IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5824
(Summary Calendar)

LUCIUS BREELAND and
VERTREES P. BREELAND,

Plaintiffs-Appellants,

versus

FEDERAL DEPOSIT INSURANCE
CORPORATION As Receiver of
Plaza National Bank, ET AL.,

Defendants-Appellees,

and

FEDERAL DEPOSIT INSURANCE
CORPORATION As Receiver of
Plaza National Bank,

Plaintiff-Appellee,

versus

LUCIUS BREELAND and
VERTREES BREELAND,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas

(SA-90-CA-1445 Consolidated with SA-91-CA-573)

(December 9, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Lucius and Vertrees P. Breeland, Plaintiffs-Appellants in one of the suits consolidated in this appeal and Defendants-Appellants in the other, are before us as parties dissatisfied with the results of summary judgments granted by the district court. They complain first that we have no jurisdiction to hear this appeal because, according to the Breelands, those judgments were not final orders and thus unappealable. Substantively, the Breelands assert that the district court committed reversible errors of fact and law in granting the summary judgments against them. Finding no such error, we affirm.

I

FACTS AND PROCEEDINGS

The Breelands were customers of the Bank of Kerrville. When Philip DeMasco and James Y. Eliot, officers of that bank, left to help establish the Plaza National Bank (Plaza), the Breelands agreed to move their banking needs to Plaza. In September 1985 Lucius Breeland executed a $53,000 promissory note (Note 1) to Plaza. Note 1, which matured on December 16, 1985, was secured by a deed of trust that provided for (1) public auction of the encumbered property in the event of default; (2) a variable

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

interest rate based on an index; and (3) an interest rate of 12.75% for the first year. The next month the Breelands executed a $155,614.32 promissory note (Note 2) to Plaza. Note 2 was secured by a deed of trust that provided for (1) public auction of the encumbered property in the event of default; (2) an adjustable interest rate based on an index; and (3) specified an interest rate of 12.5% for the first year.

On March 12, 1987, the Comptroller of the Currency declared Plaza insolvent and appointed the FDIC as receiver. Thereafter, the FDIC made demands for payment of the Breelands' notes but to no avail. Both notes went into default.

On November 6, 1990, the FDIC foreclosed on the property securing Note 1, purchasing it for $44,000 at public auction conducted by the substitute trustee in accordance with the terms of the deed of trust. After the amount recognized by the auction sale was credited to the outstanding balance on Note 1, it was left with a remaining deficiency of $23,390.49 plus interest. On February 5, 1991, the FDIC foreclosed on the property securing Note 2, purchasing it for $107,700 at public auction. After the amount recognized by the auction sale was credited to the outstanding balance on Note 2, it was left with a remaining deficiency of $103,548.11 plus interest.

The Breelands filed suit in state court against Plaza (through the FDIC), DeMasco, and Eliot, alleging breach of contract and fraud and misrepresentation with respect to Note 2. Specifically, the Breelands alleged that DeMasco and Eliot changed the interest

rate on the note without giving the required notice, and that the two officers required additional collateral in excess of the collateral described in the notes. The FDIC removed the case to federal court and filed a counterclaim against the Breelands to collect the deficiencies on both notes.

The Breelands filed an amended complaint against Plaza and Bank of Kerrville, through the FDIC as their receivers, and DeMasco and Eliot, alleging breach of contract, fraud and misrepresentation, wrongful foreclosure, and usury. Specifically, the Breelands alleged that the Plaza loans should have been consolidated with an initial interest rate of 7.5%; that Plaza's alleged breach of contract and fraud and misrepresentation voided the FDIC's foreclosure; that the foreclosure sales were invalid because they were not performed in accordance with Texas law; and that the banks made "usurious" charges on the notes.

Following the foreclosures and public auctions, the FDIC filed a forcible entry and detainer action in state court seeking to gain possession of the foreclosed properties. The Breelands removed this case to federal court, and it was consolidated with the original complaint.

In September 1991, the FDIC moved for summary judgment in the consolidated actions arguing that under the D'Oench, Duhme[1] doctrine, § 1823(e) of FIRREA,[2] and the federal holder-in-due-

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[1] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676, 86 L.Ed.2d 956 (1942).

[2] 12 U.S.C. § 1823(e).

course doctrine, the Breelands were barred from asserting the terms of any agreement that was not reflected in the bank's files at closing, and that the Breelands could not challenge the foreclosure sales because they failed to tender the payments due under the notes or plead affirmatively that they were presently willing to pay the notes. Instead of filing a response to the summary judgment motion, counsel for the Breelands filed a motion to withdraw after the time for responding to the motion had expired.

On November 1, 1991, the district court granted the FDIC's motion for summary judgment and denied the motion of the Breelands' counsel to withdraw. The court held that the Breelands' breach of contract claim constituted a personal defense to the notes and was precluded under the federal holder-in-due-course doctrine; that the fraud and misrepresentation claims were barred by the D'Oench, Duhme doctrine and § 1823(e) of FIRREA; that the wrongful foreclosure claim was unsupported by the evidence and barred under Texas state law; and that the Breelands were barred from asserting a usury claim against the FDIC.

The Breelands filed their response to the motion for summary judgment on November 4, 1991. They filed a Rule 59(e) motion alleging that DeMasco and Eliot materially altered the loan documents by "whiting out" the 7.5% interest rate and inserting the higher rates. The district court denied the motion. The court also determined that it did not have jurisdiction over the remaining state law claims against DeMasco and Eliot and remanded that portion of the case to state court.

II

ANALYSIS

A. Jurisdiction

The Breelands complain that we do not have jurisdiction over this appeal because the district court's order granting the FDIC's motion for summary judgment is not a final appealable order. They argue that the order is not final because it does not contain findings of fact or conclusions of law, and does not dispose of all claims and parties.

