72529-7

72529-7

No. 72529-7-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BINGO INVESTMENTS, LLC, a Washington limited liability company, FRANCES P. GRAHAM, a single person, SCOTT BINGHAM and KELLEY BINGHAM, husband and wife, CHRISTOPHER G. BINGHAM and CHERISH BINGHAM, husband and wife, and DAVID S. BINGHAM and SHARON G. BINGHAM, husband and wife,
Appellants,

v.

MUFG UNION BANK, N.A., a national banking association,
Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 23 PM 4:43

BRIEF OF APPELLANTS

R. Bruce Johnston, WSBA #4646
Johnston Lawyers, P.S.
2701 First Ave, Suite 340
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)
bruce@rbrucejohnston.com
Counsel for Appellants

TABLE OF CONTENTS

I. Contents

I. INTRODUCTION 1
III. PROCEDURAL BACKGROUND 3
IV. STATEMENT OF CASE 4
A. Background Facts 4
1. Frontier Bank was Engaged in an Illegal Cover-Up of the Barclay's North Loan Defaults. 4
2. All Claims and Defenses of the Appellants were known to Union Bank Before its Purchase. 9
B. Errors at Trial 11
V. ARGUMENT 11
A. Standard of Review 11
B. There is a Material Dispute of Fact as To Whether the Guarantees are Void or Voidable. 12
VI. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Cases

Bankston v. Pierce Cnty., 174 Wn. App. 932, 938-39, 301 P.3d 495 (2013) ...15
Pedersen v. Bibioff, 64 Wash. App. 710, 722, 828 P.2d 1113 (1992)......16
Ranger Ins. Co. v. Pierce Cnty., 164 Wn.2d 545, 552, 192 P.3d 886 (2008) ...14
Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119 Wn. 2d 640, 646, 835 P.2d 1030 (1992)...14
Singer Credit v. Mercer Masonry, 13 Wn. App. 877, 885-86, 538 P.2d 544 (1975)...17

Non-Washington Cases

New Bank of New England, N.A. v. Callahan, 798 F. Supp. 73, 77 (D.N.H. 1992)...19

Statutes

12 U.S.C. § 1821(e)...5, 19
RCW 62A.1-201...18
RCW 62A.1-302...19
RCW 62A.3-303...18
RCW 62A.4-401...18

Regulations and Rules

12 C.F.R. Part 365 Appx. A...15

Other Authorities

Restatement of Contracts, § 512-609...17
Restatement of Contracts, § 512...17

I. INTRODUCTION

While this case is complex, the issues on appeal are simple – the trial court granted summary judgment in the presence of disputed material facts. Despite that error, the trial court recognized the obvious – that entry of the judgment in this case was unjust, inequitable:

> THE COURT: All right. Well, unfortunately, my job puts me in a position at times where I'm required to do what the law says the law is as opposed to what I think is appropriate or what I would like the outcome to be. While I have some concerns in relation to what transpired here, I agree, there isn't sufficient evidence to establish it. And even if there was, on the basis of the documents that were signed in this case, then the waivers that were made, the guaranties were unconditional and absolute and they need to be enforced. I don't find that the defenses are appropriate here either based on the arguments that have been made by the plaintiffs. So, although I don't like the result I will grant the motion for summary judgment. Everything has been waived by virtue of the actual written documents that were executed. I'll grant the motion for summary judgment. TR 34:5-21; CP69-70.

The trial court was incorrect on the law, and weighed the evidence, rather than applying the correct standard of review for summary judgment.

II. ASSIGNMENTS OF ERROR

Appellants assign the following errors:

1. The trial court erred by granting Appellee's motion for summary judgment against Appellants and entering judgment for damages in favor of Appellee and against Appellants; and

2. The trial court erred by denying Appellants' motion for reconsideration of the said order and judgment.

Appellants raise the following issues as to these assignments of error:

1. Do disputes of genuine issues of material fact prevent summary judgment on Appellee Bank's loan-default and/or guaranty claims, and was Appellee Bank not entitled to judgment as a matter of law, where the evidence supports that; (a) Appellee Bank's predecessor caused, in whole or in part, the alleged defaults by breaching the written, signed terms of the original loan documents, and then using its undue influence over the Appellant Borrower's financial manager to modify the loans, without consideration, into loans sure to fail, (b) the guarantees were obtained as part of an illegal and/or fraudulent transaction, (c) the Appellee Bank knew of the defenses at the time of its acquisition of the loans and guaranties, and (d) the Appellee Bank paid virtually nothing for the loans in question, based in part on its knowledge of the pendency of this suit, and the defenses asserted by Appellants against the predecessor of the Appellee Bank?

