

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7589  
Summary Calendar

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COASTAL MOBILE HOMES, INC.,  
ET AL.,

Plaintiffs-Appellants,

versus

GENERAL ELECTRIC CREDIT,

Defendant-Appellee.

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Appeal from the United States District Court  
For the Southern District of Texas  
(CA-G-86-406)

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(June 9, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:\*

Coastal Mobile Homes appeals an adverse summary judgment and various other orders entered in the course of their litigation with General Electric Capital Corporation (formerly, General Electric Credit Corp.). Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

### Factual Background

This suit arises out of the financing agreements between Coastal Mobile Homes and General Electric Credit Corp. (GECC). GECC provided financing for Coastal's inventory of mobile homes under various programs, including an "Accelerated Equity Plan" (AEP). When Coastal sold a mobile home on credit, Coastal received a retail installment contract payable to Coastal over 12-15 years and a security interest in the mobile home. Coastal, in turn, pledged retail installment contracts to GECC as collateral for loans made by GECC to Coastal under the AEP. GECC served as servicing agent on the retail installment contracts; customers' payments were sent directly to GECC and were applied both to reduce the customers' accounts with Coastal and to reduce Coastal's accounts with GECC.

Coastal charged higher interest to its customers than it was charged by GECC. Over time, the customer would owe a larger amount than Coastal owed GECC for sums advanced secured by the customer account. If the customer paid the account in full, there would be a credit to Coastal's reserves. As customers failed to pay, however, the amounts realized on the retail contracts were less than the balances Coastal owed GECC. Coastal contends that GECC misapplied funds paid on the customer accounts and converted funds in Coastal's reserve account.

### Procedural Background

Coastal<sup>1</sup> sued GECC in state court, alleging GECC converted and did not properly account for customer payments. GECC removed the case to federal court in October 1986, and thereafter filed a counterclaim against Coastal for amounts due on its loans. Although the court's scheduling order set a June 2, 1987 deadline for amendments to the pleadings, Coastal first moved for leave to amend its complaint on February 27, 1989, just days before the discovery cut-off. The district court denied the motion.

GECC filed its first motion for summary judgment in July 1987. Coastal requested and was granted an extension of time to respond to the motion to allow it to undertake additional discovery; the motion was denied as premature. In March 1989 GECC refiled its summary judgment motion. The district court granted the motion and denied all claims<sup>2</sup> except the request for an accounting. GECC, with leave of court, later filed another motion for summary judgment and Coastal filed a cross-motion on the accounting claim. The district court granted judgment in favor of GECC on this claim as well.

Finally, in early 1992, Coastal attempted for the first time

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<sup>1</sup> Richard and Betty Croft, Coastal's only shareholders and officers, also joined in the suit. The district court found that they lacked standing and granted summary judgment in favor of GECC on their claims. This order was not challenged on appeal.

<sup>2</sup> The district court granted summary judgment on Coastal's claims alleging breach of the capital loan and servicing agreements, conversion, breach of contract to provide retail financing, charging usurious interest, and tortious interference.

to file an answer to GECC's counterclaims. The district court struck the answer as untimely, entered a default judgment in favor of GECC, and referred the matter to a magistrate judge for a hearing on damages. The magistrate judge submitted findings and recommendations which the district court adopted. When judgment was entered in favor of GECC, Coastal moved for Rule 60(b) relief from the earlier summary judgment orders based on allegedly new evidence presented at the damages hearing. The district court denied the motion and Coastal timely appealed.

### Analysis

#### I. The Procedural Motions

##### (1) The Motion to Amend

First, Coastal appeals the district court's denial of its motion to amend filed 21 months after the deadline set by the court's scheduling order. We review the district court's decision only for abuse of discretion<sup>3</sup> and, given Coastal's lengthy, inexcusable delay in filing its motion,<sup>4</sup> find none.

##### (2) Sanctions

Coastal also appeals the district court's imposition of sanctions for counsel's failure to appear, in person, at a status

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<sup>3</sup> **Guthrie v. J.C. Penney Co.**, 803 F.2d 202 (5th Cir. 1986).

<sup>4</sup> When delay in filing a motion for leave to amend is particularly egregious, the burden shifts to the moving party to demonstrate that the delay was "due to oversight, inadvertence or excusable neglect." **Gregory v. Mitchell**, 634 F.2d 199, 203 (5th Cir. 1981).

conference. Counsel asserts that he operated under the good faith, albeit mistaken, belief that he was entitled to appear by telephone. We defer to the district court's factual findings in support of a sanction order and review the decision to impose sanctions only for abuse of discretion.<sup>5</sup> An attorney's subjective good faith is no defense to sanctions; Rule 11 requires that the attorney's actions be objectively reasonable under the circumstances.<sup>6</sup> We find no abuse of discretion.

