IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3134

HAROLD G. DAVES and MARY MOSLEY DAVES,

Plaintiffs-Appellants,

versus

LOUISIANA NATIONAL BANK,

Defendant,

PREMIER BANCORP, INC.,

Defendant-Third Party Plaintiff-Appellee,

versus

FOSTER PROPERTIES, INC., and BRIGHTSIDE LANE CORP.,

Third Party Defendants-Appellants.

No. 92-9527

HAROLD G. DAVES and MARY MOSLEY DAVES,

Plaintiffs-Appellants,

versus

PREMIER BANCORP, INC., and LOUISIANA NATIONAL BANK,

Defendants-Appellees.

Appeal from the United States District Court for
the Middle District of Louisiana
(CA 88 503 B M1)

(December 15, 1993)

Before POLITZ, Chief Judge, REAVLEY and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Appellants Harold and Mary Daves brought this lender liability suit in Louisiana federal court against Louisiana National Bank and its successor, Premier Bancorp, Inc. (collectively "the Bank"). The Bank brought a counterclaim and third-party claim for a judgment on certain promissory notes signed by Harold Daves in 1986. The court granted summary judgment in favor of the Bank on the notes, awarding a money judgment for the amounts owed on the notes, determining the collateral securing the notes, and directing the entry of final judgment pursuant to FED. R. CIV. P. 54(b). The Bank proceeded to foreclose on the properties securing the notes, including the Daves' home. Mary Daves, with Harold Daves serving as her lawyer, then brought a state court action seeking the reconveyance of the homestead property to Mary Daves. The federal court enjoined the Daves from further pursuing their

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

state court action. The Daves appeal the summary judgment and the judgment granting the injunction. We affirm both judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The Daves brought this suit against the Bank In June of 1988. The complaint alleges that Harold Daves (Daves) had a longstanding and special relationship with the Bank. It claims that in 1985 he developed the concept for a joint venture among himself, the Bank, and his employer, Traveler's Insurance Company. The joint venture, known as Newcorp, was to sell insurance to the Bank's employees, and each venturer was to have a one-third interest in the venture. The complaint further alleges that in March of 1986, the Bank began pressuring Daves to reduce his interest in the joint venture, and linked his status and dealings with the Bank as a borrower to the Bank's efforts to reduce his interest in the joint venture. It asserts a cause of action under the anti-tying provision of the Bank Holding Company Act,[1] as well as common law causes of action for breach of the duty of good faith and fair dealing, duress, breach of fiduciary duty, and unlawful control, dominion and interference with Daves' affairs.

In September of 1989, the Bank filed an amended counterclaim and third-party claim seeking recovery on three promissory notes

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[1] 12 U.S.C. § 1972. The Act prohibits a bank from extending credit "on the condition or requirement . . . that the customer provide some additional credit, property or service to such bank other than those related to and usually provided in connection with a loan . . . ."

signed by Daves and dated December 3, 1986. Daves signed two of the notes individually and one as the agent for Foster Properties, Inc., one of his companies. In June of 1990 the Bank filed a summary judgment motion seeking a recovery on these notes, and recognizing and enforcing the mortgages and related security documents securing the notes. The district court allowed extensive briefing and oral argument on the motion. The evidence offered in opposition to the motion included three affidavits of Daves. In December of 1990 the district court issued a ruling granting the summary judgment motion, which was followed in January of 1991 by a judgment awarding money damages reflecting the amounts owed on the notes, and recognizing the validity and enforceability of the mortgages securing the notes. These mortgages covered various pieces of real estate, including the Daves homestead property and adjacent property (collectively "the homestead properties"). The summary judgment, expressly finding no just reason to delay the entry of final judgment as required by FED. R. CIV. P. 54(b), directed the entry of a final judgment.

After the court granted the summary judgment, the Daves unsuccessfully sought relief from the requirement of posting a supersedeas bond, and Harold Daves filed for bankruptcy. The Bank obtained relief from the bankruptcy stay to foreclose on the mortgages. After foreclosure, in May of 1992, Mary Daves filed a Louisiana state court petition against the Bank. The suit alleged that the Bank had breached a 1986 agreement to release

the mortgage on the homestead properties in exchange for the payment of $350,000. The suit sought damages and a judgment ordering the Bank to reconvey the homestead properties to Mary Daves. Harold Daves, a licensed attorney, served as counsel of record on the petition. Notices of lis pendens were filed on the homestead properties.