2. Did Appellants waive ***all*** defenses to the guaranties sued upon by the Bank, including (a) illegality, (b) breaches of contract by the Bank, (c) fraud in the inducement, and (d) the requirements of good faith, fair dealing and observance of reasonable commercial standards of fair dealing?

3. Does the federal holder in due course statute, 12 U.S.C. § 1821(e), immunize Appellee Bank from the consequences of its predecessor's fraud, and/or bad faith, deceptive, unlawful conduct, disclosed in the predecessor bank's files?

III. PROCEDURAL BACKGROUND

A detailed, annotated, procedural history prior to the Appellee Bank's motion for summary judgment is set forth at CP 345-347. In summary, the case was filed on September 28, 2009, by Frontier Bank, the predecessor in interest to the Appellee Bank. Frontier Bank moved for summary judgment on October 20, 2009. (CP 982). That motion was similar to the motion made by Union Bank over four and one-half years later, on May 30, 2014. (CP 755).

Appellants opposed that motion in 2009 (CP 899 and 910) and the motion was withdrawn. Appellants asserted substantial defenses and counterclaims in this case at that time. CP 882-892.

Frontier Bank then failed, on or about April 30, 2010, and its assets were sold to the Appellee Bank on or about that same date. (CP 358 *et seq.*, Purchase and Assumption Agreement.) The misdeeds of Frontier Bank were investigated and documented by the FDIC in a report dated December 2010. (CP 495 *et seq.*) Union Bank appeared in this case on December 23, 2010, but didn't even reply to the counterclaims until September 23, 2013.

The Union Bank Motion for summary judgment was filed on May 30, 2014 (CP 755), the summary judgment order entered on July 30, 2014. (CP 73). Appellants' Motion for Reconsideration was filed on August 11, 2014, and denied September 2, 2014. (CP 29; CP 14). The Notice of Appeal was timely filed on October 1, 2014. (CP 1).

IV. STATEMENT OF CASE

A. Background Facts.

The evidence, viewed in the light most favorable to the Appellants, shows the following:

1. Frontier Bank was Engaged in an Illegal Cover-Up of the Barclay's North Loan Defaults.

Frontier Bank was closed and taken over by the FDIC in April 2010. CP 496. This was the result of years of banking which did not meet the "safe and sound" banking requirements of the FDIC; and

Frontier's loan administration and management during the year before the July 2008 FDIC audit were "grossly inadequate" and specifically included "delayed recognition of problem loans."[1] CP 507.

Frontier Bank's not-so-latent problems came to a head when one of its largest commercial borrowers, the Barclay's North real estate development enterprises headed by one Patrick McCourt, imploded in December 2007, announcing to its lenders that it could not meet any of its dozens of multi-million dollar loans and bankruptcy was imminent. CP 911.[2] Worse yet, the real estate market was plunging, so there was no way to refinance the loans or realize anywhere close to the loans' face values by foreclosing on the incomplete developments. If these losses were properly recognized in Frontier Bank's accounting, and mandatory "Call Reports," it would instantly fail. Instead, to avoid immediate collapse in early 2008, Frontier Bank devised the dishonest plan described in some detail in Mr. Switzer's Declaration. CP 910-915.

The Bank's loan approval memo (CP 582 *et seq.*), shows that Centurion, not Bingo, was acquiring title to the Barclay's North

---

[1] Frontier's losses were the largest of any of the banks that failed in Washington from 2007 to 2010, and were the 8th largest losses in those years in the U.S. banking crisis. CP 500 n.1.
[2] There is a typographical error in Mr. Switzer's Declaration – it says December 2008. However, the context on CP 911 and CP 913 ¶10, make it clear that the All Bank meeting took place in December 2007.

subsidiaries. The bank ratified the transfer to Centurion, a unique transaction in the experience of Union Bank officer, and former Frontier Bank officer, Steve Arrivey. (CP 553, Arrivey Dep. at 73:17-20.) Yet Bingo and/or the Binghams were taking on all new risk by signing guarantees. (Loan Memorandum, CP 582-86.)

