IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1194

CALVIN C. OTTE,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for First National, Richardson, Texas,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
CA3 89 2873 P

April 1, 1993

Before REAVLEY, KING, and WIENER, Circuit Judges.

PER CURIAM:[*]

Shortly after being appointed receiver for the First National Bank of Richardson, Texas, the Federal Deposit Insurance Corporation (FDIC) repudiated a contract for legal services between Calvin C. Otte and First National Bank under the Financial Institutional Reform, Recovery, and Enforcement Act of 1989. Otte then brought this action in Texas state court,

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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 Pursuant to that rule, we have determined that this opinion should not be published.

alleging that he is entitled to recover reasonable attorney's fees and interest (1) under his original agreement with the Bank, (2) pursuant to quantum meruit under Texas law, and (3) pursuant to an agreement he allegedly entered into at the time he relinquished the First National Bank's files to the FDIC in its capacity as receiver. The FDIC removed the action to federal court, and the parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of the FDIC, and Otte now appeals from that judgment. Finding that Otte has failed to raise a genuine issue of material fact pursuant to Rule 56 of the Federal Rules of Civil Procedure, we affirm.

I. BACKGROUND

On May 16, 1989, Otte entered into a written contract to represent the First National Bank of Richardson, Texas ("the Bank") on a contingency fee basis for collection of accounts receivable. According to this contract, Otte was to receive (1) a "[c]ontingent fee of 50% of the amount collected on each and every account referred to the Attorney on a contingent fee basis," (2) $150 per hour on all cases assigned to him on an hourly basis, and (3) a "[c]ontingent fee of 40% on all such accounts wherein the Bank has already obtained a judgment."[1] The

[1] The contract also provides that:

> Attorney shall remit to bank on the fifteenth of each month an amount equal to the gross payments collected on Bank's behalf during the previous calendar month, less the Attorney's fee and any applicable fees . . . The Attorney shall provide Bank with a statement on a monthly basis detailing by account the gross amounts collected, applicable fees, attorney's

Bank was declared insolvent in June 1989, and the FDIC was appointed receiver. The FDIC repudiated the contingent fee contract in July 1989 under the Financial Institutional Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(e)(1).

Upon its appointment as receiver, the FDIC instructed Otte to provide a full accounting of all pre-receivership services performed for the Bank, submit a bill for all unpaid services, obtain continuances for pending legal matters, and turn over all legal files. Otte, however, initially refused to turn over the legal files. When he finally did return them, he also submitted a claim for attorney's fees in the amount of $81,300.85. The parties dispute whether the FDIC-Receiver and Otte reached a post-repudiation agreement prior to Otte's returning the files.

Otte brought this action for damages in Texas state court, alleging that (1) the FDIC-Receiver agreed to pay him reasonable attorney's fees in return for Otte's relinquishment of the Bank's litigation files, and that he is entitled to fees pursuant to that agreement, (2) the FDIC-Receiver wrongfully repudiated his contract for legal services, thereby entitling Otte to attorney's fees under his original agreement with the Bank, and, (3) in the alternative, that he is entitled to collect fees in quantum

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fees, and the net amount recovered . . . .

Moreover, the contract states that Otte was to be discharged only (1) upon the agreement of the parties, with 60 days' written notice, or (2) for cause--where the Bank believed that Otte had behaved in an illegal or unethical manner or breached any term of the contract--with 30 days' notice.

meruit under Texas law for the value of his legal services. According to Otte, he filed collection actions for the Bank against the following debtors: (1) Kenneth Landers, (2) Baughman, Vinson & Associates, (3) Leonard Hammer, and (4) Les Lewis and Barbara Tucker. It is undisputed that Otte never collected any portion of the monies due in these cases, although Otte contends in his affidavit that his actions were instrumental in obtaining payments in the Landers and Hammer cases.[2] According to Otte, he is entitled to $81,300.85 as reasonable compensation for the services he rendered, interest at a rate of one and one-half percent per month from August 1989, and additional attorney's fees totalling $12,000.00.

