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' REPLY IN SUPPORT OF THEIR JOINT MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Defendants, Frank Avellino ("Avellino"), and Michael Bienes ("Bienes") file this Reply in further support of their Joint Motion to Dismiss Plaintiffs' Third Amended Complaint ("TAC").

Introduction

Defendants seek to dismiss Plaintiffs' newly asserted fraud and negligent misrepresentation claims which are premised upon a single allegation that in 1992 Avellino and Bienes advised the Partnerships to invest in BLMIS without revealing that BLMIS was a Ponzi scheme. TAC, ¶¶ 113, 126, 132 and 138. These claims are untimely and defective.

Plaintiffs' Response attempts to avoid the clear application of Florida's statute of repose for fraud claims by claiming that Plaintiffs continuously relied on Defendants' 1992 assertion in investing in BLMIS. However, the TAC contains no such allegations and Plaintiffs' interpretation of the statute of repose is erroneous.

Plaintiffs' contention that their newly asserted claims were brought within the applicable four year statute of limitations is premised upon a misapplication of the delayed discovery rule

and an erroneous interpretation of the relation back provision of Rule 1.190(c), Florida Rules of Civil Procedure.

Further, these newly asserted fraud claims fail to meet the heightened pleading requirements of Rule 1.120(b), Florida Rules of Civil Procedure.

Argument

I. Plaintiffs' Fraud and Negligent Misrepresentation Claims (Counts X, XI and XII) Are Barred By the Statute of Repose

Plaintiffs attempt to avoid the application of statute of repose that bars their fraud and negligent misrepresentation[1] claims by implying (since they do not allege) that they continued to detrimentally rely on Defendants' 1992 omissions by the Partnerships' continued investments in BLMIS. This argument is flawed both legally and factually.

Plaintiffs' TAC alleges a single omission made by Avellino and Bienes in 1992 to support their newly asserted claims. Specifically, Plaintiffs allege that in 1992 Avellino and Bienes advised the Partnerships to invest with BLMIS and failed to disclose to the Partnerships that BLMIS was a Ponzi scheme (TAC, ¶¶ 126, 127, 132, 133). The detrimental reliance on this alleged omission was the Partnerships investing their funds in BLMIS (TAC, ¶¶ 130, 136). There are no other allegations of any further omissions or misstatements by Avellino and Bienes in the TAC, and thus, any investments in reliance by the Partnerships, whether in 1992 or later, would be in detrimental reliance of the alleged omissions in 1992. Since Plaintiffs did not file their lawsuit against Defendants Avellino and Bienes until 20 years later on December 10, 2012 (and did not assert these new claims until June 27, 2014), they are barred by the 12 year statute of repose. The applicable statute of repose could not be clearer: an action for fraud "must be

[1] Plaintiffs' allege the exact same allegations in their negligent misrepresentation cause of action as fraud.

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.* Plaintiffs newly asserted claims to not comply.

Cases cited by Plaintiffs do not support their position. *Philip Morris Inc. v. Cohen*, 102 So.3d 11 (Fla. 4th DCA 2012), contrary to Plaintiffs' argument, did not find that "…even if the defendant made the fraudulent statement more than 12 years from the filing of the complaint, the statute of repose did not bar the plaintiffs' claim if the plaintiff continued to rely on that statement after that date". The Court stated, "…appellee's fraudulent concealment claim had to be based on conduct that occurred after May 5, 1982[2] – she must prove that Nathan relied upon statements or omissions by appellants made after that date. The jury should have been instructed accordingly." *Id.* at 15. (emphasis supplied). Plaintiffs have not alleged any statements or omissions made by Avellino and Bienes after 1992 that they detrimentally relied upon.

Similarly in *Philip Morris USA, Inc. v. Hallgren*, 124 So.3d 350 (Fla. 2d DCA 2013), unlike in the instant case, the plaintiff alleged that the tobacco companies continued to engage in pervasive advertising intended to conceal the health hazards of smoking cigarettes that continued up to the death of the plaintiff, which was an ongoing pattern of concealment by defendant, and detrimentally relied on by plaintiff. No such allegations are made in the TAC.

Plaintiffs' misplaced reliance on *Hallgren* is made obvious by *Laschke v. Brown & Williamson Tobacco Corporation*, 766 So.2d 1076 (Fla. 2d DCA 2000), upon which *Hallgren* relied for the statement: a "statute of repose begins to run on a claim for fraudulent concealment based on an ongoing pattern of concealment when the last act of concealment on which the

[2] The Engle case was filed on May 5, 1994, and thus, the 12 years started in 1982.

plaintiff relied occurs.", quoted by Plaintiffs (Response, pp. 11-12). In *Laschke,* unlike here, plaintiffs alleged "an ongoing and continuous conspiracy to commit fraud…" *Id.* at 1078-79. The TAC makes no such allegation. The only allegation of omission by Avellino and Bienes is the single statement made in 1992.