(3) Appointment of Special Master

Coastal appeals the district court's denial of a motion to refer the case to a special master. The argument on appeal is simply a reassertion of two other complaints: (1) GECC failed to cooperate in discovery and (2) it was entitled to an accounting. Coastal asserts that a special master should have been appointed "to examine the original source documents of GECC and prepare the accounting which Plaintiffs-Appellants were entitled to." There are at least two flaws with this argument: (1) the district court concluded that GECC had not acted improperly during the discovery process; and (2) the district court determined that Coastal was not entitled to an accounting.<sup>7</sup> Coastal's request was essentially an attempt to have a special master conduct discovery on its behalf --

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<sup>5</sup> **Thomas v. Capital Sec. Servs., Inc.**, 836 F.2d 866 (5th Cir. 1988) (*en banc*).

<sup>6</sup> **Id.**

<sup>7</sup> See infra section II(5) of this opinion.

the district court did not err in denying the request.

## II. The Summary Judgment Motions

Coastal appeals the district court's orders granting GECC's motions for summary judgment<sup>8</sup> and denying Coastal's cross-motion on the accounting claim. We review the grant of a summary judgment *de novo*, reviewing the evidence and inferences therefrom in the light most favorable to the nonmoving party.<sup>9</sup> "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear

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<sup>8</sup> Coastal also asserts that summary judgment was improperly granted on several issues which the district court never considered. For example, Coastal contends that GECC's breach of its duty of good faith and fair dealing under the loan agreements is evidenced by the fact that it engaged in commercially unreasonable resales of foreclosed mobile homes. The fatal flaw in this argument is that Coastal raised the commercial reasonableness of the foreclosure sales for the first time in its amended complaint which the district court did not permit. Similarly, Coastal contends that the district court improperly granted summary judgment on its fraud claim, alleging that GECC made misrepresentations about the AEP; again, no such fraud claim was raised in Coastal's original complaint and, consequently, the merits of such a claim were not before the district court on a motion for summary judgment or otherwise. As with much of Coastal's conduct in the district court, Coastal's argument on these issues "flirts with the spirit of Rule 11."

<sup>9</sup> **U.S. Fidelity & Guaranty Co. v. Wiggington**, 964 F.2d 487 (5th Cir. 1992); **Baton Rouge Building & Const. Trades Council v. Jacobs Constructors, Inc.**, 804 F.2d 879 (5th Cir. 1986).

the burden of proof at trial."<sup>10</sup>

(1) The Conversion Claim

Coastal contends that GECC converted funds which should have been part of Coastal's reserve account. Money, however, cannot be the subject of a conversion action unless the money can be identified as a specific chattel.<sup>11</sup> Because Coastal's conversion claim was not for specific, identifiable currency,<sup>12</sup> summary judgment in favor of GECC is appropriate as a matter of law.

(2) Breach of Fiduciary Duty Claims

Coastal also claims that GECC breached its fiduciary duty to keep accurate records. This claim also fails as a matter of law. GECC and Coastal had a debtor-creditor relationship under the loan agreements; such a relationship does not create fiduciary duties.<sup>13</sup> GECC also had no fiduciary duty to Coastal as its agent.<sup>14</sup> "The alleged principal must have the right to control both the means and the details of the process by which the alleged agent is to

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<sup>10</sup> **Celotex Corp. v. Catrett**, 477 U.S. 317, 322 (1986).

<sup>11</sup> **Dixon v. State**, 808 S.W.2d 721 (Tex.App. 1991); **Upper Valley Aviation v. Mercantile Nat. Bank**, 656 S.W.2d 952 (Tex.App. 1983).

<sup>12</sup> **Collin County Sav. & Loan v. Miller Lumber Co.**, 653 S.W.2d 114 (Tex.App. 1983).

<sup>13</sup> **FDIC v. Coleman**, 795 S.W.2d 706 (Tex. 1990).

<sup>14</sup> Agency is a fiduciary relationship. **Matter of Carolin Paxson Advertising, Inc.**, 938 F.2d 595 (5th Cir. 1991) (applying Texas law).

accomplish his task. Absent proof of the right to control, only an independent contractor relationship is established."<sup>15</sup> Coastal presented no summary judgment evidence that it exercised any control over GECC in its role as servicing agent on the retail installment contracts. Summary judgment was proper on Coastal's claims of breach of fiduciary duty.

(3) Breach of Duty of Good Faith

The Texas Supreme Court has consistently held "that a duty of good faith is not imposed in every contract but only in special relationships marked by shared trust or an imbalance in bargaining power."<sup>16</sup> As noted above, there is no such special relationship in this case. Accordingly, there was no duty of good faith and fair dealing which GECC could have breached.

