UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-30369

NEW ORLEANS FLOORING SUPPLY, INC., ET AL.,

Plaintiffs-Appellants,

VERSUS

ROBERT J. HENNESSEY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93-4292 M)

(April 19, 1995)

Before WISDOM, DUHÉ, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Various individuals in the Chehardy family and their company, New Orleans Flooring Supply (NOFS), sued Robert J. Hennessey in state court for loss of income, tortious interference with contract, and intentional infliction of emotional distress. The Chehardys also seek damages for diminution of the value of their stock in NOFS.

Hennessey removed the action to federal court and moved to dismiss or to transfer venue, attaching affidavits and exhibits to his motion. Plaintiffs opposed the motion without presenting

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

countervailing affidavits. After oral argument, the court granted the motion to dismiss, converted the motion to dismiss into summary judgment, and set forth reasons why summary judgment dismissing Plaintiffs' complaint with prejudice should be entered. After the court entered judgment, Plaintiffs moved to reconsider on the basis of inadequate notice of conversion of the motion. The court denied reconsideration and Plaintiffs appeal. We affirm.

I. Conversion Without Notice.

Plaintiffs first complain that the court improperly converted the motion to dismiss into a motion for summary judgment without the appropriate notice to them. Rule 12 requires that, if "matters outside the pleading are presented to and not excluded by the court," a Rule 12(b)(6) motion to dismiss shall be treated as one for summary judgment under Rule 56, "and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b)(6).

"[W]hen a 12(b)(6) motion is converted into one for summary judgment, the district court must provide notice to the parties." Griffith v. Johnston, 899 F.2d 1427, 1433 n.2 (5th Cir. 1990), cert. denied, 498 U.S. 1040 (1991). Rule 56 requires ten-day notice to the adverse party before a sua sponte summary judgment may be rendered. Fed. R. Civ. P. 56(c); NL Indus., Inc. v. GHR Energy Corp., 940 F.2d 957, 965-66 (5th Cir. 1991), cert. denied, 502 U.S. 1032 (1992).

The district judge failed to give Plaintiffs prior notice that he was converting Hennessey's dismissal motion into a motion for

summary judgment. We reject Hennessey's contention that notice of conversion was not required because his attaching affidavits automatically converted his motion to dismiss into one for summary judgment. The district court had discretion to consider the attached affidavits, converting the motion or not, depending on whether it considered the extra-pleading matters. See Griffith, 899 F.2d at 1433 n.2. Once the district court converts the motion by considering extra-pleading matters, it must provide notice to the parties. Id.[2]

II. Harmless Error

Despite the strictness with which we enforce the notice requirement, the harmless error doctrine applies to the lack of the notice required by Rule 56(c). See Powell v. United States, 849 F.2d 1576, 1580-82 (5th Cir. 1988).

Error in notice is harmless "if the nonmoving party admits that he has no additional evidence anyway, or if . . . the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact." Id. at 1582. The party's admission that he has no additional evidence to

[2] We also reject the notion that the court did not convert the motion at all. The minute entry indicates that the judge considered the affidavit of Kentile Vice President Carl Schwarz and considered that Plaintiff had not come forward to refute Schwarz's affidavit. Because the court plainly considered evidence beyond the pleadings, we will not treat the decision as one under Rule 12(b)(6). Cf. Griffith, 899 F.2d at 1433 n.2 ("[W]here the wording of the district court's order clearly indicates that the court did not consider any 'extra pleading' matters, the appellate court must treat the decision as one under Rule 12(b)(6).").

present is not required if it does not appear that the nonmoving party has any additional evidence, or if the nonmoving party does not identify any. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 28 F.3d 1388, 1398 (5th Cir. 1994).

Plaintiffs maintain that they "have witnesses and other evidence of the tortious conduct," reply br. at 21, but still have not identified such evidence. By failing to present or at least explain what controverting evidence they could present, Plaintiffs fail to show how they were damaged by the court's conversion of the motion. See Leatherman, 28 F.3d at 1399; Nowlin v. RTC, 33 F.3d 498, 504-05 (5th Cir. 1994); see also Daboub v. Gibbons, 42 F.3d 285, 288 (5th Cir. 1995) (plaintiffs' simple request for additional time to compose discovery without naming what they are looking for through discovery insufficient to meet burden of articulating specific disputed facts requiring trial). Like the plaintiffs in Leatherman, Plaintiffs have neither specified any fact issue which should preclude summary judgment nor identified how additional discovery would yield an issue of fact; accordingly, the failure to provide notice was harmless. Leatherman, 28 F.3d at 1398-99; see also Nowlin, 33 F.3d at 504-05.

