United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 15, 2022
Lyle W. Cayce
Clerk

No. 21-11212

SERGIO MOGOLLON; COLLEEN LOWE, *individually and on behalf of all others similarly situated*,

Plaintiffs—Appellants,

versus

THE BANK OF NEW YORK MELLON,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-cv-3070

Before WIENER, HIGGINSON, and WILSON, *Circuit Judges*.

PER CURIAM:*

The question in this appeal is whether, under New Jersey law, the statute of limitations has run on Plaintiffs' claims alleging that the Bank of New York Mellon (BNYM) aided and abetted fraud and breach of fiduciary duty.[1] The answer turns on whether or not New Jersey's discovery rule

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

[1] BNYM alternatively contends that this court should affirm on "independently adequate grounds found in the record." But these alternative grounds were not briefed on

applies to toll the statutory period. The district court concluded the limitations period was not tolled, granting BNYM a Rule 12(b) dismissal. We conclude that dismissal was improper at the pleadings stage, so we reverse and remand.

I.

This suit arises out of the wreckage wrought by the Allen Stanford Ponzi scheme, in which Stanford, creator and owner of Stanford International Bank, Ltd. (SIBL) and a network of other entities, sold certificates of deposit (CDs) to investors with the promise of extraordinarily high return rates. *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 188 (5th Cir. 2013). In reality, most of the funds raised were used to pay other investors their promised returns. *Id.* From the scheme's onset, as early as 1999, until its collapse in February 2009, the Stanford entities swindled over $7 billion from their victims. *Id.* 188–89. On February 16, 2009, the Securities and Exchange Commission (SEC) sued Stanford, his entities, and his associates, charging them with multiple violations of federal securities laws. *Id.* at 189. The district court later appointed a receiver to oversee recovery efforts, and litigation ensued against various parties. *Id.*

As things played out in the courts and media, it came to light that Pershing LLC, a clearing firm and BNYM subsidiary, had a securities agreement with one of the Stanford entities, Stanford Company Group (SCG). Based on this information, counsel representing Plaintiffs in this

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appeal, or addressed by the district court, so we will not address them. *See Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument." (quoting *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004))); *see also Houston Pro. Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 n.2 (5th Cir. 2016) (citing FED. R. APP. P. 28(a)(8)(A); *United States v. Beaumont*, 972 F.2d 553, 563 (5th Cir. 1992)).

matter initiated a FINRA arbitration against Pershing on behalf of individual victims of the Ponzi scheme. Plaintiffs assert that through discovery in that proceeding, they acquired documents in the summer of 2014 that show BNYM's complicity in Stanford's fraud. This discovery precipitated Plaintiffs' March 8, 2019 complaint, alleging claims for aiding and abetting fraud and breach of fiduciary duty.[2]

More specifically, Plaintiffs' operative complaint[3] alleges that BNYM "possessed a general awareness of Stanford's underlying fraud." The complaint continues:

> Furthermore, BNYM's atypical conduct with respect to Stanford gives rise to a reasonable inference of knowledge:
>
> . . .
>
> • BNYM's due diligence revealed the illegality of the scheme and provided BNYM with actual knowledge of the fraud;
>
> . . .
>
> • On February 3, 2009, Mary McCullough, Senior Counsel for BNYM's Legal Department, Enforcement and Investigations Unit, emailed Arnett: "I met with the Independent Examiner this morning, and they had some follow up questions on the Stanford International Bank matter that was presented to [the sensitive issues oversight committee (SIOC)] last week. Basically, they

[2] Plaintiffs Sergio Mogollon and Colleen Lowe aspire to represent a class consisting of a subset of CD investors against BNYM. Following their initial complaint, Plaintiffs filed two amended complaints, with the operative complaint being filed on December 9, 2019. The complaint was initially filed in the United States District Court in New Jersey but was transferred to the Northern District of Texas in December 2019 by order of the Judicial Panel on Multidistrict Litigation.

[3] The district court allowed Plaintiffs to redact portions of their operative complaint in their public filing; the excerpts quoted here omit redacted allegations.

> are asking why the issue was not escalated to SIOC in January 2008 when Pershing first had concerns about a lack of transparency by Stanford. Also, they want to better understand what triggered our concerns in 2008. Finally they asked whether any extra monitoring was being done on the questionable CD rates"; and
>
> • BNYM engaged in recruiting for Stanford.
>
> . . . BNYM further encouraged and/or provided substantial assistance to the Stanford scheme based on 1) BNYM's involvement in recruiting; 2) BNYM's reputational enhancement; 3) BNYM's involvement in the transfer of funds to Stanford; and 4) BNYM's solicitation of Stanford's business . . . .
>
> . . . The substantial assistance provided by BNYM gave a false sense of legitimacy to Stanford's illicit activities which allowed A. Stanford and his associates to defraud plaintiffs and the class.

