IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 12, 2020

Lyle W. Cayce
Clerk

No. 18-30422

JOANNA PRUITT LESTER,

Plaintiff - Appellant

v.

WELLS FARGO BANK, N.A.,

Defendant - Appellee

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:15-CV-2439

Before WIENER and HIGGINSON, Circuit Judges.*

STEPHEN A. HIGGINSON, Circuit Judge:**

Joanna Pruitt Lester appeals the entry of summary judgment dismissing her Telephone Consumer Protection Act (TCPA) claims against Wells Fargo Bank. We REVERSE in part and REMAND for further proceedings. We AFFIRM the district court's denial of Lester's cross-motion for summary judgment as untimely.

* This case is being decided by a quorum. 28 U.S.C. § 46(d).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

I.

In April 2016, Lester, proceeding *pro se*, sued Wells Fargo and others alleging, *inter alia*, claims under the TCPA, arising from her 2007 mortgage with the bank. The TCPA makes it unlawful to make calls using any artificial prerecorded voice to any telephone number assigned to a cellular telephone service without prior consent. 47 U.S.C. § 227(b)(1)(A)(iii). Lester alleged that Wells Fargo called her cell phone up to ten times per day between January 1, 2011 and December 31, 2015 using automated voice recordings.

The district court granted summary judgment to Wells Fargo. Lester only appeals the district court's ruling that she settled any TCPA claims she had stemming from calls Wells Fargo made between November 17, 2011 and September 28, 2015 by failing to opt out of the class settlement agreement in *Markos v. Wells Fargo Bank, N.A.*, 2016 WL 4708028 (N.D. Ga. Sept 7, 2016).[1]

Lester conceded that she was a *Markos* class member and that she received notice of the settlement, but she alleged that she followed the opt-out procedures by mailing a completed opt-out form to the Claims Administrator. In order to opt out of the settlement, Lester was required to "mail[] a request form to [Garden City Group] . . . stat[ing] in writing [her] name, address, and telephone number and stat[ing] that [she] want[ed] to be excluded from the settlement." As evidence supporting its summary judgment motion, Wells Fargo provided the *Markos* exclusion list—a list of class members who opted out of the settlement and preserved their TCPA claims. Lester's name is absent from the list.

Lester insists that she complied with the opt-out requirements by following the instructions she was given. To support her assertion, Lester

[1] Lester does not challenge the district court's conclusion that Lester consented to Wells Fargo's phone calls for the time period from January 1, 2011 to November 16, 2011.

provided her deposition testimony, her affidavit, and her husband's affidavit, which all allege that she properly mailed the opt-out form and complied with all opt-out instructions before the deadline. The first affidavit, from Lester herself, states that she "followed the instructions exactly to opt out of the *Markos* class action settlement and forwarded the letter to the proper address containing the proper information and placed in the mail with 1st class postage." The second affidavit, from Lester's husband, who is a non-party, states that he

> is aware of the postcard from the [settlement] that was forwarded to JoAnna P. Lester. Soon after receiving the postcard, JoAnna showed the postcard to [Mr. Lester] and [Mr. Lester] and JoAnna read and discussed the postcard and the fact that JoAnna had a pending lawsuit against Wells Fargo for the TCPA and that she would be opting out. . . . [S]hortly after [Mr. Lester] and JoAnna read the postcard, a letter was prepared according to the instructions in the postcard to opt out of the lawsuit and the letter, with the exact address specified on the postcard was given to JoAnna to put in the U.S. Mail with 1st class postage attached.

Beyond these affidavits and Ms. Lester's sworn deposition testimony, Ms. Lester has no additional evidence corroborating that she mailed back the opt-out form.

In granting summary judgment to Wells Fargo, the district court held that the deposition testimony and affidavits Lester proffered were insufficient to create a genuine dispute of material fact. Lester appeals to this court.

II.

A.

