[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14813
Non-Argument Calendar

D.C. Docket No. 0:16-cv-60877-KMW

CATHERINE KERRUISH,
BARBARA CRESSMAN,

Plaintiffs - Appellants,

versus

ESSEX HOLDINGS, INC.,
NAVIN XAVIER,
RODNEY RUTTY,
JPMORGAN CHASE BANK, N.A.,

Defendants - Appellees,

RICARDO O. ALBERTY, et. al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(June 6, 2019)

Before WILLIAM PRYOR, MARTIN, and GRANT, Circuit Judges.

PER CURIAM:

Catherine Kerruish and Barbara Cressman, both British citizens, each lost more than $700,000 investing in what turned out to be a Ponzi scheme. They say they invested partly in reliance on false representations made by a JPMorgan Chase Bank, N.A. employee named Rodney Rutty in a letter sent on JPMorgan Chase letterhead. They sued Rutty for common law fraud and sought to hold JPMorgan Chase vicariously liable. The district court dismissed the claims against JPMorgan Chase and granted summary judgment to Rutty. After careful review, we affirm.

I.

Kerruish's husband, Stephen Kerruish, was managing director and majority shareholder of a Cypriot company called Lucino, Ltd. Set up for tax advantages, Lucino's purpose was to invest in the iron ore business of a company called Essex Holdings. Essex was a Florida corporation that purportedly traded in sugar and iron ore but in fact used new investor funds to pay returns to earlier investors—a classic Ponzi scheme.

Around September 24, 2012, Kerruish and her husband invested £500,000 in Lucino with the understanding that Lucino would invest the money in Essex's iron ore mining business. Kerruish did not believe the investment would be in Essex's

sugar business. Nonetheless, she says she relied on false statements about Essex's success in the sugar trade as part of her decision to invest. The only false statement Rutty is alleged to have made came in the form of a letter on JPMorgan Chase letterhead discussing Essex's success in the sugar trade.

The letter, dated December 21, 2010 and addressed to European Capital Advisors in Geneva, Switzerland, was purportedly signed by Rutty. It also included a photocopy of Rutty's business card. The letter read:

> Dear Sir/Madam:
>
> At the request of our valued customer Essex Holdings, Inc. please be advised of the following information in reference to their Sugar Allocation.
>
> Essex Holdings, Inc., has purchased the following contract in the amount of One Million Five Hundred Thousand Metric Tons of White Refined Sugar from Shepton Mallet Corp., S.A., under allocation number SM009582-121SM3331MT1500000-51210. The initial purchase consists of One Hundred Twenty Five Thousand Metric Tons for the next twelve consecutive months.
>
> We further confirm that Essex Holdings have a proven business history in the export of ICUMSA 45 sugar from Brazil.
>
> Please feel free to contact us if you have any further questions on this matter.

Rutty admits the signature resembles his but maintains he did not prepare or sign the letter.

Kerruish says she also relied on a second letter on JPMorgan Chase letterhead, dated July 12, 2011, addressed to Lucino and purportedly signed by a

JPMorgan Chase employee named Pressoir Pierre.[1] This letter included a photocopy of Pierre's business card. The second letter was near-identical to the first. It read:

> Attention Messrs. Jarvis & Kerruish:
>
> At the request of our valued customer Essex Holdings, Inc. please be advised of the following information in reference to their Sugar Allocation.
>
> Essex Holdings, Inc., has purchased the following contract in the amount of One Million Five Hundred Thousand Metric Tons of White Refined Sugar from Shepton Mallet Corp. S.A., under allocation number: SM009582-121SM3331MT1500000-51311-2. The initial purchase consists of One Hundred Twenty Five Thousand Metric Tons for the next twelve consecutive months.
>
> We further confirm that Essex Holdings, Inc., have a proven business history in the export of ICUMSA 45 sugar from Brazil.
>
> Please feel free to contact us if you have any further questions on this matter.

