

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

THOMAS S. RICHEY, as Receiver for  
WESTON RUTLEDGE FINANCIAL  
SERVICES, INC., ZAMINDARI CAPITAL,  
LLC, LEXINGTON INTERNATIONAL  
FUND, LLC, a/k/a LEXINGTON  
INTERNATIONAL FUND, INC., and  
OXFORD ADAMS CAPITAL, LLC,

Plaintiff,

vs.

BARRY BEERS, RHONDA BEERS, MALA  
KUMAR, KUMAR RAMALINGAM,  
ZIAD MINKARA, ANTHONY  
MITCHELL, ARTHUR RICE, HARRY  
"HAP" SCHULTZ, and RIVERFRONT  
PROPERTIES, INC.,

Defendants.

CIVIL ACTION NO.

1:07-CV-2736-CC

**ORDER**

This matter is presently before the Court on Plaintiff's Motion for Summary Judgment as to Barry and Rhonda Beers, Ziad Minkara, and Anthony Mitchell [Doc. No. 55].

**I. STANDARD OF REVIEW**

Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When the movant would bear the burden of proof at trial, the movant "must show affirmatively the absence of a genuine issue of material fact." Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991)). The movant "must show that, on all essential elements of its case on which it bears the burden of proof

at trial, no reasonable jury could find for the non-moving party.” Id. If the moving party fails to make this showing, then the motion must be denied and the court need not consider the non-movant’s response to the summary judgment motion. Fitzpatrick, 2 F.3d at 1116. If, however, the movant satisfies this initial burden, the non-movant must “come forward with evidence sufficient to call into question the inference created by the movant’s evidence on the particular material fact.” Id.

A court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988); Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986), *reh’g denied*, 815 F.2d 66 (11th Cir. 1987). However, Rule 56, “[b]y its very terms, . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). The non-movant may not “rely merely on the mere allegations or denials of the [non-movant’s] pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set forth specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e). An issue is not genuine if it is created by evidence that is “merely colorable” or is “not significantly probative.” Anderson, 477 U.S. at 249-50. Substantive law will identify which facts are material. Id. at 248.

In the instant case, the record reflects that Defendants Minkara and Mitchell did not file a response to Plaintiff’s motion for summary judgment, indicating that they do not oppose Plaintiff’s motion. See Local Rule 7.1B. This Court nonetheless may not merely grant the motion on the grounds that it is unopposed; instead, the Court must review all of the evidentiary materials submitted in support of the motion and must indicate that the merits of the motion were addressed. U.S. v. One

Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla., 363 F.3d 1099, 1101-02 (11th Cir. 2004) (noting that the Court need not review all evidence in the record but must at least review the evidence submitted in support of the motion). Plaintiff must meet its burden of establishing entitlement to summary judgment pursuant to the applicable standard.

Defendants Barry and Rhonda Beers (the “Beers Defendants”) submitted affidavits in response to Plaintiff’s motion for summary judgment. The Beers Defendants did not file a brief in opposition to Plaintiff’s motion that cites supporting authority, as required by the Local Rules. Local Rule 56.1B(2)(a)(2). Because the affidavit filed by Mr. Beers contains numbered paragraphs that correspond with the statement of material facts filed by Plaintiff, however, the Court will construe the affidavit to be a response to the statement of material facts. The Court will not, however, consider the supplemental affidavit filed by Mr. Beers [Doc. No. 61] or the supplemental response filed by the Beers Defendants [Doc. No. 63] in ruling on Plaintiff’s motion for summary judgment because these documents were filed without leave of Court and are not allowed by the federal or local procedural rules.

## **II. FACTS**

From February 2004 until May 2006, 300 investors deposited approximately \$30 million in the bank accounts of Weston Rutledge Financial Services, Inc., Zamindari Capital, LLC, Lexington International Fund, LLC, a/k/a Lexington International Fund, Inc. and Oxford Adams Capital, LLC (the “Receivership Companies”). (Plaintiff’s Statement of Undisputed Material Facts in Support of His Motion for Summary Judgment [Doc. No. 55-2] (hereinafter “PSMF”) ¶1.) Almost no funds were returned to the Receivership Companies from these supposed investments. (PSMF ¶2.) Approximately \$18 million of investor funds were not

returned to investors. (PSMF ¶3.) Most investors who invested funds in the Receivership Companies lost all or substantially all of their principal investments. (PSMF ¶4.)

Some investors, including Defendants Barry and Rhonda Beers, Ziad Minkara, and Anthony Mitchell (“Defendants”), received more from the Receivership Companies than they originally deposited. (PSMF ¶5.) The money paid to Defendants in excess of the principal amount of their investments was paid from funds deposited by other investors, rather than from any actual earnings by the Receivership Companies or Defendants on any investments. (PSMF ¶6.)

