UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7440
Summary Calendar

ANDRES M. REYNA, JR. and
ERNESTINA REYNA,

Plaintiffs,

JOHNNY RODRIGUEZ and SIGNAL MUTUAL
INSURANCE ASSOCIATION, LIMITED,

Intervenors-Plaintiffs,

VERSUS

CROSS SEAS SHIPPING CORP.
(JUGOLINIJA),

Defendant-Appellant,

VERSUS

CORECK MARITIME GMBH,

Defendant/Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-G91-236)

(March 4, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Defendant-appellant Cross Seas Shipping Corp. appeals from the summary judgment and dismissal granted defendant-appellee Coreck Maritime GmbH. Because the district court properly granted summary judgment, and did not abuse its discretion in denying Cross Seas' motion to set summary judgment aside, we **AFFIRM**.

I.

Plaintiff Andres M. Reyna and intervenor Johnny Rodriguez were employed as longshoreman on a ship owned and/or operated by appellant Cross Seas and time chartered by appellee Coreck. Reyna and Rodriguez filed suit against both Cross Seas and Coreck, alleging that they were injured when "a ship's cable broke and a load of dunnage fell".[2]

In January and February 1992, Coreck received responses from Cross Seas, Reyna, and Rodriguez to requests for admission and documents, and interrogatories. Cross Seas did not take discovery from Coreck; nor did it file a cross-claim against it.

On May 13, 1992, Coreck filed an unopposed motion for summary judgment, along with a motion to expedite consideration of the motion for summary judgment, and mailed both motions, certified, to all parties, including Cross Seas. On May 20, 1992, the court granted judgment. On June 9, 1992, Cross Seas filed a motion to set aside summary judgment, in which it contended, *inter alia*, that the court prematurely granted summary judgment and, in so doing, foreclosed Cross Seas from asserting any rights to contribution against Coreck. Counsel for Cross Seas attached an affidavit,

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[2] Reyna filed suit against Cross Seas in June 1991, and against Coreck that September. Rodriguez filed suit against both defendants in mid-December 1991.

stating that Cross Seas did not voice its objection to Coreck's motions before the May 20th Order because, inadvertently, the motions were not brought to counsel's attention before he left for vacation. On June 20, 1992, the court entered an order denying Cross Seas' motion. Pursuant to Fed. R. Civ. P. 54(b), the court entered final judgment as to Coreck on July 9, 1992, stating that "*all claims of all parties* against Coreck ... have been dismissed with prejudice". (Emphasis added.)

II.

Cross Seas appeals the judgment, contending, *inter alia*, that the district court lacked "jurisdiction" to enter it. Coreck responds that Cross Seas does not have standing to appeal. We assume standing, but affirm because we do not find that the court reversibly erred.

We refuse to review Cross Seas' contentions that its failure to receive ten days notice rendered the court without "jurisdiction" to grant summary judgment, and resulted in a denial of due process.[3] Cross Seas failed to raise these legal issues before the district court, and our refusal to consider them on appeal will not result in manifest injustice. *See* ***Alford v. Dean Witter Reynolds, Inc.***, 975 F.2d 1161, 1163 (5th Cir. 1992) (internal quotations omitted) ("We will consider an issue raised for the first time on appeal only if the issue is purely a legal

[3] We note that the ten-day notice requirement of Rule 56(c) is not jurisdictional but is instead only a procedural safeguard.

issue and if consideration is necessary to avoid a miscarriage of justice").[4]

A.

We turn to review *de novo* Cross Seas' contention that the court reversibly erred by granting summary judgment on the record before it. *See* ***Cormier v. Pennzoil***, 959 F.2d 1559, 1560 (5th Cir. 1992). Summary judgment is appropriate if the "`pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law'". ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). Rule 56(c) mandates the entry of summary judgment after adequate *time* for discovery, not after "adequate discovery". *See* ***Union City Barge Line, Inc. v. Union Carbide Corp.***, 823 F.2d 129, 138 n.21 (5th Cir. 1987) (citing ***Celotex***, 477 U.S. at 322).