Among the many investors who had unwisely sunk their money into McCourt's development projects, were the Binghams and also the Binghams' financial managers, Centurion Financial Group, LLC ("Centurion"), owned by Scott Switzer and Thomas Hazelrigg III.[3] Despite the clear conflict of interest caused by Centurion's independent interest in the McCourt projects, as demonstrated by the Declaration of Switzer (CP 910-015) Frontier Bank worked with Centurion and its owners to take advantage of the Binghams' then-good credit and assets to prop up fully failed loans. As Switzer stated, and the loan approval memo[4] confirms, these properties were vastly over-financed, had no income earning potential in their undeveloped state, and could not be sold in the current market – yet Frontier Bank worked with the Binghams' fiduciaries (Centurion and its owners Switzer and Thomas Hazelrigg) to put the risk on the previously

---

[3] Centurion, Hazelrigg, and Switzer were put into involuntary bankruptcies during the pendency of this case, and Hazelrigg was recently convicted of federal tax fraud, in the federal courts in the Western District of Washington at Seattle.

[4] CP 582 *et seq.*

uninvolved Binghams (Christopher and Cherish Bingham, Scott and Kelly Bingham, and Frances Graham) and the eventual potential upside onto their fiduciaries. CP 910-915 (Switzer Dec. ¶¶ 1, 4); (CP 582-87, Loan Memorandum at 1-6).

Specifically, Frontier Bank allowed Centurion to acquire the borrowing entities, single purpose companies L224-1 Bayside, LLC and L198-1 Sinclair, LLC, took several of its large McCourt loans, originally made to a different McCourt investor and secured by McCourt's "Sinclair" and "Bayside" development projects, and substituted certain of the Binghams as borrowers and/or guarantors—the property rights, however, went to Centurion. To falsely make it appear that the risks to the Binghams were low and to try to make the loans appear to the FDIC, and its Auditors, to be productive and sound, Frontier Bank increased the size of the already failed loans, with the added balance being retained by Frontier Bank as an interest reserve. (CP 910-915; *and see* CP 582, 586.) Thus, even though the collateral was not increased and its value was plummeting, the new sham loans could be made by Frontier to not appear in default, and Frontier Bank thereby wrongfully avoided reporting them as non-performing or losses to the FDIC.

We say "appear" to not be in default, because, to carry out its scheme, Frontier had to violate various federal regulations and/or

guidelines; as the retrospective confirmed. CP 495 *et seq*. For example, the Bank's subsequent Appraisal Review of the loan, demonstrates that the loans were designed to deceive the FDIC. The loan to value ratio for the Bayside loan was a preposterous 455%, more than six times the supervisory loan-to-value ratio of 75%. (CP 576, Exhibit 2 to Arrivey Dep.) The FDIC in its eventual post-mortem analysis of the Bank's failure found that during this period, Frontier had engaged in high-risk banking including overinvestment in under-secured, poorly appraised commercial real estate and development loans, and that its problems as of the July 2008 FDIC audit specifically including "delayed recognition of problem loans." (CP 507.) Simply stated, when Frontier Bank extended and modified the loans at issue in this case, and inveigled the Binghams to guarantee them on or about March 31, 2008, it was knowingly breaking federal law by evading reporting requirements, including Call Report requirements, as well as defrauding the borrowers and guarantors.

Unfortunately for Frontier Bank, the FDIC was increasing its scrutiny of Frontier and accelerated its audits and oversight. When the true nature of the fraudulent and deceptive practices, the cover-up, was more completely uncovered by the FDIC, Frontier was closed in April 2010 as discussed above.

Frontier Bank carried out its scheme for a few months, avoiding reporting the substandard loans in Call Reports in early 2008, but in September 2008, it reneged and canceled the written grant of interest reserves. (CP 913-14, Switzer Dec. ¶¶ 8-10.) Put simply, it stopped either disbursing the loan funds or reserving them. Thus, in December 2008, Frontier Bank and Centurion used their leverage to force the Binghams to accept a loan modification without apparent consideration on either side, to reduce the size of the largest loan, the "Bayside Loan," from $22,050,000 to $19,420,000 – a change that might look like an unusual act of generosity by the lender if not for the fact that the reduction constituted a loss of the interest reserves that were meant to sustain this and other loans – and actually develop the properties to a saleable condition. (*See* CP 600, CP 610-19, Herrera Dec. ¶ 5 & Exhs. A-B; *and see* CP 27-28, internal Bank Memo listing the undisbursed portions of the loans in November 2008—indicating over $7 million was not yet advanced.) Unsurprisingly, without the interest reserves that were intended to support the loans, and curtailing all development advances, all opportunities to improve or sell the projects (the collateral) was cut short, and the loans almost immediately went into payment default.