This court reviews grants of summary judgment de novo, applying the same standard as the district court. *See Nickell v. Beau View of Biloxi, L.L.C.*, 636 F.3d 752, 754 (5th Cir. 2011). Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine when a reasonable jury could return a verdict for the non-movant. *Nickell*, 636 F.3d at 754. Where, as here, the movant bears the ultimate burden of persuasion, he satisfies his burden by providing evidence establishing his entitlement to summary judgment. *See* FED. R. CIV. P. 56(c)(1). If he does, the non-movant must identify "specific evidence in the record and articulate the manner in which that evidence supports" the existence of a genuine dispute. *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004). "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). An affidavit that sets forth facts that would be admissible as evidence and that is made by a witness with firsthand knowledge of, and who is competent to testify regarding, the matters asserted may be used to support or oppose a motion for summary judgment. FED. R. CIV. P. 56(c)(4).

B.

Lester acknowledges that, if she failed to opt out of the *Markos* settlement agreement, she cannot relitigate her TCPA claims for calls received between November 17, 2011 and September 28, 2015. However, she maintains that she raised a genuine issue of material fact regarding whether she opted out of the settlement. We agree.

The evidence submitted by Wells Fargo—the public record exclusion list from the *Markos* settlement agreement in which Lester's name did not appear—satisfied Wells Fargo's summary judgment burden. Lester therefore needed to point to record facts showing that there was a genuine dispute as to whether she opted out. What she provided—her deposition testimony and affidavits from her and her husband stating with specificity that she opted

out—met this requirement. FED. R. CIV. P. 56(c); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("[J]udgment 'shall be entered' against the nonmoving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.'" (quoting FED. R. CIV. P. 56(e))).

A non-conclusory affidavit can create genuine issues of material fact that preclude summary judgment, even if the affidavit is self-serving and uncorroborated. *United States v. Stein*, 881 F.3d 853, 859 (11th Cir. 2018) (en banc) ("[T]he self-serving and/or uncorroborated nature of an affidavit cannot prevent it from creating an issue of material fact."); *McClendon v. United States*, 892 F.3d 775, 784 (5th Cir. 2018) (adopting *Stein*'s reasoning in a tax case). *See also C.R. Pittman Const. Co. v. Nat'l Fire Ins. Co. of Hartford*, 453 F. App'x 439, 443 (5th Cir. 2011) ("[A]n affidavit based on personal knowledge and containing factual assertions suffices to create a fact issue, even if the affidavit is arguably self-serving."); *Rushing v. Kan. City S. Ry. Co.*, 185 F.3d 496, 513 (5th Cir. 1999), *superseded by statute on other grounds, as noted in Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002) ("[M]erely claiming that the evidence is self-serving does not mean we cannot consider it or that it is insufficient. Much evidence is self-serving and, to an extent, conclusional.").[2] Of course, when an affidavit is conclusory, it cannot preclude summary judgment—whether it is self-serving or not. *See, e.g.*, *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 531 (5th Cir. 2005) ("[Plaintiff's] attempt to create a

[2] The Supreme Court has been clear that at summary judgment "the [court's] function is not . . . to weigh the evidence." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In addition to the Eleventh Circuit's recent *en banc Stein* decision, other circuits agree. *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1160 (11th Cir. 2012); *E.E.O.C. v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 163–64 (4th Cir. 2004); *Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003) ("[M]ost affidavits submitted [in response to a summary judgment motion] are self-serving."); *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 800 (3d Cir. 1990). Wells Fargo does not point to contrary authorities.

fact issue as to his knowledge by relying on a conclusory and self-serving affidavit is on unsteady ground."); *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 294 (5th Cir. 2004) (finding that "vague, self-serving statements in [non-movant's] affidavit" were insufficient to raise an issue of material fact); *BMG Music v. Martinez*, 74 F.3d 87, 91 (5th Cir. 1996) (affirming summary judgment for plaintiffs where "the only evidence in support of the defendants' theory is a conclusory, self-serving statement by the defendant.").

C.

