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No. 71114-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BLACK DIAMOND DEVELOPMENT COMPANY, LLC, a Washington Limited Liability Corporation; LEE WITTENBERG, individually and on behalf of his marital community; WAYNE COURTNEY, individually and on behalf of his martial community,

Appellants,

v.

UNION BANK, N.A.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LORI SMITH

REPLY BRIEF OF APPELLANTS BLACK DIAMOND DEVELOPMENT COMPANY, LLC; LEE WITTENBERG, individually and on behalf of his marital community; AND WAYNE COURTNEY, individually and on behalf of his marital community

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OLES MORRISON RINKER & BAKER, LLP

J. Craig Rusk
WSBA No. 15872
Brandon D. Young
WSBA No. 44422

701 Pike Street, Suite 1700
Seattle, WA 98101
(206) 623-3427

Attorneys for BLACK DIAMOND DEVELOPMENT COMPANY, LLC; LEE WITTENBERG, individually and on behalf of his marital community; AND WAYNE COURTNEY, individually and on behalf of his marital community

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. APPELLANTS WERE ENTITLED TO SEEK REIMBURSEMENT FOR OVERCHARGES ON DEFAULT. 2

1. Union Bank was "on notice" of its overcharges. 3

2. Union Bank ignores the prevailing law. 6

3. This is not a case involving a motion to amend. 7

B. UNION BANK SHOULD BE ESTOPPED FROM THE COLLECTION OF DEFAULT INTEREST FROM APPELLANTS. 8

C. UNION BANK'S DEFENSE TO PERMANENT FINANCING ILLUSTRATES WHY SUMMARY JUDGMENT WAS IN ERROR. 10

1. 12 U.S.C. § 1823(e) does not apply. 10

2. RCW 19.36.110 does not apply. 11

3. Union Bank cannot unilaterally determine what constitutes "material terms." 12

4. Response to Union Bank's one-sided interpretation of the contract documents. 13

5. Appellants' chart of terms supports reversal. 18

D. UNION BANK PROVES MORE DISCOVERY WAS NEEDED. 19

E. THE APPEAL WAS TIMELY. 20

1. Union Bank mischaracterizes the procedural history leading to this appeal. 20

2. Union Bank ignores CR 54(b) and RAP 2.2(d). 21

3. The cases cited by Union Bank are inapplicable. 23

4. Union Bank misinterprets RAP 5.2(e). 23

5. Complete dismissal is an overbroad remedy. 24

F. ATTORNEY FEES ON APPEAL. 25

III. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Barry v. USAA,
98 Wn. App. 199, 989 P.2d 1172 (1999) 24

Berg v. Hudesman,
115 Wn.2d 657, 801 P.2d 222 (1990) 14

Boyd v. Davis,
127 Wn. 2d 256, 897 P.2d 1239 (1995) 25

Bushong v. Wilsback,
151 Wn. App. 373, 213 P.3d 42 (2009) 23

Carrara, LLC v. Ron & E Enter.,
137 Wn. App. 822, 155 P.3d 161 (2007) 23

Champagne v. Thurston Cnty.,
163 Wn.2d 69, 178 P.3d 936 (2008) 6

Doerflinger v. New York Life Ins. Co.,
88 Wn.2d 878, 567 P.2d 230 (1977) 22

Doyle v. Planned Parenthood of Seattle-King Cnty., Inc.,
31 Wn. App. 126, 639 P.2d 240 (1982) 7

Greaves v. Med. Imaging Sys., Inc.,
124 Wn.2d 389, 879 P.2d 276 (1994) 10

Haselwood v. Bremerton Ice Arena, Inc.,
137 Wn. App. 872, 155 P.3d 952 (2007) 7

Hedges v. Hurd,
47 Wn.2d 683, 289 P.2d 706 (1955) 13

Henry v. Lind,
76 Wn.2d 199, 455 P.2d 927 (1969) 16

Herzog Aluminum, Inc. v. Gen. Am. Window Corp.,
39 Wn. App. 188, 692 P.2d 867 (1984) 25

Hollis v. Garwell, Inc.,
137 Wn.2d 683, 974 P.2d 886 (1999) 19

Howell v. Continental Credit Corp.,
655 F.2d 743 (7th Cir. 1981) 11

Hubbell v. Ward,
40 Wn. 2d 779, 246 P.2d 468 (1952) 13

Huff v. Budbill,
141 Wn.2d 1, 1 P.3d 1138 (2000)... 7

Huston v. Washington Wood & Coal Co.,
4 Wn.2d 449, 103 P.2d 1095 (1940)... 9

In re Beitzell & Co., Inc.,
163 B.R. 637, 649 (1993)... 10

Keystone Land & Development Co. v. Xerox Corp.,
152 Wn.2d 171, 94 P.3d 945 (2004)..17

Marks v. Benson,
62 Wn. App. 178, 813 P.2d 180 (1991)...20

Matter of Estates of Wahl,
99 Wn. 2d 828, 664 P.2d 1250 (1983)...14

Mudarri v. State,
147 Wn. App. 590, 196 P.3d 153 (2008) 10

Parry v. Windermere Real Estate/E., Inc.
102 Wn. App. 920, 10 P.3d 506 (2000)... 8

Pepper v. King Cnty.,
61 Wn. App. 339, 810 P.2d 527 (1991).. 22

Schoening v. Grays Harbor Community Hosp.,
40 Wn. App. 331, 698 P.2d 593 (1985) 6, 7

Schweiter v. Halsey,
57 Wn.2d 707, 359 P.2d 821 (1961) 14

Setterlund, v. Firestone,
104 Wn.2d 24, 700 P.2d 745 (1985) 13

Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.,
173 Wn.2d 829, 271 P.3d 850 (2012)..17

State v. Ashbaugh,
90 Wn.2d 432, 583 P.2d 1206 (1978).. 25

Valley Garage Inc. v. Nyseth,
4 Wn. App. 316, 481 P.2d 17 (1971)..13

Wm. Dickson Co. v. Pierce Cnty.,
128 Wn. App. 488, 116 P.3d 409 (2005) 14

Statutes

12 U.S.C. § 1823(e) 10, 11, 15, 19

RCW 19.36.100.. 11

RCW 19.36.110.. 11

RCW 4.84.330.. 25

Rules

CR 1.. 24

CR 15(a) 7

CR 54(b) ....passim

CR 8... 6

KCLR 4.2(a)(2)... 8

RAP 1.2(a).. 24

RAP 12.1(b).. 25

RAP 18.1 25

RAP 2.2(d) 2, 21, 22

RAP 2.2(e) 23

RAP 5.2(a) 24

RAP 5.2(e) 23, 25

Treatises

M. Budnitz, *et. al.*,
THE LAW OF LENDER LIABILITY, ¶ 1.03[3] (2014) 12, 18

RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979) 13, 15

I. INTRODUCTION

Appellants seek damages for (1) improper charges on default and (2) the failure to extend permanent financing. For the first issue, the Court should grant this appeal because Union Bank has not established – and cannot establish – any meaningful basis to deny Appellants' recovery for overcharges on default. For the second issue, the Court should grant this appeal because Union Bank's defense is predicated on *factual* arguments concluding that the trial court properly dismissed this case as a matter of *law*.

Fundamentally, Union Bank conflates a case concerning the interpretation of contract documents (written and approved by Frontier/Union Bank) for one premised on some type of unwritten agreement. Once this distinction is made, it is abundantly clear that the law cited by Union Bank seeking to undermine the enforceability of the parties' agreement does not apply. This leaves Union Bank to argue in defense of the trial court's erroneous decision that there was no 'meeting of the minds' – a position unsupported by any case law and premised on the declaration of a bank representative who Union Bank now admits has no personal knowledge of contract formation.

Before addressing the merits of the trial court's rulings, Union Bank challenges the timeliness of this appeal. It contends that the trial court's October 1, 2013 order constituted "final judgment." (CP 1214-15.) Union Bank ignores that at the time the trial court rendered its October 1, 2013 order, there were still pending claims (including those raised by Union Bank) and the rights of *all* the parties to the litigation remained unresolved. Orders determining fewer than all the issues presented in a case are "final" only if they comply with the requirements of CR 54(b) and RAP 2.2(d).

These rules require that when there is more than one claim for relief, or more than one party against whom relief is sought, the trial court must make an "express determination," supported by findings, "that there is no just reason for delay," and that the trial court is entering a final judgment. The only order that meets CR 54(b) and RAP 2.2(d) is an October 31, 2013 order borrowing verbatim from these rules, and finding: "[t]here being no just reason for delay and all claims against all parties having been adjudicated or voluntarily dismissed, judgment as aforesaid shall be entered forthwith." (CP 1250.) As a result, the November 5, 2013 notice of appeal was timely.

II. ARGUMENT

A. Appellants were entitled to seek reimbursement for overcharges on default.

Union Bank failed to credit Appellants for multiple loan payments, charged fees related to financing it later refused to provide, and assessed default interest on incorrect amounts. (*See* App. Br. at 19-23.) This issue was raised repeatedly, but the trial court barred recovery without any explanation or basis in law or fact.

1. Union Bank was "on notice" of its overcharges.

Union Bank's response avers that "Union Bank was not put on notice" of Appellants' claim to recover improper amounts charged on default. (UB Br. at 44.) The Court will rarely see a case where a party was put "on notice" as frequently as Union Bank was here.

To begin, Union Bank misstates the genesis of Appellants' claims. The impetus for this lawsuit was Union Bank's Notice of Default dated June 11, 2012. (*See* CP 6 at ¶ 22; CP 91-94). The Complaint explains that the Notice of Default set forth the amount Union Bank claimed to be "due and owing," including default interest, environmental and appraisal costs (for a permanent loan), and "various fees and costs that are asserted but not explained." (CP 6 at ¶ 23.) After detailing these issues, the Complaint states:

> Plaintiffs believe that Defendant has improperly calculated the interest, failed to properly apply payments to principal, and is seeking repayment of improper amounts in the appraisal and environmental review categories . . . .

(CP 6 at ¶ 24.) (emphasis added.) (*See also* CP 6 at ¶ 25.)

This claim was not added at the last minute nor arise after the lawsuit was filed. Union Bank misdirects the court by focusing on some portions of the Complaint to the exclusion of others. (*Compare* CP 6 at ¶¶ 22-25 *with* UB Br. at 42.) Meanwhile, it never addresses the impact of the allegations plainly stated in Paragraphs 22-24.

Following the Complaint, this issue was raised in correspondence, discovery, and pleadings. Only later did Union Bank argue it was "not on notice." Below is a brief timeline:

- On September 7, 2012, Appellants moved for an accounting of the amounts charged on default. The motion identifies the defects in the amounts claimed by Union Bank and points to unsubstantiated fees. (*See* CP 16.) Union Bank never responded.

- On October 7, 2012, Appellants explained, "[o]ur view is that the Bank has received that money and it should be attributed to Black Diamond's account." (CP 1097-98.)[1]

- On October 30, 2012, Appellants advised "[we] do not agree that the bank has properly calculated the amount that is owing for many reasons, which is <u>the basis of the lawsuit</u>." (CP 1008).

- On November 28, 2012, Appellants served discovery for *each* item charged on default. (CP 1010-23.) Union Bank never objected due to relevance (as it would later do with other discovery).

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[1] In a letter to Union Bank prior to the lawsuit being filed, Plaintiffs explained that it viewed Union Bank's failure to substantiate the amounts charged on default "as a <u>separate breach</u> of the bank's obligation," apart from permanent financing. (*See* CP 1001) (emphasis added.)

- In an interrogatory sent April 1, 2013, Union Bank asked Black Diamond to "state the factual basis for the allegations contained in paragraph 24 [of the Complaint]" including a calculation for the "proper" amount on default. (CP 1029.) (emphasis added.) Significantly, Union Bank's brief ignores its own discovery request.

- On April 24, 2013, Appellants noted the difficulty of responding given the Bank's failure to produce "invoice documents substantiating the amounts assessed." (CP 165.)

- In June 2013, Appellants were forced to bring a motion to compel. The resulting brief explained:

> Black Diamond believes [the loan pay-off] amount included excessive charges for items such as interest, fees and attorney costs, along with the improper assessment of certain costs. Black Diamond seeks reimbursement for these excessive costs in addition to the damages it incurred because of the failure to extend permanent financing.

(CP 112:16-22.) (emphasis added.)

- On summary judgment, Appellants noted "Union Bank compounded [its] error by assessing incorrect amounts on default and failing to give full credit for amounts paid. This issue is not addressed in Union Bank's motion." (CP 706) (emphasis added). Lee Wittenberg continued: "Black Diamond challenges the accuracy of Union Bank's calculation of amounts paid on the loan and its application of payments to interest and principal." (CP 736 at ¶ 13.)

2. Union Bank ignores the prevailing law.

After disregarding the procedural history, Union Bank never addresses CR 8 and two cases cited in Appellants' opening brief: *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 178 P.3d 936 (2008) and *Schoening v. Grays Harbor Community Hosp.*, 40 Wn. App. 331, 698 P.2d 593 (1985). The reasoning in these cases is compelling.

In *Champagne*, the Supreme Court considered whether two statutory claims not specifically pled in a complaint were preserved under Washington's "fair notice" pleading requirements. 163 Wn. 2d at 84. Defendants argued that the failure to directly allege the claims meant they were "abandoned." *Id.* Plaintiff argued "the totality of his complaint meets the notice pleading rules." *Id.* at 85. The court agreed, noting that plaintiff's claims, while vague, did not "transgress the liberal grounds of the notice pleading standard." *Id.* at 86.

Likewise, in *Schoening*, the Court of Appeals considered whether a complaint put a hospital on notice for a negligence claim. *See* 40 Wn. App. at 337. The court acknowledged that while a single allegation alluding to negligence was "not a vision of precise pleading it seems sufficient to put defendants on notice." *Id.* The court explained, "[i]t is not necessary for a plaintiff to plead facts 'constituting a cause of action' . . . . [e]ven if plaintiff's theory was not made clear in their pleading, it certainly was made clear before argument on defendants' motion for summary judgment." *Id.*

Here, not only was Appellants' claim expressly pled, it was "certainly made clear" in correspondence, discovery, and pleadings "before argument on defendants' motion for summary judgment."

3. This is not a case involving a motion to amend.

In addition to ignoring critical facts and law, Union Bank relies on inapposite cases dealing with the amendment of claims under CR 15(a). Union Bank first cites to *Doyle v. Planned Parenthood of Seattle-King Cnty., Inc.*, 31 Wn. App. 126, 130-31 (1982), where the plaintiff tried to add a products liability claim not recognized under Washington law. The Bank also cites *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872 (2007), where a plaintiff alleged a claim under Washington Public Works Act, even though the case involved a private project. *Id.* at 889-90.

Doyle and *Haselwood* illustrate why the trial court erred. Both cases concern whether a trial court abused its discretion[2] to deny a motion to amend. In both, the amendments were legally barred. There was no pending motion to amend here. Appellants'

[2] Union Bank argues that the Court should apply an abuse of discretion standard, but ignores that a motion for clarification can be reviewed de novo. *See Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). In any event, even under an abuse of discretion standard, reversal is appropriate: Appellants' claim came well before the December 30, 2013 trial date, it is legally viable, and Union Bank never demonstrated prejudice, especially when it investigated overcharges in discovery.

overcharges claim is not legally futile. Neither case deals with a situation where the claim at issue was investigated in discovery.

Citing to KCLR 4.2(a)(2) and *Parry v. Windermere Real Estate/E., Inc.* 102 Wn. App. 920 (2000), Union Bank goes on to argue, "if plaintiffs intended to assert additional claims, they were required to amend their Complaint by January 17, 2013." (UB Br. at 48.) The Bank never mentions that *Parry* explains "KCLR 4.2 is a case-management tool, not a substantive pleading." *Id.* at 512.

Parry also explains that KCLR 4.2(a)(2) provides "no additional claims or defenses may be raised after the date designated in the case schedule . . . ." *Id.* at 509. While Union Bank relies on KCLR 4.2(a)(2) to bar Appellants' claim, the Bank itself violated this rule by filing it Answer and Counterclaim on June 13, 2013, five months after the January 17, 2013 deadline. (CP 101-107.) Union Bank does not argue that its claims and defenses are somehow barred. Such a position would be inconsistent with *Parry* and serves to illustrate Union Bank's self-serving approach to this appeal.

B. Union Bank should be estopped from the collection of default interest from Appellants.

Borrowing verbatim from its motion for summary judgment, Union Bank argues "[p]laintiffs' estoppel claim tries to force Union

Bank to extend permanent financing." (UB Br. at 40.) Appellants do not bring an estoppel claim to "force" permanent financing.

Appellants' made payments along permanent financing terms for years. (CP 717-18, 735-36.) Union Bank accepted these payments, never claimed default, or denied permanent financing. (*Id.*) Union Bank eventually issued a notice of default, but still continued to accept payments before denying permanent financing. (*Id.*) These events created a harsh and inequitable result: Union Bank's delay not only prevented Appellants from securing replacement financing, it allowed the Bank to profit from default interest at an excessive rate charged on an inflated principal amount.

Appellants pled estoppel to prevent Union Bank from excessive compensation based on its prior conduct. This is akin to *Huston v. Washington Wood & Coal Co.*, 4 Wn.2d 449 (1940). In *Huston*, an employee was repeatedly paid while ignored a "union wage" contract provision which entitled him to more money. *Id.* at 453. His employer denied entitlement after the employee accepted payments for "more than two years" without objection. *Id.* at 451.

