IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50300
Summary Calendar

EL PASO ART ALLIANCE,
d/b/a El Paso Festival,

Plaintiff-Appellant,

VERSUS

PINKERTON'S,
d/b/a Pinkerton's Security and Investigation Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(EP-93-CA-322)

(November 23, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

The El Paso Art Alliance (the "Alliance") appeals a summary judgment entered in its diversity action against Pinkerton's. The Alliance argues that the district court erred in treating its action as an indemnity claim rather than a breach of contract claim. Concluding that the Alliance failed to adduce summary

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

judgment evidence to support either theory, we affirm.

I.

This claim arose from an alleged assault at a street festival in El Paso, Texas, which festival was sponsored by the Alliance. Elaine Mendez claimed that she was roughed up by one of Pinkerton's's security agents, who had been hired by the Alliance, when he tried to confiscate her video camera. She originally brought suit in state court against Pinkerton's and the Alliance among others, but her claim later was amended to involve only the Alliance.

The Alliance failed to raise the affirmative defense of the statute of limitations, which likely would have barred the claim, and later failed to defend a summary judgment motion against it. The court entered a judgment for $413,000 against the Alliance.

This judgment was not enforced, however, as apparently the Alliance was judgment-proof. Instead, Mendez negotiated a deal with the Alliance whereby it assigned any of its rights to Mendez, who in turn released the Alliance from any liability to her. Subsequently, Mendez, in the name of the Alliance, brought suit in federal district court against Pinkerton's, seeking to "recover" the amount of Mendez's judgment, plus interest.

Mendez characterized the complaint as one for breach of contract but stated that she sought "indemnity" for the amount of the prior judgment. Pinkerton's accordingly argued that the cause of action was for indemnity. On summary judgment, the district

court, applying the rule that the nature of the action is to be determined from the face of the pleadings, agreed and found that under Texas state law the Alliance was not entitled to indemnity as a matter of law.

The Alliance sought reconsideration, however, arguing that, prior to entry of judgment, it had filed an amended complaint that clarified the action as one for breach of contract. The district court examined the amendment and found that it simply replaced two phrases mentioning "indemnity" with similar phases using the word "damages." The court held that the Alliance's cause of action had not changed, and the motion for reconsideration was denied.

II.

The Alliance contends that the district court erred in granting summary judgment, because it misread the Alliance's claim as one for indemnity rather than breach of contract.[1] As we may affirm for any ground that appears in the record, Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1146 (5th Cir. 1993), we will assume, arguendo, that the Alliance's claim was for breach of contract. We examine whether the Alliance put forward sufficient summary judgment evidence on the issue of Pinkerton's's duty owed under the alleged contract.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together

[1] The Alliance concedes that if its claim was for indemnity, the district court's result was proper.

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the movant meets his burden, the burden shifts to the nonmoving party to show that summary judgment is inappropriate. The nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. Id. at 324; Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992) ("The conclusory allegation of the nonmovant that a factual dispute exists between the parties will not defeat a movant's otherwise properly supported motion for summary judgment."); see also FED. R. CIV. P. 56(e). Finally, we review a grant of summary judgment de novo. Hanks, 953 F.2d at 997.

Here, the Alliance has failed to support its assertion that Pinkerton's owed it "a duty to perform with care, skill, professionalism, and safety to see that the Plaintiff, [sic] be free of any personal injury, liability, or danger at the festival, which Defendant has agreed to under the contract." Pinkerton's did admit that it had entered into an agreement with the Alliance to provide security services for the festival. The Alliance, however, was unable to produce either a written contract or any evidence indicating the terms of a written or unwritten contract. Moreover, Pinkerton's, via the affidavit of David Holguin, its district

manager in El Paso, expressly denied entering into a contract that created such a duty. The burden thus shifted to the Alliance to go beyond its pleading and produce evidence supporting the existence of such contractual terms. In effect, the Alliance rested upon its pleadings on this issue and therefore was not able to survive summary judgment.

In order to preserve this issue, the Alliance on appeal now argues that a duty of ordinary care in performance of obligations under a contract is implied under Texas law. Such a duty may be implied, but it also may be expressly denied under the contract. City of Austin v. Houston Lighting & Power Co., 844 S.W.2d 773, 784 (Tex. App.))Dallas 1992, writ denied). More importantly, the duty attaches only to the "thing agreed to be done." Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508, 510 (Tex. 1947).

Here, Pinkerton's, in carrying out its obligations regarding security for the festival, may have owed a duty to Mendez and the property and personnel of the Alliance. That is the action that Pinkerton's arguably agreed to under the contract. What the Alliance now asserts, however, is that Pinkerton's owed a further duty to hold the Alliance harmless from any liability that arose from that performance. We read this argument as simply another way of stating that Pinkerton's agreed to indemnify the Alliance, a claim the Alliance admits on appeal is not tenable.[2] We therefore AFFIRM.

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[2] Pinkerton's also has sought sanctions against the Alliance for filing this appeal. Because we find the issues were not frivolous, we deny this request.