The Bank then returned to federal court, seeking injunctive relief from the prosecution of the state court suit. In November of 1992 the federal district court entered a judgment granting a preliminary and permanent injunction. The judgment restrained the Daves from further prosecuting the state court suit, and directed them to cancel the notices of lis pendens.

The Daves brought separate appeals, now consolidated, to this court challenging the summary judgment and the injunction.

ANALYSIS

A. *Summary Judgment*

The affidavits submitted by Daves in opposition to the summary judgment motion traced the chronology of dealings between himself and the Bank, and focused considerable attention on the insurance joint venture which was the subject of his affirmative claim for violation of the Bank Holding Company Act. Citing the little authority available, the district court concluded that the affirmative claim under this Act was not a defense to the

counterclaim seeking recovery on the notes.[2] The Daves do not challenge this conclusion on appeal, and indeed argue emphatically that they never relied on the anti-tying claim as a defense to the summary judgment motion. Instead, they contend that fact issues regarding their common law defenses made summary judgment inappropriate.

The various affidavits and memoranda in opposition to the summary judgment motion raised the common law defenses of duress, fraudulent inducement and novation. In determining whether a summary judgment motion was properly granted, we review the record independently, viewing all fact questions in a light most favorable to the nonmovant. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988).

In support of the defense of duress, Daves' affidavits asserted numerous facts regarding his dealings with the Bank. The affidavits and memoranda submitted in opposition to the summary judgment motion asserted that: (1) the Bank pressured Daves to accept a lower percentage interest in the proposed joint venture; (2) the Bank refused to abide by a prior oral agreement to release its mortgage on the Daves' home in exchange for $350,000; and (3) although in 1986 Daves' existing loans with the

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[2] The district court cited *Exchange Nat'l Bank of Chicago v. Daniels*, 768 F.2d 140 (7th Cir. 1985), and *Hunt v. Bankers Trust Co.*, 689 F. Supp. 666 (N.D. Tex. 1987). *Daniels* concluded that a violation of the Act gives rise to a cause of action for damages, but is not a defense to a lender's claim for recovery under a note, by analogizing federal antitrust cases holding that an antitrust violation does not allow a buyer of goods to keep them without payment. 768 F.2d at 144. *Hunt Brothers* reached the same conclusion. 689 F. Supp. at 673.

Bank had maturity dates occurring in 1986, there was an understanding that at least some of the loans were on a five-year term extending to 1989.

The Bank argues that the December 3, 1986 notes on which it sought summary judgment were the result of a workout agreement reached after Daves defaulted on his loans in 1986. Daves did not present competent summary judgment evidence disputing that at the time the parties entered into the December 3, 1986 renewal notes, the loans were in default,[3] nor was any such evidence presented that the Bank agreed not to accelerate the loans in the event of a default. The district court reasoned that, regardless of the term of the prior notes, the Bank had a legal right under the prior notes to accelerate the full indebtedness and foreclose on the collateral securing them once there was a default.[4] We agree with the district court that, given the absence of summary

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[3] One of the Daves affidavits stated that "[u]p until October 20, 1986, I was current on my indebtedness to [the Bank]." One of the Daves' interrogatory answers states: "We do not contend that Mr. Daves was current in his payments in December 1986." At the oral argument on the summary judgment motion, plaintiffs' counsel stated that "Mr. Daves didn't go in default on these loans until mid to late summer of 1986 . . . . He went into default -- it was sometime in the summer of, say June of '86." He further agreed with the court's statement that "at the time the December 3, 1986 notes were signed, those notes according to the agreement were the renewal of the notes that were in default, that everybody concedes were in default."

