IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D18-3563

LOWER TRIBUNAL CASE NO. CACE 12-034123 (07)

PHILIP J. VON KAHLE,

Appellant,

v.

FRANK AVELLINO,

Appellee.

APPELLANT PHILIP J. VON KAHLE'S REPLY BRIEF

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Notwithstanding Frank Avellino's ("Avellino") arguments to the contrary, and as erroneously concluded by the trial court, the FAC[1] should have been found to relate back to the filing of the IC. This is because the allegations of both complaints involve the fact of funds being invested in BLMIS, a Ponzi scheme, which necessarily included funds that were to be invested in BLMIS but were misappropriated by, among others, Avellino and Bienes, as a result of their significant and improper involvement in the management of, and exercise of control over, the Partnerships. *All* claims and losses suffered by the Partnerships arose or otherwise derive from the same conduct, transaction, or occurrence as contemplated by Fla. R. Civ. P. 1.190(c) which is to be "liberally construed and applied."[2] Avellino, like the trial court, erroneously focused on the assertion of additional claims and expanded damages, and the fact that the trial had to be rescheduled. None of those things, individually or collectively, warranted dismissal of the FAC. This Court should reverse.[3]

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[1] All capitalized terms not defined herein shall have the same meanings ascribed to them in Von Kahle's Initial Brief ("IB").

[2] *Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So. 3d 487, 490 (Fla. 4th DCA 2014) (quotation omitted).

[3] Avellino references rulings by the trial court on summary judgment, Answer Brief ("AB") at 2, 17, 28-29, 36 n.30; however, because the rulings post-dated the Dismissal Order any references to those rulings are improper and should be stricken. *See Smithers v. Smithers*, 765 So. 2d 117, 118 (Fla. 4th DCA 2000) ("Those issues had not yet been resolved by the trial court at the time it entered the orders herein

(i) The trial court erred in finding that the FAC did not relate back to the IC.

Contrary to Avellino's statement, AB at 4, Von Kahle's Statement of Facts is not "intentionally skewed" to lead the Court to believe that from the filing of the IC the Partnerships were seeking to recover all of the funds they invested in BLMIS. Von Kahle acknowledges that the scope of damages sought in the IC was for misappropriation of funds that were to be invested in BLMIS, however, the loss of those funds cannot be separated from investor funds that were actually invested in BLMIS because they all derived from the same source of investor money, and were lost as a result of improper level of control that Avellino exercised over the Partnerships. Thus, Avellino's statement is wide of the mark. The underlying issue is whether the allegations in the IC sufficiently apprised Avellino of the general factual situation concerning BLMIS and the Partnerships' relations with it, specifically including the wrongful exercise of authority over the Partnerships by Avellino (and Bienes), IC, ¶38(f), losses suffered by the Partnerships in connection with funds invested in BLMIS, *id.*, ¶30, and funds that were supposed to be invested in BLMIS but were instead misappropriated by the Defendants, including Avellino, *id.*, ¶32. As explained below, they do.

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appealed, and we may not consider subsequent events in the trial court as to any effect they might have on these rulings."). Accordingly, it is improper for this Court to consider any summary judgment rulings made by the trial court after entry of the Dismissal Order, and any statements in the AB addressing them should be stricken.

That the damage model expanded from funds specifically misappropriated by Sullivan, Avellino and others, based on facts and information developed as a result of the Partnerships' investigation, inclusive of the discovery of information concerning the significant level of control that Avellino exercised over the partnerships, *see* (R.7082) ("So these arguments, well, they've [Von Kahle] changed this what they're saying now, that's *because they discovered more, in my view. They've learned more*.") (emphasis added), does not preclude relation back.

