IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8519

SPARTAN COPPER, INCORPORATED,

Plaintiff-Appellant,

versus

NCNB TEXAS NATIONAL BANK,

Defendant-Appellee.

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NCNB TEXAS NATIONAL BANK,

Counter-Claimant-
Appellee,

versus

SPARTAN COPPER, INCORPORATED,

Counter-Defendant-
Appellant.

Appeals from the United States District Court for the
Western District of Texas
(W-90-CA-297)

(January 28, 1993)

Before POLITZ, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Spartan Copper, Inc. appeals the grant of summary judgments in favor of NCNB Texas National Bank, as the successor of a failed bank, on Spartan Copper's claims of usury, breach of contract, and violations of the Bank Tying Act against NCNB, and on NCNB's counterclaim against Spartan Copper for payment on a collaterally assigned note. In this appeal, Spartan Copper seeks to avoid an indebtedness to the former First RepublicBank Hillsboro, and further asserts affirmative claims based on the alleged contingent nature of its debt to the bank. NCNB raises the D'Oench, Duhme doctrine, contending that even if a document exists that provides for the contingency of the debt, it was not a record of the failed bank at the time it went into FDIC receivership. Finding that no issues of material fact sufficient to defeat NCNB's summary judgment motions exist, we affirm.

I

In the mid-1980's Spartan Copper Products, Inc. (SCPI), which is not a party to the instant action, owned three facilities that manufactured small diameter copper tubing. These three facilities secured an indebtedness to First RepublicBank Hillsboro. In July 1986, SCPI could no longer meet its debts and filed for reorganization under Chapter 11 of the Bankruptcy Code. While in bankruptcy, SCPI entered into negotiations to sell some of its manufacturing facilities, contemplating that such a sale would satisfy its debt to First RepublicBank Hillsboro. Shareholders of

SCPI formed Spartan Copper, Inc. (Spartan Copper), the plaintiff-appellant in this action, to facilitate these sale transactions.

In August 1987, Spartan Copper purchased two of SCPI's copper tubing manufacturing facilities in a transaction approved by the Bankruptcy Court. As part of the transaction, Spartan Copper signed two promissory notes. One note, in the amount of $453,180, was subsequently paid by Spartan Copper on February 28, 1990, and cancelled. This "first note" was apparently the primary note representing the amount of the purchase money loan for two of the plants. The "second note" is the sticking place of this case. In the amount of $455,000, it was--according to Spartan Copper--contingent upon the default of the first note, but even if the first note was paid in full, Spartan Copper's liability continued, further contingent upon the default or prepayment (resulting in the loss of interest to the bank) of a third note, which was executed by Copper Technology, Inc. in order to purchase the third SCPI manufacturing facility. This alleged contingent nature of the "second" note was based upon a letter agreement between Spartan Copper and SCPI. The two notes from Spartan Copper to SCPI were assigned to First RepublicBank Hillsboro.

First RepublicBank Hillsboro was declared insolvent in July 1988 and the FDIC was appointed its receiver. The FDIC as receiver later transferred the assets of the former First RepublicBank Hillsboro to the defendant-appellee NCNB Texas National Bank (NCNB). Among the transferred assets were the two notes from

Spartan Copper. NCNB demanded that Spartan Copper pay the $455,000 due under the second note, which bears no evidence of any contingency on its face and has a due date of September 1, 1990.

On August 31, 1990, Spartan Copper brought this action in Texas state court against NCNB for breach of contract, usury, and violations of the Bank Tying Act.[1] NCNB filed its answer and removed the action to federal district court. NCNB asserts that the letter agreement that allegedly evidences the contingent nature of the note was not in First RepublicBank Hillsboro's files at the time the bank went into receivership. On December 21, 1990, NCNB filed a motion for summary judgment, asserting that the D'Oench, Duhme doctrine and its statutory counterpart, 12 U.S.C. § 1823(e), barred Spartan Copper's claims. Three weeks later, NCNB counterclaimed for a declaratory judgment that Spartan Copper was liable under the "contingent" note and, in addition, filed a motion for summary judgment on the counterclaim. On February 1, 1991, the district court granted NCNB's motions for summary judgment, concluding that both the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e) barred Spartan Copper from presenting its claims against NCNB.

