

10-1581-cv
Int'l Strategies Grp., Ltd. v. Ness

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2010

6
7
8 (Argued: April 8, 2011 Decided: July 15, 2011)

9
10 Docket No. 10-1581-cv

11
12 - - - - -x

13
14 INTERNATIONAL STRATEGIES GROUP, LTD.,

15
16 Plaintiff-Appellant,

17
18 - v.-

19
20 PETER S. NESS,

21
22 Defendant-Appellee.

23
24 - - - - -x

25
26 Before: JACOBS, Chief Judge, CABRANES, Circuit
27 Judge, KRAVITZ, District Judge.*

28
29 Plaintiff-Appellant International Strategies Group,
30 Ltd. appeals from a March 31, 2010 judgment of the United
31 States District Court for the District of Connecticut
32 (Chatigny, J.), granting Defendant-Appellee Peter Ness's
33 motion to dismiss the complaint as untimely. The claims,
34 alleging breach of fiduciary duty, intentional

* The Honorable Mark R. Kravitz, of the United States District Court for the District of Connecticut, sitting by designation.

1 misrepresentation, negligent misrepresentation, and
2 conspiracy to commit those three offenses, arose from the
3 loss of a \$4 million investment that the plaintiff made with
4 Ness's employer. We agree with the district court that the
5 claims are untimely and that tolling is unwarranted.

6 AFFIRMED.

7 KATHLEEN C. STONE, Boston, MA, for
8 Plaintiff-Appellant.

9
10 ROBERT C. E. LANEY, (Claire E.
11 Ryan, on the brief), Ryan Ryan
12 Deluca LLP, Stamford, CT, for
13 Defendant-Appellee.

14
15 DENNIS JACOBS, Chief Judge:

16
17 Plaintiff International Strategies Group, Ltd. ("ISG")
18 appeals from a March 31, 2010 judgment of the United States
19 District Court for the District of Connecticut (Chatigny,
20 J.), granting Defendant Peter Ness's motion to dismiss as
21 untimely ISG's complaint, which alleges breach of fiduciary
22 duty, intentional misrepresentation, negligent
23 misrepresentation, and conspiracy to commit those three
24 offenses. ISG's claims arose from the loss of a \$4 million
25 investment it made with Ness's employer, Corporation of the
26 BankHouse ("BankHouse"). The district court ruled that
27 tolling of the untimely claims, on the basis of Ness's

1 continuing concealment, was unwarranted. We affirm on the
2 ground that this lawsuit, commenced in April 2004, arises
3 from an injury suffered no later than June 2000, and is
4 therefore barred by the applicable statute of repose, Conn.
5 Gen. Stat. § 52-577.

6
7 **BACKGROUND**

8 We recount only the facts that bear upon the issues
9 necessary to decide the appeal, and assume (as we must) that
10 all plausible allegations in ISG's first amended complaint
11 are true. Where appropriate, we take judicial notice of
12 filings from ISG's related lawsuits. See Scherer v.
13 Equitable Life Assurance Soc'y of the U.S., 347 F.3d 394,
14 402 (2d Cir. 2003).

15 The defendant, Peter S. Ness, was the Vice President
16 of Corporate Finance at BankHouse, as well as an in-house
17 counsel and the head of the Greenwich office. Ness was one
18 of a core group of senior executives for entities controlled
19 by James F. Pomeroy, II. BankHouse, and several other
20 Pomeroy-controlled entities, purported to offer a
21 sophisticated investment opportunity but was in essence a
22 Ponzi scheme.

1 Around April 1998, Pomeroy enticed ISG to invest \$4
2 million with BankHouse by promising guaranteed profits of \$2
3 million *every twelve days* for three months,¹ with an express
4 covenant that invested funds would not be depleted.
5 Although Pomeroy assured ISG that profits were accruing as
6 expected, ISG's funds were soon depleted through various
7 unauthorized transfers.

