UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1461

CIGNA INSURANCE COMPANY,
Plaintiff-Appellee,

versus

EDWARD C. SIMMONS,
Defendant-Appellant.

No. 93-1462

EDWARD C. SIMMONS,
Plaintiff-Appellant,

versus

CIGNA INSURANCE COMPANY,
formerly known as, Ina
Underwriters Insurance Company,
and C.R. PAYNE,
Defendants-Appellees.

No. 93-1522

EDWARD C. SIMMONS,
Plaintiff-Counter Defendant
Appellant,

versus

CIGNA INSURANCE COMPANY,
Defendant-Counter Plaintiff
Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-2391-G, 3:91-CV-2392-G & 3:93 CV 0008 G)

(August 30, 1994)

Before Wisdom and Jones, Circuit Judges, and Cobb, District Judge.[*]

EDITH H. JONES, Circuit Judge:[**]

Homeowner appeals dismissals and summary judgments issued against him in three closely-related cases arising from an insurance coverage dispute. We affirm.

BACKGROUND

Before the court are three appeals arising from the denial of an insurance claim submitted by Edward Simmons under a homeowner warranty program.[1] On November 19, 1979, Simmons bought a house from a builder who provided him with a ten-year limited home warranty agreement. The builder warranted the reliability and quality of his construction for the first two years. For the remaining eight years, Simmons was the assignee of insurance coverage held by the builder which covered "major construction defects" or "major structural defects" which might arise during the remainder of the warranty period.

Eight and one-half years after he bought the house, Simmons filed a claim with CIGNA, the insurer under the warranty program, alleging that his house had "nail pops," "cracks in sheet rock," "corner areas [that] appear[ed] to be pulling away," and

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[*] District Judge of the Eastern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] In its brief, CIGNA abandoned its cross-appeals from the district court's denial of attorney fees in the three cases.

that a "walk-by chimney [had] never [been] fixed" by the builder. CIGNA dispatched C. R. Payne to inspect Simmons' home. On October 12, 1988, CIGNA sent Simmons a letter notifying him that the damages did not constitute a major construction defect.[2] The denial letter reminded Simmons that he had a right to request arbitration, that if he chose to go to arbitration CIGNA would commence the necessary procedures, and that the arbitration would be provided at no cost to Simmons.

After the denial, the builder of Simmon's home made what Simmons describes as "cosmetic repairs throughout the home." It is not clear whether these repairs were performed at the request of Simmons or CIGNA. Several months after the repairs, Simmons noticed the reappearance of the damages that the repairers had supposedly corrected.

On October 10, 1991, Simmons sued CIGNA and Payne in Texas state court, alleging negligence, gross negligence, breach of contract, violations of the Deceptive Trade Practices Act, violations of the Texas Insurance Code, breaches of the duty of good faith and fair dealing, and fraud. On November 4, 1991, CIGNA and Payne removed the case to federal court. CIGNA also filed a separate lawsuit in the same court to compel arbitration pursuant to binding arbitration clauses in the insurance contracts. The parties refer to the lawsuit initiated by CIGNA to compel

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[2] This was defined under the insurance documents as actual damage to the load-bearing portion of the home which affects its load-bearing function and which vitally affects or is imminently likely to produce a vital effect on the use of the home for residential purposes.

arbitration as Simmons I and the bad-faith lawsuit initiated by Simmons in state court as Simmons II.

The district court compelled arbitration of the insurance coverage dispute. A three-member arbitration panel, over one member's dissent, found that Simmon's house had a "major construction defect" and that CIGNA was responsible for the necessary repairs. The parties stipulated that the reasonable and necessary cost of the repairs ordered by the arbitration panel was $25,920.

Simmons (or his lawyer) was not content with this award.[3] Following the arbitration award, CIGNA promptly offered to pay Simmons the stipulated amount upon receiving a release for all claims Simmons might have under the insurance contract arising out of the arbitrated claim. Simmons objected to the release, asserting that it compromised extracontractual causes of action he might have against CIGNA and Payne. The record shows that CIGNA repeatedly sought to disburse the money and accommodate Simmons' concerns about the language of the release. CIGNA finally applied to the district court under Simmons I for confirmation of the panel award, for a declaratory judgment that it had fully complied with the award, and for the court's assistance in obtaining Simmon's release of his insurance claims.

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[3] This is the third time this court has heard from Simmons' lawyer contesting actions resolved in CIGNA's favor. In the previous two actions, nos. 92-1252 and 94-10011, we not only affirmed the cases on the merits in CIGNA's favor, but affirmed the award of attorney's fees and costs. We found the post arbitration claims "entirely groundless, brought in bad faith, and to harass CIGNA." The tactics and claims in this case differ little from these earlier cases.

