IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1679
Summary Calendar

FEDERAL DEPOSIT INSURANCE CORPORATION,
In Its Corporate Capacity,

Plaintiff/Counter-
Defendant Appellee,

VERSUS

SAM LEWIS HUTCHESON,

Defendant/Counter-
Plaintiff Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:91 CV 0981 H)

March 26, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

The Federal Deposit Insurance Corporation ("FDIC") brought suit to collect on a promissory note originally executed and delivered to Liberty National Bank ("Bank") by the defendant, Sam Hutcheson. On a motion by the FDIC, the district court granted summary judgment in its favor and entered an award for attorney's

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* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

fees. We affirm the summary judgment, but because we find the court failed to provide Hutcheson an adequate opportunity to contest the reasonableness of the fee award, we remand.

I.

Hutcheson executed the note on February 21, 1989, for the principal sum of $90,145,41, with interest to be paid at the varying rate of 1.5% over the Bank's stated prime rate)) initially 13.5%)) but never to exceed the maximum legal rate. The note matured on April 22, 1989, and neither at that time nor since has Hutcheson made any payments. In case of default, the note provides for all reasonable attorney's fees and costs incurred in securing payment.

On May 25, 1989, the Bank was declared insolvent and the FDIC appointed to be its receiver. Acting as receiver, the FDIC entered into a purchase and assumption agreement ("P&A") with Cornerstone Bank, N.A. ("Cornerstone"), in which Cornerstone purchased certain of the Bank's assets from the FDIC, with a provision permitting it to "put-back" undesired loans within sixty days of the Bank's closing. The remainder of the Bank's assets were then sold to the FDIC in its corporate capacity.

Cornerstone subsequently exercised its put-back rights, returning to the FDIC, among other things, Mr. Hutcheson's note. Having twice failed thereafter to persuade Hutcheson to pay the note upon written demand, the FDIC brought the instant action.

II.

Hutcheson appeals on three grounds: The FDIC failed to present admissible summary judgment evidence of its entitlement to the note proceeds; the court erred in rejecting Hutcheson's affirmative defense of usury; and the court did not allow Hutcheson adequate time to contest the reasonableness of the attorney's fees award.

We review the grant of summary judgment under a de novo standard. Samaad v. City of Dallas, 940 F.2d 925, 937 (5th Cir. 1991). The pertinent test is supplied by Fed. R. Civ. P. 56(c), which provides that summary judgment shall issue if the record evidence presented by the parties "show[s] 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."

The FDIC supported its motion for summary judgment with several affidavits. Once a movant such as the FDIC presents evidence of the absence of a genuine issue as to any material fact, "the nonmovant must then direct the court to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial." FDIC v. Selaiden Builders, 973 F.2d 1249, 1253 (5th Cir. 1992) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)); Fed. R. Evid. 56(e).

III.

According to Texas law, the FDIC must satisfy three elements in order to recover on the note: (1) Hutcheson signed the note; (2)

FDIC is the legal owner of the note; and (3) a sum certain is due and owing on the note. See Selaiden Builders, 973 F.2d at 1254. Only the FDIC's legal ownership of the note is disputed.

Texas law does not recognize mere possession of a promissory note as equivalent to ownership. See Resolution Trust Corp. v. Camp, 965 F.2d 25, 29 (5th Cir. 1992) (citing Jernigan v. Bank One, 803 S.W.2d 774, 776-77 (Tex. App.)) Houston [14th Dist.] 1991, no writ). The FDIC thus bears the burden of proving up the transaction whereby it acquired possession of the note, before it is entitled to holder-in-due-course status. See Lawson v. Finance Am. Private Brands, 537 S.W.2d 483, 485 (Tex. Civ. App.)) El Paso 1976, no writ); Tex. Bus. & Comm. Code Ann. § 3.201(c), Comment 8 ("Proof of a transfer to [a transferee without indorsement] by a holder is proof that he has acquired the rights of a holder . . . .").

