

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30032
Summary Calendar

TUPPERWARE HOME PARTIES, A Division of
Dart Industries, Inc.,

Plaintiff-Appellee,

versus

WALTER B. STEWART, Individually and
d/b/a Bayouland Party Sales and
JACQUELINE F. STEWART, Individually
and d/b/a Bayouland Party Sales,

Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA-92-2826-L)

(November 2, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Walter and Jacqueline Stewart, long-time franchisees and distributors of Tupperware products, appeal the district court's entry of summary judgment in favor of their franchisor, Tupperware Home Parties. They challenge the district court's jurisdiction,

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

its dismissal of their counterclaims, and its award of attorney's fees. Having determined that the district court possessed jurisdiction and finding no error in its rulings, we affirm.

I

This case arises from the end of a relationship spanning more than twenty years between the Stewarts and Tupperware Home Parties, a division of Dart Industries, Inc. In 1987, the Stewarts and Tupperware entered into a franchise agreement giving the Stewarts the right to distribute Tupperware products in Baton Rouge, Louisiana. The Stewarts did business under the name "Bayouland Party Sales."

As part of their franchise, the Stewarts had obtained the sales force goodwill¹ from two outgoing franchises in exchange for promissory notes in the amounts of \$6,809 and \$56,960 with interest payable at nine percent a year. The notes were assigned to Tupperware.

This indebtedness was known as the Stewarts' territorial account. The Stewarts ceased servicing the territorial account in March 1989. According to the Stewarts, in 1991 and with the knowledge of Tupperware, another franchise began to interfere with the Stewarts' activities. As a result, the Stewarts say that they

¹Sales force goodwill represents the value of sales opportunities in the franchise area. A franchise generates sales force goodwill as it operates and realizes its value upon transfer of the franchise to another franchisee. The franchise agreement at issue does not refer to sales force goodwill.

were unable to remain profitable. They ran a \$60,000 balance on their merchandise account and, upon their failure in July 1992 to service it, Tupperware sought assurances from the Stewarts.

The parties failed to reach an accord. Tupperware then offered a choice: either the Stewarts could sign a consent-to-sell letter and Tupperware would broker a sale of their sales force goodwill to a new or existing franchise, or Tupperware could simply exercise its right under contract to terminate their franchise. On August 6, 1992, Tupperware informed the Stewarts by letter that their franchise would expire ten days later. The letter also advised them that

to retain the value of your franchise (i.e. goodwill), which could be applied to your outstanding account, you will need to contact Tupperware for assistance and give your full cooperation in the smooth transition of the sales force, closing out of the business, the taking of inventory, and turning over the pertinent books and records thereto.

The Stewarts responded by letter two days later that their cooperation would be conditioned on the resolution of the dispute relating to infringement on their territory. Lacking settlement, the Stewarts' franchise terminated August 17, 1992.

II

On August 21, 1992, Tupperware sued Bayouland Party Sales and the Stewarts individually. It sought \$139,846.70 in damages for breach of the franchise agreement and nonpayment of the promissory notes, plus unpaid interest on the notes from 1989, the date of

default, plus costs and attorney's fees.² By leave of court, the Stewarts counterclaimed against Tupperware for infringement upon the Stewarts' franchise area, tortious interference with their business, conspiracy to terminate their business, and loss of sales force goodwill.³ The Stewarts sought \$434,000 damages on their counterclaims.

On June 29, 1993, Tupperware moved for summary judgment on the Stewarts' counterclaims, which the district court entered July 19, 1993, except with respect to the claim for loss of goodwill. A bench trial commenced on December 13, 1993. At the close of trial, the district court dismissed the Stewarts' claim for loss of goodwill and entered judgment for Tupperware in the amount of \$49,035.55 plus interest from the date of default on the promissory notes, plus \$32,860 for attorney's fees, plus costs and interest. This appeal followed.

III

The Stewarts advance four grounds of appeal. First, they argue that the district court lacked diversity jurisdiction because Tupperware had failed to make a good faith claim exceeding \$50,000. Second, they argue that the district court abused its discretion in

²The contract provided that the prevailing party in any judicial or arbitration proceeding to enforce its provisions would be entitled to be reimbursed for its "costs and expenses, including reasonable accounting and legal fees."

³The Stewarts sought in their counterclaims to join other parties, including several officers of Tupperware, but the district court denied their motion.

entering summary judgment on their counterclaims because the period for discovery had not yet ended. Third, they argue that the district court erred in dismissing its claim for goodwill. Finally, they argue that the district court abused its discretion in its award of attorney's fees. We address these arguments in order.