After benefitting from prior payments "without protest," the Supreme Court found "[the employee's] conduct estopped himself for claiming compensation under that contract." *Id.* (citations omitted).

This is distinguishable from the cases Union Bank relies on. *See Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 879 P.2d 276 (1994) (rejecting estoppel where it would render the statute of frauds void); *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008) (rejecting estoppel to recover damages in declaratory relief action).

C. Union Bank's defense to permanent financing illustrates why summary judgment was in error.

1. 12 U.S.C. § 1823(e) does not apply.

Union Bank argues 12 U.S.C. § 1823(e) bars Appellants' claim for permanent financing, yet it admits "[t]he only agreements that arguably meet all of the 12 U.S.C. § 1823(e) criteria are the 2005 Loan Agreement and 2007 change-in-terms agreements." (UB Br. 25.) Given this admission, it is hard to understand how this statute applies, particularly on summary judgment where reasonable inferences should have been construed in favor of Appellants.

According to case law interpreting 12 U.S.C. § 1823(e), "when claims are based on provisions in the loan documents themselves, such claims are not barred." *In re Beitzell & Co., Inc.*, 163 B.R. 637, 649 (1993). Here, permanent financing is "based on provisions of the loan documents themselves." It was reduced to writing in the Construction Loan and Commitment Letter, approved by Frontier Bank, and preserved in the 2007 Change-in-Terms Agreements.

A party may not selectively enforce obligations in an agreement while relying on 12 U.S.C. § 1823(e) to bar others. *See Howell v. Continental Credit Corp.*, 655 F.2d 743, 747-48 (7th Cir. 1981). Union Bank tries to enforce default while denying an obligation for permanent financing, even though the lack of permanent financing was the alleged reason for default. Union Bank impermissibly relies on 12 U.S.C. § 1823(e) as a shield and sword.

2. RCW 19.36.110 does not apply.

Union Bank cites RCW 19.36.110 to contend "the 2005 Loan Agreement and two 2007 change-in-terms agreements must be interpreted solely on the basis of the plain language within those agreements." (UB Br. at 21.) Appellants are not enforcing an oral agreement – the permanent financing obligation was repeatedly reduced to writing. (*See e.g.* CP 740-41, 747-49, 761.)

As important, while Union Bank focuses on RCW 19.36.110's applicability to a "credit agreement," it overlooks that "credit agreement" is a statutorily defined term meaning "an agreement, promise, or <u>commitment to lend money</u>, to otherwise extend credit." *See* RCW 19.36.100. This would include the Commitment Letter.

Union Bank also argues RCW 19.36.110 bars extrinsic evidence, even if needed as an aid to interpret terms. How RCW 19.36.110 supersedes established case law permitting extrinsic evidence to clarify terms is never made clear. Union Bank would prevent courts and juries from ever deciding the meaning of terms.

3. Union Bank cannot unilaterally determine what constitutes "material terms."

Union Bank fails to provide a single case defining the "material terms" necessary to enforce a construction financing commitment. It argues *Farm Crop Energy Inc. v. Old Nat. Bank of Wash.*, 109 Wn.2d 923, 750 P.2d 231 (1988), the only Washington case actually considering the enforceability of a commitment for construction financing, "has no bearing on this appeal." Appellants do not argue *Farm Crop* is dispositive, but the case involves a situation where a commitment containing an (1) interest rate, (2) amortization, (3) collateral, (4) duration, and (5) the loan amount was enough to allow a breach action based on that commitment. *Id.* at 934-35. This is consistent with commentary (ignored by Union Bank) affirming:

> Generally, the essential elements of a contract to lend money include [1] the amount and [2] term of the loan, [3] the interest rate, [4] the method of repayment, and [5] any required collateral. Even if the parties have not expressly stated one of these essential terms, the court may fill the gap by reference to the parties' prior dealings or to commercial practice generally.

M. Budnitz, *et. al.*, THE LAW OF LENDER LIABILITY, ¶ 1.03[3] (Definiteness of All Material Terms) (2014) (citations omitted).

Union Bank relies on cases involving real estate purchase agreements where a plaintiff seeks specific performance. *See Hubbell* *v. Ward*, 40 Wn. 2d 779 (1952); *Setterlund, v. Firestone*, 104 Wn.2d 24 (1985). There is no real estate purchase agreement here, or claim for specific performance. These are important differences. Not only do real estate purchase agreements have little overlap with the elements of an agreement to lend money,[3] in Washington, *greater* certainty in terms is required in a specific performance action versus a damages action. *See Hedges v. Hurd*, 47 Wn.2d 683, 688-89 (1955); *Valley Garage Inc. v. Nyseth*, 4 Wn. App. 316, 319 (1971).

The trial court should have decided whether the terms at issue were reasonably certain for determining the existence of a breach and an appropriate remedy. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979). Regardless of whether terms are actually "missing," Union Bank never explains how the terms it relies on were necessary to determine breach of its permanent financing obligation.

4. Response to Union Bank's one-sided interpretation of the contract documents.

In Washington, "summary judgment is proper if the written contract, viewed in light of the parties' objective manifestations, has <u>only one reasonable meaning</u>." *Wm. Dickson Co. v. Pierce Cnty.*,

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[3] For example, "material" terms in *Hubbell* include: (a) rules for transferring title; (b) forfeiture procedure; (c) allocation of risk for property damage; (d) insurance; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water/utilities; (f) restrictions on: (i) capital improvements, (ii) liens, (iii) removal of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions. *See* 40 Wn.2d at 782-83. These terms have no relevance here.

128 Wn. App. 488, 494, 116 P.3d 409 (2005) (citations omitted) (emphasis added). Union Bank failed to make this showing.

First, Union Bank tries to narrow this case by analyzing contemporaneously executed documents separately as opposed to in context with each other. (*See* UB Br. at 26.) The law is clear: the loan documents must be read together.[4] The language found in those documents demands the same. (*See e.g.* App. Br. at 10, 12, 14-15).

Second, without citation, Union Bank argues "Frontier Bank would not even consider entering into an agreement for permanent financing until Building C had been built and the aggregate collected rents of Building B and C were at least $381,000." (UB Br. at 26.) There is no provision requiring the construction of Building "C."[5] Black Diamond met the $381,000 rent threshold on Building "B" alone. (CP 733 at ¶ 4.) At best, this provision is ambiguous and should have been construed against the drafter, Union Bank.[6]

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[4] *See Matter of Estates of Wahl*, 99 Wn. 2d 828, 664 P.2d 1250 (1983).

[5] Originally, Black Diamond only asked Frontier Bank to finance building "B." (CP 733 at ¶ 4.) Union Bank prevented the construction of building "C," (*id.*) so it cannot now use this as a basis to argue that the conditions precedent to permanent financing were not met. *See Schweiter v. Halsey*, 57 Wn.2d 707, 711-12, 359 P.2d 821 (1961) (finding if an injured party performed "as far as he could by his own acts," and the other party "voluntarily and causelessly refused to proceed," then that party may not benefit from his own breach). Once again, Union Bank points to an issue where further discovery was necessary.

[6] *See Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990).

Third, even though Union Bank acknowledges the Change-in-Terms Agreements "arguably" meet the "criteria" of 12 U.S.C. § 1823(e), it argues these agreements cannot be imported to supply missing terms. (UB Br. at 27.) Predictably, Union Bank continues to ask the Court to consider the contract documents in a vacuum, even though it took a different approach when holding Appellants in default. *See* CP 97 (August 2012 "Notice of Default" relying on Deed of Trust, Promissory Note, and 2007 agreements). In any event, the court need only look to the 2005 agreement. *See infra*.

Fourth, Union Bank argues there is no obligation after 2010. This argument identifies Union Bank's breach and illustrates how it would have been possible to decide this case based on RESTATEMENT (SECOND) OF CONTRACTS § 33. Appellants contracted for a long term "take out" loan on a ten-year term at specified interest rates for an amount certain. (CP 747-49, 761, 770, 784, 791.) Frontier/Union Bank agreed, but when called upon, never followed through.

Fifth, Frontier Bank confirmed it was "willing to stand by our original commitment for permanent financing." (CP 761.) It then set forth permanent loan terms *identical* to those provided in the approved Commitment Letter (CP 747-48, 770). No one questioned whether there was an enforceable obligation. This interpretation should be afforded great, if not controlling weight.[7]

Sixth, Union Bank contends "the commitment letter is not a fully executed agreement" because it is signed by one guarantor, Lee Wittenberg. (UB Br. at 28.) The permanent financing agreement was between Frontier Bank and Black Diamond, not the guarantors. (*See* CP 747.) Mr. Wittenberg is a "managing member" of Black Diamond. (CP 732.) There is no support for the position that *every* member of Black Diamond had to sign the Commitment Letter. Characteristically, Union Bank ignores this issue to enforce the default provisions arising from the short term loan specified in the Commitment Letter, but argues a signature is relevant to bar permanent financing. Union Bank cannot have it both ways.

Seventh, according to Union Bank, the Commitment Letter is an "agreement to agree" based on language providing:

> When all conditions governing a roll over loan have been met, Frontier Bank shall have the exclusive right to place the permanent financing . . . for a maximum period of three months at terms and conditions that are acceptable to Borrower and Lender.

(CP 747.) (emphasis added.) As the underlined text indicates, the Commitment Letter *presupposes the existence of obligation* for "the

[7] *Henry v. Lind*, 76 Wn.2d 199, 204-05, 455 P.2d 927 (1969) (stating "where a contract is unclear and ambiguous, the interpretation placed upon it by the parties to it is entitled to great weight and may, in some cases, be of controlling influence").

permanent financing." Once the "roll over" conditions were met, Frontier Bank could renegotiate during a three-month window. To find the existence of an "exclusive right" to decide permanent financing terms for a *later* date would render the permanent financing terms elsewhere in the Commitment Letter meaningless.[8]

Eighth, at best, Union Bank points to an agreement to negotiate. "In a contract to negotiate, the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time." *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 176 (2004).

Finally, Union Bank alleges the Commitment Letter "lacks most of the terms for permanent financing." (UB Br. at 30.) The letter contains all the "essential elements" stated in *Farm Crop* and relevant commentary. *See* CP 747, 761 (amount, rate, amortization, duration, collateral). Union Bank focuses on some documents while ignoring others despite a broadly defined "Loan Agreement."[9] The supposedly "missing" terms exist when the contract is read as a whole. *See* CP 50, 57 (default, cure rights, prepayment).

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[8] A contract interpretation giving effect to all provisions is favored over one which renders some provisions meaningless. *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

[9] *See* CP 751 (defining "Loan Agreement" to include any promises, agreements, commitments, or combination thereof related to the loan).

5. Appellants' chart of terms supports reversal.

Union Bank attacks Appellants' chart cataloguing every "material" term apparently at issue. Union Bank claims there is "no evidence that the parties intended terms from the short term loans to be incorporated into a loan for permanent financing." (UB Br. at 31). The Bank (like Appellants) contemplated a compressive agreement including permanent financing. (*See* CP 741-41, 747-49, 761, 770, 784, 791.) On summary judgment, this evidence should have been construed in favor of Appellants.

Furthermore, the allegedly missing terms would not have been subject to meaningful negotiation. As indicated in Appellants' opening brief, a comparison of the contract documents comprising the 2005 and 2007 agreements confirms that the "missing" prepayment terms, default terms, and cure rights were boilerplate. This is critical because Union Bank also ignores that if additional terms were needed, they could be filled in "by reference to the parties' prior dealings or to commercial practice generally." *See supra*, THE LAW OF LENDER LIABILITY, ¶ 1.03[3].

Union Bank blithely alleges that Appellants' chart fails because it cites to documents (*i.e.* Deed of Trust, Promissory Note) that "ignore the rigorous requirements of 12 U.S.C. § 1823(e) and

RCW 19.36.110." (UB Br. at 31). This position forgets Union Bank's admission that the 2005 agreement "arguably" meets 12 U.S.C. § 1823(e). (*Id.* at 25.) Likewise, no unrecorded agreement is at issue.

Simply put, while Appellants question the legal relevance of the allegedly "missing" terms in an action to determine the breach of a loan commitment where "material" terms are not defined by the courts, even if these terms were defined and construed in favor of Union Bank, the contract documents still support reversal.

D. Union Bank proves more discovery was needed.

Union Bank never addresses how the issues of fact in this case do not warrant further discovery. (*See* App. Br. at 43-45, 45-48.)[10] Instead, it relies on a hodgepodge of statutes and cases to argue <u>all</u> extrinsic evidence in this case is irrelevant so contrary to a prior court order (CP 575-78), the trial court correctly denied Appellants' motion to stay. (UB Br. at 36-37.)

Union Bank is wrong on the law. The case it relies on, *Hollis v. Garwell, Inc.*, 137 Wn.2d 683 (1999), explains that extrinsic evidence can be "used to illuminate what was written." *Id.* at 697.

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10 Union Bank simply repeats the same allegations raised in the prior discovery motions so Appellants respectfully ask the Court to consider CP 109-24; 125-86; 485-98; 557-663; 647-58; 693-99. Union Bank also argues that a court may not consider extrinsic evidence in cases involving 12 U.S.C. § 1823(e); however, this statute does not preclude parties from asserting claims based on a recorded agreement which may require evidence outside the agreement to determine its proper meaning. *See Howell, supra*, 655 F.2d at 747-48. (*See also* CP 719-20.)

Extrinsic evidence cannot be used "to show intention <u>independent</u> of the instrument," *Id.* at 695, but the evidence in this case, as well as the documents Appellants sought in discovery, were relevant to an intention <u>consistent</u> with the instrument (and Frontier/Union Bank's pre-litigation interpretation and potential bad faith). (CP 655.)

Union Bank's summary judgment relied on the declaration of a bank representative (Bill Herrera) with no personal knowledge of contract formation. (*See* App. Br. at 23-24, 45, 47). Union Bank now claims (for the first time), that "[p]ersonal knowledge of the parties' negotiations is unnecessary . . . . Mr. Herrera submitted his declaration based on his familiarity with the loan file." (UB Br. at 40, n. 10.) No law is cited. It is not enough that an affiant be "familiar;" personal knowledge is required. *Marks v. Benson*, 62 Wn. App. 178, 182 (1991). This underscores why discovery was needed, especially when predicated on no 'meeting of the minds.' Still, Appellants' motion to stay was denied five months before trial, without any deposition, and while Union Bank admittedly withheld discovery.

E. The appeal was timely.

1. Union Bank mischaracterizes the procedural history leading to this appeal.

In May 2013, Appellants asked Union Bank to remove individual plaintiffs Lee Wittenberg and Wayne Courtney from this case. Union Bank refused, and in June 2013, filed a counterclaim against Messrs. Wittenberg and Courtney claiming they were liable in this case under two separately executed commercial guaranties. (CP 101-07.) Appellants then raised several affirmative defenses in reply, including the claim that Messrs. Wittenberg and Courtney were not liable since the underlying loan obligation was satisfied in full. (CP 579-81.) The trial court ultimately held these plaintiffs/counter-defendants liable under the terms of their guaranties. Appellants challenge this finding.

Union Bank argues that following the trial court's order on reconsideration, "the only issue remaining in the lawsuit was the issue of attorneys fees." (UB Br. at 9.) This is misleading as it implies that issues of liability as to all parties were decided. Union Bank ignores that its counterclaim and Appellants' affirmative defenses were not decided until <u>after</u> the trial court's order denying reconsideration, and these issues required a decision concerning the liability of individual plaintiffs Wittenberg and Courtney. This was not considered on reconsideration. (*See* CP 1214-15.)

2. Union Bank ignores CR 54(b) and RAP 2.2(d).

Orders determining fewer than all the issues presented in a case are appealable only if they comply with the requirements of CR 54(b) and RAP 2.2(d). CR 54(b) provides that orders partially resolving the claims against parties are final "only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment." This is consistent with RAP 2.2(d) which states:

> In any case with multiple parties or multiple claims for relief . . . an appeal may be taken from a final judgment that does not dispose of all the claims . . . . but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay.

(Emphasis added.)

The trial court's August 30, 2013, October 1, 2013, and October 14, 2013 orders do not provide "express direction" that the decision is "final" as to all parties and all claims as mandated by CR 54(b) and RAP 2.2(d). (*See* CP 801-02, 1214-15, 1223-25). Without any express direction from the trial court, none of these orders were "final." *See Pepper v. King Cnty.*, 61 Wn. App. 339, 346 (1991) (no appellate jurisdiction where text of order did not find "no just reason for delay" or direct final judgment); *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 881 (1977).

Consistent with *Pepper* and *Doerflinger*, the trial court's October 31, 2013 order is the only order meeting CR 54(b) and RAP 2.2(d). Borrowing from these rules, the order states: "[t]here being no just reason for delay and all claims against all parties having been adjudicated or voluntarily dismissed, judgment as aforesaid shall be entered forthwith." (*See* CP 1250.) (emphasis added.)

3. The cases cited by Union Bank are inapplicable.

Union Bank relies on *Carrara, LLC v. Ron & E Enter.*, 137 Wn. App. 822 (2007) which involved a three-month late appeal of orders determining the amount of attorney fees and costs owed after the entry of a final judgment against all claims and parties. *Id.* at 824. Issues concerning the joint and several liability of others, CR 54(b), and RAP 2.2(d) were not discussed. Union Bank also cites to *Bushong v. Wilsback*, 151 Wn. App. 373, 376 (2009). In *Bushong*, like *Carrara*, the appeal was made after "setting the amount of the attorney fees, not the judgments entitling [the defendant] to those fees" and involves a single plaintiff and single defendant where CR 54(b) and RAP 2.2(d) are never implicated. *Id.* at 375. Neither case is controlling to the facts before the court.

