IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1886

Summary Calendar

HENRY MITCHELL, Next friend and on behalf of William Devon Mitchell, ET AL.,

Plaintiffs-Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:91-CV-707-A)

(February 4, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Henry and Donna Mitchell, as next friend for William Devon Mitchell, a minor, filed a pro se complaint against Metropolitan Life Insurance Company (MetLife) seeking damages or rescission for MetLife's breaches of contract. At trial, the district court

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

granted a directed verdict for MetLife. The Mitchells appeal. We affirm.

I.

In October of 1991, the Mitchells filed their pro se complaint against MetLife. Their principal cause of action was for the breach of a Qualified Assignment and Assumption Agreement (the agreement) between a subsidiary of MetLife's, Metropolitan Insurance and Annuity Company (MIAC), and the Texas Medical Liability Trust (Texas Medical). The Mitchells alleged that pursuant to the agreement MIAC had assumed Texas Medical's obligation to make periodic payments to the Tarrant County District Clerk for the use and benefit of William Devon Mitchell.

On September 28, 1992, the district court sua sponte dismissed the Mitchells' complaint for lack of subject matter jurisdiction because the $50,000 amount in controversy requirement for diversity jurisdiction was not met. We reversed the district court's dismissal and remanded the case to the district court because we determined that the district court could not say to a legal certainty that the Mitchells would not be able to recover $50,000 on their claims.

On August 30, 1993, the Mitchells' case was tried before the district court. After the close of the Mitchells' case, MetLife moved to dismiss. The district court granted MetLife's motion. In this appeal, the Mitchells complain about numerous orders of the district court.

II.

July 15, 1993 and August 17, 1993 orders

On July 12, 1993, the Mitchells filed a motion to terminate or limit the deposition of Donna Mitchell. According to the Mitchells' motion, Donna Mitchell was ill and under a doctor's order not to sit for long periods of time. On July 15, 1993, the district court denied the Mitchells' motion as moot because the discovery deadline, August 31, 1992, had already passed and no motion to extend discovery had been filed. On July 15, 1993, MetLife took the deposition of Henry Mitchell, and MetLife filed, on July 27, 1993, a request to extend the discovery deadline so that MetLife would be able to utilize Henry Mitchell's deposition at trial, which the district court granted on August 17, 1993.

The Mitchells now appeal the district court's July 12 and August 17 orders. According to the Mitchells, their July 12 motion was really a request to enforce the August 31, 1992, discovery cutoff deadline, and the district court's decision to render their July 15 motion moot and to eventually grant MetLife's motion to extend the discovery deadline was a clear abuse of discretion.

The control of discovery is left to the district court's discretion and its discovery rulings will be reversed only if they represent an abuse of discretion. Mayo v. Tri-Bell Indus., Inc., 787 F.2d 1007, 1012 (5th Cir. 1986). The district court's July 15 and August 17 orders do not constitute an abuse of discretion. With respect to the August 17 order, MetLife's

motion to extend discovery was based on its many previous attempts to depose Henry Mitchell before the discovery deadline, most of which were thwarted by Henry Mitchell's own conduct.

The Mitchells raise several other arguments relating to the district court's order of August 17, 1993. After the discovery deadline, Metlife served two notices of intention to take depositions by written questions. On August 17, 1993, the district court ordered sua sponte that MetLife's notices of intention to take deposition by written questions be stricken from the record. The Mitchells argue that the district court abused its discretion by not granting sanctions against MetLife for filing the notices.

We review a district court's decision to grant sanctions under the abuse of discretion standard. Sheets v. Yamaha Motors Corp., 891 F.2d 533, 538-39 (5th Cir. 1990). The district court was not acting unreasonably when it ordered only that the notices be struck. We cannot see how the Mitchells would have been prejudiced by the mere service of the notices, and the Mitchells have not made any specific arguments to show us how they were harmed by the filing of the notices. Therefore, the district court's order was not an abuse of discretion.

On July 21, 1993, the Mitchells filed a motion for sanctions and default judgment because of MetLife's actions in relation to a settlement conference that the parties attended pursuant to the district court's pretrial order. The Mitchells alleged that MetLife had not made a good faith effort to settle the litigation

because MetLife's representative at the conference had no authority to settle the action. The Mitchells allege that the annuity contract provides a limit of $2,981,567 for contractual damages and that the representative informed them that he could not settle the case for that amount. MetLife contended to the district court that the representative had full authority to enter into a reasonable settlement with the Mitchells but that the representative could not have entered into a settlement agreement for the full amount of the policy based on the Mitchells' allegations that MetLife had failed to make about five payments on the policy. In the district court's order, it denied the Mitchells' motion for sanctions and entry of default judgment because it determined that "the motion was the result of miscommunication between Henry Mitchell and defendant regarding the authority of defendant's representative." The district court's decision is fully supported by the record and is not an abuse of discretion.

August 18, 1993

On August 18, 1993, the district court denied MetLife's motion for summary judgment. In its order denying the motion, the district court stated that "[a]lthough the court is satisfied that the amount genuinely in controversy does not exceed $50,000.00, exclusive of interest and costs, the court is hesitant to make such a ruling in light of the May 26, 1993, opinion of the United States Court of Appeals for the Fifth Circuit." The Mitchells assert two claims concerning the

district court's August 18 order. First, the Mitchells argue that the above quoted passage from the district court's order demonstrated that "the plaintiffs would not get a fair an[d] unbias[ed] hearing or trial in said Court." We disagree. The remark does not reflect bias. The Mitchells' second contention is that the district court should have sanctioned MetLife for filing a frivolous motion for summary judgment. According to the Mitchells, this court's opinion of May 26, 1993, totally foreclosed any argument by MetLife that the Mitchells had not satisfied the required jurisdictional amount. We note, however, that lack of subject matter jurisdiction was not the only basis for MetLife's motion. We are not persuaded that the district court abused its discretion in not awarding sanctions.

