

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9030

Summary Calendar

WILL FORD HARTNETT, Administrator of the
Estate of Kerry Everett Dykes, Deceased,
Plaintiff-Appellant,

PRISCILLA DYKES LEE,
Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
3:92 CV 1157 G

(May 25, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

The district court dismissed this action for the refund of tax payments on the basis of the statute of limitations. Finding a grant of summary judgment appropriate, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Hartnett is the administrator of the estate of Kerry Everett Dykes, who died on June 26, 1982. On April 15, 1988, Hartnett applied to the IRS for the refund of taxes paid by Dykes and his wife Priscilla for the years 1981-83. After the IRS refused the refunds, Hartnett filed suit on June 8, 1992. The government responded by moving for dismissal or summary judgment on August 18, 1992. To support summary judgment, the government submitted a 1982 Form 1040, which is unsigned but appears to be the Dykes' tax return. The exhibit lists Priscilla Dykes's occupation as homemaker.

The district court entered a take nothing judgment against Hartnett on September 30, 1992. Its memorandum order noted that refund claims are subject to a three-year statute of limitations. 26 U.S.C. § 6511(a). That period expired before the refund application and the filing of this suit. Hartnett sought reconsideration, asserting that the refunds were based on losses from bad business debts and so governed by the seven-year limitations period of 26 U.S.C. § 6511(d)(1). Neither alleged facts or attached evidence supported the motion's conclusory assertions. The district court denied relief.

The judgment below does not indicate whether it was entered pursuant to Rule 12 or Rule 56, Fed. R. Civ. P. Hartnett contends that the application of the seven-year period is not precluded by his complaint, so dismissal under Rule 12 was improper. Even so, summary judgment was appropriate. The government disputed the applicability of § 6511(d)(1) by submitting evidence to show that

Priscilla Dykes was a homemaker and therefore not eligible to claim business loan losses governed by that section. Hartnett did not respond to this motion for summary judgment¹ and so failed to point to a genuine issue of material fact. Although the district court's memorandum order does not address this issue, we find that § 6511(d)(1) should not be applied under these circumstances and summary judgment based upon § 6511(a) was proper.²

The widow, now Priscilla Dykes Lee, joined Hartnett's appeal and complains that the district court did not grant her motion to intervene. On September 17, 1992, Lee filed a document entitled "Appearance of Priscilla Dykes Lee." This document purported to adopt Hartnett's complaint, but did not request intervention pursuant to Rule 24, Fed. R. Civ. P.³ We find that Lee never properly requested leave to intervene, and so has no basis to appeal the failure to grant such leave.

AFFIRMED.

¹Under the Northern District of Texas's Rule 5.1(e), the motion became ripe for decision twenty days after filing.

²Hartnett contends that because the district court did not mention evidence, it must have decided under Rule 12. We disagree. The government's request for summary judgment and the court's failure to exclude the evidence suggests summary judgment treatment. See Rule 12(c). In any event, the record supports summary judgment.

³In federal court, parties may not intervene without leave of court, as they may in Texas state court. Cf. Tex. R. Civ. P. 60.