4. Union Bank misinterprets RAP 5.2(e).

Union Bank goes on to allege Appellants' claims are barred under RAP 5.2(e), a rule governing the effect of motions for reconsideration "decided after entry of appealable order." While Appellants filed a motion for reconsideration after the August 2013 decision, that order was neither "final" nor "appealable" under CR 54(b) and RAP 2.2(d). RAP 5.2(e) would only apply had Appellants decided to file a second motion for reconsideration after the October 31, 2013 order (which they had the right to do[11]). Instead, Appellants filed a notice of appeal. The reliance on RAP 5.2(e) is misplaced.

Union Bank also ignores RAP 5.2(a) which provides "[a] notice of appeal must be filed in the trial court within the longer of (1) 30 days after the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section [RAP 5.2](e)." (Emphasis added.) Here, the order Appellants challenge came after (i.e. "the longer of") the decision denying reconsideration.

Union Bank essentially argues all motions for reconsideration must be appealed within 30 days of a decision. This undercuts the purpose of CR 54(b): to prevent more than one appeal in a single action. It also overlooks that RAP 5.2(e) is designed to extend the amount of time a party has to seek reconsideration, not operate as a procedural trap. What Union Bank proposes is contrary to secure a "just, speedy, and inexpensive determination of every action," and the appellate mandate to facilitate decisions on their merits, not compliance or noncompliance with the rules. CR 1; RAP 1.2(a).

5. Complete dismissal is an overbroad remedy.

Even if Union Bank's interpretation of CR 54(b), RAP 2.2, and RAP 5.2 is correct, dismissal of all claims is not. Appellants' motion

[11] *See Barry v. USAA*, 98 Wn. App. 199, 203 (1999) ("nothing in CR 59 leads this court to declare a one-reconsideration limit for trial court decisions").

for clarification concerning overcharges was argued separately from reconsideration issues. There is no RAP 5.2(e) issue. Furthermore, the record is convoluted and littered with multiple orders on multiple claims, in some cases disposing matters before they were briefed. Under these circumstances, the Court has the ability to hear this case on the merits. *State v. Ashbaugh,* 90 Wn.2d 432, 437-38 (1978).

F. Attorney fees on appeal.

Union Bank requests attorney fees even though it contends elsewhere that there is no enforceable agreement between the parties. In response, should the Court find the existence of an enforceable agreement, Appellants make a reciprocal request for attorney fees. *See* RCW 4.84.330; *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 191, (1984); *Boyd v. Davis*, 127 Wn. 2d 256, 264, (1995); RAP 12.1(b); RAP 18.1.

III. CONCLUSION

For any or all of the foregoing reasons, the judgment should be reversed in whole or part.

DATED this 20th day of June, 2014.

OLES MORRISON RINKER & BAKER, LLP

By: ______________________
J. Craig Rusk
WSBA No. 15872
Brandon D. Young
WSBA No. 44422

No. 71114-8-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BLACK DIAMOND DEVELOPMENT COMPANY, LLC, a Washington Limited Liability Corporation; LEE WITTENBERG, individually and on behalf of his marital community; WAYNE COURTNEY, individually and on behalf of his martial community,

Appellants,

v.

UNION BANK, N.A.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LORI SMITH

STATEMENT OF NON-WASHINGTON AUTHORITY CITED IN REPLY BRIEF OF APPELLANTS BLACK DIAMOND DEVELOPMENT COMPANY, LLC; LEE WITTENBERG, individually and on behalf of his marital community; AND WAYNE COURTNEY, individually and on behalf of his marital community

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OLES MORRISON RINKER & BAKER, LLP
J. Craig Rusk
WSBA No. 15872
Brandon D. Young
WSBA No. 44422
701 Pike Street, Suite 1700
Seattle, WA 98101
(206) 623-3427

Attorneys for BLACK DIAMOND DEVELOPMENT COMPANY, LLC; LEE WITTENBERG, individually and on behalf of his marital community; AND WAYNE COURTNEY, individually and on behalf of his marital community

Appellants attach copies of the following non-Washington authority in support of their Reply Brief.

Cases

Howell v. Continental Credit Corp., 655 F.2d 743, 747-48 (7th Cir. 1981.

In re Beitzell & Co., Inc., 163 B.R. 637, 649 (1993.

Treatises

M. Budnitz, *et. al.*, THE LAW OF LENDER LIABILITY, ¶ 1.03[3]

DATED this 20th day of June, 2014.

OLES MORRISON RINKER & BAKER, LLP

By: ______________________
J. Craig Rusk
WSBA No. 15872
Brandon D. Young
WSBA No. 44422

4832-4555-1387, v. 1

655 F.2d 743
United States Court of Appeals,
Seventh Circuit.

Lillian Lincoln HOWELL and Lincoln Television, Inc., Plaintiffs-Counter-Defendants-Appellants,
v.
CONTINENTAL CREDIT CORP., and The Drovers National Bank of Chicago, Defendant,
and
The Federal Deposit Insurance Corporation, Defendant-Counter-Plaintiff-Appellee.

No. 80-1566. | Argued Jan. 16, 1981. | Decided July 17, 1981.

In an action brought by a lessee of broadcasting equipment concerning the validity of the leases in question, the Federal Deposit Insurance Corporation intervened and counterclaimed against the lessee, contending that the leases were valid and enforceable. The United States District Court for the Northern District of Illinois, Bernard M. Decker, J., entered summary judgment in favor of the FDIC. Lessee appealed. The Court of Appeals, Pell, Circuit Judge, held that the lessee was entitled to a trial on her defense against the FDIC's counterclaim, since the leases clearly manifested bilateral nature of the lessee's and the lessor's rights and obligations, and thus, the lessee was not estopped to defend on ground that lease payments did not depend solely upon a secret or unrecorded agreement of which the FDIC could have had no notice.

Reversed and remanded.

West Headnotes (3)

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

Rule that Federal Deposit Insurance Corporation may avoid terms of any agreement not properly recorded in bank's records does not apply where document FDIC seeks to enforce is one which facially manifests bilateral obligations and serves as basis of lessee's defense. Federal Deposit Insurance Act, § 2[13], 12 U.S.C.A. § 1823(e).

111 Cases that cite this headnote

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

In action by lessee of broadcasting equipment concerning validity of leases in question wherein leases clearly manifested bilateral nature of lessee's and lessor's rights and obligations, lessee was entitled to defend against counterclaim by Federal Deposit Insurance Corporation contending that leases were valid and enforceable on grounds that lease payments did not depend solely on secret or unrecorded agreement of which FDIC could have had no notice, but arose directly and exclusively from provisions of leases which FDIC sought to enforce. Federal Deposit Insurance Act, § 2[13], 12 U.S.C.A. § 1823(e).

91 Cases that cite this headnote

[3] **Federal Civil Procedure**
Absence of Genuine Issue of Fact in General

Summary judgment should be granted only when it is clear that there is no dispute about either facts of controversy or inferences to be drawn from such facts.

5 Cases that cite this headnote

Attorneys and Law Firms

***743** Carol R. Thigpen, Jenner & Block, Chicago, Ill., for plaintiffs-counter-defendants-appellants.

Robert C. Knuepfer, Asst. U. S. Atty., Chicago, Ill., for defendant-counter-plaintiff-appellee.
Before FAIRCHILD and PELL, Circuit Judges, and SPEARS, Senior District Judge.*

Opinion

PELL, Circuit Judge.

This case arises from a highly complex but not well-managed financial transaction through which the Federal Deposit Insurance ***744** Corporation (FDIC) became the purported lessor of various items of equipment to appellant Howell as lessee. The FDIC is now claiming the amounts due under the leases and the appellants defend on the ground that the original lessor, Continental Credit Corp. (Continental) failed to provide adequate consideration. The district court granted summary judgment in favor of the FDIC dismissing the appellants' complaint on the ground that the leases did not explicitly require Continental to furnish the consideration appellants now claim. It concluded, therefore, that any agreement requiring such consideration must have been a "secret agreement," and thus held, relying upon 12 U.S.C. s 1823(e) and D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), that the agreement was not binding upon the FDIC. Howell has appealed the district court's summary judgment that the leases were enforceable against her.

I

Lillian Lincoln Howell is the sole shareholder of Lincoln Television Inc., (Lincoln) also an appellant, a California corporation licensed to operate a television station in San Francisco, California.[1] In 1974, Mrs. Howell determined the need for various broadcasting equipment to be used by Lincoln and on October 11 of that year, she placed orders with RCA for more than $856,000 worth of equipment. RCA required a down payment of 2% of the total amount ordered, and a down payment of up to 35% for some of the custom-made equipment, to be submitted with the orders. RCA also required an irrevocable letter of credit from appellant in favor of RCA for an amount sufficient to cover the full unpaid balance of the purchase price plus sundry other costs and expenses. By the beginning of 1976, appellant had paid RCA a total of $280,000 and furnished a $500,000 letter of credit.

Although the exact date of the decision is open to question, sometime during the occurrence of these events appellant became aware of the tax advantages to be gained by structuring her acquisition of the equipment as a lease as opposed to a purchase. On March 1, 1976, therefore, appellant and Continental entered into a lease of the equipment with Continental serving as lessor and appellant as lessee. The precise rationale behind appellant's putting herself in the unfortunate position of being both the lessee and the purchaser of the same equipment has eluded this court. It does appear that in order for Continental to be able to purchase the equipment, it required a bank loan and the signed leases were needed to serve as collateral. There seems little question, however, that the parties intended Continental to acquire title to the equipment in order to lease the equipment to Howell. Eventually, Continental did discount the leases with the Drovers National Bank in Chicago, Illinois (Drovers) and assigned all of its rights under the leases in return for more than $900,000 to be used to purchase the equipment. To secure her performance under the leases, appellant pledged over $1 million worth of common stock which she deposited in an escrow account with Drovers.

For awhile, the transaction progressed as the parties had planned and Continental used some of the proceeds from Drovers to purchase some of the equipment. It soon became clear, however, that Continental was using the bulk of the money for its own benefit elsewhere. Although Continental had placed purchase orders with RCA for the equipment already ordered by Howell and had instructed RCA to bill it directly for the amounts due, RCA apparently never acknowledged nor accepted these orders. In any event, Continental never paid RCA for the $856,000 worth of equipment covered by the leases at issue in this case. As a result of this failure, RCA began to draw upon appellant's letter of credit. Appellant ***745** authorized payment under the letter of $316,778.30 on March 11, 1976, ten days after she had executed the leases in favor of Continental. RCA withdrew a further $108,221.70 on April 15, 1976, two days after Continental had received the proceeds from the discounting to Drovers.

In spite of the fact that appellant was aware that RCA was drawing upon her letter of credit, she began payment of the rentals due under the leases to Drovers. Appellant paid the May and June 1976 rentals, but refused to pay the July rental after notifying Drovers of Continental's failure to purchase the equipment. Appellant claimed that Continental's acquisition of title to the equipment was required under the leases and that the failure to do so was a failure to provide consideration for the rental payments. As a result of appellant's failure to pay the rentals, Drovers seized the stock it was holding in escrow. Appellant then initiated this action to secure the stock's return and to have the leases determined to be void.

In the ensuing litigation, both parties filed motions for summary judgment which were denied. Appellant claimed that the leases were invalid because Continental had failed to obtain ownership of the equipment. Drovers relied upon a clause in the leases stating that appellant waived the right to assert against Continental's assignee any defense she might have against Continental. The court denied the motions on August 25, 1977, because it found, inter alia, that there was a genuine issue of material fact as to whether the bank took the assignment with notice of appellant's defenses. Under the Uniform Commercial Code as codified in Ill.Rev.Stat. ch. 26 s 9-206(1), such notice would have precluded Drovers from enforcing the waiver clause. Regarding the duty of Continental to acquire title to the equipment, the court stated:

> The lease is written in standard boiler plate language and does not specifically define Continental's obligations with respect to the purchase of the equipment from the vendors (RCA). It is evident that there was some agreement, presumably oral, between Continental and Howell whereby Continental would obtain title to the equipment it was leasing to the plaintiffs.

This daedalian situation was further confused on January 19, 1978, when the Comptroller of the Currency determined that Drovers would no longer be able to meet its obligations to depositors. Accordingly, he declared Drovers insolvent and appointed the FDIC as receiver. The FDIC consequently executed a purchase and assumption transaction which consisted of two agreements. Under the first agreement, the FDIC transferred Drover's deposit liabilities, $130,000,000 in cash, and a low-risk installment loan portfolio to a new bank, The Drovers Bank of Chicago, which paid a $3,125,501 premium for the value of the ongoing business. Pursuant to the second agreement, the FDIC as receiver transferred all of Drover's assets which were not readily marketable to the FDIC in its corporate capacity. Included among these assets was the "substandard" loan portfolio containing the Howell leases.

After being allowed to intervene in the present litigation, the FDIC counterclaimed against appellant contending that the leases were valid and enforceable according to their terms, and moved for summary judgment. The FDIC's motion claimed that appellant was estopped to defend against the FDIC upon her claims against Continental under D'Oench, supra and s 1823(e). On October 16, 1979, the district court granted the motion relying upon its prior factual finding that the leases contained no explicit obligation of Continental to obtain title to the equipment, and that any such obligation could only have been contained in a "secret agreement" which both D'Oench and s 1823(e) made unenforceable against the FDIC.

II

In D'Oench, the plaintiff executed a note in favor of a bank in order to deceive a state bank examiner by falsely inflating the bank's assets. The maker and the bank had ***746** a separate agreement whereby the bank would not seek to enforce the note. This agreement, however, was not recorded in the bank's records for obvious reasons. A year later, in 1934, the FDIC was formed and relied upon the state bank examiner's sanction in granting insurance protection to the bank. In 1938, the bank required a loan from the FDIC to remain solvent, and the Corporation acquired the plaintiff's note as collateral for the loan. When the bank finally did fail, the FDIC sought to enforce the note and the plaintiff protested upon the basis of the separate agreement and upon the ground that the note had been issued without adequate consideration. The Supreme Court held that the note was enforceable in the hands of the FDIC. Finding that the plaintiff was equitably estopped to defend upon the ground of the separate "secret" agreement, the Court applied the well-established rule disallowing an individual to profit from or defend upon the basis of his own wrongful act. Justice Douglas speaking for the Court noted:

> If the secret agreement were allowed as a defense in this case, the maker of the note would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible.

315 U.S. at 461, 62 S.Ct. at 681.

In 1950, the Congress codified the rationale of D'Oench in 12 U.S.C. s 1823(e) which provides in pertinent part:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation (FDIC) in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such

> agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

[1] Both D'Oench and s 1823(e) have been applied numerous times to effectuate the public policy interest in not enforcing "secret agreements" against the FDIC when it is carrying out its statutorily-mandated duties to protect depositors. Although the individuals held liable for the amounts due to the FDIC are rarely guilty of misconduct similar to that addressed in D'Oench, in these cases the FDIC has been able to avoid the terms of any agreement not properly recorded in the bank's records. See, e. g., FDIC v. Hoover-Morris Enterprises, 642 F.2d 785 (5th Cir. 1981); FDIC v. First National Finance Corp., 587 F.2d 1009 (9th Cir. 1978); FDIC v. Alker, 164 F.2d 469 (3d Cir. 1947), cert. denied, 334 U.S. 827, 68 S.Ct. 1337, 92 L.Ed. 1755; FDIC v. Rosenthal, 477 F.Supp. 1223 (E.D.Wis.1979), aff'd, 631 F.2d 733 (7th Cir. 1980); FDIC v. Timonen, No. 77 C 1389 (N.D.Ill., June 16, 1978); FDIC v. Bennett, No. 76 C 2602 (N.D.Ill., June 18, 1978); FDIC v. C&A Carbone, Inc., No. 77 Civ. 1191 (S.D.N.Y., April 13, 1978); FDIC v. Malamis, No. 77 C 1461 (N.D.Ill., Dec. 22, 1977); FDIC v. Lakeshore Financial Corp., No. 76 C 467 (E.D.Wis., Nov. 3, 1977); British Columbia Investment Co. v. FDIC, 420 F.Supp. 1217 (S.D.Cal.1976); FDIC v. Disterdoft, No. 144-161 (Cir.Ct.Wis., Dec. 29, 1977); FDIC v. Alward, No. 144-156 (Cir.Ct.Wis., Dec. 5, 1977); FDIC v. Slabaugh, No. 144-180 (Cir.Ct.Wis., Dec. 5, 1977). In all of these cases, however, the FDIC was seeking to enforce a facially valid note or guarantee imposing a unilateral obligation on the maker to pay a sum certain amount to the bank. As stated previously, the makers' defenses were founded entirely upon separate and undisclosed agreements. We believe these holdings are inapplicable, therefore, where the document the FDIC seeks to enforce is one, such as the leases here, which facially manifests bilateral obligations and serves as the basis of the lessee's defense. In these situations, we do not believe the lessee should be held ***747** liable automatically simply because the FDIC has become a belated party to the transaction.

