

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3749
Summary Calendar

JOSEPH ENTERPRISES, INC.,
and
RAYMOND A. JOSEPH,
Plaintiffs-Appellees,
Cross-Appellants,

VERSUS

ZACK'S FAMOUS FROZEN YOGURT, INC., et al.,
Defendants,

ZACK'S FAMOUS FROZEN YOGURT, INC.,
and
SAM HOLT,
Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana
(89-CV-3408-A)

(February 17, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Sam Holt served as an officer of Zack's Famous Frozen Yogurt, Inc. ("Zack's"). During his tenure as officer, he made certain representations to Raymond Joseph and Joseph Enterprises, Inc. (collectively "Joseph"), regarding the probability of success of a Zack's franchise, the financial health of Zack's, and the availability of exclusive franchising rights in several states. The jury found these representations were fraudulent. Zack's failed timely to provide Joseph with a Uniform Franchise Offering Circular as required by the Federal Trade Commission. Nevertheless, Joseph agreed to become a master developer for the state of Alabama.

Joseph sued for breach of contract, rescission, and declaratory relief. In addition, Joseph sued Holt for negligent and fraudulent misrepresentations. The district court dismissed the negligent misrepresentation claim, finding that the one-year prescriptive period for tort claims barred such relief. The court failed to dismiss the fraudulent misrepresentation claim, apparently holding that it sounded in contract.

II.

Holt argues that the fraudulent misrepresentation claim against him is barred by the one-year prescription period. We agree. Fraudulent misrepresentation sounds in tort and has a one year prescriptive period. See Silver v. Nelson, 610 F. Supp. 505, 517 n.16 (E.D. La. 1985). Joseph has not cited any authority establishing a contract cause of action for fraudulent misrepresen-

tation. Accordingly, the district court erred in granting damages against Holt for fraudulent misrepresentation.

Joseph argues that because the alleged fraud led to the formation of a contract, the prescription period for contracts ought to apply. This argument has no merit. Fraudulent misrepresentation is a tort. It does not become a contract action simply because the fraud leads to the formation of a contract. Of course, the fraudulently induced party may always raise fraud as a defense to a contract enforcement action or seek, as Joseph did here, rescission of the contract.¹

An action to rescind the contract, however, obviously is a contract action. The fraudulently induced party may have an additional claim for fraudulent misrepresentation, but the two causes of action are distinct. Moreover, these two actions have different prescription periods, and Joseph failed to file within the tort prescriptive period. Consequently, his fraudulent misrepresentation claim against Holt is time-barred. The district court awarded damages for contract rescission against Holt, however, so we must also address Holt's claim that he cannot be held liable for rescission damages.

¹ Dugas v. Cason, 524 So. 2d 1248 (La. App. 3d Cir. 1988), is not to the contrary. This case merely stands for the proposition that an action by a party to a contract seeking rescission based upon fraudulent representation by another party falls within the prescription period for contracts. Id. at 1250. As we note in the text, a rescission action based upon fraudulent misrepresentation differs from a fraudulent misrepresentation action itself. Dugas supports our analysis.

III.

Next, Holt contests the district court's award of damages against him for rescission. As we read the amended judgment, the district court rendered judgment against Holt and Zack's, granting rescission of the franchise agreements. Then, curiously, the court purports to award damages against Holt and Zack's for fraudulent misrepresentation as well as against Zack's alone for rescission. One could read this judgment as granting damages against Holt only for fraudulent misrepresentation, a claim that is time-barred. We assume the district court awarded damages against Holt for rescission where the rescission was based upon fraudulent misrepresentation.

Given this interpretation of the judgment, we must decide whether Holt can be liable for rescissory damages under Louisiana law. We conclude that he may not. Rescissory damages may be awarded only against parties to the contract. Holt was not a party to the contract. His fraud may be relevant to whether Joseph may obtain rescissory damages from Zack's, but Holt may not be held liable for such damages.

Joseph's reliance upon Lynnhaven Dolphin Corp. v. E.L.O. Enters., 776 F.2d 538 (5th Cir. 1985), and Dutton & Vaughan, Inc. v. Spurney, 496 So. 2d 1126 (La. App. 4th Cir. 1986), writ denied, 501 So. 2d 208 (1987), is misplaced. These cases stand for no more than the proposition that corporate officers acting in their official capacity may be held personally liable for their fraudulent misrepresentations. As we acknowledged above, Joseph may have

had a cause of action against Holt for fraudulent misrepresentation, but that cause of action is time-barred. Where he was not a party to the contract, Holt does not become liable for damages arising from rescission of a contract simply because he acted fraudulently in helping his corporation procure that contract.²

The judgment of the district court is REVERSED, and judgment in favor of Holt is hereby RENDERED.

² Of course, Holt may be liable to the corporation for breach of his fiduciary duty, but that issue is not before us.