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[1]As the premise of its affirmative claims against the bank, Spartan Copper alleges that a modification of the terms of the Copper Technology, Inc. note allowing Copper Technology, Inc. to make reduced monthly payments to NCNB on its loan altered a material term of the agreement concerning the sale of the SCPI assets and thus triggered Spartan Copper's obligation to pay the "contingent" note.

On February 27, 1991, Spartan Copper filed a motion for reconsideration, arguing that it had not been given an opportunity to conduct adequate discovery. The district court vacated its February 1 order and reopened discovery with the condition that "[d]iscovery should be limited to matters which would overcome the bar of D'Oench, Duhme." On May 6, 1991, and again on May 24, NCNB filed motions for protective order, arguing that discovery should be limited to documents dated before the receivership of First RepublicBank Hillsboro. The district court granted the motions, and following the additional discovery period, it reinstated its prior summary judgments in favor of NCNB. Spartan Copper appeals the grant of the summary judgments in favor of NCNB on its claims against NCNB as well as on NCNB's counterclaim on the note. Additionally, it argues that the district court erred in restricting its discovery to matters that would defeat the application of the D'Oench, Duhme doctrine--in particular to documents dated and events occurring before the receivership of the failed bank.

II

Summary judgment is proper if the pleadings, depositions, admissions, and other summary judgment evidence demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986); Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250

(5th Cir. 1990). In reviewing the trial court's ruling on summary judgment, this court applies the same standard as did the trial court, viewing the facts in the light most favorable to the nonmoving party. Federal Deposit Ins. Corp. v. Hamilton, 939 F.2d 1225, 1228 (5th Cir. 1991). We decide questions of law de novo. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988). Furthermore, "[i]n reviewing a district court's grant of summary judgment, an appellate court may affirm even though the district court relied on the wrong reason in reaching its result." Davis v. Liberty Mutual Ins. Co., 525 F.2d 1204, 1207 (5th Cir. 1976) (citations omitted).

On appeal of a discovery ruling by the district court, this court can reverse only where the discovery ruling is arbitrary or clearly unreasonable. Whalen v. Carter, 954 F.2d 1087, 1098 (5th Cir. 1992).

III

The district court found that NCNB was entitled to summary judgment on Spartan Copper's claims of usury, breach of contract, and federal Bank Tying Act violations because each of Spartan Copper's alleged causes of action "is grounded upon the existence of an alleged agreement that fails to satisfy the express requirements of the D'Oench, Duhme doctrine, and thus, is barred as a matter of law."[2] We agree.

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[2]The district court also discussed 12 U.S.C. § 1823(e), which represents the codification of the common law doctrine of

The D'Oench, Duhme doctrine is a federal common law rule of estoppel that precludes a borrower from asserting claims and defenses against the FDIC and its transferees "based upon secret unrecorded side agreements the borrower entered into with the failed institution." FDIC v. Ernst & Young, 967 F.2d 166, 169 (5th Cir. 1992) (citing Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1248 (5th Cir. 1990)); see also D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676 (1942). The doctrine thus "favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can." Bell & Murphy and Associates v. InterFirst Bank Gateway, N.A., 894 F.2d 750, 754 (5th Cir. 1990).

The instant case presents the classic fact pattern to which the D'Oench, Duhme doctrine applies. Spartan Copper executed a note that it claims is "contingent" upon certain occurrences; this contingency gives rise to its claims of usury, breach of contract, and Bank Tying Act violations as well as to its defenses to NCNB's counterclaim for payment on the note.[3] The face of the note,

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D'Oench, Duhme. Because we decide this case solely on the basis of the D'Oench, Duhme doctrine, we express no opinion as to whether § 1823(e), which prior to 1989 did not protect receivers or their transferees, would apply to the actions in the instant case. It is settled law in this circuit that § 1823(e) neither displaces nor preempts the D'Oench, Duhme doctrine. FDIC v. McClanahan, 795 F.2d 512, 514 n.1, 516 (5th Cir. 1986).