August 27, 1993 order

Pursuant to the district court's June 22, 1993, scheduling order both parties were to file exhibit lists accompanied by a written statement by the opposing party stating whether the party agreed to the admissibility of the exhibits or objected and the party's reasons for objection by August 23, 1993. On August 23, 1993, MetLife filed its exhibit list and a motion for an extension of time for the Mitchells to file their statement concerning the admissibility of MetLife's exhibits. In its motion, MetLife stated that it had tried to obtain the statement from the Mitchells but had been unsuccessful. On August 27, 1993, the district court granted MetLife's motion for an extension of time. In its order, the district court noted that

on August 24 and August 26 the Mitchells had filed their statement.

The Mitchells now appeal the district court's order which granted an extension of time for them to file their statement. The Mitchells argue that "[a]ny delay by the plaintiffs in filing any documents required to be file by the Court is an abuse of said Federal Court Order and should not be allowed by any parties." The Mitchells' basic premise concerning the district court's August 27 order, as it has been in all their arguments concerning the district court's actions, is that any deviation no matter how slight from a discovery deadline or order of the district court is a violation of the district court's order and is thereby automatically sanctionable. However, this is not how discovery works in the federal system. The district court has broad discretion to order the conduct of discovery so that the case can be expeditiously and fairly decided. Whether a deviation by a party from any of the court's orders is sanctionable conduct is left to the sound discretion of the trial court. Any other rule would lead to harsh results and would not take into account any exigent circumstances which tend to arise in day-to-day affairs. Therefore, the mere fact that the district court allowed a party an extension of time to file a document with the court does not by itself demonstrate that the district court has abused its discretion in ordering the conduct of discovery in a case before it. Therefore, the Mitchells' argument is totally without merit.

District court's denial of the Mitchells' motion in limine and for a jury trial

Next, the Mitchells argue that the district court erred in denying their motion in limine and request for jury trial. However, we fail to see, and the Mitchells do not inform us, how the district court's denial of their motion in limine could have prejudiced them in any manner considering the fact that their case was dismissed before Metlife entered any evidence and because the case was a non-jury trial. See Government of Canal Zone v. Jimenez, 580 F.2d 897, 898 (5th Cir.), cert. denied, 439 U.S. 990 (1978) (noting that when a judge is sitting as the trier of fact he is presumed to disregard inadmissible evidence). Again, their claim is meritless.

Further, the Mitchells' argument that the district court erroneously denied their motion for jury trial is totally without merit. The Mitchells did not file a demand for jury trial until August 27, 1993, almost two years after the Mitchells filed their complaint. Therefore, the district court did not err in denying their motion. See FED. R. CIV. P. 38(d).

Denial of the Mitchells' motion for new trial

Finally, the Mitchells argue that the district court erred in denying their motion for new trial. The decision to grant or deny a motion for new trial is a matter for the district court's discretion, and we will reverse the district court's determination only if it represents an abuse of discretion. Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 164

(5th Cir. 1990). The Mitchells argued that the district court should grant them a new trial because the district court improperly denied their motion for continuance at trial and because the Mitchells' main witness, even though she was subpoenaed, did not attend the trial. The Mitchells alleged that the witness who did not attend the trial had sufficient evidence to prove that MetLife had missed payments owed to Devon Mitchell. The district court denied the Mitchells' motion. In its order, the district court stated that it had been unaware of any motion for continuance until prior to the commencement of trial testimony when the Mitchells asked the court to consider their motion for continuance. The district court noted that the Mitchells must have filed their motion for continuance later that day after the end of the trial. The motion that the Mitchells filed does not mention that one of their witnesses would be unable to attend trial that day. The district court was apparently unaware of the fact that one of the Mitchells' witnesses would be unable to attend the trial until the Mitchells filed their motion for new trial. The court further noted that there was no evidence that the prospective witness was ever actually served with a subpoena. The Mitchells attached a copy of a subpoena for Celena L. Michael to their motion for new trial. However, the back side of the subpoena, which shows that service was made on the witness, was not filled out.[1] The court

[1] On appeal, the Mitchells attach to their briefs an affidavit and a new copy of the subpoena that they filed with the district court. The affidavit was signed on December 9, 1993,

further noted that there was nothing in the record to reflect that the witness would have given any testimony that would have prevented the rendition of a judgment against the Mitchells. Because the district court was never informed before trial that the Mitchells were missing an important witness and because the Mitchells offered no proof to the district court that they properly subpoenaed the witness, we cannot say that the district court abused its discretion in denying their motion on that ground. Further, the Mitchells have not presented this court with any arguments that the district court erroneously concluded that there was no indication in the record that the missing witness would have been able to present any evidence which would have prevented the rendition of judgment in favor of MetLife. Therefore, we can not say that the district court abused its discretion.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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and is a statement by a member of the Tarrant County Sheriff's Department stating that he delivered a copy of the subpoena to the witness who did not show up at the trial. The Mitchells also attach a copy of the subpoena with the back side filled out, showing that the subpoena had been served. We, however, will not review this evidence because it is not a part of the record presented to the district court. See GHR Energy Corp. v. Crispin Co. Ltd. (In re GHR Energy Corp.), 791 F.2d 1200, 1201-02 (5th Cir. 1986) (noting that a court of appeals is barred from considering filings outside the record on appeal and attachments to briefs do not suffice); Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1174 (5th Cir. 1985) (petition for reh'g).