UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)
CASE NO. 9:10-CV-81612
(Ancillary Pro. No. 08-81565-CIV-Hurley/Hopkins)

JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital Consortium, LLC, et al.

Plaintiff,

vs.

WELLS FARGO BANK, N.A., as successor-in-interest to Wachovia Bank, N.A.,

Defendant.
_________________________________/

WELLS FARGO BANK, N.A.'S MOTION FOR RECONSIDERATION OF ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS AND DENYING DEFENDANT'S MOTION TO STRIKE (ECF NO. 52) AND INCORPORATED MEMORANDUM OF LAW

Defendant, Wells Fargo Bank, N.A., as successor-in-interest to Wachovia Bank, N.A. ("Wells Fargo"), by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 54(b) and 60(b) and S. D. Local Rule 7.1, hereby moves for reconsideration of this Court's Order Granting in Part Defendants' Motion to Dismiss and Denying Defendants' Motion to Strike (ECF No. 52)(the "Partial Dismissal Order") and for an Order dismissing all claims against Wells Fargo with prejudice. In support hereof, Wells Fargo states as follows:

I. INTRODUCTION

On April 5, 2011, Jonathan E. Perlman, Esq. ("Perlman" or "Receiver"), as Court appointed Receiver of Creative Capital Consortium, LLC, et. al. (the "Receivership Entities"), filed his eight (8) count Amended Complaint against Wells Fargo seeking to recover damages allegedly incurred by the Receivership Entities in connection with a Ponzi scheme allegedly perpetrated by the Receivership Entities.

On April 21, 2011, Wells Fargo filed its Motion to Dismiss Amended Complaint and/or Motion to Strike Immaterial, Impertinent, and Scandalous Matter (ECF No. 23). On November 22, 2011, this Court entered its Partial Dismissal Order.[1] Subsequent to the Partial Dismissal Order, on January 11, 2012, the Eleventh Circuit Court of Appeals issued its unpublished opinion in *Lawrence v. Bank of America*, 455 Fed. Appx. 904 (11th Cir. 2012)("*Lawrence II*").

On May 23, 2012, in the related case brought by the Receiver against Bank of America, N.A., the Court entered its Order Granting Defendants Motion to Dismiss [the Amended Complaint](ECF No. 82)("Bank of America Dismissal Order"), wherein the Court expressly stated:

> "Although *Lawrence II* is an unpublished opinion and therefore does not constitute binding precedent, see U.S.C.A. 11th Cir. Rule 36-2, its reasoning sheds substantial light on the exact issue presented by the instant motion. With the benefit of the Eleventh Circuit's reasoning on this issue, the Court now concludes that the Receiver's allegations are insufficient as a matter of law to state a claim for aiding and abetting liability. Because banks have no duty to investigate even suspicious transactions, allegations of such transactions do not demonstrate the actual knowledge required for aiding and abetting claims. *Lawrence*, 455 Fed. Appx. at 907."

See Bank of America Dismissal Order (ECF No.82), pp. 2-3, *Perlman v. Bank of America, N.A.*, Case No. 9:11-cv-80331-DTKH, formerly pending in the United States District Court for the Southern District of Florida (the "Bank of America Action").

The same considerations that caused this Court to dismiss with prejudice all claims against Bank of America, N.A. have equal applicability to the instant action. As this Court has now determined in the Bank of America Action that it will follow the reasoning of *Lawrence II*, this

[1] The causes of action that were not dismissed pursuant to the Partial Dismissal Order (ECF No. 52) are: (1) Aiding and Abetting Breach of Fiduciary Duty (Count I); (2) Aiding and Abetting Conversion (Count II); (3) Avoidance and Recovery of Fraudulent Transfers Pursuant to Chapter 726 of The Florida Statutes (Count VI); and (4) Avoidance and Recovery of Fraudulent Transfers Pursuant to Chapter 726 of The Florida Statutes (Count VII). Counts I and II are collectively referred to herein as the "Aiding and Abetting Claims." Counts VI and VII are collectively referred to herein as the "Fraudulent Transfer Claims."

