UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50031
Summary Calendar

RUBEN RODRIGUEZ,

Plaintiff-Appellant,

versus

EAST-WEST APPAREL INCORPORATED, et al.,

Defendants,

MITCHELL BRASINGTON,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(M0-93-CV-108)

(August 23, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

INTRODUCTION

Plaintiff Ruben Rodriguez sustained personal injuries in the course and scope of his employment at East-West Apparel, Inc.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

("East-West") on or about September 8, 1990. In April 1991, Rodriguez filed suit against East-West[1] in state court seeking recovery of damages for his injury.[2] Approximately two and a half years later, on May 15, 1993, Rodriguez filed his third amended petition and added Mitchell R. Brasington as a defendant. Rodriguez claims that East-West is the "alter-ego" of Brasington, and that Brasington was a shareholder, owner, partner and joint-adventurer of East-West.[3] Accordingly, Rodriguez contends that the identities of Brasington and East-West are in substance "one and the same," and therefore that Brasington should be individually liable to Rodriguez.

In this case, the primary issue on appeal is whether the individual claim against Brasington is barred by limitations. Because Brasington was not added as a defendant until after the expiration of the two-year statute of limitations[4], Rodriguez has a viable claim only if he can show that Brasington was the "alter ego" of the corporation against whom Rodriguez timely filed suit. Gentry v. Credit Plan Corp. of Houston, 528 S.W.2d 571, 574-576 (Tex. 1975). If Rodriguez proves alter ego, the doctrine of "relation back" would apply to allow Rodriguez's third amended

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[1]Rodriguez filed suit in state court against East-West Apparel, Inc., and East-West Apparel, Inc., of Nevada. This opinion will refer to the two entities collectively as "East-West."

[2]Rodriguez's petition alleged that his employer failed to maintain worker's compensation insurance.

[3]Brasington admits only to being a shareholder of East-West.

[4]Tex. Civ. Prac. & Rem. Code § 16.003(a).

petition -- in which he added Brasington as a defendant -- to relate back to his original timely filed petition, and his claim against Brasington would therefore not be barred by limitations.

BACKGROUND

On April 16, 1991, Rodriguez filed suit against East-West in state court in El Paso, Texas. On May 11, 1993 East-West filed a voluntary petition pursuant to Chapter 11 of the federal bankruptcy code. Four days later, Rodriguez filed his third amended petition in which Brasington was added as a defendant. East-West removed the case to federal district court on June 15, 1993.[5] The next day, the district court scheduled a trial date of November 8, 1993, and stated that discovery must be completed within 100 days. Pursuant to a joint motion of East-West and Rodriguez, however, the court extended the discovery deadline twice, and it rescheduled trial for November 22, 1993, and then later for December 20, 1993.

On November 1, 1993, Brasington filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, and he filed his original answer to Rodriguez's May 15, 1993 third amended petition. Approximately two weeks later, on November 23, 1993, pursuant to the settlement of all of Rodriguez's claims against East-West, the court dismissed Rodriguez's claims against East-West with prejudice, leaving Brasington as the sole remaining defendant. On the same day, the court rescheduled the trial for December 20, 1993 and ordered that Brasington's motion to dismiss be treated as

[5]Federal jurisdiction over cases relating to a pending bankruptcy is established by 28 U.S.C. § 1334.

a summary judgment, giving both parties 10 days to respond. Rodriguez failed to respond to Brasington's motion for summary judgment, but on December 9, 1993, he apparently filed a motion for continuance of any summary judgment hearing and of the trial arguing that he needed the additional time to conduct discovery.[6] On December 10, 1993, the district court denied Rodriguez's motion for continuance, and on December 16, 1993, the court entered summary judgment in favor of Brasington. Rodriguez appeals.

DISCUSSION

A. Motion for Continuance

Rule 56(f) of the Federal Rules of Civil Procedure gives the district court discretion to grant motions to continue in the context of summary judgment proceedings. Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1155 (5th Cir. 1993). Decisions by the district court denying a motion for continuance to conduct discovery shall be disturbed only when such a finding reflects an abuse of discretion. Id. at 1156; Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017, 1029 (5th Cir. 1983).

In order to obtain a continuance for discovery, the movant must: (1) request extended discovery prior to the district court's ruling on the summary judgment, (2) put the court on notice that further discovery pertaining to the summary judgment motion is being sought, (3) demonstrate specifically how the requested

[6]Although Rodriguez recites in his brief that he filed his motion for continuance on December 9, 1993, the motion is not contained in the record on appeal, nor is it even listed on the docket sheet.

discovery pertains to the pending motion, and (4) diligently pursue relevant discovery. Chevron, 987 F.2d at 1155-1156. Although the record demonstrates that Rodriguez complied with the first two procedural elements, he failed to meet the third and fourth requirements.