Walter v. Avellino, 2014 WL 1663332 (11th Cir. Apr. 28, 2014) cited by Plaintiffs, has no relevance to this case. That action involved allegations of federal securities fraud and the issue on appeal related to the application of inquiry notice, a standard unique to the federal securities laws. The federal securities laws' statute of repose raised on appeal had not been raised before the trial court. Since the statute of repose had not been raised before the trial court, and there had been one specific investment made that occurred after the time limitation of the statute of repose, the court reversed the trial court's dismissal of the complaint with directions to the trial court to consider the arguments of statute of repose, which has yet to be ruled upon. There were no rulings or holdings made by the Eleventh Circuit relating to the continuing fraud argument made by plaintiff, which is also a provision unique to the federal securities laws at issue in that action which has no relevance here.

Plaintiffs have failed to allege any fraudulent omissions or statements made by Avellino or Bienes after 1992 that they relied upon and thus their fraud counts (Counts X and XI) as well as Count XII (Negligent Misrepresentation) should be dismissed with prejudice based on the statute of repose.

II. Plaintiffs' Fraud Claims are Barred By The Statute of Limitations

Plaintiffs contend that the fraud could not have been discovered within four years of the discovery of the Madoff Ponzi scheme, because they have pled that "only after gaining access to

the Partnerships' books and records that the Conservator was able to uncover the improper activities alleged." Response, p. 5. Plaintiffs' argument is without merit.

Plaintiffs' fraud claims against Avellino and Bienes are based on allegations that in 1992 Avellino and Bienes advised the Partnerships to invest their funds with BLMIS, and failed to disclose to the Partnerships that BLMIS was a Ponzi scheme. TAC ¶¶ 126, 127. Based on these allegations it is undisputed the Partnerships knew in 1992, when the alleged advice and omissions were made, that their investments were in BLMIS. Accordingly, in 2008, when the world was put on notice that Madoff was a Ponzi scheme, the facts giving rise to the fraud claim were known by the Partnerships as well in 2008.

Plaintiffs attempt to avoid the statute of limitations arguing that the Conservator was unable to uncover the "improper activities alleged" until it gained access to the Partnerships' books and records. This is slight-of-hand. The Conservator is not suing in his own right. The Conservator is merely bringing the claims of the Partnerships, and thus, steps in the shoes of the Partnerships. *See, Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. 2d DCA 2003). The Partnerships always had their own records. Whether the Conservator has access to the Partnerships' records is immaterial. Accordingly, since the Partnerships knew in 1992 that their investments were in BLMIS, and the Madoff Ponzi scheme was revealed in 2008, the Partnerships, a/k/a the Conservator, knew the facts giving rise to their fraud claims in 2008.

Further, the review in 2011 of the Partnerships' books and records, purportedly revealed that the general partners' monies alleged were used to pay kickbacks to Defendants and that Sullivan allegedly inappropriately distributed Partnership funds from the capital contributions of other general partners, instead of from the Partnerships' profits (TAC, ¶¶ 46 and 47). There are

no allegations in the TAC that the books and records revealed for the first time that the Partnership assets were invested in BLMIS. Accordingly, Plaintiffs are barred by the four year statute of limitations for fraud, and thus, their new claims for fraud (Counts X and XI) as well as Count XII (Negligent Misrepresentation) should be dismissed with prejudice.

III. Plaintiffs' Claims Do Not Relate Back To The Original Complaint

Plaintiffs argue that the new causes of action they have alleged in the TAC arise out of the same occurrences and transactions alleged in the original complaint "…because they relate to Defendants using the Partnerships and Sullivan as front men to invest in BLMIS while omitting the fraudulent nature of the entity". Response, p. 8. However, contrary to Plaintiffs' argument, no such occurrences, transactions or facts are alleged or raised in the Original Complaint.

In the Original Complaint the allegations are that the Partnerships were formed to serve as an investment club (¶13); the investments were to be invested in BLMIS (¶15); the investors' monies were used to pay Sullivan in management fees, assets were funneled to Sullivan and other Defendants in the form of "commissions" or "referral fees" (¶¶22 and 23); and that Sullivan with his co-conspirators (all the other Defendants) essentially created a Ponzi scheme by which they took investors monies, did not invest the monies and paid themselves monies in management fees and "kickbacks" (¶¶25, 26, 27). Thus, the Original Complaint focused on the alleged Ponzi scheme created by Sullivan and his co-conspirators, including all named Defendants, not just Avellino and Bienes, and that the Defendants, including Avellino and Bienes received "kickbacks" from the Partnerships, while Sullivan paid himself excessive management fees.

