UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1761

RAYMOND WHITTLE and
LAURA WHITTLE,

Plaintiffs-Appellants,

versus

MILES HOMES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(3:91 CV 1098 G)

(June 4, 1993)

Before POLITZ, Chief Judge, KING and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:[*]

Raymond and Laura Whittle and their Chapter 7 trustee, John Litzler, seek reversal of an adverse summary judgment in favor of Miles Homes, Inc. For the reasons assigned, we affirm.

Background

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

On the evening of December 24, 1980, the Whittles' home was destroyed by fire. In early January 1981 they commenced efforts to build a new home on property they owned in Dallas, Texas. The following September they entered into a contract with Miles Homes, a division of Insilco, Inc. (Miles). Under the contract, Miles was to provide the building materials on credit and the Whittles were to pay only interest on the amount advanced for two years, at which time they would pay fully the $40,000 principal. The Whittles claim that the Miles salesman verbally promised not only to render assistance in locating long-term financing, but also promised to provide such financing if none could be obtained elsewhere. The Whittles secured the debt with a lien on the property.

When the $40,000 became due the Whittles had not obtained permanent financing and could not pay. Instead, on November 9, 1987, the Whittles and Miles executed an extended loan agreement which again provided for payment of interest only until February 20, 1988. The principal amount was increased to $66,000 to reflect an interest charge of ten percent per annum from the end of the original contract to the execution of the extension agreement.

During the Whittles' search for financing, they were informed that their property was situated between two levees in a flood plain which made it a poor insurance risk and, concomitantly, a poor lending risk. Upon learning this, in 1985 Raymond Whittle, believing the original contract guaranteed financing, contacted Miles to request permanent financing. Miles informed the Whittles

that it did not guarantee permanent financing under any conditions and that it would not provide such financing.

In February 1988 the extension agreement expired and the balance became due. Unfortunately, the Whittles still had not secured permanent financing. Miles, after rejecting continued partial payments and demanding the full balance, attempted to assist the Whittles in their extended search for a permanent lender. Finally, in February 1991, Miles began foreclosure proceedings. The Whittles responded by suing in Texas court, alleging numerous causes of action. Miles removed the case to federal court after the Whittles obtained a temporary restraining order enjoining the foreclosure.

The district court, after requiring the Whittles to post bond, found all of their claims either barred by limitations or facially devoid of merit. Summary judgment in favor of Miles was entered. The Whittles timely appealed.

Analysis

As an **Erie**[1] court we are bound to apply Texas substantive law. We review the grant of summary judgment *de novo*, applying the same standard as the district court.[2] The moving party is entitled to summary judgment if "the pleadings, depositions, answers to

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[1] **Erie Ry. Co. v. Tompkins**, 304 U.S. 64 (1938).

[2] **Simon Solomon v. Walgreen Co.**, 975 F.2d 1086 (5th Cir. 1992).

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact."[3] If, taking the record as a whole and reviewing the facts in the light most favorable to the nonmovant, we find no factual dispute of such quality that a reasonable jury could find for the nonmovant, we must perforce affirm.[4]

The Whittles contend that Miles violated their right to privacy, was negligent or grossly negligent, intentionally inflicted emotional distress, breached their contractual obligations, subjected them to fraud and duress, conspired to injure the Whittles, and violated state and federal debt collection standards as well as the Texas Deceptive Trade Practice-Consumer Protection Act.

The majority of these theories pivot on the Whittles' allegation that Miles promised to provide permanent financing if they could not obtain it elsewhere. We agree with the district court's conclusion that there is no genuine issue of material fact pertaining to Miles's limitation defense to these claims under Texas law.[5] Even assuming the Miles representative made

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[3] Fed.R.Civ.P. 56(c).

[4] **Matsushita Elec. Indus. Co. v. Zenith Radio Corp.**, 475 U.S. 574 (1986).

[5] State statutes of limitations and ancillary tolling rules fall within **Erie**'s comprehension of substantive law. **Flour Eng's & Constr., Inc. v. Southern P. Transp.**, 753 F.2d 444 (5th Cir. 1985).

enforceable promises or actionable misstatements contrary to the language of the contract, the various limitations periods expired before the Whittles filed suit.