2. <u>All Claims and Defenses of the Appellants were known to Union Bank Before its Purchase.</u>

This lawsuit, the original summary judgment filings, and all the original loan documents were in the Bank's files, and were known (or should have been known) to Union Bank before it purchased the assets. This is not the usual case, where, after a purchasing bank buys loan documents with no apparent set-offs, claims or defenses, a borrower alleges oral promises not reflected in the defunct bank's files. In the usual case, a purchasing bank gives value for the apparent condition of the loans, and should have the benefit of the state and federal statutes of frauds. Here, however, these loans were obviously highly classified (CP 552-60, Arrivey Dep.) and patently subject to very public litigation and were substantially or fully written off.

In this connection, it is important that the Purchase and Assumption Agreement of the Appellee Bank provides that: "Loans or other assets charged off the Accounting Records of the Failed Bank prior to the Bid Valuation Date shall be purchased at a price of zero." (CP 373.). It is the height of irony that the Binghams disclosed the fraud of Frontier, disclosed the Bank was acting in concert with Centurion, Hazelrigg and Switzer, and those disclosures correctly devalued the fraudulent and illegal loans to "zero" on the Bank's books – with those disclosures then allowing the Bank to purchase the paper for zero (or at a deep discount), and for their efforts as victims to result in a judgment

for the full face amount of the loans – but that is what has happened. And thus the trial judges comments to the effect that the result in this case was inequitable.

B. Errors at Trial.

The bottom line on the material facts, is that there was (and is) sufficient evidence in the record to support a finding that the guaranties upon which summary judgment was granted were (a) obtained in illegal transactions in which the Binghams were victims, not participants, and/or (b) that such guarantees were obtained by fraud or conduct lacking good faith, attributable to the Bank, and fully **disclosed** to |Union Bank, and by the records of Frontier Bank before any Purchase by the Appellee Bank or receivership by the FDIC.

V. ARGUMENT

A. Standard of Review.

On review of a summary judgment, this Court engages in the same inquiry as the trial court, affirming the grant of summary judgment only when no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law; the court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could only

reach one conclusion. *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn. 2d 640, 646, 835 P.2d 1030 (1992).

B. There is a Material Dispute of Fact as To Whether the Guarantees are Void or Voidable.

On a summary judgment motion, the court must construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Evidence disputing material facts cannot be weighed at the summary judgment phase of a case. Viewed in the light of the unrebutted facts established by Scott Switzer's declaration, the Loan Memorandum, the FDIC official forensic autopsy of Frontier Bank, and the obvious breaches of fiduciary duties by Centurion to the Binghams, together with the bank's other records, there is adequate support of a strong inference that the execution of the guarantees and the Change In Terms Agreements and associated loan documents in March 31, 2008 and December 2008 were part of a scheme to disguise the reissue, extension, and re-securing of loans which should have been reported as substandard and which were in excess of lawful loan to value ratios, and other regulations.

The loans should have been called and collected right then and there – when the Binghams were not guarantors of those loans – they would have had no liability. The cover-up of the bad loans was done

primarily to defraud the FDIC through the blatant violation and disregard of federal banking laws and regulations. The Binghams were collateral damage, tricked into guarantying loans which had no reasonable chance of repayment, a fact known to the Bank. After all, the standards, guidelines, rules and regulations so thoroughly discussed in the FDIC report on the failure of Frontier are for the very purpose of maintaining a reasonable level of risk. See, CP 495 *et. seq.*

The fact and purpose of defrauding the FDIC puts these instruments squarely into the category of illegal contracts. "A contract that is illegal is void—that is, null from the beginning and unenforceable by either party… even if both parties knew of the illegality at the time of formation." *Bankston v. Pierce Cnty.*, 174 Wn. App. 932, 938-39, 301 P.3d 495 (2013). Here, Frontier Bank, a state non-member bank insured by the FDIC, was obliged under 12 C.F.R. Part 365 Appx. A. to stay within supervisory loan limits, including, for example, of 80% for commercial real estate loans except in unusual and carefully documented cases, and to keep records that accurately reflected the risk of excessive LTV loans, and the concentration of risky loans. Frontier Bank and Centurion used the Binghams' supposedly good credit to delay the need to recognize its 455% LTV Bayside Loan and other known problems outlined in the Switzer Declaration. Frontier promised interest

reserves to keep the balls in the air, and make the loans (falsely) appear current for another year, until, in the face of increased FDIC scrutiny, it abruptly back-tracked and tried to cover its traces by demanding a change to the existing fraudulent documents by dropping the interest reserves.