[4] At the oral argument on the motion, counsel for the Daves agreed with the court's statement that "at the time the notes were renewed, the option for the bank was either -- there were three options involved. Mr. Daves could have brought the note up-to-date or paid it off. The Bank could have sued him, or they could have entered into this renewal agreement that was entered into. And that was the option that everybody has."

judgment evidence that the Bank had caused the default on the loans,[5] it had a legal right to enter into a workout agreement calling for the pledge of additional collateral or other terms which varied the original written terms (or alleged oral terms) of the prior loan arrangement. Under Louisiana law, "[a] threat of doing a lawful act or a threat of exercising a right does not constitute duress." LA. CIV. CODE ANN. art. 1962 (West 1987).

In support of the defense of fraudulent inducement, Daves asserted in one affidavit that the December 3, 1986 notes "were fraudulently induced, because [the Bank] represented to me that they were needed because of [my] financial condition, whereas, in truth, they were part of its illegal design to deprive me of my interest or potential interest in Newcorp." Assuming that Daves is competent to testify as to the Bank's intent, this evidence is insufficient to support a defense of fraudulent inducement. Under Louisiana law, like the law of all other jurisdictions of which we are aware, a misrepresentation standing alone will not support a claim or defense of fraud. Instead, the party claiming fraud must establish that he relied on the misrepresentation or that it caused him to act in a manner detrimental to his best interests.[6] Here, Daves did not claim that he would not have

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[5] When asked, at the oral argument on the summary judgment motion, "What was the cause of the default?" counsel for the Daves responded, "Inability to pay the interest payments." He went on to concede that "[t]here is no doubt that the tying did not cause the default . . . . I agree with the court that the tying is not a cause of the default."

[6] *See* LA. CIV. CODE ANN. art. 1955 (West 1987) ("Error induced by fraud need not concern the cause of the obligation to

entered into the workout loans if he had known the true intent of the Bank. On the contrary, he claimed that he was well aware of the Bank's intentions, and that the Bank's overt pressure on him to reduce his interest in the Newcorp joint venture supported his claims of duress and illegal tying.[7]

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vitiate consent, but it must concern a circumstance that has substantially influenced that consent."); *Id.* at art. 1954 ("Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill. This exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations."); *Plan Investments of Shreveport, Inc. v. Heflin*, 286 So. 2d 511, 512 (La. App. 2d Cir. 1973) (finding that mortgage and note were fraudulently induced where defendants "had no knowledge the instruments they signed were a mortgage and a promissory note, but relied upon the representations of [plaintiff] that it was an advertisement contract to show their home . . . . 'Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract . . . . The error must be on a material part of the contract, that is to say, such part as may reasonably be presumed to have influenced the party in making it . . . .'") (citations omitted).

[7] For example, one of Daves' affidavits details at length the alleged efforts by the Bank to reduce Daves' interest in Newcorp prior to the workout agreement. It states: "On February 7, 1986, Buck Singletary, the Bank's General Counsel, told me for the first time that the division of ownership may not be one-third for each party, even though I was the party who conceived of and initiated the joint venture . . . . On the same day . . . the Bank's legal counsel, Singletary, and the Travelers lawyer, Paul Eddy, advised the Bank's New Orleans lawyer that the original allocation of ownership was no longer appropriate, even though I made the joint venture possible. On February 20, 1986, the New Orleans lawyer confirmed this telephone conversation by letter . . . . On March 12, 1986, I met with Griffin and Tooker of Travelers and they told me I must reduce by interest in the initial Newcorp venture from one-third to 10 percent . . . . When I refused to reduce my ownership interest in Newcorp, in spite of the extreme pressure put on me by [the Bank] to do so, [the Bank] changed its strategy . . . . Conversations were held and letters were exchanged during May, June and August of 1986, concerning the ownership issue of Newcorp and my loan status . . . . On October 20, 1986, I wrote a letter to C. W. Mccoy, Chairman of [the Bank] outlining my grievances which included . .