Most of the Whittles' causes prescribed two years after they arose.[6] Only fraud and contract are governed by four-year statutes. Thus, as the Whittles concede, absent tolling or estoppel, they had at most four years from accrual of their cause of action to seek redress. One might argue that the Whittles' cause of action accrued when they signed a contract which, contrary to an alleged oral promise, did not contain a guarantee of permanent financing. Raymond Whittle admitted, however, that Miles, rightly or wrongly, informed him in 1985 that they had no such right. This was some six years before the Whittles filed suit. None of their causes of action relating to the contractual right to financing could have accrued after that point.[7] The summary judgment record is devoid of any basis for estopping Miles from asserting its limitations defense or for tolling the limitations period after 1985. We therefore conclude that the

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[6] Although Texas is yet to adopt a comprehensive limitations statute, torts generally are regarded as subject to a two-year statute of limitations, Tex. Civ. Prac. & Rem. Code Ann. § 16.003; **Willis v. Maverick**, 760 S.W.2d 642 (Tex. 1988). The DTPA is governed by a two-year statute, Tex. Bus. & Com. Code Ann. § 17.565. A fraud cause of action, on the other hand, is deemed comparable to an action on a debt and thus prescribes after four years. **Williams v. Khalaf**, 802 S.W.2d 651 (Tex. 1990). A four-year limitations period also applies to contract claims. **Id.**

[7] Cf. **Clade v. Larsen**, 838 S.W.2d 277 (Tex.App. 1992, writ denied) (finding homeowner's causes of action stemming from poor construction accrued when owner became aware of wrongful conduct).

Whittles' claims with respect to the Miles refusal to provide permanent financing were time barred; the summary judgment rendered with respect thereto was therefore appropriate.[8]

The Whittles' remaining claims are simply without merit. We briefly address only the claims for invasion of privacy and intentional infliction of emotional distress.

The Whittles maintain that the district court erred in finding their claim for invasion of privacy time-barred. Texas courts apply a two-year statute of limitations to these claims.[9] The Whittles suggest that Texas courts would not find their privacy claim to have accrued, and thus that the limitations period had not commenced, until they learned of the alleged invasion of privacy in 1991. Because we find the alleged invasion too insubstantial to state a privacy claim under Texas law, we need not reach that issue.

The Whittles' claim that while they were living temporarily in New York,[10] a representative of Miles went to their home and looked into a window to see if the structure had been completed. The record suggests that the home was then occupied by a renter. They

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[8] **Wells v. Rockefeller**, 728 F.2d 209 (3d Cir. 1984), cert. denied, 471 U.S. 1107 (1985).

[9] E.g., **Stevenson v. Koutzarov**, 795 S.W.2d 313 (Tex.App. 1990, writ denied).

[10] The record indicates that Miles was aware of the Whittles' absence and had encountered difficulty in inspecting the house.

also claim that the representative discussed their financial condition with their neighbors. Mrs. Whittle claimed to have become "very distraught, upset, and fearful" as a result.

The act of looking through an open window to ascertain whether the house was complete while the Whittles were not living in it was not a sufficient intrusion to create liability under Texas law.[11] Further, the Whittles had listed their neighbors as credit references in their application with Miles and thus had consented to the discussion of their financial affairs with those neighbors.

The Whittles also claimed intentional infliction of emotional distress. The only conduct of Miles the Whittles identified as a basis for this claim consisted of the mailing of notices of foreclosure. Texas law details the contents of such notices and requires that a mortgagee send notices prior to foreclosure. The sending of such a notice is, as a matter of law, not sufficient in itself to create liability for intentional infliction of emotional distress.

Finally, the Whittles complain of the district court's requirement that they post bond and the release of those sums to Miles after entering judgment in Miles's favor. The district court's final judgment awarded Miles damages in excess of the bond,

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[11] **Billings v. Atkinson**, 489 S.W.2d 858 (Tex. 1973) (recognizing the tort and applying the Restatement (Second) of Torts). See also Restatement (Second) of Torts § 625B cmt. d ("There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as a result of conduct to which the reasonable man would strongly object.").

applied the full amount of the bond to satisfy the judgment in part, and directed that any excess proceeds from the foreclosure be returned to the Whittles. Thus, although we perceive no error, even assuming, *per arguendo*, that there was error in requiring or releasing the bond, no harm was sustained by the Whittles.

The judgment of the district court is AFFIRMED in all respects.