Here, there is no dispute that the affidavits submitted by Lester comply with Rule 56. Therefore, the issue is whether the affidavits are vague or conclusory. *Kariuki v. Tarango*, 709 F.3d 495, 505 (5th Cir. 2013) ("[W]ithout more, a vague or conclusory affidavit is insufficient to create a genuine issue of material fact in the face of conflicting probative evidence."); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 7 F.3d 1203, 1207 (5th Cir. 1993) (focusing on whether the affidavit at issue was conclusory); *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216, 1221 (5th Cir. 1985) ("We have long recognized that mere statements of conclusions of law or ultimate fact cannot shift the summary judgment burden to the nonmovant."). "[T]here is a level of conclusoriness below which an affidavit must not sink if it is to provide the basis for a genuine issue of material fact." *Orthopedic & Sports Injury Clinic v. Wang Labs., Inc.*, 922 F.2d 220, 224 (5th Cir. 1991). "[U]nsupported . . . affidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment." *Id.* at 225 (quoting *Galindo*, 754 F.2d at 1216).

Determining whether a particular affidavit is vague or conclusory is necessarily a fact-bound analysis that will depend on the facts and claims at issue. Broad legal or factual assertions in an affidavit that are unsupported by

specific facts are generally held to be conclusory. *Kariuki*, 709 F.3d at 505 (vague and general statements about moral character insufficient to create genuine issue of material fact); *Chavers v. Exxon Corp.*, 716 F.2d 315, 318 (5th Cir. 1983) (statement that a defendant's "trade[,] business and occupation is the location, production and sale of oil and gas" was conclusory because defendant's status under Louisiana law depended on other, unstated, facts); *Fowler v. S. Bell Telephone & Telegraph Co.*, 343 F.2d 150, 154 (5th Cir. 1965) (defendants' sworn, conclusory statements that they were acting within scope of employment did not support summary judgment where unsupported by specific facts). By contrast, more detailed and fact-intensive affidavits can raise genuine issues of material fact that preclude summary judgment. *See, e.g.*, *Rushing*, 185 F.3d at 513 (sworn testimony not conclusory when it is specific).

Lester's affidavit and her husband's affidavit, along with Lester's deposition testimony, raise a genuine issue of material fact as to whether she placed her opt-out form in the mail. The affidavits Lester provided were "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." FED. R. CIV. P. 56(c)(4). Lester states unequivocally that she complied with all the instructions on the opt-out form and mailed the form back to the proper address. The affidavit from Lester's husband provides additional and interlocking detail, including that he discussed the opt-out form with Ms. Lester and they agreed that she would opt out from the class action. These allegations, made under pain of perjury, are not conclusory. *See Lujan*, 497 U.S. at 888. Here, an example of a conclusory allegation might be "I am not a member of the class action because I opted out." Lester's sworn allegations are more developed and specific. Lester explains the steps she took to successfully opt out, emphasizing that she *mailed* her form.

Although a self-serving affidavit may not always preclude summary judgment, the affidavits here are sufficient to create a genuine factual dispute. *See Stein*, 881 F.3d at 859. Notably, the veracity of Lester's allegations would be difficult to prove any other way, and there are few material factual details omitted. It is difficult to imagine how Lester could prove that she placed the opt-out form in the mail other than to swear that she did so, above all when she was not instructed to mail the form via private carrier or certified mail.

Therefore, there is a genuine issue of material fact as to whether Lester successfully opted out of the class action.

II.

Lester also challenges the district court's denial of her cross-motion for summary judgment as untimely. We review a district court's decision to allow an untimely filing for an abuse of discretion under Rule 16(b). *See United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 275 (5th Cir. 2015). Lester filed her cross-motion for summary judgment 37 days after the deadline for filing dispositive motions. Although Lester filed a motion for an extension of time to file her opposition to Wells Fargo's motion for summary judgment, she did not request additional time for filing a dispositive motion or even note that she intended to file a dispositive motion. Because Lester never sought an extension of time for filing her cross-motion for summary judgment and filed that motion 37 days after the deadline, the district court did not abuse its discretion by denying the motion as untimely. We therefore affirm the district court's denial of Lester's cross-motion for summary judgment.

* * *

For the foregoing reasons, we REVERSE in part and REMAND for further proceedings. We AFFIRM the district court's denial of Lester's cross-motion for summary judgment as untimely.