Before the parties had even litigated the post-arbitration issues in Simmons I, and before Simmons II had concluded, Simmons filed yet another lawsuit in Texas state court claiming that the requirement of the above-mentioned release was unconscionable under Texas law. CIGNA removed this case and it completed the trilogy as Simmons III.

The district judge ordered the following: In Simmons I, he declared that CIGNA had fully complied with its obligations under the insurance documents, directed CIGNA to tender the monies awarded by the arbitration panel to the court, and conditioned the release of the award to Simmons only upon the execution of a release of all claims against CIGNA under the warranty program arising out of his insurance claim. In Simmons II, the district judge determined that Payne had been fraudulently joined to avoid diversity jurisdiction and granted summary judgment on all extracontractual claims against Payne and CIGNA based primarily on statutes of limitations. He later granted CIGNA summary judgment on the contract claims based on the issuance and confirmation of the arbitration award in Simmons I. Finally, the judge denied Simmons motion for remand in Simmons III and granted the defendants' motion for summary judgment under the res judicata effect of Simmons I and Simmons II.

DISCUSSION

The parties are well aware of our summary judgment standards. We review issues of law de novo viewing the evidence in the light most favorable to the nonmovant. After the moving party

has carried its burden under Rule 56(c), the nonmovant must come forward with specific facts showing that there is a genuine issue for trial. Where 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. Ind. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986).

Simmons I

The only issue appealed in Simmons I is whether the district court properly required Simmons to execute a release of all legal rights he might have against CIGNA "for major construction defect insurance benefits under the [homeowner warranty] program arising out of [his] claim or related claims, or arising out of the arbitration award or modified award." Simmons asserts that this language constitutes a blanket release of all claims he might have against CIGNA. He argues that the arbitrators did not consider extracontractual claims and that requiring a blanket release of such claims is improper and unconscionable.

Simmons arguments are meritless. It is abundantly clear from the insurance documents, district court rulings and especially correspondence with CIGNA's lawyers, that the release does not include extracontractual claims. Simmons even refused to sign a release which CIGNA's lawyers had drafted that expressly reserved for Simmons all extracontractual rights and causes of action Simmons might have against CIGNA. The release and discharge is properly limited to major construction defect insurance benefits.

Simmons cannot recover further major construction defect insurance benefits from CIGNA for this house.

Simmons II

Simmons contests the district court's finding that he fraudulently joined Payne to avoid diversity jurisdiction. When fraudulent joinder is claimed, the burden is on the defendant to show that there is "no possibility that the plaintiff can establish a cause of action." B, Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981); Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992). "After all disputed questions of fact and all ambiguities in the controlling state law are resolved in favor of the nonremoving party, the court determines whether that party has any possibility of recovery against the party whose joinder is questioned." Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir. 1990). It is appropriate to go beyond the pleadings and examine the evidence in a procedure similar to that used for ruling on a motion for summary judgment. Id.

The district court found that Simmons' extracontractual claims, the only claims applicable to Payne, were barred by statutes of limitations. CIGNA denied his claim on October 12, 1989. Simmons filed his lawsuit in Texas court nearly three years later on October 10, 1991. This led to the judge's ruling on fraudulent joinder. The judge later ruled that Simmons' contractual claims were barred by the arbitration award and Simmons I.

It is undisputed that Simmons' claims for negligence, breach of duty of good faith and fair dealing, violations of the Texas Deceptive Trade Practices Act, and violations of Article 21.21, § 16(d) of the Texas Insurance Code are subject to a two-year statute of limitations. To avoid the statute, Simmons asserts that the district judge should have employed a discovery rule, and determined that his claims arose not on the date of coverage denial, but on the date he discovered that the post-claim repairs had failed to correct the claimed defects. Under established Texas law, however, limitations begin to run on the date the carrier denies the claim. Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 827-29 (Tex. 1990) (discussing accrual date of claims at some length). Application of the discovery rule is limited to those cases where there has been no outright denial of the plaintiff's claim. Davis v. Aetna Casualty & Surety Co., 843 S.W.2d 777, 778 (Tex. App. -- Texarkana 1992, no writ). The district court therefore rightly granted summary judgment to CIGNA and Payne on all extracontractual causes of action that were subject to a two-year statute of limitation.

