[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14119
Non-Argument Calendar

D.C. Docket No. 1:18-cv-00062-AW-GRJ

LUIS A. MESONES, SR.,
LUIS A. MESONES, JR.,
JOSE MESONES, and
ROSA S. NAKAMATSU,

Plaintiffs-Appellants,

versus

FELIPE J. ESTEVEZ,
as Bishop of the Diocese of St. Augustine a corporation sole,

Defendant-Appellee.

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

(August 23, 2021)

Before MARTIN, NEWSOM, and ANDERSON, Circuit Judges.

PER CURIAM:

The Plaintiffs in this case are Luis Mesones, Sr., and his three adult children, Luis Mesones, Jr., Jose Mesones, and Rosa Nakamatsu. Plaintiffs sued Felipe Estevez, the Bishop of the Diocese of St. Augustine (the "Diocese"), for employment discrimination. After giving Plaintiffs leave to amend, the district court dismissed their complaint with prejudice, finding that Plaintiffs affirmatively alleged facts that demonstrated their claims were time-barred and not subject to equitable tolling. This is Plaintiffs' appeal.

I.

Plaintiffs are naturalized United States citizens who were born in Peru. One by one, Plaintiffs came to the United States and began working for the Diocese. Luis Sr. began working in 1984; Luis Jr. in 1985; Jose in 1991; and Rosa in 1999. Plaintiffs alleged that for some period of time after they began working, the Diocese failed to make retirement contributions, pay for Social Security and state and federal employment taxes, and provide health insurance that the Diocese gave to similarly situated United States-born employees. Plaintiffs also alleged that the Diocese intentionally made misleading and fraudulent statements to both government agencies and Plaintiffs to hide the fact that they were not providing benefits to foreign-born employees to which those employees were legally entitled.

Plaintiffs say these statements deprived them of their ability to timely file this case. As such, Plaintiffs did not file a complaint with the Equal Employment Opportunity Commission ("EEOC") until 2017, when Rosa, after reviewing paperwork provided to her following her resignation, noticed that the Diocese listed an incorrect start date and notified the other Plaintiffs.

Plaintiffs received their right-to-sue letters from the EEOC in 2018 and filed suit shortly after. They brought, among others, claims alleging discrimination based on national origin under Title VII of the Civil Rights Act of 1964. In the complaint, Plaintiffs included a "memorandum of law" on the statute of limitations and argued they were entitled to equitable tolling. The Diocese moved to dismiss the complaint as time-barred because it was "filed **decades** outside the applicable statutes of limitations." The district court accepted the Diocese's argument, finding that Plaintiffs' legal memorandum lacked factual support and directing them to "plead factual content which supports equitable tolling."

Plaintiffs filed an amended complaint, but the Diocese again moved to dismiss on equitable tolling grounds. The district court agreed with the Diocese as to the amended complaint as well, finding that the claims were untimely and not saved by a continuing-violation theory or equitable tolling. The court dismissed the complaint with prejudice, and Plaintiffs timely appealed.

II.

We review de novo both a district court's dismissal of a complaint for failure to state a claim and its application of a statute of limitations. Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341, 1345 n.2 (11th Cir. 2021) (failure to state a claim); Foudy v. Indian River Cnty. Sheriff's Off., 845 F.3d 1117, 1122 (11th Cir. 2017) (statute of limitations). We also review de novo the legal question of a district court's denial of equitable tolling, but we review the court's underlying factual determinations for clear error. Cabello v. Fernandez-Larios, 402 F.3d 1148, 1153 (11th Cir. 2005) (per curiam).

III.

We begin with a discussion of the statutory scheme underlying this case. In Florida, a plaintiff seeking to file a Title VII action must first file a charge of discrimination with the EEOC within 300 days of the alleged unlawful employment practice. EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1271 (11th Cir. 2002) (per curiam) (citing 42 U.S.C. § 2000e-5(e)(1)).[1] If the EEOC decides not to litigate on the plaintiff's behalf, then the EEOC must send him notice, often

[1] Florida is a deferral state, Joe's Stone Crabs, 296 F.3d at 1271, which means plaintiffs are not bound by the ordinary 180-day filing period. See Maynard v. Pneumatic Prods. Corp., 256 F.3d 1259, 1262–63 (11th Cir. 2001); see also 42 U.S.C. § 2000e-5(e)(1) ("[I]n a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . , such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred[.]").

called a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). Once the plaintiff receives the right-to-sue letter, he must file his complaint within 90 days. Id. There appears to be no dispute that here, Plaintiffs filed their EEOC charge outside the 300-day requirement.[2]

However, because Title VII's timely-filing requirements are not jurisdictional, they are subject to equitable tolling. Stamper v. Duval Cnty. Sch. Bd., 863 F.3d 1336, 1342 (11th Cir. 2017). Equitable tolling "is an extraordinary remedy" that is "typically applied sparingly[,]" Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1221 (11th Cir. 2017) (quotation marks omitted), and the plaintiff bears the burden of proving that equitable tolling of the limitations period is appropriate, Stamper, 863 F.3d at 1242. Generally, the plaintiff must prove (1) that he diligently pursued his rights, and (2) that "some extraordinary circumstance" stood in his way that prevented timely filing. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 971 (11th Cir. 2016) (en banc) (quotation marks omitted).