(4) The Usury Claim

In its original petition, Coastal contended that GECC charged usurious interest rates because they charged finance charges on the retail installment contracts and charged interest to Coastal on its debt. The district court found that because the charges were based upon different obligations, the usury claim was "totally absurd." We agree. On appeal, Coastal merely contends that it made a general usury claim and that GECC failed to present summary judgment evidence that it did not charge usurious interest. As the party with the burden of proving the usury claim, Coastal, not

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<sup>15</sup> **Id.** at 598 (citations omitted).

<sup>16</sup> **FDIC v. Coleman**, 795 S.W.2d at 708-09.



GECC, had the burden to come forward with evidence to establish the elements of the usury claim.<sup>17</sup> This Coastal failed to do. The district court properly granted summary judgment.

(5) Breach of Obligations as Servicing Agent/  
Accounting Claim

Coastal claims that GECC breached its obligations as servicing agent on the retail installment contracts because, by its own admission, GECC sent monthly Inception to Date Transaction Reports which were only estimates rather than accurate statements of the customer accounts. Coastal alleges that because of this breach and because of alleged inconsistencies in the statements provided by GECC, the district court should have granted summary judgment in favor of Coastal on their request for an accounting.

In response to Coastal's cross-motion for summary judgment, GECC submitted a sworn affidavit explaining the statements Coastal believed to be inconsistent. The district court determined that Coastal's claims were based upon false comparisons and an unjustifiable misunderstanding of GECC's accounting system and, thus, Coastal had not demonstrated any genuine issue of material fact regarding whether GECC maintained accurate records. Summary judgment in favor of GECC on the accounting claim was proper.

III. GECC's Counterclaim

Coastal contends that GECC's counterclaim should have been dismissed because the pleading failed to contain a short statement

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<sup>17</sup> **Celotex.**

of the basis for the court's jurisdiction.<sup>18</sup> The district court found the counterclaim deficient under Rule 8, but noted that dismissal would only be appropriate if the defect could not be cured by amendment. The district court also determined that, when considered with other pleadings, the counterclaim was not fatally defective<sup>19</sup> and should not be dismissed. Coastal does not and cannot dispute that there was complete diversity between the parties and the amount in dispute on the counterclaim exceeded \$10,000, the jurisdictional *ad damnum* threshold when suit was filed. The district court's exercise of jurisdiction over the counterclaim was proper.

Finally, Coastal contends that it was deprived of a full hearing on the damages issue because it was not permitted to present evidence that (1) GECC's sale of collateral was not commercially reasonable, (2) GECC delayed posting payment, and (3) GECC charged excessive interest. The district court determined that Coastal was either attempting to raise affirmative defenses which were stricken with its answer or raise issues which already had been resolved against them by way of summary judgment. Coastal, however, failed to proffer any relevant evidence on the commercial reasonableness of the sales. In fact, the witness presented by Coastal could not relate the evidence to any mobile

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<sup>18</sup> See Fed.R.Civ.P. 8.

<sup>19</sup> See **Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole**, 948 F.2d 953 (5th Cir. 1991); **Hildebrand v. Honeywell, Inc.**, 622 F.2d 179 (5th Cir. 1980).

home involved in this case. The district court also previously granted summary judgment in favor of GECC on Coastal's claim of tortious interference; this claim was predicated upon GECC's alleged delayed posting of payments and the excessive interest rates. As a result, the resolution of these issues in favor of GECC became the law of the case.<sup>20</sup> Again, the district court did not err in excluding this evidence.

#### IV. The Rule 60(b) Motion

Coastal claims that evidence presented during the damages hearing on GECC's counterclaim proved that evidence earlier relied upon in support of summary judgment for GECC was inaccurate. As a result, Coastal filed a motion for Rule 60(b) relief asking that the various summary judgments in favor of GECC be vacated; this motion was denied by the district court. We review the denial of a 60(b) motion only for abuse of discretion.<sup>21</sup> On appeal, Coastal appears only to challenge this ruling to the extent that it denied 60(b) relief on the claim of breach of fiduciary duty and claims based upon the delayed posting of payments on customer accounts. The "new" evidence Coastal relies on includes the contract between the parties and canceled checks which were in their possession. Coastal presented neither the district court nor this court with

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<sup>20</sup> See Fed.R.Civ.P. 56(d).

<sup>21</sup> **Aucoin v. K-Mart Apparel Fashion Corp.**, 943 F.2d 6 (5th Cir. 1991).

any explanation of why they were unable to obtain this evidence at the time they responded to the motions for summary judgment. The district court committed no abuse of discretion in denying Rule 60(b) relief.

#### Conclusion

Coastal's complaints in this appeal arise, not from any errors on the part of the district court, but from Coastal's failure to timely comply with the requirements of Rule 56. Coastal has responded throughout this litigation with too little, too late. For the foregoing reasons, we AFFIRM the district court in all respects.