IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4875

Summary Calendar

IN THE MATTER OF:
STEVE D. THOMPSON, Debtor.

BILLY R. VINING,

Plaintiff-Appellee,

versus

BUCCANEER BROKERAGE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
92 CV 823

(June 18, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Buccaneer Brokerage, Inc. appeals from the district court's grant of summary judgment in favor of Billy R. Vining--the trustee of Steve D. Thompson Trucking, Inc.--in the amount of $11,117.33 with prejudgment interest and court costs. Finding

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 Pursuant to that rule, the court has determined that this opinion should not be published.

that Buccaneer has failed to establish the presence of any genuine issues of material fact pursuant to Rule 56 of the Federal Rules of Civil Procedure, we affirm the district court's grant of summary judgment in favor of Vining.

I

In August 1989, Thompson Trucking, Inc. voluntarily filed for relief under Chapter 11 of the Bankruptcy Code. Subsequently, the case was converted to one under Chapter 7 of the Bankruptcy Code, and Billy R. Vining (Trustee) was appointed trustee.

Trustee brought this action against Buccaneer to recover alleged freight undercharges totalling $11,117.33--charges resulting from transportation services performed by Thompson Trucking for Buccaneer but allegedly not paid for in accordance with the tariffs Thompson filed with the Interstate Commerce Commission. Trustee moved for summary judgment and, in support of this motion, filed the affidavit of a freight bill auditor and analyst, Charles E. Shinn, and several other affidavits. In opposing Trustee's motion for summary judgment, Buccaneer filed the affidavit of its president, Murray C. Shelton, along with several exhibits.

The district court rendered summary judgment in favor of Trustee and against Buccaneer for (1) undercharges totalling $11,117.33, (2) pre-judgment interest at the 90-day treasury bill rate in effect on June 22, 1988, and (3) court costs. Buccaneer appeals from this grant of summary judgment.

II

In reviewing a grant of summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (we review grants of summary judgment de novo). Specifically, we ask whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In making this determination, we view all of the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion for summary judgment. Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

To defeat a motion for summary judgment, Rule 56(e) of the Federal Rules of Civil Procedure requires the non-moving party to set forth specific facts sufficient to establish that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). While a mere allegation of the existence of a dispute over material facts is not sufficient to defeat a motion for summary judgment, if the evidence shows that a reasonable jury could return a verdict for the non-moving party, the dispute is genuine. Id. at 247-48, 106 S. Ct. at 2510. On the other hand, if a rational trier of fact, based upon the record as a whole, could not find for the non-moving party, there is no genuine issue for trial. Amoco

Production Co. v. Horwell Energy, Inc., 969 F.2d 146, 147-48 (5th Cir. 1992).

Finally, where the non-moving party has presented evidence to support the essential elements of its claims but that "evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-51 (citations omitted). In our review of a district court's decision to grant a motion for summary judgment, we will affirm that decision if, after examining the entire record, we are convinced that the standard set forth in Rule 56 of the Federal Rules of Civil Procedure has been met. See Amoco Production Co. v. Horwell Energy, Inc., 969 F.2d 146, 147-48 (5th Cir. 1992).

III

In Maislin Industries U.S., Inc. v. Primary Steel, Inc., __ U.S. __, __, 110 S. Ct. 2759, 2765-71 (1990), the Supreme Court reaffirmed its longstanding precedent that, "[u]nder the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from [that rate] is not permitted upon any pretext." Id. at __, 110 S. Ct. at 2766 (emphasis added). The Court went on to explain that "strict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather that such adherence, despite its harsh consequences in

some cases, is necessary to enforcement of the Act." Id. at __, 110 S. Ct at 2769.[1]

Buccaneer's defense against Trustee's claims of undercharge is that it participated in (1) Thompson Tariff ICC THST 500 ("Tariff 500") and (2) Thompson Discount Tariff No. 104 ("Tariff 104").[2] We find that the evidence introduced by Buccaneer in

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[1] Although the Court did not fully address the issue, it also suggested that a carrier's participation in an unreasonable rate practice is no defense:

> In the instant case, the Commission did not find that the rates were unreasonable but rather concluded that the carrier had engaged in an unreasonable practice in violation of § 10701 that should preclude it from collecting the filed rates. The Commission argues that under the filed rate doctrine, a finding that the carrier engaged in an unreasonable practice should, like a finding that the filed rate is unreasonable, disentitle the carrier to collection of the filed rate. We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule.

Id. at __, 110 S. Ct. at 2767 (footnote omitted). But see In re Steve D. Thompson Trucking, Inc. v. Rock Wool Manufacturing Co, 989 F.2d 1424 (5th Cir. 1993) (discussed infra at note 2).

