IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10635

JOHN G. MAHLER COMPANY,

Plaintiff-Appellant,

VERSUS

KLEIN KAROO LANDBOUKOOPERASIE DPK, ET AL.,

Defendants,

KLEIN KAROO LANDBOUKOOPERASIE DFK, C.M. COETZEE, J.J. SCHOEMAN, and ATTIE DE WAAL,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-365-D)

(June 5, 1995)

Before HIGGINBOTHAM, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

John G. Mahler Company ("Mahler") appeals the summary judgment dismissal of its state law fraud, conspiracy, and breach of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

contract claims arising from an alleged breach of a series of exclusive dealing contracts by Klein Karoo Landboukooperasie ("Klein Karoo"). Mahler contends that the district erred in dismissing its claims on statute of limitations grounds, as it did not have actual notice of the breach until 1992. Mahler also complains that the district court implicitly and erroneously found that only one perpetual contract existed. Because we find that all pre-1988 claims are barred by the applicable Texas statute of limitations and that a genuine, material factual dispute remains over the existence of the post-1988 contract(s), we affirm in part and vacate and remand in part.

I.

Starting approximately twenty years ago, Mahler became the Texas importer of record of ostrich skins from the South African company Klein Karoo. Mahler purchased the skins from Klein Karoo and resold them to boot companies and other manufacturers of leather goods. Events, however, marred this mutually beneficial relationship.

Congress passed the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5073 (1988 & Supp. III), repealed by South Africa Democratic Transition Support Act of 1993, Pub. L. 103-149, § 4(a)(1), (2), 107 Stat. 1503, 1504-05 (1993) ("Act" or "Anti-Apartheid Act"), in order to "set forth a comprehensive and complete framework to guide the efforts of the United States in helping bring an end to apartheid in South Africa and lead to the

establishment of a nonracial, democratic form of government." Id. § 5002. The Act, among other prohibitions, prevented the importation into the United States of unfinished agricultural products from South Africa. Id. § 5069(1). Thus, under the Act, the direct importation of ostrich skins from South Africa became illegal.

Consequently, Klein Karoo began shipping unfinished ostrich skins to BGI, a Botswana company, where the skins were tanned. Mahler then "purchased" the skins from BGI but remitted payment to Upperland Trading Limited, an English concern. According to Mahler, the agreement to use this international trading network was with Klein Karoo. While U.S. customs officials questioned Mahler's importation of South African skins, the business was allowed to continue.

Around this time, Mahler also discovered that someone had begun to sell skins in Mahler's dealership area. Mahler investigated but could not get any customers to tell it who the competitor was; as early as 1986, however, Mahler believed that it was Klein Karoo. Mahler claims that it was unable to verify its suspicions until 1992, when it hired one of the employees of a customer. The employee informed Mahler that Klein Karoo was supplying skins to Jaypar Ltd., who in turn was competing in Mahler's supposedly exclusive dealership area. Soon after this discovery, Klein Karoo ceased doing business with Mahler.

Mahler filed suit in Texas state court alleging fraud, breach of contract, and conspiracy. This suit was removed to federal district court because of diversity of citizenship. After numerous

other defendants were dismissed, the remaining defendants, Klein Karoo and various named officers, successfully moved for summary judgment. The district court determined that the applicable Texas limitations period was four years, and Mahler's claims prior to August 20, 1988 were time-barred. Because the court found that in 1986 Mahler had knowledge of the facts that formed the basis of its causes of action, it refused to allow Mahler to avoid limitations because of theories of fraudulent concealment or the discovery rule. All claims were dismissed.

II.

The summary judgment motion is designed to dispose promptly of actions in which there is no genuine issue as to any material fact. FED. R. CIV. P. 56(c) provides in relevant part that

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment, however, will not lie "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When considering the evidence, the court must view the facts and inferences in the light most favorable to the nonmoving party. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993). We review summary judgment motions de novo, applying the same standard as the

district court. Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1084 (5th Cir. 1994).

III.

A.

As we have jurisdiction over this case because of diversity of citizenship, we apply the substantive law of Texas. Under Texas law, the contract and fraud causes of action asserted here must be brought within four years after the day they accrue. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (West 1986); see also Hoover v. Gregory, 835 S.W.2d 668, 677 (Tex. App.))Dallas 1992, writ denied) (determining limitations for breech of contract claims); Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990) (determining limitations for fraud claims). The period for civil conspiracy is two years. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 1986); see also Coppock & Teltschik v. Mayor, Day & Caldwell, 857 S.W.2d 631, 640 (Tex. App.))Houston [1st Dist.] 1993, writ denied) (civil conspiracy).[1] A defendant seeking to bar suit by the affirmative defense of limitations must establish all its elements. Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975); Oram v. General Am. Oil Co., 513 S.W.2d 533, 534 (Tex. 1974).