The IC clearly and specifically contains allegations that notified Avellino of the fact that the damages would likely include funds lost by the Partnerships as a result of their investments in BLMIS in addition to losses sustained by the misappropriation of funds that were to be invested in BLMIS but were instead stolen at Avellino's direction. Specifically, the IC alleges, among other things, that (i) "[t]he Partnerships collectively invested tens of millions dollars in BLMIS," IC, ¶16; (ii) "[t]he Partnerships lost millions of dollars," *id.*, ¶17; (R.1491) (third bullet point); and (iii) "millions of dollars were mismanaged, inappropriately accounted for, or misappropriated at the direction of the Defendants," *id.*, ¶19.

The IC further alleges, among other things, that "Avellino and Bienes knew or should have known that millions of dollars of Partnership assets were being misappropriated." IC, ¶32. More importantly, there are numerous allegations of the "significant, inappropriate and unlawful level of control over the Partnerships" by

Avellino, *id.*, ¶¶31(b), 32 ("Avellino was active in the management of the Partnerships itself."), and 38(f) ("Allowing Avellino and Bienes to participate in the management of the Partnerships."). These control allegations, when viewed in the context of the allegation that "[t]he Partnerships' investments were supposed to be invested with … BLMIS," IB, ¶14, "[t]he Partnerships collectively invested tens of millions of dollars in BLMIS," IC, ¶16, and they "lost millions of dollars," *id.*, ¶17, were sufficient to put Avellino on notice of the general factual situation concerning the relationship and interactions between the Partnerships and BLMIS, such that claims for all losses suffered by the Partnerships in connection with its investments in BLMIS—beyond funds that were to be invested in BLMIS but instead were misappropriated—was potentially at issue. In short, there are sufficient allegations in the IC that should have prompted the trial court to conclude that the allegations in the FAC are within the scope of additional damages sought, as well as the additional claims asserted, related back to the filing of the IC.

Avellino, misconstruing the allegations in the IB, states that Von Kahle misquotes the record, AB at 5, but the quotes to which he refers ("This is not a simple case" and "the biggest fraud in the history of the United States of America"), are direct quotes from the record, (R.7081), and he neglects to acknowledge the very next sentence which ties the Partnerships to the Ponzi scheme run by Bernard Madoff through BLMIS. IB at 4. And while the case at bar is not remotely as large as the

Madoff-inspired fraud—there was no statement that it was—it is significant nonetheless as the Partnerships suffered many millions of dollars in losses as a result of actions taken by Avellino through his substantial and inappropriate exercise of control over the Partnerships, which necessarily includes the investments in BLMIS in addition to the significant funds that were improperly diverted.

Avellino's statement that Von Kahle is attempting to "create bias against Avellino," AB at 5, is baseless. The allegations directed at Avellino (and Bienes) concerned wrongdoing in connection with their direct involvement in management of, and the improper and unlawful exercise of control over, the Partnerships, and anything and everything that flowed therefrom, specifically including investments in BLMIS and funds that were to be invested in BLMIS but were wrongfully misappropriated. Even if those allegations reflect badly on Avellino, which is what he is really complaining about, it is of no moment.

Avellino levels claims of "distortion," among other things, with record citations employed by Von Kahle, but in actuality Avellino is misconstruing the record. For example, Avellino claims that paragraphs 13-16 of the IC do not support the proposition that A&B, like its predecessor, operated a feeder fund for BLMIS. AB at 6. However, paragraph 13 of the IC alleges that each of the Partnerships was formed as an "investment club," paragraph 15 alleges that "[t]he Partnerships investments were supposed to be invested with…BLMIS," and paragraph 16 alleges

that "[t]he Partnerships collectively invested tens of millions of dollars in BLMIS." IC, ¶¶13, 15 and 16. Moreover, the IC alleges that Avellino used Sullivan as a front man to operate partnerships so they could continue to raise and pool funds from third parties to invest in BLMIS, while avoiding the scrutiny of regulators. *Id.*, ¶31(b). Contrary to Avellino's statements these allegations do, in fact, support the statement that A&B operated a feeder fund to facilitate exclusive investments with BLMIS.