The FDIC removed the action to federal court, and the parties then filed cross-motions for summary judgment and responses. Although it did make some rulings in favor of the FDIC,[3] the district court denied these motions as to Otte's claim

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[2] On May 23, 1989, the district court entered a judgment against Landers and in favor of the Bank for "$450,000 Principal, accrued interest of $61,563.89, and reasonable attorney's fees of $45,000, together with all costs of suit and interest therein from this date until paid at the contractual rate of 18% per annum . . . ." However, this judgement was not collected before the FDIC became receiver for the Bank on June 30, 1989.

As for the Hammer case, Otte contends that he obtained a settlement offer of $35,000 from Hammer's attorney. However, the only direct evidence submitted by Otte to substantiate this claim is a copy of a letter dated June 22, 1989 from Hammer's counsel to Otte, which asks Otte to call him "so that we can discuss potential settlement . . . ." Settlement was ultimately reached in the Hammer case, but not until early 1990.

[3] The district court ruled that, (1) "regardless of whether the bank was placed in receivership before or after FIRREA, longstanding legal principles supported the right of a receiver to repudiate contracts made with the underlying institution," and

under 12 U.S.C. § 1821(e)(3) and ordered the parties to submit additional summary judgment materials. The parties complied, and the district court, resolving the remaining claims, held that Otte does not have a "provable" claim under 12 U.S.C. § 1821(e)(3). Accordingly, the court granted summary judgment in favor of the FDIC.

II. STANDARD OF REVIEW

In reviewing a grant of summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (we review grants of summary judgment de novo). Specifically, we ask whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In answering the first part of this question, we view all the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion. Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

To defeat a motion for summary judgment, Rule 56(e) requires the non-moving party to set forth specific facts sufficient to

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(2) "no breach occurred that would entitle Otte to recovery in quantum meruit." The court reserved judgement only on Otte's entitlement to recover under the amended 12 U.S.C. § 1821(e)(3) (receiver liability for amount of actual direct compensatory damages determined as of date of appointment of receiver), and limited the supplemental briefing it requested to that issue.

establish that there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). While a mere allegation of the existence of a dispute over material facts is not sufficient to defeat a motion for summary judgment, if the evidence shows that a reasonable jury could return a verdict for the non-moving party, the dispute is genuine. Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2510. On the other hand, if a rational trier of fact, based upon the record as a whole, could not find for the non-moving party, there is no genuine issue for trial. Amoco Production Co. v. Horwell Energy, Inc., 969 F.2d 146, 147-48 (5th Cir. 1992). In our review of a district court's decision to grant a motion for summary judgment, we will affirm that decision if, after examining the entire record, we are convinced that the standard set forth in Rule 56(c) of the Federal Rules of Civil Procedure has been met. See id.

III. DISCUSSION

Otte raises the following issues on appeal: (a) whether he has brought a recognizable attorney's fees claim under 12 U.S.C. § 1821(e)(3), (b) whether he is entitled to quantum meruit under Texas law, and (c) whether he has raised a genuine issue of material fact as to whether the FDIC-Receiver entered into an agreement to pay Otte reasonable attorney's fees in exchange for his returning the Bank's files.

A. Recourse Under 1821(e)(3)

Section 1821(e)(1) provides the FDIC-Receiver with broad discretion to repudiate contracts:

> **(e) Provisions relating to contracts entered into before appointment of conservator or receiver**
>
> **(1) Authority to repudiate contracts**
>
> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease--
>
> (A) to which such institution is a party;
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> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
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> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1); see First National Bank of Chicago v. Unisys Finance Corp., 779 F. Supp. 85, 86-87 (N.D. Ill. 1991); Atlantic Mechanical, Inc. v. RTC, 772 F. Supp. 288, 292 (E.D. Va. 1991), aff'd, 953 F.2d 637 (4th Cir. 1992). In the case before us, Otte has conceded that the FDIC-Receiver had the authority and power to disaffirm his contract with the Bank.

After repudiation of a contract, the FDIC-Receiver's liability is limited by section 1821(e)(3),[4] which provides

[4] Although the FDIC took control of the Bank before this amendment to FIRREA was enacted, the parties do not dispute the retroactive application of section 1821(e)(3). We simply note that, as we acknowledged in Resolution Trust Corporation v. Camp, 965 F.2d 25, 31 (5th Cir. 1992), the FDIC-Receiver's power to disaffirm executory contracts existed under the common law

that:

> **(3) Claims for damages for repudiation**
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> **(A) In general**
>
> [T]he liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be--
>
> **(i)** limited to actual direct compensatory damages;
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> **(ii)** determined as of--
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> **(I)** the date of the appointment of the conservator or receiver . . . .
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> * * *
>
> **(B) No liability for other damages**
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> For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include--
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> **(i)** punitive or exemplary damages;
>
> **(ii)** damages for lost profits or opportunity; or
>
> **(iii)** damages for pain and suffering.

