IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA
CASE NO. 12-034123 (07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,
Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.
Defendants.
_____/

DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Defendants, Frank Avellino ("Avellino"), and Michael Bienes ("Bienes") submit this memorandum of law in support of their Joint Motion to Dismiss Plaintiffs' Third Amended Complaint.

Introduction

On June 27, 2014, Plaintiffs filed their Third Amended Complaint ("TAC"). The TAC asserts new claims against Avellino and Bienes for: Fraudulent Misrepresentation (Count X); Fraudulent Inducement (Count XI) and Negligent Misrepresentation (Count XII) as well as a revised claim of Breach of Fiduciary Duty (Count VIII). Each of these newly asserted claims is premised upon the same allegation: "Upon information and belief, in 1992, Defendants Avellino and Bienes advised the Partnerships, through Sullivan, to invest their funds with BLMIS." (TAC, ¶¶ 113, 126, 132 and 138).

Additionally, the TAC sets forth extensive new "facts" involving Avellino and Bienes' prior involvement with A&B, a company that invested with BLMIS, which in 1992 entered into an SEC consent judgment and ceased operations. (TAC, ¶¶ 11-30). The TAC weaves these new

allegations into Plaintiffs' newly asserted contention that Avellino and Bienes formed a relationship with Sullivan to have the Partnerships invest with BLMIS. (TAC, ¶ 20).[1]

On December 10, 2012 (one day short of four years from the public disclosure of the Madoff Ponzi scheme) Plaintiffs filed their initial complaint which asserted claims against Avellino and Bienes for: Count II – Aiding and Abetting a Breach of Fiduciary Duty; Count III – Unjust Enrichment; and Count IV – Money Had and Received. Count II centered on the allegation that Michael Sullivan, the general partner of the Partnerships, allowed Avellino and Bienes to participate in the management of the Partnerships (Compl., ¶ 45(f)). The two remaining claims against Avellino and Bienes sought to recover "Kickbacks" Sullivan paid to Avellino and Bienes.

On December 2, 2013, Plaintiffs filed their Amended Complaint, which added several claims relating to the "Kickbacks", but did not otherwise substantively change Plaintiffs' claims against Avellino.

On January 31, 2014, Plaintiffs moved for leave to file a second amended complaint (the "SAC") which was granted by this Court's February 20, 2014 order. The SAC asserted for the first time allegations that Avellino and Bienes acted as an investment advisors to the Partnerships advising the Partnerships to invest all of their funds in Bernard L. Madoff Investment Securities ("BLMIS"). SAC, ¶¶ 93-96.

[1] These allegations are starkly different and new from the Second Amended Complaint wherein Sullivan was the alleged instigator and mastermind behind the alleged scheme, who paid "kickbacks" to the other Defendants, including Avellino and Bienes. The TAC also drops six defendants as parties.

Argument

I. Plaintiffs' Fraud Claims are Barred by the Statute of Repose

The TAC's newly asserted fraud claims, Counts X and XI, are premised upon the allegation that "[u]pon information and belief, in 1992, Defendants Avellino and Bienes advised the Partnerships, through Sullivan, to invest their funds with BLMIS." TAC, ¶¶ 126, 132.

Florida's statute of repose for fraud claims provides that an action for fraud "must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." § 95.031(2), *Florida Statutes.* The TAC setting forth these new allegations of fraud was filed on June 27, 2014 – twenty-two years after the alleged fraud.

Accordingly, Plaintiffs are precluded from asserting the TAC's fraud claims which, on their face, are barred. *Philip Morris USA, Inc. v. Hess*, 95 So.3d 254, 260 (Fla. 4th DCA 2012).[2] Unlike a statute of limitations, at the end of the time period set forth in a statute of repose – here, 12 years after the commission of the alleged fraud – the cause of action ceases to exist. *WRH Mortgage, Inc. v. Butler*, 684 So.2d 325, 327 (Fla. 5th DCA 1996).[3]

The TAC's negligent misrepresentation claim (Count XII), since it makes the identical allegations as Counts X and XI, should be construed as a fraud claim and thus, also barred by

[2] The First District has certified that it is in conflict with the Fourth District on the issue of whether the trial court reversibly erred in denying a requested jury instructions and verdict question on the statute of repose, section 95.031(2), Fla. Stat. *See R. J. Reynolds Tobacco Company v. Hiott*, 129 So.3d 473 (Fla. 1st DCA 2014); *Philip Morris USA, Inc. v. Buchanan*, 2014 WL 3406430 (Fla. 1st DCA July 14, 2014). However, until the Supreme Court rules on such issue, this court is bound to follow the decision of the Fourth District. *State v. Hayes*, 333 So.2d 51 (Fla. 1976).