As to fraud, the law of Washington is clear. Fraud in the inducement refers to fraud that induces the transaction "by misrepresentation of motivating factors such as value, usefulness, age, or other characteristic of the property or item in question." *Pedersen v. Bibioff*, 64 Wash. App. 710, 722, 828 P.2d 1113 (1992). All of these factors are present in this case – The motivating factors of the Bank were not disclosed – to save itself from immediate shut down by the FDIC. The value and usefulness of the property was not disclosed. The Binghams relied on the Bank's participation in the scheme, and reasonably so to their detriment.

If fraud in the inducement is shown, the transaction is voidable. Id And, as with all waivers, the waivers determined by the trial court to be absolute, were necessarily subject to the requirement that they be "an intentional relinquishment of a known right." *Singer Credit v. Mercer Masonry*, 13 Wn. App. 877, 885-86, 538 P.2d 544 (1975). How one could waive a fraud of which he is unaware is not clear from the cases cited by Union Bank – but one thing is clear, if Frontier Bank had told the

Bingham's the truth at the time it presented the guarantees for signature – they certainly never would have been signed. At this summary judgment stage of the litigation, it is properly inferred that the fraud was known to the Bank, and not to the Bingham's.

The doctrine of illegality goes one step further. Illegality is treated at length in the Restatement of Contracts, § 512-609 (Chapter 18). It is uncontestable black letter law that a bargain is illegal if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy. (Restatement of Contracts, § 512.) In general there is no remedy on an illegal bargain. There should be no remedy here – particularly to Union Bank, which knew, at the time it acquired the loan documents in question, that fraud was alleged in these proceedings and that fraud was likely to have been committed, from its own due diligence and information received in its FDIC due diligence

Not only were the guarantees and instruments sued upon by Frontier and taken over by Union unlawful due to the illegality and fraud, Frontier Bank acted with a manifest lack of good faith, defined in the context of negotiable instruments or secured loan transactions as "honesty in fact and the observance of reasonable commercial standards of fair dealing." RCW 62A.1-201(20), RCW 62A.3-303, and RCW 62A.4-401. Here, to procure the Binghams' assent, Frontier Bank played on the conflict of interest of the Binghams' fiduciary Centurion.

Centurion, which was at risk because of its own loans to Barclay's North, got both the ownership of the Barclay's North subsidiaries, and a $5 million unsecured line of credit from Frontier Bank. The Binghams got nothing but additional risk. In this regard, it is worth note that Union is entitled to judgment against Switzer, Hazelrigg and Centurion, and may file claims in the respective bankruptcies of those persons and entities. The Bank, however, should not have judgment against the victims, the Appellants in this case.

Union Bank raised two reasons that the Court should supposedly not even consider illegality, fraud or lack of good faith: the blanket boilerplate waivers in the Binghams' guarantees, and FDIC avoidance of unsigned agreements of a failed depository institution under 12 U.S.C. § 1821(e).[5] But neither of those excuses apply here. Waiver of the obligations of good faith is prohibited by law: "The obligations of good faith, diligence, reasonableness, and care prescribed by this title may not be disclaimed by agreement." RCW 62A.1-302. And the requirements imposed by state law, such as "an implied covenant of good faith and fair dealing," or failure to "conduct a commercially

---

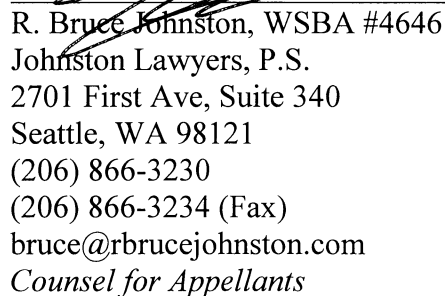
[5] This statute was referred to at the hearing by the name of the doctrine it codified, the '*D'oench Duhme*' doctrine, but strictly speaking, in state court it is the statute, not the federal common law doctrines, that may apply.

reasonable sale" are not mere side agreements between a borrower and a failed depository, so they are outside the scope of 12 U.S.C. § 1821(e). *New Bank of New England, N.A. v. Callahan*, 798 F. Supp. 73, 77 (D.N.H. 1992). The federal statute does not prevent the court from considering the context of a loan to see that there are issues of fact as to illegality, fraud and failure of good faith, as exist in this case.

VI. CONCLUSION

Respectfully, the grant of summary judgment by the trial court should be reversed, and this matter directed to trial on the issues joined.

DATED this 23rd day of March, 2015.