12 U.S.C. §§ 1821(e)(3)(A) & (B) (emphasis added); see Atlantic Mechanical, 772 F. Supp. at 292. Otte has presented no evidence that he made any collections pursuant to the contingency contract beyond allegations that his work was instrumental in resolving the Hammer and Landers cases. See supra note 2. Nevertheless, Otte contends that he suffered direct compensatory damages from the disaffirmance of the contract, and that he is entitled to be compensated for the services that he performed before the date the receiver was appointed. He relies upon the Ninth Circuit's opinion in Federal Sav. & Loan Ins. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.), cert. denied, 488 U.S. 848, 109 S. Ct. 127

D'Oench doctrine, see D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 456-62, 62 S. Ct. 676, 679-81 (1942), before the enactment of section 1821(e)(3). Moreover, other circuits have expressly held that FIRREA amendments apply to pre-FIRREA receiverships. See, e.g., North Arkansas Medical Center v. Barrett, 962 F.2d 780, 786-87 (8th Cir. 1992); FDIC v. Wright, 942 F.2d 1089, 1095-97 (7th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 1937 (1992).

(1988), for the proposition that lawyers representing failed institutions are to be paid for work performed prior to the institution of a receivership.

The district court rejected Otte's claim on the basis of the "provability doctrine"--a judicially-created test for claims against the FDIC.[5] See Citizens State Bank of Lometa v. Federal Deposit Ins. Corp., 946 F.2d 408, 412 (5th Cir. 1991). This court has developed a three-part test for determining provability:

> A claim is provable against the FDIC as receiver if (1) it exists before the bank's insolvency and does not depend on any new contractual obligations arising later; (2) liability on the claim is absolute and certain in amount when suit is filed against the receiver; and (3) the claim is made in a timely manner, well before any distribution of the assets of the receivership other than a distribution through a purchase and assumption agreement.

Interfirst Bank Abilene v. FDIC, 777 F.2d 1092, 1094 (5th Cir. 1985), citing First Empire Bank v. FDIC, 572 F.2d 1361, 1367-69 (9th. Cir.), cert. denied, 439 U.S. 919, 99 S. Ct. 293 (1978). The district court and the FDIC-Receiver read the provability doctrine into FIRREA through both the "actual direct compensatory damages" language of section 1821(e)(3) and section 194 of the National Bank Act, which limits the distribution of receivership assets to "all such claims as may have been proved to [the receiver's] satisfaction." 12 U.S.C. § 194; see Citizens State Bank, 946 F.2d at 411; Interfirst Bank, 777 F.2d at 1094.

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[5] The provability of the claim in Angell, 838 F.2d at 395, was not at issue.

It is clear from the record that Otte did some work for the Bank. What is at issue is whether his attorney's fees claim under section 1821(e)(3) has any chance of success on its merits. This court has held that the provability doctrine bars recovery beyond amounts "absolute and certain." Interfirst Bank Abilene v. FDIC, 777 F.2d 1092, 1094-95 (5th Cir. 1985). Under the terms of Otte's contingency fee arrangement, at the date of its repudiation Otte was not entitled to any compensation. The fact that Otte has been able to assess the hours he spent working on behalf of the Bank and obtain a fair-market appraisal of those services does not create an "absolute and certain" liability for those services on the Bank or the FDIC.[6] Moreover, in Lometa, we