[3]Spartan Copper alleges that the "contingent" note was a condition to and a necessary part of the financing evidenced by the first note. It argues that because First RepublicBank Hillsboro required that the "contingent" note be tied as a

however, does not evidence the alleged contingency; the contingency is based upon a letter agreement between Spartan Copper and SCPI that, unfortunately for Spartan Copper, was not in the records of First RepublicBank Hillsboro at the time it went into receivership.[4] Consequently, as transferee of the rights of the

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condition to making the purchase money loan (the first note, for the amount of $453,180) and to the prepayment or default of the Copper Technology note, the effect of the tying arrangement was to force Spartan Copper to assume part of the debt of Copper Technology, Inc. Thus, Spartan Copper asserts, the "contingent" note is compensation that it paid for the purchase money loan and consequently constitutes interest thereon; this alleged interest exceeds the amount permitted by law and is therefore usurious.

Additionally, Spartan Copper argues that NCNB violated the Bank Tying Act by demanding payment of the contingent note when it knew that the note illegally required Spartan Copper to pay the debt of a third party. Finally, Spartan Copper supports its breach of contract claim by asserting that NCNB has demanded payment on the note despite the fact that Copper Technology has neither prepaid nor defaulted on its obligation; such demand is allegedly in breach of the letter agreement executed by Spartan Copper and NCNB's assignor, First RepublicBank Hillsboro. Thus, all three of Spartan Copper's claims are based upon the "contingent" nature of the $455,000 note, which is not evidenced on the face of the note but instead is found, if found anywhere, in a letter agreement between Spartan Copper and First RepublicBank Hillsboro, which was not in the failed bank's files at the time it went into receivership.

[4]Spartan Copper attempts to raise a fact question on this issue, arguing that the evidence shows that the letter agreement was a record of the failed bank. The evidence cited by Spartan Copper, however, is nothing more than speculation, and speculation is insufficient to raise a fact issue. See Schultz v. Metropolitan Life Ins. Co., 872 F.2d 676, 679 (5th Cir. 1989); see also Nichols Const. Corp. v. Cessna Aircraft Co., 808 F.2d 340, 346-7 (5th Cir. 1985).

Spartan Copper contends that NCNB has admitted that the letter agreement was a record of First RepublicBank Hillsboro at the time that it went into receivership. This argument is meritless. In its request for admissions, Spartan Copper asked NCNB whether the copy of the letter agreement attached to the original petition was true and correct copy. NCNB responded

receiver, NCNB cannot be held liable for affirmative claims arising out of the letter agreement. See Porras v. Petroplex Sav. Ass'n., 903 F.2d 379, 381 (5th Cir. 1990); Bell & Murphy, 894 F.2d at 753-54; see also Kilpatrick v. Riddle, 907 F.2d 1523, 1528 (5th Cir. 1990) ("We also observe at the outset that if the D'Oench, Duhme doctrine protects the FDIC, it also protects NCNB, because `we recently extended D'Oench, Duhme' to `assignees of the FDIC.'")

Citing FDIC v. Laguarta, 939 F.2d 1231 (5th Cir. 1991), Spartan Copper argues that the D'Oench, Duhme doctrine is inapplicable in this case because the letter agreement between Spartan Copper and SCPI was an "integral part" of the loan

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that parts of the agreement differed from the "handwritten portions of the document in Defendant's possession." This response cannot be read as an admission that the letter agreement was a record of First RepublicBank Hillsboro at the time it went into receivership. NCNB could have received a copy of the letter agreement from a source other than the records of First RepublicBank Hillsboro, and indeed that is what NCNB claims.

Spartan Copper also argues that the deposition testimony of Stephen Dumas, a former president of First RepublicBank Hillsboro, establishes that the letter agreement was a record of the bank at the time it went into receivership. Significantly, however, Dumas did not state that the letter agreement was a record of his bank. He testified that the letter agreement was not "secret" and that he knew it created the contingency in the underlying note. Record, Vol. IV, p. 947. This testimony is irrelevant to the issue at hand. The D'Oench, Duhme doctrine is unconcerned with whether the unrecorded agreement is a secret to the failed bank and its representative; instead, the issue is whether the unrecorded agreement is a secret to the receiver and its transferees. In sum, Spartan Copper has failed to present sufficient evidence to create an issue of material fact as to whether the letter agreement was in the bank's files at the time it went into receivership. No genuine issue of material fact exists unless there is sufficient evidence favoring the nonmoving party for a factfinder to find for that party. Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 272 (5th Cir. 1987).

