

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50765
Summary Calendar

THOMAS R. McDADE and
DOROTHY A. McDADE,

Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its corporate capacity in the
liquidation of Charles Schreiner Bank,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-626)

(July 25, 1995)

Before GARWOOD, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:¹

Thomas and Dorothy McDade (the McDades) challenge the district court's dismissal of their action against the Federal Deposit Insurance Corporation (the FDIC) arising out of their purchase of a house and land from the FDIC. We affirm.

I.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The McDades purchased approximately 868.86 acres of land and appurtenances, including a ranch house, from the FDIC, acting in its corporate capacity. The FDIC's real estate agent provided the McDades with an advertising circular describing the house as "[a]n attractive old frame ranch house in good useable condition." The agent also allegedly made various other statements concerning the house's condition. Although the McDades knew that the ranch house was covered externally with asbestos siding, they discovered only after the sale that the interior substructure of the house also contained hazardous asbestos. The McDades contend that they would not have purchased the property at the agreed upon price had they known that fact.

The McDades filed the instant suit against the FDIC, asserting three claims: (1) that the FDIC's misrepresentations regarding the habitability of the ranch house violated the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.41-.63 (Vernon 1987) (the DTPA claim), (2) that the FDIC was negligent in negligently misrepresenting the house's suitability (the negligence/negligent misrepresentation claim), and (3) that the FDIC breached both express and implied warranties of habitability (the breach of contract/breach of warranties claim). The district court granted summary judgment in favor of the FDIC on the breach of contract/breach of warranties claim and granted the FDIC's motion to dismiss on the DTPA and negligence/negligent misrepresentation claims. The McDades challenge the propriety of each of these rulings, which we consider below.

II.

A.

As to the breach of warranties claim, the district court determined that the written contract executed by the McDades, signed after the alleged misrepresentations, precluded an express breach of warranty claim.²

We agree with the district court, although on slightly different grounds. The Texas Supreme Court recently held that a buyer who freely agrees to purchase commercial real estate "as is" cannot recover damages from the seller if the buyer later discovers that the property is not in as good condition as he believed it to be upon initial inspection. Prudential Ins. Co. v. Jefferson Assocs., 896 S.W.2d 156, 161 (Tex. 1995). Here, the McDades signed an earnest money contract that provided: "[S]eller makes and will make no representation and gives no warranties, express or implied, of property condition. All inspections are to be selected and paid by the Buyer and are responsible solely to the Buyer." They also signed a "Special Warranty Deed" stating that by accepting the deed they acknowledged that the FDIC had not made any representation or warranty concerning the property's condition and that the sale was "as is" and "with all faults." Thus, the district court correctly granted summary judgment on the breach of contract/breach of warranties claim.

² The McDades do not appeal the district court's determination that under Texas law there is no implied warranty of habitability because the FDIC was not the builder of the house.

B.

In dismissing the DTPA and negligent misrepresentation claims, the district court reasoned that because the claims sounded in tort, the FDIC was not the proper defendant under the Federal Tort Claims Act (the FTCA), 28 U.S.C. § § 1346, 2671-80. The McDades do not challenge the correctness of this ruling in their appeal. Rather, the McDades contend that their DTPA claim rested in part on a breach of warranties claim, which is contract-based and thus is not covered by the FTCA. Even if this argument was presented properly to the district court, it fails under Prudential Ins. Co. v. Jefferson Assocs., supra.

C.

The McDades argue finally that the district court improperly denied their motion for leave to amend the complaint to add the United States as a party-defendant and to include a claim for promissory estoppel. We review a denial of a motion for leave to amend the complaint for an abuse of discretion. Old Time Enters., Inc. v. International Coffee Corp., 862 F.2d 1213, 1220 (5th Cir. 1989). Although Federal Rule of Civil Procedure 15 "evinces a strong bias in favor of granting a motion for leave to amend a pleading," such leave "need not be granted when it would be futile to do so." F.D.I.C. v. Conner, 20 F.3d 1376, 1385 (5th Cir. 1994).

The McDades argue that since the FDIC in their motion to dismiss argued that the claims had to be filed against the United States, the court should have allowed them to amend their complaint to add the United States as a party in order to cure this defect.

However, the McDades themselves admitted to the court in their response to the FDIC's motion to dismiss that both the negligence/negligent misrepresentation claim and the DTPA claim fall within the FTCA's misrepresentation exception, 28 U.S.C. § 2860(h).³ Section 2860(h) provides that Congress has not waived the federal government's sovereign immunity for any tort claims "arising out of . . . misrepresentation, deceit, or interference with contract rights." In fact, in its order dismissing these claims, the district court noted that because the claims fell within the misrepresentation exception, the court would not have jurisdiction to hear them even if they were properly brought against the United States.⁴

It would similarly be futile for the McDades to add a promissory estoppel claim against the FDIC. To establish promissory estoppel, a party must prove (a) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment. FDIC v. Royal Park No. 14, Ltd., 2 F.3d 637, 641 (5th Cir. 1993). Given

³ The McDades do not argue on appeal that their negligence/negligent misrepresentation claim does not fall within § 2860(h). In their motion for leave to amend the complaint, the McDades stated that in a separate motion they would address some additional claims not falling within § 2860(h); however, they never filed a separate motion.

⁴ The McDades contend that the district court abused its discretion by not providing reasons for denying their motion to amend the complaint to add the United States as a party. However, as mentioned above, in its order granting the FDIC's motion to dismiss, the district court had already discussed why the defect would not be cured even if the United States were the party-defendant. The district court's failure to explain its reasoning again was not an abuse of discretion.

the extensive "as is" provisions of the contract and deed, any reliance by the McDades on the earlier representations as to the property's condition is unreasonable as a matter of law. Thus, the district court did not abuse its discretion in denying the McDades' request to amend their complaint to include a promissory estoppel claim.

III.

For the foregoing reasons, we affirm the district court's dismissal of the McDades' action against the FDIC.

AFFIRMED.