A

The Stewarts first challenge the district court's jurisdiction. If it exists, the district court's jurisdiction is founded upon diversity of citizenship, as provided in 28 U.S.C. § 1332.⁴ The Stewarts contend that the court lacked jurisdiction because the amount in controversy did not exceed \$50,000, exclusive of interest and costs, as the statute requires. 28 U.S.C. § 1332(a).

We weigh the sufficiency of the amount in controversy based on Tupperware's complaint, and we credit it absent a showing of bad faith, which exists if it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353, 81 S.Ct. 1570, 1573, reh'g denied, 368 U.S. 870, 82 S.Ct. 24 (1961) (quoting St. Paul Mercury Indem. Co., 303 U.S. at 289, 58 S.Ct. at 590). Put another way, jurisdiction "is effectively established by showing that the

⁴28 U.S.C. § 1332(a)(1) vests federal district courts with jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interests and costs, and is between citizens of different states."

claim is probably in excess of the requisite jurisdictional level." Kleibert v. Upjohn Co., 915 F.2d 142, 147 (5th Cir.) (JOLLY, J., dissenting), vacated and reh'g granted, 923 F.2d 47, and appeal dismissed, 947 F.2d 736 (1991) (emphasis original).

The face of Tupperware's complaint, as amended, indicates that Tupperware instituted this suit to recover damages in the amount of \$139,846.70--\$59,093.52 due on the promissory notes and \$80,753.18 on the merchandise account--plus attorney's fees, interest and costs. The amount due on the merchandise account consisted of a past due balance of \$68,511.69 and a current balance that was not yet due of \$12,241.49.

The amount sought in the complaint seems well above the jurisdictional floor. The Stewarts argue that the district court lacked subject matter jurisdiction because Tupperware never was entitled to more than \$49,035.55, the actual amount due on the promissory notes. This argument lacks merit: diversity jurisdiction is determined at the time the complaint is filed, and neither a subsequent event nor an eventual failure to recover more than the jurisdictional amount will affect it. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S.Ct. 586, 590 (1938).

The Stewarts further argue that Tupperware's claims were in bad faith, and thus insufficient to invoke jurisdiction, in two respects. First, because Tupperware had failed to offset the Stewarts' outstanding balance by the value of inventory and

merchandise returned, the Stewarts argue that the amount claimed on the merchandise account was in bad faith. This argument ignores the fact that the merchandise was not returned to the Stewarts until after the complaint was filed. The Stewarts had a past due balance on the account that exceeded the jurisdictional floor, and Tupperware had no assurance when filing its complaint that the Stewarts either would return or would pay for the merchandise.

Second, the Stewarts argue, Tupperware's claim on the notes was in bad faith because it admitted the amount due was below the jurisdictional threshold. We disagree. Tupperware admitted that it had misstated the principal, but it never admitted that the principal and interest together were below the jurisdictional threshold.⁵ In sum, we surely cannot say to a legal certainty that Tupperware's claim, at the time of the complaint, was less than the jurisdictional amount. See St. Paul Mercury Indem. Co., 303 U.S. 283, 58 S.Ct. 586 (1938). Accordingly, Tupperware properly invoked the diversity jurisdiction of the district court.

B

Turning to the merits, the Stewarts challenge the district court's entry of summary judgment in favor of Tupperware on the Stewarts' counterclaims for infringement of their exclusive territory, interference with their contractual rights, and

⁵The Stewarts do not argue, because they cannot, that interest due on the notes by virtue of their terms may not be counted for jurisdictional purposes. See, e.g., Brainin v. Melikan, 396 F.2d 153 (3d Cir. 1968).

conspiracy to terminate their business. Their sole argument is that summary judgment here was premature because it was granted before the agreed time for discovery had expired. The Stewarts filed their counterclaims February 18, 1993, and on May 26 they obtained new deadlines, including a discovery deadline of October 5. Tupperware filed its motion for summary judgment June 29, and the district court entered judgment July 14, when several weeks of discovery yet remained.

