IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7322

HERMAN O. POWERS,

Plaintiff-Appellant,

versus

TEXACO, INC., ET AL.,

Defendants,

TEXACO, INC. and TEXACO REFINING AND MARKETING, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA B-89-21)

(May 11, 1994)

Before REAVLEY and JOLLY, Circuit Judges, and PARKER[*], District Judge.

PER CURIAM:[**]

Herman Powers sued Texaco, Inc. (Texaco) and Walter Keller under the Petroleum Marketing and Practices Act (PMPA), 15 U.S.C. §§ 2801-2841. Texaco Refining & Marketing, Inc. (TRMI), a Texaco

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

subsidiary, was later added as a defendant. Powers appeals the summary judgment dismissing his suit on limitations grounds, arguing that the relevant statute of limitations was tolled for various reasons. We affirm.

The PMPA has a one-year limitations provision for civil actions, which states:

> [N]o such action may be maintained unless commenced within 1 year after the later of --
> (1) the date of termination of the franchise or nonrenewal of the franchise relationship; or
> (2) the date the franchisor fails to comply with the requirements of [the PMPA].

15 U.S.C. § 2805(a). The franchise relationship terminated at the end of August 1987 and this suit was not brought until January of 1989. Powers argues that the statute of limitations was tolled under equitable and legal tolling doctrines.

We assume, without deciding the issue, that equitable tolling is available in suits brought under the PMPA.[1] Powers contends that Texaco misled him into believing that his franchise would be renewed. However, in January of 1987 TRMI offered in writing to sell the lease and equipment to Powers, thus manifesting its intent not to continue the franchise agreement. This offer was renewed in writing in July of 1987. In April of 1987 Powers was informed in writing that the franchise would not be renewed. He vacated the premises at the end of the term of the agreement in August of 1987. He made no effort to

---

[1] *But see Hill v. Texaco, Inc.*, 825 F.2d 333, 334-35 (11th Cir. 1987) (holding that equitable tolling is not available under the PMPA).

communicate with Texaco between this time and the time that the station was leased to another party a year later, and did not contact a lawyer during this period. When asked in deposition, "what was the basis for your understanding in August of 1987 that you would be able to make a deal with Texaco after the termination of your lease on August 31st, 1987?," he admitted that he "didn't have any representations from anyone at Texaco that that was the case." He claims in an affidavit that a Texaco representative named Woody Lowery told him that he should wait for a lower offer from Texaco and should not investigate his rights, and that Texaco would extend his lease. However, in deposition Powers testified only that Lowery had said in a "roundabout way" that if he didn't sue Texaco, the company would negotiate with him. He admitted that he "didn't think much about" Lowery's statement, and when asked if he relied on it, he answered "not really." A plaintiff claiming equitable tolling due to the defendant's representations or concealment must show that he exercised due diligence to discover the facts supporting his claim,[2] and that he relied on the defendant's statements or conduct.[3] Powers did not make an adequate showing of due

---

[2] *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989) (affirming summary judgment where plaintiff "failed to demonstrate sufficient diligence in bringing her claim to warrant the application of equitable principles."); *Hill*, 825 F.2d at 335-6 (affirming summary judgment on PMPA claim where plaintiff failed to show due diligence required for tolling of limitations).

[3] *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 810 (5th Cir. 1991) (citing *Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 785 (5th Cir. 1980), *on reh'g en banc*, 640 F.2d

diligence or reliance. We find the affidavit insufficient to raise a fact issue because "the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984).

Powers also claims that the limitations period was legally tolled. He argues that he did not receive a summary statement of the provisions of the PMPA.[4] He does not deny that he received the April 1987 notice of nonrenewal letter, but claimed in his affidavit that the letter did not include the required summary. He admitted that he probably did receive the summary in his deposition, and the letter itself references the summary as an enclosure. Texaco submitted competent summary judgment evidence that the summary was included. We reject Powers' argument for two reasons. First, as explained above, a non-movant cannot defeat summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony. Second, we fail to see how the failure to provide the summary

---

584 (1981), as permitting equitable tolling "where an employee's delay in filing was due to reliance on his employer's misrepresentation . . . ."); ; *Cruce v. Brazosport Indep. School Dist.*, 703 F.2d 862, 864 (5th Cir. 1983) (noting that "evidence of knowing misrepresentation on the part of defendant and of reasonable reliance on the misrepresentation by plaintiff would support a factual issue of equitable tolling.").

[4] Under the PMPA, the termination or nonrenewal of a franchise must be preceded by a notice letter furnished by the franchisor at least 90 days before termination or nonrenewal. The notice letter must include a summary of the provisions of the PMPA. *15 U.S.C.*. § 2804(a),(c)(3)(C),(d).

legally tolls limitations. The limitations period of the PMPA, quoted above, runs from the later of the termination of the franchise or the date of the *failure* to comply with PMPA requirements, not the date of compliance. If Texaco or TRMI failed to send the summary, then that violation occurred in April of 1987 when the letter was sent, or 90 days prior to the termination of the franchise when the summary was due, both of which occurred more than a year before suit was filed. Powers cites two district court cases[5] addressing the failure to send a proper notice, but they do not discuss limitations and do not hold that failure to send a proper notice legally tolls limitations.

