UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2434

FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for GIBRALTAR SAVINGS,
GIBRALTAR SAVINGS ASSOCIATION,

Plaintiff-Appellee,

FIRST GIBRALTAR BANK, FIRST
GIBRALTAR BANK, FSB,

Intervenor-Plaintiff-
Appellee,

versus

FOXWOOD MANAGEMENT COMPANY, ET AL.,

Defendants,

FOXWOOD MANAGEMENT COMPANY,
CHARLES L. SOWELL and JACK
C. OGG,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas
(CA-H-89-289)

(January 14, 1994)

Before JOHNSON, GARWOOD, and JONES, Circuit Judges.*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

GARWOOD, Circuit Judge:

Defendants-appellants, Foxwood Management Company (Foxwood), Charles L. Sowell (Sowell), and Jack C. Ogg (Ogg), appeal two summary judgments respectively granted in favor of the Federal Deposit Insurance Corporation (FDIC) as plaintiff and the First Gibraltar Bank (First Gibraltar) as intervenor-plaintiff. First Gibraltar moved to obtain a deficiency judgment on the remaining balance of defendants' promissory note and guaranty and the FDIC moved to dismiss defendants' counterclaims and defenses to the promissory note now held by First Gibraltar. We affirm the judgment in favor of the FDIC on the ground that defendants' claims are moot. We affirm the judgment in favor of First Gibraltar on the ground that no defenses were raised in the court below to the *prima facie* case presented by First Gibraltar.

Facts and Proceedings Below

On January 11, 1980, Foxwood Properties Ltd. # 1 (Foxwood Properties), a Texas limited partnership, executed a promissory note in favor of Gibraltar Savings Association (Gibraltar Savings) secured by a deed of trust on several lots. Foxwood is a Texas general partnership and is the general partner of Foxwood Properties. On behalf of Foxwood Properties, the note and deed of trust were signed by Foxwood by all of its (Foxwood's) general partners: Thomas G. Sumner (Sumner)[1], Sowell, Ogg, and Patrick Mahaffey (Mahaffey), each of whom signed.[2] The promissory note was

[1] Sumner filed for bankruptcy after removal and is not a party to this appeal.

[2] Mahaffey was a defendant below, but did not file a notice of

modified and replaced by a new note on March 30, 1981, again executed by Foxwood Properties by its general partner Foxwood through Foxwood's general partners Sumner, Sowell, Ogg, and Mahaffey, each of whom signed as such. Sumner, Sowell, Ogg, and Mahaffey executed a March 30, 1981, guaranty agreement as additional security for this note. The loan agreement was again modified and some of the terms concerning the disposition of collateral were changed on July 15, 1983.

Foxwood Properties and the defendants subsequently defaulted on the March 30, 1981, note. Gibraltar conducted a nonjudicial foreclosure on the collateral, reducing the balance due on the note to $1,534,532.45 plus interest.

This dispute arose in 1987 when Gibraltar Savings sued Foxwood, Sumner, Sowell, Ogg, and Mahaffey to collect the deficiency due on this March 30, 1981, promissory note and guaranty agreement in Texas state court. Foxwood Properties has never been a party to this action. The state court defendants raised several counterclaims and defenses including breach of fiduciary duty, breach of agreement to form a joint venture, wrongful foreclosure, and violations of the Texas Deceptive Trade Practices Act (DTPA).

On December 28, 1988, Gibraltar Savings was declared insolvent. The FSLIC took control of Gibraltar Savings. The FSLIC subsequently transferred substantially all of Gibraltar Savings' assets, including the promissory note and guaranty agreement to First Gibraltar Bank (First Gibraltar). Although the FSLIC

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appeal and is not currently before this Court.

transferred the note and guarantySQthe right to be paidSQto First Gibraltar, the FSLIC agreed to remain liable for most defenses to the note and for other claims arising from the transaction between Gibraltar Savings and defendants, including defendants' counterclaims pending in this action.