Court should now reconsider the Partial Dismissal Order in this action and dismiss all claims against Wells Fargo with prejudice.

II. MEMORANDUM OF LAW

A. This Court Has Authority to Reconsider the Partial Dismissal Order

Fed. R. Civ. P. 54(b), provides, in pertinent part, that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and ***may be revised at any time before the entry of a judgment*** adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b)(emphasis added). Likewise, this District has recognized that: "A Court may reconsider a [non-dispositive] prior ruling when (1) there is an intervening change in controlling law; (2) new evidence is available; and (3) there is a need to correct clear error or manifest justice." *Eisenberg v. Carnival Corp.*, 2008 WL 2946029 at *1 (S.D. Fla. 2008).

Additionally, pursuant to Fed. R. Civ. P. 60(b), this Court is permitted to reconsider a non-final order in light of an intervening appellate decision. *See e.g. Max M. v. Thompson*, 585 F.Supp. 317, 323 (N.D. Ill. 1984). In *Max M.*, on July 1, 1983, the District Court issued an Order on the Defendants' motions to dismiss wherein the District Court dismissed the claims against all defendants except for plaintiffs' claim against certain Defendants for reimbursement of the amounts expended by Mr. and Mrs. M. for Max's psychiatric treatment. *Id.* at 319. As the July 1, 1983 Order in *Max M.* did not dispose of all of the claims, it was a non-appealable, non-final order pursuant to 28 U.S.C. § 1291. *Id.* at 321.

A number of months later, on November 18, 1983, the Seventh Circuit Court of Appeals issued its opinion in the matter of *Timms v. Metropolitan School District of Wabash County, Ind.*,

722 F.2d 1310 (7th Cir.1983).[2] *Timms* directly addressed certain of the issues in the July 1, 1983, Order on the Defendants' motions to dismiss in *Max. M.* Based upon the November 18, 1983 *Timms* decision, Max M. filed a motion to reconsider the July 1, 1983 Order on the Defendants' motions to dismiss. *Max M.*, 585 F.Supp. at 320. In reviewing the Court's authority to entertain Max M.'s motion to reconsider based upon the *Timms* decision, the Court stated:

> "[T]here is no impediment to this Court's entertaining plaintiffs' motion to reconsider in light of an intervening controlling appellate decision. Here, where there has not yet been a ruling on the pending cross-motions for summary judgment on Max M.'s single remaining claim, let alone a trial, ***the appearance of an intervening opinion by the Court of Appeals for our own circuit makes it incumbent upon this Court, in the interests of equity and judicial economy, to reconsider its partial dismissal of plaintiffs' complaint.***"

Max M., 585 F.Supp. at 321 (emphasis added).

Like *Max M.*, this Court's November 22, 2011 Partial Dismissal Order was a non-appealable, non-final order pursuant to 28 U.S.C. § 1291. In this action, neither of the parties have filed motions for summary judgment and this action is not set for trial until March 2013. Like *Max M.*, there is no question that had *Lawrence II* been handed down prior to this Court's Partial Dismissal Order (ECF No. 52), this Court would have followed the Eleventh Circuit's line of reasoning in *Lawrence II*. *Max M.*, 585 F.Supp. at 324. *See also* Bank of America Dismissal Order (ECF No.82), p. 3.

Accordingly, as set forth above, this Court has the authority to and in the interests of equity and judicial economy should reconsider its ruling on the Partial Dismissal Order based upon the intervening opinion and reasoning in *Lawrence II*, which this Court has since followed in the May 23, 2012 Bank of America Dismissal Order.

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[2] The original Seventh Circuit panel opinion in *Timms* was issued on September 19, 1983. *See Max M.*, 585 F.Supp. at 320.