Seven months after Coreck's entry in the suit, plaintiffs and intervenor presented no probative evidence in support of Coreck's liability. The pleadings of plaintiffs and intervenor do not allege that Coreck engaged in wrongful conduct. In addition, their responses to requests for admission and deposition testimony

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[4] Even if Cross Seas was not properly notified, it was not prejudiced by its failure to receive ten days notice. Cross Seas received the expedited motion and did not oppose it or request a continuance pursuant to Fed. R. P. 56(f), see *infra*. Moreover, it had at least 20 days subsequent to the grant of summary judgment to present evidence in opposition. And, finally, its opposition to summary judgment was adequately presented in its motion to set aside summary judgment, and properly disposed of by the district court. *See infra*.

uncovered no probative evidence showing that Coreck provided, purchased, or owned either the dunnage that fell or the cable that allegedly parted.[5] Moreover, Captain Lehmann, the representative (supercargo) for Coreck onboard the vessel at the time of the injury, stated in an affidavit that Coreck did not provide or purchase the dunnage or the cable involved in the injuries, and that Coreck did not provide any instructions to the ship's crew or the longshoremen with regard to the cable, dunnage, or operations. Based upon this record, we hold that summary judgment was properly granted.[6]

B.

Finally, we address the district court's denial of Cross Seas' motion to set aside summary judgment and request for leave to file a cross-claim against Coreck. We treat this as a motion pursuant to Fed. R. Civ. P. 60(b), and review for abuse of discretion. ***See*** Fed. R. Civ. P. 60(b); ***Hibernia Nat. Bank***, 776 F.2d at 1279 (5th Cir. 1985) ("a decision to grant or deny relief under 60(b) is within the sound discretion of the trial court").

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[5] Cross Seas' speculative assertions, contained in its discovery responses, concerning Coreck's possible ownership of the dunnage and cable, do not create a genuine issue of material fact. *See infra* note 7.

[6] We recognize that "[a] motion for summary judgment cannot be granted simply because there is no opposition, even if the failure to oppose violated a local rule". ***Hibernia Nat. Bank v. Administracion Central Sociedad Anonima***, 776 F.2d 1277, 1279 (5th Cir. 1985). Here, however, the court considered the summary judgment motion on the merits and concluded, "[a]s there is no genuine material issue of fact with regard to the liability of Defendant Coreck Maritime GmbH, summery judgment is to be granted as a matter of law".

First, we conclude that the district court did not abuse its discretion in denying Cross Seas' request for additional discovery. In its motion to set aside summary judgment, Cross Seas did not present probative admissible evidence in opposition[7]; rather, it argued that there was inadequate time for discovery. "To preserve a complaint of inadequate opportunity to conduct discovery, the party opposing the motion for summary judgment must file a motion and non-evidentiary affidavits pursuant to Fed. R. Civ.P 56(f), explaining why it cannot oppose the summary judgment motion on the merits." ***Robbins v. Amoco Production Co.***, 952 F.2d 901, 907 (5th Cir. 1992). Assuming, without deciding, that Cross Seas' request for additional discovery could be construed as a belated rule 56(f) motion, the district court did not abuse its discretion in denying it. A rule 56(f) continuance should ordinarily be granted unless "the non-moving party has not diligently pursued discovery of the evidence". ***International Shortstop, Inc. v. Rally's, Inc.***, 939 F.2d 1257, 1267 (5th Cir. 1991) (citations omitted), *cert. denied*, ___ U.S. ___, 112 S. Ct. 936 (1992). "[T]he trial court need not aid non-movants who have occasioned their own predicament through sloth." ***Wichita Falls Office Associates v. Banc One Corp.***, 978 F.2d 915, 919 (5th Cir. 1992). Because, during the almost seven months that Coreck was a party, Cross Seas did not make any effort

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[7] Cross Seas attached a copy of the Charter Party between Cross Seas and Coreck, and asserted that because, under its terms, Coreck had the obligation of providing dunnage, "[i]t is entirely possible that the dunnage in question was provided by Coreck". Mere speculation is insufficient to defeat a summary judgment motion, especially in light of affidavit testimony to the contrary.

through discovery to discern Coreck's liability, the district court did not abuse its discretion in denying Cross Seas' request for additional time.

Nor did it abuse its discretion in denying Cross Seas' belated attempt to file a cross-claim. Cross Seas wholly neglected to pursue Coreck's alleged liability. From the time Coreck entered the suit until the grant of summary judgment, Cross Seas displayed no intention of claiming against Coreck. It allowed the court's deadline for filing non-dispositive motions, such as motions for leave to file a cross-claim, expire. Moreover, as stated *supra*, Cross Seas made no effort through discovery to discern Coreck's liability. The district court did not abuse its discretion in refusing to recognize Cross Seas' belated claim. Among other things, such belated claims are far too disruptive to the proper, orderly, and economical disposition of actions.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.