

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

No. 98-41436

BLUE GULF SEAFOOD INC,

Plaintiff-Appellant,

and

DOLPHIN J, INC; MERMAID SEAFOOD, INC; T& J
OYSTERS, INC,

Intervenor Plaintiffs-Appellants,

versus

TRANSTEXAS GAS CORPORATION; FALCON DRILLING
COMPANY, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(G-98-CV-349)

December 12, 2000

Before BARKSDALE, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Blue Gulf Seafood, Inc. (“Blue Gulf”), Dolphin J, Inc. (“Dolphin”), T & J Oysters, Inc. (“T & J”), and Mermaid Seafood, Inc. (“Mermaid”), appeal the district court’s dismissal of their claims against TransTexas Gas Corporation (“TransTexas”), and Falcon Drilling Company, Inc. (“Falcon”) pursuant to FED. R. CIV. P. 12(b)(6). Blue Gulf, Dolphin, and T&J allege that they are Louisiana corporations; Mermaid alleges it is a Texas corporation. Each alleges ownership rights in oyster leases in Galveston Bay, Texas. Each asserts that they incurred damages to their oyster beds and suffered a loss of production due to the activities of TransTexas and Falcon. The district court properly dismissed Blue Gulf’s, Dolphin’s, and T&J’s complaints for failure to state a claim because under TEX. PARKS & WILD. CODE § 76.008 foreign corporations are not permitted to “lease and control land” in Texas, and under TEX. PARKS & WILD. CODE § 76.031 foreign corporations may not receive a permit to plant or harvest oysters from public waters. Therefore, Blue Gulf, Dolphin, and T & J have “failed to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). Further, these parties may not defeat dismissal based on the argument that they are commercial fishermen, because they failed to plead this claim in their complaint. Mermaid’s claim against TransTexas and Falcon, however, was improperly dismissed because it is a Texas corporation.

Accordingly, the district court’s dismissal of Blue Gulf’s, Dolphin’s, and T&J’s claims is AFFIRMED, and the dismissal of Mermaid’s claims is VACATED and REMANDED.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.