IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-9565
(Summary Calendar)

LEON CHOCRON PUBLICIDAD Y EDITORA, S.A.,

Plaintiff-Appellee,

versus

JIMMY SWAGGART MINISTRIES,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-91-878-MI)

(April 16, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

In this action to recover on a debt, Defendant-Appellee, Jimmy Swaggart Ministries (the Ministry), appeals the district court's grant of summary judgment in favor of Plaintiff-Appellee Leon Chocron Publicidad Y Editora S.A., now known as All Right, S.A. (All Right). In addition, the Ministry appeals the denial of its subsequent motions for new trial or vacation of the summary judgment. As our plenary review convinces us that the district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court got it all right, we affirm.

I

FACTS AND PROCEEDINGS

All Right, an Argentinean corporation, filed suit in federal court against the Ministry, a Louisiana non-profit corporation, alleging that the Ministry had failed to pay in full for television air time purchased for the transmission of Ministry programs in Argentina. Specifically, All Right claimed that the Ministry had paid only $221,534 for services billed at $362, 181. The Ministry denied both the existence of the contract and the performance of the services, i.e. the airing of the programs.

Several months after instituting this litigation, All Right filed a motion for summary judgment. Included in its summary judgment evidence are three letters. The first letter is to the Ministry from Leon Chocron, president of All Right, pleading for payment for the broadcasts and warning, apologetically, that he will be forced to sue for the money if payment is not forthcoming. Chocron also discusses the representations made to him by Jim Woolsey, a director of the Ministry.

The second letter, in response to Chocron's plea, is from Frances Swaggart, the wife of Jimmy Swaggart. In that letter, Mrs. Swaggart apologizes profusely for the Ministry's failure to pay Chocron the money it owes him. Specifically, she writes: "You have been such a gracious Christian brother in your efforts to try to keep the Telecast on in Argentina and our hearts ache because we have not been able to meet our obligations to you." The third

letter is to Chocron from Woolsey, who thanks Chocron for his reports on the program and confirms details surrounding its broadcast.

After the district court granted summary judgment, the Ministry filed a motion to vacate it. At the hearing on this motion, the Ministry argued that All Right had failed to produce any television station logs to prove the programs had been broadcast or that partial payment had been made. In response, the district court held open All Right's summary judgment motion and directed All Right to submit the broadcast logs. Chocron then filed an affidavit stating that he could not obtain the necessary broadcast records as they were held by the Argentinean government and could not be released. The district court then vacated All Right's summary judgment motion for lack of evidence that the broadcast actually occurred.

All Right filed a second motion for summary judgment, this time appending an affidavit of Guillermo Macera, President of Auditores Publicitarios, S.A., an external television monitoring company. Macera states in his affidavit that Auditores Publicitarios monitors all broadcasts and confirms that the broadcasts were aired on the dates claimed by Chocron. All Right also included its own invoice for the transmissions of the broadcasts as well as details of the payments made by the Ministry. An affidavit by Chocron authenticates this payment history. Based on this additional evidence, the district court granted All Right's second summary judgment motion.

The Ministry challenged the summary judgment motion with a motion for a new trial or, alternatively, a motion to vacate the judgment, based on three grounds. First, the Ministry argued that it had been "constructively abandoned" by its former counsel, who, it claimed, had been mentally and physically incapable due to his treatment for cancer. Second, it maintained that summary judgment was inappropriate because discovery was still pending. Finally, the Ministry reiterated that a genuine issue of material fact existed regarding whether a contract existed and the programs actually aired. In addition, the Ministry insisted that if a contract existed, it provided for review in an Argentinean court. All Right opposed the motions and filed its own motion for Rule 11 sanctions.

The district court denied the Ministry's motions, rejecting each of the three grounds asserted by the Ministry. The court also rejected All Right's motion for Rule 11 sanctions. The Ministry timely appealed.