R. Bruce Johnston, WSBA #4646
Johnston Lawyers, P.S.
2701 First Ave, Suite 340
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)
bruce@rbrucejohnston.com
Counsel for Appellants

PROOF OF SERVICE

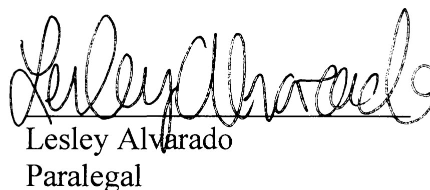
The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On March 23, 2015, I served or caused to be served a copy of the foregoing document upon counsel for Respondent to be served by hand and email upon counsel of record for Respondent, Joseph E. Shickich, Jr. and Michael David Pierson, at

Riddell Williams PS
1001 4th Ave., Ste. 4500
Seattle, WA 98154-1065
jshickich@riddellwilliams.com

SIGNED this 23rd day of March, 2015,



Lesley Alvarado
Paralegal

798 F.Supp. 73
United States District Court,
D. New Hampshire.

NEW BANK OF NEW ENGLAND, N.A.
v.
Michael F. CALLAHAN; John S. Kopka III.
Michael F. CALLAHAN, Third-party Plaintiff, [1]
v.
FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver
for Bank of New England, N.A., Third-party Defendant.

Civ. No. 91–62–D. | Sept. 2, 1992.

Mortgagee brought action against mortgagors seeking deficiency judgment, and mortgagor filed third-party complaint against Federal Deposit Insurance Corporation (FDIC), alleging abuse of process, breach of implied covenant of good faith and fair dealing, failure to conduct commercially reasonable foreclosure sale, and breach of fiduciary duty in connection with foreclosure sale. The District Court, Devine, Chief Judge, held that: (1) mortgagee was entitled to deficiency judgment against mortgagor; (2) mortgagor's failure to either file new lawsuit or notice of continuance against FDIC did not divest mortgagor of his right to pursue third-party claim; and (3) mortgagor's third-party action was not barred by *D'Oench* doctrine or its statutory counterpart.

So ordered.

West Headnotes (4)

[1] **Mortgages** Right to Deficiency Judgment and Grounds Therefor in General

Mortgagee was entitled to deficiency judgment against mortgagors where mortgagors executed mortgages on two parcels of real property in favor of mortgagee and received funds in return, mortgagors ceased payments of principal and interest due under mortgages, and mortgagee sold mortgaged properties at two separate sales, receiving amounts less than balance of principal and interest due under mortgages.

Cases that cite this headnote

[2] **Banks and Banking** Powers, Functions and Dealings in General

Mortgagor's failure to file new lawsuit against Federal Deposit Insurance Corporation (FDIC) or file notice of continuance after FDIC disallowed administrative claims brought by mortgagor in connection with foreclosure sales conducted by insolvent lending institution did not render final FDIC's claim disallowance; no affirmative action is necessary to continue suit commenced before appointment of receiver or to keep suit alive, and thus mortgagor's claim remained alive during administrative process. Federal Deposit Insurance Act, § 2[11](d)(6), 12 U.S.C.A. § 1821(d)(6).

11 Cases that cite this headnote

[3] **Banks and Banking** Powers, Functions and Dealings in General

In order for Federal Deposit Insurance Corporation (FDIC) to cloak itself with protection of *D'Oench* doctrine or its statutory counterpart, opposing party must be trying to rely on "agreement" to defeat FDIC's interest in an asset. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

3 Cases that cite this headnote

[4] **Banks and Banking** ⇨ Powers, Functions and Dealings in General

Mortgagor's third-party action against Federal Deposit Insurance Corporation (FDIC) for abuse of process, breach of implied covenant of good faith and fair dealing, failure to conduct commercially reasonable foreclosure sale, and breach of fiduciary duty with respect to foreclosure sale were not barred under *D'Oench* doctrine or its statutory counterpart; mortgagor's claims were not based upon any agreement between mortgagor and insolvent mortgagee, but rather were based upon mortgagee's state law obligations. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

6 Cases that cite this headnote

Attorneys and Law Firms

***74** Jonathan S. Springer, Portsmouth, N.H., for plaintiff and FDIC.

Stephen L. Tober, Portsmouth, N.H., for defendant Callahan.

ORDER

DEVINE, Chief Judge.

This order addresses motions for summary judgment filed by plaintiff New Bank of New England (NBNE) and third-party defendant Federal Deposit Insurance Corporation (FDIC). For the reasons that follow, NBNE's motion is granted, and FDIC's is denied.

Factual Background[2]

On July 10, 1987, defendants Callahan and Kopka executed a promissory note to Union National Bank[3] in the amount of $85,000. This note was secured by a first ***75** mortgage on a .35 acre property located on Fuller Acres Street in Hampton, New Hampshire. As here relevant, the note obligated Callahan and Kopka to make monthly interest payments to the bank on the outstanding principal each month, beginning August 10, 1987. The entire principal and interest balance was originally due on May 10, 1988, and later extended to August 10, 1988.