The Daves argue that the December 3, 1986 notes constituted a novation which extinguished the prior debt. This argument becomes relevant to the debt owed only if we conclude that the new notes are unenforceable. Since we conclude that summary judgment enforcing the new notes was appropriately granted, we need not consider whether the old notes were extinguished by a novation. The novation defense is, however, relevant to the question of which collateral secured the new notes, since the Bank sought and recovered a judgment allowing it to foreclose on collateral pledged under agreements preceding the execution of the new notes. Daves contended by affidavit that the parties intended a novation, because the new obligations evidenced by the notes and related documents of December 3, 1986 "were distinctly different in date, amount, signatories and collateral," and because one Bank official informed him that "it's a new ball game" when Daves inquired why the Bank was requiring new collateral in 1986, rather than merely extending the loan as had been the prior practice. We agree with the district court that the 1986 notes and related documents did not effect a novation which extinguished prior security agreements between Daves and the Bank. Under Louisiana law, a novation may not be presumed, and "[t]he intention to extinguish the original obligation must be clear and unequivocal." LA. CIV. CODE ANN. art. 1880 (West 1987). The Code further provides:

. tying with regard to unrelated business dealings with the bank (Newcorp)."

> Novation takes place when, by agreement of the parties, a new performance is substituted for that previously owed, or a new cause is substituted for that of the original obligation. If any substantial part of the original performance is still owed, there is no novation.
>
> Novation takes place also when the parties expressly declare their intention to novate an obligation.
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> Mere modification of an obligation, made without intention to extinguish it, does not effect a novation. The execution of a new writing, the issuance or renewal of a negotiable instrument, or the giving of new securities for the performance of an existing obligation are examples of such a modification.

Id. at art. 1881. Under these provisions and Louisiana case law,[8] the 1986 workout agreement did not effect a novation. A substantial indebtedness was owed at the time of the agreement. An intent to extinguish the prior security agreements was not expressed clearly and unequivocally; indeed, a contrary intent is plain from the wording of the documents signed in 1986.[9]

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[8] *Compare Eldred v. Wicker*, 273 So. 2d 902, 903 (La. App. 1st Cir. 1973) ("Giving of a note for an antecedent debt does *not* constitute a novation, in the absence of a specific intent that it do so, because novation is never presumed. Such a transaction only changes the form of the indebtedness.") (emphasis in original); *B. F. Goodrich Co. v. Ryan Tire Service, Inc.*, 203 So. 2d 863, 866 (La. App. 1st Cir. 1967) ("Our Courts have held that the acquisition of an additional security does not novate the debt.").

[9] The November 13, 1986 workout agreement states that "[t]he *additional* collateral required to induce [the Bank] to renew your loans is as follows . . . ." Emphasis added. It does not indicate an intent to extinguish the collateral previously pledged. The letter agreement dated December 3, 1986 states that there is no agreement, commitment or offer on the part of the Bank "which would in any way . . . novate . . . the rights held by [the Bank] . . . except as . . . may be expressly stated within this Letter Agreement." Collateral pledge agreements signed on the same day expressly state: "This Agreement is in addition to and does not supersede any previous Collateral Pledge Agreement(s) between the PLEDGOR and PLEDGEE."

On appeal the Daves also appear to raise the defense of bad faith performance or breach of the duty of good faith and fair dealing. They did not raise bad faith as a common law defense to the motion, and cannot raise it for the first time on appeal.[10]

B. *The Injunction*

After the federal district court entered summary judgment, Mary Daves brought a state court petition against the Bank. The sole factual basis of the petition concerned the alleged oral agreement between the Bank and the Daves to release the mortgage on the homestead properties in exchange for $350,000. Specifically, the petition alleges: "In the latter part of 1986, Premier, through its authorized officers and agents, contracted with your petitioner and her husband, Harold G. Daves, that if they would make payment of $350,000 toward the outstanding mortgages which Premier held, Premier would release that mortgage which they held on petitioner's family home and adjacent property more fully described above." It further alleges that "[e]xcept for a collateral mortgage placed on petitioner's home in connection with loans for its construction in 1977 and which

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[10] *See Colony Creek, Ltd. v. Resolution Trust Corp.*, 941 F.2d 1323, 1326 (5th Cir. 1991) ("Appellants 'cannot attack summary judgment on appeal by raising distinct issues that were not before the district court.'") (citation omitted); *C.F. Dahlberg & Co. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir. 1988) ("On a motion for summary judgment, the opponent bears the burden of establishing that there are genuine issues of material fact, and may not wait until trial or appeal to develop claims or defenses in response to the summary judgment motion."); *Smith v. Mobil Corp.*, 719 F.2d 1313, 1316 (5th Cir. 1983) (state law affirmative defenses cannot be raised for first time in an appellate brief).

loans were totally paid by September 11, 1980, at no time was it ever intended by your petitioner that the aforedescribed property would be placed as collateral on any obligations of your petitioner to Premier." The petition prayed for a judgment ordering "that the property be immediately reconveyed to your petitioner . . . ." As described above, the federal district court enjoined the further prosecution of the state court suit. We conclude that the injunction was properly granted.