On January 25, 1989, the FSLIC removed this case to federal court and moved to dismiss defendants' counterclaims. This motion was denied. The FDIC then replaced the FSLIC as the party defending the counterclaims.

On November 29, 1990, First Gibraltar intervened to assert its rights as holder of the note, claiming that all of the defendants were personally liable on the note. First Gibraltar's complaint in intervention did not seek recovery on the personal guarantees of defendants.[3]

On January 31, 1991, the FDIC filed a motion for summary judgment, forty-eight pages long plus ninety-six pages of exhibits, seeking dismissal of defendants' counterclaims. The FDIC served the motion on two defendants, Sowell, through counsel of record Michael Landrum, and Sumner, through counsel of record Joe Holzer, but did *not* serve the motion on defendants Foxwood (represented by counsel of record Charles Wist, now withdrawn), Ogg (pro se), or Mahaffey (pro se). On several prior occasions, the FDIC had properly served all defendants. On February 22, 1991, the district judge issued an order granting the FDIC's motion for summary

[3] First Gibraltar's summary judgment motion based defendants' liability on the March 30, 1981, note and on the guarantee. The judgment below based defendants' liability only on the note.

judgment. A docket entry on that date reflects that notice of this order was given to all parties. No separate document judgment under Fed. R. Civ. P. 58(b) was entered respecting the FDIC.

On February 28, 1992, First Gibraltar filed a motion for summary judgment seeking a deficiency judgment against defendants on the note and guaranty. Defendants were properly served yet they never made any response to this motion. The district court on April 14, 1992, granted First Gibraltar's motion for summary judgment and rendered judgment in favor of First Gibraltar for $1,534,532.45 plus interest of over a million dollars against Foxwood, Foxwood Properties (not a party to this litigation), Sowell, Ogg, and Mahaffey. A separate document Rule 58(b) judgment in favor of First Gibraltar was entered on April 29, 1992. Defendants appeal both summary judgment orders of the district court.

I. Appellate Jurisdiction

Preliminarily, we address the district court's failure to enter a Rule 58(b) separate document judgment relating to its order granting the FDIC's motion for summary judgment. *See Theriot v. ASW Well Service, Inc.*, 951 F.2d 84, 85-88 (5th Cir. 1992); *Simmons v. Willcox*, 911 F.2d 1077, 1080 n.6 (5th Cir. 1990). *See also Bankers Trust Co. v. Mallis*, 98 S.Ct. 1117, 1120-21 n.6 & 7 (1978) (per curiam). A "separate document" is a document briefly describing the judgment of the court issued separately from and in addition to any opinion or order explaining the district court's reasons for its decision. This "separate document" rule applies to all appealable decisions of the district court, whether final or

interlocutory. *Theriot*, 951 F.2d at 88. The separate document rule is not jurisdictional and can be waived by the parties.[4] *Id.* at 87 n.10. Defendants mention in their brief several times that no final judgment was entered, but do not argue that the separate document rule makes their appeal premature or deprives this Court of jurisdiction to hear the appeal. Since neither party moved to dismiss this appeal under *Mallis,* and since the district court's order granting summary judgment has become a final decision, the parties have waived this challenge, and this case is properly before us.

II. Defendants' Counterclaims Against the FDIC

Foxwood and Ogg claim that the summary judgment order in favor of the FDIC should be vacated since the FDIC failed to serve them with its motion for summary judgment. Sowell, who joined in defendants' brief, was properly served and cannot complain about the FDIC's failure to serve Foxwood and Ogg. Sowell did not challenge the merits of the district court's decision granting summary judgment in favor of the FDIC.

