IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-60210
(Summary Calendar)

STEVEN D. HAVARD and
JUDY A. HAVARD,

PLAINTIFFS-APPELLANTS,

VERSUS

KEMPER NATIONAL INSURANCE COMPANIES
d/b/a American Manufacturers Mutual
Insurance, ET AL.,

DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
JACKSON DIVISION
3:94-CV-184WS

November 3, 1995

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:[*]

When Mr. and Mrs. Havard's house was damaged by a fire on March 26, 1993, they immediately contacted their insurance agent, who arranged for appraisals on behalf of Kemper. Unfortunately, the parties were unable to agree upon which appraisal to use, and the Havards filed suit against Kemper, appraiser Hatch (re the "Meadows" appraisal), contractor Midsouth Home, and insurance agent Rex R. Haynes alleging fraud, detrimental reliance, negligence, misrepresentation,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and breach of contract. The lower court dismissed defendant Haynes on the basis of fraudulent joinder, and granted summary judgment in favor of the other defendants. We affirm.

FACTS

Immediately after the fire, defendant Haynes arranged for the Havards' temporary housing at a local motel. He also arranged for a local contractor, Robertson Brothers, to make an estimate of the damage done to their house, and he contacted Kemper who sent out an appraiser, John Meadows. The Robertson Brothers' estimate amounted to $8,530, which was commensurate with that of the fire department. Other estimates performed at the Havards' request amounted to $14,300 (Ditto's Home Improvements), $14,900 (the "Farris" estimate), $11,184.55 (London Companies), and $16,290 (Construction Managers). The Meadows' estimate totaled $5,874.45, and Kemper tendered a check in that amount less the $500 deductible.

When the Havards rejected the first check, Kemper responded with a letter stating that, in accordance with the terms of the insurance contract, it would only pay for the actual cost of the repairs, and that as Havard did not agree with the Meadows appraisal, he should furnish Kemper with documentation to support those actual repair costs. Additionally, Kemper pointed out that should they fail to agree on the amount necessary, the insurance contract included an appraisal provision: Kemper and the Havards would each choose their own appraiser, and the two appraisers would choose an umpire in order to result in an impartial appraisal. Furthermore, Kemper's April 30 letter said "[p]lease advise whether you would like for us to reissue our check in the amount of $5,374.45 *pending resolution of the amount necessary* to repair your dwelling." The Havards rejected the reissuance of the check and threatened suit.

The situation continued to deteriorate. Haynes sent a letter on July 13, also mentioning the Havards' right under the contract to an appraisal process. On September 29, Kemper sent another letter, this time to the Havards's attorney, invoking the appraisal provision and accompanied by a check again in the amount of $5,374.45. The letter asked "Please let me know if your clients would like to cash the check for $5,374.45 *or* if they would like to enter into an appraisal proceeding." The

Havards wrote "[i]n partial payment and accepted with reservation" on the check, and then endorsed and cashed it.

The issues on appeal are three: 1) whether Haynes was properly dismissed, 2) whether summary judgment was properly granted to defendants Kemper, Hatch, and Mobile South on the fraud/ misrepresentation claims, and 3) whether summary judgment was properly granted to Kemper on the remaining breach of contract claim.

DISCUSSION

Defendant Haynes was dismissed as being fraudulently joined. In assessing fraudulent joinder claims, it is appropriate for the court to look beyond the pleadings and use standards similar to those used in ruling on summary judgment motions. *B., Inc. v. Miller Brewing Co*., 663 F.2d 545, 549 n.9 (5th Cir. 1981). When determining fraudulent joinder, the district court may look to the facts as established by summary judgment evidence as well as the controlling state law. *Carriere v. Sears, Roebuck and Co*., 893 F. 2d 98, 100 (5th Cir.), *cert .denied*, __U.S.__, 111 S. Ct. 60, 112 L.Ed. 2d 35 (1990). Thus, fraudulent joinder exists when the facts establish that the plaintiff has no possibility of stating a valid claim against the resident defendant under state law. *McFarland v. Utica Fire Ins. Co*., 814 F. Supp. 518, 522 (S.D. Miss. 1992), *aff'd without op*., 14 F. 3d 55 (5th Cir. 1994).