B. *The Aiding and Abetting Claims Should Be Dismissed With Prejudice At This Time Based Upon Lawrence II and the Bank of America Dismissal Order*

In both this action and the Bank of America Action, prior to *Lawrence II* being decided by the Eleventh Circuit on January 11, 2012, this Court considered whether the Receiver could properly plead the "actual knowledge" element of his aiding and abetting claims by alleging "atypical transactions" on the accounts the Receivership Entities maintained at the banks. In doing so, the Court attempted to reconcile a variety of cases with conflicting outcomes. *See* November 22, 2011 Partial Dismissal Order (ECF No. 52), pp. 14-19; *see also* December 22, 2011 Order on Motion to Dismiss [initial complaint] (ECF No. 51), pp. 10-16 in the Bank of America Action. Prior to *Lawrence II* being decided by the Eleventh Circuit, in both the instant action and the Bank of America Action, this Court addressed, but declined to follow United States District Judge Virginia M. Hernandez's decision in *Lawrence v. Bank of America, N.A.*, 2010 WL 3467501 (M.D. Fla. 2010)("*Lawrence I*"), and ultimately held that allegations of atypical allegations are sufficient to withstand a motion to dismiss on the Receiver's Aiding and Abetting claims. *See* Partial Dismissal Order (ECF No. 52), p. 19; *see also* Bank of America Action, Order on Motion to Dismiss [initial complaint] (ECF No. 51), p. 16-17; *see also* Bank of America Dismissal Order (ECF No.82), p. 2.

In the Bank of America Action, on January 9, 2012, the Receiver filed an Amended Complaint (ECF No. 57). On February 16, 2012, Bank of America filed a Motion to Dismiss the Amended Complaint (ECF No. 67). The *Lawrence II* opinion was issued by the Eleventh Circuit on January 11, 2012 between the filing of the Amended Complaint and the filing of the Motion to Dismiss in the Bank of America Action.

In the May 23, 2012 Bank of America Dismissal Order, the Court noted that "in the instant motion, the Bank restates its earlier argument supporting its motion to dismiss the aiding and abetting claims in light of an intervening unpublished Eleventh Circuit opinion [*Lawrence II*]. The

Motion also argues that the Court must dismiss the re-pleaded fraudulent transfer claims based upon the reasoning in *Lawrence II*. In each case, the Court agrees." *See* Bank of America Dismissal Order (ECF No.82), pp. 1-2.

Now that this Court has determined that it will follow the Eleventh Circuit's reasoning in *Lawrence II*, this Court should apply that same reasoning to the allegations of the Amended Complaint (ECF No. 19) in this action, and reconsider its ruling on the Partial Dismissal Order (ECF No. 52) and dismiss this entire action with prejudice. Very simply, there is absolutely nothing in the Amended Complaint which demonstrates that Wells Fargo had actual knowledge of any Ponzi scheme allegedly perpetrated by the Receivership Entities. Rather, the Amended Complaint is entirely based upon allegations that Wells Fargo failed to properly investigate atypical transactions and, at most, should have known that the Receivership Entities were perpetrating a Ponzi scheme. *See* Amended Complaint (ECF No. 19), ¶¶29-66.

However, subsequent to the November 22, 2012 Partial Dismissal Order (ECF No. 52), both *Lawrence II* and this Court in the Bank of America Action have held: "Because banks have no duty to investigate even suspicious transactions, allegations of such transactions do not demonstrate the actual knowledge required for aiding and abetting claims." *Lawrence II*, 455 Fed. Appx. at 907." *See* Bank of America Dismissal Order (ECF No.82), pp. 2-3. *Lawrence II* added: "Although Plaintiffs alleged the transactions were atypical and therefore Bank of America should have known of the Ponzi scheme, such allegations are insufficient under Florida law to trigger liability." *Lawrence II*, 455 Fed. Appx. at 907; Bank of America Dismissal Order (ECF No.82), p. 2.

As in *Lawrence II* and the Bank of America Action, the allegations in the Amended Complaint fail to demonstrate that Wells Fargo had actual knowledge of any Ponzi scheme perpetrated by the Receivership Entities and are insufficient under Florida law to trigger liability against Wells Fargo. Based upon the foregoing, and the subsequent rulings in *Lawrence II* and the

Bank of America Action, it is "incumbent upon this Court, in the interests of equity and judicial economy, to reconsider its partial dismissal of plaintiffs' complaint." *Max M.*, 585 F.Supp. at 321. Thus, this Court should reconsider its Partial Dismissal Order (ECF No. 52) and dismiss the Aiding and Abetting Claims (Counts I and II) with prejudice at this time.

