IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1550
Summary Calendar

RESOLUTION TRUST CORP.,
As Receiver for
Caprock Federal Savings and Loan Association,

Plaintiff-Appellee,

VERSUS

BRUCE H. WHITEHEAD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(5 91-CV-005-C)

(February 17, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

The defendant, Bruce Whitehead, appeals a summary judgment in favor of the Resolution Trust Corporation ("RTC") based upon a guaranty executed by Whitehead. Finding no error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Amarillo Capital Corporation ("Amarillo Capital") executed a deed of trust note (the "Amarillo Note") for $3,600,000, payable to Caprock Savings and Loan Association ("Caprock"). Whitehead executed a guaranty of the Amarillo Note.

Lubbock Capital Corporation ("Lubbock Capital") then executed a $4,000,000 deed of trust note (the "Lubbock Note") payable to Caprock. The Lubbock Note also was guaranteed by Whitehead. Upon default of both notes, Caprock made demands for full payment on Amarillo Capital, Lubbock Capital, and Whitehead.

The Federal Home Loan Bank Board subsequently declared Caprock insolvent and placed it into receivership. The RTC was appointed receiver and ultimately became a party to this lawsuit against Whitehead, the guarantor of the notes, on behalf of Caprock.

Pursuant to Fed. R. Civ. P. 56, the RTC filed a motion for summary judgment and supporting memorandum arguing that no material fact questions existed: The sums payable on the notes had matured and were immediately due; and, as holder of the notes, it was entitled to judgment as a matter of law. Whitehead did not submit a response. The district court denied the motion, holding that the copy of the guaranty lacked a signature page and the supporting affidavit did not explain the outstanding principal amounts, which differed from the principal amounts on the notes. Thereafter, the court set a trial date.

The RTC then filed a second motion for summary judgment. Addressing the court's concerns, it again requested judgment as a

matter of law on the two outstanding promissory notes. Explaining that additional time was needed and that certain requested documents had not been received, Whitehead filed a written request for a hearing on the motion but did not request a continuance. The district court, noting that a response had not been filed, entered summary judgment.

II.

Whitehead submits that the trial court erred in failing to meet the mandatory requirements of rule 56(c) by granting the summary judgment motion without conducting, upon request, a hearing. Relying upon Enochs v. Sisson, 301 F.2d 125 (5th Cir. 1962), Whitehead asserts that the court was without jurisdiction and authority to grant the motion without conducting a hearing.

We review de novo an appeal of a grant or denial of summary judgment. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992). Summary judgment is proper if the movant demonstrates that there is an absence of genuine issues of material fact. Once the movant fulfills his burden, the nonmovant must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. Id. This burden may be satisfied by submitting depositions, affidavits, or other competent summary judgment evidence. Mere conclusional allegations are not competent summary judgment evidence and are insufficient to defeat the motion. Id. Summary judgment is appropriate if the nonmovant does

not respond or fails to set forth specific facts, by affidavits or otherwise, to show the existence of a genuine issue of material fact. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In Hamman v. Southwestern Gas Pipeline, 721 F.2d 140 (5th Cir. 1983), we elaborated upon the notice and hearing requirements of rule 56(c). There, the district court had granted a motion for summary judgment without conducting a hearing after a response to the motion and a supplemental motion were received from the parties. Id. at 142. We affirmed, holding that no oral hearing is required. Id. Rule 56 requires merely ten days' notice to the adverse party that the matter will be taken under advisement. Id.

We also concluded that the court's local rules placed the parties on notice that the district court could decide the summary judgment motion at any time after twenty days had passed from the filing date; the local rules applicable to this case are the same as in Hamman. Id. Local Rule 5.1(e) of the Northern District of Texas provides,

> In a civil action, any response to a motion shall be filed within 20 days from the date the motion was filed . . . . Motions shall be deemed ready for disposition at the end of these periods, unless the presiding judge grants an extension of time for the filing of a response.

Local rule 5.1(g) states that "[o]ral argument on motions will not be held unless directed by the presiding judge." Local rules requiring briefs and affidavits opposing a motion for summary judgment to be filed within a certain period provide adequate notice within the meaning of the rule. Hamman, 721 F.2d at 142.

Whitehead contends that he requested a hearing and that his counsel indicated to the court that he was unable to file a response to the motion because more discovery was needed. This argument is without merit. This lawsuit was removed to district court on January 18, 1991. The RTC's first motion for summary judgment was filed on May 13, 1991, to which no response was filed by Whitehead's previous counsel. On November 12, 1991, Whitehead moved the court to substitute another attorney. On November 25, 1991, RTC filed a second motion and memorandum for summary judgment. That motion was not granted until January 17, 1992, almost sixty days after the filing of the second motion. Therefore, substituted counsel had notice under rule 5.1(e) that the motion was ripe for disposition and had ample time in which to respond prior to the motion being granted.

A nonmoving party in need of more time to obtain discovery to respond satisfactorily to a motion for summary judgment may file a request with the district court under Fed. R. Civ. P. 56(f). International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1266 (5th Cir. 1991), cert. denied, 112 S. Ct. 936 (1992). The party should request additional time for discovery by submitting an affidavit containing specific facts that explain its failure to respond to the summary judgment motion.

A party's failure to conform its request to the provisions of rule 56(f) do not bar the court's consideration of the request, however. The nonmovant is deemed to have invoked the rule if it indicates to the court "some equivalent statement, preferably in

writing," of its need for more discovery. Vague assertions that additional discovery will produce needed, but unspecified, facts will not suffice.

Whitehead's attorney submitted to the courtroom deputy a request for a hearing on the summary judgment motion. In the request, counsel indicated that he needed more time to respond to the motion because the RTC had not provided requested documents and because he had been retained only recently. The district court did not abuse its discretion in ruling on the motion without holding a hearing. Whitehead's counsel did not specify how the requested documents would have aided his response any more than did the documents already available and in the record; counsel failed to state what facts he was attempting to discover as required by rule 56(f); and he did not move for an extension of time to respond to the motion in order to notify the court that he wanted to respond. Therefore, the requirements of rule 56(c) were satisfied.

Whitehead argues that he was "taken by surprise" by the court's granting of the summary judgment motion after the case had been set for trial and that therefore he is entitled to relief under Fed. R. Civ. P. 60(b). Because Whitehead's "Motion to Reconsider" the grant of summary judgment questions the propriety of the district court's decision and was served within ten days of the date the order was granted, it should be treated as a Fed. R. Civ. P. 59(e) motion instead of a rule 60(b) motion. Harcon Barge Co. v. D & G Boat Rentals, 784 F.2d 665, 668-70 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986). The denial of the rule

59(e) motion brings up the underlying judgment for review. Id. As discussed, there was no error committed in entering summary judgment, so there was no error in denying rule 59(e) relief.

III.

RTC requests that the court award it attorneys' fees because the appeal is frivolous. The award or denial of attorneys' fees is within our discretion if we determine that the appeal is frivolous. See Fed. R. App. P. 38. An appeal is frivolous if it is without merit in law and in fact. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). We deny the award of fees in this matter, as this appeal, while wholly meritless, is not frivolous.

AFFIRMED.