In the Original Complaint there is no mention of, nor notice to Avellino and Bienes, of those allegations alleged in the TAC that they advised the Partnerships to invest in BLMIS so that they (Avellino and Bienes) could use the Partnerships and Sullivan as front men to continue the Madoff Ponzi scheme, knowing at the time that BLMIS was in fact a Ponzi scheme. These "facts" refer to a completely different occurrence and transaction than that which was initially pled in the Original Complaint.

The first time any such allegations were included was in the Second Amended Complaint. Not only was the Second Amended Complaint filed after the running of the four year statute of limitations, but it too did not put Avellino and Bienes on notice of what new claims would be asserted in the TAC. In the Second Amended Complaint Plaintiffs alleged that Avellino and Bienes advised Sullivan and the Partnerships to invest their monies in BLMIS (¶20). There is no mention in that version of Plaintiffs' complaint that in 1992 Avellino and Bienes had knowledge that BLMIS was a Ponzi scheme and they were using Sullivan and the Partnerships as "front men" as now alleged in the TAC.

These newly asserted facts and claims do not satisfy the requirement of Rule 1.190(c) that they "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Alleging new facts upon which a claim is based separate and distinct from the facts previously alleged will not relate back to the original filing. *Lefebrve v. James*, 697 So.2d 918, 920 (Fla. 4th DCA 1997).

Plaintiffs continue to change their version of the facts and theories of causes of action against Defendants Avellino and Bienes in each new complaint. Plaintiffs cannot defeat the

statute of limitations by filing new causes of action and labeling them an amended complaint. *School Bd. Of Broward County v. Surette,* 394 So.2d 147, 154 (Fla. 4th DCA 1981).

IV. Plaintiffs' Claims For Negligent Misrepresentation and Breach of Fiduciary Duty Are Time Barred

As set forth in Defendants' memorandum in support of their motion to dismiss, the discovery provision of §95.031(2)(a), *Florida Statutes,* does not apply to claims of negligent misrepresentation or breach of fiduciary duty. The delayed discovery provision applies to claims of fraud, products liability, professional and medical malpractice and intentional torts based on abuse only. *Ryan v. De Gonzalez,* 841 So.2d 510, 518 (Fla. 4th DCA 2003), quoting *Davis v Monahan,* 832 So. 2d 708, 709-10 (Fla. 2002).

Lopez-Infante v. Union Cent. Life Ins. Co., 809 So.2d 13 (Fla. 3d DCA 2002) cited by Plaintiffs does not change this proposition. Although the plaintiff in *Lopez-Infante* brought claims for fraud in the inducement, negligent misrepresentation, breach of contract and fraud, the court in *Lopez-Infante* only addressed the issue of whether plaintiff successfully stated a cause of action for fraud. In ruling that the complaint asserted a valid claim for fraud, the court noted that the plaintiffs' continuous payments of premiums based upon misrepresentations constituted an ongoing fraud which continued until plaintiffs stopped making payments. The court did not address the other causes of action raised by the plaintiff in that case. This decision provides no support for Plaintiffs' contention that the delayed discovery provisions apply to claims other than those set forth in the statute, which does not include claims for Negligent Misrepresentation or Breach of Fiduciary Duty.

Defendants rely on their arguments set forth in their Motion to Dismiss and Memorandum relating to the fiduciary duty cause of action. Contrary to the Plaintiffs' argument,

a party cannot revive an indisputably time-barred claim (breach of fiduciary duty based on events in 1992) by improperly pleading it together with another claim (breach of fiduciary duty based on payments made in the mid to late 2000(s), which is what Plaintiffs have done here.

VI. Plaintiffs' Fraud And Negligent Misrepresentation Claims Are Not Adequately Pled

Plaintiffs have failed to substantively address the arguments raised in Defendants' Motion to Dismiss and Memorandum that Plaintiffs' claims of Fraud and Negligent Misrepresentation fail to satisfy the pleading requirements of Rule 1.120(b), Florida Rules of Civil Procedure. Specifically they have failed to address what specific alleged statement(s) or omission(s) was made by each individual Defendant; they rely instead on their allegations which lump Defendants Avellino and Bienes together. TAC, ¶¶ 126, 132 and 138. This is not proper pleading of fraud or negligent misrepresentation claims, which claims should be dismissed. Indeed, the need for specificity is especially great here given that the events occurred over two decades ago, and the claims are subject to the statute of repose and statute of limitations. Plaintiffs' complaint about the motion to dismiss rings hollow when Plaintiffs have studiously avoided pleading their twenty year old fraud claim with the required specificity.

VII. Conclusion

On June 27, 2014, Plaintiffs' asserted entirely new and different claims against Avellino and Bienes premised upon a purported omission made in 1992. These claims are time barred. Defendants' motion to dismiss should be granted in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being sent by electronic service via the Florida Courts E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 to all parties on the attached service list this 18th day of August, 2014.

/s/Gary A. Woodfield

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