's land development plans, conspired together and used this knowledge to deprive the corporation of the property and obtain it for themselves.

C. Restatement (Second) of Torts §§875 & 876 (Acting In Concert)

Joint and several liability among multiple tortfeasors exists when the tortfeasors, acting in concert or through independent acts, produce a single injury. This principle is set forth in the Restatement (Second) of Torts §§875 & 876 which provide as follows:

§ 875. Contributing Tortfeasors-General Rule. "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."

§ 876. Persons Acting in Concert. "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

Comment on Clause (a) reads: a. Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts. The theory of the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of anyone.

By virtue of this relationship, the tortfeasor becomes liable for the actions of those with whom he acted in concert such that there is a joint enterprise, and a mutual agency, so that the act of one is the act of all, and liability for all that is done is visited upon each. *See W. Keeton, Prosser & Keeton on Torts* § 52, at 346 (5th ed. 1984)).

In *Acadia Partners, L.P. v. Tompkins*, 759 So. 2d 732 (Fla. 5th DCA 2000), plaintiff, after winning a breach of contract judgment against a corporation, sought to pierce the corporate veil and impose liability upon corporate directors, together with the corporation's accountant and counsel, for fraudulently inducing plaintiff to loan money to the corporation. In its complaint, plaintiff alleged that the accountant and the attorney in their capacity as board members had made misrepresentations and conspired to devise a plan to fraudulently induce plaintiff to loan funds to the corporation so that the chairman and vice-chairman of the board of directors and the CEO of the corporation could use the funds for their personal use. The court held that these allegations set forth a viable basis for joint and several liability under the terms described in Restatement (Second) of Torts §876. *See also Conley v. Boyle Drug Company*, 477 So. 2d 600 (Fla. 4th DCA 1985); *Roos v. Morrison*, 913 So. 2d 59 (Fla. 1st DCA 2005).

D. Aiding & Abetting

A cause of action for aiding and abetting a breach of fiduciary duty requires a plaintiff to establish: 1) a fiduciary duty on the part of a primary wrongdoer; 2) a breach of that fiduciary duty; 3) knowledge of the breach by the alleged aider and abettor; and 4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *See Fonseca v. Taverna Imps., Inc.*, 212 So. 3d 431 (Fla. 3rd DCA 2017).

Refer to the following cases for stating a cause of action for aiding and abetting a fraud: *Perlman v. Wells Fargo Bank, N.A.*, 2014 U.S. App. LEXIS 8497 (11th Cir. 5/6/14) and *ZP No. 54 Ltd. P'ship v. Fid. & Deposit Co. of Md.*, 917 So. 2d 368, 372 (Fla. 5th DCA 2005).