An agent can incur independent liability only if the agent engages in independent conduct which rises to the level of gross negligence, malice, or reckless disregard for the rights of the plaintiff. *Id* .at 521. Fraud must be pleaded with particularity and may not be inferred or presumed. *Singing River Mall v. Mark Fields, Inc.*, 599 So. 2d 938, 945 (Miss. 1992). The elements of fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the representation's truth' (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. *Singing River Mall*, 599 So. 2d at 945. Haynes appears to have

acted at all times for an on behalf of Kemper, and the plaintiffs even admit this in their complaint. After the fire, when the Havards needed temporary housing, Mr. Haynes paid for their stay at a local motel, he called a contractor and asked them to prepare an estimate, and he then contacted Kemper and informed Kemper of the Havards' claim. He also sent a letter to the Havards when he learned of their disagreement with Kemper in which he pointed out their right to an appraisal proceeding in accordance with the contract. None of this amounts to independent conduct in reckless disregard for the rights of the plaintiffs, nor does it contain any misrepresentation. Thus, because these facts establish that the Havards had no possibility of stating a valid claim against Mr. Haynes individually under state law, he was properly dismissed from the suit, and remand was properly denied.

As regards the dismissal of the other claims of fraud on summary judgment, the well established standard is that where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Matsushita Elec. Ind. Co. V. Zenith Radio*, 475 U.S. 574, 587, 89 L. Ed 2d 538, 552, 106 S Ct. 1348 (1986). If the factual context renders the plaintiffs' claim implausible -- if the claim is one that simply makes no economic sense -- then the plaintiff must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Id*. We resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy. *Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994). In the absence of any proof, we do not assume that the nonmoving party could or would prove the necessary facts. *Id*.

Under Mississippi law, a cause of action for fraud requires proof of an intent to deceive. *Mills. V. Damson Oil Corp*., 931 F. 2d 346, 348 (5th Cir. 1991). The plaintiffs allege that the defendants "colluded" to "deceive, trick, and defraud" them into pursuing the appraisal clause of their contract with defendant Kemper. Similar appraisal clauses have been held enforceable as a fair provision for settling appraisal differences with regard to insurance contracts since *Hamilton v. Liverpool & London & Globe Ins. Co*, 136 U.S. 242, 256 (1890). Generally, it is the duty of both parties to act in good faith and to make a fair effort to carry out such an appraisal agreement.

Hartford Ins. Co., v. Conner, 79 So. 2d 236, 238 (Miss 1955). Nowhere in the record do the Havards plead with the necessary specificity how the defendants intended to defraud them by encouraging them to either accept the Meadows' estimate or choose to exercise their options under the appraisal provision. Nor do any facts in the record show that it would make economic sense for the defendants to "collude" in order to force the Havards into making this choice. Thus, the district court's holding that there is no genuine issue of material fact with regard to the claim of fraud and the defendants are entitled to summary judgment as a matter of law, is fully supported by the summary judgment record.

The final issue upon appeal is whether the acceptance of the second check, as accompanied by the "Larry Gunn" letter, amounts to an accord and satisfaction under Mississippi law. In accord with the standard of review on summary judgment, if the movant meets his burden of demonstrating the absence of a genuine issue of material fact, then the nonmoving party must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 91 L ed. 2d 265,274, 106 S Ct. 2548 (1986). Where the nonmoving party fails to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof, the moving party is entitled to a judgment as a matter of law. *Id*. at 477 U.S. 323.

The Havards premise their argument on provisions of the Uniform Commercial Code ("UCC") as adopted by Mississippi. They also question its application as beyond its scope of coverage. Article 3 governs the use of negotiable instruments and commercial paper such as checks. Miss. Code Ann. § 75-3-1-101, 104 (1981). The remaining issue in the case at bar is whether the check tendered by Kemper and accepted by the Havards "with reservation," along with its accompanying writings, amounted to an accord and satisfaction. Because this issue revolves around the use of a negotiable instrument, Article 3 law governs except where principles of law and equity have not been displaced by its particular provisions. Miss. Code Ann. § 75-1-103 (1981).

