

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20160

Summary Calendar

HOMESTEAD INSURANCE COMPANY and
CYGNUS INSURANCE SERVICES, LTD.,

Plaintiffs-Appellees,

versus

TOM MAC, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-0047)

(February 3, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

The district court granted Homestead Insurance Company and Cygnus Insurance Services' motion for summary judgment, finding that the companies were under no obligation to indemnify and defend Tom Mac in an action involving an unscheduled vessel. We agree and, accordingly, affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Tom Mac is engaged in the business of inland and marine construction. On September 4, 1992, two of Tom Mac's employees were aboard a barge and were attempting to remove broken pilings from a damaged pier. They were fatally injured when a crane on the deck of the barge collapsed. The decedents' representatives filed suit in state court, and Tom Mac requested that Cygnus and Homestead defend and indemnify it against the damages arising from the deaths. In July 1992, Homestead, through the services of Cygnus, had issued a protection and indemnity maritime insurance policy to Tom Mac. The policy insures only scheduled vessels, and the barge on which the crewmen died was not scheduled.

In January 1993, Homestead and Cygnus instituted this declaratory judgment action, seeking to have the court declare that they were under no obligation to indemnify and defend Tom Mac against claims by the decedents' representatives. On October 29, 1993, Homestead and Cygnus filed a motion for summary judgment. Tom Mac did not respond to the motion, and, on January 3, 1994, the district court granted the motion. Tom Mac filed a motion to reconsider, which the court denied. The court certified the judgment as final pursuant to Rule 54(b), and this appeal followed.

II.

Tom Mac claims that it did not reply to the motion for summary judgment because of its understanding that Homestead and Cygnus would supplement the motion as discovery progressed. Tom Mac also

claims that there are material issues of fact concerning whether the insurance agreement was subject to oral modifications, but that it was unable to obtain evidence of these modifications by deposition prior to the court's ruling on the motion. However, Tom Mac never asked the court for an extension to file a response so that the depositions could be obtained. See Fed. R. Civ. P. 56(f).

The district court did not abuse its discretion in denying Tom Mac's motion to reconsider. Whatever the understanding between Tom Mac, Homestead, and Cygnus, it did not operate to extend the deadline after which the court was free to decide the motion for summary judgment. It is within the discretion of the court to grant an extension, and "only the court may extend its deadlines." Kelley v. Price-Macemon, Inc., No. 88-2862, 1992 WL 124408, at *3 (E.D. La. 1992), aff'd, 992 F.2d 1408 (5th Cir. 1993), cert. denied, 114 S. Ct. 688 (1994). Further, the district court did not abuse its discretion because it had before it sufficient evidence to rule on the summary judgment motion. Homestead and Cygnus attached to the motion a copy of the policy, which Tom Mac had stipulated to be a correct copy. The terms of the policy make clear that it covers vessels named in the policy. See Motors Ins. Co. v. Bud's Boat Rental, Inc., 917 F.2d 199, 203 (5th Cir. 1990). In this case, the accident occurred on an unscheduled vessel.

Tom Mac claims that the policy's Automatic Acquisition Clause provides coverage for the unscheduled barge. The clause reads:

This policy is hereby extended to cover automatically any vessel which the Assured [Tom Mac] . . . may acquire by purchase or bareboat charter, it being understood that the Assured will notify this Company [Homestead] as soon as they

have knowledge of such purchase or bareboat charter and pay additional premium for date of each acquisition or bareboat charter.

Tom Mac's claim is without merit. Tom Mac leased the barge at issue more than six months before obtaining the policy from Homestead and Cygnus. Had the parties intended to insure the vessel, it assuredly would have been scheduled.

Tom Mac also claims that the policy's Additional Crew Clause provides coverage for personal injuries suffered by Tom Mac employees whether or not they are working on a scheduled vessel at the time of an accident. The clause reads:

It is hereby understood and agreed that in consideration of additional premiums to be declared crews may be increased, at an additional premium of \$16.50 per day per man 5 (five) days minimum earned premiums. This premium shall be payable at final audit. The crew basis for the policy is 10 (ten). Crews exceeding this number shall be reported at final audit.

This claim is also without merit. As stated above, this policy insures vessels and their crews, not crews alone. See Motors Ins. Co., 917 F.2d at 203. Tom Mac claims that the deposition testimony of Randolph Zator, an agent for third-party defendant Insurance Alliance, establishes that the policy was intended to cover all of Tom Mac's employees regardless of whether they were working aboard a scheduled vessel at the time of the accident.¹ However, the policy is unambiguous in its intent to cover vessels, and parol evidence is not admissible to create an ambiguity in a facially unambiguous contract. See Entzminger v. Provident Life & Accident

¹ This deposition testimony was attached to Tom Mac's motion to reconsider.

Ins. Co., 652 S.W.2d 533, 537 (Tex. App.--Houston [1st Dist.] 1983,
no writ).

The district court was correct in granting Homestead and
Cygnus' motion for summary judgment and did not abuse its
discretion in denying Tom Mac's motion to reconsider. Accordingly,
the judgment is

AFFIRMED.