[2] The leases here involved clearly manifest the bilateral nature of the lessee's and lessor's rights and obligations. Regarding Continental's obligation to acquire title to the equipment, the leases set forth this obligation both directly, such as in paragraph 13:

> 13. Title To Equipment As Personal Property.... The Equipment shall always remain and shall be admitted to be personal property ... and the title thereto shall remain in Lessor exclusively....

and indirectly, such as within the definition of "actual costs" from which the rental payments were computed. The definition provides: " 'Actual Costs' means the cost to Lessor of purchasing and delivering the Equipment to Lessee...." This is not a case such as D'Oench and its progeny where the maker's defense depended solely upon a secret or unrecorded agreement, usually oral, of which the FDIC could have had no notice. The defense appellant posits here arises directly and explicitly from the provisions of the leases which were in the bank's files and which the FDIC now seeks to enforce. We have not been presented with any persuasive reason why appellant's defense should not at least be tested at trial. Rather, we agree with the statements made in Riverside Park Realty Co. v. FDIC, 465 F.Supp. 305, 313 (M.D.Tenn.1978), where the court in addressing a very similar situation stated:

> When the enforcement of a separate collateral or secret agreement would alter the terms of an asset acquired by the FDIC so that the FDIC's right, title, or interest in the asset would be defeated or diminished, s 1823(e) comes into play. See, e. g., Federal Deposit Insurance Corp. v. Vogel, 437 F.Supp. 660 (E.D.Wis.1977); Dasco, Inc. v. American City Bank & Trust Co., 429 F.Supp. 767 (D.Nev.1977). The statute was enacted to effectuate a federal public policy to protect the funds of depositors in federally insured banks. "It operates to insure that the FDIC, when it expends moneys entrusted to it to purchase assets of a closed insured bank, can rely on the bank's records and will not be risking an impairment of the assets through an agreement not contained in the bank's records." Federal Deposit Insurance Corp. v. Vogel, supra, 437 F.Supp. at 663. Congress undoubtedly intended to cloak the FDIC with a significant amount of protection by promulgating s 1823(e), and accordingly the courts have repelled attempts of obligors on notes acquired by the FDIC who seek to prevent enforcement of the

obligations by asserting separate, secret, unrecorded agreements. For example, in Federal Deposit Insurance Corp. v. Vogel, supra, the court held that in a suit by the FDIC against the guarantors of a letter of credit, the guarantors could not assert that their guaranties were given for the oral promise of the closed bank to loan the guarantors $2,000,000, which the bank failed to do; and in Dasco, Inc., supra, the court decided that the makers could not defeat the rights of the FDIC in a note by claiming the existence of an oral agreement between the parties that made the maker's liability on the note conditional.

When, however, the asset upon which the FDIC is attempting to recover is the very same agreement that the makers allege has been breached by the FDIC's assignors, s 1823(e) does not apply. None of the policies that favor the invocation of this statute are present in such cases because the terms of the agreement that tend to diminish the rights of the FDIC appear in writing on the face of the agreement that the FDIC seeks to enforce.

465 F.Supp. at 313.

The details of exactly how Continental was to acquire title,[2] and the remaining factual details of appellant's defense flagged on the face of the instrument are issues for trial, which might result in the ***748** conclusion that the defense is unavailable due to waiver clauses in the leases or evidence of contrary intent of the parties, or is otherwise insufficient to defeat the FDIC's claims. However, the fact that the court must go outside the leases to test the strength and validity of the defenses is not fatal where the foundation and basis of that defense is in a document arguably meeting the nonsecrecy requirements of s 1823(e). Furthermore, the fact that appellant "lent herself" to an incondite business transaction or sought certain legal tax advantages in her business dealings does not call for the application of the equitable estoppel discussed in D'Oench. See FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974).

[3] Summary judgment should be granted only when it is clear that there is no dispute about either the facts of the controversy or the inferences to be drawn from such facts. In this case, the district court granted summary judgment on the basis of a factual finding that the leases did not contain the manifestation of the agreement that Continental was to acquire title to the equipment. This was clearly erroneous. The resulting application of the D'Oench doctrine and s 1823(e) was thus in error. The judgment is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Footnotes

* Judge Adrian A. Spears, Senior District Judge of the Western District of Texas, is sitting by designation.

1 Although Lincoln is also an appellant, the leases were in the name of Howell and our focus in this opinion is on her as the active participant in the transactions in question. Accordingly, the references in this opinion to the "appellant" refer only to her as any claims of Lincoln are only based upon Howell's claim.

2 The district court noted that "It can be speculated that such an agreement (between Howell and Continental) would have required Continental to either pay the vendors directly or to reimburse Howell for any payments she may have made for the equipment.

163 B.R. 637
United States Bankruptcy Court,
District of Columbia.

In re BEITZELL & CO., INC., Debtor.
BEITZELL & CO., INC., Plaintiff,
v.
The FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver for the National Bank of Washington, Defendant.

Bankruptcy No. 90-00211. | Adv. No. 90-0091. | Nov. 9, 1993.

Chapter 11 debtor sued bank claiming breach of good faith and fair dealing, breach of fiduciary duty, tortious interference with contract, tortious interference with prospective business, and negligent misrepresentation seeking compensatory and punitive damages. After Federal Deposit Insurance Corporation (FDIC) was appointed as receiver for bank, FDIC moved to dismiss. The Bankruptcy Court, S. Martin Teel, Jr., J., held that: (1) FDIC was not entitled to invoke federal holder in due course doctrine as bar to any of borrower's claims; (2) common-law *D'Oench Duhme* doctrine did not preclude borrower from asserting claim for breach of duty of good faith and fair dealing under District of Columbia statute which incorporated duty into every contract; (3) requirements of codified version of *D'Oench Duhme* doctrine were satisfied with respect to borrower's claim for breach of obligation of good faith under District of Columbia law; and (4) *D'Oench Duhme* doctrine and its codified version barred breach of fiduciary duty claim based upon duty which was not implied by law from face of contract.

Motion granted in part; denied in part.

West Headnotes (48)

[1] **Banks and Banking**
Powers, functions and dealings in general

Federal holder in due course doctrine is limited to purchase and assumption transactions, and thus, Federal Deposit Insurance Corporation, as liquidator of bank's assets, was not entitled to invoke doctrine as bar to any claims brought by borrower regarding notes.

[2] **Banks and Banking**
Powers, functions and dealings in general

Even if federal holder in due course doctrine was found to apply to other than purchase and assumption transactions, Federal Deposit Insurance Corporation (FDIC) as receiver of failed bank would still have to defend against any assertion of borrower's claims against receivership estate, and doctrine would only act to prevent borrower from asserting any personal claims as defense or setoff to its debt to bank.

[3] **Bills and Notes**
Interest

Note with variable interest rate tied to prime rate is not "negotiable instrument," under District of Columbia law, because note does not contain unconditional promise to pay sum certain. D.C.Code 1981, § 28:3-104.

1 Cases that cite this headnote

[4] **Bills and Notes**
Interest

Notes signed by borrower which were subject of borrower's suit against bank were not "negotiable instruments" under District of Columbia law, where notes provided for variable rate of interest tied to prime rate. D.C.Code 1981, § 28:3-104.

1 Cases that cite this headnote

[5] **Banks and Banking**

—Powers, functions and dealings in general

D'Oench Duhme doctrine is common-law rule of estoppel which precludes borrower from asserting against Federal Deposit Insurance Corporation (FDIC) defenses based upon secret or unrecorded side agreements that alter terms of facially unqualified obligations; doctrine shields FDIC from claims and defenses based on agreements not firmly established in failed financial institution's official records and prevents FDIC from being held liable for claim that is inconsistent with written documents of failed institution or based on unrecorded oral or written side agreement.

1 Cases that cite this headnote

[6] **Banks and Banking**
—Powers, functions and dealings in general

Borrower's intent is irrelevant to application of *D'Oench Duhme* doctrine; proper inquiry is whether borrower lent himself to scheme or arrangement that would be likely to mislead or deceive banking authorities.

[7] **Banks and Banking**
—Powers, functions and dealings in general

Party can be said to have "lent himself to scheme or arrangement" that would likely mislead or deceive banking authorities for purpose of *D'Oench Duhme* doctrine simply by failing to reduce agreement relied upon to writing.

1 Cases that cite this headnote

[8] **Banks and Banking**
—Powers, functions and dealings in general

Courts strictly adhere to requirements of statutory counterpart to *D'Oench Duhme* doctrine. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[9] **Banks and Banking**
—Powers, functions and dealings in general

Given broad interpretation of term "agreement," for purposes of statutory codification of *D'Oench Duhme* doctrine, obligation of good faith and fair dealing and obligation to act as fiduciary would be viewed as conditions to performance of borrower's obligation; these conditions would constitute part of overall "agreement," for purposes of statute, and would need to satisfy statute's rigorous requirements in order for borrower to base claim upon such obligations. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

1 Cases that cite this headnote

[10] **Banks and Banking**
—Powers, functions and dealings in general

D'Oench Duhme doctrine and its codified version, while overlapping, are capable of somewhat different interpretations. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[11] **Banks and Banking**
—Deposit insurance

Purpose of both common-law *D'Oench Duhme* doctrine and its codified version is to enable bank examiners accurately to determine health of institution based on examination of formally maintained written records of institution; in light of this policy, court must consider whether transaction at issue, explicitly an "agreement" under statute or "arrangement" under common-law *D'Oench Duhme* doctrine, would tend to deceive bank examiners when determining whether claim or defense is barred. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[12] **Banks and Banking**
Powers, functions and dealings in general

Policy of both common-law *D'Oench Duhme* doctrine and its codified version is to place risk of nonrecovery on borrowers in situations where they could have protected themselves by including terms of their agreement in writing; this policy choice is premised on rationale that, although borrowers are in position to protect themselves by negotiating for certain terms and conditions, depositors and creditors of bank cannot protect themselves against harm and thereby should be favored when institution fails. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[13] **Banks and Banking**
Statutory provisions

Additional purpose behind codified version of *D'Oench Duhme* doctrine is to ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with collusion of bank employees, when bank is headed for failure. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[14] **Banks and Banking**
Powers, functions and dealings in general

Defense or claim that is based solely on alleged representations or agreements that are unrecorded is barred by *D'Oench Duhme* doctrine and its statutory counterpart; however, when claims are based on provisions in loan documents themselves, such claims are not barred. Federal Deposit Insurance Act, § 2 [13](e), 12 U.S.C.A. § 1823(e).

[15] **Banks and Banking**
Powers, functions and dealings in general

Some claims are beyond scope of codified version of *D'Oench Duhme* doctrine and can be asserted against Federal Deposit Insurance Corporation (FDIC). Federal Deposit Insurance Act, §§ 2[11], 2[11](d)(9)(A), 2[13](e), 12 U.S.C.A. §§ 1821, 1821(d)(9)(A), 1823(e).

[16] **Banks and Banking**
Powers, functions and dealings in general

Claim or defense is barred by common-law *D'Oench Duhme* doctrine and/or by its codified version if it is premised solely on unrecorded agreements, promises or representations and not on any obligation found explicitly in loan documents. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[17] **Banks and Banking**
Powers, functions and dealings in general

Proper inquiry in determining whether borrower's claims against bank are barred by either common law *D'Oench Duhme* doctrine or its statutory counterpart is whether any of the borrower's claims are premised on obligation that is found in loan documents or are not premised on any agreement whatsoever. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[18] **Banks and Banking**
Powers, functions and dealings in general

Common-law *D'Oench Duhme* doctrine did not bar borrower's claim against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, alleging breach of duty of good faith and fair dealing which was implied into every contract as a matter of law by District of Columbia statute; FDIC had duty to know law and any obligations imposed by such laws and could not escape imposition of such obligation by reliance on *D'Oench Duhme* doctrine. D.C.Code 1981, § 28:1–203.

1 Cases that cite this headnote

[19] **Banks and Banking**
Powers, functions and dealings in general

Literal interpretation of what it means for obligation to appear "expressly" in document, for purposes of *D'Oench Duhme* doctrine, was unwarranted, and provision implied as matter of law in every loan agreement should be treated as appearing on face of agreement.

1 Cases that cite this headnote

[20] **Banks and Banking**
Powers, functions and dealings in general

Obligation implied in contract as matter of law is different in nature than obligation implied by local custom, for purposes of application of *D'Oench Duhme* doctrine.

[21] **Banks and Banking**
Powers, functions and dealings in general

Codified version of *D'Oench Duhme* doctrine did not bar borrower's claim against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, alleging breach of duty of good faith and fair dealing under District of Columbia law, where borrower was relying on specific statutory provision which implied obligation of good faith in every contract to show that bank acted in bad faith with respect to exercise of certain rights provided expressly in loan documents. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

3 Cases that cite this headnote

[22] **Banks and Banking**
Powers, functions and dealings in general

Because obligation of good faith could be said to be part of loan documents under District of Columbia statute that imposed duty of good faith as matter of law into every contract, requirements of codified version of *D'Oench Duhme* doctrine were satisfied because loan agreement itself fulfilled those requirements. D.C.Code 1981, § 28:1–203; Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[23] **Banks and Banking**
Powers, functions and dealings in general

Extending codified version of *D'Oench Duhme* doctrine such that any obligation required by law must be in writing in order to be effective against Federal Deposit Insurance Corporation (FDIC) simply is not warranted; it suffices that loan agreement is in writing and that obligation is included in agreement as matter of law. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

Next

[24] **Contracts**
—Presumptions and burden of proof

Parties entering into bargain should be able to assume parties will act in accordance with obligations imposed by law without having to explicitly set forth what law is.

[25] **Banks and Banking**
—Powers, functions and dealings in general

Purpose behind "*D'Oench Duhme* doctrine" is to protect against "secret" or "unrecorded" obligations or conditions, and obligation implied by law as to recorded contract is neither secret nor unrecorded. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[26] **Banks and Banking**
—Powers, functions and dealings in general

Even if borrower were able to establish that bank owed duty to act in good faith under District of Columbia law, borrower's claim against Federal Deposit Insurance Corporation (FDIC), as receiver, that duty was breached could not be premised solely on alleged oral agreements or representations by vice president of bank that approval for borrower's purchase of business would be given by virtue of codified version of *D'Oench Duhme* doctrine. D.C.Code 1981, § 28:1–203; Federal Deposit Insurance Act, §§ 2[11](d)(9)(A), 2[13](e), 12 U.S.C.A. §§ 1821(d)(9)(A), 1823(e).

1 Cases that cite this headnote

[27] **Banks and Banking**
—Powers, functions and dealings in general

Borrower was not barred under codified version of *D'Oench Duhme* doctrine from suing on oral statements by bank's officers that did not constitute promises but instead were acts of bad faith in violation of contractual obligation of good faith under District of Columbia law; thus, borrower could sue on its allegations that bank unreasonably withheld consent to its purchase of another business. D.C.Code 1981, § 28:1–203; Federal Deposit Insurance Act, §§ 2[11](d)(9)(A), 2[13](e), 12 U.S.C.A. §§ 1821(d)(9)(A), 1823(e).

[28] **Banks and Banking**
—Powers, functions and dealings in general

D'Oench Duhme doctrine and its codified version did not bar borrower from suing on its allegation that bank breached its duty of good faith, under District of Columbia law, by unilaterally deciding to terminate borrower's business, making threats to increase bank's bargaining position; interfering with borrower's contract with third party and with borrower's prospective business advantages; and demanding that borrower pay for auctioneer to sell inventory; borrower's contention that bank's acts were coercive could be considered as basis for its claim for breach of good faith. D.C.Code 1981, § 28:1–203; Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[29] **Banks and Banking**
—Powers, functions and dealings in general

If tort claim against Federal Deposit Insurance Corporation (FDIC) relates solely to actions taken with respect to secret, unrecorded agreement, then such claim is barred under *D'Oench Duhme* doctrine and its codified version; however if tort claim is based on conduct of lender independent of any agreement or secret arrangement, that claim is not barred. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[30] **Banks and Banking**
Powers, functions and dealings in general

Codified version of *D'Oench Duhme* doctrine barred borrower's claim for breach of fiduciary duty against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank; borrower's argument that lender owed fiduciary duty was, in essence, attempt to imply duty or standard that would govern lender's exercise of provisions found in loan agreement but duty/standard was not stated anywhere in loan agreement. Federal Deposit Insurance Act, § 2 [13](e), 12 U.S.C.A. § 1823(e).

[31] **Banks and Banking**
Powers, functions and dealings in general

Codified version of *D'Oench* doctrine clearly bars any attempt to imply standard governing enforcement of note that is not found in loan agreement itself. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[32] **Fraud**
Fiduciary or confidential relations

Fact that fiduciary relationship may be inferred from loan documents is insufficient to support claim that such duty is owed by lender to borrower.

[33] **Banks and Banking**
Powers, functions and dealings in general

Borrower could not rely on its longstanding banking relationship with bank and on control bank exercised over all of borrower's income as grounds for finding fiduciary relationship to supply standard of care in performance of bank's contractual obligations under loan agreements so as to assert claim for breach of fiduciary duty against Federal Deposit Insurance Corporation (FDIC), as receiver for bank; *D'Oench Duhme* doctrine and its codified version barred such unwritten contract term from being enforced. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[34] **Contracts**
Terms implied as part of contract

Unlike obligation of good faith, fiduciary duty is not imposed by law to every contract on its face.

