

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-8448
Summary Calendar
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PATRICIA GIDDINGS,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE
CORPORATION as Receiver of
Washington County State Bank,
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Western District of Texas
(A-92-CA-407-JN)
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(January 31, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Plaintiff-appellant Patricia Giddings (Giddings) filed this
suit in the district court of Washington County, Texas, in December
1990. However, process was not issued until June 1992. In early

* 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should not be published.

July 1992, the case was removed to the United States District Court for the Western District of Texas. Defendants filed motions to dismiss, which were subsequently heard by the magistrate judge. The magistrate judge recommended that the motions be granted. The order of the magistrate judge advised that failure to file written objections to his findings and recommendations within ten days would bar an aggrieved party from attacking the findings and recommendations. Giddings filed no objections within the ten-day period, but thereafter did procure an extension of time until February 12, 1993, in which to file the objections. However, Giddings never did file such objections. On February 16, 1993, Giddings did file a first amended complaint; however, this was not accompanied by any motion for leave to file, nor was any order ever entered granting leave to file. On February 18, 1993, the district court, noting the failure to file objections to the magistrate judge's report by the February 12 extended deadline, and the February 16 filing of the first amended complaint, found that the magistrate judge's report was correct and should be approved and adopted. On the same day, the district court entered judgment dismissing the suit without prejudice. On February 22, Giddings filed a motion for leave to file the first amended complaint (which was never expressly ruled on), and on March 1 Giddings filed a motion to vacate the district court's judgment. The motion to vacate was overruled on March 5, 1993, and Giddings thereafter filed her notice of appeal, complaining of the February 18, 1993, judgment dismissing her suit without prejudice.

Giddings' appeal presents no reversible error. The only intelligible argument that Giddings makes on appeal is that she has some character of a derivative action. However, nothing in her original petition or complaint even remotely purports to assert a derivative action. Given Giddings' failure to ever file objections to the magistrate judge's report, her tendering of the amended complaint after the extended time for filing such objections had expired, her failure to file, prior to judgment, a motion for leave to file the amended complaint, and the long pendency of this suit, the district court was not obliged to consider the amended complaint.

Moreover, the amended complaint was in any event plainly insufficient for purposes of a derivative action. It was not verified as required by Rule 23.1, Federal Rules of Civil Procedure. Further, it failed to allege with any particularity whatever reasons excusing demand on the corporation. Although it does allege that Defendant Gaskamp was an officer and director of the corporation in which Giddings was a shareholder, and was guilty of diverse actions of malfeasance and conspired in that respect "with other officers and directors," it does not allege how many directors were on the board, or the identity of any directors other than Gaskamp, or what, with any specificity at all, any of the other directors are alleged to have done. The general allegations of the amended complaint fail to meet the requirements of the Texas Business Corporations Act, art. 5.14B(2)(b). A pleading is subject to dismissal thereunder if it does "not include specific facts and

particularized reasons for failing to make demand." *Dotson v. Kung*, 717 S.W.2d 385, 390 (Tex. App.SOHouston, 14th Dist., 1986; n.r.e.). The federal rule is similar. See *Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1209 (9th Cir. 1980); *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 264 (1st Cir.), cert. denied, 94 S.Ct. 161 (1973).

The judgment of the district court is

AFFIRMED.