The last payment received on the note was on August 28, 1989. This payment, however, did not extinguish the debt. Plaintiff made unsuccessful demands on Callahan and Kopka for payment of the outstanding principal balance and interest. On September 14, 1990, plaintiff foreclosed on the note and mortgage. The Fuller Acres property was sold at foreclosure for $38,500, leaving Kopka and Callahan owing a deficiency of $55,132.22. With the addition of costs and other items, plaintiff claims a total debt of $65,969.46, as of February 28, 1992.

On February 7, 1989, defendant Callahan executed a second promissory note in favor of Bank of New England, N.A.,[4] in the amount of $985,000. This note was secured by a first mortgage on property located on Ocean Boulevard in Hampton, New Hampshire, and obligated Callahan to make monthly payments to the bank beginning March 3, 1989. The entire principal and accrued interest was due to be paid by November 3, 1989. Callahan's last payment to the bank was in November 1989, but an outstanding balance remained, for which the bank made several unsuccessful demands.

The bank subsequently foreclosed, and on September 14, 1990, it sold the Ocean Boulevard property for $235,000. As of February 28, 1992, Callahan's total deficiency stood at $967,479.10.

In April 1990, plaintiff filed suit in Rockingham County (New Hampshire) Superior Court to collect the above-described deficiencies. Subsequently, Callahan filed a third-party action,[5] alleging abuse of process, breach of an implied covenant of good faith and fair dealing, failure to conduct a commercially reasonable foreclosure sale, and breach of fiduciary duty. NBNE now seeks summary judgment on its affirmative claims, and FDIC seeks the same against Callahan in his third-party action.

Discussion

The role of summary judgment is " 'to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Mesnick v. General Elec. Co.,* 950 F.2d 816, 822 (1st Cir.1991), *cert. denied,* 504 U.S. 985, 112 S.Ct. 2965, 119 L.Ed.2d 586 (1992) (quoting *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 50 (1st Cir.1990)). The burden is upon the moving party to " 'show that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law,' " *id.* (quoting 56(c), Fed.R.Civ.P.), and the court must view the entire record in the light most favorable to the nonmovant, " 'indulging all reasonable inferences in that party's favor,' " *id.* (quoting *Griggs–Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir.1990)). However, once the moving party has made a properly supported motion for summary judgment, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (citing Rule 56(e), Fed.R.Civ.P.); *see also Mesnick, supra,* 950 F.2d at 822 ("Not every discrepancy in the proof is enough to forestall a properly supported motion for summary judgment; the disagreement must relate to some genuine issue of material fact.").

[1] With respect to NBNE's claims, defendants have not disputed any of the relevant material facts asserted by plaintiff, i.e., executing the notes and receiving the funds, *see* Answer to Plaintiff's Petition for Injunction, Monetary Damages and Other Relief ¶¶ 18 and 25. Most importantly, defendants have presented nothing to rebut plaintiff's claim of an existing deficiency. ***76** Defendants may not simply rest on denial of plaintiff's pleadings. Rule 56(e), Fed.R.Civ.P. As no genuine issue of material fact remains with respect to defendants' respective liabilities on the two notes in question, plaintiff NBNE's motion for summary judgment is granted.

Third-party defendant FDIC asserts two different grounds in support of its motion. The court finds neither persuasive. A brief discussion follows.

[2] FDIC first argues that Callahan's failure to comply with 12 U.S.C. § 1821(d)(6)[6] bars the third-party action. The argument goes as follows. FDIC disallowed Callahan's administrative claim on June 4, 1991. *See BNE v. Callahan,* 758 F.Supp. 61 (D.N.H.1991). Following the disallowance, Callahan

> has not filed a new lawsuit, [and] has failed to 'continue' the instant action by filing a Notice of Continuance or by taking any other affirmative action with this Court and has failed to take any other action which would keep his counterclaim alive. The 60–day deadline for taking such action expired on August 4, 1991.
> Memorandum in Support of Motion for Summary Judgment at 10. Thus, FDIC argues, the claim disallowance is final, and Callahan lacks any further right to pursue his claim. The court disagrees.

Neither the statute nor relevant case law—the latter of which FDIC has failed to provide—indicates that any "affirmative action" is necessary to "continue" an action [7] commenced before the appointment of a receiver, or to keep the action "alive". In the court's opinion, Callahan's claim remained "alive" during the administrative process. *See also Marquis, supra,* 965 F.2d at 1154 (cases "suspended" during administrative procedure can simply be resumed). Accordingly, the court declines to rely on 12 U.S.C. § 1821(d)(6) as grounds to grant FDIC's motion.