III. Merits of the Dismissal

The district court held that the complaint (petition) failed to allege outrageous conduct so as to support the intentional-infliction-of-emotional-distress claim.

Plaintiffs complain that the court never explained why the allegations, including misrepresentations and false promises, were not outrageous enough to support an emotional distress claim. The elements of this claim require both extreme and outrageous conduct as well as severe emotional distress. Bolanos v. Madary, 609 So.2d 972, 976 (La. Ct. App. 1992), writ denied, 615 So.2d 339 (La. 1993). The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." White v. Monsanto Co., 585 So.2d 1205, 1209 (La. 1991).

Plaintiffs point to no case, and we find none, wherein a business dispute or even false promises or misrepresentations in a commercial transaction constitute extreme and outrageous conduct. Cf. Dufour v. Westlawn Cemeteries, 639 So.2d 843, 848 (La. Ct. App. 1994) (unauthorized disposition of remains of a dead parent will support the action); Bolanos, 609 So.2d at 977 (alleged mental anguish of shareholders resulting from wrongful acts against their corporation is not actionable).

Nor does the jurisprudence establish that the cumulative effect of Hennessey's intentional acts could be actionable.[3]

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[3] Plaintiffs rely largely on Bustamento v. Tucker, 607 So.2d 532, 538 (La. 1992) (repeated or continued harassment in the workplace can be sufficiently outrageous), and Smith v. Mahfouz, 489 So.2d 409, 413 (La. Ct. App.) (removing cattle guard and felling of trees to block an access road to plaintiff's historic buildings was actionable given the fact that defendant realized to a virtual certainty that plaintiff would suffer anxiety over possible emergency need for the access road in case of fire), writ denied, 494 So.2d 1181 (La. 1986). Neither of those cases convinces us

The claim of tortious interference with contract against a corporation's officer requires a contract between the plaintiff and a corporation, the defendant corporate officer's knowledge of the contract, his intentional inducement of the corporation to breach the contract or his rendering its performance more burdensome, his lack of justification, and damage caused by breach or difficulty of performance of the contract. 9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228, 234 (La. 1989).

The court found from the Schwarz affidavit that plaintiffs could not establish a tortious-interference claim because Hennessey's actions were authorized by Kentile and therefore justified. An officer is justified and he is entitled to immunity if he acted within the scope of his corporate authority and in the reasonable belief that his action was for the benefit of the corporation. 9 to 5 Fashions, 538 So.2d at 231; see also Hampton v. Live Oak Builders, Inc., 608 So.2d 225, 226 (La. Ct. App. 1992) (allegations not establishing that officer acted outside scope of his authority were insufficient). Plaintiffs have not refuted that evidence or shown the existence of an issue of material fact precluding summary judgment on the tortious-interference claim.

The action for loss of stock value was asserted by the Chehardys as shareholders. Shareholders have no right of action for loss of stock value caused by injury to their corporation. See Nowling v. Aero Servs. Int'l, Inc., 752 F.Supp. 1304, 1314-15 (E.D.

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that a Louisiana court would find the cumulative effect of Hennessey's conduct actionable.

La. 1990) (recognizing that wrong to the corporation that depresses stock value is a wrong to the shareholders collectively which must be enforced derivatively). Plaintiffs complain that in their opposition to the motion to dismiss, they requested leave to amend to add a derivative action or to assert this claim by the corporate plaintiff. Yet Plaintiffs filed no motion to amend, nor did they take any step to comply with Rule 7. Neither have Plaintiffs listed the district court's failure to permit amendment as an issue on appeal. In such circumstances, we find no abuse of discretion in the district court's tacit denial of the informal request to amend.

CONCLUSION

Though this Court strictly applies the procedural safeguards of Rule 56 allowing the adverse party an opportunity to respond, Plaintiffs have yet to specify an item of evidence that could create a genuine issue of fact. Under Powell and Leatherman a Rule 56 notice error is harmless in just such a case. We find no error in the summary dismissal of the claims. The judgment of the district court is

AFFIRMED.