IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8676

TERRY ELSEY,

Plaintiff-Appellee,

versus

SEARS ROEBUCK & CO.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas
(A-93-CV-361)

(July 15, 1994)

Before REAVLEY and JONES, Circuit Judges, and JUSTICE[*], District Judge.

PER CURIAM:[**]

Sears, Roebuck and Company appeals the district court's order denying its motion to compel arbitration, an appeal of right under the Federal Arbitration Act, 9 U.S.C. §16(a) (1990). We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Terry and Bonnye Elsey, husband and wife, decided to purchase the Sears mail-order franchise in Blanco, Texas. Because Terry already had his upholstery shop, the Sears business was to be Bonnye's. When Terry and Bonnye met with the Sears' agents to discuss the franchise, the agents allegedly lauded the past performance of the franchise, told the Elseys that this would be a long-term investment, and stated that absent criminal activity, the two-year franchise agreement would renew automatically. Bonnye signed the franchise agreement, and Terry allegedly invested a substantial sum of money into the franchise business.

Some time after the first renewal, Sears decided to close down its mail-order business. The Elseys decided to sue. Bonnye was required by her franchise agreement to arbitrate her claim. In an attempt to sidestep arbitration and get to a jury, the Elseys filed suit in Terry's name. In his complaint, Terry distances himself from the contract by describing himself as an investor Sears fraudulently induced to invest in its moribund mail-order business.

Sears responded by filing a motion to compel arbitration of Terry's claim, arguing that Terry was bound by the franchise agreement through either ratification, or alternatively, as a partner of Bonnye's. The district court, relying on the fact that Terry did not sign the franchise agreement, denied the motion to compel arbitration and concluded that Terry was not at

this state barred from suing Sears. Sears now appeals this ruling.

Because we are unable to hold that Terry was bound by the franchise agreement, we agree with and affirm the district court's judgment. This does not necessarily afford much encouragement to Terry, however. If Sears was unaware that Terry intended to invest separate property in the franchise and made no representations to Terry individually, he had no legal right to rely on Sears' representations. *See Westcliff Co., Inc. v. Wall*, 267 S.W.2d 544, 546-47 (Tex. 1954) (holding that third-party cannot rely on representations not directed at him); *Jefmor, Inc. v. Chicago Title Ins. Co.*, 839 S.W.2d 161, 163-64 (Tex. Civ. App.–Fort Worth 1992, no writ) (holding that "Foster, an outsider to the original transaction, had no right to rely on the statement by McCarley to Amerifirst or to allege the statement's falsity as a wrong to Foster"). If Sears *did* know of Terry's intent to invest separate property in the franchise, a different picture might be presented. *See Colonial Refrigerated Transportation, Inc.,* 403 F.2d 541, 549 (5th Cir. 1968) (affirming a fraudulent misrepresentation judgment under Texas law favoring a group of joint venturers, where the fraudulent statement was made directly to one joint venturer but was intended to influence all).

If Sears were entitled to the burden upon Terry to raise an issue of a legal claim, as if this were an appeal from summary judgment, we would order dismissal on this record. That was not

the issue before the district court, nor is it the posture of the case on this appeal.

AFFIRMED.

EDITH H. JONES, dissenting:

Unlike my colleagues, I cannot conceive that Mr. and Mrs. Elsey, partners in marriage and de facto partners in business, ought to be allowed to sever their relationship for the sole purpose of seeking a jury trial on their dispute with Sears. It is a waste of all parties' time and money, not to say judicial resources, to bifurcate this claim. I respectfully dissent.