[35] **Action**
Agent, broker, banker, trustee, or other fiduciary
Banks and Banking
Actions

To extent that borrower invoked fiduciary relationship with bank to prove that breach of contract by bank also constituted breach of fiduciary duty for purpose of providing different basis for damages against bank, damages claim was redundant, where measure of damages would be same as for breach of contract since borrower had not alleged different injuries arising from different counts and there was no proof of existence of additional damages attributable solely to tort and punitive damages could not be recovered against Federal Deposit Insurance Corporation (FDIC).

Next

[36] **Action**
—Agent, broker, banker, trustee, or other fiduciary

If borrower recovered damages on its breach of contract claims against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, it would not be entitled to recover additional compensatory damages in tort unless it alleged and proved existence of additional damages attributable solely to that tort.

[37] **Federal Civil Procedure**
—Tort actions in general

To extent that borrower's claims against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, for tortious interference with existing contract and for tortious interference with prospective business were nothing more than borrower's allegation that bank breached its oral promise that it would consent to purchase of another business, disguised as different cause of action, claims had to be dismissed.

[38] **Banks and Banking**
—Powers, functions and dealings in general

Borrower's claims against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, for tortious interference with existing contract and for tortious interference with prospective business were not premised solely upon oral representations and agreements, and thus, were not barred by *D'Oench Duhme* doctrine and its codified version. Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C.A. § 1823(e).

[39] **Torts**
—Tortfeasor as stranger to contract or relationship, in general

Under District of Columbia law, tortious interference with contractual relations arises when defendant interferes with contract between plaintiff and some third party.

[40] **Banks and Banking**
—Powers, functions and dealings in general

Oral representation by bank's vice president that bank would give consent to borrower's purchase of another company was exactly type of agreement that *D'Oench Duhme* doctrine operates to bar.

[41] **Banks and Banking**
—Actions

Borrower's allegations that bank wrongfully dishonored checks, wrongfully declared default and acceleration on loans, failed to give reasonable notice prior to demanding repayment, unreasonably required payment in full within three days of giving demand, unreasonably withheld its consent, and unilaterally decided to terminate borrower's business provided plausible grounds upon which borrower could prove that bank breached its duty of good faith and fair dealing, under District of Columbia law, and stated claim against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank.

[42] **Federal Civil Procedure**
—Pleading, Defects In, in General

Complaint must only allege plausible grounds in order for it to survive motion to dismiss.

borrower's breach of contract claim.

1 Cases that cite this headnote

[43] **Torts**
—Business relations or economic advantage, in general
Torts
—Contracts in general

Actions by lender that are directed only at its borrower do not state cause of action for intentional interference with contract or prospective business, even when those actions directed at borrower indirectly affect borrower's relationship with some third party.

[44] **Torts**
—Pleading

Borrower's allegations that bank refused to consent to borrower's purchase of another company failed to state claim for tort of intentional interference with existing contract or prospective business relationship, where borrower failed to allege any facts from which it could be inferred that bank intentionally interfered with borrower's contract with third party or its business relationships.

[45] **Torts**
—Contracts in general

Even if bank breached its contract with borrower by withholding its consent to purchase of another company in bad faith, that breach served as no basis for claim for intentional interference with contract; assuming that bank's alleged breach of contract in turn resulted in breach of sale agreement with third party, borrower's remedy was not claim for tortious interference with contract but rather element of damages for

[46] **Banks and Banking**
—Actions

Borrower could not assert claim for punitive damages against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank.

[47] **Municipal Corporations**
—Damages

Punitive damages may not be assessed against public instrumentalities.

[48] **Damages**
—Nature and Theory of Damages Additional to Compensation
Damages
—Persons for or against whom exemplary damages may be awarded

Punitive damages are designed to punish wrongdoer, and where wrongful party is in receivership, only parties punished would be innocent creditors.

Attorneys and Law Firms

***642** Alan S. Dubin, Bethesda, MD, for debtor/plaintiff.

Glenn M. Young, Washington, DC, for defendant.

Opinion

*643 *DECISION GRANTING IN PART, DENYING IN PART THE FDIC'S MOTION TO DISMISS*

S. MARTIN TEEL, Jr., Bankruptcy Judge.

The court considers a motion to dismiss for failure to state a claim upon which relief can be granted, filed by the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for the National Bank of Washington ("NBW"), and the opposition thereto filed by the debtor, Beitzell & Co., Inc. ("Beitzell").

The FDIC's motion to dismiss should be denied unless it appears beyond doubt that Beitzell can prove no set of facts in support of its claims that would entitle it to relief. *See Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957); *Tele–Communications v. United States,* 757 F.2d 1330 (D.C.Cir.1985); *McGowan v. Warnecke,* 739 F.Supp. 662 (D.D.C.1990); *Royal Bank of Canada v. FDIC,* 733 F.Supp. 1091, 1094 (N.D.Tex.1990). For purposes of this motion, the court accepts as true the allegations of Beitzell's complaint and construes the allegations in light most favorable to the nonmovant. *Bell & Murphy and Assoc. v. InterFirst Bank Gateway, N.A.,* 894 F.2d 750, 752 n. 1 (5th Cir.1990); *High v. McLean Fin'l Corp.,* 659 F.Supp. 1561, 1565 (D.D.C.1987).

I. *Procedural and Factual Background*

On March 20, 1990, Beitzell filed a petition for relief under Chapter 11 of the Bankruptcy Code. On August 2, 1990, Beitzell commenced this adversary proceeding against NBW, asserting claims for breach of good faith and fair dealing, breach of fiduciary duty, tortious interference with existing contract, tortious interference with prospective business, and negligent misrepresentation. Beitzell seeks compensatory damages in the amount of $5,000,000 and punitive damages in the amount of $25,000,000.

On August 6, 1990, NBW filed a proof of claim against Beitzell in the amount of $2,545,000. Thereafter, on August 9, 1990, Beitzell filed an Amended Complaint and Objection to Claim. In addition to asserting the five counts contained in the original complaint, Beitzell objects to the claim filed by NBW and seeks an order providing that NBW's claim is only $765,845.00. Under the doctrine of recoupment, Beitzell contends that its claim against NBW constitutes a complete defense to any payment on NBW's claim, and that NBW is not entitled to any payments by Beitzell.

On August 10, 1990, the Office of the Comptroller of the Currency declared NBW insolvent and appointed the FDIC as its Receiver. On April 8, 1991, the FDIC filed a motion to dismiss Beitzell's Amended Complaint and Objection to Claim on the grounds that 12 U.S.C. § 1823(e), the *D'Oench Duhme* doctrine, and the federal holder in due course doctrine preclude Beitzell from asserting its claims against the FDIC. This motion was taken under advisement after oral argument and full briefing by the parties.[1]

Beitzell is a corporation duly organized and existing under the laws of the District of Columbia and has its principal place of business in Washington, D.C. Beitzell is and has been in the business of distributing liquor and other spirits at wholesale for over 50 years.

Beitzell alleges that it entered into a banking relationship with NBW in the 1940s and deposited substantial sums of money and kept substantial balances in its accounts with NBW until the mid–1980s. On January 16, 1986, Beitzell and NBW executed a Revolving Note in the amount of up to $3,000,000 payable upon demand and a Term Note totalling $550,000 ("Notes"). Both Notes were secured pursuant to a Loan Security Agreement ("Agreement") which essentially required Beitzell to deposit its collection of accounts receivable and inventory proceeds into an account with NBW. Under the Agreement, Beitzell alleges that it was entitled to borrow and NBW was obligated to lend the value of 80% of the eligible accounts receivable plus 50% of eligible inventory (the "Borrowing Formula") up to a maximum of ***644** $3,000,000. Beitzell never exceeded the Borrowing Formula.

Beitzell further alleges that at all relevant times, Beitzell was current with its interest payments to NBW and was never otherwise in default under the terms of the Revolving Note, the Term Note and the Agreement.

In 1988, Beitzell and NBW conducted discussions regarding Beitzell's acquisition of an Arlington, Virginia liquor wholesale entity, doing business as Virginia Imports, Ltd. ("Virginia Imports"). NBW consented to Beitzell's purchase and agreed to finance the acquisition. Pursuant to the Beitzell–NBW financing agreement, NBW disbursed in excess of $1,000,000 to Beitzell against its revolving line of credit. Furthermore, Beitzell received consent to disburse $1,600,000 to Virginia Imports, but only after Beitzell had obtained a security interest in Virginia Import's inventory, and assigned such interest to NBW as further collateral. In the beginning of 1989, NBW demanded that Beitzell and Virginia Imports be financed as separate borrowers, and thus refused to include the value of Virginia Import's inventory in the borrowing base used to determine Beitzell's ability to borrow against inventory.

In the Amended Complaint, Beitzell describes an unconsummated transaction between Forman Brothers, Inc. ("Forman Brothers") and Beitzell concerning the sale of certain of its liquor lines, including its four most successful lines. This sale was an effort to reverse business losses that occurred in the late 1980s. Beitzell alleges that NBW's actions deprived Beitzell of the benefits of this attempted sale. In January of 1990, Beitzel and Forman Brothers conditionally executed a purchase agreement. Under the relevant purchase terms, Forman Brothers would purchase certain of Beitzell's inventory at cost, and would acquire certain liquor lines for a premium of $800,000. As a condition of closing, Beitzell had to obtain NBW's consent to consummate the Forman Brothers deal. Beitzell alleges that prior to signing the purchase agreement, an NBW vice-president, Joseph McGrath, orally informed Beitzell that NBW would consent to the transaction. However, on January 31, 1990, NBW mailed a letter to Beitzell informing it that NBW would not give its consent to the proposed sale unless Beitzell agreed to pay NBW's legal fees. Beitzell alleges that due to the time pressure, it was forced to agree to this request.

Beitzell further alleges that despite a meeting held on February 5, 1990, where two NBW vice-presidents stated the transaction would be in Beitzell's best interest, NBW refused to give its consent, except under terms which Beitzell alleges were unreasonable and coercive. NBW demanded that all proceeds of the sale be paid over to NBW, including the $800,000 premium. Beitzell contends that this demand was improper since NBW had only advanced 50% of the value of the inventory to Beitzell. NBW also indicated that Beitzell would have no further right to borrow after the sale to Forman Brothers. Beitzell contends that these terms were unreasonable, demanded in bad faith, and were not reasonably necessary to protect NBW's position.

In response, the FDIC contends that NBW was merely exercising its discretion regarding the sale of the collateral proposed by Beitzell and that its insecurity regarding Beitzell's ability to honor its debts to the banks was the reason for such refusal. The FDIC also contends that NBW's concerns were heightened upon learning that Beitzell was a judgment debtor of the Teamster's Union.[2]

On February 22, 1990, Beitzell met with NBW to discuss obtaining NBW's consent. Beitzell alleges that an NBW vice president stated that NBW would not take a position that would be perceived by the Teamsters Union as helpful to Beitzell due to NBW's close ties with labor unions. Beitzell further alleges that NBW stated that because the deal would not close, it had decided to accelerate Beitzell's debt to NBW and to foreclose on Beitzell's inventory.

***645** Beginning on February 22, 1990, NBW refused to honor checks drawn on Beitzell's account. Beitzell contends that funds should have been available under its revolving line of credit and that the dishonored checks had been issued before NBW decided to accelerate the debt. Certain of these checks were for payments of federal payroll tax obligations and obligations owed the D.C. government.

On February 23, 1990, NBW sent a demand letter to Beitzell declaring that Beitzell was in default under the loan documents and called for payment of both notes in three days. Beitzell alleges that they were not in default, and thus NBW wrongfully declared such a default. Beitzell contends that at the time NBW called the notes due, NBW was fully and adequately secured and the prospects of Beitzell's making repayment were certain. Beitzell had assets of approximately $7,750,000 and liabilities of approximately $6,640,000 and NBW was its only secured creditor.

On February 26, 1990, NBW sent a letter informing Beitzell of its failure to pay on demand and stated NBW's intention to enter upon Beitzell's premises and seize its inventory. Beitzell permitted NBW to enter the premises shortly thereafter in an effort to minimize damages to its business.

In early March 1990, Beitzell contends that NBW demanded it to employ an auctioneer at an exorbitant price to sell Beitzell's inventory within the next thirty to sixty days. When Beitzell refused, NBW threatened to notice the foreclosure sale of real estate securing the notes and to accelerate the Virginia Imports note. Beitzell contends that by its actions, NBW ultimately forced Beitzell out of business and into bankruptcy, thus providing the grounds for the five counts in its Amended Complaint.

II. *Does Federal Holder in Due Course Status Bar Beitzell's Claims?*

[1] The FDIC has argued that it is entitled to holder in due course status with respect to its loan instruments and, as such, Beitzell is barred from asserting all five counts in its Amended Complaint against the FDIC.[3] The arguments of both parties focus on whether this doctrine applies to

nonnegotiable instruments, and accordingly, whether the Notes at issue are negotiable. However, the court does not need to reach these issues in light of its prior ruling in *In re 1301 Connecticut Ave. Assoc.,* 126 B.R. 823, 830–831 (Bankr.D.D.C.1991).

[2] In *1301 Connecticut Ave.,* this court held that the federal holder in due course doctrine is limited to purchase and assumption transactions. 126 B.R. at 830 (citing *Campbell Leasing, Inc. v. FDIC,* 901 F.2d 1244 (5th Cir.1990)); *Sunbelt Savings, FSB Dallas, Texas v. Montross,* 923 F.2d 353 (5th Cir.1991); *FDIC v. Gulf Life Ins. Co.,* 737 F.2d 1513, 1518 (11th Cir.1984).[4] Other courts appear to agree with this conclusion. *See In re 604 Columbus Ave. Realty Trust,* 968 F.2d 1332 (1st Cir.1992) (federal holder in due course doctrine was fashioned precisely for the purpose of expediting purchase and assumption transactions and thus only applies in those cases); *FDIC v. Laguarta,* 939 F.2d 1231, 1239 n. 19 (5th Cir.1991) (doctrine inapplicable absent purchase and assumption transaction); *Desmond v. FDIC,* 798 F.Supp. 829, 841 (D.Mass.1992).

[3] [4] There being no suggestion that the FDIC in this case is acting other than as a liquidator of NBW's assets, the FDIC is not entitled to invoke the federal holder in due course doctrine as a bar to any of Beitzell's claims.[5] Therefore, the court must consider ***646** whether the *D'Oench Duhme* doctrine ("*D'Oench* ") or 12 U.S.C. § 1823(e) bars such claims.

III. *D'Oench Duhme and 12 U.S.C. § 1823(e)*

A. Brief Overview of *D'Oench* and the Statute

[5] The *D'Oench Duhme* doctrine is a common law rule of estoppel which precludes a borrower from asserting against the FDIC defenses based upon secret or unrecorded "side agreements" that alter the terms of facially unqualified obligations. *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 460, 62 S.Ct. 676, 680, 86 L.Ed. 956 (1942).[6] This doctrine shields the FDIC from claims[7] and defenses based upon agreements not firmly established in the failed financial institution's official records. *Resolution Trust Corp. v. Oaks Apts. Joint Venture,* 966 F.2d 995, 998 (5th Cir.1992); *Bowen v. FDIC,* 915 F.2d 1013, 1015–16 (5th Cir.1990). In addition, the doctrine prevents the FDIC from being held liable for a claim that is inconsistent with the written documents of the failed institution or based on an unrecorded oral or written side agreement. *D'Oench,* 315 U.S. at 459, 62 S.Ct. at 680. As one court has noted, the development of *D'Oench* over the years has been "expansive and perhaps startling in severity." *Bowen,* 915 F.2d at 1015.

[6] [7] Although the Supreme Court did not set out a specific test to determine when the doctrine applies, the Court indicated that the doctrine's applicability depends upon whether the alleged agreement was "designed to deceive the creditors or the public authority or would have that effect." *D'Oench,* 315 U.S. at 460, 62 S.Ct. at 681. Moreover, the borrower's intent is irrelevant; the proper inquiry is "whether the borrower lent himself to a scheme or arrangement that would be likely to mislead or deceive banking authorities." *Id.* And a party can be said to have lent themself to a scheme or arrangement simply by failing to reduce the agreement relied upon to writing. *Timberland Design, Inc. v. First Service Bank,* 932 F.2d 46, 48–49 (1st Cir.1991).

[8] In addition to the *D'Oench* doctrine is its statutory counterpart, 12 U.S.C. § 1823(e). Section 1823(e) protects the FDIC against any agreement which tends to diminish or defeat the FDIC's interest in any asset acquired by it unless such agreement: (1) is in writing; (2) was executed by the depository institution and the obligor contemporaneously with the acquisition of the asset; (3) was approved by the board of directors of the depository institution or its loan committee; and (4) has been continuously an official record of the depository institution.[8] Courts strictly adhere to these requirements. ***647** *American Federation of State, County and Municipal Employees v. FDIC,* 826 F.Supp. 1448, 1456 (D.D.C.1992).

By its terms, section 1823(e) only protects the FDIC from "agreement[s]" not satisfying the statute's requirements. However, the Supreme Court, in the only decision considering this area of the law since *D'Oench* and the enactment of § 1823(e), interpreted the term "agreement" broadly to include *all* conditions to the parties' performance of their bargain. *Langley v. FDIC,* 484 U.S. 86, 90–93, 108 S.Ct. 396, 400–02, 98 L.Ed.2d 340 (1987). In *Langley,* the parties asserted the defense that they were fraudulently induced to enter into the note by the bank's misrepresentations concerning the land at issue. The Court found that the truthfulness of alleged representations by the bank was a condition to performance of the maker's obligation to repay the loan, and thus such representations would constitute a main component of an "agreement" for purposes of § 1823(e). *Id.* at 91, 108 S.Ct. at 401. In essence, the parties were attempting to enforce an oral warranty through an action for fraud. Because the representations did not meet the requirements of the statute, the Court held that such claims were barred by § 1823(e). *Id.* at 96, 108 S.Ct. at 403.