The difficulty in this case lies in the fact that the contract of sale between the FDIC as receiver and the FDIC in its corporate capacity does not expressly delineate which assets of the Bank are being transferred to FDIC in its corporate capacity. Rather, it states that

> [t]he Receiver does hereby sell to the Corporation all the Receiver's right, title, and interest in all assets not purchased by the Assuming Bank pursuant to the Purchase and Assumption Agreement and all assets subsequently reacquired from the Assuming Bank by the Receiver.

Thus, the assets held by FDIC in its corporate capacity are defined only in relation to assets assumed by Cornerstone under the terms of the P&A agreement. Absent some evidence as to whether the note was assumed by Cornerstone, and if so, whether it was then put-back to the FDIC, we face a question as to the identity of the owner of the note)) a situation we previously have held is inappropriately resolved on summary judgment. See Camp, 965 F.2d at 29 n.1 (describing circumstances of FDIC v. Clark, No. 91-8259 (5th Cir. March 16, 1992) (per curiam) (unpublished opinion)).

Citing this gap in the evidence, the district court announced, in its Memorandum Opinion and Order, dated June 19, 1992, that it was unpersuaded of FDIC's ownership: Neither the terms of the contract of sale nor the conclusionary letters of John Haiduk, an FDIC liquidation assistant, were dispositive. The court nonetheless permitted the FDIC an opportunity to supplement the record, which opportunity the FDIC promptly seized by filing the supplemental affidavit of Liquidation Assistant Douglas Jeffers, consisting of the P&A agreement and correspondence evidencing that Cornerstone had returned the note to FDIC. Based upon these newly-provided documents, the district court, in its Order dated July 10, 1992, granted summary judgment on the issue of FDIC's ownership.

Hutcheson objects to the tardily-produced supplemental affidavit of Douglas Jeffers and supporting documents on a number of grounds: improper authentication, the "best evidence" rule (Fed. R. Evid. 1003), and alleged inconsistencies in Jeffers's two affidavits, which Hutcheson claims create an issue of credibility that can be resolved only by the trier of fact. See Tippens v. Celotex, 805 F.2d 949, 953-55 (11th Cir. 1986) (disallowing summary judgment where inconsistent testimony by witness creates credibility question).

At the outset, we must dismiss Hutcheson's contention that Jeffers was an inappropriate affiant ostensibly because he lacked personal knowledge of the transactions at issue. Recently, in Camp, 965 F.2d at 29, we rejected a similar argument inasmuch as it "would have us hold [FDIC] to a standard so strict that summary judgment would be all but impossible for plaintiffs in cases such as these." See also Selaiden Builders, 973 F.2d at 1254 n.12 (FDIC employees' "personal knowledge" derived from review of FDIC business records sufficient for purposes of rule 56(e)). Because "suits on promissory notes provide fit grist for the summary judgment mill," FDIC v. Cardinal Oil Well Servicing Co., 837 F.2d 1369, 1372 (5th Cir. 1988), such a result would be contrary to our prior jurisprudence and detrimental to that part of our docket more deserving of full trial treatment. Jeffers's status as an FDIC liquidation assistant, and his review of the FDIC and Liberty records, brings him within the personal knowledge requirement of rule 56(e).

Hutcheson's reliance upon Fed. R. Evid. 1003, to the effect that Jeffers's supplemental affidavit testimony and the supporting documents must be disregarded, is similarly misplaced.[1] In an

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[1] Rule 1003 provides,

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

(continued...)

exhibit to the supplemental affidavit, a two-page letter from Cornerstone, dated May 25, 1989, evidences Cornerstone's intention to put-back certain of the small loans it had assumed in the P&A agreement.[2] The attached loan listings include a page headed "Commercial Loans Trial Balance," which lists the note; it is not highlighted.