II

ANALYSIS

A. Summary Judgment

1. Standard of Review

The Ministry first challenges the district courts grant of summary judgment. As is now well-established, we review a grant of summary judgment by the same standards used by the district court.[1]

[1] Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

Summary judgment is proper when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.[2] All factual questions are to be viewed in the light most favorable to the nonmovant; all legal questions are reviewed de novo.[3]

2. Summary Judgment Standard

The standards governing summary judgment are set forth in Federal Rule of Civil Procedure 56 and the Supreme Court trilogy of Anderson v. Liberty Lobby Inc.,[4] Celotex Corp. v. Catrett,[5] and Matsushita Electrical Industrial Co. v. Zenith Radio Corp.[6] Rule 56(e) sets forth the burden of each party on summary judgment, providing:

> When a motion for summary judgment is made and supported as provide in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The Court clarified this language by holding in Matsushita that the nonmovant "must do more than simply show that there is some metaphysical doubt as to material facts."[7] Rather, the nonmovant

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[2] FED. R. CIV. P. 56.

[3] Walker, 853 F.2d at 358.

[4] 477 U.S. 242 (1986).

[5] 477 U.S. 317 (1986).

[6] 475 U.S. 574 (1986).

[7] Matsushita, 475 U.S. at 586.

must respond to a proper motion for summary judgment with specific facts demonstrating a genuine issue of material fact exists.[8] Thus, a genuine issue of material fact is not raised by mere conclusionary allegations or bald assertions unsupported by specific facts.[9]

In response to All Right's summary judgment motion, the Ministry produced several affidavits. One affiant testifies that she is familiar with the alleged accounts of the Ministry and that there is no proof that the broadcasts ever aired. The same affiant, in a separate affidavit, testifies that no where is there any evidence in the Ministry's records suggesting any debt is due to All Right. Instead, the affiant insists "[w]e do not owe the plaintiffs anything." These affidavits amount to nothing more than a simple denial of All Right's allegations and conclusionary assertions that no money is owed. They are devoid of any specific information to support the existence of a genuine issue of material fact.

The Ministry's theory of this case is clear from the motions it filed in the district court. It would argue that Chocron has fabricated this debt; that there is no contract; and that the programs never aired. The Ministry points to the absence of the station logs as conclusive proof of this theory. In fact, however, the Ministry has no proof to support this theory, but relies only on denials and bald assertions. In light of the Ministry's failure

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[8] Id.

[9] Anderson, 477 U.S. at 249.

to produce specific facts in support of its conclusionary allegations, we agree with and affirm the district court's grant of summary judgment.

B. Pending Discovery Requests

The Ministry also urges that summary judgment was inappropriate because there was an outstanding discovery request for the production of checks or receipts showing that All Right paid television stations for the airing of the Ministry programs. This is another way of asking for proof that the programs did in fact air. The district court declined to continue the summary judgment motion pending this discovery, noting that there was sufficient affidavit evidence that the programs did air. Moreover, the court found that the Ministry had failed to show that the lack of further discovery worked an injustice in this case.

The decision whether to continue a motion for summary judgment to allow further discovery rests in the sound discretion of the district court.[10] Given that All Right produced affidavits of Chocron and Macera confirming that the programs did air, the cumulative evidence that would result from production of the receipts was not necessary. Neither would the inability of All Right to produce the receipts negate the proof contained in the affidavits. Consequently, we conclude that the district court did not abuse its discretion by granting the summary judgment motion despite the pending discovery request.

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[10] Saavedra v. Murphy Oil U.S.A., Inc., 930 F.2d 1104 (5th Cir. 1991).

C. Post-trial Motions

1. Standard of Review

Within ten days of the entry of summary judgment, the Ministry filed a motion for a new trial under Fed. R. Civ. P. 59(a) or to vacate the judgment under Fed. R. Civ. P. 60(b). As the motion was made within ten days of the judgment's entry, the district court properly treated it under the standards applicable to Rule 59. We review the denial of a motion for new trial under Rule 59 for abuse of discretion.[11] This discretion is not limitless, however, as the district court must balance two important judicial concerns: "the need to bring litigation to an end and the need to render just decisions on the basis of all the facts."[12]

2. Constructive Abandonment of Counsel

The Ministry's first contention in seeking a new trial is that it was "constructively abandoned" by its counsel due to his ongoing medical treatment for cancer. The Ministry cites specific instances demonstrating the inadequacies of counsel's representation, all of which involve counsel's failure to assert particular defenses, make particular motions, or seek particular evidence.[13]

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[11] Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990).

[12] Id. at 174.

