UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1400
Summary Calendar

RICHARD L. HUBBARD
AND HUBBARD CHEVROLET, INC.,

Plaintiffs-Appellants,

VERSUS

GENERAL MOTORS CORP.,
Jointly and severally, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern Texas
(3:91 CV 1080 X)

(October 26, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellants, Richard L. Hubbard ("Hubbard") and Hubbard Chevrolet, Inc. ("HCI"), appeal from the district court's grant of summary judgment for Appellees, General Motors Corporation ("GMC") and General Motors Acceptance Corporation ("GMAC"). Appellants sued under the Dealers' Day in Court Act ("DDICA"), 15 U.S.C. §§ 1221-1225; the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2; the Texas Deceptive Trade Practices Act ("DTPA"), Tex Bus. & Com. Code Ann.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§§ 17.41-17.63 (West 1987); and for tortious interference with a contract; breach of contract; intentional and malicious infliction of emotional distress; and negligence. The district court also denied Appellants' Motion to Vacate Judgment and/or Motion for New Trial. HCI and Hubbard appeal. We affirm.

BACKGROUND

Richard L. Hubbard is the sole stockholder of Hubbard Chevrolet, Inc. On June 27, 1986, HCI entered into a Dealer Sales and Service Agreement with GMC to operate a Chevrolet Dealership in Ferris, Texas. As part of this agreement, GMAC and HCI entered into a "GMAC Retail Plan," in which GMAC contracted to purchase retail installment contracts

In mid-1987, HCI began having financial difficulties. HCI attempted to borrow additional funds from GMAC and was turned down. HCI began using other financial institutions to obtain retail financing for its customers. A year later, Hubbard advertised in local and national publications in an attempt to obtain additional investors or purchasers.

In 1989, Hubbard told GMAC that HCI had sold several vehicles to customers, but did not have the funds to reimburse GMAC. GMAC exercised its contractual right to foreclose on the inventory of HCI. GMC then gave notice of its intent to terminate the Dealer Sales and Service Agreement because HCI had been closed since May 31, 1989 and it had failed to maintain its state dealership license. On June 6, 1992, Appellants filed this present suit.

DISCUSSION

A. Standard of Review

Contrary to Appellants' argument, we apply federal procedural law to both the state and federal law claims. Hanna v. Plumer, 380 U.S. 460 (1965); Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1978). Summary judgment is appropriate if the record discloses "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). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

B. Statute of Limitations

Appellants argue that their state law claims, except fraud and breach of contract, are ongoing acts that continued after June 5, 1989, and thus, are not time barred. Under Texas law, claims for

tortious interference with contractual relations, intentional infliction of emotional distress, and negligence must be brought within two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West 1986); First Nat'l Bank v. Levine, 721 S.W.2d 287, 288-89 (Tex. 1986). A claim under the DTPA also has a two year limitation period. Tex. Bus. & Com. Code Ann. § 17.565 (West 1987).

Appellants have failed to raise a genuine issue of material fact that Appellees' alleged wrongful acts continued after June 5, 1989. The record reflects that Hubbard's inventory was repossessed on May 17, 1989 and nothing in the record shows that Appellees rejected credit applications until August 1989 as Appellants allege. The alleged misrepresentations by Appellees' representatives regarding the dealership were made in 1986. Finally, only one potential purchaser was rejected by Appellees after June 6, 1989, but the record shows that GMC had a legitimate reason for that rejection. Appellants have pointed to nothing in the record to the contrary.

C. Breach of Contract

Without identifying which specific contract or which specific portion thereof, Appellants generally allege that Appellees' actions constitute a breach of contract. The Appellants have failed to establish a genuine issue of material fact as to all the elements of their prima facie case.[2] Regarding the Dealer Sales

[2] Under Texas law, to recover on a breach of contract claim, Appellants must establish: 1) that the contract sued upon exists; 2) that Appellants complied with the terms of that contract or that they were ready, willing, and able to comply but had a valid excuse for their nonperformance; 3) that the Appellees breached the

and Service Agreement, the Appellees contend that they were willing to comply with the terms of the agreement, but have not contradicted evidence that HCI did not comply with the contract by failing to conduct customary operations as a dealership for seven consecutive business days and by losing its dealership license. Appellees also have the right to approve or disapprove potential purchasers of the dealership. Under the GMAC Retail Plan, GMAC is not required to purchase retail installment contracts, but "may" do so. Without citing any authority, Appellants argue that fraud converts Appellees' valid exercise of their contractual rights into a breach of contract. Fraud, however, is an independent cause of action. See 1488, Inc. v Philsec Inv. Corp., 939 F.2d 1281, 1287 (5th Cir. 1991).

D. Fraud

To establish a prima facie claim of fraud under Texas law, Appellants must establish that a false material representation was made by a speaker who knew of the falsity, or made the representation recklessly without knowledge of the truth, with the intention that it be acted upon by a party who did in fact act upon the representation to his or her injury. 1488, Inc. v Philsec Inv. Corp., 939 F.2d 1281, 1287 (5th Cir. 1991); Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977). Appellants have failed to adduce evidence of the alleged representations' falsity. Hubbard testified in his deposition that he believed that initially

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contract; and 4) that such breach caused Appellants' damages. Stegman v. Chavers, 704 S.W.2d 793, 795 (Tex. App.--Dallas 1985, no writ).

Appellees were on his team and wanted his business to succeed. As for the remainder of Appellants' claims, they have failed to point to evidence in the record of false representations made by Appellees regarding purchasers or loan plans.

E. Dealers' Day in Court Claim

To prevail on a DDICA claim, Appellant must establish a lack of good faith by the automobile manufacturer. Good faith, as defined by 15 U.S.C. § 1221(e), requires that the dealer demonstrate that the manufacturer coerced or intimidated the dealer. R.D. Imports Ryno Indus., Inc. v. Mazda Distributors (Gulf), Inc., 807 F.2d 1222, 1227 (5th Cir.), cert. denied, 484 U.S. 818 (1987). Mere arbitrariness is insufficient to establish lack of good faith. Hubbard Chevrolet Co. v. General Motors Corp., 682 F. Supp. 873 (S.D. Miss. 1987), aff'd, 873 F.2d 873 (5th Cir.), cert. denied, 493 US. 978 (1989). Appellants have failed to allege any actions by Appellees that rise to the level of coercion. Hubbard testified in his deposition that there were no disagreements with Appellees in which he believed they were trying to coerce him to do something he did not want to do. The cases cited by Appellants do not support their argument that good faith under the DDICA should be given its common usage of generalized fairness.

F. Sherman Antitrust Act

Although the district court granted summary judgment for Appellees on both Appellants' § 1 and § 2 antitrust claims, Appellants did not brief the § 2 claim. A party who inadequately

briefs an issue is considered to have abandoned the claim. Villanueva v. CNA Ins. Cos., 868 F.2d 684, 687 n.5 (5th Cir. 1989) (civil). The district court correctly concluded that Appellants could not demonstrate the threshold requirement under § 1 of joint or concerted action between more than one party. Appellants concede that GMAC is a wholly owned subsidiary of GMC, and a subsidiary cannot conspire with its parent company for purposes of § 1. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

G. Motion for a New Trial/Motion to Vacate

We have fully considered the additional evidence attached to Appellants' post-judgment motion and find that summary judgment is still appropriate. Thus, the district court did not abuse its discretion in denying the motion.

H. Standing and Tortious Interference

Because we find that Appellants have failed to establish a genuine issue of material fact as to any of their claims, we need not address Appellees' arguments regarding standing and tortious interference with contract.

CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the Appellees.

AFFIRMED.