UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1486

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY,

Plaintiff and Counter-defendant--Appellee,

VERSUS

WENDELL L. FENNELL AND CELINA T. FENNELL,

Defendants and Third-party Plaintiffs--Appellants,

VERSUS

NATIONSBANK OF TEXAS, INC.,
FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER OF FIRST REPUBLICBANK ABILENE, N.A.,

Counter-defendants--Appellees,

AND

TIM COLLARD, JOHN CLARK AND JOHN COMBS,

Third-party Defendants--Appellees.

Appeal from the United States District Court
For the Northern District of Texas
CA 1 90 122 C c/w CA 1 91 119

August 19, 1993

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[1]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Wendell and Celina Fennell (the Fennells) appeal district court rulings holding them liable for the amounts due on four promissory notes, and dismissing their claims against the Federal Deposit Insurance Corporation as receiver of First RepublicBank Abilene, N.A. (FRBA) (FDIC-Receiver), the FDIC in its corporate capacity (FDIC-Corporate), NationsBank of Texas, N.A. (NCNB), and various officers of the banks. Concluding that the Fennells' defenses and claims are barred by the **D'Oench Duhme** doctrine, we affirm.

II.

The FDIC, in its corporate capacity, currently holds four promissory notes executed by the Fennells and originally made payable to Interfirst Bank Abilene, N.A., which later became Firstrepublic Bank Abilene, N.A. (FRBA). When FRBA failed in 1988, the FDIC was appointed Receiver. Under a purchase and assumption agreement, the FDIC-Receiver assigned certain assets and liabilities, including the notes at issue, to JRB Bank, N.A., a bridge bank organized under 12 U.S.C. § 1813(i)(2). JRB Bank later became NCNB Texas National Bank (NCNB). Later, NCNB assigned the promissory notes to the FDIC-Corporate.

The Fennells maintain that they are not liable on the notes. Rather, they argue, they are entitled to damages from NCNB, the FDIC-Receiver, and the FDIC-Corporate for fraud, breach of contract, and wrongful foreclosure. The Fennells also seek to recover damages from Tim Collard, John Clark, and John Combs, who were officers at FRBA and, later, at NCNB.

Three of the notes at issue were executed before 1987. The parties refer to them as the quadraplex note, the Fairway Oaks note, and the oil and gas note. The fourth note, executed in 1987, lies at the center of the controversy. The parties refer to it as the Hoylake note.

The Fennells claim that they purchased the Hoylake property, a nonperforming asset, from FRBA in exchange for FRBA's promise to restructure the oil and gas note and extend to the Fennells a $15,000 line of credit. According to the Fennells, FRBA did not restructure the oil and gas note or extend the line of credit. The Fennells further contend that when FRBA failed, NCNB promised to fulfil FRBA's end of the agreement, but did not.

In 1989, when the Fennells' defaulted on the four promissory notes, NCNB filed this suit in Texas state court for collection of amounts due. The Fennells filed third party actions against Collard, Clark, and Combs, and counterclaims against NCNB and the FDIC. The Fennells' claims and counterclaims alleged fraud, real estate fraud, Deceptive Trade Practices Act violations, wrongful foreclosure, and breach of contract. The suit was subsequently removed to federal court. The FDIC, in its corporate capacity, was substituted as plaintiff when it received the notes at issue by assignment from NCNB.

The case proceeded to trial. After the Fennells presented their case to the jury, the district court granted, in part, the FDIC's motion for judgment as a matter of law, finding the Fennells liable for the amount due on the notes, and ruling that the Fennells take nothing against the FDIC. The court also granted, in

part, NCNB's motion for judgment as a matter of law, ruling that the Fennells take nothing against NCNB on all but the Fennells' breach of contract claim. Furthermore, it entered a take-nothing judgment in favor of Clark and Combs on all theories alleged and in favor of Collard on all theories alleged except as to the fraud theory.

The jury found against NCNB on the Fennells' breach of contract claim, and awarded damages of $377,000. In addition, the jury awarded the Fennells attorneys' fees of $35,000. The jury also awarded $102,943.53 in attorneys' fees to the FDIC for collection on the notes. The jury found against the Fennells on their fraud claim against Collard.

The district court granted NCNB's motion for judgment NOV on the breach of contract claim. It also denied the Fennells' motion for judgment NOV on the attorneys' fee award to the FDIC. The court denied the Fennells' motions for relief from judgment, for entry of findings of fact and conclusions of law, and for a new trial. This appeal followed.

III.

A.