Though neither letter pertained to Essex's iron ore business, Kerruish says the letters influenced her decision to invest in that business because they led her to believe "Essex was a wealthy, successful company" with a "good relationship with a major bank." She says she believed Essex's "sugar trade had created a huge fund, tens of millions of dollars, and that this would be available as a cushion

[1] The complaint named Pierre as a defendant and asserted fraud claims against him. He was later dismissed for lack of service.

against any problems with the mining effort." She apparently came by that belief based on statements from other banks attesting to the size of Essex's deposits.

Kerruish believed the initial £500,000 investment would be for nine months with the option to renew, and profits paid every 90 days. Kerruish received two payments of $48,000 on the first and second 90-day marks after the investment. Assured the investment was sound, Kerruish and her mother, Cressman, decided to invest £500,000 of Cressman's money in Essex through Lucino. Cressman made her investment on April 10, 2013.

After the second 90-day payment, Kerruish never received another payment. Cressman never got any payment. All told, Kerruish lost $701,606, and Cressman lost $761,600.

The fraud eventually came to the attention of the U.S. Attorney for the Southern District of Florida. The criminal case resulted in Navin Xavier, an Essex officer named in Kerruish and Cressman's complaint, pleading guilty to a $29 million fraud. As part of the plea, he admitted he "would indirectly provide investors with purported letters from financial institutions that indicated Essex Holdings had substantial funds on deposit, or had executed significant contracts related to sugar transportation or iron ore mining." He admitted "[t]hese letters were false and fraudulent, and the signatures of the bank officers referenced in the letters were forged." The plea agreement specifically referred to a letter sent in

December 2010 on JPMorgan Chase Bank letterhead "indicating that Essex Holdings had purchased 125,000 metric tons of white sugar. This letter contained a forged signature and was not created by JP Morgan Chase Bank, N.A."

II.

Kerruish and Cressman sued Essex Holdings, five Essex officers, TD Bank, N.A., a TD Bank employee, JPMorgan Chase, and Rutty. They asserted common law fraud claims against all defendants, alleging joint and several liability. Although the complaint alleged joint and several liability, Kerruish and Cressman argued in response to a motion to dismiss that they meant to hold JPMorgan Chase vicariously liable. They also alleged violations of the Securities Exchange Act against all defendants and negligence claims against JPMorgan Chase. Only the common law fraud claims against Rutty and JPMorgan Chase are before us in this appeal.[2]

The district court dismissed all claims against JPMorgan Chase and all but the common law fraud claims against Rutty. Kerruish and Cressman conceded that dismissal of the securities fraud claim against Rutty was proper. The court concluded Kerruish and Cressman did not meet Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement for fraud as to JPMorgan Chase because

[2] Kerruish and Cressman do not argue the district court erred in dismissing the securities fraud or negligence claims. We deem them to have conceded the district court correctly dismissed those claims. See Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 681–82 (11th Cir. 2014).

there were no allegations that would put JPMorgan Chase on notice of the basis for vicarious liability. It concluded Kerruish and Cressman did not plead essential elements of the securities fraud claims against JPMorgan Chase and Rutty or the negligence claims against JPMorgan Chase. The district court denied Kerruish and Cressman's motion to amend their complaint.

The district court later granted summary judgment to Rutty on the common law fraud claim against him. The court held that no reasonable jury could find that Rutty signed and sent the letter Kerruish claimed induced her to invest in Essex.

The district court made three evidentiary rulings that affected the evidence at the summary judgment stage. First, it ruled Kerruish and Cressman could not take Xavier's deposition. Kerruish and Cressman moved late in the discovery period for leave to take the deposition, as required due to Xavier's incarceration, see Fed. R. Civ. P. 30(a)(2)(B), and did not serve Xavier with a notice of intent to depose him until after the discovery deadline passed. Second, the district court admitted Xavier's plea agreement under Federal Rule of Evidence 807, the residual hearsay exception. And finally, it denied Kerruish and Cressman's motion, filed after summary judgment briefing was complete, to supplement the record with a declaration from Xavier. The declaration says Xavier "paid compensation to bankers Pressoir Pierre and Rodney Rutty of JPMorgan Chase Bank in order to have them sign letters falsely stating that Essex had a successful sugar business,

and to have them make the same false representation to any potential investor in Essex who called them and asked them about the company."

