

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3459
(Summary Calendar)

KURT LACOSTE,

Plaintiff-Appellant,

versus

KRAMO, LTD (UK)
d/b/a Kramo Marine, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Louisiana
(CA-90-3068-E)

(February 3, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

In this diversity suit involving an action for breach of a written employment contract, Plaintiff-Appellant Kurt LaCoste appeals the district court's dismissal of his complaint. LaCoste insists that the court was clearly erroneous in finding that Defendant-Appellee Kramo, Ltd. was not the party liable for breach of the contract in question. As we find evidence in the record that supports the district court's conclusions, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. FACTS AND PROCEEDINGS

This case involves LaCoste, three entities with similar names and disputed connections, and Larry Johnston, whose status was also disputed. The three entities are (1) Kramo, Ltd., a United Kingdom corporation specializing in dismantling and transporting equipment; (2) Kramo Marine, which was intended to be a Texas corporation but was never formed; and (3) Kramo Transportation, Inc., a United States corporation formed by Johnston but having no connection to Kramo, Ltd.

As part of a business deal, Kramo, Ltd. chartered a ship, the M/V ACADIAN LIBERTY. In doing so, Kramo, Ltd. worked through Johnston, that U.K. company's U.S. representative. Johnston, in turn, hired LaCoste to maintain the vessel, its records, and its crew.

At trial both Johnston and Lacoste testified that Johnston's hiring of Lacoste was done on behalf of Kramo, Ltd., which had chartered the M/V ACADIAN LIBERTY. Kramo, Ltd., through the affidavit testimony of its President, Barrie Holloway, denies that it had any connection with Kramo Marine, the party with which Lacoste contracted. Moreover, Kramo, Ltd. denies that Johnston had any authority to contract for subsequent voyages, and insists that Kramo, Ltd. had no connection with Kramo Transportation, Inc.

The written employment contract signed by LaCoste and Johnston is at the center of this dispute. The contract specifies: "This is a Basic Contract between Kramo Marine (Mr. Larry M. Johnston) and Mr. Kurt LaCoste." The contract set forth the duties of LaCoste in

connection with the chartered vessel, the M/V ACADIAN LIBERTY, and any other vessels Kramo Marine might acquire in the future. In a separate document, entitled the Bareboat Charter and Option to Purchase, the owners of the M/V ACADIAN LIBERTY, granted Kramo, Ltd. and Johnston an option to purchase the vessel. Johnston later exercised this option through his own United States corporation, Kramo Transportation, Inc.

After a few months of employment, LaCoste ceased receiving payments under the employment contract. He was told to look for other work because Kramo, Ltd. had terminated its charter of the M/V ACADIAN LIBERTY. This breach of contract action followed, with LaCoste suing Kramo, Ltd., "doing business as Kramo Marine." In the district court, LaCoste insisted that Johnston was an agent of Kramo, Ltd.; that Johnston negotiated the contract on its behalf; and that the contract had been breached. Thus, Lacoste argued, Kramo, Ltd. was liable for his damages resulting from the alleged breach.

In a bench trial, the district court concluded at the close of the evidence that Kramo, Ltd. was not liable for breach of contract, finding that Kramo, Ltd. was not a party to the contract and had no interest in the vessel at the time LaCoste performed the services for which he was not paid. Lacoste timely appeals, arguing that the court erred by ignoring both witnesses' testimony that Kramo, Ltd. was a party to the contract, and was doing business under the trade name Kramo Marine, Ltd.

II

ANALYSIS

A. STANDARD OF REVIEW

According to Lacoste, who is the only party to submit a brief on appeal, there is a single fact at issue: whether Kramo Ltd. used the trade name Kramo Marine to enter into a contract with Lacoste through its agent, Larry Johnston. Our review on appeal is hampered by the failure of appellee to file a brief and by the brevity of the district court's opinion. Nonetheless, we agree with Lacoste's identification of the issue before us as one of fact. We review the district court's rulings for clear error.

B. FINDINGS OF FACT

Although the it did not expressly find that Kramo, Ltd. was not acting under the trade name of Kramo Marine, the district court implicitly rejected that possibility by finding that Kramo, Ltd. was not a party to the employment contract. Lacoste objects to this finding, pointing to his own contrary testimony and that of Johnston, the only non-documentary evidence submitted at trial. Both witnesses testified that Kramo, Ltd. was a party to the contract and that the name Kramo Marine was used simply because Kramo, Ltd. intended to form a separate branch to handle marine affairs.

The documentary evidence submitted at trial, however, contradicts the testimonial evidence. In his affidavit, Holloway denies any relationship between Kramo, Ltd. and Kramo Marine. Moreover, Holloway denies that Johnston had authority to hire for

subsequent voyages or that Kramo, Ltd. was connected in any way to Kramo Transportation. The district court, therefore, was forced to choose between the live testimony of Lacoste and Johnston on the one hand and the sworn statements of Holloway, in absentia, on the other. We are cited no per se authority and are aware of none, which says that live testimony trumps documentary evidence, forcing a trial court to credit such testimony over affidavits, depositions, answers to interrogatories, or the like. When there is a conflict between documentary evidence and testimony in open court, the court still must make the credibility call. And we always defer to the district court's determination of credibility absent clear error. We find no such error here.

C. RATIFICATION

In his supplemental brief to this court, Lacoste argues for the first time that Kramo, Ltd. ratified the contract entered into by Johnston when it paid Lacoste several months' wages. Ratification takes place when an initially unauthorized contract is subsequently approved by acceptance of the benefits of that contract. Thus an indispensable element of ratification is that the ratified act must have originally been unauthorized. Ratification is a very different legal theory than the one presented in the trial court by Lacoste, i.e., that Kramo, Ltd. was in fact Kramo Marine and thus party to the contract. Because Lacoste did not raise this wholly inconsistent theory in his complaint or anytime thereafter in the district court, we decline to address it for the first time on appeal.

For the foregoing reasons, the district court's judgment in favor of Kramo, Ltd. dismissing Lacoste's action is AFFIRMED.