Barry and Rhonda Beers received \$572,695.69 from the Receivership Companies. (PSMF ¶7.) Plaintiff Thomas S. Richey, the Receiver for the Receivership Companies, contends that this amount includes \$213,845.55 more than they invested. (Plaintiff’s Response to Defendants Barry and Rhonda Beers’ Supplemental Affidavit [Doc. No. 62], p. 2.)<sup>1</sup> Mr. Beers filed an affidavit admitting that he received \$20,000.00 more from the Receivership Companies than he invested. (Defendant’s Affidavit in Opposition of Plaintiff’s Motion for Summary Judgment as to Barry Beers [Doc. No. 57] (hereinafter “Barry Beers Aff.”) ¶2.)<sup>2</sup> Mr. Beers states that he deposited \$545,445.69 into the Receivership Companies, while Plaintiff identifies the amount deposited as \$358,850.14 . (Barry Beers Aff. ¶2; PSMF ¶7; Plaintiff’s Response to Defendants Barry and Rhonda Beers’ Supplemental Affidavit [Doc. No. 62], p. 2.) The amounts that Barry and Rhonda Beers received above their

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<sup>1</sup> Plaintiff initially sought \$230,845.55 in its initial summary judgment filing but has since located evidence of an additional \$17,000.00 deposit made by the Beers Defendants.

<sup>2</sup> Rhonda Beers filed an affidavit stating that she did not sign any documents. She does not, however, state that she did not receive funds from the Receivership Companies.

original deposits were not returns on their investments. (PSMF ¶9.)<sup>3</sup> Their profits were funded, instead, from other investors' deposits to the Receivership Companies. (PSMF ¶10.) Plaintiff Thomas S. Richey, the Receiver for the Receivership Companies, demanded that Barry and Rhonda Beers return the amounts in excess of their original deposit to the Receivership Estate and set out the amounts owed, provided copies of cancelled checks, wire transfer documents, and deposit slips chronicling deposits in and transfers out of the Receivership Companies. (PSMF ¶¶ 11, 12.)

Ziad Minkara deposited \$100,000.00 into the Receivership Companies and received \$130,867.70 back - \$30,867.70 more than he invested. (PSMF ¶¶14, 15.) None of the \$30,867.70 that Ziad Minkara received above his original deposits came from returns on his investments. (PSMF ¶16.) Instead, this amount was funded from other investors' deposits to the Receivership Companies. (PSMF ¶17.) Beginning on May 18, 2007, Plaintiff Thomas S. Richey, the Receiver for the Receivership Companies, demanded that Ziad Minkara return the funds to the Receivership Estate and set out the amounts owed, provided copies of cancelled checks, wire transfer documents, and deposit slips chronicling deposits in and transfers out of the Receivership Companies. (PSMF ¶¶ 18, 19.)

Anthony Mitchell deposited \$178,516.86 into the Receivership Companies and received \$293,231.15 back - \$114,714.29 more than he invested. (PSMF ¶¶21, 22.) None of the \$114,714.29 that Mr. Mitchell received above his original deposit came from returns on his investment; instead, this amount was funded from other investors' deposits to the Receivership Companies. (PSMF ¶¶23, 24.) Beginning

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<sup>3</sup> The affidavit filed by Mr. Beers states that he was told that these amounts came from returns on his investments, but he admits that he has "no idea" where the funds came from. (Barry Beers Aff. ¶¶4-5.)

November 3, 2006, Plaintiff Thomas S. Richey, the Receiver for the Receivership Companies, demanded that Mr. Mitchell return the funds to the Receivership Estate and set out the amounts owed, provided copies of cancelled checks, wire transfer documents, and deposit slips chronicling deposits in and transfers out of the Receivership Companies. (PSMF ¶¶ 25, 26.) Mr. Mitchell voluntarily made two payments totaling \$70,000.00 toward the \$114,714.29 that he received above his principal investment with the Receivership Companies, and \$44,714.29 remains outstanding. (PSMF ¶¶ 28, 29.)

### III. ANALYSIS

Plaintiff contends that the amounts received by Defendants in excess of the amounts they invested are fraudulent transfers. This Court agrees.

The Uniform Fraudulent Transfer Act provides as follows:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) Intended to incur, or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

O.C.G.A. § 18-2-74(a). The Court agrees with Plaintiff's position that the evidence establishes that the Receivership Companies made transfers to Defendants with actual intent to defraud the creditors of the Receivership Companies. The

Receivership Companies were operated as a Ponzi scheme.<sup>4</sup> The amounts that the Receivership Companies paid to Defendants above their initial deposits were not returns on Defendants' investments because none of the initial amounts Defendants transferred to the Receivership Companies were actually invested. Instead, the monies that Defendants received were from new investors.

