UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2845
(Summary Calendar)

JOHN R. LEDFORD,

Plaintiff-Appellant,

VERSUS

SAN JACINTO SAVINGS ASSOCIATION, ET AL.,

Defendants-Appellees,

THE RESOLUTION TRUST CORPORATION RECEIVER
FOR SAN JACINTO SAVINGS ASSOCIATION,

Intervenor-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-90-4005)

(September 21, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant John R. Ledford appeals the district court's grant of summary judgment in favor of Defendants-

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellees San Jacinto Savings Association, et al. and the Resolution Trust Corporation (collectively, the defendants). Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

In December 1989, Elton Porter Insurance Agency, Inc. executed two promissory notes in favor of San Jacinto Savings Association (San Jacinto). These notes were secured by, inter alia, certain agency assets generally referred to as the "Book of Business." Ultimately, Elton Porter Insurance defaulted on the notes and San Jacinto foreclosed on the collateral, including the Book of Business.

After this foreclosure, Ledford claimed that he was the actual owner of some of the accounts that comprised this Book of Business and sued San Jacinto in state court to recover those accounts. During the pendency of that suit, San Jacinto failed and was placed under Resolution Trust Corporation (RTC) receivership. The RTC promptly intervened in the suit, removed it to a federal district court, and was substituted for San Jacinto as defendant.

Ledford never pursued, much less exhausted, the administrative claims process statutorily established for claims against the RTC.[1] Eighteen months after removing this suit, the RTC filed a motion to dismiss for want of subject matter

[1] See 12 U.S.C. § 1821(d) (made applicable to the RTC by 12 U.S.C. § 1441a(b)(4)).

jurisdiction, arguing that Ledford's failure to exhaust his administrative remedies deprived the district court of jurisdiction over his claim. Simultaneously, the RTC and the other defendants made a joint motion for summary judgment; Ledford had made his own motion for summary judgment some six months earlier.

The district court did not address the merits of the RTC's motion to dismiss grounded in failure to exhaust administrative remedies, but instead granted the defendants' joint motion for summary judgment. The court also denied Ledford's subsequent motion for new trial. Ledford timely appealed.

II

ANALYSIS

A. Summary Judgment

The grant of a motion for summary judgment is reviewed de novo, using the same criteria employed by the district court.[2] This court must "review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party."[3] Nonetheless, when a properly supported motion for summary judgment is made, the adverse party may not rest upon the mere allegations or denials of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial to

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[2] U.S. Fidelity & Guaranty Co. v. Wigginton, 964 F.2d 487, 489 (5th Cir. 1992); Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

[3] U.S. Fidelity & Guaranty Co., 964 F.2d at 489; Baton Rouge Building & Construction Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986).

avoid the granting of the motion for summary judgment.[4]

In his motion for summary judgment, Ledford made the bare, conclusionary claim that he "was the owner of certain tangible and intangible property" and that San Jacinto unlawfully and wrongly took this property. This motion was supported only by an equally vague and conclusionary affidavit from Ledford himself. In marked contrast, the defendants' joint motion for summary judgment set forth properly supported allegations that if uncontroverted were more than sufficient to show that there was no genuine issue of material fact and that the defendants were entitled to judgment as a matter of law.

Ledford apparently chose to ignore the clear message of the Supreme Court's 1986 trilogy of summary judgment cases.[5] The tenor of his response to the defendants' motion is best set forth by the introductory language of that response itself:

> The Plaintiff views the motion for summary judgment as flippant and frivolous, and will not respond to any grounds set forth for summary judgment unless requested to do so by the court. It is deemed that the Motion for Summary Judgment and the Brief filed in support thereof are so utterly in derogation of basic principals [sic] of law that they do not merit a

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[4]Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

[5] Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

studious response.

Neither this response nor Ledford's own motion for summary judgment set forth specific facts showing that there was a genuine issue for trial. Consequently, the defendants' affidavits and summary judgment evidence were not effectively rebutted and were sufficient to support the district court's grant of summary judgment. We therefore reject Ledford's first point of error.[6]

B. Motion for New Trial

Ledford made his motion for new trial more than ten days after judgment was entered against him. Therefore, his motion was governed by Rule 60(b) of the Federal Rules of Civil Procedure. We review the denial of such a motion only for an

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[6] As the instant appeal is so lacking in merit, we find it an inappropriate vehicle to address the RTC's claim that Ledford's failure to exhaust his administrative remedies once San Jacinto was placed under RTC receivership served to divest the district court of jurisdiction over this suit.

This court has previously held that when a financial institution is in RTC receivership before a suit is filed, failure to exhaust the administrative remedies provided for by FIRREA can deprive the courts of jurisdiction over a claim against the RTC. Meliezer v. Resolution Trust Corp., 952 F.2d 879 (5th Cir. 1992). We have not, however, previously addressed the jurisdictional effect of a failure to exhaust on a such a suit when the financial institution is placed in RTC receivership after the suit has been filed. Neither are we aware of any other circuit court that has squarely addressed the jurisdictional effect of a failure to exhaust under similar circumstances. Cf. Resolution Trust Corp. v. Mustang Partners, 946 F.2d 103 (10th Cir. 1991) (holding that failure to exhaust administrative remedies barred a party from pursuing a counterclaim against the RTC, but making no mention of any effect on the court's jurisdiction). We are unwilling to expand the rule of Meliezer to such a situation in the absence of adequate briefing by the party opposing such an expansion, preferring to await a more appropriate vehicle for such purpose.

abuse of discretion.[7]

Ledford's motion was premised on the assertion that he had discovered new evidence that would support his claim. Unfortunately for Ledford, his efforts again fell short of the mark. Rule 60(b) provides that:

> On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons:
> . . . .
> (2) newly discovered evidence <u>which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)</u>;
> . . . .[8]

To prevail on a motion for new trial under Rule 60(b)(2) based on newly discovered evidence, the movant must show that: The evidence was discovered following the trial; he used due diligence to discover the evidence at the time of the trial; the evidence is not merely cumulative or impeaching; the evidence is material; and a new trial in which the evidence is introduced would probably produce a different result.[9] Such a motion for new trial is "an extraordinary motion" and these requirements must be strictly met.[10]

Ledford failed to establish that he could not have discovered his alleged new evidence earlier through the exercise

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[7] <u>Phillips v. Insurance Co. of N. America</u>, 633 F.2d 1165, 1167 (5th Cir. 1981).

[8] Fed. R. Civ. P. 60(b) (emphasis added).

[9] <u>Johnson Waste Materials v. Marshall</u>, 611 F.2d 593, 597 (5th Cir. 1980).

[10] <u>Id.</u>

of due diligence.[11] He also failed to establish that a new trial in which his claimed newly discovered evidence was introduced would probably have produced a different result. As the district court stated in its order denying a new trial, "[a] close look at [Ledford's new evidence] reveals that it doesn't say much at all." We find no abuse of discretion in the district court's denial of Ledford's motion for a new trial.

III

CONCLUSION

When confronted with a properly supported motion for summary judgment, Ledford failed to set forth specific facts showing that there was a genuine issue for trial. Consequently, the district court's grant of summary judgment for the defendants was proper. When then confronted with this adverse final judgment, Ledford similarly failed to carry his burden for a new trial under Rule 60. Accordingly, the district court did not abuse its discretion in denying that motion. For the foregoing reasons, the judgment of the district court, granting summary judgment for the defendants on all counts, is

AFFIRMED.

[11] See id. at 598-99.