

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4770

Summary Calendar

Agricredit Acceptance Corp.,
Plaintiff-Appellant,
versus
Keith Rodriguez,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CV 91 0239)

(December 23, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

This suit arose from defendant's service as a trustee for a chapter 13 bankruptcy proceeding. Plaintiff alleged that defendant negligently failed to ensure that the debtor maintain insurance on plaintiff's collateral. Following discovery, the district court granted summary judgment in favor of defendant. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In January 1989, Johnson purchased a \$92,000 log skidder. Plaintiff held the purchase mortgage for this skidder. As required by the mortgage agreement, Johnson insured the skidder with plaintiff as beneficiary. In March 1989, Johnson sought Chapter 13 bankruptcy relief. Defendant was appointed trustee in the matter, and under the Johnson's plan he was to receive monthly payments for distribution to creditors. Plaintiff filed a proof of claim and valued its secured interest at \$60,000. In June 1989, when the plan was approved, the skidder insurance policy was in effect. In December 1989, however, the policy expired without renewal. At some point after the policy's expiration, the skidder was destroyed. In June 1990, the Chapter 13 proceeding was converted to a Chapter 7 liquidation. Unable to recover its collateral, plaintiff sued defendant for his allegedly negligent failure to ensure that the skidder was insured.

When a party moves for summary judgment, an opponent who bears the burden of proof on the dispositive issue must come forward with evidence creating an issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Irrelevant factual disputes do not preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Allegations and assertions by counsel are not sufficient to create a genuine issue of fact. Rountree v. Fairfax Cty. School Bd., 933 F.2d 219, 223 (4th Cir. 1991); Samuels v. Wilder, 871 F.2d 1346, 1349 (7th Cir. 1989). Rule 56 mandates summary judgment when a party fails to establish the existence of an element essential to his case. Washington v. Armstrong World

Industries, Inc., 839 F.2d 1121, 1122 (5th Cir. 1988); see also McGann v. H & H Music Co., 946 F.2d 401, 404 (5th Cir. 1991).

Plaintiff asserts that a genuine issue of fact exists regarding the issue of negligence. This assertion, however, is unsupported by evidence. Although the question of negligence is generally one for a trier of fact, it may only be submitted when the plaintiff has produced prima facie evidence of a breach of duty. When no evidence has been produced, no issue of fact genuinely exists which prevents summary judgment. Plaintiff in this case failed to meet its burden of producing relevant evidence, and failed to seek time for additional discovery pursuant to Fed. R. Civ. P. 56(f). Defendant was entitled to summary judgment as a matter of law.

The only evidence which plaintiff produced to oppose summary judgment was immaterial. This evidence demonstrated that Johnson was erratic in making payments required by the plan, and that defendant on several occasions responded by moving to dismiss the bankruptcy proceeding. This evidence does not demonstrate that defendant breached an alleged duty to see that collateral was insured. Rather, the evidence suggests that defendant fulfilled the trustee's recognized duties. Plaintiff's argument that the debtor's difficulties in adhering to the plan should have caused defendant to take steps regarding collateral insurance, without other evidence, cannot create a genuine issue regarding negligence.

AFFIRMED.