Under the Anti-Injunction Act, a federal court cannot enjoin proceedings in a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. In this case, prosecution of the state suit was properly enjoined under the last exception to the Anti-Injunction Act, known as the relitigation exception. The federal district court had already entered a final judgment expressly allowing the Bank to foreclose on the Daves' homestead properties. This court has explained the parameters of the relitigation exception as follows:

> The relitigation exception "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." The exception applies, however, only if the parties to the original action actually disputed the issue and the trier of fact actually resolved it. In determining which issues have been actually litigated, the federal court is "free to go beyond the judgment . . . and may examine the pleadings and the evidence in the prior action." If "a question of fact is put in issue by the pleadings, and is submitted to the jury or other trier of facts for its determination, and is determined, that question of fact has been `actually litigated.'"

Santopadre v. Pelican Homestead Sav. Ass'n, 937 F.2d 268, 273 (5th Cir. 1991) (citations omitted).

Here, the relief sought in state court would conflict directly with the relief awarded by the federal court. The district court, intimately familiar with the parties' dispute, could only have concluded that the primary, if not the sole, purpose of bringing the state court suit was to vitiate the district court's judgment allowing foreclosure on the homestead properties. Further, the Daves directly raised in the federal court, as a defense to the summary judgment motion, the alleged oral agreement to release the homestead properties in exchange for $350,000.[11] The Daves argue, however, that this factual issue regarding the oral agreement was couched in terms of a

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[11] For example, the complaint in the federal suit alleged that "despite the fact that it had always been understood between plaintiff and the Bank that plaintiffs' valuable home and property in Baton Rouge would be excluded from any security arrangement with the Bank, the Bank seized on its position of leverage with respect to the settlement to insist that it be given a mortgage on plaintiffs' home and property." One of the summary judgment responses argued that "[o]ne particularly pernicious aspect of the duress and fraud practiced by Premier on Daves concerned the collateral mortgage it held on his home. When Daves borrowed the money to renovate his home and executed a mortgage to secure the loan, it was made plain to Premier, and Premier agreed, that the home was not to constitute collateral for the various business deals in which it was financing Daves. In this connection it was understood that Daves could redeem the mortgage on his house by paying of the relatively small loan it secured." One of the Daves' affidavits stated that "in March 1986, after Premier Bank asserted the continued viability of the February 3, 1977 collateral mortgage, the Bank agreed to accept a $350,000 payment and agreed to cancel the mortgage. Pursuant to this agreement, I obtained a binding loan commitment of $400,000 from Pelican Homestead and Saving Association on October 17, 1986 for the purpose of paying off the mortgage on our home. In violation of its agreement, Premier refused to act on the Pelican commitment."

duress or fraud defense in the federal action, and was characterized as a contract claim in the state court suit. We do not believe that artful pleading or the labels assigned to a claim can so easily circumvent a federal court's power to preserve and effectuate its judgments under the relitigation exception.[12] Here, the parties litigated, and the court decided, the factual issue of whether the alleged oral agreement prevented the Bank from foreclosing on the homestead properties. We conclude, therefore, that the injunction was properly granted.

The judgments granting the summary judgment motion and the injunction are AFFIRMED.

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[12] *Compare Int'l Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 131-32 (5th Cir. 1975) ("But Nix's foundation of his state court action on independent theories of state law does not necessarily extricate his suit from the relitigation exception of the Anti-Injunction Act . . . . Thus, even though Nix frames his state court action in terms of state contract law rather than federal labor policy, he may not relitigate the very issue which lies at the core of his claim -- the legitimacy of his taking an official's papers. In these circumstances, a federal court need not stand idly by and hope that the state court perceives that the issues before it formed the basis of prior federal court litigation. Rather the federal court may intervene, pursuant to § 2283, `to protect or effectuate its judgments.'").