The allegation of A&B's predecessor functioning as a feeder fund was explicitly alleged in the FAC, also cited to by Von Kahle, but ignored by Avellino in his AB. *See, e.g.,* FAC, ¶12 ("Alpern and Avellino operated a feeder fund that pooled money from their customers for investment with BLMIS. That feeder fund was called Alpern & Avellino."). This is only a small subset of examples where Avellino hypocritically misstates facts in the record and does not help his cause in seeking affirmance of the flawed result reached by the trial court.[4]

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[4] Avellino claims that the Brief improperly combines citations to 2 paragraphs in the IC regarding investments in BLMIS. AB at 6. There is no rule that prohibits a litigant from citing to multiple allegations in a complaint together. Contrary to Avelino's statement, the allegation in ¶17 of the IC that the Partnerships "lost millions of dollars" does relate to funds invested in BLMIS, *see* (R.1491, 3d bullet point), which is inseparable from the millions of dollars that were "inappropriately distributed to assorted general partners," and "mismanaged, inappropriately accounted for, or misappropriated at the direction of the Defendants, IC, ¶¶18 and 19, as those funds all derive from investor funds which were to be invested in BLMIS. Avellino states that citations to allegations in the IC regarding misappropriated funds concerns payments to Sullivan and other Defendants—like Avellino—not monies invested in BLMIS. AB at 6. That is correct; however, Von Kahle does not claim that the funds misappropriated were invested in BLMIS, but that those funds were supposed to be

A theme advanced by Avellino is that facts about him exercising control over the Partnerships in the FAC are "new," since in the IC he was only "allowed to be involved in the management of the Partnerships." AB at 12. The IC, in fact, contains allegations of the actual exercise of "control" of the Partnerships by Avellino beyond his improper involvement in management. IC, ¶¶31(b) (Avellino was given "significant, inappropriate and unlawful *control* over the Partnerships.") (emphasis added); *see also* IC, ¶31(c) (referencing Sullivan's co-conspirators). Along those lines, and contrary to Avellino's contention (i.e., distortion), AB at 12 n.12, the FAC does not allege that Sullivan "exclusively" controlled the Partnerships. *See* FAC, ¶60 ("Sullivan, through the Partnerships *or entities that he exclusively controlled*....") (emphasis added).

Avellino claims there are no allegations in the IC regarding BLMIS being a Ponzi scheme. AB at 7-8, 24. This claim must be viewed in the context that, at the

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invested in BLMIS but were misappropriated by multiple Defendants, including Avellino. *See* IC, ¶¶19, 22, 23, 26, 31(b). Those damages are appropriately attributable to Avellino given allegations in the IC and FAC of his active participation in management of, and significant and improper exercise of control over, the Partnerships and funds they obtained for investment in BLMIS, regardless of whether they were actually invested with BLMIS, as well as the improper fees and commissions Avellino was alleged to have received or facilitated Sullivan receiving. IC, ¶¶23, 31(b), 32, 34, 43, 44, 46. Von Kahle did not quote from ¶52 of the IC as Avellino alleges. AB at 7. In actuality, the language referenced in the "same" parenthetical referred to by Avellino was from ¶46 of the IC. Regardless, Von Kahle erroneously added quote marks around the sentence in his IB when he, in fact, meant to paraphrase ¶46 of the IC.

motion to dismiss stage, "…all reasonable inferences arising [from allegations in a complaint] are allowed in favor of the plaintiff."[5] Viewed this way, allegations that the investments of the Partnerships which were formed to invest in BLMIS were "[l]ike many Ponzi schemes and investment frauds," "grounded in trust," IC, ¶¶15, 16, 25; *see also* IC, ¶20 (noting that after implosion of Madoff Ponzi scheme several partners of the Partnerships sought access to the Partnerships' books and records), and allegations of the exercise of control over the Partnerships by Avellino in the IC (¶31(b)) and FAC (e.g., ¶¶25, 30, 69-71), sufficiently alleged BLMIS was a Ponzi scheme.[6] The subsequent allegations in ¶¶26 and 30 of the IC make it clear that the Partnerships were not operated as a Ponzi scheme and show that, though inartfully

[5] *Wallace v. Dean*, 3 So. 3d 1035, 1042-43 (Fla. 2009) (quotation omitted).

