UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10509
Summary Calendar

JIMMY L. MADRY and KAREN MADRY,

Plaintiffs-Appellants,

versus

FINA OIL & CHEMICAL CO.,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(1:93-CV-25)

(December 27, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Jimmy Madry and Karen Madry appeal the summary judgment dismissal of their common law and ERISA[1] claims against Jimmy

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[1]Employment Retirement Income Security Act, 29 U.S.C. § 1132 (1988).

Madry's former employer, Fina Oil and Chemical Co. The Madrys also appeal the grant of declaratory relief to Fina. We affirm in part and reverse in part.

Background

In 1972 Madry was employed by the predecessor company of Fina as an hourly production employee working under a collective bargaining agreement. In 1979 he was offered a salaried position not covered by the collective bargaining agreement. He accepted the position, allegedly with assurances of permanent employment if he did a good job.

In November of 1992, Fina informed Madry that his position as a maintenance foreman was being eliminated and that he could return to a job as an hourly production employee at a lower compensation. When Madry complained that he was physically unable to do production work, Fina placed him on sick leave with an offer of long-term disability status if medical evaluations substantiated his claimed disability.

Ignoring Fina's request for medical evidence, Madry filed the instant suit alleging breach of an oral contract for employment, fraud, breach of a covenant of good faith and fair dealing, and a right to injunctive relief under ERISA section 1132. Karen Madry joined as a complainant claiming loss of consortium. The action was filed in Texas state court; Fina removed to federal court on the basis of the ERISA claim. The district court granted Fina summary judgment on all counts and granted its request for a

declaratory judgment that Jimmy Madry was an "at will" employee. The Madrys timely appeal.

Analysis

We review a grant of summary judgment *de novo*, affirming where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[2] We view the summary judgment evidence in a light most favorable to the Madrys.

Madry first contends that in the offer and acceptance of a job conditioned only upon satisfactory work performance, he and Fina executed an oral contract of employment[3] which Fina subsequently breached by terminating his position. In **Pruitt v. Levi Strauss & Co.**,[4] we held that oral employment contracts were not enforceable under the Texas statute of frauds.[5] Madry maintains that since our decision in **Pruitt** the Texas state courts have enforced these contracts and that we are obliged to "follow subsequent state court decisions that are clearly contrary to a previous decision of this

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[2]**Montgomery v. Brookshire**, 34 F.3d 291, 294 (5th Cir. 1994) (citing Fed.R.Civ.P. 56(c)).

[3]Madry interprets this alleged contract to guarantee a job comparable to the one he most recently held. Fina counters that this alleged contract promised Madry only that he would have a job, which it has always been prepared to provide. Our disposition of the contract claim makes resolution of this issue unnecessary.

[4]932 F.2d 458 (5th Cir. 1991).

[5]Tex. Bus. & Com. Code Ann. § 26.01 (1987).

court."[6]

We are cognizant that recent decisions by the Texas courts of appeal have enforced oral contracts for employment for long as the employee does satisfactory work.[7] We are equally aware, however, that the more recent case cited by the parties found these contracts unenforceable.[8] At best, Madry has demonstrated the existence of a conflict within the Texas intermediate appellate courts; we are not persuaded that **Pruitt** is an application of Texas law so clearly contrary to that employed by Texas courts that we may disregard its holding.[9] Thus, following **Pruitt**, as we conclude we must, we find no error in the district court's ruling that the alleged oral contract was unenforceable as a matter of law.

Madry next challenges the rejection of his claim that Fina fraudulently induced him to leave his production job for a salaried

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[6]**Farnham v. Bristow Helicopters, Inc.**, 776 F.2d 535, 537 (5th Cir. 1985) (discussing the exception applicable in diversity cases to the general rule that a panel of this court is bound by the decisions of prior panels).

[7]See **Goodyear Tire & Rubber Co. v. Portilla**, 836 S.W.2d 664 (Tex.Ct.App. - Corpus Christi 1992), aff'd on other grounds, 879 S.W.2d 47 (Tex. 1994). We note that the Texas Supreme Court expressly refrained from addressing the issue at bar in affirming the result reached by the court of appeals. 879 S.W.2d at 52 n.8.