The Fennells first challenge the propriety of the district court's rulings dismissing the Fennells' claims against NCNB and the FDIC, and finding them liable to the FDIC for the amounts due on the notes. Under the **D'Oench Duhme** doctrine, codified at 12 U.S.C. § 1823(e), the rulings were proper. That statute provides:

> 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, either as security for a

> loan or by purchase or as receiver of any insured depository institution, 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
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> (4) has been continuously, from the time of its execution, an official record of the depository institution

Section 1823(e) protects the FDIC-corporate, the FDIC-Receiver, and bridge banks from defenses and affirmative claims based on unrecorded side agreements to extend future loans. **Resolution Trust v. Sharif-Munir-Davidson Dev.**, 992 F.2d 1398, 1404 n.9 (5th Cir. 1993); **Bell & Murphy & Assoc. v. Interfirst Bank Gateway**, 894 F.2d 750, 753-54 (5th Cir.), **cert. denied**, 498 U.S. 895, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990). All of the Fennells' claims and defenses against the FDIC and NCNB are premised on an "agreement" to extend a line of credit and restructure an existing loan "which tends to diminish or defeat" the FDIC's interest in the four promissory notes. Thus, all of these claims and defenses fall if the agreement does not satisfy the requirements of § 1823(e).

We agree with the FDIC and NCNB that the Fennells' claims and defenses against the FDIC and NCNB cannot succeed because of the lack of a written agreement between the Fennells and FRBA. The Fennells point to the following as evidence of an agreement between the Fennells and FRBA: (1) oral conversations between the Fennells,

Collard and Clark that took place before and after the Fennells signed the Hoylake note; (2) the Fennells' written offer for the Hoylake property, which was "contingent upon financing as we discussed;" (3) a memorandum to FRBA's senior loan committee in which Collard proposed a restructuring of the oil and gas note, and proposed the extension of a $15,000 line of credit to the Fennells;[2] (4) minutes of an April, 1987 meeting in which FRBA's senior loan committee approved the loans as proposed in Collard's memorandum; and (5) a letter from Collard to the Fennells, dated 10 months after the execution of the Hoylake note, in which Collard purports to "outline the refinancing/home acquisition financing package approved by our bank."

The Fennells argue, in effect, that a factfinder could infer

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[2]The memorandum outlined the following loans:

1. The Hoylake Loan. This loan in the amount of $144,000 would provide the funds to purchase the Hoylake Property and would be secured by the Hoylake Property;

2. The Quadraplex Loan. This loan in the amount of $150,800 would renew and increase (by $14,286) the Quadraplex Note and the increase would provide part of the down payment for the Hoylake Property, and would remain secured by the Quadraplex;

3. The Oil and Gas Loan. This loan in the amount of $26,625 would renew and increase (by $1,8000) the Oil and Gas Note and the increase would provide a portion of the down payment for the Hoylake Property, and would be secured by previously pledged oil and gas properties and by a deed of trust on the Fennells' existing home on Ivanhoe (the "Ivanhoe Property"), and would reduce the monthly payments from $1550 to $360; and

4. The Line of Credit Loan. This loan would be a one year line of credit for working capital in the amount of $15,000, which would have to be paid to zero for thirty days during the one year term, and would be secured by the Smith-Newton-McMillon lease.

from the above evidence an agreement that meets § 1823(e)'s requirements. We have held, however, that inferences that can be drawn from conduct of the parties do not satisfy § 1823(e)'s writing requirement. **Beighley v. Federal Deposit Ins. Corp.**, 868 F.2d 776, 783 (5th Cir. 1989). Moreover, to satisfy § 1823(e), the Fennells must do more than point to a written document expressing FRBA's intent to restructure a note and extend additional credit; the writing must obligate FRBA to do so. **Federal Sav. & Loan Ins. v. Two Rivers Associates**, 880 F.2d 1267, 1276 (11th Cir. 1989); **see also Franklin Asaph Ltd. Partnership v. F.D.I.C.**, 794 F. Supp. 402, 408 (D. D.C. 1992) (Section 1823(e)'s writing requirement not met by unexecuted loan documents or by bank's files reflecting loan committee's approval of loan). Although the loan committee approved the loan restructuring and line of credit sought by the Fennells, no written agreement to that effect was executed by the Fennells and FRBA. Nor did the Hoylake note make any reference to this agreement. The district court correctly concluded that the agreement does not satisfy § 1823(e).

B.

The Fennells next try to circumvent the restrictions of § 1823(e) by arguing that they and NCNB reached an independent agreement that NCNB would restructure the oil and gas note and extend to the Fennells a $15,000 line of credit. For evidence of this alleged agreement, the Fennells point to (1) the purchase and assumption agreement under which NCNB acquired the assets and liabilities of FRBA from the FDIC-Receiver; (2) NCNB's promises, through its newsletter, that "The current terms of your [FRBA Bank]

loan will not change at NCNB Texas," and that "All contracts and other agreements are still in force;" and (3) Collard's oral promise to the Fennells, on the day NCNB assumed the assets and liabilities of FRBA, that "everything was going to be fine."

As to the first two items, NCNB and the FDIC argue that if the agreement between the Fennells and FRBA fails under § 1823(e), that agreement is not a liability assumed by NCNB from FDIC as Receiver for FRBA. We agree; to hold otherwise would leave bridge banks effectively unprotected by **D'Oench Duhme**, and, consequently, would severely restrict the FDIC's ability to work out purchase and assumption agreements with bridge banks. **Porras v. Petroplex Sav. Ass'n.**, 903 F.2d 379, 380 (5th Cir. 1990); **Pernie Bailey Drilling Co. v. FDIC**, 905 F.2d 78, 80 (5th Cir. 1990).