[6] Accordingly, we find the case before us distinguishable from those in which, despite the fact that the contract at issue approaches being an incomplete contingency contract, an "absolute and certain" sum is ascertainable and established by facts existing before insolvency. For example, in Citizens State Bank of Lometa v. F.D.I.C., 946 F.2d 408, 416 (5th Cir. 1991), we held that claims under letters of credit were provable because the bank's liability under the letters of credit (1) was established by facts existing before insolvency, (2) did not require any new post-insolvency contractual obligation, and (3) the amount of liability on the letters of credit was absolute and certain at the time the action was filed. We recognized that federal regulations "treat a standby letter of credit not as contingent liability, but as a loan--that is, as though the credit had been extended as of the date of commitment." Id. at 416. Similarly, in Dababneh v. FDIC, 971 F.2d 428, 434 (10th Cir. 1992), the Tenth Circuit recently held that a claim for future rent under an executory lease agreement was not a provable claim because the rent claim had not "accrued" before the appointment of the receiver. Id. at 436; see Lometa, 946 F.2d at 412 n.9 (distinguishing lease claims from letter of credit claims because lease claims require a "new contract" upon reentry post-receivership). The critical factor in Dababneh was the absence of a pre-receivership lease default that could create a right to unpaid rent at the time of appointment of a receiver--in other words, the fact that the lessor had no established claim under the lease before repudiation. Id. at 434-35.

held that a claim is only provable if "it exists before the bank's insolvency and does not depend on any new contractual obligations arising later . . . ." 946 F.2d at 412 (emphasis added). In light of the fact that Otte's contingency contract was terminated before its completion, even if Otte could establish with certainty that his work on behalf of the Bank is worth a fixed sum, liability for that sum was not established before insolvency.

In conclusion, the provability doctrine bars Otte's claim for attorney's fees under 12 U.S.C. § 1821(e)(3). We hold, therefore, that the district court did not err by granting summary judgment in favor of the FDIC-Receiver on this issue.

B. Quantum Meruit

Otte also contends that, should we find that he is not entitled to recover damages under section 1821(e), he is entitled to compensation in quantum meruit under Texas law. He cites a number of cases applying Texas law for the proposition that "[i]t has been a long established rule that when a client, without cause, discharges his attorney before he has completed his work, the attorney may recover on the contract for the amount of his compensation."

In Caton v. Leach Corp., 896 F.2d 939, 947-48 (5th Cir. 1990), this court considered a similar contention, though the FDIC was not a party to that action. The plaintiff in that case was a sales representative who was terminated while working on a large sales contract, and he directed the court to evidence

suggesting that he had contributed significantly to his former employer's obtaining that contract. In considering the plaintiff's quantum meruit contention in that case, we recognized that the remedy of quantum meruit "is quasi-contractual rather than truly contractual[,]" id. at 947 (quotation omitted). We stated that, "[i]f the work in question is covered by an express contract, there can be no recovery in quantum meruit." Id. Relying upon Mitsubishi Aircraft Int'l, Inc. v. Maurer, 675 S.W.2d 286 (Tex. App.--Dallas 1984, no writ),[7] we concluded that the plaintiff in Caton was not entitled to relief in quantum meruit. 896 F.2d at 948; see also Cole v. Benavides, 481 F.2d 559, 561 (5th Cir. 1973) ("Under Texas law, a party may plead alternative theories of recovery in contract and quantum meruit, but if he proves the existence of an enforceable contract, he may not recover in quantum meruit.") (emphasis in original). Similarly, in Jhaver v. Zapata Off-Shore Co., 903 F.2d 381, 384-85 (5th Cir. 1990), we held that a broker could not recover in quantum meruit under Texas law, even though the contract was ambiguous as to compensation.

Although it is not disputed that Otte's services for the Bank were governed by an express contract, Otte contends that he was discharged without cause and in breach of his contract with the Bank. He contends that he is therefore permitted to recover

[7] In Maurer, the Texas Court of Appeals held that a plaintiff terminated after he negotiated several sales but before the triggering date in his commission agreement was not entitled to relief in quantum meruit.