The Havards argue that the restrictive indorsement on the back of the check in part prevents

the acceptance of the check from being presumptive evidence of an accord and satisfaction. Under Miss. Code Ann. §75-1-207(2), restrictive phrases will reserve rights *except* in the context of an accord and satisfaction. Miss. Code Ann. § 75-1-207 (2)(Supp. 1995). This is a new provision added to concord with the revision of § 75-3-311, and intended to adopt the traditional common law rules. U.C.C. 1-207 Official Comment 3 (1994). Under the common law rules, if a check is offered in full satisfaction of an unliquidated claim, then you either accept the check as written or refuse it. U.C.C. art. 3-311 Official Comment 2 (1994). If you accept the check, you can not reserve rights merely by writing something to that effect on the check. *Id*. Mississippi has adopted the revisions of both 1-207(2) and 3-311. Miss. Code Ann. §75-1-207(2), 3-311 (Supp. 1995). Thus, the restrictive indorsement on the back of the check does not prevent its evidencing an accord and satisfaction.

If a person against whom a claim is asserted proves that he "tendered an instrument in good faith" to the claimant as full satisfaction of a claim subject to a bona fide dispute, and "if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim," then the claim is discharged when the claimant obtains payment of the instrument. Miss. Code Ann. § 75-3-311 (Supp. 1995). While the letter accompanying the first Kemper check, as appellant recognizes, was issued "pending resolution," the letter accompanying the check that the Havards accepted asked whether they "would like to cash it *or* enter into an appraisal proceeding." According to the language of the earlier accompanying letter, the first check was offered in partial settlement. Thus, the remaining issues are whether the written communication accompanying that second check conspicuously indicated that it was being offered in full satisfaction of the Havards' claim, and whether the check was offered in good faith as settlement of the claim.

A term or clause is conspicuous "when it is so written that a reasonable person against whom it is to operate ought to have noticed it.....Whether a term or clause is "conspicuous" or not is for decision by the court." Miss. Code Ann. §75-1-201(10) (1981). The tenor of the second

accompanying letter was substantially different from the first. The situation had substantially changed: the Havards were now represented by an attorney and were seriously pursuing litigation. The letter opened with a statement that the insurance company was invoking the appraisal clause. The second paragraph included the word "or," clearly indicating that Kemper expected the Havards either to accept the check in settlement of their claim or to pursue the appraisal provision. By adding a restrictive endorsement to the check, the Havards implicitly indicated that they were aware of the common law doctrine that acceptance of the check meant the creation of an accord and satisfaction, and they were thus acknowledging the terms of Kemper's offer. Moreover, they were represented by an attorney. Thus, as a matter of law, the trial court correctly found that a reasonable person in the Havards' position ought to have realized that the check was being tendered in settlement of the claim, and that the accompanying letter thus was a conspicuous offer of settlement. . The final question is whether Kemper's check was a good faith offer. The UCC provides an explicit example of bad faith:

> For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The claimant is necessitous and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check, because of the absence of good faith by the insurer in making the tender.

U.C.C. § 3-311 (a)(I) Official Comment 4. (1994).

Looking at the facts in the light most favorable to the Havards, they were necessitous. The fire and its aftermath greatly inconvenienced them, forcing them first to move to a hotel with their small children and then to live in their own home for a time without hot water. Moreover, as a result of dealing with the fire and its aftermath, Havard, a college student, underwent further financial hardship through loss of his computer and loss of supplemental employment. However, though the Havards were necessitous, that does not mean that Kemper dealt unfairly with them. Kemper made several offers to invoke the appraisal provision, which was designed to result in an appraised value

fair to both parties. The Havards refused and described the appraisal provision as an attempt to "deceive, trick, and defraud them." Although Kemper's appraisal and settlement offer was substantially lower than the Havards' appraisals, even viewed in a context most favorable to the Havards, it cannot be said that Kemper dealt unfairly with them.[1] Thus, as a matter of law, Kemper's offer of settlement was in good faith, and the district court's granting of summary judgment to the defendants is AFFIRMED.

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The Havards also argue that the district court should have allowed them to proceed with more discovery in accordance with Fed. R. Civ. P. 56(f). We review the district court's decision to preclude further discovery prior to granting summary judgment for abuse of discretion. *Krim v. Banctexas Group, Inc.*, 989 F.2d 1435, 1441 (5th Cir. 1993). Both Havard and Kemper submitted sufficient affidavits showing substantially the same facts, and thus showing that there was no genuine issue of material fact. Therefore, the district court's decision to preclude further discovery was not erroneous.