On matters of such timing we defer to the district court unless we find that it has abused its discretion. Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp., 992 F.2d 1398, 1401 (5th Cir. 1993). Before a court rules on summary judgment, it should, of course, afford the non-moving party adequate time for appropriate discovery. The district court may--but need not--order a continuance "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed. R. Civ. P. 56(f). Our cases make clear that before obtaining a continuance, the non-moving party first must request additional discovery before the district court rules on the motion, second, must notify the court that further discovery is being sought, and third, must explain specifically how the requested discovery will enable them to justify their opposition to summary judgment. See, e.g., Wichita Falls Office Assocs. v. Banc

One Corp., 978 F.2d 915, 919 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 2340 (1993).

Here, after restating the substance of their counterclaims, the affidavit by Walter Stewart accompanying their opposition to the motion for summary judgment only explains that the Stewarts "were unavailable to provide this affidavit prior to this date due to their being out of the state." (emphasis ours.) It does not cite a need for additional discovery. Nor does it explain that additional discovery would aid in avoiding summary judgment. In their pleading in opposition to the motion for summary judgment, the Stewarts argued that several issues of material fact remain, and said simply that they had not yet had the opportunity to depose Tupperware's officers. The pleading does not request a continuance on the summary judgment ruling. It also fails to explain how additional discovery would aid the Stewarts in avoiding summary judgment. In short, the district court never denied a continuance on its ruling because no continuance was requested.

The Stewarts maintain in their brief on appeal that their answers to interrogatories indicate that "there are several documents in possession of [Tupperware] which would be sought in discovery." But those answers identify only one document--a nationwide plan by Tupperware to consolidate its franchises. At the hearing on the motion, they informed the court "that there were additional documents sought and depositions which were scheduled which were needed by defendant to support its claims," with

substantially the same argument. In short, the Stewarts made no clear argument in the district court nor make a clear argument before us that explains how additional discovery would enable them to justify their opposition to the motion for summary judgment.

Three months elapsed between the district court's final determination that the counterclaims were properly before it and Tupperware's motion for summary judgment. During that time, the Stewarts apparently conducted no discovery and offered no explanation why. In sum, to the extent that the Stewarts sought a continuance, they did not adhere to the requirements of rule 56(f). Accordingly, on these facts, we hold that the district court did not abuse its discretion in entering summary judgment before the end of the discovery period.

C

The district court's entry of summary judgment disposed of all the Stewarts' counterclaims except their claim for goodwill, which the district court dismissed at the close of the bench trial. The Stewarts also appeal that dismissal. They claimed an entitlement to goodwill based on the termination letter, which advised them to cooperate with Tupperware in closing out their franchise "to retain the value of your franchise (i.e. goodwill)." The Stewarts argue on appeal that they complied with Tupperware's advice, and that the principles of detrimental reliance entitle them to the value of their goodwill. The Stewarts did not raise or argue this theory at trial: after rejecting the Stewarts' arguments, the district court

raised the theory as "the only other possible basis for a creation of a legal, binding obligation in this case," and then rejected its application here. Because the Stewarts did not present this theory at trial, we deem it waived, and we decline to address it. See Abbott v. Equity Group, Inc., 2 F.3d 613, 627 (5th Cir. 1993).

D

Finally, the Stewarts challenge as excessive the attorney's fees awarded by the district court. We generally defer to the trial court's determination and we will reverse only if we find an abuse of discretion. L & A Contracting Co. v. Southern Concrete Servs., Inc., 17 F.3d 106, 113 (5th Cir. 1994).

The trial court awarded \$32,860 in attorney's fees. The Stewarts contend that amount is excessive because it represents fifty-one percent of the total amount awarded. They stipulated that the number of hours was reasonable; they challenge only the hourly rates.⁶ They argue that Tupperware introduced no evidence to support the district court's evaluation, and that as a consequence the award should be reduced by half.

In rendering its judgment on attorney's fees, the court specifically referred to "the amount of issues involved and the work involved, as seen by this court, both from the record and in dealing with pretrial issues and in the handling the trial of this

⁶The hourly rates were dictated into the record at trial. The rates were: \$120 for partners, \$100 for associates, \$45 for paralegals, and \$40 for law clerks.

matter." The Stewarts acknowledge that the district court considered the Louisiana law that is appropriate for determining attorney's fees, and point to no other indication that the district court erred. On these facts, we find no abuse of discretion and thus affirm the district court's determination and award of attorney's fees.

IV

Having determined that diversity jurisdiction exists, that the district court's entry of summary judgment on the Stewarts' counterclaims was proper, and that the attorney's fees awarded were within the district court's discretion, we AFFIRM its judgment in all respects.

A F F I R M E D.