FDIC's second argument is premised on the now-familiar doctrine set forth in *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), which, along with its statutory counterpart, 12 U.S.C. § 1823(e), [8] prohibits a party from *77 relying on any unwritten agreement to defeat a claim by, or assert a claim against, FDIC. *See, e.g., Timberland Design, Inc. v. First Service Bank for Savings,* 932 F.2d 46 (1st Cir.1991).

[3] In order for FDIC to cloak itself with the protection of *D'Oench* or section 1823(e), however, the other party must be trying to rely on an "agreement" to defeat FDIC's interest in an asset. *See Bascom v. FDIC,* 777 F.Supp. 123, 126 (D.N.H.1991) (mechanic's lienholder's suit to challenge value obtained at foreclosure not a suit based on an agreement; therefore, neither *D'Oench* nor section 1823(e) bars claim).

[4] In the case at bar, Callahan's suit alleges abuse of process for the "timing and circumstance" of the suit against him; breach of an implied covenant of good faith and fair dealing; failure to conduct a commercially reasonable sale; and breach of fiduciary duty with respect to the foreclosure sale. FDIC here argues for dismissal because Callahan has described his claim as a "lender liability action", and in *Timberland,* also a lender liability action, similar claims were dismissed pursuant to *D'Oench.* This argument, however, overlooks *Timberland* 's reaffirmance of the "agreement" requirement. *See id.* at 50 ("The district court correctly held that *D'Oench* bars affirmative claims, whether cloaked in terms of contract or tort, as long as those claims arise out of an alleged secret agreement.").

Here, the court can find no such agreement. FDIC argues, for example, that the abuse of process claim, based on the timing of the state court suit, "can be fairly read to incorporate an agreement on the part of the bank not to sue at a particular time or in a particular manner," and such an unwritten agreement is barred by *D'Oench.* The court disagrees. The obligation to refrain from abuse of process is one that arises from state law. *Amabello v. Colonial Motors,* 117 N.H. 556, 559, 374 A.2d 1182, 1184 (D.N.H.1977). Such legal obligations are presumed to be part of every contract. *Sauriolle v. O'Gorman,* 86 N.H. 39, 163 A. 717 (1932); *Boston Ice Co. v. Boston & Maine R.R.,* 77 N.H. 6, 86 A. 356 (1913). *See generally* 17A Am.Jur.2d § 381 (1991). The court here finds that each of the four counts of the third-party complaint fits the same mold—allegations based on the bank's legal obligations—rather than purported agreements between the parties. Having so found, the court rules that the third-party claims do not rely on "agreements" within the meaning of *D'Oench* on section 1823(e), and therefore FDIC's motion for summary judgment on those grounds must be denied. [9]

Conclusion

For the reasons herein stated, NBNE's motion for summary judgment on its claims against Kopka and Callahan is granted; FDIC's motion for summary judgment on Callahan's third-party complaint is denied.

SO ORDERED.

Footnotes

1 Although the instant motions refer to Callahan as the "plaintiff in counterclaim" and FDIC as "defendant in counterclaim", Callahan's action against FDIC is actually a third-party action and will be hereinafter referred to as such.

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

2 Because neither Callahan nor Kopka has filed objection to the instant motions, both have waived the right to controvert the facts asserted by the plaintiff and the third-party defendant in the motions and accompanying materials. *Jaroma v. Massey,* 873 F.2d 17 (1st Cir.1989). The facts herein cited, therefore, are culled from those sources.

3 Via machinations not here relevant, NBNE has succeeded to the interests of Union National Bank and Bank of New England, N.A. For convenience, the court will describe the bank parties as plaintiff.

4 *See supra* note 2.

5 Defendant Kopka has filed neither an answer nor an appearance in this matter.

6 12 U.S.C. § 1821(d)(6) provides:

(6) Provision for agency review or judicial determination of claims

(A) In general

Before the end of the 60–day period beginning on the earlier of—

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations

If any claimant fails to—

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60–day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

7 Recent case law indicates that Callahan need not have filed a new action. *Marquis v. FDIC,* 965 F.2d 1148 (1st Cir.1992).

8 12 U.S.C. § 1823(e) provides:

(e) Agreements against interests of Corporation

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

9 The court notes that FDIC did not address the substance of the counterclaim within the instant motion. As such, the court did not so address the claims.

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.