While we acknowledge Hutcheson's concerns over permitting photocopied evidence where, as here, the appearance of colored highlighting markers may prove dispositive, we take judicial notice of the fact that highlighted marks invariably show up in photocopied documents as dark, sometimes opaque, lines. Such a line appears, for example, in the listing for the note immediately following the Hutcheson loan on the Commercial Loans Trial Balance document. Given this fact, and our ability to conclude thereby that the instant note in fact was returned to the FDIC, admission of such evidence does not implicate any such fairness concerns as contemplated by rule 1003(2).

Lastly, we are unable to discern, in Jeffers's two affidavits, any discrepancy that might create a question of credibility

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(...continued)
Only the latter of these two provisions applies here, as Hutcheson has raised no questions as to the authenticity of the original of the documents included in the Jeffers affidavit.

[2] Prior to a listing and attached schedule of the loans, the document states,

> Highlighted in yellow in these binders are loans which we contracted to buy with balances of $10,000 and below. Highlighted in orange are loans which we, by choice, are keeping. All remaining loans, not highlighted, are by this letter and under the terms of the Purchase and Assumption Agreement put back to the F.D.I.C.

necessitating a determination by a trier of fact. Indeed, we find no discrepancies whatsoever between Jeffers's original and supplemental affidavits. The fact that the latter includes information left out of the former is no cause to doubt Jeffers's credibility; simply stated, it is the nature of a supplemental affidavit that it supplement the original. Plainly, something more than Hutcheson's unfounded allegations of Jeffers's bad faith and bias are needed before the Tippens exception can be said to apply.

We find that the summary judgment evidence produced by the FDIC in the supplemental affidavit sufficed to establish FDIC's ownership of the note. That conclusion, shared by the district court, takes this case out of those identified in Camp, in which "[w]e would not hesitate to reverse summary judgment had Appellants pointed to evidence in the record to the effect that they had a legitimate fear that the [FDIC] was not the owner and holder of the note in question and that some other entity might later approach them demanding payment." Camp, 965 F.2d at 29. The supplemental affidavit documents should allay any fears Hutcheson might have, based upon the text of the FDIC contract of sale, that Cornerstone might later seek payment from him.

Once the FDIC thus established, as an initial matter, its ownership of the note, the burden fell upon Hutcheson to adduce affirmative evidence contradicting the FDIC on this issue. Celotex, 477 U.S. at 324. Having failed to do so, Hutcheson cannot merely rely upon the alleged incompleteness of the FDIC's proof: "In other words, it does not suffice for Appellants merely to state that the [FDIC's] allegations, backed up with affidavits, might be in error." Camp, 965 F.2d at 29.

IV.

The district court also correctly dismissed Hutcheson's contention that the post-maturity rate of interest on the note was usurious. It is settled Texas law that a specified pre-maturity rate, in the absence of agreement as to the post-maturity rate, will be presumed to continue after maturity. Petroscience Corp. v. Diamond Geophysical, Inc., 684 S.W.2d 668, 668-69 (Tex. 1984) (per curiam). The exact argument urged by Hutcheson here, that the six percent rate provided in Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (West 1987) should be deemed to be the post-maturity rate, we rejected in FDIC v. Blanton, 918 F.2d 524, 532 (5th Cir. 1990). The usury savings clause made a part of the note evinces the parties' intent to comply with Texas usury laws and thus fortifies us in our conclusion that the parties did not intend the six percent statutory rate to apply. See id. at 532 n.8.

V.

Finally, despite our affirmance on the above two grounds, we nonetheless must remand, because the district court did not allow Hutcheson a sufficient opportunity to contest the reasonableness of the attorney's fees award. Local Rule 5.1(e) of the Northern District of Texas specifies that a party has twenty days to respond to a motion. Here, the FDIC filed its motion requesting attorney's fees on July 20, 1992; the court granted the request a scant two days later. We agree with both parties that the district court erred in this regard.

In light of the foregoing, we AFFIRM the summary judgment on the issues of Hutcheson's liability on the note and his affirmative defense of usury. We VACATE and REMAND, however, the order awarded attorney's fees so that Hutcheson may properly contest the reasonableness of the amount claimed.