IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1234
Summary Calendar

HOMER MCGINNIS, et al.,

Plaintiffs,

HOMER MCGINNIS, et al.,

Plaintiffs-Appellants,

VERSUS

STAR ENTERPRISE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:90 CV 777 A)

October 21, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Plaintiffs Homer McGinnis, Anne McGinnis, and Pride of Texas Distributing Company, Inc. ("Pride"), appeal a summary judgment on their claims against Star Enterprise ("Star") for its alleged

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

antitrust, contract, and Petroleum Marketing Practices Act ("PMPA") violations. Finding no genuine issue of material fact, we affirm.

I.

A.

Pride, owned by the McGinnises, is an independent wholesaler and retailer of gasoline and other petroleum products sold under the "Texaco" brand name. Star is the exclusive refining and marketing entity of Texaco products for twenty-six states, including Texas. From 1964 to June 1991, Pride and its predecessor, through a series of marketer agreements with Star and its predecessors, was a franchisee for distribution of Texaco products and a purchaser of those products from Star and its predecessors.

In order to buy gasoline from Star at wholesale prices, Pride signed a standard wholesale contract, under which the wholesaler pays a "marketer price" for gasoline. Retailers, however, when they buy directly from Star, must pay the "retail tankwagon price," which is more than wholesale but less than the retail price the public pays. The wholesaler contracts from 1964 to 1973 specified that the marketer price would be the retail tankwagon price less a specified discount (the "functional discount"). In 1974, however, the wholesaler contracts abandoned the specific discount scheme and instead referred to the price a wholesaler pays as merely the "marketer price." Star assured Pride that the change in terms did not reflect a change in price.

B.

On October 1, 1989, the plaintiffs filed suit against Star and Texaco Refining and Marketing, Inc. ("TRMI"), in Texas state court ("McGinnis I"). The plaintiffs asserted that Star and TRMI failed to sell gasoline to Pride on a price-competitive basis, that Star imposed new and more restrictive terms and conditions on credit provided to Pride, and that Star and TRMI misrepresented to Pride that it would be given credit for consumer purchases of gasoline within forty-eight hours after such purchases were made. The plaintiffs also alleged claims for breach of contract, breach of express and implied warranties, negligent misrepresentation, negligence, declaratory judgment, tortious interference with contractual or prospective business relations, breach of the duty of good faith and fair dealing, fraud, intentional and negligent infliction of emotional distress, and violation of the Texas Deceptive Trade Practices Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 ("DTPA").

C.

On May 8, 1990, the parties in McGinnis I entered into a settlement agreement, which provided the following release:

> (A) [Appellants] hereby release . . . TRMI and Star . . . from any and all claims . . . resulting . . . from any matters described in the Litigation as well as all damages and causes of action which were or could have been asserted by [Appellants] in the Litigation against any of the parties hereby released.
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> . . . .
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> (E) . . . [T]he foregoing releases are not intended to

> release any matters that prospectively arise in the course of [the parties'] future dealings.

Pursuant to the terms of the settlement agreement, McGinnis I was dismissed with prejudice on May 11, 1990.

In July 1990, Star announced a rebate program for retailers who purchased gasoline directly from Star. The following month, after Iraq invaded Kuwait, Star instituted a "pacer" program, limiting wholesalers' purchases. Retail outlets were not put on the pacer program, and Star allowed Star-owned trucks to load gasoline before other wholesalers. Furthermore, Star eliminated the functional discount, so that the difference between the wholesale price and the retail tankwagon price shrunk to one cent per gallon. Pride could not pass on this price to the consumer, as the retail tankwagon price had not increased. Star also refused to increase Pride's line of credit.

D.

Plaintiffs filed suit again in Texas state court, claiming that Star's conduct amounted to a constructive termination of Pride's franchise, in violation of the PMPA. Pride also raised several state law claims, including breach of contract and violation of the DTPA. The claims were based upon the functional discount; the forty-eight-hour credit period; price-fixing and eliminating wholesalers; and the discriminatory allocation of gasoline. After the lawsuit was filed, both parties signed a mutual agreement of cancellation on June 6, 1991.

Star removed the action to federal court. After extensive

discovery, the district court granted Star's motion for summary judgment on all claims, holding that the claims were precluded by the release provision of the 1990 settlement agreement and that plaintiffs had failed to produce summary judgment evidence concerning post-settlement violations.

II.

A.

This court reviews a grant of summary judgment de novo. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks, 953 F.2d at 997.

We begin our determination by consulting the applicable substantive law to determine what facts and issues are material. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-movant. Id. If

the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327.

The plaintiffs contend that Star failed to meet the initial burden of Celotex because plaintiffs had no notice that Star was seeking summary judgment on the basis of lack of evidence. Although "[i]t is not enough for the moving party to merely make a conclusory statement that the other party has no evidence to prove his case," Ashe v. Corley, 992 F.2d 540, 543 (5th Cir. 1993), in this case Star did present evidence sufficient to shift the burden: It introduced the settlement agreement containing the release. That alone would shift the burden to plaintiffs with regard to claims covered by the release.

