

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3152

IBS FINANCE, S. A./VADUZ,

Plaintiff-Appellee,

versus

MAGD E. ZOHDI,

Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana
(CA 91 418 B M1)

ON PETITION FOR REHEARING

(November 19, 1992)

Before REAVLEY, HIGGINBOTHAM and DUHÉ, Circuit Judges.

PER CURIAM:¹

The district court erroneously disregarded Magd Zohdi's affirmative defense of prescription in granting IBS Finance, S.A. summary judgment on its fraud claim. Finding no disputed facts as to prescription, we reverse the court's summary judgment and dismiss IBS's complaint.

¹ 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Zohdi pleaded guilty to defrauding IBS in May 1989, a court sentenced Zohdi to prison and ordered restitution in July 1989, and Zohdi repaid IBS \$54,813.18 in August 1989. Louisiana requires plaintiffs to sue in tort within one year of sustaining injury, LA. CIV. STAT. ANN. art. 3492, although its courts toll this prescriptive period while plaintiffs' claims are not known or reasonably knowable. *Richards v. LaCour*, 515 So. 2d 813, 817 (La. Ct. App. 3d Cir. 1987). IBS did not sue Zohdi for fraud until April 1991.

The parties argued Zohdi's prescription defense to the court as follows. In Zohdi's answer, he asserted the prescription defense and also admitted count 10 of IBS's complaint, which alleges that, in August 1989, Zohdi paid IBS \$54,813.18 in satisfaction of the fraudulently induced \$1.1 million loan. On October 9, 1991, the court ordered the parties to file any summary judgment motions by November 14. IBS filed its summary judgment motion (which addressed prescription) on November 19, and also asked the court to expedite oral argument on its motion. IBS included with the summary judgment motion a "Notice of Hearing" which addresses the following to Zohdi:

You are hereby notified that IBS Finance, S.A./Vaduz intends to bring the attached Motion for Summary Judgment for hearing on the 20th day of March, 1992 at 10 o'clock a.m., or as soon thereafter as it can be heard.

Then on November 30, in response to IBS's assertion that Zohdi may hide his assets, the court entered this order:

The Court does not believe oral argument is required herein. After the time provided by the local rules & Rule 56 for filing an opposition has elapsed, the Court will consider the motion on the briefs filed herein.

Five days later, on December 5, Zohdi filed a memorandum in opposition to IBS's summary judgment which details his prescription defense. Then, on January 23, 1992, the court rendered summary judgment for IBS and explained that:

Zohdi sets forth no legal or factual basis to support his prescription defense in either the answer or in the context of an opposition to the [summary judgment] motion before the Court. The mere allegation of a prescription defense does not prevent the Court from granting summary judgment on plaintiff's claim.

District Court Opinion at 5-6 (footnotes omitted). The court offered no explanation for why it did not consider Zohdi's opposition memorandum; it simply, and wrongly, stated that "Zohdi has filed no opposition to IBS's motion." *Id.* at 4.

On these facts, we will not countenance any waiver of Zohdi's prescription defense. Rule 56(c) requires that parties be served with summary judgment motions ten days before the court hears those motions, and permits them to serve opposing affidavits until the day of the hearing. IBS told Zohdi that the hearing would not be held until March, and then got the court to cancel it altogether at the end of November. Zohdi filed his opposition five days after learning that there would be no hearing and that the court would decide the matter on written submissions. *Both* IBS and Zohdi missed the court's deadline for

filing summary judgment motions. The court had both parties' motions for almost two months before it granted IBS summary judgment. The court erred in ignoring Zohdi's memorandum in opposition to summary judgment.

Moreover, the court had sufficient information before it to deny IBS summary judgment even without Zohdi's opposition memorandum. Alerted to the issue by Zohdi's answer, the court should have recognized that IBS sued Zohdi well over a year after IBS alleged that it accepted payment in restitution from Zohdi. IBS even addressed prescription in the summary judgment memorandum that the court did consider, and never denied having knowledge of its claim against Zohdi for over a year before it filed suit. IBS simply argued to the court that its rights under the restitution proviso in Zohdi's sentence preserved its right to a civil judgment for fraud while the restitution order was effective. Thus, IBS's memorandum in support of summary judgment alerted the court to the fact that IBS asserted a legal exception to otherwise-operative prescription. In response, the district court simply ignored Zohdi's prescription defense without considering IBS's legal argument. The court erred in granting IBS summary judgment with the case in this procedural posture. The evidence before the court at no time showed that Zohdi's prescription defense was a "mere allegation." District Court Opinion at 5.

The parties have fully presented their arguments concerning prescription to both the district court and this court, and we

may resolve the entire matter by explaining our understanding of the law. *Teachers Ins. & Annuity Ass'n v. Green*, 636 F.Supp. 415, 417 & n.1 (S.D.N.Y. 1986) simply, and correctly, explains that a suit to enforce a restitution order represents a cause of action that is distinct from a tort suit, and that a person who pleads guilty to criminal charges may not relitigate, in a subsequent civil suit, the matters to which she pleaded guilty. *Green* says nothing about prescription; *LaCour* addresses that matter. In *LaCour*, a Louisiana appellate court held that the one-year prescriptive period for a civil suit predicated on an intentional tort begins to run once the plaintiffs learn that the defendant has been indicted for committing the tort. 515 So.2d at 818. Yet IBS waited well over a year after Zohdi was *convicted* and even *started to make restitution to IBS* before suing him for fraud. We know of no Louisiana law that tolls the prescriptive period during the executory term of a federal restitution order. Thus, all evidence indicates that IBS's claim is prescribed.

For this reason we DENY IBS's rehearing petition.