[6] Avellino claims that the statement in ¶25 of the IB that the "roots" of the investments in BLMIS were based on trust from participation in church referred to the actor as Sullivan. AB at 8, 24. Paragraph 25 of the IC cited to by Von Kahle at ¶25 of the IB did, in fact, identify the actor in question as Sullivan. Avellino questions a statement in the IB regarding Avellino and Bienes' involvement in management of, and exercise of control over the Partnerships specifically regarding funds invested in BLMIS. AB at 8. However, since the Partnerships were formed as investment clubs to invest solely in BLMIS, IC, ¶¶13, 15, control over investments in BLMIS necessarily follows. Regarding statements in the IB concerning breach of fiduciary states that the only breach of fiduciary duty claim in the IC was against Sullivan, AB at 9; that is correct as Avellino and Bienes were claimed to have assisted in those breaches (Count II), and Von Kahle doesn't state otherwise. And both statements correctly reference control over the Partnerships as alleged in the IC and FAC, which control helped facilitate Avellino's assisting in Sullivan's breach of fiduciary duties. The inference from the allegations of exercise of control, *Wallace v. Dean*, 3 So. 3d at 1042-43, supports the further allegation that Avellino and Bienes knew or should have known that BLMIS was a Ponzi scheme.

drafted, ¶25 references BLMIS as being a Ponzi scheme. Even if the foregoing contradicts anything undersigned counsel stated at the hearing regarding paragraph 73 of the FAC (R.7094, referring to TAC as containing allegations that BLMIS was a Ponzi scheme, that Avellino and Bienes knew or should have known that fact and failed to disclose it), the allegations in the IC referenced above govern. And contrary to Avellino's contention, AB at 17, the trial court did not find any allegations in the FAC contradicted allegations in the IC.

On *de novo* review no deference is given to the trial court's judgment (*i.e.*, analysis).[7] The trial court's conclusion that the FAC did not relate back to the IC is flawed since it focused on the existence of expanded claims and damages. That much is conceded by Von Kahle, but neither or both preclude relation back.

As confirmed in *Kopel v. Kopel*, 229 So. 3d 812, 815 (Fla. 2017), the text of Rule 1.190(c) controls the relation back analysis. The *Kopel* Court quoted *Flores v. Riscomp Indus., Inc.*, 35 So. 3d 146 (Fla. 3d DCA 2010), apropos here, as holding that "[a]lthough additional allegations of fact were inserted into the complaint as it progressed through its steps, and the legal theories of recovery were supplemented and modified, the substantive factual situation remained the same as that found in the original complaint." *Kopel*, 229 So. 3d at 818; *Flores*, 35 So. 3d at 148 ("We

[7] *Van v. Schmidt*, 122 So. 3d 243, 246 (Fla. 2013).

have articulated the test to be whether the original pleading gives fair notice of the general fact situation out of which the claim…arises.") (quotation omitted).

Additional allegations of fact were set forth in the FAC, which also asserted additional legal theories of recovery, and sought expanded damages—a fact erroneously harped on by Avellino and the trial court. Nevertheless, the underlying, substantive factual situation of the Partnerships involvement with BLMIS, as supplemented and modified as Von Kahle and his predecessor proceeded through the discovery process, including Avellino's significant involvement in management of, and improper exercise of control over, the Partnerships remained the same as set out in the IC. Thus, *Flores* supports reversal here.[8] The assertion of claims for damages, principally losses suffered by the Partnerships beyond funds misappropriated by the Defendants, relates back given allegations of significant and improper exercise of control exercised by Avellino over the Partnerships in the IC and FAC.