Under Texas law, statutes of limitation generally begin to run when the cause of action upon which suit is based has accrued. Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967). An action accrues "at the time when facts come into existence which authorize a claimant to seek a judicial remedy." Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 829 (Tex. 1990); Robinson v. Weaver,

[1] The district court, in its memorandum opinion, expressed doubt about whether Mahler's complaint stated a cause of action for civil conspiracy. We do not decide this question.

550 S.W.2d 18, 19 (Tex. 1977). Thus, in assessing the general tort or contract claim, the time of the breach of the defendant's duty is the time the limitations clock begins to run. A party's ignorance of the breach or of facts relating thereto generally does not halt the clock. See, e.g., Robinson, 550 S.W.2d at 19 ("In personal injury actions, this means when the wrongful act effects an injury, regardless of when the claimant learned of such injury.").

Texas jurisprudence, however, creates two limited exceptions to this rule: fraudulent concealment and the discovery rule. Fraudulent concealment of material facts underlying a cause of action by a defendant may prevent him from seeking the protection of the statute. Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983). That court noted that

> [w]here a defendant is under a duty to make disclosure but fraudulently conceals the existence of a cause of action from the party to whom it belongs, the defendant is estopped from relying on the defense of limitations until the party learns of the right of action or should have learned thereof through the exercise of reasonable diligence.

Id.

The discovery rule likewise bars the running of limitations, but only where a plaintiff was unable to know of his injury at the time of accrual and could not have discovered it through the exercise of reasonable diligence. Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988); Robinson, 550 S.W.2d at 19; Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967). Under Texas law, the plaintiff bears the burden of proving either "affirmative

defense" to avoid a defendant's assertion of limitations. See Weaver v. Witt, 561 S.W.2d 792, 793 (Tex. 1977) (per curiam) (fraudulent concealment); FDIC v. Shrader & York, 991 F.2d 216, 220 (5th Cir. 1993) (discovery rule), cert. denied, 114 S. Ct. 2704 (1994).[2]

In construing these rules of Texas law, we impose a mutual requirement upon a party seeking to avoid being barred by limitations. For either, "[t]he plaintiff is required to act with diligence in seeking to discover fraud after being put on inquiry; and if it failed to do so under all of the facts and circumstances of the case, the statute will not be tolled." Professional Geophysics, 932 F.2d at 399 (quoting Pan Am. Petroleum Corp. v. Orr, 319 F.2d 612, 613 (5th Cir. 1963)). In other words, a plaintiff's intentional or even negligent ignorance of its cause of action is no excuse under Texas law.

Here, Mahler attacks both the sufficiency of Klein Karoo's summary judgment evidence and the court's findings that Mahler had presented insufficient evidence to support either its fraudulent concealment or the discovery rule bars. It protests that the only

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[2] We have noted previously that "[u]nlike the discovery rule, fraudulent concealment is an affirmative defense to the statute of limitations that must be pleaded and proved by the plaintiff." Professional Geophysics, Inc. v. Placid Oil Co. (In re Placid Oil Co.), 932 F.2d 394, 399 (5th Cir. 1991). Technically, this statement is true, as under Texas procedure the discovery rule is a plea of confession and avoidance rather than an affirmative defense. Woods, 769 S.W.2d at 517.

What is troubling, however, is that the Texas Supreme Court in Woods held that while the plaintiff seeking to use the discovery rule bore the burden of proof at trial, on summary judgment the defendant-movant bore the burden of overcoming the discovery rule. Id. at 518 n.2. Imposing this requirement in federal court would contradict the central holding of Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986), and the plain language of FED. R. CIV. P. 56(e). Accordingly, when we directly addressed the issue in Shrader & York, 991 F.2d at 220, we held that the burden always remains on the party seeking the benefit of the discovery rule.

evidence presented on the issue of the accrual date was a one-sentence response to an interrogatory. Mahler also contends that the application of the statute's bar was improper, as it had no actual knowledge of Klein Karoo's allegedly improper sales, because they were either inherently undiscoverable or fraudulently concealed.

