

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-7665
Summary Calendar

LINDA HAYLES CURRY,

Plaintiff-Appellant,
Cross-Appellee,

VERSUS

PORTER HURT, ET AL.,

Defendants-Appellees.
Cross-Appellants.

Appeal from the United States District Court
For the Northern District of Mississippi
CA WC91 81 B D

(July 6, 1993)

Before HIGGINBOTHAM, SMITH and DEMOSS, Circuit Judges.

PER CURIAM:*

This appeal arises from the district court's grant of a motion for summary judgment. The court ruled that the three year statute of limitations applicable to oral contracts precluded the plaintiff's action for breach of contract. At issue in the suit

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was the time when the cause of action accrued and, ultimately, whether the dispositive installment contract exception applied to save the contract. The court rejected the exception and consequently, found that the action had accrued more than three years before the date of filing. The plaintiff, Curry, appeals the court's ruling and its dismissal of her claim. We affirm.

I- FACTS AND PROCEEDINGS BELOW

In 1985, plaintiff Linda Hayles Curry entered into an oral agreement with the manufacturer of toning tables which allowed her to market their products under a private label. The toning tables were sold through her Mississippi corporation, "Tan & Tone." Supply problems with the manufacturer caused Curry to approach Porter Hurt, an officer of Sun Industries. Curry hoped to persuade Sun, an Arkansas manufacturer of toning tables, to enter the toning table market. Another corporation connected to Hurt, the defendant Spirit Manufacturing, Inc. ("Spirit"), agreed to manufacture and sell exclusively to Curry's company (Tan & Tone) the toning tables for \$8,000 a set. Curry would retail these tables under her private label. This agreement was never reduced to writing, though the district court found the parties all agreed that these were the terms of the initial contract.

The problems at the heart of this appeal stem from the subsequent modification of the initial contract. Later that same year, Curry found that demand for the tables far exceeded Tan & Tone's retailing capacity. She went to Arkansas to discuss the problem with Hurt. Curry proposed selling her operation, an offer

which Hurt declined. The parties agreed to modify the terms of the initial agreement. The new terms: allowed Curry to continue purchasing the tables for \$8,000 a set; granted her exclusive sales territories; and required Hurt to pay her \$2,500 per set for the first one hundred sets of toning tables sold to persons other than Curry. Thereafter, a royalty or commission would be paid, with the price to be negotiated. The terms of this agreement were again not reduced to writing. Hurt made notations on a scratch pad of the royalty schedule which he gave to Curry who subsequently discarded it.

Spirit made the requisite payments for two years before refusing to make further payments. On June 11, 1987, Hurt sent Curry a letter informing her that her commissions "far exceed[] what we had anticipated. . . [W]e must stop your commission schedule. . . I simply feel that you have made enough money to date." Curry immediately contacted Hurt with complaints of the payment termination and requested their reinstatement. After much discussion and ten months after the letter, Hurt sent Curry two checks totaling \$300,000. Each check bore the notation: "Royalty Payment- Final." Curry received the money on April 1, 1988 and immediately deposited it into a Tan & Tone account.

More than two years later, on November 13, 1990, Curry wrote to Hurt threatening a lawsuit unless he responded. Hurt met with Curry and told her that he would consider paying additional sums but that no money was presently available. Hurt asked that Curry delay filing until February 1, 1991 in order to consider the idea.

No further payments arrived and on July 2, 1992, Curry filed this suit.

Curry's complaint alleged that the Hurt brothers were individually liable for breach of contract and fraud. The defendants responded with six affirmative defenses. After discovery was completed, the defendants filed a motion for summary judgment which claimed that the applicable statute of limitations barred Curry's claims. The defendants also requested summary judgments on all six of their defenses.

On September 28, 1992, the district court granted summary judgment on the plaintiff's claims and dismissed the action with prejudice. The court, applying Mississippi choice of law rules, found that the statute of limitations issue was a procedural matter and, therefore, governed by Mississippi law. The court found the modified agreement was an oral contract because its indefiniteness would require parol evidence to complete the terms.¹ This conclusion led the court to apply the three year statute of limitations² applicable to oral contracts, as opposed to the six-year statute for written contracts. The court concluded that the plaintiff's claim was barred under the statute because Hurt's letter of June, 1987 created a total breach and started the tolling of the statute. The court ruled that Curry was barred from bringing a single cause of action for total breach because the

¹ See, Sloan v. Taylor Mach. Co., 501 So.2d 409, 411 (Miss. 1987).

² See, §15-1-29, Miss. Code Ann. (1972).

action had accrued more than three years before the date of filing. The district court also concluded that there was no evidence to support the plaintiff's claim of fraud. Without this tort claim, the court found that there could be no individual liability against the corporate officers of Spirit. The court, therefore, dismissed the claims against the Hurt brothers individually. The court also denied the defendant's motions for summary judgment on their six affirmative defenses.