[8]**Collins v. Allied Pharmacy Management, Inc.**, 871 S.W.2d 929 (Tex.Ct.App. - Houston [14th Dist.] 1994. But see **Gertstacker v. Blum Consulting Engineers, Inc.**, 884 S.W.2d 845 (Tex.Ct.App. - Dallas 1994) (post-**Collins** decision rendered since submission of this case on appeal), writ requested (Nov. 17, 1994).

[9]See **Pruitt**, 932 F.2d at 466 ("We do not read **Farnham** as requiring or even allowing us to disregard our own prior decision when a subsequent state appellate court decision merely 'conflicts' with it.").

position. A fraud action requires proof of a material, false representation, known by the speaker to be false, intended by the speaker to be acted upon by the other party and actual reliance by that party thereon to his detriment.[10] "To withstand summary judgment, the plaintiff in a fraud action must adduce some evidence that the purported misrepresentation was deliberately or recklessly false at the time it was made."[11] Madry admits that the managers and supervisors at his refinery did not make the alleged assurances knowing those assurances to be false. He thus fails to establish an essential element of his fraud claim. His contention that these statements were ordered by upper-level executives within Fina is speculative and wholly unsupported. On this evidentiary basis, we find no error in the district court's rejection of the fraud claim.[12]

Madry's challenges to the district court's exercise of jurisdiction over his claims are equally unavailing. His original complaint sought injunctive relief under section 1132 of ERISA, a

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[10]**Jackson v. Speer**, 974 F.2d 676 (5th Cir. 1992) (citing **Trenholm v. Ratcliff**, 646 S.W.2d 927 (Tex. 1983)).

[11]**Pruitt**, 932 F.2d at 462.

[12]The district court found that the fraud claim was "dependent" upon the contract claim. We express no opinion of this characterization of Texas law; rather, we hold that Madry has failed to produce any evidence to support his fraud claim, independent of its relation to the contract claim. See **Hanchey v. Energas Co.**, 925 F.2d 96 (5th Cir. 1990) (noting that the court of appeals is free to affirm the district court on other grounds). Karen Madry's loss of consortium claim is dependent upon a finding of fraud. See **Cluck v. Cluck**, 712 S.W.2d 599 (Tex.Ct.App. - Corpus Christi 1986).

federal statute providing subject matter jurisdiction.[13] Fina's removal under 28 U.S.C. § 1441 was entirely proper. Further, the trial court's refusal to remand the state law claims, all of which were based on the same factual allegations as the federal claim, was within the court's discretion.[14]

There is no merit whatsoever in Madry's contention that the district court should have abstained herein. Prudential abstention under either **Railroad Comm'n of Texas v. Pullman**[15] or **Colorado River Water Conservation Dist. v. United States**[16] is the "exception, not the rule"[17] and Madry points to no circumstances justifying its application.

In his final assignment of error Madry maintains that the district court's declaration that Madry was an "at will" employee of Fina was duplicative and superfluous in light of the resolution of the contract claim. We agree. The declaratory judgment does not declare any significant rights not already at issue in the contract dispute and the grant of such relief was an abuse of

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[13]29 U.S.C. § 1132(e) (Supp. V 1993).

[14]See **Brown v. Southwestern Bell Telephone Co.**, 901 F.2d 1250 (5th Cir. 1990) (discussing decision not to remand state claims under similar factual circumstances).

[15]312 U.S. 496 (1941) (abstaining from ruling on constitutional issues that might be mooted by a state court's resolution of state law issues).

[16]424 U.S. 800 (1976) (abstaining because of difficult state law issue of substantial public import transcending the results of the case then at bar).

[17]**Id.** at 813.

discretion under the Texas declaratory judgment statute.[18]

For the foregoing reasons we AFFIRM the district court's judgment in all respects EXCEPT its award of declaratory relief, which we REVERSE.

[18]**B.M.B. Corp. v. McMahan's Valley Stores**, 869 F.2d 865 (5th Cir. 1989) (citing **John Chezik Buick Co. v. Friendly Chevrolet Co.**, 749 S.W.2d 591 (Tex.Ct.App. - Dallas 1988)); **Redwine v. AAA Life Ins. Co.**, 852 S.W.2d 10 (Tex.Ct.App. - Dallas 1993).