This is Kerruish and Cressman's appeal.

III.

We first review the district court's evidentiary rulings, since our conclusions as to those rulings will affect the summary judgment analysis. We review all the district court's evidentiary rulings for abuse of discretion. See Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1306–07 (11th Cir. 2016); Rivers v. United States, 777 F.3d 1306, 1312 (11th Cir. 2015); Holloman v. Mail-Well Corp., 443 F.3d 832, 837 (11th Cir. 2006). A district court abuses its discretion when it makes a clear error of judgment or applies the wrong legal standard. Corwin v. Walt Disney Co., 475 F.3d 1239, 1249 (11th Cir. 2007). As we explain, we see no abuse of discretion in any of the evidentiary rulings.

Because Xavier was incarcerated, the Federal Rules of Civil Procedure required Kerruish and Cressman to seek leave of court prior to deposing him. See Fed. R. Civ. P. 30(a)(2)(B). Kerruish and Cressman sought leave to depose Xavier more than a year after the case began and one month before the close of discovery, though they named him as a defendant in the case from the beginning. Indeed, there was a default judgment against Xavier due to his failure to answer the complaint.

The district court expressed two concerns at a hearing on the motion to take Xavier's deposition. First, it was concerned that Xavier had not been properly served with the complaint, as he was served at Essex Holdings' corporate address, not his prison address. Lacking proper service, Xavier might have good cause for failing to appear, thus excusing the default. Second, the district court was concerned whether Xavier's criminal attorney knew that Kerruish and Cressman sought leave to depose him about the fraud at issue in his criminal case. The district court directed Kerruish and Cressman's attorney to contact Xavier's criminal attorneys and then inform the court by close of business the next day about Xavier's willingness and availability to sit for a deposition. Kerruish and Cressman's attorney did not serve Xavier with a notice of intent to depose him until nearly a month passed after the hearing. By that time, the discovery deadline expired, and JPMorgan Chase and Rutty had filed their summary judgment motion. Given these circumstances, the district court declined to extend any deadlines. If Xavier's deposition were taken at that point, a new summary judgment motion would have to be filed in order to address his testimony.

This was no abuse of discretion. Under Federal Rule of Civil Procedure 16, a district court must issue a scheduling order setting a discovery deadline. Fed. R. Civ. P. 16(b)(1), (3)(A). That order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The good cause standard

"precludes modification of the scheduling order unless the schedule cannot be met despite the diligence of the party seeking the extension." Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218, 1232 (11th Cir. 2008) (alteration adopted and quotation marks omitted). Though the district court may extend discovery for good cause, it has no obligation to do so, and its decision to hold litigants to the clear terms of a scheduling order ordinarily will not constitute an abuse of discretion. Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292, 1307 (11th Cir. 2011). Kerruish and Cressman offer no explanation for waiting until the eleventh hour to seek to depose a witness they must have known would be critical to their case. It was within the district court's discretion to hold them to the discovery deadline, particularly given the month it took them to serve Xavier a notice of intent to take his deposition after the district court demanded more alacrity.

Neither have Kerruish and Cressman offered any basis for us to conclude the district court abused its discretion in admitting Xavier's plea agreement under the hearsay residual exception. They say the district court admitted the plea agreement as a statement against penal interest under Rule 804(b)(3). Not so. The district court admitted the plea under Federal Rule of Evidence 807. Kerruish and Cressman's failure to challenge the district court's actual basis for admitting the

plea agreement means they have waived their argument against its admission. See Sapuppo, 739 F.3d at 681–82.