"Under [the Uniform Fraudulent Transfer Act], transfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception." Quilling v. Schonsky, 247 Fed. Appx. 583, 586 (5th Cir. 2007); see also In re C.F. Foods, LP, 280 B.R. 103, 111 (E.D. Penn. 2002); In re Slatkin, 525 F.3d 805, 814 (9th Cir. 2008). "Courts have routinely applied [the Uniform Fraudulent Transfer Act] to allow receivers . . . to recover monies lost by Ponzi scheme investors." Donell v. Kowell, 533 F.3d 762, 767 (9th Cir. 2008). The simple existence of a Ponzi scheme has been found sufficient to establish actual intent for the purposes of the Uniform Fraudulent Transfer Act. See Slatkin, 525 F.3d at 814. The Court so finds here.<sup>5</sup>

The Court turns to the amount that should be returned to Plaintiff. Plaintiff seeks only the return of the amounts Defendants received in excess of their principal investment. The Uniform Fraudulent Transfer Act supports this type of disgorgement remedy. See O.C.G.A. § 18-2-78; see also Donell, 533 F.3d at 772. As to Defendants Minkara and Mitchell, the amount received in excess of the principal

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<sup>4</sup> A Ponzi scheme is "an investment scheme whereby returns to investors are financed, not through the success of an underlying business venture, but from the principal sums of newly attracted investors." Rasch v. State, 260 Ga. App. 379, 379 n.1, 579 S.E.2d 817, 818 n.1 (2003).

<sup>5</sup> Even if the Court were to find insufficient evidence of actual intent, the Court would find that Plaintiff established that the transfers were made without the exchange of reasonably equivalent value and at a time when the Receivership Companies were insolvent, for the reasons stated by Plaintiff.

investment is undisputed. The Court finds that the receiver is entitled to recover \$30,867.70 from Mr. Minkara and \$44,714.29 from Mr. Mitchell. As to the Beers Defendants, however, there is a dispute regarding their amount of the principal investment in the Receivership Companies, as described in the fact section of this Order. While the Beers Defendants admit that they received some monies in excess of their principal investment, the amount of the Beers' profit is disputed. While Plaintiff urges the Court to reject Mr. Beers' affidavit as self-serving and conclusory, it is a "well-settled principle of law that a party may resist summary judgment by relying upon his own sworn testimony, so long as that testimony is based on personal knowledge." Washburn v. Beverly Enterprises-Georgia, Inc., No. CV 106 051, 2006 WL 3404804 (S.D. Ga. Nov. 14, 2006) (citations omitted); see Price v. Time, Inc., 416 F.3d 1327, 1345 (11th Cir. 2005) ("Courts routinely and properly deny summary judgment on the basis of a party's sworn testimony even though it is self-serving."). This Court will not judge Mr. Beers' credibility in ruling on Plaintiff's summary judgment motion. The amount of funds deposited into the Receivership Companies is a matter within Mr. Beers' personal knowledge, and the Court may not simply ignore Mr. Beers' affidavit because he has failed to attach bank records or other supporting documents. Mr. Beers' affidavit is itself evidence that the Court must consider in ruling on Plaintiff's motion for summary judgment. The Court finds, therefore, that while Plaintiff has established the Beers' Defendants' liability for fraudulent transfer, the amount of the Beers' profits that should be disgorged and returned to Plaintiff is a jury question.

Plaintiff additionally seeks pre-judgment interest on the amounts Defendants received as fraudulent transfers. Plaintiff submits that interest should be calculated from the time Defendants became liable to repay the amounts they received in excess of their principal investments, which Plaintiff identifies as the date

Defendants received the first demand letter from Plaintiff. Georgia law provides that a party recovering monetary damages is entitled to an award of pre-judgment interest if the damages amount is liquidated. O.C.G.A. § 7-4-15. An amount is liquidated when “it is certain how much is due and when it is due.” Dalcor Management, Inc. v. Sewer Rooter, Inc., 205 Ga. App. 681, 683, 423 S.E.2d 419, 421 (1992). The Court agrees with Plaintiff’s position that pre-judgment interest is properly awarded as to Defendants Minkara and Mitchell, and the Court will award pre-judgment interest of seven percent per annum simple interest pursuant to O.C.G.A. § 7-4-2. Because the Court has determined that there is a dispute regarding the amount of the Beers Defendants’ profits, the Court will not award pre-judgment interest on Plaintiff’s claim against them.

#### IV. CONCLUSION

For the above-stated reasons, the Court **GRANTS in part and DENIES in part** Plaintiff’s Motion for Summary Judgment as to Barry and Rhonda Beers, Ziad Minkara, and Anthony Mitchell [Doc. No. 55].

The motion is **GRANTED** as to Defendants Ziad Minkara and Anthony Mitchell. The Clerk of Court is **DIRECTED** to enter judgment in favor of Plaintiff and against (1) Defendant Minkara in the amount of \$30,867.70, plus \$5,035.32 in pre-judgment interest (\$5.91 per day from May 18, 2007 to the present date), plus post-judgment interest and costs, and (2) Defendant Mitchell in the amount of \$44,714.29, plus \$8,981.35 in pre-judgment interest (\$8.57 per day from November 3, 2006 to the date of this Order), plus post-judgment interest and costs.

The motion is **DENIED** as to the Beers Defendants to the extent that the Court finds that the Beers Defendants are liable for amounts received as fraudulent transfers but that there is a genuine dispute as to such amount. The Court will hold a jury trial on this issue at its earliest opportunity and will notify the parties of a trial

date in a separate Order.

SO ORDERED this 16th day of September, 2009.

*s/ CLARENCE COOPER*

CLARENCE COOPER  
UNITED STATES DISTRICT JUDGE