Collard's alleged promise to the Fennels, by itself, does not support the existence of an agreement with NCNB because no consideration was given for Collard's promise. The Fennells argue that their continued performance under the loan agreements constitutes consideration. This argument has no merit because, as we have previously discussed, the Fennells were already obligated to perform under the loan agreements. **Signs v. Bankers Life & Casualty Company**, 340 S.W.2d 67, 73 (Tex. Civ. App. 1960). Not only did the alleged agreement lack fresh consideration, but it lacked such material terms as the maturity date of the loan, the interest rate, and the repayment terms. Even if we accept the Fennells' argument that the alleged agreement adopted the terms negotiated by the Fennells and FRBA, the part of the alleged agreement dealing with the line of credit lacks a rate of interest,

a loan closing date, and a maturity date. The part of the alleged agreement dealing with the commitment to restructure the oil and gas lease would also require future negotiation; when NCNB acquired FRBA's assets, there was no longer $26,625 of debt to restructure, and the contemplated amortization period for the oil and gas note in April of 1987 could not apply to the remaining balance due in November of 1988. So the agreement fails for the additional reasons that it lacks essential terms. **T.O. Stanley Boot Co. v. Bank of El Paso**, 847 S.W.2d 218, 221 (Tex. 1992).

C.

The Fennells next argue that the district court erred in ruling on the motions for directed verdict and judgment NOV without making findings of fact and conclusions of law. This argument has no merit. Fed. R. Civ. P. 52 requires the entry of findings of fact "[i]n all actions tried upon the facts **without a jury** or with an advisory jury" (emphasis added). However, Rule 52 makes no such requirement with respect to any other motion: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion . . . ." The Fennells appeals to "fundamental fairness" are similarly unavailing; the record is adequate for meaningful review of the district court's rulings.

D.

The Fennells next argue that the district court erred in refusing to let them introduce a private letter ruling requested by NCNB and handed down by the Internal Revenue Service. The private letter ruling says that a buyer bank that accepts "all the assets and liabilities" of a failed bank can receive the tax advantages of

the loss carry forwards of the failed bank. The Fennells sought to use the letter to show that NCNB obtained tax advantages without assuming FRBA's obligations to the Fennells. The district court concluded that the Fennells were attempting to "bootstrap" themselves into a third party beneficiary position.

The district court correctly excluded the private letter ruling because it is irrelevant to any material issue in the case. As has already been discussed, the agreement asserted by the Fennells fails the requirements of 12 U.S.C. § 1823(e). Therefore it was not a liability assumed by the NCNB.

E.

The Fennells next argue that the district court erred in awarding the FDIC $102,943.53 in attorneys' fees consistent with the jury verdict. First, they argue, the FDIC joined the lawsuit only three months before trial. Second, they argue that the jury's verdict indicates that the jury mistakenly believed that NCNB would be liable to the FDIC for the attorneys' fees. Finally, they argue that the district court failed to instruct the jury to segregate amounts spent collecting on the notes from amount spent defending the Fennells' counterclaims.

The first two arguments have no merit. Both the terms of the promissory notes and Texas statute provide for the payment of reasonable attorneys' fees expended in collecting the notes. Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (Vernon 1986). Thus liability for attorneys' fees flows automatically from a finding of liability on the notes. The jury's only task was to determine the amount to be awarded, and the relevant jury interrogatory asked only that it

determine the amount. The Fennell's third argument likewise has no merit. The Fennells did not argue at trial through a motion for directed verdict or otherwise that the attorneys' fees should be segregated. Fed. R. Civ. P. 50(b); **Seidman v. American Airlines, Inc.**, 923 F.2d 1134, 1137-38 (5th Cir. 1991).

F.

Finally, the Fennells challenge the take nothing judgment entered on their claims against Collard, Clark, and Combs. The jury considered and rejected the Fennells' fraud claim against Collard. However, the district court dismissed the remaining claims against the three defendants as a matter of law.

Collard, Clark and Combs argue that the Fennells' brief fails to point to any evidence that creates a jury issue on any of the Fennells' claims against them, except the fraud claim against Collard. They argue that this failure to comply with F.R.A.P. Rule 28(a)'s requirement that the appellant's argument "contain the contentions of the appellant with respect to the issues presented, and the reasons therefore," results in a waiver of those arguments. We agree. The Fennells have waived their claims except for their real estate fraud claim against Collard. **Matter of Texas Mortg. Services Corp.**, 761 F.2d 1068, 1073 (5th Cir. 1985). However Collard correctly points out that real estate fraud is a subset of common law fraud. **Bykowicz v. Pulte Home Corp.**, 950 F.2d 1046, 1050 (5th Cir.), **cert denied**, ___ U.S. ___, 113 S. Ct. 73, 121 L. Ed.2d 38 (1992). So the jury's amply supported finding that Collard did not commit common law fraud effectively disposes of the

real estate fraud claim.[3]

IV.

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

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[3]Our disposition of the preceding issues makes it unnecessary to address the parties' arguments concerning the proper measure of damages in this case.