On January 27, 2020, BNYM moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b). BNYM contended, among other things, that Plaintiffs' claims were time barred under New Jersey's applicable statute of limitations, which requires that claims for aiding and abetting fraud and breach of fiduciary duty be brought within six years of when they accrued. Plaintiffs conceded that they filed suit more than six years after the unearthing of Stanford's scheme in 2009 but asserted that New Jersey's "discovery rule" applied, rendering their claims timely. The district court disagreed and granted BNYM's motion to dismiss. In its order, the court explained that "[f]or Plaintiffs to proceed with this lawsuit, the delayed discovery rule would need to have tolled the running of the limitations period until at least March 2013, over four years after the SEC filed its first enforcement action against Stanford." *Mogollon v. Bank of N.Y. Mellon*, No. 3:19-CV-3070-N, 2021 WL 5856803, at *2 (N.D. Tex. Nov. 12, 2021). The

court then concluded that "[w]ithout deciding when precisely the objective threshold was crossed, . . . Plaintiffs possessed—or reasonably should have possessed—facts alerting them to the existence of a financial injury caused by the unlawful conduct of *some third party* before March 2013." *Id.* (emphasis added). Plaintiffs timely appealed.

II.

We review the district court's grant of a motion to dismiss de novo, accepting all well-pleaded facts as true and drawing all reasonable inferences in the nonmoving party's favor. *Anokwuru v. City of Houston*, 990 F.3d 956, 962 (5th Cir. 2021). "A statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff[s'] pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like." *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003).

III.

Plaintiffs do not dispute that New Jersey's six-year statute of limitations governs. Instead, they assert that the district court misapplied New Jersey's discovery rule. They state that, contrary to the district court's interpretation, even when a plaintiff has knowledge that his injury was the fault of another, the statute of limitations does not begin to run in relation to a particular defendant until *that party* is identifiable. Plaintiffs further state that BNYM has failed "to point to any credible evidence—let alone any found in the complaint, . . . that would have alerted a reasonably diligent investor that BNYM was also responsible for their losses" before the summer of 2014, and Rule 12(b)(6) dismissal was thus improper.

BNYM counters that Plaintiffs should have known facts supporting their claims against BNYM as early as 2009 because Pershing's relationship with the Stanford entities was widely publicized and its relationship with BNYM was public record. Accordingly, BNYM asserts that Plaintiffs did not

exercise due diligence or even allege diligent action in their complaint. BNYM also asserts that Plaintiffs conflate "identifiable" with "identified" and argues that the statute of limitations begins to run whenever a plaintiff is aware that his injury was the fault of another even if he "does not know who precisely injured him or the universe of all potentially culpable parties." Finally, BNYM contends that the cases on which Plaintiffs rely are distinguishable from this one, asserting that the cases cited by Plaintiffs involve multiple causative factors, whereas this case only involves one—the purchase and sale of fraudulent CDs. And, in such a case, "the statutes of limitation begin to run as to all possible defendants as soon as the nature of the injury becomes . . . 'concrete.'" With the parties' contentions in mind, we turn to the law.

The New Jersey discovery rule "postpon[es] the accrual of a cause of action so long as a party reasonably is unaware either that he has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity." *Caravaggio v. D'Agostini*, 765 A.2d 182, 186 (N.J. 2001) (internal quotation marks and citation omitted). According to the Supreme Court of New Jersey, the linchpin of the rule "is the unfairness of barring claims of unknowing parties." *Id.* (quoting *Mancuso v. Neckles*, 747 A.2d 255 (N.J. 2000)). Admittedly, New Jersey's discovery rule has been somewhat of a work in progress, oft requiring lawyers and judges to grapple with its application. *See The Palisades At Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC*, 169 A.3d 473, 484 (N.J. 2017) (noting discovery-rule jurisprudence was "far from a model of clarity"). Thus, in 2001, the court sought to "set the record straight" via *Caravaggio*, which provides "the template for when a cause of action commences in accrual statutes of limitations." *Id.* at 485.

