IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10718
Summary Calendar

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Plaintiff-Appellee,

VERSUS

M.C.I. PLANNERS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1518-P)

(January 30, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

I.

This case demonstrates what happens when corporate employees lack adequate language skills. American Telephone and Telegraph Company ("AT&T") supplied long-distance telephone service for M.C.I. Planners, Inc. ("Planners"). Planners accrued $65,099.97 in

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

unpaid long distance charges for calls made using its long distance system, which calls Planners alleges were made fraudulently by unknown third parties.

After some telephone contact between the parties, Jeanette East of AT&T sent a letter to Jane Griswold of Planners reviewing the basis for AT&T's claim for the full amount of the debt and concluding with the statement: "I am presenting a formal good faith settlement offer of 15% of the total claim. The total claim is $65,099.97." Planners seized upon this ill-conceived language and immediately dispatched a check for $9,764.99 (15% of $65,099.97) and a letter accepting the settlement offer.

AT&T, upon receipt of Planners's letter, called Planners and sent a letter explaining that the first letter had been a proposal for AT&T to adjust 15% off of the full amount of the outstanding claim, not a proposal to discount the claim by 85% and accept payment of 15%. Wendy Vicine, who wrote this second letter from AT&T, explained that because there had been a misunderstanding, Planners's $9,764.99 check was being returned.

II.

AT&T filed suit under 47 U.S.C. § 203 to collect the full $65,099.97. Federal jurisdiction was based upon a federal question under 28 U.S.C. § 1331 and diversity under 28 U.S.C. § 1332. Planners timely filed an answer asserting waiver, estoppel, accord and satisfaction, novation, and laches.

Planners moved for leave to amend its answer; in the proposed

amended answer, Planners sought a declaratory judgment for the enforcement of the settlement agreement it claimed had been entered into by the parties pursuant to the East letter and also asserted the defenses of compromise and settlement and payment and release. The district court denied leave to amend.

Both AT&T and Planners moved for summary judgment. In support of its motion, Planners asserted that the parties had entered into a valid and enforceable settlement agreement prior to AT&T's filing suit. Planners also moved to strike East's affidavit, explaining her interpretation of the cryptic language in the first letter to Planners, which had been offered as summary judgment evidence by AT&T. The district court denied Planners's motions to strike the East affidavit and for summary judgment and granted AT&T's motion for summary judgment.

III.

A.

Planners contends that the district court erred in denying its motion to amend to assert compromise and settlement and payment and release, and to counterclaim based upon the settlement agreement. The court reasoned that "the request for leave was filed after the expiration of the discovery deadline and . . . the other deadlines could be adversely affected by allowing the First Amended Original Answer." Planners argues that this ruling was erroneous because the new defenses and counterclaim, being based upon the settlement agreement, would have required no additional discovery. Accord-

ingly, Planners claims that allowing the amendment would not have prejudiced AT&T or affected the other deadlines.

Planners cites Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971), for the proposition that "a court should always grant leave to amend absent compelling circumstances." A careful reading of Zenith reveals that the Court said nothing about compelling circumstances, opining instead that: "The grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court . . . . But in deciding whether to permit such an amendment, the trial court was required to take into account any prejudice that Zenith would have suffered as a result." Id. at 330-31.

We review a decision to grant or deny leave to amend for abuse of discretion. Id. at 330. Here, Planners's new arguments in the proposed amended answer were not based upon any new information uncovered during the discovery process. Nor did the new theories advanced in the proposed amended answer add anything substantial to the arguments that had already been made. The timing of the request for leave to amend suggests that it was merely an attempt for the new lawyer on the case to escape from the content of the answer filed by his predecessor.

A district court is not obligated to allow filings out of time solely because defendant's new counsel has refined the theory of the case. Planners has failed to show any countervailing consideration that might outweigh the district court's concern about possible delays. We find no abuse of discretion in the denial of

leave to amend.

B.

Planners argues that the district court erred in denying its motion to strike the East affidavit. According to Planners, the offer contained in the East letter was unambiguous, and therefore further explanations as to its meaning are inadmissible under the parol evidence rule. This argument relies absolutely upon the letter's being unambiguous; if we agree with the district court's finding that the language was ambiguous, the argument fails.

We agree with the district court that the language is ambiguous. The sentence, taken in the context of the letter as a whole, is a high school composition teacher's nightmare. Following a summary of AT&T's policy of holding customers responsible for long distance calls made from their exchanges and of the relevant law on the subject, the letter states: "I am presenting a formal good faith settlement offer of 15% of the total claim. The total claim is $65,099.97."

First of all, as AT&T points out, this language, taken literally, suggests that AT&T was offering to pay Planners $9,764.99, an interpretation that is extremely implausible given that Planners owed AT&T money, not the other way around. Second, the grammar is awkward and suggests that some sort of an error has been made. The addition of a single letter "f" at the end of the word "of" would have made the sentence an offer to discount 15% from the amount of the claim. Whether through an inherent lack of

clarity or secretarial error, AT&T dispatched a letter that contained an ambiguous settlement offer. Instead of calling AT&T to clarify the murky terms of the offer, as it was invited to do in the East letter, Planners twisted the language into an outrageously favorable settlement offer that it then purported to accept.

C.

Planners claims that the district court erred in concluding that no enforceable settlement agreement existed. In the alternative, Planners argues that if the language was ambiguous, at the very least there was an issue of fact as to whether a settlement agreement was formed. The district court, in its summary judgment order, reasoned that because the most literal reading of the language in the East letter))that AT&T was offering to pay Planners money to settle the lawsuit))made no sense, the paragraph was ambiguous. Accordingly, the court found that there was no meeting of the minds with regard to any settlement and that therefore no settlement agreement had ever been reached.

