UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1599
Summary Calendar

Resolution Trust Corporation,
as receiver for, Southwest
Federal Savings Association, ET AL.,

Plaintiffs,

Resolution Trust Corporation,
as receiver for, Southwest
Savings Association,

Plaintiff-Appellee,

VERSUS

Scarlett Walker and Kenneth Walker,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas
(3:90 CV 1416 X c/w 3:90 CV 1418 H & 3:90 C 1419 H)

(September 1, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, 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

Debtors defaulted on note and appeal the enforcement of the deficiency after foreclosure of the collateral. We affirm.

Facts and Prior Proceedings

This suit arises from the banking and business relationship between Kenneth and Scarlett Walker and City Savings and Loan Association (City Savings). In July 1986, the Walkers executed a promissory note payable to City Savings for an original principal of $2,000,000. The note was secured by a Deed of Trust for a 476 acre ranch in Coleman County. The Walkers failed to make payments on the loan, and City Savings proceeded to foreclose on the ranch. In 1988 the Walkers sued City Savings in state court to enjoin and restrain the foreclosure sale of the Coleman County ranch. The ranch was eventually foreclosed upon in late 1988, leaving a deficiency. After City Savings' demise, its successor, Southwest Savings Association (Southwest), pursued the Walkers for the deficiency as well as for failure to pay two other promissory notes made with City Savings. On July 13, 1989, the Walkers filed their Second Amended Complaint against Southwest. The Walkers asserted that Southwest wrongfully foreclosed upon the ranch and breached its duty of good faith. The Walkers also asserted several claims arising out of business ventures they undertook with City Savings:

(1) that City Savings owed them money from the Capehart Joint Venture ("Capehart"), and that they are entitled to an offset on their indebtedness;

(2) that City Savings agreed to indemnify the Walkers after

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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.

the Walkers made a loan to T. T. Carruther and Associates, and that City Savings agreed to offset other Walker debts by any amounts owed for the indemnification;

(3) that City owed them money for a certificate of deposit;

(4) that they were not advanced the full amount of money borrowed under another note; and

(5) that City did not act in good faith with regard to the $2,000,000 note.

After Southwest was declared insolvent, the Resolution Trust Corporation (RTC) was declared its conservator. The RTC subsequently removed and consolidated all of the state court suits to federal district court. In June 1990, Southwest Savings was closed by the Office of Thrift Supervision and through agreement, Southwest Federal Savings Association (Southwest Federal) acquired all of Southwest's assets, and the RTC retained its liabilities.

Shortly thereafter, the RTC filed a motion for summary judgment, arguing that the claims based upon City Savings' actions were barred by the **D'Oench Duhme** doctrine[1], and that the wrongful foreclosure claims had no merit. Southwest Federal also claimed that it was entitled to summary judgment on all of its note claims. On April 4, 1991, the district court granted summary judgment in favor of the RTC on all of the Walkers' counterclaims and defenses against City Savings and Southwest because many of the Walkers' claims were based upon alleged written agreements that the Walkers never presented as evidence. In addition, the district court found

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[1]About this same time, the Walkers' attorney was allowed to withdrawal. The Walkers proceeded pro se.

that the Walkers' homestead arguments, as well as, arguments regarding the inadequate foreclosure price for the ranch were without merit. The district court also granted summary judgment in favor of Southwest Federal as to one of the promissory notes, but not the $2,000,000 note.

The Walkers attempted to appeal the partial grant of summary judgment to this Court, but the appeal was dismissed for lack of jurisdiction. On September 5, 1991, the district court entered a final judgment against the Walkers. Having determined that all of the Walkers' claims against Southwest had been resolved, the district court rendered a take-nothing judgment against the Walkers as to their claims against Southwest. The Walkers attempted to appeal this final judgment but the appeal was dismissed because the Walkers failed to file a Notice of Appeal.

On June 22, 1992, the RTC's remaining claims against the Walkers were tried before the district court. The district court then rendered judgment in favor of the RTC on the deficiency owed by the Walkers on the $2,000,000 real estate lien note. The Walkers now appeal the judgment of June 22, 1992.

Discussion

This Court reviews the grant of summary judgment motions de novo. **Hanks v. Transcontinental Gas Pipe Line Corp.**, 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if 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 judgment as a matter of law." Fed. R. Civ. P.

