

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60183
Conference Calendar

MARGOT M. TRZECIAK,

Plaintiff-Appellant,

versus

CITY OF HARLINGEN ET AL.,

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-B-91-65
- - - - -
(September 23, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This Court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Fed. R. App. P. 3(c) provides that "[t]he notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken."

In the Rule 60(b) motion, Jacqueline Reynolds-Church appeared as the attorney for a group of "representatives of the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Estate of Margot M. Trzeciak"; none of the "representatives" was specifically named in the motion, and the motion did not include the independent executor and legal representative of the estate, Renate Pierce. In the notice of appeal, however, Reynolds-Church states that she represents Margot Trzeciak, the deceased plaintiff, and the notice of appeal names only the dead person as appellant.

Fed. R. Civ. P. 17(b) provides that "the capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile"; in all other cases (except those involving a corporation, a partnership, an unincorporated association, or a receiver appointed by a court of the United States), the capacity to sue shall be determined by the law of the state in which the district court is held. Fed. R. Civ. P. 17(b).

Because Margot Trzeciak was domiciled in Texas and this case was removed to the Southern District of Texas, under Rule 17(b) the capacity to sue is determined by Texas law. Upon the qualification and appointment of a personal representative of a decedent's estate, Tex. Prob. Code Ann. § 178 (West 1980) provides for the issuance of (a) letters testamentary to an executor who has been named in a will that has been probated and (b) letters of administration "[w]hen a person shall die intestate, or where no executor is named in a will, or where the executor is dead or shall fail or neglect to accept and qualify within twenty days after probate of the will, or shall neglect

for a period of thirty days after the death of the testator to present the will for probate." Section 233 requires the personal representative to use ordinary diligence to collect any claims due to the estate if he determines that there is a reasonable prospect of collecting the claim. "If he wilfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate . . . for the amount of such claims . . . as has been lost by such neglect." Tex. Prob. Code Ann. § 233 (West Supp. 1994). Section 233A designates the executor or the administrator to institute suit for collection of such claims. Tex. Prob. Code Ann. § 233A (West Supp. 1994).

Although Texas law specifies that suit by the executor or the administrator is the mechanism by which claims due to an estate are to be collected, Reynolds-Church sought Rule 60(b) relief on behalf of certain unnamed "representatives of the estate of Margot M. Trzeciak" and then appealed the district court's denial of the motion as the attorney for "Margot Trzeciak." This notice on behalf of the deceased was filed even though Reynolds-Church admits that other lawyers represented Ms. Trzeciak and her estate. Because the postjudgment motion and the appeal were not filed by the legal representative authorized by Texas law and Rule 17(b) to do so, the appeal is dismissed. See John Hancock Mut. Life Ins. Co. v. Warren, 72 S.W.2d 347, 348 (Tex. Ct. App. 1934) ("general rule is that a suit to recover [real property] belonging to the estate of a decedent must be brought by the executor or the administrator, and not by the

heirs, devisees, or their assigns"); see also Chandler v. Wilson,
294 S.W.2d 801, 807 (Tex. 1956).

DISMISSED.