transaction. In Laguarta, the FDIC, as receiver of an insolvent bank, sought to enforce a note against borrower Laguarta, who in turn argued as an affirmative defense that the insolvent bank had failed to meet the funding obligations in the original loan agreement. The FDIC responded that the funding obligations were collateral to the note. This court rejected that argument, concluding that the funding obligations "were integral to the loan transaction, and the Receiver does not contend they were absent from the loan file or otherwise concealed." Id. at 1239. Laguarta is obviously distinguishable from the instant case. While a bank's promise to provide the requisite funds is undoubtedly the sine qua non of most loan transactions, the completely separate agreement in this case, which is not even referenced on the face of the loan document, cannot be considered "integral" to the loan transaction in the sense referenced in Laguarta. Moreover, and crucially, the evidence here does not support that the letter agreement was part of the loan file, unlike Laguarta. The circumstances in the instant case involve a transaction that is a "secret" to the successor bank and against which NCNB could not have defended itself. To refuse to apply D'Oench, Duhme in this case would preclude the doctrine from serving one of its essential functions--protecting receivers and their transferees from claims and defenses based upon secret side agreements. See Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1248 (5th Cir. 1990).

Spartan Copper additionally argues that the D'Oench, Duhme doctrine is inapplicable in this case because it is an innocent borrower and it did not intend to deceive NCNB. We have often held that the intent of the borrower is irrelevant in determining whether the D'Oench, Duhme doctrine applies. See FDIC v. Hamilton, 939 F.2d 1225, 1228 (5th Cir. 1991) ("It is not relevant that the borrower did not intend to deceive banking authorities...."); Bowen v. FDIC, 915 F.2d 1013, 1017 (5th Cir. 1990); Beighley v. FDIC, 868 F.2d 776, 784 (5th Cir. 1989).

Thus, we hold that this case presents the classic situation in which the doctrine protects a receiver and its transferees. The D'Oench, Duhme doctrine thus bars Spartan Copper's claim that NCNB is liable for the breach of contract, usury and Bank Tying Act violation claims.

Spartan Copper also appeals the district court's grant of NCNB's motion for summary judgment on its counterclaim for a declaratory judgment that Spartan Copper is not liable to NCNB for the payment of the second note. We similarly find no error in this portion of the judgment. As the district court succinctly noted in its order granting NCNB's motions for summary judgment, "[t]he summary judgment evidence establishes that NCNB is the sole owner of the note; the note is a valid obligation of Spartan; the note is in default; and Spartan is liable to NCNB for the principal amount due plus attorney's fees." Finally, Spartan Copper contests the district court's discovery ruling by arguing that the district

court abused its discretion by refusing to permit Spartan Copper to conduct discovery into files dated after the receivership of First RepublicBank Hillsboro. The relevant point in time for a document to be a record of the failed bank for D'Oench, Duhme purposes, however, is the time of receivership. If a document is not a record of the failed bank at that time, it cannot preclude the application of the D'Oench, Duhme doctrine. Accordingly, any request for documents dated after the date of receivership would amount to nothing more than a fishing expedition. See FSLIC v. Cribbs, 918 F.2d 557, 560 (5th Cir. 1990) ("To have permitted...discovery absent any indications that [the party] would have been able to assert a viable defense based on the documents he sought would have added needless costs and delay, while serving no valid purpose."). The district court did not clearly err in limiting Spartan Copper's discovery in this case.

IV

In sum, we hold that the D'Oench, Duhme doctrine applies in this case and is, in fact, determinative of its outcome. NCNB was entitled to summary judgment on Spartan Copper's claims of usury, breach of contract, and federal Bank Tying Act violations because each of these claims depends upon a letter agreement that the court is precluded from considering under the dictates of the D'Oench, Duhme doctrine. NCNB was further entitled to summary judgment on its counterclaim because the evidence before the district court established that the note, which is a valid obligation of Spartan

Copper, is in default and NCNB, as sole owner of the note, is entitled to the principal amount due plus attorney's fees. Finally, the district court did not clearly err by limiting Spartan Copper's discovery to files dated before the receivership of First RepublicBank Hillsboro, as the relevant point in time for D'Oench, Duhme purposes is the date of FDIC receivership. Therefore, because we find no error, the judgment of the district court is

A F F I R M E D.