Summary judgment shall be rendered when 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 judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 323-25 (1986); Thomas v. Harris County, 784 F.2d 648, 651 (5th Cir. 1986). All evidence and the inferences to be drawn therefrom must be viewed in the light most favorable to

the party opposing the motion. Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979). The party defending against a motion for summary judgment cannot defeat the motion unless it provides specific facts that show the case presents a genuine issue of material fact, such that a jury might return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). This court reviews a summary judgment de novo, applying the same standards as did the district court.

Traditional contract principles of offer and acceptance support the district court's conclusion that no meeting of the minds was achieved in the settlement negotiations. See, e.g., Dumas v. First Fed. Sav. & Loan Ass'n, 654 F.2d 359 (5th Cir. Unit B. Aug. 1981); Smulcer v. Rogers, 256 S.W.2d 120, 121 (Tex. Civ. App.))Ft. Worth 1953, writ ref'd n.r.e.). Accordingly, we find no error in the denial of Planners's motion for summary judgment.

Nor did the court err in granting summary judgment to AT&T. Planners's liability under the F.C.C. tariff is not disputed. Furthermore, it is not disputed that the possibility that calls may have been made by an unauthorized third party does not affect Planners's liability under the tariff. See, e.g., AT&T v. Jiffy Lube Int'l, Inc., 813 F. Supp. 1164, 1167 (D. Md. 1993). The

district court did not err in finding that the summary judgment evidence provided by AT&T proved that the calls at issue originated from Planners's exchange and that in the absence of a valid settlement agreement, Planners was therefore liable for the full amount of the unpaid bill. Planners had presented no competent summary judgment evidence raising a genuine issue of material fact as to whether the calls originated from its exchange; summary judgment for AT&T was appropriate.

In its response to AT&T's motion for summary judgment Planners did not present its alternative argument, i.e., that a court finding that the language of the East letter was ambiguous would create an issue of fact for the jury as to whether a contract had been formed. Accordingly, we examine this issue under the plain error standard. We perceive no error in the district court's conclusion that there was no material issue of fact precluding summary judgment. While a finding of ambiguity in a contract interpretation dispute might require a jury to elect between two conflicting interpretations, a finding of ambiguity in a contract formation dispute does not.

D.

Finally, Planners argues that the district court erred in ordering an award of prejudgment interest at the rate of ten percent per annum. No general federal statute governs awards of prejudgment interest. Hansen v. Continental Ins. Co., 940 F.2d 971, 984 (5th Cir. 1991). If a particular federal statute is

silent as to awards of prejudgment interest, a federal court can look to state law for guidance in determining the appropriate rate. Id. Since the federal statute under which AT&T's claim was brought does not address the awarding of prejudgment interest, the decision whether to award prejudgment interest, and the applicable rate, are reviewed for abuse of discretion. Although the court may look to state law for guidance, such law is not binding, and it is within the court's discretion to select an equitable rate. Hansen, 940 F.2d at 984-85.

The district court's order, without any discussion, awarded prejudgment interest at the rate of ten percent per annum pursuant to TEX. REV. CIV. STAT. art. 5069-1.05 (Vernon 1994). Planners asserts that the court erred by not applying another interest provision in the Texas code, TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987), allowing prejudgment interest of six percent on "all accounts and contracts ascertaining the sum payable."

In order for art. 5069-1.03 to apply under Texas law, the lawsuit must have involved an account or contract from which the district court could have ascertained the sum payable. Hext v. Price, 847 S.W.2d 408, 415 (1993); Griffith v. Geffen & Jacobsen, P.C., 693 S.W.2d 724, 726-27 (Tex. App.))Dallas, no writ). Here, the amount of the claim was easily ascertainable throughout the litigation. We agree with Planners that the policies underlying the art. 5069-1.03 rate are relevant, as the dispute between the parties was in the nature of a contract.

The F.C.C. tariff placed mandatory reciprocal obligations on

both AT&T and Planners. This relationship has been found to give rise to a breach of contract claim. See Harrison Higgins, Inc. v. AT&T Communications, Inc., 697 F. Supp. 220, 224 (E.D. Va. 1988). Although the tariff itself is not a contract, its existence does not preclude a contractual relationship between the parties; the tariff merely supplies some of the terms of the contract. See, e.g., Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., 953 F.2d 1431, 1437 (3rd Cir. 1991), cert. denied, 112 S. Ct. 3056 (1992) (agreement specified that conditions for service were set forth in tariff); Towne Reader Serv., Inc. v. MCI Telecommunications Corp., 1992 WL 225550, at *2 (W.D.N.Y. 1992) ("Under the filed tariff doctrine, a telephone carrier must bill its telephone calls in accordance with tariffs filed with the FCC, and customers cannot challenge those rates . . . . The tariffs filed with the FCC, and not the representations of the telecommunications companies, set the terms of the contract between the parties."). Even if the relationship between the parties was not a contractual one, it is undisputed that their differences flow from an account in the language of the Texas statute. Griffith, 693 S.W.2d at 726-27.

The district court's adoption of the rate of interest in art. 5069-1.05, which applies to state actions for wrongful death, personal injury, and property damage cases, among other types of suits, was an abuse of discretion. Although it would not necessarily have been an abuse of discretion for the court to adopt a ten percent rate of prejudgment interest after a consideration of the

equities, the court made no such consideration. In fact, the terse record suggests that the court erroneously believed it was bound by art. 5069-1.05.

We therefore VACATE the portion of the judgment relating to the prejudgment interest rate and REMAND with instructions to set a new interest rate based upon the equities in the case, consistent with this opinion. In all other respects, the judgment is AFFIRMED.