Caravaggio instructs that "accrual occurs when a plaintiff knows or, through the exercise of reasonable diligence, should know of the basis for a

cause of action against an identifiable defendant." *Id.* *Caravaggio* also identifies a sub-category of cases—relevant here—in which "a plaintiff knows she has been injured and knows the injury was the fault of another[] but does not know that an additional party was also responsible for her plight." *Caravaggio*, 765 A.2d at 188. In such a scenario, "when a plaintiff knows of an injury, and knows that it is the fault of another, but is reasonably unaware that a third party may also be responsible, the accrual clock does not begin ticking against the third party until the plaintiff has evidence that reveals his or her possible complicity." *Id.* at 189. That is to say, "a cause of action may accrue against different defendants at different times." *Id.* at 188.

This is where we first detect conflict between the district court's order—as well as BNYM's position—and the law. In its dismissal order, the district court stated that "[o]nce a reasonable person would perceive an injury stemming from the malfeasance of *some* third party, the clock begins to run with respect to *all* parties whose wrongful conduct played a role in bringing the injury about." *Mogollon*, 2021 WL 5856803 at *2. The district court cited *Savage v. Old Bridge-Sayreville Medical Group, P.A.*, 633 A.2d 514, 518 (N.J. 1993) for support, appending this parenthetical: "fault means only 'possible—not provable or even probable'—fault by another and 'does not mean knowledge of basis for legal liability or a provable cause of action.'" *See Mogollon*, 2021 WL 5856803 at *2. To the extent that the district court was insinuating that the clock against BNYM began to run at the same time as the clock against Pershing, i.e., sometime in 2009, our reading of *Savage* is not the same as the district court's, which also appears to conflict with *Caravaggio*.[4]

[4] The district court's order notes that it previously declined to hold as a matter of law that the limitations period against Pershing began to run in February 2009, "[b]ut rejecting the limitations argument in that case required the [c]ourt to go only so far as to

Indeed, the Supreme Court of New Jersey highlighted *Savage* in its *Caravaggio* opinion as a "good example" of when an action may accrue against different defendants at different times:

> In *Savage*, the plaintiff filed a medical malpractice action against physicians who had administered tetracycline to her in early childhood. The drug apparently discolored her teeth. The plaintiff became twenty-one in 1981. Until then the statute was tolled by reason of her age. She filed a complaint in 1989 alleging she was unaware until 1988 that her injury was due to the fault of her doctors. The trial judge ruled that because she had all the "facts" in 1981 at the time she reached majority, *i.e.* that her teeth were discolored and that medication given to her as a child might have caused the discoloration, she had only two years to bring suit. The Appellate Division disagreed. It reasoned that, although the plaintiff was aware that she had suffered injury and that the medication was a likely cause of it, the record did not reveal anything to suggest that she was or should have been aware that a lack of care in administering the medication was also a cause of her condition.
>
> We agreed with the Appellate Division's conclusion that, although plaintiff was aware of her injury and that the medicine was a likely cause of it, she was not aware that her injury was additionally due to her physicians' avoidable fault. In so ruling, we distinguished Savage's claims from those of the plaintiff in *Apgar v. Lederle Labs*, 123 N.J. 450, 453, 588 A.2d 380 (1991), whose untimely suit against the manufacturer we held time barred because the plaintiff knew, by the time she was eighteen years old, that the medicine she had taken as a child had discolored her teeth, that that medicine "had not

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hold that the delayed discovery rule could have tolled the start of the limitations period until November 2009, roughly nine months after the SEC instituted the first action against Stanford." *Id.*

> been thoroughly tested", [sic] and that "certain things weren't right."

Caravaggio, 765 A.2d at 188 (citations omitted).

Basically, *Savage* does not preclude a determination that the statute of limitations as to Pershing and BNYM began to run at different times. Dismissal was thus improper on that ground. This leads us to BNYM's remaining arguments that (1) Plaintiffs conflate "identifiable" (i.e., knowing distinct harm was caused by a third party) and "identified" (knowing *BNYM* caused it); (2) the cases cited by Plaintiffs are distinguishable because they involve multiple causative factors rather than a single causative factor, as in this case; and (3) Plaintiffs were not diligent in discovering their claims against BNYM.[5] At bottom, we conclude that dismissal based on Plaintiffs' purported lack of diligence at the Rule 12(b)(6) stage was improper.