[2] This court recently issued Rock Wool, 989 F.2d at 1424, in which we also addressed claims of freight undercharge brought by Trustee against shippers; Rock Wool was also an appeal from a grant of summary judgment in favor of Trustee. Although we reversed the district court's grant of summary judgment in Rock Wool, our decision was based upon grounds not presented in the case before us. Specifically, the shippers in Rock Wool did not profess to have shipped at a published tariff rate, which is what Buccaneer alleges. Rather, the shippers in Rock Wool claimed that they contracted at a rate below the filed tariff, and they raised a challenge to the reasonableness of the filed tariff rate. Id. at 430. We reversed the district court's grant of summary judgment and remanded for further proceedings on the grounds that the district court was required to either (1) make an express determination regarding the shippers' rate reasonableness challenge pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("Judgment Upon Multiple Claims . . . .") or (2) refer the issue to the Interstate Commerce

support of its challenge to the district court's grant of summary judgment is "merely colorable" and "not significantly probative." Anderson, 477 U.S. at 249-50 (citations omitted). Specifically, although the February 17, 1989 correspondence between Thompson and Buccaneer states that "YOU WILL BE A PARTICIPANT IN TARIFF THST 500," the correspondence also states that "THIS TARIFF WILL REFLECT A DISCOUNT LEVEL OF 45% . . . ." Trustee has introduced evidence to establish that, of its twenty-four undercharge claims, only three involve a forty-five percent discount. More importantly, the record establishes that Tariff 500 applied only for the discount of a business called Hercules Incorporated.

As for its contention that it participated in Tariff 104, that tariff has the following requirement on its face:

> [2] THE DISCOUNT IN THIS ITEM APPLIES ONLY WHEN THE SHIPPER AND/OR CONSIGNEE IS NOTIFIED BY THE CARRIER THAT IT IS A PARTICIPANT IN THIS ITEM. THE NOTIFICATION FORM WILL SPECIFY THE ORIGIN(S) AND/OR DESTINATION(S) FROM AND/OR TO WHICH THE DISCOUNT WILL APPLY.
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> [3] THE NOTIFICATION FORM REFERRED TO IN [2] ABOVE MUST BE SIGNED BY THE CARRIER'S DIRECTOR OF TRAFFIC AND AN AUTHORIZED SALES REPRESENTATIVE OF THE CARRIER.

Buccaneer has produced no evidence of any such notification forms. Moreover, the evidence Buccaneer has produced to establish that it was a participant in Tariff 104 is, at best, merely colorable. See Anderson, 477 U.S. at 249-50. Specifically, the only evidence introduced by Buccaneer to support its assertion that some of the rate undercharges at issue

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Commission (ICC). Id. at 433.

resulted from participation in Tariff 104 is a copy of portions of the Tariff itself, two items of correspondence from Thompson to Buccaneer which make no reference to Tariff 104, and an affidavit by Murray C. Shelton, the president of Buccaneer, in which Shelton states in a summary fashion that "Buccaneer was operating in accordance with Steve D. Thompson Trucking, Inc. Discount Tariff 104." Especially in light of Trustee's solid showing to the contrary,[3] this naked assertion in Shelton's affidavit is simply not enough evidence to raise a genuine issue of material fact. See Lechuga v. Southern Pacific Transp. Co., 949 F.2d 790, 798 (5th Cir. 1992);[4] Galindo v. Precision American Corp., 754 F.2d 1212, 1216 (5th Cir. 1985) ("affidavits setting forth `ultimate or conclusory facts . . .' are insufficient to either support or defeat a motion for summary judgment"), quoting C. WRIGHT, A. MILLER & M. KANE, Federal Practice and Procedure: Civil § 2738 at 486-89 (2d. ed. 1983).

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[3] For example, the Shinn affidavit introduced by Trustee and based upon a full accounting of the Thompson rate charges to Buccaneer establishes that (1) Buccaneer received discounts from Thompson and (2) the discounts the Trustee challenges do not result from any filed tariff.

[4] In Lechuga, we held that:

> Conclusory statements in an affidavit do not provide facts that will counter summary judgment evidence, and testimony based on conjecture alone is insufficient to raise an issue to defeat summary judgment. Lechuga's statements in his affidavit are conclusory and unspecific, and as such are inadequate to raise a genuine issue of fact in this case.

949 F.2d at 798.

In sum, Buccaneer has failed to produce evidence adequate to raise genuine issues of material fact. Accordingly, we conclude that Trustee is entitled to summary judgment as a matter of law. See FED. R. CIV. P. 56(c); see also Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, __ U.S. __, 113 S. Ct. 82 (1992).

III

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of Trustee in the sum of $11,117.33 with pre-judgment interest and court costs.