56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. **Celotex Corp. v. Catrett**, 106 S.Ct. 2548, 2554 (1986). After a proper motion for summary judgment is made, a non-moving party, who wishes to avoid summary judgment by establishing a factual dispute, must set forth specific facts showing that there is a genuine issue for trial. **Hanks**, 953 F.2d at 997.

The Walkers first argue that the district court coerced them into having a non-jury trial. After a thorough review of the record, we are convinced that the district court did not in any way coerce the Walkers into waiving a jury trial. Therefore, the Walkers have failed to show any error.

The Walkers' second argument is that the district court erred by allowing an allegedly erroneous exhibit to be entered into evidence by the RTC. The exhibit, a document listing the amount that the Walkers owed on the real estate lien note, was not listed on the list of exhibits. Nevertheless, it was offered and admitted into evidence. Prior to the admission of the exhibit, John G. Moyer, the department manager for the commercial real estate loan department at the RTC, testified as to all of the information contained in the document. The exhibit, therefore, was merely cumulative of testimony already admitted into evidence and did not affect any of the Walkers' substantial rights. **See** Fed. R. Evid. 103(a).

The Walkers next argue that the district court erred by not allowing them to introduce any of their exhibits into evidence.

Exhibit 1 was a letter purportedly written by Mr. Walker in 1986. The RTC objected to the admission of the letter as hearsay, and the court sustained the objection. Mr. Walker answered the objection by citing the business record exception. Exhibits 2 and 3 were handwritten notes written by a man named Roy Martin. The RTC again timely objected to their admission as hearsay. Mr. Walker again responded that these notes were part of his business records. The district court sustained the objection. The record reflects that Mr. Walker failed to make an offer of proof concerning the handwritten notes referred to as exhibits 2 and 3. Therefore, the Walkers did not preserve any error for this Court to review. **See** Fed. R. Evid. 103(a)(2). Exhibit 1 was reviewed off the record by the district court. However, we are unable to review exhibit 1 because it was not designated in the record on appeal. **See** Fed. R. App. P. 10(b)(2); **Federal Practice and Procedure** § 5040 (excluded exhibits should become part of the record on appeal (citing Fed. R. App. P. 10)). The record reflects that the Walkers did not even attempt to offer any other exhibits.[2]

For their fourth argument, the Walkers contend that the district court was prejudiced by testimony that Mr. Walker pleaded guilty to a felony in May 1981 and served time in federal prison. At trial, however, the court sustained the Walkers' objection to any evidence of his conviction and incarceration. The court specifically ruled that it would not consider the conviction "for any purpose whatsoever." After the close of evidence, the district

[2] This was especially detrimental to the Walkers as they never offered any proof of the joint ventures undertaken by themselves and City Savings.

court again announced that it was not considering the conviction. We therefore find no merit in the Walkers' contention.

Next, the Walkers argue that the district court erred in finding that their Coleman County ranch did not have "homestead" status. The issue of the "homestead" status of the ranch was raised once during trial, and Mr. Walker admitted that the "homestead" issue had been previously decided in the first summary judgment proceeding. That proceeding ended in a final judgment entered on September 5, 1991. The Walkers appealed that judgment, however, and this Court dismissed the appeal because no notice of appeal was timely filed. Therefore this Court had no jurisdiction to hear the matter. Even if we did, this Court will not disturb a finding by the district court unless it is clearly erroneous. Fed. R. Civ. P. 52(a).[3] Based on the record before this Court, the district court's finding regarding the "homestead" status of the ranch is not clearly erroneous.

The Walkers also argue that the district court erred in finding that they were not entitled to their claimed offsets. According to the Walkers, had the court allowed their exhibits, the evidence would have shown that their claimed offsets exceeded at least the amount of the debt the RTC claimed. The Walkers, however, never offered any evidence of a right to offsets, much less any evidence of a joint venture between themselves and City Savings.

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[3] "...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...." Fed. R. Civ. P. 52(a).

Finally, the RTC argues that this Court should order the Walkers to pay the expenses and attorney's fees it incurred in this appeal. According to the RTC, this appeal is "frivolous" and "without merit." Rule 38 of the Federal Rules of Appellate Procedure gives appellate court discretion to award costs to the appellee, including attorney's fees, if the appellate court deems an appeal frivolous. **See** Fed. R. App. P. 38; **Ruiz v. Medina**, 980 F.2d 1037, 1038-39 (5th Cir. 1993). In light of the Walkers' status as **pro se** appellants and the record in this case, attorney's fees against them do not appear appropriate.

Conclusion

Based on the foregoing, the judgment of the district court is affirmed.