8 BankHouse prolonged the scheme by tantalizing ISG with
9 some or all of its notional profits--in the form of a \$9
10 million promissory note. Around October 1998, Ness and
11 Pomeroy proposed that ISG forgo the payment by note and
12 instead participate in another investment opportunity. ISG
13 knew nothing about this proposed investment,² but agreed

¹ See App. at 68 (Funds Management Agreement). Although ISG did not attach the Funds Management Agreement to its complaint or its opposition to Ness's motion to dismiss, it "reli[ed] on the terms and effect of [the agreement] in drafting the complaint" by alleging that the investment created fiduciary duties, see Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002); it also filed the agreement in its suit against BankHouse, see Barber Aff. Ex. A, Int'l Strategies Grp., Ltd. v. Corp. of the BankHouse, Inc., No. 02-cv-10532 (D. Mass. May 15, 2002). The agreement may therefore be considered in this appeal.

² ISG's pleadings are inconsistent as to whether it knew that funds would be transferred to another entity. Compare First Am. Compl. ¶ 25 ("[ISG] agreed to allow what it believed to be an augmented investment amount to be transferred to another entity, Swan Trust, for further

1 nevertheless. BankHouse then transferred \$19 million of its
2 clients' money to a foreign entity, Swan Trust, which
3 included any remnant of ISG's investment.

4 The funds that BankHouse transferred to Swan Trust were
5 swiftly distributed (unlawfully) to third-party bank
6 accounts. BankHouse concealed the depletion from ISG for a
7 time: In January 1999, Ness sent a memorandum informing
8 Chris Barber, a Managing Director of ISG, that funds
9 invested with Swan Trust were expected to yield profits of
10 200% to 300%, which would be disbursed to BankHouse by the
11 end of the month.³ At some point prior to June 2000,
12 however, ISG learned that Swan Trust had dissipated the
13 funds. (ISG's filings reflect an unimportant inconsistency
14 on the timing.⁴)

investment."), with Pl.'s Opp. to Def.'s Mot. to Dis. at 6
("At the time, ISG had no knowledge of Swan Trust").

³ This and subsequent communications from Ness are properly considered because they were referenced (either specifically or as a course of conduct) in the complaint and were attached by ISG to its opposition to Ness's motion to dismiss. First Am. Compl. ¶ 29; Pl.'s Opp. to Def.'s Mot. to Dis. Ex. E; cf. Chambers, 282 F.3d at 153.

⁴ ISG's complaint concedes knowledge of the dissipation only as of June 2000. First Am. Compl. ¶ 36. Its opposition to Ness's motion to dismiss, however, admits knowledge since August 1999. Pl.'s Opp. to Def.'s Mot. to Dis. at 10; see also Complaint ¶ 90, Int'l Strategies Grp., Ltd. v. Corp. of the BankHouse, Inc., No. 02-cv-10532 (D.

1 The complaint alleges that BankHouse undertook (or
2 pretended to undertake) efforts to recover the funds from
3 Swan Trust, as a ploy to dissuade ISG from bringing a claim.
4 As part of the deception, ISG cites two memoranda that Ness
5 co-wrote to it in October 1999 ("the October 1999
6 Memoranda"), which optimistically described the recovery
7 efforts conducted by BankHouse's attorneys and its "recovery
8 specialists," but stressed the need for confidentiality.
9 See Pl.'s Opp. to Def.'s Mot. to Dis. Exs. F, G. ISG was
10 lulled: Although the memoranda suggested an imminent
11 recovery, ISG waited for months while the recovery efforts
12 unfolded.

13 Approximately nine months later, ISG (and other
14 investors) accepted BankHouse's suggestion to grant a power
15 of attorney to BankHouse's outside counsel, A. John
16 Pappalardo, to act on its behalf in the recovery efforts.
17 Efforts by Pappalardo continued from mid-2000 through the
18 fall of 2001, during which time (as ISG alleges generally)
19 BankHouse and "its employees and agents" deceived ISG by
20 insisting "that they were doing everything feasible to

Mass. Mar. 22, 2002).

The discrepancy is unimportant because the result is the same even if the June 2000 date is used.

1 recover the funds" and that independent action would
2 "interfere with [BankHouse's] ability to recover on behalf
3 of the investors." First Am. Compl. ¶ 43.