This court has jurisdiction over all final decisions of the district court. 28 U.S.C. § 1291. The district court's order is final when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 467, 98 S. Ct. 2454, 57 L.Ed.2d 351 (1978) (quoting Catlin v. United States, 324 U.S. 229, 232, 65 S. Ct. 631, 89 L.Ed. 911 (1945)); Frizzell v. Sullivan, 937 F.2d 254, 255 (5th Cir. 1991).

Here, the district court order granting the motion for summary judgment concluded the litigation on the merits with respect to all claims against the FDIC, and the order remanding the pendent state law claims to state court disposed of the claims against the remaining parties, at least as far as the federal courts are concerned. The Breelands' mischaracterization of the district court's order granting the FDIC's motion for summary judgment to the contrary notwithstanding, we find that the order does contain findings of fact and conclusions of law. We hold therefore that

the district court's orders are final appealable orders, and that we do have jurisdiction over this appeal.

B. Motion for Summary Judgment

The Breeland also complain that the district court improperly granted the FDIC's motion for summary judgment. We review the district court's grant of summary judgment de novo. Weyant v. Acceptance Ins. Co., 917 F.2d 209, 212 (5th Cir. 1990). Summary judgment is appropriate when, considering all of the facts in the pleadings, depositions, admissions, answers to interrogatories, and affidavits and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of fact. Newel v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990). There is no genuine issue of fact if, taking the record as a whole, a rational trier of fact could not find for the nonmoving party. Id.

The moving party has the initial burden of demonstrating the absence of a genuine issue of fact. St. Paul Ins. of Bellaire v. AFIA Worldwide Ins., 937 F.2d 274, 278 (5th Cir. 1991). Once the moving party files a proper summary judgment motion the nonmoving party must show that there is a genuine issue of material fact for trial by submitting affidavits or highlighting statements in the depositions, answers to interrogatories, and admissions that establish the genuine issue. Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party fails to meet his initial burden, however, summary judgment cannot be supported solely on the ground that the

nonmoving party failed to respond to the motion. John v. State of La (Bd. of Trustees for State Colleges and Univ.), 757 F.2d 698, 709-10 (5th Cir. 1985).

The D'Oench, Duhme doctrine and § 1823(e) of FIRREA bar the use of unrecorded agreements between the failed bank and borrower as the basis for defenses or claims against the FDIC. Bowen v. Federal Deposit Ins. Corp., 915 F.2d 1013, 1015 n.3 & 1016 (5th Cir. 1990). This principle applies even if the FDIC has actual knowledge of the alleged defenses. Federal Deposit Ins. Corp. v. Laguarta, 939 F.2d 1231, 1237-38 (5th Cir. 1991).

The Breelands argue that DeMasco and Eliot, as officers of Plaza, agreed to an initial interest rate of 7.5% and that the FDIC received notice of this agreement on the day that it was appointed receiver for the bank. But the evidence in the record demonstrates that Lucius Breeland conceded that the agreement regarding the 7.5% interest was never reduced to writing, and that the copies of Note 2 which the Breelands submitted as a "true and correct" copy indicates an interest rate of 12.5%. The written documents in the bank files do not support the Breelands' allegations; the district court properly granted summary judgment on these claims.

The Breelands also argue that the foreclosure sales should be set aside. Under Texas law a mortgagor who seeks to recover foreclosed property must tender payment of the amount due on the note as a condition precedent to the recovery of title from a mortgagee in possession. Fillion v. David Silvers Co., 709 S.W.2d 240, 246 (Tex.Ct.App. 1986). The Breelands nevertheless argue that

the FDIC was never in possession of the properties and therefore this rule does not apply.

In order to be entitled to the equitable relief they seek, however, Breelands must "do equity."[3] See Phillips v. Latham, 523 S.W.2d 19, 25 (Tex.Ct.App. 1975). True, the FDIC never obtained possession of the properties, but only because the Breelands refused to vacate the properties after the sales, thereby creating a legal obstacle to the FDIC's ability to take possession. The Breelands' failure to "do equity" cannot excuse their obligation to tender the amount due on the notes as a condition precedent to regaining possession.

Further, the Breelands argue that the foreclosure sales are void because the substitute trustee failed to conduct the public auctions in accordance with Texas law, under which the sale must occur at the designated area of the county courthouse for the county in which the property is located. Tex. Prop. Code Ann. § 51.002 (Vernon's 1992). The summary judgment evidence in the record indicates that the sales were conducted at the designated locations, and the Breelands have not presented any evidence to the contrary. The district court properly granted summary judgment for the FDIC on the wrongful foreclosure claim.

Finally, the Breelands make the bald assertion that Plaza and the Bank of Kerrville made "usurious" charges on the notes. The Breelands are not entitled to relief against the Bank of Kerrville

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[3] The term "do equity" requires the party seeking an equitable remedy to come to court with clean hands. Truly v. Austin, 744 S.W.2d 934, 938 (Tex. 1988).

because neither that bank nor the FDIC as its receiver was served in this action. The allegations against Plaza are made in a purely conclusionary manner, failing to indicate which charges were usurious. Such unsupported and imprecise allegations are insufficient for purposes of defeating summary judgment on the usury claims. Moreover, under Texas law the usury claim is punitive in nature and therefore cannot be asserted against the FDIC. Federal Deposit Ins. Corp. v. Claycomb, 945 F.2d 853, 861 (5th Cir. 1991), cert. denied, 112 S. Ct. 1301 (1992). The district court properly granted summary judgment against the Breelands on their usury claims.

AFFIRMED.