Powers also claims that the limitations period was legally tolled due to the bankruptcy of Texaco from April of 1987 to April of 1989. Under 11 U.S.C. § 108(c), "if applicable nonbankruptcy law . . . fixes a period for commencing . . . a civil action in a court other than a bankruptcy court on a claim against the debtor . . . then such period does not expire until . . . 30 days after notice of the termination or expiration of the stay under [the Bankruptcy Code]." Powers argues that the limitations period was therefore extended until the bankruptcy case was resolved. Texaco argues that its interest in the franchise was transferred to its subsidiary, TRMI. TRMI did not file for bankruptcy.

---

[5] *Martin v. Texaco*, Inc., 602 F. Supp. 60 (N.D. Fla. 1985); *Blankenship v. Atlantic-Richfield Co.*, 478 F. Supp. 1016, 1018 (D. Or. 1979).

Evidence was presented that Texaco's contractual rights and obligations under the franchise agreement were assigned to TRMI. The January 1987 written offer to sell the leasehold rights and equipment was made by TRMI. The attached drafts of an assignment of lease and bill of sale also identified TRMI as the assignor/seller. The April 1987 notice letter came from TRMI, and referenced the lease and sale agreements "you have with Texaco Refining and Marketing Inc., as successor in interest to Texaco Inc." Under Texas law, contracts generally are assignable unless there is a contractual provision to the contrary.[6] The sale and lease agreements in the record have standard integration clauses and prohibited assignments by Powers, but did not similarly restrict Texaco, warranting the conclusion that Texaco was legally entitled to assign the agreement to TRMI.

Section 108 of the Code must be read in conjunction with § 362. Section 108 tolls limitations for filing a claim against a debtor until 30 days after the expiration of the automatic stay under § 362. Both provisions relate to "the debtor." These provisions did not stay Powers' claims against TRMI and Keller, or extend the time for filing a claim against them. Section 362 does not operate as an automatic stay against the codefendants of a debtor. *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir. 1983). It would make no sense, therefore, to apply the tolling provision of § 108 to such codefendants. Further, the

---

[6] *Cloughly v. NBC Bank-Seguin, N.A.*, 773 S.W.2d 652, 655 (Tex. App.--San Antonio 1989, writ denied); *Hallman v. Safeway Stores, Inc.*, 368 F.2d 400, 403 (5th Cir. 1966).

subsidiary of a corporate parent who has filed for bankruptcy protection is treated as a legal entity separate and distinct from the debtor parent under the Code. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 994 F.2d 956, 969 (1st Cir.1993) (prosecution of appeal against subsidiary not subject to § 362 automatic stay where parent had filed for bankruptcy); *In re Winer*, 158 B.R. 736, 743 (N.D. Ill. 1993) ("Section 362(a) does not proscribe actions brought against nondebtor entities, even where there is a close nexus between those nondebtors and their bankrupt affiliates. That concept has consistently been confirmed and applied in a host of cases everywhere . . . . And the doctrine applies with equal force even where the nondebtor is a corporation wholly owned by the debtor . . . ."); *Funding Systems Railcars, Inc. v Pullman Standard Inc.*, 34 B.R. 706, 709 (N.D. Ill. 1983) ("Courts have consistently held that the fact that a debtor owns all of the stock of a subsidiary does not provide a sufficient basis for a bankruptcy court to enjoin the prosecution of a suit against the subsidiary.").

Neither the automatic stay nor the tolling provision under the Code applies to such a subsidiary.[7] Texaco's bankruptcy

---

[7] An exception to this rule might be found upon proof that the subsidiary is a corporate sham or piercing the corporate veil is justified. *Winer*, 158 B.R. at 743 ("Absent a piercing-the-corporate veil situation . . . the debtor's presence in the bankruptcy court cannot block actions implicating the nondebtor subsidiary . . . ."); *In re Mego Int'l, Inc.*, 30 B.R. 479, 481 (S.D.N.Y. 1983) ("[O]wnership of a subsidiary by a bankrupt parent does not make that subsidiary the parent's property, unless the subsidiary is `a mere sham or conduit rather than a viable entity.'"). No such proof was offered here.

filing had no effect on claims brought against TRMI, and TRMI was therefore entitled to establish by summary judgment motion that it was the franchisor under the PMPA, and that the suit was barred by the PMPA's one-year limitations provision.

Finally, we find no merit to Power's claim of judicial estoppel. He cites no authority, nor is there any, that the mere filing of joint discovery responses by Texaco and TRMI (who were represented by the same counsel) estops them from denying that they are separate legal entities.

AFFIRMED.