4 On August 15, 2001, nearly two years after the October
5 1999 Memoranda he co-drafted, Ness faxed a single-page,
6 handwritten note (the "August 2001 Fax") to Chris Barber of
7 ISG, in evident response to an inquiry by ISG:

8 *Chris--*

- 9
- 10 • *Discussed your letter with Jim [Pomeroy]*
 - 11
 - 12 • *Will get letter to you ASAP from me (with*
 - 13 *John [Pappalardo] OK) or from John---*
 - 14
 - 15 • *We are proceeding with first steps of*
 - 16 *litigation ---*
 - 17

18 *Peter*

19 Pl.'s Opp. to Def.'s Mot. to Dis. Ex. H. ISG claims that it
20 first realized that the recovery efforts were futile (or
21 perhaps fictitious) after the promises in this fax went
22 unfulfilled.

23 After a few more months, ISG hired its own counsel to
24 recover its funds through litigation. Several additional
25 months later, on March 22, 2002, ISG commenced a suit
26 against BankHouse, Pomeroy, and various other Pomeroy-

1 controlled entities to recover its investment funds.⁵ Ness
2 was not named a defendant or mentioned in the complaint.
3 The defendants answered, but later ceased to defend. After
4 more than two years of litigation, ISG won a default
5 judgment of over \$10 million in damages and penalties.⁶

6 ISG's inability to collect on its judgment triggered
7 additional lawsuits. This suit was filed on April 27, 2004
8 in the United States District Court for the District of
9 Connecticut. Three days later, a nearly identical suit was
10 filed in the United States District Court for the District
11 of Massachusetts against Stephen Heffernan, the Chief
12 Financial Officer of BankHouse, alleging (among other
13 claims) the same six causes of action as alleged in this
14 suit.⁷ Ness was not mentioned in the complaint. The suit
15 against Heffernan was dismissed as untimely.⁸

⁵ See Complaint, Int'l Strategies Grp., Ltd. v. Corp. of the BankHouse, Inc., No. 02-cv-10532 (D. Mass. Mar. 22, 2002).

⁶ See Amended Judgment, Int'l Strategies Grp., Ltd. v. Corp. of the BankHouse, Inc., No. 02-cv-10532 (D. Mass. June 3, 2004).

⁷ See Complaint, Int'l Strategies Grp., Ltd. v. Heffernan, No. 04-10863 (D. Mass. Apr. 30, 2004).

⁸ See Memorandum of Decision, Int'l Strategies Grp., Ltd. v. Heffernan, No. 04-10863 (D. Mass. July 30, 2004), ECF No. 11; App. at 60-63. The court ruled that the repose

1 While this suit (against Ness) and the suit against
2 Heffernan were pending, ISG began suing third parties
3 involved in the transactions. In May and June 2004, ISG
4 sued two banks involved in the transfers.⁹ In September
5 2004, ISG sued Pappalardo and his current and prior law
6 firms, claiming malpractice in connection with the power of
7 attorney it granted him.¹⁰ Pappalardo and the firms
8 prevailed on summary judgment: Each claim was held either
9 meritless (because no attorney-client relationship was
10 formed) or untimely.¹¹

period began in 1999, when ISG knew all the facts giving rise to its claim (after BankHouse and its CEO represented to ISG that its funds were about to be returned); under Massachusetts law, ISG's knowledge that its funds were dissipated precluded tolling.

⁹ See Complaint, Int'l Strategies Grp., Ltd. v. ABN AMRO Bank N.V., No. 04-601604 (Sup. Ct. N.Y. County May 27, 2004); Complaint, Int'l Strategies Grp., Ltd v. ABN AMRO Bank N.V., No. 04-601731 (Sup. Ct. N.Y. County June 7, 2004). Ness is mentioned in only one paragraph in each complaint (concerning the \$9 million promissory note). The cases, which were consolidated, have apparently been dismissed pursuant to a stipulated order.

