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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK D. VINION; et al.,

Plaintiffs - Appellants,

v.

AMGEN INC.; et al.,

Defendants - Appellees.

No. 05-36121

D.C. No. CV-03-00202-DWM

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, Chief District Judge, Presiding

Argued and Submitted September 26, 2007
Seattle, Washington

Before: B. FLETCHER, KLEINFELD, and GOULD, Circuit Judges.

Patrick D. Vinion, Richelle Vinion, Clayton H. Riddle, and Angela Riddle (collectively, "Appellants") appeal two decisions by the district court: (1) dismissal of their contract claims against Amgen Inc. and Immunex Corporation (collectively, "Companies"); and (2) summary judgment in favor of the Companies

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Circuit Rule 36-3.

on a variety of state law tort claims. Although we have sympathy for Appellants, the law is not on their side. For the reasons set forth below, we AFFIRM both of the district court's decisions.

We affirm the district court's decision to dismiss Appellants' contract claim because it appears beyond doubt that Appellants could prove no set of facts that would entitle them to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The written agreements did not contain a promise that the Companies would provide the study drug for free indefinitely once the study ended. The district court properly considered these documents because the complaint alleged their contents and no party questioned their authenticity. See Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994). The oral contract claim could not succeed because the parol evidence rule, see Mont. Code Ann. §§ 28-2-904, 28-2-905, 30-2-202, barred proof that any oral promise was made, while the statute of frauds, see Mont. Code Ann. § 28-2-903(a), would have made it unenforceable even if proved.

Summary judgement on Appellants' tort claims was also appropriate because a review of the evidence reveals no genuine dispute of material fact as to whether the Companies made the alleged promise. See Scribner v. Worldcom, Inc., 249 F.3d 902, 907 (9th Cir. 2001). Appellants' implied agency theory fails as a matter of law under either Washington or Montana law. The states use slightly

different formulations of the rule, compare, Udall v. T.D. Escrow Servs., Inc., 154 P.3d 882, 888 (Wash. 2007), with Mont. Code Ann. § 28-10-103(1), but the resulting inquiry is the same, compare Adamski v. Tacoma Gen. Hosp., 579 P.2d 970 (Wash. 1978), with Butler v. Domin, 15 P.3d 1189 (Mont. 2000), and the result in this case is the same. As the district court and the parties refer to Montana law, and the choice is not outcome-determinative, we follow suit.

Appellants' implied agency theory cannot succeed because there was no action or inaction by the Companies that would have led the Appellants to a reasonable belief that Dr. Whitehouse was the Companies' agent. See Mont. Code Ann. § 28-10-103(1); Butler, 15 P.3d at 1197. The only contact between the Companies and Appellants was the consent agreement they signed at the beginning of the study. The agreement says that the study is "under the direction" of their physician and says nothing to support a reasonable belief that their physician would be acting under the direction of the Companies. The Companies' agreement with the physician specified that he was an "independent contractor," and the Companies did nothing that would give him the appearance of being their agent.

Dr. Whitehouse was Appellants' personal physician before the study, he invited them to participate, and he provided care during the study at his own office, not any office provided by the Companies. See Butler, 579 P.2d. at 1196-97. Dr.

Whitehouse's statements to Appellants about "compassionate use" cannot impose liability on the Companies because he was not the Companies' actual or apparent agent (even assuming that his statements were what Appellants understood them to be). See Sunset Point P'ship v. Stuc-Flex Int'l, Inc., 954 P.2d 1156, 1160 (Mont. 1998). The Companies cannot be held legally liable to Appellants for promises made to other participants in a separate study conducted in California. That the Companies were inconsistent in extending post-study drugs to participants in different studies has no bearing on whether the Companies' conduct towards Appellants left them with the reasonable belief that Dr. Whitehouse was the Companies' agent.

See also Abney v. Amgen, Inc., 443 F.3d 540 (6th Cir. 2006); Suthers v. Amgen Inc., 372 F. Supp. 2d 416 (S.D.N.Y. 2005).

AFFIRMED.