UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-2217

(Summary Calendar)

RUMI VESUNA,

Plaintiff-Appellant,

versus

ABB LUMMUS CREST INC.,
d/b/a Saudi Consulting
and Design Company, and
ASEA BROWN BOVERI, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(H 92 2360)

(September 9, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Rumi Vesuna appeals summary judgment of his claim that ABB Lummus Crest Inc. ("Lummus") and ASEA Brown Boveri, Inc. ("Boveri") breached an employment contract. Finding no error, we affirm.

In January 1990, Lummus entered into an association agreement with Saudi Consulting and Design Company ("SCADO"), the purpose of which was to "seek[] and perform[] engineering and design services

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in the Kingdom of Saudi Arabia." Lummus recruited Vesuna to work as a senior process engineer in Saudi Arabia. In May 1991, Lummus and Vesuna agreed in principle as to Vesuna's employment with Lummus. A month later, Vesuna traveled to Lummus's Houston office to execute the employment contract. After examining the terms of the proposed agreement, Vesuna raised two concerns. First, he stated that he desired a twenty-four month term of employment, rather than a twelve-month term. Second, he expressed his concern over the fact that SCADO, and not Lummus, was the company he would be working for under the contract. Vesuna successfully negotiated for the longer term, but failed in his attempt to have the proposed agreement changed to reflect that Lummus and/or Boveri[1] would be his employers under the contract. Thereafter, Vesuna signed the employment contract, which explicitly listed SCADO as Vesuna's employer. After Vesuna was terminated prior to completing his twenty-four month term, he filed suit against Lummus and Boveri for breach of contract.[2]

Lummus and Boveri filed a motion to dismiss for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). Treating the defendants' motion to dismiss as a

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[1] Vesuna alleged in his amended complaint that Boveri is the parent corporation for Lummus. *See* Record on Appeal vol. 2, at 231.

[2] Vesuna also filed a libel claim against Lummus. *See* Record on Appeal vol. 1, at 81. Since, however, Vesuna does not argue this issue on appeal, we deem the issue abandoned. *See Hobbs v. Blackburn,* 752 F.2d 1079, 1083 (5th Cir.) (stating that issues neither raised nor briefed on appeal are deemed abandoned), *cert. denied,* 474 U.S. 838, 106 S. Ct. 117, 88 L. Ed. 2d (1985).

motion for summary judgment,[3] the district court found that Vesuna had not demonstrated a genuine issue regarding whether the defendants were parties to the employment contract. The court therefore granted summary judgment for the defendants. Vesuna filed a timely notice of appeal.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While 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), that party may not rest upon mere allegations or denials in its pleadings, but

[3] *See* Fed. R. Civ. P. 12(b) ("If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief may be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

We initially reject Vesuna's argument that he received inadequate notice of the possibility that the court could treat the defendants' motion to dismiss as a motion for summary judgment. *See* Brief for Vesuna at 10-12. When a court converts a motion to dismiss into a motion for summary judgment because the court has considered matters outside the pleadings, "[t]he proper question . . . is whether the plaintiff[] had ten days' notice after the court accepted for consideration matters outside the pleadings." *Isquith v. Middle South Utilities, Inc.,* 847 F.2d 186, 196 (5th Cir.), *cert. denied,* 488 U.S. 926, 109 S. Ct. 310, 102 L. Ed. 2d 329 (1988); *see Washington v. Allstate Ins. Co.,* 901 F.2d 1281, 1284 (5th Cir. 1990) (holding that a nonmovant had sufficient notice that motion to dismiss would be treated as motion for summary judgment because hearing on motion was held more than ten days after nonmovant submitted matters outside the pleadings). Here, Vesuna filed his amended complaint))containing matters outside the pleadings in the form of exhibits))more than *thirty* days before the court converted the defendants' motion to dismiss into a motion for summary judgment. *See* Record on Appeal vol. 1, at 85; vol. 3, at 1. We therefore hold that Vesuna received adequate notice.

Turning to the merits of Vesuna's appeal, we conclude that Vesuna has not satisfied his burden of setting forth specific facts demonstrating a genuine triable issue regarding the identity of his

employer under the contract. The text of the contract itself indicates that SCADO was Vesuna's sole employer.[4] *See* Record on Appeal vol. 2, at 223. We cannot find any instances in the summary judgment record where Vesuna has substantiated his bare allegation that Lummus and Boveri were his "real" employers under the contract.[5] At most, Vesuna's summary judgment evidence suggests that Lummus and Boveri provided services to Vesuna; this evidence, however, does not create a genuine issue for trial concerning whether Lummus and Boveri were his employers under the employment contract.

Accordingly, the district court's summary judgment is AFFIRMED.

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[4] Moreover, Vesuna admitted that he signed the employment contract knowing that the contract stated that SCADO, and not the defendants, was going to be his employer. *See* Record on Appeal vol. 2, at 214.

[5] For example, Vesuna argues on appeal that the defendants and SCADO were simply alter egos of each other. *See* Brief for Vesuna at 14. Since Vesuna raises this fact-law issue for the first time on appeal, we need not address it. *See United States v. Garcia-Pillado,* 898 F.2d 36, 39 (5th Cir. 1990) (stating that "issues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice" (attribution omitted)). Even were we to address this issue, we would find that Vesuna has not demonstrated a genuine issue of material fact regarding alter ego liability.