¹⁰ See Complaint, Int'l Strategies Grp., Ltd. v. Greenberg Traurig, LLP, No. 04-cv-12000 (D. Mass. Sept. 16, 2004). Ness was mentioned once in the complaint, in connection with the August 2001 Fax.

¹¹ See Int'l Strategies Grp., Ltd. v. Greenberg Traurig, LLP, 482 F.3d 1 (1st Cir. 2007), aff'g on other grounds No. 04-cv-12000, 2006 U.S. Dist. LEXIS 3401 (D. Mass. Jan. 30, 2006).

1 After the other suits had concluded, the district court
2 in this case granted Ness's motion to dismiss the action as
3 untimely, ruling that the limitations period began to run by
4 June 2000 and that tolling was unwarranted.

5
6 **DISCUSSION**

7 We review de novo a district court's dismissal of an
8 action under Fed. R. Civ. P. 12(b)(6) for failure to state a
9 claim. Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 88 (2d
10 Cir. 2009). To avoid dismissal, ISG's allegations "must be
11 enough to raise a right to relief above the speculative
12 level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
13 (2007). Assuming all "well-pleaded factual allegations" to
14 be true and drawing all reasonable inferences in ISG's
15 favor, we "determine whether [the allegations] plausibly
16 give rise to an entitlement to relief." Ashcroft v. Iqbal,
17 129 S. Ct. 1937, 1950 (2009).

18
19 **I**

20 Tort actions under Connecticut law are (with exceptions
21 not relevant here) subject to the three-year statute of
22 repose that "begins with the date of the act or omission

1 complained of, not the date when the plaintiff first
2 discovers an injury." Piteo v. Gottier, 112 Conn. App. 441,
3 445 (App. Ct. 2009) (internal quotation marks omitted); see
4 Conn. Gen. Stat. § 52-577; Barrett v. Montesano, 269 Conn.
5 787, 794 (2004) (noting that Conn. Gen. Stat. § 52-577 is
6 among the statutes that the Connecticut Supreme Court has
7 referred to as "statutes of limitations" even though they
8 "technically function more like statutes of repose").

9 ISG's funds were unlawfully dissipated by June 2000,
10 the point by which ISG concedes knowledge of the dissipation
11 in the present complaint. See First Am. Compl. ¶ 36. The
12 present suit was filed on April 27, 2004, nearly four years
13 later. ISG argues that its claims are nevertheless timely,
14 because Ness's actions amounted to a "continuing course of
15 conduct" through August 2001, thereby "allowing [it] to
16 commence [its] lawsuit at a later date."¹² Sherwood v.
17 Danbury Hosp., 252 Conn. 193, 203 (2000) (internal quotation

¹² To the extent that ISG argues that Ness's actions from 1999 to 2001 give rise to separate causes of action for misrepresentation and breach of fiduciary duty, it is duplicative of the "continuing course of conduct" argument. In any event, ISG did not raise this argument before the district court, and "[i]n general, a federal appellate court does not consider an issue not passed upon below." See Booking v. Gen. Star Mgmt. Co., 254 F.3d 414, 418 (2d Cir. 2001) (internal quotation marks omitted).

1 marks omitted).

2 At the threshold, Ness argues that a course of conduct
3 cannot toll the repose period beyond the plaintiff's
4 discovery of the injury. See, e.g., Rosato v. Mascardo, 82
5 Conn. App. 396, 405 (App. Ct. 2004). The cases he cites
6 interpret a different statute of limitations (Conn. Gen.
7 Stat. § 52-584), one that contains a separate two-year
8 limitation triggered when an injury is "first sustained or
9 discovered." However, at least one Connecticut trial court
10 has indicated that this proposition from Rosato is
11 nevertheless equally applicable to § 52-577, and the
12 knowledge of the injury may well deny a plaintiff (with a
13 claim subject to that provision) the benefit of the
14 continuous course of conduct doctrine. See Coss v. Stewart,
15 Civ. No. 08-5007541-S, 2010 WL 1050534, at *6 n.1 (Conn.
16 Super. Ct. Feb. 11, 2010), aff'd, 126 Conn. App. 30 (App.
17 Ct. 2011). It is possible that the wording in Rosato may
18 signify only that the separate two-year limitation will
19 already have begun running at that point. But we need not
20 resolve the issue, because even if the continuous course of
21 conduct doctrine were available for the period following the
22 discovery of the actionable harm, ISG has not plausibly

1 alleged facts warranting its application.