[3] Such a bar is particularly appropriate for claims of fraud that are most susceptible to stale memories, lost evidence and witnesses that have disappeared. *Kish v. A.W. Chesterton Company*, 930 So. 2d 704, 707 (Fla. 3rd DCA 2006).

§95.031(2), *Florida Statutes*. *Ostreyko v. B.C. Morton Organization, Inc.,* 310 So.2d 316, 318 (Fla, 3rd DCA 1975) (Negligent misrepresentation actions sound in fraud rather than negligence).

II. Plaintiffs' Newly Asserted Claims are Barred by the Statute of Limitations

A. Fraud Claims

The fraud claims asserted for the first time in the TAC are also barred by the statute of limitations which provides that a fraud claim must be commenced within four years of when the facts giving rise to the claim were discovered or should have been discovered. § 95.11(3)(j), *Florida Statutes.*

The TAC alleges that in 1992 Avellino and Bienes advised Sullivan for the Partnerships to invest all of their assets in BLMIS. (TAC, ¶¶ 113, 126, 132 and 138). The Court can take judicial notice of the fact that the BLMIS Ponzi scheme was publically revealed on December 11, 2008, the latest time by which the facts giving rise to the claim became known. *See, e. g., Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC,* 424 B.R. 122 (SDNY 2010), *aff'd,* 654 F.3d 229 (2d Cir. 2011), *cert. dismissed,* 132 S. Ct. 2712 (2012). Thus, the newly asserted fraud claims filed on June 27, 2014, well more than four years after the date when the facts giving rise to the claim became known or could have been discovered (assuming *arguendo* Plaintiffs could not have discovered the alleged fraud before December 11, 2008) are time barred.

Plaintiffs may contend that the initial complaint filed on December 10, 2012 was filed within four years of the disclosure of the BLMIS Ponzi scheme and thus these new claims fall within the four year Statute of Limitations pursuant to the relation back provision of Rule 1.190(c), Florida Rules of Civil Procedure.

Rule 1.190(c) provides that a newly asserted claim will relate back to the date of the initial filing if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading…" While amendments should be liberally granted, a party cannot defeat the statute of limitations by filing a new cause of action and labeling it an amended complaint. *School Bd. Of Broward County v. Surette,* 394 So.2d 147, 154 (Fla. 4th DCA 1981).

The test to determine whether an amendment sets forth a new cause of action is whether such amendment is based upon the same specific conduct, transaction or occurrence between the parties. An amendment that merely makes more specific that which is already alleged or changes the legal theory will relate back. However, alleging new facts upon which a claim is based wholly separate and distinct from the facts previously alleged will not relate back to the original filing. *Lefebvre v. James,* 697 So.2d 918, 920 (Fla. 4th DCA 1997).

The newly alleged facts – that in 1992 Avellino and Bienes advised the Partnerships to invest in BLMIS – which form the basis for newly asserted claims of fraud, negligence and breach of fiduciary duty, assert new and significantly different conduct wholly separate and distinct from the previously asserted facts and claims of payments made beginning in 2003.[4] These new facts and claims are not based upon the same specific conduct, transaction, or occurrence of the initial complaint and thus, do not relate back to the date of the original filing.[5]

The Supreme Court's recent decision in *Caduceus Properties, LLC v. Graney, 137 So.2d 987* (Fla. 2014), does not change the analysis or outcome. The Supreme Court's decision in

[4] In fact, some of the allegations in the TAC change the facts from the Second Amended Complaint. For example, in the TAC Plaintiffs changed facts pled to now state, upon information and belief (See ¶ 25 in TAC compared to ¶20 in Second Amended Complaint).

[5] Plaintiffs may argue that the claim that Avellino and Bienes advised the Partnerships to invest in BLMIS was first asserted in the Second Amended Complaint (¶ 93). However, Plaintiffs did not seek leave to file the Second Amended Complaint until January 31, 2014, well after the running of the four year Statute of Limitations. Therefore, any claim premised upon such allegation is time barred and should be dismissed.

Caduceus resolved a conflict between the first and fifth districts on the issue of whether an amended complaint which seeks to add as a party a third party defendant relates back to the filing of the third party complaint for the purpose of the statute of limitations. The Court held that an otherwise time barred amendment that names a third party defendant as a party defendant does relate back to the date of the third party complaint as long as the provisions of Rule 1.190(c) are met. *Id.* at 992-993. The Court emphasized that the trial court retains the discretion to deny such claims if they do not arise from the same "conduct, transaction, or occurrence" of the earlier pleading. *Id.* at 994.

The TAC's newly asserted claims based upon conduct which took place twenty-two years ago are time barred.