The district court here applied Villarreal and found that Plaintiffs did not meet the first equitable-tolling requirement. Because Plaintiffs alleged that "one-by-one—Defendant began providing [them] with benefits and deducting payroll taxes[,]" but did not allege why they failed to notice the resulting reduction in net

[2] A statute of limitations defense may be raised on a motion to dismiss where it is clear from the face of the complaint that the statutory period has expired. See AVCO Corp. v. Precision Air Parts, Inc., 676 F.2d 494, 495 (11th Cir. 1982).

pay, the court said Plaintiffs' allegations showed they did not diligently pursue their rights. The district court also found Plaintiffs failed to meet their burden to show the extraordinary-circumstances requirement because their alleged lack of understanding about United States employment rules was not an extraordinary circumstance.

As a preliminary matter, Plaintiffs' appeal centers around the retirement contributions they allege were not provided. They have abandoned any claim about the Diocese's failure to provide health insurance and pay for Social Security and state and federal employment taxes. With respect to the retirement contribution claim, Plaintiffs say the district court made three errors. First, they argue the court erred by applying Villarreal, and say it should have applied the equitable tolling standard set forth in Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975).[3] Second, Plaintiffs argue the district court improperly applied the standards governing a motion to dismiss. Third, Plaintiffs argue the district court made improper findings of fact in reaching its decision. We address these arguments in turn.

[3] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

A.

Plaintiffs first argue that we should apply Reeb, which held that the deadline for filing an EEOC discrimination charge does not begin to run until the facts that would support a charge of discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his rights. 516 F.2d at 931. In keeping with this argument, Plaintiffs argue that Villarreal does not properly apply to their claim for equitable tolling. Thus we must address which standard, Villarreal or Reeb, applies.[4]

In Reeb, the plaintiff, a woman, was initially hired as a contract employee. 516 F.2d at 925. The plaintiff became a permanent employee for a few months, but returned to contract status for reasons related to her salary. Id. After she completed her first monthly contract, her employer notified her by letter that her contract would not be renewed due to a "limitation of funds." Id. at 925–26. The plaintiff initially accepted the reason the employer gave for terminating her. Id. at 926. However, months later, she learned that her position was refilled by a man whom she alleged was less qualified. Id. She filed charges of discrimination with the EEOC after the 90-day statutory requirement for filing. See id. After finding

[4] Plaintiffs attempted to recharacterize their Reeb argument in their reply brief. The Diocese moved to strike the reply brief for raising new arguments. To the extent Plaintiffs' reply brief raises new arguments not addressed in their initial brief, we **GRANT** the Diocese's motion to strike. See Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam) ("[W]e do not address arguments raised for the first time in a pro se litigant's reply brief.").

that Title VII's time limits were not jurisdictional, the former Fifth Circuit considered whether to excuse the plaintiff from complying with those time limits. Id. at 929–30. Because the plaintiff alleged that her employer "actively sought to mislead" her, the court held that "'[w]here wrongful concealment of facts is alleged, . . . a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense.'" Id. at 930; see also Jones v. Dillard's, Inc., 331 F.3d 1259, 1265 (11th Cir. 2003) (analyzing Reeb).

Villarreal distinguished the facts of Reeb. See Villarreal, 839 F.3d at 972. Because the plaintiff did not allege any "active deception" by the employer, Villarreal held the general standard of due diligence and extraordinary circumstances applied. Id. at 971–72. The facts of this case line up more closely with Villarreal. Even though Plaintiffs say the Diocese made intentional misrepresentations, they do not allege any active deception that would have prevented them from filing their claim. At most, Plaintiffs alleged that the Diocese "had listed an incorrect date" for their employment start dates and, when questioned, the Diocese said the "patently untrue" statement that those start dates were correct. But there are no allegations that the Diocese actively prevented Plaintiffs from discovering the dates listed on their employment documents.

Because the Villarreal standard applies, Plaintiffs must prove both diligence and extraordinary circumstances.

B.

Plaintiffs next argue the district court improperly applied the standards governing a motion to dismiss. They suggest the "plausibility" standard does not apply to their tolling allegations because timeliness is not an element of their claim—it is an affirmative defense. Instead, they say that the Diocese must show "that it is 'beyond a doubt' from the face of the complaint 'that [Plaintiffs] can prove no set of facts that toll the statute.'" Appellants' Br. at 20 (quoting Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 & n.13 (11th Cir. 2005)). The Diocese, however, argues that the Twombly/Iqbal plausibility standard is the proper standard for evaluating allegations of equitable tolling. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007) (holding that to survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face"); Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (clarifying when a claim has facial plausibility).