2 "To support a finding of a 'continuing course of
3 conduct' . . . there must be evidence of the breach of a
4 duty that remained in existence after commission of the
5 original wrong related thereto." Fichera v. Mine Hill
6 Corp., 207 Conn. 204, 209 (1988). A plaintiff can show a
7 "duty that remained in existence" by establishing: (A) "a
8 special relationship between the parties giving rise to such
9 a continuing duty," or (B) "some later wrongful conduct of a
10 defendant related to the prior act." Id. at 209-10.

11

12

A

13 ISG's conclusory claim that BankHouse's "superior
14 knowledge, skill and expertise" and acceptance of ISG's
15 funds created a fiduciary bond *with Ness* is not a plausible
16 allegation of a "special relationship between the parties"
17 giving rise to a continuing duty. Id. at 210; see First Am.
18 Compl. ¶ 14. The Connecticut Supreme Court recognizes that
19 "not all business relationships implicate the duty of a
20 fiduciary," and that "certain relationships, as a matter of
21 law, do not impose upon either party the duty of a
22 fiduciary." Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255

1 Conn. 20, 38 (2000). Because the present suit is against
2 Ness in his personal capacity, the inquiry must focus on
3 ISG's dealings with Ness rather than its dealings with other
4 BankHouse agents, or with the firm itself.

5 ISG does not allege that Ness had any role in the
6 solicitation of ISG's investment, First Am. Compl. ¶ 13, or
7 that he presented himself as an investment manager. ISG
8 merely claims that "from time to time" Ness "held himself
9 out as having experience and expertise in financial and
10 investment matters." First Am. Compl. ¶ 4. Nor does ISG
11 claim that Ness offered to perform a key role in its
12 investing relationship with BankHouse or that he purported
13 to have superior knowledge about investments made by
14 BankHouse or ISG. See Beverly Hills Concepts, Inc. v.
15 Schatz & Schatz, Ribicoff & Kotkin, 247 Conn. 48, 57 (1998).
16 Absent a representation that Ness had "superior knowledge,
17 skill or expertise" or that he "sought the plaintiff's
18 special trust," there can be no breach of fiduciary duty
19 under Connecticut law. Id. Whether or not BankHouse owed a
20 fiduciary duty to ISG, Ness's fiduciary duties--if any--ran
21 to BankHouse by virtue of his officership. See First Am.
22 Compl. ¶ 11.

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B

ISG has also not plausibly alleged that tolling is warranted on account of "some later wrongful conduct . . . related to the prior act" by Ness. Fichera, 207 Conn. at 210. Conclusory allegations are made about BankHouse and its "employees and agents," but the only alleged misrepresentations attributed to Ness after 1999 are stray remarks from the August 2001 Fax, most notably that "We are proceeding with first steps of litigation." (Ness's failure to inform ISG of the repose period cannot establish a course of conduct because, as discussed above, Ness had no special relationship with ISG.)

A single-page, handwritten fax sent twenty months after any other alleged misrepresentation by Ness does not plausibly link up to form a continuous course of conduct. If a plaintiff's miscellaneous, discontinuous interactions with a defendant over an extended period of time alone justified tolling, it "would render the repose part of [a] statute of limitations a nullity," Nieves v. Cirimo, 67 Conn. App. 576, 587 (App. Ct. 2002), and "would, in effect, allow the plaintiff to acquiesce in the defendant's conduct for as

1 long as convenient to the plaintiff, contrary to one of the
2 purposes of statutes of limitations, which is to prevent the
3 unexpected enforcement of stale claims concerning which the
4 persons interested have been thrown off their guard by want
5 of prosecution," Rivera, 45 Conn. Supp. at 160 (internal
6 quotation marks omitted).