[9] Given this broad interpretation of the term "agreement," an obligation of good faith and fair dealing and the obligation to act as a fiduciary would be viewed as conditions to the performance of the borrower's obligation. *See New Maine Nat'l Bank v. Benner,* 774 F.Supp. 36, 40 (D.Maine 1991) (defense of breach of duty of fiduciary duty is nothing more than assertion that the lender's performance of its fiduciary duty was a condition to the repayment of the note); *Clay v. FDIC,* 934 F.2d 69, 72 (5th Cir.1991) (duty to manage loan prudently is a condition that falls within definition of "agreement"). These conditions would constitute part of the overall "agreement" for purposes of § 1823(e) and would need to satisfy the statute's rigorous requirements in order for Beitzell to base a claim upon such obligations.

[10] Because the term "agreement" is defined broadly, the protection afforded by *D'Oench* and the statute often overlap. As one district court judge noted, "Over the years, the case law surrounding *D'Oench* and the statute ... has cross-pollinated such that it is difficult to decide where the statute ends and *D'Oench* begins ... the crucial question is the total protection that the statute and *D'Oench* together provide." *American Federation,* 826 F.Supp. at 1457. Courts have adopted different views with respect to the relationship between the common law *D'Oench* doctrine and 18 U.S.C. § 1823(e). *Compare Bowen,* 915 F.2d at 1015 n. 3 (§ 1823(e) codified *D'Oench*) *with American Federation,* 826 F.Supp. at 1460 (statute is partial codification of *D'Oench*) *and Tuxedo Beach Club Corp. v. City Fed. Sav. Bank,* 749 F.Supp. 635, 641 (D.N.J.1990) (statute is broader in that it applies to any agreement, whether or not it is secret and regardless of the maker's participation in the scheme, but also narrower in that it only applies to agreements, and not to other defenses the borrower might raise). This court finds no reason to disagree with Judge Lamberth's conclusion in *American Federation* that both *D'Oench* and the statute, while overlapping, are capable of somewhat different interpretations. Thus, this decision is based upon the protection provided by both *D'Oench* and the statute. *See Washington Properties v. RTC,* 796 F.Supp. 542, 545 n. 3 (D.D.C.1992) (Judge Richey).

B. Policy Background

[11] Before addressing Beitzell's claims, it is important to understand the policies behind *D'Oench* doctrine and section 1823(e). One purpose of both *D'Oench* and § 1823(e) is to enable examiners accurately to determine ***648** the health of an institution based on an examination of the formally maintained written records of the institution. *D'Oench,* 315 U.S. at 460, 62 S.Ct. at 680; *Langley,* 484 U.S. at 91–92, 108 S.Ct. at 401–02. *See Bowen,* 915 F.2d at 1016 ("The doctrine means that the government has no duty to compile oral histories of the bank's customers and loan officers ..."). In light of this policy, a court must consider "whether the transaction at issue—explicitly an 'agreement' under the statute or an 'arrangement' under *D'Oench*—would tend to deceive bank examiners" when determining whether a claim or defense is barred. *American Federation,* 826 F.Supp. at 1461.

[12] Another policy of both *D'Oench* and section 1823(e) is to place the risk of nonrecovery on borrowers in situations where they could have protected themselves by including the terms of their agreement in writing. *See Langley,* 484 U.S. at 94, 108 S.Ct. at 402. This policy choice is premised on the rationale that while borrowers are in a position to protect themselves by negotiating for certain terms and conditions, depositors and creditors of the bank cannot protect themselves against harm and thereby should be favored when an institution fails. *Id.; American Federation,* 826 F.Supp. at 1461–62.

[13] Finally, one additional purpose behind section § 1823(e), evidenced by the requirements of the statute itself, is to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank is headed for failure." *Langley,* 484 U.S. at 92, 108 S.Ct. at 401.[9]

C. Does *D'Oench* or Section 1823(e) Bar Beitzell's Claims?

[14] Although the *D'Oench* doctrine has been interpreted expansively, it has not been read to mean that there can be no defenses at all to attempts by the FDIC to collect on promissory notes. *FDIC v. Laguarta,* 939 F.2d at 1237 (maker can sue bank for breach of funding obligation in note); *FDIC v. McClanahan,* 795 F.2d 512, 515 (5th Cir.1986) (maker may defend that bank breached its obligation under the note). There is no doubt that a defense or claim that is based solely on alleged representations or agreements that are unrecorded is barred by the *D'Oench* doctrine and its statutory counterpart, § 1823(e).[10] However, when claims are based on provisions in the loan documents themselves, such claims are not barred. *See, e.g., Oaks Apartments Joint Venture,* 966 F.2d at 1000 ("When an agreement between a borrower and a lender imposes mutual obligations to perform agreed-to requirements, and the lender does not fully perform, *D'Oench* will not bar the borrower from asserting claims based upon the failure of the lender to satisfy his respective obligation"); *Howell v. Continental Credit Corp.,* 655 F.2d 743, 746–47 (7th Cir.1981)

(*D'Oench* does not bar enforcement of facially manifested bilateral obligation and bank's obligation to obtain title was in lease recorded in bank's records); *Bell & Murphy,* 894 F.2d at 754 (bank's obligation must appear on the face of the document which FDIC seeks to enforce); *Laguarta,* 939 F.2d at 1238–39 (doctrine does not preclude a claim that arises out of an obligation contained in the Loan Agreement itself)[11] ; *RTC v. Wellington Dev. Group,* 761 F.Supp. 731, 737 (D.Colo.1991) (*D'Oench* and § 1823(e) do not bar defenses arising out of ***649** express terms of loan documents). *See also RTC v. Montross,* 944 F.2d 227, 228–29 (5th Cir.1991) (personal defenses to which the maker is entitled must of course be based on documents of the bank at the time of insolvency and not upon secret agreements unenforceable under *D'Oench*); *FDIC v. Texas Country Living,* 756 F.Supp. 984, 987 (E.D.Tex.1990) (*D'Oench* has been expanded to defeat nearly every defense that is not based on a written document in the file with the lending institution).

[15] Likewise, section 1823(e) cannot be said to bar all claims and defenses. Congress has created an elaborate administrative system to deal with claims asserted by individuals against failed institutions. *See* 12 U.S.C. § 1821. Included in this scheme is a specific provision which states, "... any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation." 12 U.S.C. § 1821(d)(9)(A). Having expressly provided for the exclusion of claims that are based on agreements that fail to meet the requirements of § 1823(e), nevertheless, some claims are beyond the scope of that section and can be asserted against the FDIC.

[16] A careful examination of the cases finding that a claim or defense is barred by *D'Oench* and/or § 1823(e) reveals that those defenses or claims are premised solely on unrecorded agreements, promises or representations and not on any obligation found explicitly in the loan documents.[12] *See, e.g., Bell & Murphy,* 894 F.2d at 753 (claims of fraudulent misrepresentation and breach of contract arose out of unrecorded agreement to make future loans); *Kilpatrick v. Riddle,* 907 F.2d at 1525 (claim that maker was fraudulently induced into signing note by a scheme to defraud investors in violation of federal securities laws barred by *D'Oench*); *Beighley v. FDIC,* 868 F.2d 776, 778 (5th Cir.1989) (claims for breach of contract, breach of fiduciary duty, promissory estoppel and fraud all were based on an alleged breach of an oral agreement and thus barred by *D'Oench*); *604 Columbus Ave. Realty Trust,* 968 F.2d 1332 (plaintiff's tort and contract claims were held to be barred by *D'Oench* when premised solely on a secret kickback arrangement)[13]; *Torke v. FDIC,* 761 F.Supp. 754, 757 (D.Colo.1991) (nothing in the loan documents, security agreements, or modification agreements evidences any agreement upon which claims for breach of fiduciary duty, negligent misrepresentation, and breach of contract can be based).

[17] Accordingly, the proper inquiry is whether any of Beitzell's claims are premised on an obligation that is found in the loan documents or are not premised on an agreement whatsoever. If the latter, then such claims would not be barred by either *D'Oench* or § 1823(e).

Count I

[18] [19] Count I alleges a breach of duty of good faith and fair dealing. Beitzell points out that D.C.Code Ann. § 28:1–203 imposes an obligation of good faith and fair dealing in every contract that falls within the UCC. Thus, the notes and security agreements at issue, which are subject to the UCC,[14] include this duty (obligation) of good faith and fair dealing. The question, however, is whether an obligation implied by law can be said to be found expressly in the loan documents. Certainly if the court followed a literal interpretation of what it means for an obligation to appear expressly in the document, it could not be said that this duty appeared in the document. However, this court is not of the view that such a literal interpretation is warranted. A provision implied as a matter of law in every loan agreement ***650** should be treated as appearing on the face of the agreement.

The Fifth Circuit has held that claims based on UCC obligations implied in the loan agreement are not barred by *D'Oench. Texas Refrigeration Supply, Inc. v. FDIC,* 953 F.2d 975, 980–81 (5th Cir.1992) ("*TRS*"). In *TRS,* the borrower sued the lender for breach of contract, wrongful acceleration, unreasonable disposal of collateral at foreclosure, breach of fiduciary duty, misrepresentation, and breach of good faith. Plaintiffs argued that pursuant to the Texas UCC, creditors are forbidden from accelerating loans except for good cause[15] and must dispose of collateral in a commercially reasonable way. They further contended that because these obligations are inferred as a matter of law in any and every loan agreement, they appear on the face of the notes. The court agreed and held that because the claims for wrongful acceleration and unreasonable foreclosure sale were premised on obligations implied by law, they were not barred by *D'Oench:*

> *D'Oench Duhme* does not of itself thwart the assertion of rights for relief from wrongful acceleration and

unreasonable sale at foreclosure. *See Garrett v. Commonwealth Mortgage Corp.*, 938 F.2d 591, 595 (5th Cir.1991) ("[Neither section 1823(e) nor the *D'Oench Duhme* doctrine prevents plaintiffs from asserting claims or defenses that do not depend on agreements.") ...

> Obligations about timely acceleration and the disposal of collateral are implicit in every promissory note. These covenants are inferred in every such loan agreement.... And because they are an integral element of the relationship between every borrower and lender, they cannot be said to be secret or unwritten in the *D'Oench Duhme* sense....

TRS, 953 F.2d at 981.
The court also emphasized, however, that any claim premised on an oral agreement cannot be asserted against the FDIC. *TRS*, 953 F.2d at 982 n. 13 and 983. Thus, the court held that plaintiff's claims for breach of contract, breach of fiduciary duty, misrepresentation, and breach of good faith,[16] all of which were premised on one or more oral agreements to extend future credit, were barred by *D'Oench.*[17]

In *TRS*, the court failed to mention its earlier decision in *FDIC v. Hamilton*, 939 F.2d 1225 (5th Cir.1991), which addressed whether obligations implied pursuant to local banking custom can be asserted against the FDIC. In *Hamilton*, the borrowers attempted to set off their note obligation by alleging that the bank breached its obligation to timely advance funds pursuant to a line of credit. Although the local banking custom was for the bank to fund the full amount requested within one business day, this obligation was not recorded anywhere in the bank's records. Accordingly, the court held that "the long arm of *D'Oench Duhme* reaches out to block their claim." 939 F.2d at 1229. In so holding, the court concluded "the rationale that bars claims based on oral and collateral writings is equally applicable to claims based on unwritten, albeit widespread and prevailing, banking customs." *Id.* Like unrecorded agreements, implied obligations would not be readily apparent to FDIC examiners and the FDIC would face a similar burden in attempting to ascertain the bank's concealed liabilities. *Id.*[18] Moreover, the obligor could have insisted that the terms be put in writing by the bank.

***651** [20] Although *Hamilton* and *TRS* may appear to be contradictory, *Hamilton* is distinguishable from *TRS* (and from the case at bar) on the basis that an obligation implied as a matter of law is different in nature than an obligation implied by local custom. Whereas the FDIC might not be aware of local custom, nor have the duty to be aware of such, it does have a duty to know the law and any obligations imposed by such laws. To find otherwise would essentially be exempting the FDIC from the law. The FDIC should not be allowed to escape the imposition of such an obligation by reliance upon *D'Oench* or § 1823.

[21] Even if Beitzell is not barred by *D'Oench* from establishing that NBW owed an obligation of good faith, the court must consider whether section 1823(e) demands a different conclusion. In *TRS*, the court suggested that it would reach the same conclusion under § 1823(e) noting that "we have long held that the statutory and common law *D'Oench Duhme* doctrines bar essentially the same claims and defenses; that is they are virtually interchangeable." 953 F.2d at 979 n. 3. As stated above, this court does not view *D'Oench* and § 1823(e) as entirely inclusive of each other and a closer inquiry of whether the statute's requirements would be met is necessary. The district court for this district has held that a claim for the breach of an implied obligation of good faith asserted against the FDIC as receiver is barred by section 1823(e). *Washington Properties Limited Partnership v. RTC*, 796 F.Supp. at 549.[19] Although the court cited *TRS*, it noted that it was not directly on point and that in any event, it was not binding on the court. 796 F.Supp. at 549.

In *Washington Properties*, the plaintiff contended that its claim for the bank's breach of the covenant of good faith and fair dealing, which is implied in all contracts, was not barred. 796 F.Supp. at 546, 549. It argued that *D'Oench* is an equitable doctrine which should not be used to thwart the equitable doctrine of the implied covenant of good faith. In rejecting this argument, the court noted that the thrust of the plaintiff's claims was fraud in the inducement, and that its decision was based primarily upon § 1823(e) rather than on *D'Oench*. 796 F.Supp. at 546. The court also emphasized that wherever there is an allegation of fraud there must also be an implied allegation of a breach of the implied covenant of good faith and fair dealing. Thus, to accept plaintiff's argument "would be to strip § 1823(e) of its powers, and deprive of its power the Supreme Court's holding that fraud in the inducement claims are governed by § 1823(e)." 796 F.Supp. at 546. The case at bar, however, is distinguishable from *Washington Properties* and is more analogous to *TRS*. First, the implied covenant of good faith and fair dealing that the parties attempted to rely upon in *Washington Properties* was one imposed as an equitable doctrine by the court in *Hais v. Smith*, 547 A.2d 986 (D.C.1988). Beitzell in addition to citing *Hais* relies upon the provision in the D.C. version of the UCC, D.C.Code Ann. § 28:1–203, that implies an obligation of good faith and fair dealing in the performance of the contract.[20] More importantly, the parties in *Washington Properties* were not trying to imply the good faith obligation to any one specific provision or right that was evidenced in the loan documents. Rather, they wanted the court to imply the obligation in a general, equitable sense governing duties or promises that were all unrecorded and nowhere to be found in the loan documents (and, indeed, were negated by the loan documents themselves). Beitzell, on the other hand, is seeking to imply the obligation of good faith with respect to the exercise of certain rights provided expressly in the loan documents. In other ***652** words, Beitzell is arguing that NBW acted in bad faith with respect to actions taken regarding provisions actually in the loan agreement. Rather than implying the obligation of good faith and fair dealing to duties or obligations that simply cannot be said to exist because proof of such is barred by *D'Oench* and § 1823(e), Beitzell is asserting that the obligation of good faith and fair dealing governs the actions NBW took while exercising its rights and obligations that are specifically set forth in the loan agreement. Thus, allowing this count to go forward would not circumvent the court's holding in *Langley* regarding the scope of § 1823(e).

[22] [23] [24] [25] Because the obligation of good faith can be said to be part of the loan documents, the requirements of section 1823(e) are satisfied, for the Loan Agreement itself fulfills those requirements. Although the court in *Hamilton* construed the term "writing" narrowly such that only those obligations literally expressed on the face of the contract satisfy this requirement, extending section 1823(e) such that any obligation required by law must be in writing in order to be effective against the FDIC simply is not warranted. *Hamilton,* 939 F.2d at 1231. It suffices that the loan agreement is in writing and that the obligation is included in the agreement as a matter of law. Even though Beitzell could have had NBW's obligation to act in good faith included in the loan agreement, or somehow limited in writing NBW's ability to exercise the provisions in the Agreement, parties entering into a bargain should be able to assume that the parties will act in accordance with obligations imposed by the law without having to explicitly set forth what the law is. Moreover, the purpose behind the *D'Oench* doctrine is to protect against secret or unrecorded obligations or conditions, and an obligation implied by law as to a recorded contract is neither secret nor unrecorded. And while section 1823(e) is strict, extending it to exempt the FDIC from obligations imposed by law is simply not warranted.

[26] However, even if Beitzell is able to establish that a duty to act in good faith was owed, Beitzell's claim that the duty was breached cannot be premised solely upon alleged oral agreements or representations. *See Lake Forest Developments v. FDIC,* 989 F.2d 197, 201 (5th Cir.1993) (claim for breach of fiduciary duty that relied solely upon alleged oral modification was barred but claim that notice of foreclosure was inadequate did not rely on alleged oral representations and was not barred). In its Amended Complaint, Beitzell has asserted ten grounds in support of its claim that NBW acted in bad faith.