Furthermore, all of Simmons' extracontractual claims fail to survive summary judgment even if they were timely. The Texas Supreme Court recently ruled that adjusters and agents of adjusters are not individually liable for breaches of good faith or fair dealing by the insurer. Natividad v. Alexis, Inc., 875 S.W.2d 695, 698 (Tex. 1994). Moreover, there is no such tort in Texas as the negligent infliction of emotional distress. Boyles v. Kerr, 855

S.W.2d 593, 594 (Tex. 1993). Finally, the intentional infliction of emotional distress requires conduct "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993) (citation omitted). This clearly did not occur here.[4]

As for Simmons' claim that CIGNA breached its common law duty of good faith and fair dealing, not only is it time-barred, but the undisputed facts preclude judgment for Simmons as a matter of law. To recover Simmons must first prove that CIGNA had no reasonable basis for denying payment of his claim. Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 215 (Tex. 1988) (listing elements of claim). The fact that one member of an independent arbitration panel dissented from the panel's decision is prima facie evidence that CIGNA had a reasonable (though mistaken) basis for denying Simmons claim; we believe no reasonable juror could conclude otherwise under these facts.

Simmons most strongly argues that the district court erred in its summary judgment against him on his fraud claims. The district court incorrectly ruled that actions for fraud were subject to a two-year statute of limitations. In fact, the Texas Supreme Court recently ruled that all fraud actions are subject to a four-year statute of limitations. Williams v. Kahlaf, 802 S.W.2d 651 (Tex. 1990). We uphold the district court's grant of summary judgment, however, on another ground supported by the record. See

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[4] Except perhaps for the conduct displayed by Simmons' lawyer.

Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990).

Simmons alleges that by the letter denying his claim on October 12, 1989, CIGNA and Payne fraudulently represented that Simmons' home defects were not covered under the insurance policy.[5] It is elementary that issuing a denial of coverage letter that is later shown to be incorrect is simply not fraud unless the person making the representation either knew the representation was false, or made the representation recklessly without knowledge of its truth. E.g., Stone v. Lawyers Title Insurance Corp., 554 S.W.2d 183, 185 (Tex. 1977). It follows that not every letter incorrectly denying insurance coverage is fraudulent. Most such denials are simply contractual disagreements that may be solved through arbitration, as was done in this case. Some may involve breaches of good faith and fair dealing. Even fewer constitute fraud. The denial in this case, though incorrect, was reasonable. Issuing a denial-of-coverage letter on a reasonable assessment of a claim is not a fraudulent representation but a business decision. Texas courts have not hesitated in comparable cases to recharacterize fraud claims as claims for the breach of the duty of good faith and fair dealing. See, e.g., Natividad v. Alexsis, Inc., 833 S.W.2d 545, 549 (Tex. App. -- El Paso 1992) (rejecting plaintiff's claims

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[5] Simmons also alleged that there was fraud concerning representations made at the time of purchase. This contention is meritless. The builder who sold Simmons his house was not an agent for CIGNA when he made the alleged misrepresentation that "an insurance company 'stood behind' the home." CIGNA cannot be liable for any representations allegedly made by this unidentified salesman working for a company who was the beneficiary of an insurance policy issued by CIGNA.

of fraud in insurance settlement proceedings and recharacterizing them as claims for breach of duty of good faith and fair dealing), rev'd on other grounds, 875 S.W.2d 695 (Tex. 1994).

Finally, Simmons complains that the district court improperly dismissed his contractual claims against CIGNA in Simmons II based on the collateral estoppel effect of the arbitration proceeding. Simmons argues that the contract claim should not be dismissed because he is entitled to attorney's fees, prejudgment interest, and undefined consequential damages arising from the breach. Again, we affirm. "The application of collateral estoppel from arbitral findings is a matter within the broad discretion of district court . . . ." Universal American Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1137 (5th Cir. 1991). The district court's discretion extends to matters such as attorneys fees, prejudgment interest, and consequential damages -- all items which are ordinarily subject to broad discretion even absent preexisting arbitral findings. We therefore find no error in the district court's dismissal of Simmon's contract-related claims.

Simmons III

Simmons contends that the district court erred in entering summary judgment for CIGNA on Simmons III, his case that alleged that the release requirement was improper or unconscionable under Texas law. The judge held that the res judicata effects of Simmons I (via claim preclusion) and Simmons II (via issue preclusion) barred or estopped further litigation. We find no error in the judge's rulings. In any event, the claim that the

required release in its limited form was improper or unconscionable is frivolous.

For the foregoing reasons, the district court's rulings are **AFFIRMED** in all respects.