7 Moreover, Ness's fax was not unprompted: It was
8 apparently in response to an inquiry by ISG. App. at 164
9 (reflecting Ness's assurance that he "[d]iscussed [ISG's]
10 letter with Jim [Pomeroy]"). A plaintiff does not have a
11 unilateral option to extend the repose period of its claims
12 merely by making an inquiry that can be expected to elicit a
13 reply. Cf. Sanborn v. Greenwald, 39 Conn. App. 289, 297
14 (App. Ct. 1995) ("A plaintiff should not be allowed to keep
15 a legal malpractice action alive after the lawyer-client
16 relationship has ended by telephoning the attorney every
17 three years to obtain verification that something the
18 attorney had drafted previously would not cause the
19 plaintiff harm.").

20 21 II

22 ISG argues that even if its claims were untimely, Ness

1 should be equitably estopped from asserting a repose defense
2 because he discouraged ISG from pursuing its remedies. Ness
3 cites our dicta concerning the unavailability of equitable
4 tolling under Conn. Gen. Stat. § 52-577 as establishing a
5 "well-settled" principle that equitable estoppel is
6 inapplicable as well. Ness Br. at 11; Gerena v. Korb, 617
7 F.3d 197, 206 (2d Cir. 2010). But that argument ignores the
8 differences between equitable tolling and equitable
9 estoppel. See Bennett v. United States Lines, 64 F.3d 62,
10 65-66 (2d Cir. 1995). In any event, a recent Connecticut
11 Appellate Court case indicates that equitable estoppel may
12 be available under § 52-577. See Coss v. Steward, 126 Conn.
13 App. 30, 41-45 (App. Ct. 2011).

14 Equitable estoppel in Connecticut has two elements: (1)
15 "the party against whom estoppel is claimed must do or say
16 something calculated or intended to induce another party to
17 believe that certain facts exist and to act on that belief";
18 and (2) "the other party must change its position in
19 reliance on those facts, thereby incurring some injury."
20 Connecticut Nat'l Bank v. Voog, 233 Conn. 352, 366 (1995)
21 (internal quotation marks omitted). "[A] person who claims
22 an estoppel must show that he has exercised due diligence to

1 know the truth, and that he not only did not know the true
2 state of things but also lacked any reasonably available
3 means of acquiring knowledge." Id. at 367 (internal
4 quotation marks omitted).

5 ISG has not plausibly alleged that it exercised due
6 diligence or changed its position based on Ness's
7 representations. The August 2001 Fax was vague, cursory,
8 informal, and otherwise without indicia of reliability. A
9 diligent party would not have depended on it, at least not
10 without demanding reliable confirmation. Moreover, the (at
11 least) twenty-month gap between the fax and Ness's previous
12 alleged misrepresentations defeat any claim that ISG relied
13 upon Ness for periodic status updates to assess whether to
14 forbear bringing suit. (To the contrary, ISG was relying on
15 Pappalardo to execute its recovery efforts through the power
16 of attorney it granted him.)

17 Under Connecticut law, ISG's knowledge by June 2000
18 that its funds were dissipated necessarily informed it that
19 Ness's earlier representations were untrue. First Am.
20 Compl. ¶¶ 29, 32, 36. ISG's credulous faith in Ness's
21 subsequent assurances fell well short of diligence;¹⁴ there

¹⁴ ISG argues that the district court improperly found facts concerning (inter alia) ISG's sophistication, and

1 is "no reason to encourage investors who suspect something
2 amiss to rely solely on their [advisor's] advice and to
3 refrain from seeking outside advice." Piteo v. Gottier, 112
4 Conn. App. 441, 449 (App. Ct. 2009). ISG "cannot seek the
5 safe harbor of equitable estoppel due to [its] own failure
6 to recognize that [it] w[as] required to pursue [its]
7 action." Celentano v. Oaks Condo. Ass'n, 265 Conn. 579, 615
8 (2003).

9
10 For the foregoing reasons, the judgment of the district
11 court is affirmed.

prematurely required it to prove due diligence. Since the record supports no plausible inference of due diligence (without regard to ISG's level of sophistication), these arguments need not be reached.