[27] Beitzell first alleges that NBW unreasonably withheld its consent to the Forman Brothers sale. The allegation that a vice president represented that approval would be given cannot be sued upon as a promise breached in bad faith by virtue of §§ 1823(e) and 1821(d)(9)(A). However, Beitzell is not barred from suing on oral statements that did not constitute promises but instead are acts of bad faith in violation of the contractual obligation of good faith. Thus, Beitzell may sue on its allegations that NBW unreasonably withheld consent to the Forman Brothers transaction.

[28] Similarly, § 1823(e) and *D'Oench* do not bar Beitzell from suing on its allegation that NBW breached its duty of good faith by unilaterally deciding to terminate Beitzell's business (*e.g.,* without any need to do so to protect NBW); making threats to increase its bargaining position; interfering with Beitzell's contract with Forman Brothers and with Beitzell's prospective business advantages; and demanding that Beitzell pay for an auctioneer to sell inventory.[21] Although in *Bell & Murphy,* 894 F.2d at 754, the court stated that it was irrelevant to the applicability of *D'Oench* whether the claimant was coerced or under economic duress in giving consent to a sale, this statement was made in the context of rejecting claims based on *oral promises* made in the negotiations that led to the agreement to sale. Therefore, Beitzell's contention that NBW's acts were coercive can be considered as a basis for its claim for breach of good faith.

***653** Moreover, Beitzell has alleged at least four actions, evidenced in writing, that it contends evidence a breach of this duty: wrongful dishonor of checks, wrongful declaration of default/acceleration, failure to give reasonable notice prior to demanding repayment and unreasonably requiring payment in full within three days of giving demand.

[29] The remaining counts sound in tort and, therefore, prior to addressing the remaining claims, the court must first determine whether *D'Oench* and section 1823(e) apply to tort claims. In *Astrup v. Midwest Federal Sav.*

Bank, 886 F.2d 1057, 1059 (8th Cir.1989), the court held that the *D'Oench Duhme* doctrine "affords no protection against tort claims against a financial institution...."[22]. *See also Vernon v. RTC,* 907 F.2d 1101, 1108 (11th Cir.1990) (holding that tort claims are not barred by *D'Oench*). However, other courts have held that the doctrine applies to any claim, whether sounding in contract or tort. *See 604 Columbus Ave.,* 968 F.2d at 1344 (*D'Oench* applies to claims involving secret agreements that sound either in tort or in contract) (citing *Timberland Design,* 932 F.2d 46, 50 (1st Cir.1991)); *Castleglen Inc. v. RTC,* 984 F.2d 1571, 1577 (10th Cir.1993) (party cannot simply recast contract defense as affirmative tort claim to evade prohibitions of *D'Oench* doctrine); *Torke v. FDIC,* 761 F.Supp. at 757; *Queen v. First Service Bank,* 129 B.R. 5 (Bankr.N.D.N.H.1991) (doctrine bars tort claims arising out of secret agreements). The courts holding that tort claims are subject to *D'Oench* and the statute note that regardless of whether the claim is a contract or tort action, the inquiry is the same—whether the claim is based on undocumented agreements or other oral representations.

Given the purposes of *D'Oench* and the statute, there is no reason why they should not apply when the claim, although sounding in tort, is based on unrecorded, oral representations or agreements. Moreover, "where the success of an asserted tort claim hinges on an agreement which does not satisfy the requirements of section 1823(e), it is not necessary to determine whether or not the claim falls within the confines of section 1823(e) or *D'Oench Duhme;* for the claim must fail under the plain meaning of section 1821(d)(9)(A)." *Tuxedo Beach,* 749 F.Supp. at 645 (claim for breach of fiduciary duty was based on unrecorded agreement to fund loan).[23] Therefore, if a tort claim relates solely to actions taken with respect to a secret, unrecorded agreement, then such a claim is barred. However, if the claim is based on conduct of the lender independent of any agreement or secret arrangement, that claim is not barred by either *D'Oench* or § 1823(e). With this distinction in mind, the court will consider whether Beitzell's remaining counts should be dismissed.

Count II

[30] Count II is a claim for breach of fiduciary duty. Several courts have held that a claim for breach of fiduciary duty is barred by either D'Oench or § 1823(e). *See, e.g., Beighley,* 868 F.2d 776; *Clay,* 934 F.2d 69; *Wellington,* 761 F.Supp. at 738; *New Maine Nat'l Bank,* 774 F.Supp. 36. However, these courts barred those claims because the claimant's assertion that a fiduciary duty was owed was based on oral representations or agreements not recorded in the banks records. *American Federation,* 826 F.Supp. at 1472. However, when the basis for finding a fiduciary relationship "derives from a source other than an unwritten agreement, *D'Oench* does not apply." *Id.* (source of duty is in relationship as broker-agent, not in any statements made); *Astrup,* 886 F.2d at 1059 (parties conceded that they were co-venturers and that such co-venturers owe each other a fiduciary duty).

***654** [31] [32] In this case, Beitzell's argument that NBW owed a fiduciary duty is, in essence, an attempt to imply a duty or standard that would govern NBW's exercise of the provisions found in the loan agreement. *See New Maine Nat'l Bank,* 774 F.Supp. at 40 (defense of breach of duty of fiduciary duty is nothing more than assertion that the lender's performance of its fiduciary duty was a condition to the repayment of the note); *Clay,* 934 F.2d at 72 (duty to manage loan prudently is a condition that falls within definition of "agreement"). However, this duty/standard is not stated anywhere in the loan agreement. And as the court in *Langley* made clear, section 1823(e) clearly bars any attempt to imply a standard governing the enforcement of the note that is not found in the loan agreement itself. *See Wellington,* 761 F.Supp. at 738 (without relying on oral representations, which are barred by both D'Oench and 1823(e), parties would be unable to establish that a fiduciary duty was owed—other than the oral representations, there were simply no provisions in the loan documents indicating that such a fiduciary relationship existed); *Clay,* 934 F.2d at 73 (claim for breach of fiduciary duty barred when the notes and loan agreements alone did not establish that a fiduciary relationship existed and establishing that such a duty was owed would require evidence outside the bank's files).[24]

[33] [34] In its Amended Complaint, Beitzell relies upon its longstanding banking relationship with Beitzell, (Amended Complaint ¶ 5) and the control that NBW exercised over all of Beitzell's income (Amended Complaint ¶ 7, 35) as grounds that a fiduciary relationship existed.[25] Although the source of the alleged fiduciary duty appears to be based on the nature of the relationship between Beitzell and NBW, the relationship is being invoked primarily to supply a standard of care in the performance of NBW's contractual obligations. Unlike the obligation of good faith, a fiduciary duty is not imposed by the law to every contract on its face. Rather, Beitzell seeks to supply a term (or a standard of performance) that is not implied by law from the face of the contract. *D'Oench* and § 1823(e) bar such an unwritten contract term from being enforced. Beitzell may not disguise its contract claim as a fiduciary duty claim and thereby subject the FDIC to a higher duty of care.

[35] [36] This does not end the inquiry, however. Although Beitzell's breach of fiduciary duty claim depends on a breach of contract being established, the fiduciary duty existed independent of any contract. Accordingly, Beitzell may prove that the contract was breached and then prove that this constitutes a breach of fiduciary duty as well. To the extent that Beitzell invokes the relationship for this secondary purpose and thereby for the purpose of providing a different basis for damages, the result is nevertheless the same although the analysis is different.

Except for punitive damages, the measure of damages would be the same as for breach of contract on the basis that Beitzell has not alleged different injuries arising from the different counts. *See Greenwood Ranches Inc. v. Skie Construction Co.,* 629 F.2d 518, 521 (8th Cir.1980) (plaintiff is not entitled to separate compensatory damage award under each legal theory when the causes of action are simply alternate theories for seeking the same relief); *Thompson v. Portland,* 620 F.Supp. 482, 489 (D.Me.1985) (amount of compensatory damages depends upon the extent of injury and not the number of theories); 22 Am.Jur.2d, *Damages* § 35 (1988). ***655** If Beitzell recovers damages on its breach of contract claim, it would not be entitled to recover additional compensatory damages in tort unless it alleges and proves the existence of additional damages attributable solely to the tort. *Rosen v. Marlin,* 486 So.2d 623, 626 (Fla.Dist.Ct.App.1986) (where compensatory damages requested in tort count are identical to those in contract count, damages for tort are not recoverable); *Davison Fuel & Dock Co. v. Pickands Mather & Co.,* 54 Ohio App.2d 177, 376 N.E.2d 965, 968, 8 O.O.3d 324 (1977) (independent actions in contract and tort do not permit recovery of more than the amount of damage actually suffered from the breach of contract). Beitzell has not alleged any damages arising solely from the alleged breach of fiduciary duty. And as seen below, punitive damages may not be recovered against the FDIC. Accordingly, the claim for damages would be redundant and will be dismissed on that basis.

Counts III and IV

[37] [38] [39] Count III is a claim for tortious interference with an existing contract[26] and Count IV is a claim for tortious interference with prospective business. To the extent that these counts are nothing more than Beitzell's allegation that NBW breached its oral promise that it would consent, disguised as a different cause of action, they must be dismissed. *See FDIC v. MM & S Partners,* 626 F.Supp. 681, 687 (N.D.Ill.1985) (party cannot dress up breach of oral agreement in garb of waiver and estoppel). However, as in the case of Count I, these claims are not premised solely upon oral representations and agreements and thus are not barred by *D'Oench* and § 1823(e).

Count V

[40] Count V is a claim based on negligent misrepresentation. The sole basis for this claim is the alleged oral representation by an NBW vice president that NBW would give its consent to the Forman Brothers transaction. (Amended Complaint ¶ 44–48.) Reliance on this type of oral, unwritten representation is exactly the type of agreement that the *D'Oench* doctrine operates to bar. *Desmond v. FDIC,* 798 F.Supp. 829, 834–5 (D.Mass.1992) (claim based on unrecorded promise to settle was barred). Under *D'Oench,* a claim cannot be asserted against the FDIC based on secret or unrecorded agreements. Accordingly, Count V must be dismissed.

IV. *Even if Beitzell's Claims are Not Barred By D'Oench or Section 1823(e), Has Beitzell Alleged Facts Sufficient to Withstand A Motion to Dismiss?*

[41] In addition to asserting that Beitzell's claims were barred by *D'Oench,* section 1823(e) and the federal holder in due course doctrine, the FDIC contends that Beitzell's claims do not allege facts sufficient to state a claim upon which relief can be granted. Given the court's earlier decision above, Counts I, III and IV are the only claims which must be addressed.

[42] Beitzell's complaint must only allege plausible grounds in order for it to survive a motion to dismiss. *See McLean Financial Corp.,* 659 F.Supp. at 1569. The following allegations and related facts as incorporated in Count I of the complaint provide plausible grounds upon which Beitzell could prove that NBW breached its duty of good faith and fair dealing owed to Beitzell: wrongful dishonor of checks, wrongful declaration of default/acceleration, failure to give reasonable notice prior to demanding repayment and unreasonably requiring payment in full within three days of giving demand, unreasonably withholding its consent, unilaterally deciding to terminate Beitzell's business (to the extent this allegation suggests that NBW's actions forced Beitzell out of business and into bankruptcy), making threats, and demanding that Beitzell pay for an auctioneer at an exorbitant price to sell its inventory. However, two of Beitzell's allegations in support of Count I, that NBW interfered with Beitzell's contract with Forman Brothers and with its ***656** prospective business relationships are nothing more than conclusory allegations that are unsupported by the facts alleged. Therefore, these two

allegations cannot be relied upon by Beitzell as support for Count I and will be dismissed. However, because the court is required to read the complaint liberally on a motion to dismiss, the court finds that Beitzell's remaining allegations in Count I are sufficient to withstand the FDIC's motion to dismiss. *See K.M.C. Co. Inc. v. Irving Trust Co.*, 757 F.2d 752, 760 (6th Cir.1985) (obligation of good faith required lender to give notice to borrower before it curtailed financing and demanded repayment); *Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9 (1st Cir.1987) (bank breached obligation of good faith by failing to give notice of intent to terminate relationship and failing to make an effort to negotiate alternative solutions).

[43] [44] Counts III and IV are causes of action for the tort of intentional interference with an existing contract and with a prospective business relationship, respectively. In support of these Counts, Beitzell has only alleged actions taken by NBW that were directed towards Beitzell itself, rather than towards some third party that has either entered into a contract with Beitzell or was considering doing business with Beitzell. Actions by a lender that are directed only at its borrower do not state a cause of action for intentional interference with contract or prospective business, even when those actions directed at the borrower indirectly affect the borrower's relation with some third party. *See, e.g., IK Corp. v. One Financial Place Partnership*, 200 Ill.App.3d 802, 146 Ill.Dec. 198, 209, 558 N.E.2d 161, 172 (1990) (acts forming basis of tortious interference claim must be directed at parties other than plaintiff); *State National Bank v. Academia Inc.*, 802 S.W.2d 282, 295–97 (Tex.Ct.App.1991) (applying Illinois law) (same). Moreover, Beitzell has not alleged any facts from which it could be inferred that NBW intentionally interfered with Beitzell's contract with Forman Brothers or its business relationships. *See Trimed Inc. v. Sherwood Medical Co.*, 977 F.2d 885, 890 (4th Cir.1992) (plaintiff must prove party intentionally and wrongfully hindered contract performance); *Laser Industries Ltd. v. Eder Inst. Co.*, 573 F.Supp. 987 (N.D.Ill.1983) (no evidence that purpose in withholding consent was to induce third party not to enter into contract).

[45] Even if NBW is found to have breached its contract with Beitzell by withholding its consent in bad faith, that breach serves no basis for a claim for intentional interference with contract. *1301 Conn. Ave.*, 126 B.R. at 833 (citing *Business Equipment Center Ltd. v. DeJur–Amsco Corp.*, 465 F.Supp. 775, 788 (D.D.C.1978) ("Interference with a contract between a plaintiff and a third party, which is caused by the defendant's breach of his own contract with plaintiff, serves as no basis for claim of intentional interference with contract.")) Assuming that NBW's alleged breach of contract in turn resulted in the breach of the sale agreement with Forman Brothers, Beitzell's remedy is not a claim for tortious interference with contract, rather, it is an element of damages for Beitzell's breach of contract claim. *id.*

Accordingly, Counts III and IV will be dismissed as failing to state a claim upon which relief can be granted.

V. *Beitzell's Objection to NBW's Claim*

Beitzell's amended complaint included an objection to NBW's proof of claim in the amount of $2,545,000 that was filed in Beitzell's bankruptcy case on August 9, 1990. Beitzell has asserted two grounds for its objection. First, Beitzell contends that its records indicate that NBW's claim is approximately $765,845.00. (Amended Complaint ¶ 53). In its Motion to Dismiss, the FDIC did not specifically address this allegation or move for dismissal of the objection on this ground. Accordingly, Beitzell's objection on this ground will not be dismissed.

The second ground for its objection is simply the reassertion of the claims against NBW set forth in the earlier portions of the complaint. (Amended Complaint, ¶ 54.) The court has determined that all of those claims, except for Count I, will be dismissed. As a result, those dismissed claims cannot provide grounds for Beitzell's objection to NBW's claim. Therefore, only Count I can provide a basis for Beitzell's objection.

***657** Beitzell has alleged that under the doctrine of recoupment, its claims (which is now only Count I) against NBW constitute a defense to the payment of NBW's claim. (Amended Complaint ¶ 55.) The FDIC did not argue as a grounds for dismissal that recoupment cannot be had against the FDIC. Nor have the parties briefed the issue. Therefore, the court reserves ruling on the issue of whether Beitzell can assert recoupment. *See 1301 Connecticut Ave.*, 126 B.R. at 831 n. 5.

VI. *Punitive Damages*

[46] [47] [48] Beitzell seeks an award of $25,000,000 in punitive damages. Punitive damages may not be assessed against public instrumentalities. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). *See Professional Asset Management, Inc. v. Penn Square Bank*, 566 F.Supp. 134 (W.D.Okla.1983) (punitive damages are inappropriate against government when acting in the public interest). In *Tuxedo Beach*, the court held that a claim for punitive damages may not be

asserted against the FDIC as receiver "on the grounds that it would contravene public policy and constitute an assessment of punitive damages against a United States instrumentality." 749 F.Supp. at 650. The court reasoned that the FDIC, when acting as receiver for a failed institution, is responsible for managing and resolving the affairs of that institution for the benefit of creditors, unsecured depositors and the federal taxpayer. In addition, punitive damages are designed to punish a wrongdoer, and where the wrongful party is in receivership, the only parties punished would be the innocent creditors. This court agrees with *Tuxedo Beach. See 1301 Connecticut Ave.,* 126 B.R. at 831 n. 5. Accordingly, Beitzell is barred from asserting a claim for punitive damages against the FDIC as Receiver.[27]

CONCLUSION

Count I will not be dismissed. The remaining Counts, II, III, IV, and V, will be dismissed in toto. With respect to the objection to NBW's claim, the motion to dismiss will be granted in part, and denied in part, with the court reserving ruling on the issue of whether recoupment may be asserted against the FDIC.

Footnotes

1 On September 20, 1991, the court denied the FDIC's second motion to dismiss for lack of subject matter jurisdiction. On December 20, 1991, the district court denied the FDIC's request for leave to pursue an interlocutory appeal of that order.