B. <u>Negligent Misrepresentation and Breach of Fiduciary Duty Claims</u>

Count XII (Negligent Misrepresentation) and Count VIII (Breach of Fiduciary Duty) are also barred by the statute of limitations. These causes of action must be commenced within four years of when the cause of action accrued. § 95.11(3)(a) and (p), *Florida Statutes.* A cause of action accrues when the last element of the cause of action occurs, in this case, damages. § 95.031(1), *Florida Statutes.* Plaintiffs incurred damages when they invested in the Partnerships (alleged to be in 1992) well before four years prior to the commencement of this action.

Because the discovery rule of § 95.031(2)(a), *Florida Statutes,* does not apply to these claims, *Ryan v. Gonzalez,* 841 So.2d 510, 518 (Fla. 4th DCA 2003), the negligent misrepresentation and breach of fiduciary duty claims were barred in the 1990s, and cannot be revived by Plaintiffs filings in this case. Therefore, although these two claims are also based upon the newly alleged conduct that Avellino and Bienes advised the Partnerships to invest in

BLMIS in 1992, and thus the relation back provision of Rule 1.190(c) would also not apply, the Court need not rule on the relation-back doctrine in dismissing these claims as time -barred as of the 1990s.

Plaintiffs may argue that their Breach of Fiduciary Duty claim is based not only on the allegation that in 1982 Avellino and Bienes advised the Partnerships to invest in BLMIS – clearly a time-barred claim – but also on the allegation that Avellino and Bienes received "kickbacks", some of which were received within four years of the filing of the complaint. TAC, ¶ 113. However, Plaintiffs cannot combine time-barred claims with arguably non-time-barred claims (which alleged conduct is separated by more than a decade) to revive a time-barred claim.

III. The TAC's Fraud and Negligent Misrepresentation Claims Fail to Meet the Heightened Pleading Requirements of Rule 1.120(b)

Rule 1.120(b), Florida Rules of Civil Procedure, requires that "the circumstances constituting fraud … shall be stated with such particularity as the circumstances may permit." Failure to do so when challenged by a motion to dismiss is fatal. *Strack v. Fred Rawn Construction, Inc.,* 908 So.2d 563, (Fla. 4th DCA 2005.

The fraud claims of the TAC fail to meet the heightened pleading requirements of Rule 1.120(b). The sole factual allegation supporting Plaintiffs' fraud claims – "Upon information and belief, in 1992, Defendants Avellino and Bienes advised the Partnerships, through Sullivan, to invest their funds with BLMIS" – is woefully inadequate.

To comply with Rule 1.120(b), the fraud claims should allege "…who made the false statement, the substance of the false statement, the time frame in which it was made and the context in which it was made." *Eagletach Communs, Inc. v. Bryn Mawr Inv. Group, Inc.,* 79 So.3d 855, 861-62 (Fla. 4th DCA 2012) (*quoting Bankers Mut. Capital Corp. v. U.S. Fid. &*

Guar. Co., 784 So.2d 485, 490 (Fla. 4th DCA 2001). In addition, it must allege with specificity what each Defendant did or said; it cannot lump them together. *See Fellner v. Cameron*, 2012 WL 1648886 at *4 (M.D. Fla. 2012).

Setting aside the question of whether a fraud claim can even be alleged on "information and belief", the allegation that both Avellino and Bienes purportedly made statements to Sullivan in 1992, without specifying what each allegedly said, to whom and when, fails to provide each defendant with the requisite particularity required for a claim of fraud.

The TAC's Negligent Misrepresentation claim (Count XII) is also subject to and fails to comply with Rule 1.120(b). An action for negligent misrepresentation sounds in fraud rather than negligence. *See Johnson v. Amerus Life Insurance Co*., 2006 WL 3826774 *4 (S.D. Fla. 2006). The specificity requirements for fraud also apply to claims for negligent misrepresentation. *Morgan v. W.R. Grace & Co.*, 779 So.2d 503, 506 (Fla. 2d DCA 2000). Accordingly, since the same general allegations (including those pled on "upon information and belief") are pled for the negligent misrepresentation cause of action as were pled for the fraud causes of action, the negligent misrepresentation claim fails to meet the appropriate specificity requirements and should be dismissed.

IV. The Conspiracy Count Should also be Dismissed

Finally, insofar as Count IX (Civil Conspiracy) has as its object any of these time barred and deficiently pleaded claims (the TAC is silent on the objects(s)), this claim must be dismissed as well.

Conclusion

Counts VIII, X, XI and XII of the Third Amended Complaint, together with the supporting factual allegations set forth in paragraphs 11 through 30, should be dismissed with prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 25th day of July, 2014.

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