Klein Karoo, however, presented sufficient proof to establish the putative existence of all the elements of its affirmative defense under the Texas statute of limitations. Indeed, the face of Mahler's complaint alleges a series of contracts entered into over a twenty-year period. And it states that competing products began entering Mahler's exclusive dealership area in 1986, thus establishing that period as the time of the first breach. Mahler, upon summary judgment, does not dispute these points. As suit was filed on August 20, 1992, any breach of the alleged contracts prior to August 20, 1988, is time-barred. Unless Mahler established one of the exceptions to this rule under Texas law, its actual knowledge of breach vel non is irrelevant.

Nor has Mahler established any material factual disputes regarding any exception to the statute of limitations. First, Mahler was "put on inquiry" in 1986. See Placid Oil, 932 F.2d at 399. In support of its summary judgement motion, Klein Karoo attached an interrogatory with Mahler's responses. Interrogatory 16 asked "[w]hen did Plaintiff first believe Defendants were engaged in the alleged conduct described in Plaintiff's Second Amended Petition?" Mahler's response, presumably made with the

assistance of its counsel, stated "Plaintiff objects to Interrogatory No. 16 to the extent that it is overbroad and vague. Subject to and without waiving this objection, Plaintiff responds as follows: Plaintiff first believed Defendants were engaging in the alleged conduct in 1986." Mahler's concession, which it did not directly oppose on summary judgment, was at least sufficient to require it to exercise due diligence in investigating the potential breach and pursuing any claims.[3]

Mahler next argues that it used diligent efforts to discover the source of the ostrich skins, but those efforts were frustrated by Klein Karoo and those customers with whom it conspired. Mahler believes that it should not be barred, as it did not have "actual" notice of Klein Karoo's actions until 1992.

Mahler's assertion that it did not have actual knowledge of the source of the competing leather until 1992, however, does not address Mahler's burden here. Under Texas law, "[t]he estoppel effect of fraudulent concealment ends when a party learns of facts, conditions, or circumstances which would cause a reasonable prudent person to make inquiry, which, if pursued, would lead to discovery

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[3] Mahler is correct to point out that interrogatory responses are not binding judicial admissions. They may, however, be used as evidence, FED. R. CIV. P. 33(c), and for assessing summary judgment, FED. R. CIV. P. 56(c). As such, Klein Karoo was free to use the response to support its motion. Mahler, in turn, was free, within certain limits, to come forward with other evidence that contradicted its prior response. See, e.g., Thurman v. Sears, Roebuck & Co. 952 F.2d 128, 136 n.23 (5th Cir.) (party not allowed to contradict prior deposition response with affidavit without showing cause), cert. denied, 113 S. Ct. 136 (1992).

We explore this problem in greater detail below in addressing the issue of whether one or many contracts existed. Here, however, Mahler did not present any such evidence. In fact, in its response to Klein Karoo's motion, Mahler states that it "does not dispute that it became aware of sales of ostrich skins in its territory in approximately 1986."

of the concealed cause of action." Borderlon, 661 S.W.2d at 909.

The summary judgment record, however, does not support the inference that Mahler's causes of action were inherently undiscoverable or that reasonable investigation would not have discovered them. At best, the record supports a finding that Mahler made a limited investigation and was unwilling to pursue it against its source of valuable exotic leathers. Indeed, the correspondence between John Mahler and Klein Karoo, attached to Mahler's opposition to summary judgment, suggest that Mahler was aware by 1989 that Klein Karoo was involved with selling skins within Mahler's area.

Mahler has presented no evidence that would require us to draw the opposite inference. Moreover, the importation of South African ostrich skins through Jaypar, Ltd., was a matter of public record. See Tariff Classification of Ostrich Skins from South Africa, 23 Cust. B. & Dec. 872 (U.S. Customs Serv. 1989). Mahler correctly suffered summary judgment on this issue, as it presented insufficient evidence to support its burden of showing that it could not discover that Klein Karoo was the source of the skins.

B.

Mahler next complains that the district court implicitly and erroneously treated Mahler's contractual arrangements with Klein Karoo as one "perpetual" contract, rather than as a series of one-year contracts. If a series of contracts existed, then any contract entered into after August 20, 1988, fours years before the

date suit was filed, would not be barred by the four-year limitation period.

