**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 93-8420**
**Summary Calendar**

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**PHEASANTRY FILMS, ET AL.,**

**Plaintiffs-Appellants,**

**versus**

**GENERAL ELECTRIC CAPITAL CORPORATION, ET AL.,**

**Defendants-Appellees.**

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Appeal from the United States District Court
for the Western District of Texas
(SA-92-CA-434)

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(February 1, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

EDITH H. JONES, Circuit Judge:

Plaintiffs brought tortious interference claims against lenders to a now-bankrupt business partner. They argue that the district court erred by refusing to allow amendment of their complaint, conditionally granting a transfer to a New York venue, and granting defendants summary judgment. We affirm because summary judgment was proper even on the basis of the appellants' amended complaint.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## BACKGROUND

Appellants, Pheasantry Films, Inc. and Bancannia Film Distribution, Pty-Ltd. ("Pheasantry"), produced a motion picture film and contracted with Virgin Vision, Inc. ("Virgin") for its distribution in the United States and Canada. Shortly thereafter, the parent of Virgin was acquired by Management Company Entertainment Group ("MCEG"). The acquisition was financed in part by a $67 million loan from appellee Kidder Group, which was later assigned to appellee General Electric Capital Corp ("lenders"). Pheasantry sued Virgin after Virgin defaulted on its obligations and obtained a $115 million default judgment in Texas state court in September, 1990. Within two months, creditors filed involuntary bankruptcy petitions against Virgin and MCEG.

In January, 1991, Pheasantry sued the lenders in Texas state court, primarily alleging tortious interference with contractual relations. Appellees removed the case to the United States District Court for the Western District of Texas where it was assigned to Judge Edward C. Prado. About 14 months later, Judge Prado dismissed the case without prejudice because of appellants' failure to prosecute diligently. On April 7, 1992 Pheasantry refiled the petition against the lenders in Texas state court with nearly identical allegations. The lenders removed this action to U.S. district court and the case was again assigned to Judge Prado.

Although they are not always consistent, the appellants basically assert three factual theories of liability. The first is

that the lenders tortiously interfered with the appellants' distribution agreement with Virgin by refusing to approve Virgin's disbursements to the appellants, thus causing Virgin to breach the distribution agreement. The second theory of liability, asserted in an amended complaint,[1] alleges that the appellees caused general harm to MCEG by lending MCEG funds even though the lenders "knew or should have known" that "there was absolutely no way that MCEG could have ever repaid the funds provided by Kidder." Lending money to MCEG under such circumstances allegedly constituted tortious interference with appellants' contractual relations with Virgin. The third theory of liability, also contained in the amended complaint, is that the appellees were negligent in making, structuring, and administering their loans to MCEG, causing the "ruin" of MCEG, which consequently prevented Virgin from meeting its contractual obligations with the appellants.

The lenders moved to dismiss the petition in the second proceeding, or, in the alternative, for summary judgment. The district court deferred decision on these motions until discovery was completed, set for September 11, 1992. After nearly a year of wrangling over discovery and other procedural matters, including no fewer than six motions by the appellants requesting extensions of various deadlines, the court ordered the plaintiffs to file an

[1] The district court struck the amended complaint because it was not timely filed. The appellants maintain that this was error, arguing that they could properly amend under Fed. R. Civ. P. 15(a) at any time because the defendants had not answered the complaint in the second proceeding. We do not reach this issue, because summary judgment was appropriate even under the amended complaint.

amended response to the defendants' motions for summary judgment no later than February 23, 1993. Based on the admissible evidence submitted by that date, the district judge granted the defendants summary judgment or, in the event this court reversed the summary judgment, a transfer of venue to New York.

**DISCUSSION**

In reviewing summary judgment, we examine the record and pleadings independently, view fact questions in the light most favorable to the non-movant, and consider legal questions de novo. Christopherson v. Allied-Signal Corp., 939 F.2d 1106, 1109 (5th Cir. 1991), cert. denied, 112 S. Ct. 1280 (1992). As a general rule, evidentiary rulings are within the sound discretion of the trial judge and will be reversed only upon a showing of a clear abuse of discretion. Cotita v. Pharma-Plast, U.S.A., Inc., 974 F.2d 598, 601 (5th Cir. 1992).

To defeat the appellees' motion for summary judgment, the appellants relied principally on the deposition and affidavit testimony of 1) Steven Bickel, 2) Raymond Godfrey, 3) Colin Hurren, and 4) expert opinions. The district court expressly or implicitly ruled that none of this evidence was admissible and that the plaintiffs had therefore not created a genuine issue for trial. The admissibility of the excluded evidence will be examined separately.

**Bickel Affidavit**

Steven Bickel, the former president of Virgin, stated in his affidavit that appellees "controlled" MCEG's and Virgin's cash

disbursements and refused his request to allow disbursements to the appellants to honor Virgin's distribution agreement. The district judge ruled that the affidavit asserted only general knowledge of the alleged control over MCEG's payments to the appellants. Judge Prado specifically noted an admission Mr. Bickel made when questioned by the appellants' own attorney:

> Q. (by Mr. Hays) My question is this: I don't want to know what someone told you. What I want to know is other than what you have been told by someone, do you have any facts or any other information upon which you base your conclusion that General Electric or Kidder were exercising control over disbursements and had to approve cash disbursements made by MCEG, Virgin Vision, Inc.?
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> The witness: No.

We find that the judge did not abuse his discretion by ruling that this admission by Mr. Bickel reflected a lack of personal knowledge. We have closely examined the Bickel testimony, especially those passages reprinted in appellants' brief, and conclude that the district judge was within his discretion when he determined that Mr. Bickel relied on "common knowledge," not personal knowledge, in making his statements. See Cormier v. Pennzoil Exploration & Production Co., 969 F.2d 1559, 1561 (5th Cir. 1992) (affidavits opposing summary judgment must be made on personal knowledge).

**Godfrey Deposition Testimony**

The appellants have proffered favorable deposition testimony by Raymond Godfrey, the former Chief Executive Officer of MCEG. His testimony, however, was taken in a different case in

which the appellees were not parties. Since the lenders never had an opportunity to cross-examine this witness, his deposition testimony cannot be considered for summary judgment purposes. Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1020 (5th Cir.), cert. denied, 113 S. Ct. 2456 (1993).

**Hurren Affidavit**

Colin Hurren's affidavit contains statements purportedly based on personal knowledge that allege control of MCEG by the appellees. The appellants, however, filed the Hurren affidavit weeks after the due date for submission of summary judgment evidence without seeking or obtaining the court's permission. Consequently, the judge's exclusion of this evidence for summary judgment purposes was entirely proper. A court is entitled to enforce some limits on the timely submission of appropriate summary judgment evidence. Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990).

**Expert Opinion**

Finally, the appellants cite affidavit and deposition testimony of two experts who were not involved in the events at issue. They offer their opinion that the appellees "had to know" that MCEG would default on its loan. The exclusion of expert opinion evidence is subject to review under a manifest error standard, Christopherson, 939 F.2d at 1109. The district court dismissed this evidence, stating that it served only to suggest that the lenders displayed bad business judgment. We find no error in this ruling. See also, United States v. Ruppel, 666 F.2d 261,

270 (5th Cir.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3487 (1982) ("admission of opinion testimony about a defendant's state of mind is highly prejudicial and must be avoided").

Similarly, the appellants have offered no admissible evidence for their negligence and conspiracy claims that withstands summary judgment.

Because we find that the appellants presented no evidence sufficient to present a genuine issue of material fact on any of their claims, we need not address the issues of the amended complaint or transfer of venue.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.