It is the consistent allegation of control that makes damages suffered by the Partnerships properly the subject of relation back to the IC, including monies invested in BLMIS claimed in the FAC in addition to unjust fees, commissions and/or kickbacks. Avellino contends that even if allegations of control were relevant to the new claims they only concern aiding and abetting Sullivan in his breach of

[8] *See also Anderson v. Epstein*, 202 So. 3d 893, 899 (Fla. 3d DCA 2016).

fiduciary duty to the Partnerships. AB at 26 n.23. That contention does not hold water given the allegations in paragraph 31(b) of the IC that Sullivan, who was a person who agreed to act as a "front man" for the Partnerships at Avellino's direction. That Sullivan acted as a "front man" supports and is consistent with the claims asserted in the FAC as well as the additional damages suffered by the Partnerships of funds invested with BLMIS. Accordingly, and for the reasons explained above, Avellino's unwarranted and otherwise improper spin on Von Kahle's argument, AB at 23, should be summarily rejected by the Court.[9]

(ii) The Court should reject Avellino's contention that, even if claims in the FAC relate back to the IC, the trial court appropriately dismissed the FAC with prejudice.

Avellino argues that, even if the contested claims in the FAC relate back to the IC, dismissal of those claims was appropriate under Rule 1.190(a) which gives a trial court discretion to deny leave to amend "if it is so late in the proceedings that the opposing party would be unfairly prejudiced or the privilege to amend has been abused." AB at 31. In support of this purported two-part standard Avellino cites to

[9] The Court should also reject *Lefebvre v. James*, 697 So. 2d 918 (Fla. 4th DCA 1997), cited to by Avellino, AB at 27-28, as distinguishable. That case involved an initial claim for deficient pig feed, and a second proposed claim for negligent delivery of pig feed which the Court found would not relate back as it would constitute a new cause of action. Here, the claims asserted in the FAC appropriately relate back to the IC because they are based on funds invested in BLMIS, or due to be invested in BLMIS but misappropriated, and losses suffered by way of significant and improper exercise of control by Avellino over the Partnerships in dealing with investor funds, all of which were alleged in the IC.

Fla. R. Civ. P. 1.190(a) and *Caduceus Props., LLC v. Graney*, 137 So. 3d 987, 994 (Fla. 2014). *Id.* However, this argument was not raised with the trial court and was, therefore, waived.[10] And Rule 1.190(a) does not say what Avellino says it says. Moreover, after the word "prejudice" in *Caduceus*, Avellino omits the following language from the decision, "and other options, such as a continuance would be unfair to either party," and in its place Avellino substitutes "or the privilege to amend has been abused." AB at 31, as if those words had actually been written by the Supreme Court. Yet they were not.

Avellino contends that Von Kahle has abused the privilege to amend, AB at 32-33; however, even if that was the legal standard (it is not), the trial court never made such a determination. And the trial court's statement that Von Kahle—the successor fiduciary for the Partnerships—was learning more facts as the case progressed, (R.7082), refutes Avellino's contention. As to alleged prejudice, in conclusory form, Avellino raises the specter of *unidentified* evidence being "lost, discarded and/or destroyed, memories of [*unidentified*] witnesses faded, and [*unidentified*] witnesses missing, disappearing or deceased." AB at 33. The only factual support for these what-ifs is that Bienes passed away, AB at 35; however, the only appellant in this appeal is Avellino.

[10] *See, e.g., J.W. Rolle Dev. Co. v. Neuman*, 910 So. 2d 349, 350 (Fla. 4th DCA 2005).

As far as further discovery regarding Avellino's knowledge that BLMIS was a Ponzi scheme, and his failure to disclose same, that discovery would be limited and, in fact, has otherwise already occurred. Bernie Madoff was deposed in this matter (R.2533-2534), and a subpoena has been issued to Irving Picard as Trustee of BLMIS for the documents related to those claims. (R.1439-1440). There can be no dispute the parties engaged in substantial discovery on the issue of Avellino's knowledge that BLMIS operated as a Ponzi scheme. See (R.5985-5986, ¶¶19-20).