Under Texas law, the existence of a contract is generally a matter of fact. See Foreca, S.A. v. GRD Dev. Co., 758 S.W.2d 744, 746 (Tex. 1988) (holding that whether a contract exists between parties is an issue of fact if there is a dispute over intent); Scott v. Ingle Bros. Pac. Inc., 489 S.W.2d 554, 556 (Tex. 1972) (accord); Cf. Federal Express Corp. v. Dutschmann, 846 S.W.2d 282, 282 (Tex. 1993) (overturning jury determination that a contract existed, because, as a matter of law, evidence foreclosed matter). Accordingly, if the summary judgment evidence supported Mahler's contention of multiple contracts, summary judgment was improper on any contract entered after August 1988.

Mahler presented the following summary judgment evidence relevant to this issue. Davina K. Dixon, Mahler's principal secretary, submitted an affidavit stating that the agreement between Mahler and Klein Karoo was negotiated annually in Paris. While the affidavit does not state how long Dixon had been employed at Mahler, she states that it was at least four years. Reid Daniel, Mahler's credit manager, submitted an affidavit that also stated that the two companies annually negotiated the number, quality, and prices of the ostrich skins. Daniel had worked for Mahler for sixteen years. Finally, Mahler attached portions of a deposition by Frank Tisdale, Mahler's "designated representative," who had been hired in 1992 after the death of the company's founder. In the deposition Tisdale denied that the agreement was

renewed on a year-to-year basis. His understanding was that the contract was "perpetual," and the parties were "married to each other forever."

We note, of course, that Tisdale's statements at his deposition were not an admission, even if he was Mahler's designated representative. And the testimony of a party's witnesses may conflict, thus creating disputed fact issues for summary judgment purposes. Long gone are the times when a party was forced to adopt the statements of its witnesses. See FED. R. EVID. 607; see generally 3A JOHN H. WIGMORE, WIGMORE ON EVIDENCE §§ 896-918 (Chadbourn rev. 1970 & Supp. 1991) (examining change in common law rule).

We have held, however, that "a nonmovant cannot defeat a summary judgment motion by submitting an affidavit which contradicts, without explanation, the nonmovant's previous testimony in an attempt to manufacture a disputed material fact issue." Thurman, 952 F.2d at 136 n.23; Albertson v. T. J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1984); Kennett-Murray Corp. v. Bone, 622 F.2d 887, 893-94 (5th Cir. 1980). Such factual disputes are not genuine, but are shams.

We conclude that Mahler has presented a genuine issue of disputed material fact over the existence of one-year contracts. Dixon's and Daniel's affidavits support the conclusion that a series of one-year contracts was entered into by Mahler and Klein Karoo. Tisdale's statements undercut this finding, but they do not make it a sham. Dixon and Daniel had been with Mahler during at least part of the period when Mahler's founder allegedly was

traveling to Paris to enter into these contracts. Tisdale was not. Of course, Tisdale's statement is the common fodder of impeachment, but as it is not our task or that of the district court to judge the credibility of the witnesses on summary judgment, Tisdale's statement alone is not grounds for discounting Mahler's evidence.

C.

Klein Karoo, perhaps anticipating our result, makes several arguments that it contends make this point irrelevant. They argue that any contract was breached at the time that Mahler first learned of the breach))1986. Klein Karoo also argues that any contract after 1988 was illegal under U.S. law.[4]

Klein Karoo's first argument logically follows only if we view the contract as one, rather than many.[5] A contract not in existence in 1986 cannot be breached by knowledge gained in that year. If indeed contracts were created post-1988, then the legal injury occurred by Klein Karoo's subsequent actions. See Murray, 800 S.W.2d at 828 ("[A] cause of action can generally be said to accrue when the wrongful act effects an injury." (citation omitted)). A party's breach of a previous contract does not foreclose the parties from entering into subsequent, valid and enforceable contracts.

Nor do we find that the contract as alleged by Mahler was

[4] Klein Karoo also argues that the issue of the existence of multiple contracts was not raised in the district court. A quick reading of Mahler's opposition to summary judgment, however, refutes this point.

[5] This point also forecloses any issue of the application of Texas's one-year statute of frauds. Tex. Bus. & Com. Code Ann. § 26.01 (West 1987).

unenforceable as an illegal or impossible agreement under the Anti-Apartheid Act. Mahler's allegations are that after 1986, the parties agreed to modify business dealings consistent with the Act. Klein Karoo arranged to have its South African skins shipped to BGI in Botswana, where they were tanned. Mahler made actual payment to Upperland Trading Limited. This arrangement continued after economic sanctions were lifted in July 1991.