II

Appellant claims that the district court erred, as a matter of law, in holding that the claim was barred by the three year statute of limitations. The defendants filed a cross-appeal claiming that the district court erred in denying their motions for summary judgment on the basis of the Statute of Frauds and on the doctrine of Accord and Satisfaction. Both parties base their motions on 28 U.S.C. §1291 which allows appeals from any final judgment.

We begin by noting that we have no appellate jurisdiction to hear the cross-appeal. 28 U.S.C. §1291 states, in relevant part, that

[t]he courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States. . . (emphasis added)

The denial of summary judgment which the counter-appellants are appealing is not a "final judgment." Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305, 1306, 98 S. Ct. 2 (1977). In that case, the Supreme Court declared that "[t]he order denying summary judgment which the applicants seek to have

reviewed here. . . is not even appealable to the Court of Appeals under 28 U.S.C. §1291. . . [I]t is not a 'final order or decision' within the meaning of that section. . . ." Therefore, we only have jurisdiction over the appeal and must dismiss the counter-appeal.

Our inquiry into the appellant's claims falls within certain parameters. The standard of review for a district court's grant of summary judgment is de novo. Davis v. Illinois Central R.R., 921 F.2d 616, 617-18 (5th Cir. 1991). The law which we must apply is decided by Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). The general rule is that a federal court in a diversity action, such as this, follows the choice of law rules of the state in which it sits. Under the Erie Doctrine, a federal court sitting in diversity must also apply the state's rules regarding the applicable statute of limitations. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949); Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079; See also, Gillies Aeronaves de Mexico, S.A., 468 F.2d 281 (5th Cir. 1972), cert. denied, 410 U.S. 931, 93 S. Ct. 1375, 35 L. Ed. 2d 594 (1973). As this diversity case was filed in a Mississippi, the district court applied the choice of law rules of that forum.

In resolving choice of law issues, Mississippi follows the "center of gravity" or "the most significant relationship" test. Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); See also, Boardman v. United Services Auto Ass'n, 470 So. 2d 1024, 1031 (Miss. 1985).

When the enforceability and construction of a contract is in issue, Mississippi's general rule is that the law of the state where performance is to take place is presumed to have "the most significant relationship" to the controversy. See, Johnson v. Knight, 459 F. Supp. 962 (N.D. Miss. 1978).

While Arkansas law controls all substantive issues,³ the statute of limitations defense is a "procedural" matter. Under Mississippi choice of law rules, Mississippi law applies to all procedural matters. See, Shewbrooks v. A.C. & S. Inc., 529 So. 2d 557, 566 (Miss. 1988)(holding that the limitation period of the applicable statute of the state where the suit is filed controls); See also, King v. Otasco, Inc., 861 f.2D 438, 441 (5th Cir. 1988) (applying Mississippi law on statute of limitations). Anything relating to a statute of limitations defense will also be governed by Mississippi law. Therefore, whether the contract was oral or written, for statute of limitations purposes, is an issue "relating to" a procedural matter and is governed by Mississippi law. The district court used this analysis to apply Mississippi law in its determination that the contract was merely an oral agreement to which the shorter, three-year statute of limitations would apply. We shall do the same.

Appellant's arguments are based on an exception in the Restatement (Second) of Contracts. The pertinent Restatement section begins with the general rule that:

³ Arkansas was the forum where performance was to, and in substantial part did, occur. See, Memorandum of 9/28/92, at 6.

Section 243. Effect of a breach by non-performance as giving rise to a claim for damages for *total breach* . . . (emphasis added)

Appellant relies on the exception to this general rule which states that:

(3) **Where at the time of the breach the only remaining duties of performance are** those of the party in breach and **are for the payment of money in installments not related to one another**, his breach by non-performance as to less than the whole, whether or not accompanied or followed by repudiation, **does not give rise to a claim for damages for total breach**. Restatement (Second) of Contracts, §243(3) (emphasis added).

The issue on appeal is upon what date did the Mississippi statute of limitations begin to run. The dispositive question is whether this contract is an installment contract or a contract which uses monthly payments as a mere method of compensation. If it is the latter, then the defendant's breach was a total breach which occurred outside the limitations period. The "total" breach would have occurred in June 1987 with Hunt's letter. The plaintiff would, therefore, have had to sue before June 1990, instead of July 1992. If it is an installment contract then, then Mississippi law states that "where a debt is payable in installments the statute of limitations begins to run as to each installment from the time it becomes due and the creditor can recover only on those installments falling due within the statutory period." Meridien Prod. Credit Ass'n v. Edwards, 231 So. 2d 806, 808 (Miss. 1970).

The district court rejected the appellant's argument that an installment contract existed. The court found that the exception applied only when there was an underlying debt which obligated the debtor to make installment payments. We agree. The facts of the

case do not appear to transform the oral contract into the requisite "installment" contract. There was no "underlying `debt'" involved. We agree with the district court that, without a debt, payment in installments becomes nothing more than the method and time of compensation.

We affirm.