Rule 807 permits the introduction of hearsay evidence that does not fall into another hearsay exception if the statement "has equivalent circumstantial guarantees of trustworthiness," is "offered as evidence of a material fact," is "more probative on the point for which it is offered" than other evidence the proponent could reasonably obtain, and "admitting [the statement] will best serve the purposes of [the evidence rules] and the interests of justice." Fed. R. Evid. 807. A guilty plea certainly has guarantees of trustworthiness, see In re Slatkin, 525 F.3d 805, 812 (9th Cir. 2008), and Xavier's admissions were probative of material facts in the case.[3]

Finally, the district court did not abuse its discretion in excluding Xavier's declaration that he paid Rutty to sign false letters. Kerruish and Cressman moved to supplement the record with Xavier's declaration months after discovery had closed and after the court denied their motion to depose Xavier. The district court had discretion to disregard the declaration given its untimeliness. See Josendis, 662 F.3d at 1307; Oravec, 527 F.3d at 1232.

[3] We decline to address the merits of the claim given the waiver, but we note the district court cited In re Slatkin, 525 F.3d 805, 812 (9th Cir. 2008), in support of its conclusion.

IV.

"We review a district court's grant of summary judgment de novo." Global Quest, LLC v. Horizon Yachts, Inc., 849 F.3d 1022, 1026 (11th Cir. 2017). Summary judgment is warranted when the evidence viewed in the light most favorable to the nonmovant presents no genuine issues of material fact, such that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552–53 (1986).

In Florida, "[t]he essential elements of common-law fraud are: (1) a false statement of fact; (2) known by the person making the statement to be false at the time it was made; (3) for the purpose of inducing another to act in reliance thereon; (4) action by the other person in reliance on the correctness of the statement; and (5) resulting damage to the other person." Gandy v. Trans World Comput. Tech. Grp., 787 So. 2d 116, 118 (Fla. 2d DCA 2001). The false statement must be "material," meaning "a contract would not have been entered into but for the" false statement. Casey v. Cohan, 740 So. 2d 59, 62 (Fla. 4th DCA 1999). A person's reliance on the false statement must be reasonable. Schopler v. Smilovits, 689 So. 2d 1189, 1190 (Fla. 4th DCA 1997); see also Green Leaf Nursery v. E.I. DuPont De Nemours & Co., 341 F.3d 1292, 1304 n.11 (11th Cir. 2003) ("Justifiable reliance is an element of fraud under Florida law."). Multiple tortfeasors may be held jointly and severally liable under Florida law "when the tortfeasors, acting in

concert or through independent acts, produce a single injury." Acadia Partners, L.P. v. Tompkins, 759 So. 2d 732, 736 (Fla. 5th DCA 2000); see also Merrill Crossings Assocs. v. McDonald, 705 So. 2d 560, 560–62 (Fla. 1997) (holding the doctrine of joint and several liability applies to intentional torts).

On de novo review, we agree with the district court there is no genuine dispute of fact that Rutty did not create or sign the letter attesting to Essex's sugar business. The only admissible evidence from which a jury could conclude Rutty had anything to do with the letter is his testimony that the signature resembles his. But he has sworn he did not create or sign the letter, and Xavier has admitted that he did. In his plea agreement, Xavier specifically admits he created a December 2010 letter on JPMorgan Chase letterhead that made false representations about Essex's sugar business. In the face of this evidence, no reasonable jury could conclude that Rutty made the fraudulent statement Kerruish and Cressman attribute to him.

As they did below, Kerruish and Cressman also point to another letter Rutty signed as further evidence he participated in the fraud. In October 2010, Xavier sent Rutty an email requesting a "proof of funds" letter stating Essex's deposits at the bank. A draft of the letter read:

> We, the undersigned bank officers, hereby confirm with full responsibility that the amount of US$ 250,000.00 (two hundres [sic] fifty United States dollars) is reserved in this bank at the request of our client Essex Holding, Inc., for payment as our clints [sic] instruct.

The draft instructed Rutty to put the letter on JPMorgan Chase letterhead and included a block for his signature. A final version of the letter is not in the record, but Rutty sent Xavier an email from his JPMorgan Chase account a few days later responding to the request for the proof of funds letter. The email said: "Hi Navin [Xavier] .. sent fax .. sorry for the delay …"

At the time of this exchange, Essex had well over $250,000 in deposits at JPMorgan Chase. Nonetheless, Kerruish and Cressman argue the letter falsely states Essex had a quarter of a million dollars on "reserve" at JPMorgan Chase. Their view seems to be that it is not clear what "reserve" means, so the letter could not be truthful on that point. From this, they say, a reasonable jury could infer Rutty made false statements for Xavier.

