

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20072

Summary Calendar

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BAYOU CONTRACTING, INC.,

Plaintiff-Appellant,

VERSUS

THE HOME INDEMNITY COMPANY,

Defendant-Appellee.

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Appeals from the United States District Court  
For the Southern District of Texas

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(CA H 93 0997)

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(October 26, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:\*

This appeal concerns a malicious prosecution claim under Texas law. In Texas, the plaintiff, to recover for malicious prosecution, must have suffered damages resulting from a seizure of his person or property. Because the appellant/plaintiff has

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

not

suffered such damages, we affirm the district court's decision to grant summary judgment in favor of the appellee/defendant.

#### **FACTS AND PROCEDURAL HISTORY**

From September 16, 1987 through September 16, 1988, the appellee, The Home Indemnity Company ("Home"), a firm incorporated in New Hampshire with its principal place of business in New York, issued insurance policies to the appellant, Bayou Contracting, Inc. ("Bayou"), a company incorporated and with its principal place of business in Texas. When a dispute developed between the two companies over Home's claim of existing outstanding premiums, Home brought suit for breach of contract in the 334th Judicial District Court of Harris County, Texas. Bayou counterclaimed, arguing that Home should be bound by the representations of its agent, Fred S. James & Company of Baton Rouge, Inc. ("James"), on the amount of premiums to be paid. Further, Bayou claimed that, because Home did not abide by James's statements, Home violated the Texas Insurance Code, the Deceptive Trade Practices Act, and committed fraud, conspiracy to defraud, and breach of the duty of good faith and fair dealing. Bayou also brought a third party action against James and its representative Joseph A. Gabriele. On March 24, 1992, Bayou filed a motion to non-suit its counterclaim against Home. On April 9, 1992, the 334th District Court granted Bayou's motion and signed an agreed take nothing final judgment with respect to Home's suit against Bayou and Bayou's suit against James and Gabriele.



On January 6, 1993, Bayou filed the instant proceeding against Home in the 157th Judicial District Court of Harris County, Texas, claiming causes of action for malicious prosecution and abuse of process. After removing the case to federal court based on diversity jurisdiction, Home filed a motion for summary judgment, arguing that Bayou's claims were precluded by the final judgment in the initial state court lawsuit. Home also asserted that he was entitled to summary judgment against the malicious prosecution claim because (1) the state court lawsuit was not terminated in favor of Bayou; (2) Bayou did not suffer the type of damages required for a malicious prosecution claim; (3) Home had probable cause to sue Bayou; and (4) Home did not act maliciously. On December 16, 1993, Bayou filed a response to the motion, refuting Home's legal arguments. On December 27, 1993, the district court agreed with Home's res judicata argument and granted summary judgment, holding that Bayou's malicious prosecution claim is barred by the judgment entered in the 334th District Court. Bayou appeals only the judgment on the malicious prosecution cause of action.

#### **STANDARD OF REVIEW**

Appellate courts review summary judgments *de novo*, applying the same standard as the district court. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 956 (5th Cir. 1993). Summary judgment shall be rendered if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making its determination, the court

must draw all justifiable inferences in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

#### MALICIOUS PROSECUTION

The district court granted summary judgment on the basis of res judicata by extending the holding of Getty Oil Co. v. Insurance Co. of North America, 845 S.W.2d 794 (Tex. 1992), *cert. denied sub nom. Youell & Companies v. Getty Oil Co.*, \_\_\_\_ S. Ct. \_\_\_\_ (1993),<sup>1</sup> to a proceeding involving malicious prosecution. We may affirm on alternate grounds. Riley v. Commissioner, 311 U.S. 55, 59 (1940).

In order to file a malicious prosecution claim in Texas, the plaintiff must have suffered damages from a seizure of his person or property. "Texas law requires special injury for malicious prosecution, that is, actual interference with the defendant's person (such as an arrest or detention) or property (such as an attachment, an appointment of receiver, a writ of replevin or an injunction). . . . This means `actual physical detention of a person or seizure of his property.'" St. Cyr v. St. Cyr, 767

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<sup>1</sup>In Getty, the Supreme Court of Texas applied the "transactional" approach to res judicata to preclude a suit for insurance coverage notwithstanding that the need for coverage was contingent on the outcome of a prior suit. Under the transactional approach, "a judgment in an earlier suit `precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." Getty, 845 S.W.2d at 798.

Because we dispose of this appeal on alternate grounds, we do not examine the applicability of Getty to a suit on malicious prosecution where Texas law clearly requires as an element thereof that the previous lawsuit be terminated in favor of the plaintiff in the subsequent malicious prosecution case.

S.W.2d 258, 259 (Tex. App.--Beaumont, 1989, writ denied).

Here, Bayou does not claim any such damages from the filing of the suit. There is no allegation in the pleadings that any seizure of a person or property occurred. In fact, in his deposition, Johnny Franks, the President of Bayou, stated that no one was arrested and no property was seized because of the suit. Franks did testify, however, that the suit prevented Bayou from obtaining additional business, eventually forcing it out of business. Accordingly, Bayou alleges damages for lost revenue, mental anguish, and attorney's fees. However, Texas courts have held that such damages do not meet the legal standard. Rodriguez v. Carroll, 510 F. Supp. 547, 550, 553 (S.D. Tex. 1981) (personal and professional reputation, lost income, mental anguish and stress, attorney's fees); Martin v. Trevino, 578 S.W.2d 763, 766-68 (Tex.Civ.App.--Corpus Christi, 1979, writ ref'd n. r. e.) (loss of revenue and profitability, litigation expenses); Moiel v. Sandlin, 571 S.W.2d 567, 570-71 (Tex.Civ.App.--Corpus Christi, 1978, no writ) (increase in professional liability insurance premium rates). Further, "[t]he mere filing of a civil suit resulting in damage to the defendant is not such an interference with the person or property of the defendant in the suit as will support an action for malicious prosecution." Butler v. Morgan, 590 S.W.2d 543, 545 (Tex. Civ. App.--Houston [1st Dist.], 1979, writ ref'd n. r. e.). Bayou also argues that the deposition testimony of Brenda Page, Senior Casualty Underwriter for Home, establishes that Home's conduct in regards to Bayou was illegal. Even assuming this to be

true, however, the fact that special damages were not suffered precludes a malicious prosecution action, regardless of the alleged illegality of Home's underlying conduct. Because the damages claimed by Bayou did not emanate or result from an actual seizure of Bayou's person or property, Bayou's claim of malicious prosecution fails as a matter of law. Accordingly, the judgment of the district court is **AFFIRMED**.