2 A few days before the deal was to close, the National Labor Relations Board, acting on behalf of the Teamsters' Union, moved to enjoin the transaction absent some set-aside to secure a contingent back-pay liability that had been incurred in connection with a 1987 Board proceeding. The court of appeals granted the relief sought.

3 Neither party addresses whether the "defenses" are personal or real. However, they are personal defenses. *See* D.C.Code Ann. § 28–3:305.

4 Moreover, as *Campbell Leasing* makes clear, even if the federal holder in due course doctrine applies, the FDIC as receiver must still defend against any assertion of these claims against the receivership estate. 901 F.2d at 1249 (plaintiff entitled to try their claims, liquidate amount of damages and receive a pro-rata share of insolvent bank's assets). Thus, even if the doctrine was found to apply, it would only act to prevent Beitzell from asserting any "personal" claims as a defense or setoff to its debt to NBW. *See 1301 Conn. Ave.,* 126 B.R. at 826.

5 Even if the doctrine was not limited to purchase and assumption transactions, it is doubtful that the doctrine would apply in this case. As noted in *1301 Connecticut Ave.,* the circuits are in conflict as to whether the doctrine applies to nonnegotiable notes. The Fifth Circuit has consistently held that the doctrine does not apply to such instruments. *Sunbelt Savings,* 923 F.2d at 357, *remanded on other grounds,* 944 F.2d 227 (5th Cir.1991); *FDIC v. Payne,* 973 F.2d 403 (5th Cir.1992); *RTC v. Oaks Apt. Joint Venture,* 966 F.2d 995 (5th Cir.1992). If this holding is followed, it would provide an independent basis for precluding the application of this doctrine since the Notes in this case were not negotiable. As this court held in *1301 Connecticut Ave.,* a note with a variable interest rate tied to the prime rate is not a negotiable instrument because it does not contain "an unconditional promise to pay a sum certain" required by D.C.Code § 28:3–104. Both Notes in this case were alleged to provide for a variable rate of interest tied to the prime rate and thereby would not be negotiable instruments.

6 In *D'Oench,* the FDIC sought to enforce a note that it acquired when a bank failed. The maker of the note raised as a defense an oral agreement with the bank that the note would not actually be called for payment.

7 Beitzell is essentially asserting claims against the FDIC, rather than asserting defenses. However, the courts have consistently held that if the defenses are barred by the *D'Oench Duhme* doctrine, then the defenses framed as a cause of action must also be barred, as any other result would nullify the doctrine. *Kilpatrick v. Riddle,* 907 F.2d 1523, 1528 (5th Cir.1990); *Bell & Murphy & Assoc.,* 894 F.2d at 753 (*D'Oench* bars affirmative claims based upon unrecorded agreements); *604 Columbus Avenue Realty Trust,* 968 F.2d at 1344 (*D'Oench* applies to bar affirmative claims as well as defenses premised on secret agreements).

8 Section 1823(e) provides in pertinent part: "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 ... 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 held that none of the statute's purposes would be met "if an element so fundamental as a condition upon the obligation to repay is excluded from the meaning of 'agreement.' " 484 U.S. at 92.

10 For example, Beitzell cannot assert against the FDIC–Receiver any claims arising from NBW's alleged breach of an unwritten agreement to consent to the sale of Beitzell's collateral to Forman Brothers.

11 In *Laguarta*, the maker asserted, as a defense to collection on the note by the FDIC, that the lender breached its funding obligation under the Loan Agreement. The court concluded that because the funding obligations were "spelled out" in the Loan Agreement, *D'Oench* did not apply. 939 F.2d at 1239. The court did note, however, that *D'Oench* precluded the use of plaintiff's assertions that the president of the bank had represented that the bank would continue to extend and modify its loan as necessary against the FDIC. 939 F.2d at 1235 n. 10. However, since the claim was not premised solely upon these unrecorded representations, it was not barred by *D'Oench*.

12 None of the reported cases get beyond the "agreement" stage and address such requirements of § 1823(e) as the approval by the board of directors or loan committee and the existence of a minute.

13 Although the trust tried to argue that its claims were based on a factual basis independent of the kickback arrangement and on express terms in the loan agreement, the bankruptcy court had explicitly found that these claims were premised on the kickback scheme.

14 *See* D.C.Code Ann. §§ 28:9–102(1)(a), 9–104, 9–105(1) and 28:3–104(2)(d), 3–104(3).

15 Tex.Bus. & Comm.Code § 1.208 (Tex.UCC). D.C.Code Ann. § 28:1–208 imposes the same requirement.

16 Significantly, the court did not address whether the duty of good faith was implied as a matter of law apparently because the argument was not raised.

17 The court held that although certain claims were not barred, any allegations of oral agreements cannot be used as evidence to support those claims. *TRS*, 953 F.2d at 982 n. 13.

18 The court rejected the Hamiltons' argument that the burden in this case would not be severe since the FDIC would only have to investigate the local custom regarding each type of instrument in general, rather than investigate each individual asset.

19 Plaintiff's claim for fraudulent inducement was premised on allegations that the lender misrepresented its ability to administer the loan, failed to perform its promise to disburse funds, and failed to advise plaintiffs of deviations from the Agreement. The court held that no document meeting the requirements of section 1823(e) was introduced in which the bank made any representations about its ability to administer, or in which the bank accepted any duty. 796 F.Supp. at 546. Moreover, the documents explicitly stated that such a duty would not be owed.

20 Section 28:1–203 provides: "Every contract or duty within this subtitle imposes an obligation of good faith in its performance or enforcement."

21 This does not mean, however, that these allegations necessarily suffice to state a claim for relief based on breach of good faith. *See* part IV, *infra*.

22 As examples of the types of claims that would not be barred the court noted a claim for personal injuries to a motorist in a collision with an armored car, for insider profits in a sale in violation of federal securities regulations, or for fraudulently entering into transactions involving discriminatory interest rates. In *Astrup*, the claim for breach of fiduciary duty was based on the allegations that the coventurer fraudulently entered transactions involving discriminatory interest rates.

23 As discussed earlier, section 1821(d)(9)(A) bars any claim that is based on, or substantially comprised of, an agreement that does not meet the requirements of section 1823(e).

24 Nobody has suggested that the loan documents either expressly or inferentially evidence a fiduciary relationship. Furthermore, the fact that a fiduciary relationship may be inferred from the loan documents is insufficient to support a claim that such a duty is owed. In *Clay*, the court held that while it could be inferred from the documents that the parties agreed that such a duty was owed,

inferences of such an agreement are insufficient to support a claim against the FDIC. *See Beighley*, 868 F.2d at 782–83 (inferences that certain duties were owed does not satisfy the requirements of § 1823(e)); *Bowen*, 915 F.2d at 1016 (FDIC not required to search a failed bank's documents for inferences and hidden duties).

25 Beitzell alleges that NBW "owed Beitzell fiduciary duties of good faith, fair dealing and complete honesty ... by virtue of the parties' banking/lending relationship." (Amended Complaint ¶ 34.)

26 Tortious interference with contractual relations arises when a defendant interferes with a contract between the plaintiff and some third party. *Weaver v. Gross*, 605 F.Supp. 210, 216 (D.D.C.1985); *Donohoe v. Watt*, 546 F.Supp. 753, 757 (D.D.C.1982), *aff'd*, 713 F.2d 864 (D.C.Cir.1983); *1301 Conn. Ave.*, 126 B.R. at 832.

27 Since the FDIC is only acting in its receivership capacity, I need not address whether punitive damages can be recovered against the FDIC when acting in its corporate capacity.

End of Document

Law of Lender Liab. ¶ 1.03[3]
A.S. Pratt & Sons
The Law of Lender Liability
Mark Budnitz (First Edition (1990) preparedby Helen Davis Chaitman)
Current through the September 2013 Update
Chapter 1. Commitments to Lend
¶ 1.03. Elements of Contract Formation

¶ 1.03[3] DEFINITENESS OF ALL MATERIAL TERMS

To be enforceable as a contract, an agreement must reflect the parties' assent to all of the essential or material terms of the bargain. A court will decline to enforce a contract in which the terms are not definite or cannot be supplied by a rule of law.

[A] court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. ... It is said to be fundamental that a person may not be subjected by law to a contractual obligation unless the character of such obligation is fixed with a reasonable degree of definiteness by an express or implied agreement of the parties; that an agreement must not only identify the subject matter but also must spell out the essential commitments and agreements of the parties with respect thereto; and that the courts cannot specifically enforce contracts or award substantial damages for their breach when they are wanting in reasonable certainty.[1]

Generally, the essential elements of a contract to lend money include the amount and term of the loan, the interest rate, the method of repayment, and any required collateral.[2] Even if the parties have not expressly stated one of these essential terms, the court may fill the gap by reference to the parties' prior dealings or to commercial practice generally.[3]

Numerous cases have considered whether an alleged contract to lend money was sufficiently definite to be enforced. The results can only be described as contradictory, and little by way of practical guidance can be gleaned from them.

Perhaps the case that best illustrates the lengths to which a court may go to find proposed loan terms sufficiently definite is National Farmers Organization v. Kinsley Bank.[4] In that case, the borrower approached a bank with which he had done business on several prior occasions and requested a loan to buy between 15,000 and 20,000 lambs for delivery the following fall at a price of $50.50 per hundredweight. The jury found that the bank had agreed orally to make the loan; in fact, the bank had issued a check for $17,190 for the down payment, which advance was evidenced by the borrower's promissory note in that amount and was secured by an interest in the lambs. The bank contended that it had agreed to loan the borrower only the down payment and dishonored other checks drawn by the borrower to pay the balance of the purchase price. The jury found not only that the bank had agreed to make the loan, but also that the terms of the alleged loan were not too indefinite to be enforced. It was not disputed that the precise terms of the proposed loan—amount, interest rate, and terms of repayment—had not been expressly stated. The Tenth Circuit affirmed the judgment on the issue of liability, holding that the question of definiteness of the terms was properly for the jury to decide. The court noted that the jury could have determined the contract terms left open by considering standard commercial practice and the prior course of business between the bank and the borrower.[5] The court further stated that the bank's part performance in advancing funds for the down payment demonstrated that the bank had not considered the loan terms to be too indefinite.[6]

Although National Farmers Organization is perhaps the most extreme example, other courts have also been willing to fill open terms of an alleged oral loan commitment. In Wait v. First Midwest Bank/Danville,[7] the complaint alleged that there was an oral agreement to make a loan in a stated amount, that the interest rate was to be "the variable rate of interest then charged," and that installment payments were to be made on a "periodic" basis. Holding that these allegations sufficiently pleaded the terms of the alleged contract, the court stated:

We note, however, that while a contract must be complete and definite in its terms to be enforceable, reasonable certainty is all that is required. Further, the duration of an agreement may be determined from a consideration of the agreement as a whole. ... Duration could conceivably be inferred based upon custom in the area, the terms of the previous loan with the

Westville Bank, or in considering the steps plaintiff alleges he has taken to obtain the loan.[8]

It is remarkable that the borrower's prior course of dealing with another lender could serve to prove the terms of a loan from the new lender.

Other courts have required a greater degree of certainty as to the material terms of loans. In Willowood Condominium Association v. HNC Realty Co.,[9] for example, the court stated that a written term providing for interest at "4 1/4% over Hartford National Bank prime rate with a minimum of 9%" was too indefinite to enforce. The lender's letter did not specify how and when the rate would be adjusted or paid, and, because no closing date was specified, it was not possible to determine the initial interest rate on the loan (presumably required to perform a damages calculation).

In Kreisler & Kreisler, LLC v. National City Bank et al.,[10] a commercial borrower filed class action claiming that lender breached contract by charging interest allegedly in excess of the rate specified in promissory note securing commercial loan. The plaintiff argued that 365/360 term in the payment provision conflicted with the term "per annum" in the variable interest rate provision and that the description of the "annual interest rate" in the payment provision was too indefinite and uncertain to be enforced because it did not calculate a rate or purport to calculate an interest amount. The Eighth Circuit held that the rate in the contract unambiguously indicated the bank's use of the 365/360 method and resulting increase in the effective interest rate. The Eighth Circuit found fault with the plaintiffs' argument because they did not argue that the contract language was ambiguous. Rather, the plaintiffs took issue with the method of calculation. The Eighth Circuit affirmed the district court's conclusion that the contract language was clear, that the provisions did not conflict, that the contract sufficiently disclosed how interest would be charged, and that the bank complied with its terms.

In Peterson Development Co. v. Torrey Pines Bank,[11] the court held, first, that a loan commitment was not binding because it did not contain all of the material terms. The court considered material terms to include: "the identity of the lender and borrower, the amount of the loan, and the terms for repayment."[12] The commitment letters in this case provided that financing would be offered either to the borrower-developer or to prospective purchasers of the homes built by the developers. The court felt that this provision did not identify the borrowers clearly enough. Second, the exact amount of the loan was not specified. Rather, the letter stated that loans would be made up to a maximum of the lesser of 90 percent of the amount of the lender's appraisal or the purchase price. Third, instead of containing a specific interest rate, the letter said that the rate would be the lender's standard rate for comparable loans on the date the lender approved these loans.

Not surprisingly, courts have declined to enforce alleged oral agreements to loan money "to the extent of the Bank's lending limit"[13] or as long as the borrower is making progress toward profitability.[14] An alleged oral agreement to provide floor plan financing for late model cars that failed to establish the precise amount of the loan, the interest rate, or the repayment terms was held to be too indefinite to enforce, in spite of extensive prior dealings of the parties on unrelated transactions.[15]

It is difficult to predict whether the existence of one or more open terms will result in a finding that the agreement is too indefinite to enforce or whether the agreement will be found to be enforceable, with the court either supplying the missing terms itself or imposing on the parties an obligation to negotiate in good faith to supply the missing terms.[16]

Footnotes

1 Willowood Condominium Ass'n v. HNC Realty Co., 531 F2d 1249, 1251 (5th Cir. 1976).

2 Union State Bank v. Woell, 434 NW2d 712 (ND 1989).

3 Restatement (Second) of Contracts § 204 (1979).

4 National Farmers Org. v. Kinsley Bank, 731 F2d 1464 (10th Cir. 1984).

5 Id. at 1470.

Next

6 See Restatement (Second) of Contracts § 34(2) (1979). See also supra ¶ 1.03[2].

7 Wait v. First Midwest Bank/Danville, 491 NE2d 795 (Ill. App. Ct. 1986).

8 Id. at 522 (emphasis added).

9 Willowood Condominium Ass'n v. HNC Realty Co., 531 F2d 1249 (5th Cir. 1976).

10 657 F.3d 729 (8th Cir. 2011).

11 Peterson Dev. Co. v. Torrey Pines Bank, 284 Cal. Rptr. 367 (Ct. App. 1991). See Nelson v. Production Credit Ass'n. 930 F2d 599 (8th Cir.), cert. denied, 112 S. Ct. 417 (1991).

12 Peterson Dev. Co. v. Torrey Pines Bank, 284 Cal. Rptr. at 374.

13 Union State Bank v. Woell, 434 NW2d 712 (ND 1989).

14 Champaign Nat'l Bank v. Landers Seed Co., 519 NE2d 957 (Ill. App. Ct. 1988); McClellan v. Banc Midwest, NA, 517 NE2d 762 (Ill. App. Ct. 1987).

15 Dennis Chapman Toyota, Inc. v. Belle State Bank, 759 SW2d 330 (Mo. Ct. App. 1988).

16 See infra ¶ 1.04[1] discussing the obligation to negotiate over open terms.

No. 71114-8-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BLACK DIAMOND DEVELOPMENT COMPANY, LLC, a Washington Limited Liability Corporation; LEE WITTENBERG, individually and on behalf of his marital community; WAYNE COURTNEY, individually and on behalf of his martial community,

Appellants,

v.

UNION BANK, N.A.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LORI SMITH

DECLARATION OF SERVICE OF REPLY BRIEF OF APPELLANTS BLACK DIAMOND DEVELOPMENT COMPANY, LLC; LEE WITTENBERG, individually and on behalf of his marital community; AND WAYNE COURTNEY, individually and on behalf of his marital community

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OLES MORRISON RINKER & BAKER, LLP

J. Craig Rusk
WSBA No. 15872
Brandon D. Young
WSBA No. 44222

701 Pike Street, Suite 1700
Seattle, WA 98101
(206) 623-3427

Attorneys for BLACK DIAMOND DEVELOPMENT COMPANY, LLC; LEE WITTENBERG, individually and on behalf of his marital community; AND WAYNE COURTNEY, individually and on behalf of his marital community

I, Judith A. Morland, declare as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Oles Morrison Rinker & Baker LLP. My business and mailing address is 701 Pike Street, Suite 1700, Seattle, Washington 98101-3930.

3. On June 20, 2014, I caused to be served true and correct copies of the following documents by ABC Legal Messengers on the following parties:

Stellman Keehnel
Katherine Heaton
DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104

Entitled:

1. Reply Brief of Appellants Black Diamond Development Company, LLC, Lee Wittenberg, individually and on behalf of his marital community; and Wayne Courtney, individually and on behalf of his marital community;

2. Statement of Non-Washington Authority in Support of Reply Brief of Appellants Black Diamond Development Company, LLC, Lee Wittenberg, individually and on behalf of his marital community; and Wayne Courtney, individually and on behalf of his marital community; and

3. this Declaration of Service.

DATED this 20th day of June, 2014, in Seattle, Washington.

Judith A. Morland

Judith A. Morland

4837-6669-3659, v. 1