As to conduct allegedly occurring after the settlement date, Star repeatedly and explicitly stated, in its brief in support of its motion for summary judgment, that there was no evidence to support the claim that violations occurred after the settlement date. Thus, Star satisfied its summary judgment burden by providing the release and alleging that there was no evidence to support the claim that violations occurred after May 8, 1990. Moreover, plaintiffs' contention that they had no notice of the lack of evidence is baseless. Accordingly, we turn to the merits of the summary judgment.

B.

The plaintiffs first complain that the district court failed

to give them adequate time to conduct discovery on their antitrust claims. We review the district court's decision to preclude further discovery prior to granting summary judgment for abuse of discretion. Solo Serve Corp. v. Westowne Assocs., 929 F.2d 160, 167 (5th Cir. 1991). Plaintiffs conducted discovery and received an extension of time to respond to the summary judgment motion but failed to move for a continuance under FED. R. CIV. P. 56(f). When a party fails to file a rule 56(f) motion, a district court has discretion to refuse to permit further discovery before awarding summary judgment. International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 1991), cert. denied, 112 S. Ct. 936 (1992).

The record indicates that approximately two years passed from the filing of the lawsuit to the filing of the motion for summary judgment. Furthermore, plaintiffs deposed Star's key executives and received two extensions of time to respond to the summary judgment motion. Nevertheless, plaintiffs did not file a rule 56(f) motion, which, if granted, would have enabled them to conduct further discovery before the court ruled on the summary judgment motion. "Rule 56 does not require that any discovery take place before summary judgment can be granted; if a party cannot adequately defend such a motion, Rule 56(f) is his remedy." Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1990). Under these circumstances, the district court did not abuse its discretion in precluding further discovery.

C.

The district court held that the releases signed by Pride in its 1990 settlement with Star barred its claims concerning the functional discount, the forty-eight-hour credit period, the price-fixing and antitrust violations, and the scheme to eliminate marketers. Under Texas law, "[a] release, valid on its face, . . . is a complete bar to any later action based on the matters covered by the release." Deer Creek, Ltd. v. North Am. Mortgage Co., 792 S.W.2d 198, 201 (Tex. App.))Dallas 1990, no writ). The plaintiffs received valuable consideration for the relinquishment of their rights; a court must give effect to the terms of their agreement.

The release bars all claims arising out of conduct occurring before May 8, 1990, and plaintiffs failed to produce evidence to show that any conduct occurred after the 1990 settlement agreement. The functional discount claim is essentially the same as the competitive pricing action asserted in McGinnis I, or at least arises out of the same facts. Plaintiffs' only evidence concerning conduct after May 8, 1990, is an affidavit by Homer McGinnis. But conclusionary allegations cannot create fact issues. Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1984). Vague allegations and legal conclusions do not satisfy the non-movant's burden so as to preclude summary judgment. Bowser v. McDonald's Corp., 714 F. Supp. 839, 843 (S.D. Tex. 1989).

Likewise, the McGinnis affidavit presents plaintiffs' only evidence of conduct after May 8, 1990, concerning credit violations and Star's alleged scheme to eliminate its own marketers. These

claims therefore are either barred by the release or not supported by adequate evidence to survive summary judgment. The price-fixing claim, although not pled in McGinnis I, is a claim that could have been pled because it arises out of the same set of facts. The plaintiffs did not provide summary judgment evidence that would show that antitrust violations could not have been pled in McGinnis I or that violations occurred after May 8, 1990. Therefore, we find that the claims concerning pre-settlement conduct are barred by the release and that there is insufficient evidence concerning conduct after May 8, 1990, to survive summary judgment.[1]

D.

Plaintiffs argue that the district court erred in awarding summary judgment on their claim that Star constructively terminated their franchise relationship in violation of the PMPA, which prohibits suppliers from terminating or non-renewing franchises except on specific grounds. 15 U.S.C. §§ 2801-2806. The act is to be strictly construed, however, as it is in derogation of common-law rights. See Checkrite Petroleum, Inc. v. Amoco Oil Co., 678 F.2d 5, 8 (2d Cir.), cert. denied, 459 U.S. 833 (1982).

The plain meaning of the statute does not provide for "constructive termination," and Pride continued as a franchisee at all times relevant to this action. Furthermore, plaintiffs present

[1] There is no merit to plaintiffs' assertion that the marketer agreement was a contract of adhesion. Plaintiffs entered into the agreement voluntarily and with the assistance of counsel. They accepted the benefits of the agreement and should be bound by it.

no summary judgment evidence that would show that Star unilaterally cancelled the franchise agreement or that Pride was forced to sign the cancellation agreement. Thus, the district court did not err in granting summary judgment on Pride's PMPA claim.

E.

Plaintiffs also raised a laundry list of other claims, based in both tort and contract. We agree, for the reasons stated in the district court's Opinion and Order, that these claims are without merit.

III.

Each of plaintiffs' claims is either barred by the release clause or lacks adequate evidence to survive summary judgment. Plaintiffs were afforded ample opportunity to conduct discovery and to respond to Star's motion for summary judgment but provided no evidence to support their claims. Therefore, the district court did not err in granting summary judgment.

AFFIRMED.