C. The Fraudulent Transfer Should Be Dismissed With Prejudice At This Time Based Upon Lawrence II and the Bank of America Dismissal Order

Lawrence II and the Bank of America Dismissal Order likewise dictate the immediate dismissal with prejudice of the Receiver's Fraudulent Transfer claims against Wells Fargo. In the Bank of America Dismissal Order, this Court stated:

> "This Court has already concluded that the Receiver has not properly alleged the Bank's actual knowledge of the underlying violations. The Court further concludes that because banks have the "right to assume that individuals who have the legal authority to handle the entity's accounts do not misuse the entity's funds" *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003), the alleged atypical transactions and other red flags do not comprise "facts or circumstances [that] would have induced an ordinarily prudent bank to make inquiry" Waxenberg, 611 F. Supp.2d at 1319."
>
> The Court also finds fraudulent transfer liability of a bank under these circumstances at odds with the reasoning in *Freeman v. First Union Nat'l Bank*, 865 So.2d 1272 (Fla.2004). In *Freeman*, the Florida Supreme Court rejected a cause of action for aiding and abetting fraudulent transfers against a bank that was the primary banker for a Ponzi schemer after it effectuated wire transfers on the schemer's behalf even after the schemer was sued and a court issued an injunction freezing the accounts at the bank. *Id.* at 1274, n.3. To allow Plaintiff in the instant case to circumvent Freeman by holding a bank liable for its customer's deposits into its own accounts would undermine the Florida Supreme Court's determination of "the narrow focus of the FUFTA and its limitations" *Id.* at 1277."

See Bank of America Dismissal Order (ECF No.82), pp. 4-5.

The same analysis and result apply herein. As set forth above, the Receiver has not properly alleged Wells Fargo's actual knowledge of the underlying violations. As a matter of law, Wells Fargo had the "right to assume that individuals who have the legal authority to handle the entity's accounts [did] not misuse the entity's funds". *Lawrence II*, 455 Fed. Appx. at 907; *O'Halloran*, 350

F.3d at 1205; Bank of America Dismissal Order (ECF No.82), pp. 4-5. Additionally, like in the Bank of America Action, this Court should not allow the Receiver to circumvent the "the narrow focus of the FUFTA and its limitations" articulated by Florida Supreme Court in *Freeman* by seeking to hold a bank liable for its customer's deposits into its own accounts. *See* Bank of America Dismissal Order (ECF No.82), p. 5

As in *Lawrence II* and the Bank of America Action, the Fraudulent Transfer Claims in the Amended Complaint fail to state a cause of action as a matter of law. Based upon the foregoing, and the subsequent rulings in *Lawrence II* and the Bank of America Action, it is "incumbent upon this Court, in the interests of equity and judicial economy, to reconsider its partial dismissal of plaintiffs' complaint." *Max M.*, 585 F.Supp. at 321. Thus, this Court should reconsider its Partial Dismissal Order (ECF No. 52) and dismiss the Fraudulent Transfer Claims (Counts VI and VII) with prejudice at this time.

III. CONCLUSION

Based upon the subsequent rulings in *Lawrence II* and the Bank of America Dismissal Order, the Receiver's Amended Complaint (ECF No. 19) fails to state a cause of action as a matter of law and should be dismissed with prejudice. Wherefore, Wells Fargo request that this Court reconsider its rulings in the Partial Dismissal Order (ECF No. 52) and dismiss this entire action with prejudice, and grant such other relief as this Court deems is just and proper.

CERTIFICATE OF COMPLIANCE WITH S.D. FLA. L.R. 7.1(A)(3)

I HEREBY CERTIFY that, in accordance with S.D. Fla. L.R. 7.1(A)(3), counsel for Wells Fargo has conferred with counsel for the Plaintiff to address the issues raised in this Motion, and the Plaintiff does not agree to the relief requested in this Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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