For his part, Rutty says he has no recollection of the email exchange, but he does not deny it happened. And though he says he did not know precisely what "is reserved in this bank" means, he says it was not uncommon for him to sign "proof of funds" letters for clients, by which he meant a letter showing that a client has an account in good standing with a certain amount of money on deposit.

We reject Kerruish and Cressman's cramped reading of the letter. It is not materially false for a bank to say a company has $250,000 "on reserve" when the company in fact has much more available in deposits. As JPMorgan Chase and Rutty point out, one of a bank's core purposes is to hold money and pay it as a

client instructs. At the time the letter was apparently sent, JPMorgan Chase could have paid $250,000 at Essex's instructions. The letter was true in this material respect. Because the letter was true, a reasonable jury could not rely on it to conclude that Rutty was involved in Xavier's fraud and therefore responsible for the letter touting Essex's sugar business.

In their final effort to survive summary judgment, Kerruish and Cressman ask us to take judicial notice of statements Xavier made in his motion to vacate his sentence under 28 U.S.C. § 2255. See Xavier v. United States, No. 1:18-cv-21990-DPG (S.D. Fla. May 1, 2019). Kerruish and Cressman say Xavier made statements in that proceeding that would create a genuine dispute of fact in this one.

Under Federal Rule of Evidence 201, a court "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); see also Cunningham v. Dist. Att'y's Office, 592 F.3d 1237, 1255 (11th Cir. 2010) (taking judicial notice of federal and state court records). But "the taking of judicial notice of facts is, as a matter of evidence law, a highly limited process. The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997) (en banc) (per curiam) (declining to take judicial notice of

newspaper accounts or press releases of a public official's conduct). "[T]he kinds of things about which courts ordinarily take judicial notice are" things like "scientific facts: for instance, when does the sun rise or set," or "matters of geography." Id.

Rule 201 does not extend to the evidence Kerruish and Cressman would like us to notice. Judicial notice of court records is ordinarily confined to determining what happened in the course of a proceeding—when a plaintiff filed a complaint, what claims were argued and adjudicated, and so on. See, e.g., Coney v. Smith, 738 F.2d 1199, 1199–200 (11th Cir. 1984) (per curiam). We have found no authority for the proposition that we may take judicial notice of an affidavit never made part of the district court record and rely on it to reverse a grant of summary judgment. And we see hearsay problems lurking were we to do so.

Kerruish and Cressman's request is in essence no different than an appellant offering an affidavit to an appeals court in the first instance to try to persuade the appeals court to reverse summary judgment. We would not accept a new affidavit for the first time on appeal, see Hoover v. Blue Cross & Blue Shield of Ala., 855 F.2d 1538, 1543 n.5 (11th Cir. 1988), and we will not accept Xavier's statements in his § 2255 motion as evidence in this case simply because he made them in a court document. We are particularly disinclined to do so since the district court

rebuffed both the plaintiffs' eleventh-hour attempts to get Xavier's statements into the record. This strikes us as a third attempt, and we will not sanction it.

In sum, we see no dispute in the record: Rutty did not make or sign the letter Kerruish and Cressman say induced them to invest in Essex. Because they cannot show he made any false statement on which they reasonably relied, Rutty was entitled to summary judgment on the common law fraud claims against him. And because Rutty is not liable for common law fraud, JPMorgan Chase cannot be held vicariously liable. It was therefore harmless for the district court to deny Kerruish and Cressman's motion to amend their complaint to assert vicarious liability against JPMorgan Chase.

We do not doubt Kerruish and Cressman suffered serious financial hardship as a result of this fraud. But they simply have not shown that Rutty or JPMorgan Chase participated in the wrongdoing that led to their loss. We **AFFIRM** the district court's dismissal of the claims against JPMorgan Chase and grant of summary judgment to Rutty.