

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' JOINT MOTION TO
DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT**

Defendants, Frank Avellino (“Avellino”), and Michael Bienes (“Bienes”) file this Joint Motion to Dismiss Plaintiffs’ Third Amended Complaint (“TAC”), and in support thereof, state as follows:

1. On June 27, 2014, Plaintiffs filed the TAC which asserts new claims against Avellino and Bienes for: Fraudulent Misrepresentation (Count X); Fraudulent Inducement (Count XI), 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).

2. The fraud claims set forth in Counts X and XI are barred by the statute of repose which provides that an action for fraud must be commenced within 12 years after the commission of the alleged fraud. § 95.031(2)(a), *Florida Statutes*. The TAC’s new claims of fraud are based upon alleged fraudulent conduct committed in 1992, well more than 12 years before the institution of this action.

3. The TAC's Negligent Misrepresentation claim (Count XII) is also barred by the statute of repose. This claim makes the identical allegations as Counts X and XI, and thus, should be construed as a fraud claim.

4. The fraud claims 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.¹ §§ 95.11(3)(a) and (j); 95.031(2)(a), *Florida Statutes*.

5. 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), *Florida Statutes*. A cause of action accrues when the last element of the cause of action occurs, in this case, damages. Plaintiffs incurred damages when they invested in the Partnerships, well before four years before the commencement of this action.

6. Plaintiffs' newly asserted claims are not saved by Rule 1.190(c) which 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." Plaintiffs' new claims do not satisfy this requirement. The new claims, premised upon the new allegation that Avellino and Bienes advised the Partnerships to invest in BLMIS, allege new and significantly different conduct not based upon the same conduct, transaction, or occurrence set forth in the initial complaint and thus, do not relate back to the date of the original filing. The fact that the claim that Avellino and Bienes advised the Partnerships to invest in BLMIS was first

¹ The Court can take judicial notice of the fact that the BLMIS Ponzi scheme was publicly revealed on December 11, 2008 at which time damages incurred by the Partnerships – the last element of these causes of action – 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).

asserted in the Second Amended Complaint does not help Plaintiff since Plaintiff 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

7. Additionally, the TAC's newly asserted fraud (and other) claims fail to meet the heightened pleadings requirements of Rule 1.120(b), Florida Rules of Civil Procedure. The allegation: "Upon information and belief, in 1992, Defendants Avellino and Bienes advised the Partnership, through Sullivan, to invest their funds with BLMIS" does not allege fraud with the requisite particularity required by Rule 1.120(b). The fraud claims also fail to attribute specific statements to each Defendant, but merely lumps them together.

8. The TAC's Count XII of Negligent Misrepresentation also fails to plead with specificity as required by Rule 1.120(b). Since a claim for negligent misrepresentation sounds in fraud rather than negligence, the specificity requirements for fraud apply to such a claim. This claim is premised upon the same allegation as the fraud claims which lacks the requisite specificity.

9. 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.

WHEREFORE, Defendants Frank Avellino and Michael Bienes request this Court to enter an order dismissing Counts VIII, X, XI and XII of the Third Amended Complaint with prejudice and striking paragraphs 11 through 30 of the Third Amended Complaint which support such claims.

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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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