In order to obtain a continuance for additional discovery, the nonmoving party must show how such additional discovery will defeat the summary judgment motion by creating a genuine issue of material fact. International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 1991)(emphasis added), cert. denied, 112 S. Ct. 936 (1992). A nonmoving party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts," but must demonstrate that further discovery would be more than a fishing expedition." Id.; Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1443 (5th Cir. 1993). Rodriquez alleges merely that he was unable to conduct discovery because Brasington was out of the state. He never specifically states how such additional discovery would pertain to the pending motion, and how further discovery would raise a genuine issue of fact.

Further, Rodriguez failed to diligently pursue relevant discovery. The district court had previously extended the discovery deadline several times, and these deadlines had expired without any effort by Rodriguez to commence discovery. Rodriguez did not commence discovery efforts until mid-December 1993, approximately one week prior to trial, and seven months after he added Brasington as a defendant in his third amended petition. In

light of these facts, the district court refused the requested continuance. We find the district court's decision sound, and refuse to substitute our own judgment for that of the lower court's. Therefore, we hold that the district court properly denied plaintiff's motion for continuance.

B. Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment may be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." This court reviews a district court's grant of summary judgment *de novo*, using the same standard as the district court -- viewing all of the evidence and all factual inferences from the evidence in the light most favorable to the non-movant. Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), cert. denied, 113 S. Ct. 82 (1992). Rodriguez makes two arguments in support of his position that the district court erroneously granted Brasington's motion for summary judgment. First, he asserts that summary judgment is mandated only after "adequate time for discovery," and since he was deprived an adequate opportunity to perform discovery, summary judgment was inappropriate. Second, Rodriquez claims that because Brasington admitted he was a shareholder in East-West, this was enough to raise a genuine issue of material fact as to whether Brasington was

the alter ego of the corporation. Both of Rodriguez's arguments are easily refuted.

As discussed above, Rodriguez had ample time to conduct discovery, but instead, chose not to begin any discovery on Brasington until six days prior to trial, approximately six weeks after the extended discovery deadline had passed. Further, he outright failed to respond to Brasington's motion to dismiss (which was treated as a motion for summary judgment). This court will not condone his complaint of inadequate time for discovery when he is responsible for his position. The law clearly sets forth procedures by which discovery may be extended when circumstances impede the pre-trial process. Here, however, there is nothing contained in the record or in either brief which explains Rodriguez's failure to perform discovery.

In order to challenge Brasington's motion for summary judgment, Rodriguez had a duty to go beyond the pleadings in order to designate specific facts showing that a genuine issue of fact existed. Kidd v. Southwest Airlines, Co., 891 F.2d 540, 584 (5th Cir. 1990). Rodriguez, however, neither responded to the motion nor identified any issues of material fact.

Additionally, Rodriguez relies on Brasington's position as a shareholder in East-West to satisfy the existence of a genuine issue of fact as it relates to the alter ego of the corporation. Under the doctrine of limited liability, however, the owner of a corporation is not liable for the corporation's debts. United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 690 (5th Cir.

1985)(citing Baker v. Raymond Int'l, 656 F.2d 173, 179 (5th cir. 1981), cert. denied, 456 U.S. 983, 102 S. Ct. 2256 (1982)). Creditors of the corporation have recourse only against the corporation itself, not against its parent company or shareholders. Id. Although Brasington has admitted that he was a shareholder, this court has made it clear that "[even] one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate veil." Id. at 691.

The case law in this Circuit and the Fourth Circuit bases "alter ego" determinations on how the corporation actually operates and the individual defendant's relationship to that operation. See Jon-T Chemicals, 768 F.2d at 693 (citing DeWitt Truck Brokers, Inc. v. W. Ray Fleming Fruit Co., 540 F.2d 681, 684 (4th Cir. 1976)). Because Rodriguez failed to diligently pursue discovery, he failed to substantiate his allegation of alter ego. The statute of limitations therefore bars Rodriguez's claim against Brasington, because his third amended petition does not "relate back" to his original timely filed petition against East-West. Finally, because Rodriguez was given adequate opportunity to perform discovery, and because he has not raised any issue of fact, we hold that the district court properly granted summary judgment in favor of Brasington.

AFFIRMED.