IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1112

TORQ MONEY PURCHASE PENSION PLAN, ET AL.,

Plaintiffs,

versus

W.H. McCRORY, JR., ET AL

Defendants,

W.H. McCRORY, JR.,

Defendant-Third Party
Plaintiff-Appellee,

versus

MICHAEL PALMER and JAMES NEWKIRK,

Third Party Defendants-
Appellants.

Appeal from the United States District Court
from the Northern District of Texas
CA3 89 1633 G

June 14, 1993

Before POLITZ, Chief Judge, GOLDBERG and JONES, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellants Palmer and Newkirk were held liable on an indemnity agreement they executed in behalf of William H. McCrory, Jr., relieving him of liability on his guarantee of a real estate investment indebtedness. On appeal, Newkirk and Palmer raise several objections to the trial proceedings, all of which are meritless.

Only a brief recitation of background facts is necessary to put appellants' issues in perspective. The case began as a collection action by the Torq entities against McCrory, seeking recovery on his guarantee on a loan for a failed investment in an apartment project targeted toward elderly residents in Oklahoma City. Torq held a note securing a second lien mortgage on the property. McCrory impleaded Newkirk and Palmer, two of the other investors, who had entered into an agreement with him dated December 28, 1988, which provided that if the apartment project could be refinanced under certain conditions, McCrory would not be held liable on his guarantee.[1] Newkirk and Palmer agreed diligently to attempt to procure such financing. McCrory agreed diligently to assist them.

Palmer, at least, was involved with other aspects of Torq's business interests.[2] Consequently, McCrory's first line of defense was to assert that Torq itself had essentially let McCrory

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[1] Newkirk and Palmer had already paid several hundred thousand dollars to settle the first lien note, and the December 1988 agreement arose out of that settlement.

[2] Torq, Newkirk and Palmer were all represented by the same attorney at trial, and neither the individuals nor the company sent a representative to sit through the trial.

off the hook of his guarantee if suitable refinancing could be attained. Alternatively, he sought indemnity from Newkirk and Palmer based on their execution of the December 28, 1988 agreement.

At the close of trial, the district court granted judgment on Torq's claim against McCrory, leaving the jury to determine questions of his liability to Torq and the indemnity claims. Answering separate interrogatories, the jury rejected McCrory's defenses against Torq, but it agreed that Newkirk and Palmer were obliged to indemnify McCrory on his guarantee.

On appeal, Newkirk and Palmer first contend that the district court reversibly erred by failing to submit a jury interrogatory inquiring whether McCrory breached his commitment in the December 1988 agreement to work diligently with Newkirk and Palmer to secure refinancing. The district court rejected such an interrogatory because no such defense had been pled by the indemnitors, and it had not been included in the pretrial order. We find no abuse of discretion in this decision. McCrory's compliance with that agreement raised an issue that could have been foreseen by appellants' counsel well in advance of trial; it was never contended that testimony at trial had surprised appellants' counsel. McCrory was entitled to formulate his defense based on the issues that the parties had raised in their pleadings and in the pretrial order. Because this issue was untimely raised and was not critical to the disposition of the case, the court had discretion not to include it in the charge, and he did not abuse his discretion.

Alternatively, appellants assert that as a matter of law, McCrory did not diligently assist Newkirk and Palmer in their efforts to obtain financing. They also contend that a new trial should have been ordered because the jury's finding that Newkirk and Palmer did not diligently seek financing, when coupled with McCrory's lack of assistance, was against the overwhelming weight of the evidence. On issues that challenge the jury verdict, we may not reverse unless the evidence points so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary decision. Granberry v. O'Barr, 866 F.2d 112, 113 (5th Cir. 1988). Under such a test, appellants' arguments fail. McCrory testified that he did what he could to assist in the financing effort, and at a critical point, Palmer's partner Mr. Farrell and a HUD loan "expert," Homer Swindler, appeared to have taken over the refinancing effort. McCrory thought his services were no longer needed, and he thought that a new loan had practically been landed. The jury was entitled to find him credible. At the same time, the jury was entitled to conclude that Newkirk and Palmer did not fulfill their responsibilities under the agreement; among other things, they allegedly refused to contribute to a refundable deposit on the refinancing. Whether or not we might agree with their verdict, there is evidence in the record to support it. We are not convinced that the jury ran so amok that a new trial is required, much less a reversal in appellants' favor.

Palmer and Newkirk finally object to the following paragraph of the amended judgment entered by the district court:

> It is further ordered, adjudged and decreed that if and to the extent McCrory pays any amounts to Torq pursuant to the foregoing judgment, he shall be entitled to recover from Newkirk and Palmer such amounts, not to exceed the amounts provided for in the foregoing judgment against McCrory. Provided, however, that regardless of whether or not McCrory has made any payment to Torq, McCrory nevertheless shall have the right to enforce his judgment against Palmer and Newkirk provided that such enforcement is strictly conditioned on the enforcing authority paying over all new proceeds of any collection direct to Torq to be applied to Torq's judgment against McCrory; and, provided further that McCrory is hereby granted the right to assign all or any portion of this judgment against Palmer and Newkirk to Torq.

According to appellants, there is no legal authority that permits McCrory to enforce his judgment for indemnity against Palmer and Newkirk so that he can pay off his obligation to Torq. Appellants' principal objection seems to be that under the mechanics of this part of the judgment, they will be required to pay Torq "twice", as they have already settled their personal guarantee obligations with Torq. If the amended judgment is enforced as Newkirk and Palmer contend, that will happen not because of the district court's whim but as a direct consequence of their December 28, 1988 indemnity agreement. Although the court's framing of the judgment so as to permit McCrory to execute it on behalf of Torq may be unusual, we do not believe the court's solution transgressed the law or its discretion.

After oral argument of this case, we sought an explanation from the district court of his reasons for having amended the judgment. He furnished those reasons, and the parties

have commented extensively in letter briefs on those reasons and on other extra-record matters. Having reviewed all those post-argument submissions, we remain of the view that the district court framed the judgment in an acceptable manner. The judgment emphatically does not absolve McCrory of his liability to Torq. It simply affords more flexibility for Torq to collect through McCrory or his indemnitors.

For the foregoing reasons, the judgment of the district court is AFFIRMED.