attorney's fees in quantum meruit despite the fact that his services were governed by an express contract. It is true that, under Texas law, an attorney discharged without cause and in breach of the contract governing his services may recover the reasonable value of his services in quantum meruit. See Truly v. Austin, 744 S.W.2d 934, 936 (Tex. 1988); Howell v. Kelly, 534 S.W.2d 737, 739 (Tex. Civ. App. 1976). Nevertheless, Otte was not improperly discharged because the FDIC-Receiver had the power and authority to repudiate his contract with the Bank under 12 U.S.C. § 1821(e)(1). Specifically, section 1821(e) expressly empowers the FDIC to clip the entanglements of a failed bank, and the equity concerns at the center of the doctrine of quantum meruit are recognized in section 1821(e)'s recovery provision. See 12 U.S.C. § 1821(e)(1). Had Otte shown that he suffered "actual direct compensatory damages[,]" he would have been able to recover such damages pursuant to section 1821(e)(1). To allow plaintiffs such as Otte--plaintiffs who cannot attain recovery under section 1821 because they cannot show direct compensatory damages--to classify the FDIC's terminations of failed banks' entanglements as breaches of contract justifying recovery in quantum meruit would bypass the federal policy underlying FIRREA, as well as the express but limited allowance for recovery provided under that section.

In sum, because (1) there was an express contract governing Otte's work for the Bank, (2) the FDIC, empowered by section 1821(e) and the public policy undergirding it, had full authority

to terminate Otte's contract, and (3) this termination is distinguishable from one without cause and in breach of contract, Otte may not recover under quantum meruit on the grounds that the FDIC breached his contract with the Bank. We conclude, therefore, that the FDIC-Receiver is entitled to summary judgment on Otte's claim in quantum meruit.

C. The Alleged Post-Repudiation Agreement

Otte's final contention is that a genuine issue of material fact exists as to whether the FDIC-Receiver entered into a post-repudiation oral agreement to pay him reasonable attorney's fees in exchange for his turning over the Bank's litigation files. Otte supports this contention with an affidavit he submitted pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, in which he alleges that:

> [a]t first I refused to deliver my files to the FDIC because they represented my work product and I explained that to Mr. Howard, Mr. Garcia, and Mr. Jackson. I requested reasonable compensation for the worked [sic] performed and each verbalely [sic] assured me that after I submitted my statement that I would be paid.
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> * * *
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> Although I had been assured by Mr. Seigler in the claims department that I would be paid, I have never received [p]ayment form [sic] the Defendant FDIC.[8]

The record establishes that Otte initially resisted surrendering the Bank's files to the FDIC-Receiver. Moreover, we acknowledge that Otte's affidavit establishes that, in bargaining

[8] Otte also relies upon the affidavit submitted by Ernest C. Garcia, a staff attorney for the FDIC-Receiver, which states that the FDIC-Receiver offered Otte $20,000 to settle his claim, as evidence that the FDIC-Receiver did ultimately enter a post-repudiation agreement with him.

with the FDIC-Receiver over custody of the Bank's files, Otte proposed to surrender the files to the FDIC-Receiver in exchange for reasonable compensation for work he performed on behalf of the Bank. Nevertheless, the record also establishes that, despite whatever verbal assurances Otte may have initially received from the FDIC-Receiver, by the time he actually surrendered the Bank's files, Otte had been clearly informed by the FDIC-Receiver that there was no guarantee that he would receive compensation. Specifically, Otte's relinquishment of the Bank's files followed an exchange of correspondence between Otte and the FDIC-Receiver. Beyond the fact that none of these letters assures Otte that he would receive compensation, in a letter dated July 28, 1989 (just three days prior to Otte's turning over the files at issue), the FDIC-Receiver both recited Otte's refusal to surrender the Bank's files before arrangements were made to compensate him and underscored that it was making "no assurances that [Otte's] claim for fees will be approved as submitted." When Otte did turn over those files on July 31, 1989, the FDIC-Receiver's representative gave him a signed statement which provides: "This is to acknowledge receipt of the Statement for Professional Services [r]endered on this the 31st day of July, 1989. <u>However I do not acknowledge that this statement will be paid by the FDIC</u>."[9] Finally, we recognize that, despite the express files-for-compensation terms of the

[9] The emphasized sentence was hand-written into the otherwise typed statement. Otte has not challenged the legitimacy of this statement.

oral agreement Otte alleges, Otte ultimately surrendered the Bank's files without receiving any compensation or any documentation of a promise to compensate him; the documentation Otte did receive--the signed statement--is to the contrary.

In sum, although the FDIC-Receiver accepted the Bank's files, the record establishes that the FDIC-Receiver never accepted Otte's proposed files-for-compensation deal. We conclude, therefore, that the FDIC-Receiver is entitled to summary judgment on this issue.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the FDIC-Receiver. We also order Otte to bear the costs of this appeal.