[13] Specifically, the Ministry lists the following objections:

> (1) [Counsel] should have filed for a continuance of the hearing of the Appellee's Motion for Summary Judgment under Rule 56(f) so that additional affidavits could be obtained and discovery completed.

Although the Ministry cites numerous district and circuit cases addressing the ineffective assistance of counsel, they fail to cite or distinguish Fifth Circuit precedent directly on point. In Sanchez v. United States Postal Service,[14] we rejected a postal worker's motion for a new trial based on ineffective assistance of counsel. We held in Sanchez that:

> Since no right to effective assistance of counsel exists [in civil trials], we need not consider the alleged errors committed by Sanchez' attorney. If Sanchez' attorney did mishandle the case, Sanchez may have a remedy against his attorney in the form of a malpractice suit. Sanchez' potential cause of action against his attorney remains separate and distinct from his [original claim]; therefore, we cannot grant him any relief in this proceeding.[15]

As the Ministry offers no reason why Sanchez does not apply, its meritless argument borders on being sanctionable.[16]

> (2) [Counsel] should have alleged 1988 (or 1985) contract translated from Spanish. By doing so, he could have discovered the alleged contract provision and advanced a Rule 12 motion or other defenses based on improper venue and jurisdiction under the specific provisions of the alleged contract.
> (3) [Counsel] should have asserted defenses and objections and/or timely filed discovery requests directed to the existence or nonexistence of a contract as to whether any of the alleged broadcasts were actually aired, the existence of the station logs, and any evidence of payments by the Appellee to the local broadcast stations.

[14] 785 F.2d 1236 (5th Cir. 1986).

[15] Id. at 1237.

[16] Interestingly, the Ministry characterizes All Right's distinction of one of these cases, a 1953 district court decision from Alaska, as simply being on the basis of the case's age and court's geographic location. The Ministry insists that "if this type of relief was recognized forty years ago in Alaska and still stands, then this theory of recovery is not novel and should be considered by this Court." Although we cast no aspersions on the

3. Genuine Issue of Material Fact

In its post-trial motions, the Ministry restates its argument that there exist genuine issues of material fact whether a contract existed and whether the programs aired. The Ministry submits additional affidavits on this issue and, for the first time, introduces a forum clause from a contract translated from Spanish. The district court has the discretion to grant a new trial based on new evidence, but must consider whether the new evidence (1) would probably change the outcome; (2) could have been discovered earlier with due diligence; and (3) are merely cumulative or impeaching.[17] As we find that the affidavits and the translated contract provision could have been introduced earlier, we conclude that the district court did not abuse its discretion.

The Ministry's new affidavits do nothing more than reassert that the evidence showing that the programs actually aired is unreliable. Woolsey submits an affidavit stating that he has never heard of Auditores Publicitarios and doubts its credibility. Moreover, Woolsey urges that the company's affidavit be disregarded as irrelevant as it has no standing in an attempt to collect any charges due All Right. In addition, the Ministry submits the affidavit of a television sales manager with sixteen years experience. She testifies that in her opinion, such external monitoring companies are unreliable, although she provides no basis

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wisdom of Alaskan jurisprudence, we are constrained by that pesky doctrine of stare decisis to apply our own precedents and not the law of Alaska.

[17] Johnston v. Lucas, 786 F.2d 1254, 1257 (5th Cir. 1986).

for this generalization and no specific reason why Auditores Publicitarios meets this generalization.

All of this information was available to the Ministry at the time All Right filed its second summary judgment motion. As the district court noted, if the Ministry wanted to challenge the credibility of Macera's affidavit, it could have done so before the summary judgment motion was granted. Moreover, these affidavits fail to raise a genuine issue of material fact. Instead, they make naked, unsupported statements concerning the credibility of the evidence that the program aired.

The Ministry also fails to explain why the forum selection clause was not introduced while the summary judgment motion was pending. More importantly, the Ministry fails to provide a translation of the entire contract or evidence that the parties signed the contract containing the proffered forum clause. Given the total lack of evidence establishing the validity or applicability of this forum selection clause, the district court did not abuse its discretion in declining to grant a new trial.

For the foregoing reasons, the summary judgment in favor of All Right is

AFFIRMED.