The plausibility standard is the proper standard for evaluating whether Plaintiffs adequately alleged they were entitled to equitable tolling. See Fedance v. Harris, 1 F.4th 1278, 1287 (11th Cir. 2021) (considering whether plaintiff "plausibly alleged that fraudulent concealment prevented him from bringing claims" and thus whether plaintiff was entitled to equitable tolling). Tello, the case

Plaintiffs rely on, applied the old, "no set of facts" standard under Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957). See Tello, 410 F.3d at 1288 n.13. The Conley standard has since been replaced by Twombly/Iqbal's plausibility standard. See Speaker v. U.S. Dep't of Health & Hum. Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1380 (11th Cir. 2010) ("In 2007, the Supreme Court in [Twombly] retired Conley's 'no set of facts' test in favor of a new formulation of Rule 12(b)(6)'s pleading standard.").

Under the correct standard, Plaintiffs must allege sufficient facts to state a claim for equitable tolling that is "plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. at 1974. A claim is facially plausible if a plaintiff pleads "factual content that allows the court to draw the reasonable inference" that they are entitled to equitable tolling. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949; see Fedance, 1 F.4th at 1287–89 (applying plausibility standard to equitable tolling allegations). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice[,]" and courts need not accept conclusory statements as true. Iqbal, 556 U.S. at 678–79, 129 S. Ct. at 1949–50; see Fedance, 1 F.4th at 1287 (determining that conclusory allegations made it implausible that plaintiffs were unaware of possible claims). Plaintiffs may also "plead [themselves] out of court" by alleging facts inconsistent with the timeliness of bringing their claims. Villarreal, 839 F.3d at 971; see also Fedance, 1

F.4th at 1289 (holding that because plaintiff "had all the facts he needed" well before filing, "equitable tolling does not excuse the untimeliness of [his] complaint").

With that, we turn to the district court's application of this standard to the allegations in Plaintiffs' complaint.

C.

Plaintiffs' final argument is that the district court directed its attention to the wrong facts in making its due-diligence finding and that they properly stated their equitable tolling claim.[5] They say the court was wrong to find that any reduction in their net pay should have notified them that they were not covered by the Diocese's retirement plan. Plaintiffs explain this is because the Diocese was required to make all necessary contributions for the retirement plan. This means the Diocese never reduced their net pay for any employee's participation in the retirement plan. As such, Plaintiffs say there are no allegations and no other information before the court suggesting they had a duty to inquire, with due diligence, into the possibility of problems with their retirement plans.

Plaintiffs' due diligence argument carries some weight. Plaintiffs attach a description of the Diocese's retirement plan to their complaint. The plan makes

[5] Because Plaintiffs are pro se on appeal, we liberally construe their briefs. Timson, 518 F.3d at 874. We read Plaintiffs' brief to be making the alternative argument that if the Reeb standard does not apply, they have met the Villarreal standard for equitable tolling.

clear that participants "are not required or permitted to contribute to th[e] plan." Instead, the plan says the Diocese "will make all the contributions necessary to provide the retirement benefits that [a participant] earn[s] under th[e] plan." Notwithstanding Plaintiffs' due diligence arguments, however, they are still required to show extraordinary circumstances existed that prevented them from filing their EEOC charge. Villarreal, 839 F.3d at 971. That they have not done.

To show extraordinary circumstances, Plaintiffs rely on their allegations that the Diocese intentionally misrepresented the facts of their employment. We have recognized that "fraud, misinformation, or deliberate concealment" may qualify as extraordinary circumstances. See, e.g., Jackson v. Astrue, 506 F.3d 1349, 1355 (11th Cir. 2007). Plaintiffs argue that, in some "false Documents," the Diocese lied about the dates they began their employment, and that misrepresentation qualifies as an extraordinary circumstance. Plaintiffs attached these documents to their complaint. The problem is that—as Plaintiffs themselves acknowledge—the Diocese provided these allegedly fraudulent statements to the EEOC in response to the investigation of Plaintiffs' EEOC charges. Because, by Plaintiffs' own admission, the Diocese did not make these false statements until after they filed their EEOC charges, it is not plausible that such statements prevented their timely filing and qualify as an extraordinary circumstance. See Villarreal, 839 F.3d at 971.

Plaintiffs also alleged that the Diocese "had listed an incorrect date" for their employment start dates and, when questioned, the Diocese said the "patently untrue" statement that those start dates were correct. But Plaintiffs have not alleged that the Diocese did anything to prevent them of learning of these allegedly incorrect start dates. In re Int'l Admin. Servs., Inc., 408 F.3d 689, 701 (11th Cir. 2005) ("Fraudulent concealment must consist of affirmative acts or representations which are calculated to, and in fact do, prevent the discovery of the cause of action." (quotation marks omitted)). This is not the type of fraud, misinformation, or deliberate concealment that qualifies as an extraordinary circumstance.

On this record, Plaintiffs have failed to meet their burden to show they are entitled to equitable tolling. The district court's order dismissing Plaintiffs' complaint is **AFFIRMED**.[6]

[6] Plaintiffs' motion to strike the Diocese's response brief is **DENIED**.