Also, there is no real dispute that BLMIS was, in fact, operated as a Ponzi scheme, or that Avellino never disclosed that fact. Now that the trial has been taken off the trial calendar, and will need to be rescheduled if Von Kahle prevails on appeal, there will be ample time for the limited discovery that needs to be taken. Hence no prejudice, let alone "unfair prejudice," will befall Avellino if the Dismissal Order is reversed. And contrary to his assertion, AB at 35, Avellino's testimony on the issue of BLMIS functioning as a Ponzi scheme and the lack of disclosure will suffice without trial testimony from Bienes, who was deposed on that issue.

Finally, that dismissal of the TAC was without prejudice, AB at 31, refutes Avellino's contention that dismissal was based on statute of limitations and repose grounds. *Id.* The order granting the motion to dismiss the TAC (R.1342) does not identify the bases for dismissal rendering as supposition Avellino's contention, refuting his position. The Motion to Dismiss the FAC also confirms that the TAC

was dismissed, not on statute of repose or limitations grounds, but because the allegations of the TAC lacked specificity, and, even if the Court finds that the FAC relates back to the IC, dismissal was appropriate.[11]

(iii) Dismissal was, in fact, based solely on the relation back doctrine as plainly reflected in the hearing transcript.

Avellino disputes Von Kahle's contention that the sole basis for dismissal was the relation back doctrine. AB at 1. However, the Dismissal Order says so. (R.1550, ¶4) ("The Court dismissed Count I (as set forth above) and Counts II, III, and IV of the Fourth Amended Complaint with prejudice on the grounds that they are barred by the statute of limitations because they do not relate back to the filing of the original Complaint in this action."); *see also* (R.7098, 7101 (Hr'g Transcript)). That the parties addressed at the hearing or in their papers the delayed discovery doctrine, continuous tort doctrine and statute of repose does not, in the absence of specific rulings by the trial court at the hearing, mean, as Avellino contends, that the Court accepted his arguments on those issues. Likewise for Avellino's reference to arguments made by the parties in connection with dismissal of the Third Amended Complaint (the "TAC"), AB at 2, n.2, because the Order granting Avellino and

[11] The absence of any analysis in the order dismissing the FAC also refutes Avellino's related contention that "[i]t is *clear* the trial judge considered these factors [i.e., discovery would have to be retaken, evidence would be lost, witnesses' memories faded, etc.] in making his decision to not give any further leave to amend the claims…." AB at 34 (emphasis added).

Bienes' motion to dismiss the TAC (R.1342) does not identify the basis for dismissal, dismissal was without prejudice, there is no transcript of the hearing on the motion to dismiss and, in seeking dismissal, Avellino did not raise the argument concerning the TAC. AB at 36, n.30.[12] Thus, the Court should reject Avellino's contention that in dismissing the claims in the TAC the trial court "found" that the above-referenced doctrines did not save the claims asserted therein. AB at 3.

CONCLUSION

This Court should reverse and remand this matter to the trial court for further proceedings on the wrongfully dismissed claims.

Respectfully submitted,

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[12] Avellino's contention that Von Kahle waived the right to challenge dismissal of claims in the FAC on appeal, AB at 35 n.29, is baseless. Von Kahle plainly argued against dismissal in his papers and at the hearing on the Motion to Dismiss.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Reply Brief is in compliance with the requirements of Rule 9.100(b)(1), Florida Rules of Appellate Procedure. This Reply Brief of Appellant is Times Roman 14-point and otherwise complies with the requirements of Rule 9.210(a) and (d), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail upon Haile, Shaw & Pfaffenberger, P.A., *Attorneys for Appellee Frank Avellino*, Gary Woodfield, Esq. (gwoodfield@haileshaw.com) (bpetroni@haileshaw.com) (eservice@haileshaw.com) and Susan Yofee, Esq. (syoffe@haileshaw.com), 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 on this 25th day of June, 2019.

By: s/ *Leonard K. Samuels*
Leonard K. Samuels