

UNITED STATES COURT OF APPEALS

Filed 6/11/96

FOR THE TENTH CIRCUIT

GARDEN CHOICE INC., doing business
as Garden Choice Restaurant, an
Oklahoma corporation; IN KI KO, an
individual; MUN KI KO, an individual,

Plaintiffs-Appellants,

v.

UNITED STATES FIDELITY &
GUARANTY COMPANY, a Maryland
corporation,

Defendant-Appellee.

No. 95-6236
(D.C. No. CIV-94-1506-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before PORFILIO, JONES,** and TACHA, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** Honorable Nathaniel R. Jones, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiffs appeal from the district court's grant of summary judgment in favor of defendant on their breach of contract and bad faith denial of insurance claims. Plaintiffs argue that the district court erred in granting summary judgment because there were issues of material fact concerning (1) whether plaintiffs made material misrepresentations justifying rescission of the insurance policy by defendant and (2) whether defendant acted in bad faith in denying plaintiffs' claims.

"We review the grant . . . of summary judgment de novo, applying the same legal standard as the district court pursuant to Fed. R. Civ. P. 56(c)." Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 796 (10th Cir. 1995). In doing so, we examine the factual record and all reasonable inferences that can be drawn therefrom in the light most favorable to the nonmoving party. Id. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Applying this standard of review, we conclude the district court thoroughly considered the evidence before it and correctly granted defendant's motion for summary judgment.

Accordingly, we affirm for substantially the reasons stated by the district court in its order of April 13, 1995.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED. Plaintiffs' motion to supplement their appendix with exhibits and excerpts from depositions is DENIED. See Aero-Medical, Inc. v. United States, 23 F.3d 328, 329 n.2 (10th Cir. 1994)(court of appeals will not review evidence not before district court).¹

Entered for the Court

Nathaniel R. Jones
Senior Circuit Judge

¹ Even if we did consider this evidence, which was not presented to the district court, we conclude defendant still would have been entitled to summary judgment.