Under the Act, it was illegal to import into the United States any South African "agricultural commodity or any byproduct thereof . . . ." 22 U.S.C. § 5069(1); see also 31 C.F.R. § 545.205. The skins of ostriches raised in South Africa would seem to fall within this prohibited category. As is so often the case, however, Congress paints with a broad brush and leaves the details for others. Congress, in order to effectuate this law, delegated to the President the authority to "issue such rules, regulations, licenses, and orders necessary to carry out the provisions of this chapter . . . ." 22 U.S.C. § 5111. The President, in turn, delegated to the Secretary of the Treasury the task of implementing § 5069. Exec. Order No. 12571, 51 Fed. Reg. 39,505 (1986), reprinted in 22 U.S.C. § 5111 (1993); see also 31 C.F.R. §§ 545.101 to 545.901 (1993) (South African Transactions Regulations).

Under the regulations promulgated by the Treasury Department, "[d]eterminations of country of origin for purposes of this part will be made in accordance with the normal Custom rules of origin." 31 C.F.R. § 545.414. Under those regulations, South Africa is not

the "country of origin" of a commodity if the good undergoes a substantial transformation in another country. See 19 C.F.R. § 134.1(b) (1993). Moreover, the regulations provide that products of third countries, including specifically Botswana, do not become prohibited merely because they are transshipped through South Africa for exportation to the United States. 31 C.F.R. § 545.411.

Here, the skins were shipped to Botswana, where they were tanned. This practice was investigated by the United States Customs Service and approved, as it found that the South African skins underwent a substantial transformation in either Botswana or England. Tariff Classification of Ostrich Skins from South Africa, 23 Cust. B. & Dec. 872 (U.S. Customs Serv. 1989). Accordingly, an agreement, even with a private South African company, to provide these "non-South African" products was not illegal under the Act.

In sum, under the allegations of Mahler's complaint and the evidence put forward on summary judgment, a genuine issue of material facts exists over the number of contracts entered into by the two parties. This issue is not mooted by Klein Karoo's breach of alleged previous contracts or by the trade prohibitions of the Anti-Apartheid Act.

III.

Finally, Mahler contends that the district court was premature in granting summary judgment, because it had not yet completed discovery. Accordingly, Mahler would like another chance to oppose Klein Karoo's motion for summary judgment. Yet, Mahler did not

invoke explicitly the protection of FED. R. CIV. P. 56(f).[6] We therefore must determine whether Mahler's actions were the equivalent of a motion for continuance.

While we have been careful to stress that in assessing rule 56(f) claims "[f]orm is not to be exalted over fair procedure," Littlejohn, 483 F.2d at 1146, the only potential request for a continuance that we have been directed to is a brief paragraph in Mahler's response to Klein Karoo's motion for summary judgment. In it, Mahler states, "[p]laintiff submits that defendants' motion is premature in that discovery is still ongoing."[7] We fail to see how this irresolute statement buried in Mahler's response to the summary judgment motion is equivalent to an affidavit seeking a continuance, supported with facts showing why such discovery is needed. See International Shortstop, 939 F.2d at 1267. As we find that this statement was insufficient to put the district court on notice that Mahler was requesting additional time to complete discovery, the court did not abuse its discretion by not addressing

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[6] See Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992) (examining proper procedure for invoking rule), cert. denied, 113 S. Ct. 2340 (1993); International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1266-67 (5th Cir. 1991) (same), cert. denied, 502 U.S. 1059 (1992); Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1146 (5th Cir.) (en banc) (same), cert. denied, 414 U.S. 1116 (1973).

[7] The text of the full paragraph is as follows:

> 3. Defendants in their motion for summary judgment have failed to sustain their burden of establishing that no genuine issue of material fact exists in this action. Plaintiff submits that defendants' motion is premature in that discovery is still ongoing. Plaintiff has reason to believe that defendants are in possession of facts which will assist in proving plaintiff's case. However, the fact that much of plaintiff's desired discovery must take place overseas makes plaintiff's discovery more difficult, expensive, and time consuming to complete. Research of applicable foreign laws, travel schedules, and coordination of all counsels' schedules all have complicated plaintiff's efforts to conduct depositions in South Africa.

the issue.

IV.

In sum, we hold that Mahler's claims based upon any contract or tort causes of action grounded in conduct prior to August 22, 1988, are barred by Texas law. Any conspiracy cause of action based upon conduct prior to August 22, 1990, is also barred. We remand, however, because we find that a genuine issue of material fact remains over the existence of post-1988 contracts.

The judgment is AFFIRMED in part and VACATED and REMANDED in part.