

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1836

JOHNNY KARP INVESTMENTS, LLC,
Appellant

v.

PETER C. KYRIAKOULIS; JOSEPH GROSODONIA; EDWARD C. AYERS, III;
VII CAPITAL PARTNERS, LP; VII CAPITAL MANAGEMENT, LLC;
VII CAPITAL ADVISORS, LLC; VII CAPITAL GROUP, LLC;
JOHN/JANE DOES 1-5, fictitious individuals to be named after discovery;
ABC CORPS. 1-5, fictitious corporate entities to be named after discovery

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-19-cv-16644)
Honorable Susan D Wigenton, U.S. District Judge

Submitted Under Third Circuit L.A.R. 34.1(a)
on March 1, 2021

Before: KRAUSE, PHIPPS, and FUENTES, *Circuit Judges*

(Opinion filed: March 2, 2021)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

KRAUSE, *Circuit Judge*.

Johnny Karp Investments challenges the District Court’s dismissal of its securities fraud suit, which claimed that Peter Kyriakoulis and others (the “Defendants”) violated Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, as well as various state laws. Because we agree with the District Court that the complaint was time-barred, we will affirm.

A. Discussion¹

The complaint, filed on August 13, 2019, alleged that the Defendants fraudulently induced Appellant, starting in September 2013, to invest \$1.15 million by misrepresenting they would “purchase securities that were guaranteed to provide a return on investment” and that Defendants then induced Appellant to maintain its investment even as the “risky, speculative investments” that Defendants actually purchased led to unrecoverable losses. JA 30, 32. The District Court determined that only the inducement to invest initially was actionable, a ruling not squarely challenged on appeal, and that the complaint was untimely because it was filed “2 years after the discovery of the facts constituting [that alleged] violation,” JA 8 (quoting 28 U.S.C. § 1658(b)(1)). The Court then granted the Defendants’ motion to dismiss and declined to exercise supplemental jurisdiction over Appellant’s state law claims.

Appellant’s sole argument on appeal is that it did not “in fact discover” and “a reasonably diligent plaintiff [could not] have discovered,” *Merck & Co. v. Reynolds*, 559

¹ The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291.

U.S. 633, 637 (2010), the facts necessary to plead the scienter and economic loss elements of its securities fraud claim, *Fan v. StoneMor Partners LP*, 927 F.3d 710, 714 (3d Cir. 2019), until August 14, 2017, so that its complaint was filed within two years of the claims’ accrual. On *de novo* review, “accept[ing] as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view[ing] them in the light most favorable to the non-moving party,” *DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 215 (3d Cir. 2007) (citation omitted), we disagree.

According to the complaint, Kyriakoulis began managing Appellant’s investments in September 2013 and, by mid-2015, grew the account from \$575,000 to over \$1.2 million, all of which was invested in municipal bonds. From that point onward, however, Kyriakoulis’s strategy and Appellant’s fortunes took a different turn, with Kyriakoulis representing in June 2015 that Defendants were diversifying to more liquid, accessible investments and the net asset value of the holdings falling below \$400,000 by December.

Although aware of Defendants’ diversification and losses, Appellant invested an additional \$540,000 on April 1, 2016, based on Kyriakoulis’s promise to “generate all time high profits.” JA 23. It then maintained those investments despite monthly statements reflecting a continued decline to \$123,574 by September 2016; despite being advised in September 2016 that Defendants were pursuing investments with “a high degree of volatility,” JA 25, rather than “conservative, safe investments,” JA 19; and despite being notified, and allegedly being “shocked to learn,” on April 4, 2017 that Defendants had invested in oil futures that reduced the account to just over \$160,000, JA 26–28.

On August 14, 2017, Kyriakoulis e-mailed that the account had bottomed out at \$2,210 and “there [was] little hope of any meaningful recovery.” JA 29. Two years later, on August 13, 2019, Appellant filed suit.

Appellant contends that suit was timely because before August 14, 2017, Appellant did not discover—and no reasonably diligent investor could have discovered—the facts underlying Defendants’ fraudulent intent and Appellant’s economic loss. Like the District Court, we reject this argument. On its face, the complaint reflects that by April 4, 2017, at the latest, Appellant was well aware that Kyriakoulis was not making safe and conservative investments or generating high profits, as he represented, and that he was, instead, doing “the exact opposite.” JA 11. The complaint’s allegations thus make clear that well before August 2017, Appellant knew or reasonably should have known the facts necessary to prove all the elements of securities fraud, including that Kyriakoulis had “made . . . material misstatement[s] *with an intent to deceive*—not merely innocently or negligently,” *Merck*, 559 U.S. at 649, and those misstatements resulted in substantial economic loss.

Appellant’s remaining arguments fare no better. To the extent Appellant argues it was fraudulently induced to leave its investments in place by Defendants’ false assurances, those alleged misrepresentations were not made “in connection with the purchase or sale of any security,” as required to state a claim under Section 10(b). 15 U.S.C. § 78j(b). In addition, nothing in the District Court’s opinion suggests it erroneously applied the inquiry-notice doctrine, and Appellant offers no authority for the novel proposition that it could not plead economic loss until it knew with certainty that the loss was unrecoverable.

In short, we perceive no error in the District Court’s order granting Defendants’ motion to dismiss.²

B. Conclusion

For the foregoing reasons, we will affirm the District Court’s order.

² Although not contested by Appellant, we note that the District Court did not err in “declin[ing] to exercise supplemental jurisdiction over state claims after it dismis[s]e[d] a federal claim on which its jurisdiction is based.” *Robert W. Mauthe, M.D., P.C. v. Optum Inc.*, 925 F.3d 129, 135 (3d Cir. 2019).