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[5] These issues substantially overlap as they each boil down to the same primary inquiry: Plaintiffs' diligence—or lack thereof—in identifying their claims. BNYM relies heavily on *McDade v. Siazon*, 32 A.3d 1122 (N.J. 2011), in contending that Plaintiffs were not diligent, and Plaintiffs misconstrue "identifiable" to mean "identified." *McDade* concerned a plaintiff injured by a raised pipe protruding from a sidewalk. *Id*. at 1126. The *McDade* court determined, at the summary judgment stage, that the discovery rule did not delay the accrual of the plaintiff's claims when he (1) was aware that the owner of the pipe was potentially liable for his injury but was not immediately aware of the owner's identity and (2) was not reasonably diligent in determining whether the owner could be identified. *Id*. at 1131–32. So regardless of whether Plaintiffs conflate an "identifiable" party with an "identified" one, this issue goes back to Plaintiffs' diligence in discovering the alleged facts supporting their claims against BNYM. Moreover, *McDade* is distinguishable from the factual scenario here, as Plaintiffs allege that they were unaware of BNYM's involvement altogether, not just its identity.

Similarly, BNYM cites *Yarchak v. Trek Bicycle Corp.*, 208 F. Supp. 2d 470 (D.N.J. 2002) in support of its contentions that Plaintiffs were not diligent, and that the cases on which Plaintiffs rely, such as *Caravaggio*, involved multiple causative factors as opposed to a single one, like the case at hand. *Yarchak* involved claims of personal injury sustained from a defective bicycle seat. *Id*. at 475. There, the district court granted partial summary judgment to the defendants, ultimately concluding "that Plaintiff either knew or should have been aware of facts suggesting a possible causal connection between the bicycle seat

It is a core principle that at the motion to dismiss stage, we must accept as true all well-pleaded allegations contained in Plaintiffs' complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The district court concluded, and BNYM contends on appeal, that Plaintiffs either possessed or reasonably should have possessed facts regarding the existence of an injury "caused by the unlawful conduct of some third party before March 2013." *Mogollon*, 2021 WL 5856803 at *2. But the court's conclusion cannot be inferred from—and is in fact contradicted by—Plaintiffs' complaint, as excerpted *supra*. Plaintiffs allege that they "did not discover the factual allegations against BNYM . . . until the summer of 2014, at the earliest, through document production in a FINRA arbitration proceeding against Pershing." Even assuming Plaintiffs earlier knew of Pershing's interactions with Stanford and Pershing's corporate relationship with BNYM, those facts, without more, do not provide a basis for BNYM's alleged actionable involvement in the Stanford scheme pleaded in the complaint. While it may later become obvious that Plaintiffs possessed or should have possessed facts alerting them to the existence of their claims against BNYM before the summer of 2014, that is not obvious from the face of the complaint or documents referenced therein. We thus conclude that Rule 12(b)(6) dismissal was improper.[6]

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and his impotency and that other business entities involved in the seat's manufacture and distribution may have caused or substantially contributed to his injuries more than two years prior to the filing of Plaintiff's Second Amended Complaint." *Id.* at 492. Again, this conclusion was ultimately reached on a diligence determination. Further, the New Jersey *state* court cases cited by the parties do not purport to make the single-versus-multiple distinction posited by BNYM.

[6] BNYM contends that the court may take judicial notice of the media coverage surrounding the scheme, including details linking Stanford entities and Pershing. BNYM also highlights that its corporate relationship to Pershing is public record. However, a mere parent/subsidiary relationship, without more, is not enough to be actionable. As noted in Plaintiffs' briefing, "[b]y that same logic, Plaintiffs should have also filed lawsuits against

Our holding in no way precludes an eventual finding by the district court that this action is time barred based on facts developed through discovery, via summary judgment or otherwise. *See Caravaggio*, 765 A.2d at 185 (addressing discovery rule issue on summary judgment); *see also Palisades*, 169 A.3d at 479; *McDade*, 32 A.3d at 131–32. At that stage, as stated in *Palisades*, "[t]he court may consider documentary evidence, deposition transcripts, and, in its discretion, take testimony." *Palisades*, 169 A.3d at 489.

* * *

For the reasons discussed above, we conclude that the district court erred in granting BNYM's Rule 12(b)(6) motion for dismissal based on New Jersey's statute of limitations.

REVERSED and REMANDED.

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the 26 other sister entities that are also wholly owned by [BNYM], but where there was no evidence that they were connected to the Stanford fraud."

United States Court of Appeals

FIFTH CIRCUIT
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December 15, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 21-11212 Mogollon v. Bank of NY Mellon
USDC No. 3:19-CV-3070

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Appellee pay to Appellants the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By:_____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Mr. Jeffrey J. Chapman
Mr. Michael E. Criden
Mr. Thomas Miles Farrell
Ms. Lindsey Caryn Grossman
Mr. Kevin Love