

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50487
Summary Calendar

PERMIAN PETROLEUM COMPANY,

Plaintiff,

and

DALLAS INTERNATIONAL BANK,

Intervenor-Plaintiff-Appellee,

versus

PETROLEOS MEXICANOS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(DR-92-CA-44)

(January 24, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Petroleos Mexicanos (Pemex) appeals the district court's determination of damages owed to Dallas International Bank (DIB).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

We find no error in the district court's application of relevant law. Accordingly, we affirm.

I.

In 1986, Permian Petroleum Company filed suit against Pemex alleging that Pemex had failed to pay for several deliveries of liquified petroleum gas (LPG). That same year, DIB intervened claiming that it had a security interest in the LPG that Pemex had unlawfully converted. DIB filed a motion for summary judgment against Pemex, which the district court granted in November 1988. On June 27, 1991, this court issued an opinion affirming, inter alia, the district court's grant of DIB's motion for summary judgment, but vacating the district court's award of damages. Permian Petroleum Co. v. Petroleos Mexicanos, 934 F.2d 635 (5th Cir. 1991). It found that the district court had erroneously relied on the date of delivery of the LPG as the date on which to calculate the conversion damages. Id. at 652. The court held that the date of conversion was the proper date. Id. The court also prescribed a formula by which prejudgment interest would be calculated. Id. at 652-53. The court noted that the parties could stipulate the required values or "[i]f they cannot and record proof is confusing or lacking, the district court should make the required findings based on additional evidence. If definitive proof is lacking, the court should make the best possible estimation." Id. at 652.

On remand, the district court referred the matter to a magistrate judge who found the market price to be the price Pemex

paid for other deliveries of LPG from Permian. The magistrate judge also found that under Texas law, prejudgment interest should be calculated using a ten percent rate of interest. After review of both Pemex and DIB's objections to the magistrate judge's report, the district court accepted it. Following denial of Pemex's motion for new trial and a mathematical correction on a damage calculation, the district court certified the judgment as final under Rule 54(b). Pemex brings this appeal.

II.

Pemex first claims that the district court erred in applying Texas law to determine the prejudgment rate of interest. Pemex claims that since it is an agency of the Mexican government, the Foreign Sovereign Immunities Act (FSIA) applies. Even if it were true that the FSIA would dictate a federal common law rule in this case, a position DIB vigorously contests, Pemex has waited far too long to make this argument. It is clear from examining the record that throughout this litigation the court and the parties, including Pemex, have been operating under the belief that Texas law is the applicable law. Indeed, in its motion for new trial, Pemex tried to argue that the district court applied the wrong Texas statute in calculating prejudgment interest. In addition, this court's 1991 opinion applied Texas law. It is well settled that we need not listen to arguments not presented below. See, e.g., FDIC v. Bennett, 898 F.2d 477, 479 (5th Cir. 1990).

Next, Pemex claims that the district court erroneously determined the market value of the LPG based on the sales price of the gas from Permian to Pemex. Pemex argues that the correct value is the controlled price of LPG in Mexico or the market price of LPG in Texas. Pemex's argument that the market price of LPG in Texas should apply was not made below and, accordingly, we do not consider it. Its other argument that the controlled price of LPG in Mexico should apply is without merit.

In remanding the case for recalculation of damages owed to DIB, this court instructed the district court to look first to the record and then, if evidence in the record was confusing or lacking, make additional findings. On remand, Pemex introduced an unsworn affidavit from Adolfo Grana Raab, one of Pemex's in-house attorneys, stating the Mexican controlled price for LPG on March 12, 1985, the date of conversion. The district court, however, relied on record evidence that showed Pemex paid Permian \$0.524 per gallon of LPG during the month of March 1985. While not the exclusive measure of conversion damages, reference to a contract price to measure the market value of converted property is appropriate, especially when it serves the purpose of fully compensating the injured party. See Dorchester Gas Producing Co. v. Harlow Corp., 743 S.W.2d 243, 256 (Tex. App.--Amarillo 1987).
AFFIRMED.