Turning to the merits, Foxwood and Ogg contend that the summary judgment order in favor of the FDIC must be vacated since they were not served with the FDIC's motion for summary judgment. Fed. R. Civ. P. 56(c) requires that movants for summary judgment serve adverse parties at least ten days before the time fixed for the hearing. This Court strictly enforces the notice requirement

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[4] We do not determine the effect of the absence of a Rule 58(b) separate document judgment respecting the FDIC on the rights of Mahaffey, who has never filed a notice of appeal.

of Rule 56(c) to give parties the opportunity to present all of their factual and legal arguments to the district court since summary judgment is a final adjudication of the merits. *Powell v. United States*, 849 F.2d 1576, 1579 (5th Cir. 1988); *Judwin Properties, Inc. v. U.S. Fire Ins. Co.*, 973 F.2d 432, 436-37 (5th Cir. 1992); *Western Fire Ins. Co. v. Copeland*, 786 F.2d 649, 653 (5th Cir. 1986). "`This Circuit has upheld the strict requirements of notice embodied in Rule 56,' *Underwood v. Hunter*, 5 Cir., 1979, 604 F.2d 367 and has consistently refused to dispense with the procedural safeguards set forth in the rule." *Hanson v. Polk County Land, Inc.*, 608 F.2d 129, 131 (5th Cir. 1979).

In this case, the district court clearly erred in granting summary judgment to the FDIC since three defendants were not served with the FDIC's motion for summary judgment or informed by the district judge that he was going to decide the FDIC's motion.[5]

The failure to give notice to nonmoving parties requires us to reverse the district court's summary judgment order unless the error is plainly harmless. *Powell*, 849 F.2d at 1580; *Western Fire*, 786 F.2d at 653. "[E]rror in notice is harmless if the nonmoving party admits that he has no additional evidence anyway or if, as in *Norman v. McCotter* [765 F.2d 504 (5th Cir. 1985)], the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact." *Powell*, 849 F.2d at

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[5] There was no excuse for the FDIC's failure to serve Foxwood, Ogg, and Mahaffey, since all three had been served several times in the past by the FDIC. The FDIC was aware that Wist was still counsel of record for Foxwood as it had served Wist with all other docments involved in this case.

1582 (fact disputed on appeal made error harmful). Since the lack of notice deprives defendants of making legal arguments and developing the record in support of these arguments as well, errors in notice are only harmless where the unnotified party has no meritorious legal claim or no legal claim that could be meritorious with development of the record. *See Underwood v. Hunter*, 604 F.2d 367, 369 (5th Cir. 1979).[6]

Ignoring the merits of defendants' counterclaims, the district court dismissed those claims under the prudential mootness doctrine because defendants would recover nothing even if they prevailed on their claims. The district court's holding relied on special rules limiting the liability of the FDIC as receiver to the value of the institution liquidated, based on the Federal Home Loan Bank Board's (FHLBB) determination that Gibraltar Savings was insolvent and unable to pay depositors and secured claimants, let alone unsecured claimants.

Defendants assert the error was harmful and their claims were not moot for two reasons. First, defendants argue that the FHLBB determination is not binding because "the continuing change in the financial condition of Gibraltar Savings vis-a-vis the claim process, including redistribution of claims among and between depositors, secured creditors and unsecured creditors, is dynamic and, by movant's own proof, can change at any time. To preempt

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[6] The FDIC argues that the error was harmless because parties with identical interests were served. We reject this "per se" argument. Identity of interests is no excuse for the failure to serve. Further, the defendants that were served in this case offered no defense to the FDIC's motion.

such determination based on a 'one time statement' of worthlessness would, therefore, be premature . . . ."

A claim against the FDIC as receiver should be dismissed when there will never be assets available to satisfy the claim. *First Indiana Federal Savings Bank v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992); *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205, 208 (5th Cir. 1989); *FDIC v. Browning*, 757 F.Supp. 772 (N.D. Tex. 1989). Whether the FDIC has sufficient assets to satisfy a claim depends on the source of the claim. Where a claim is made against the FDIC in its capacity as receiver for a failed institution, the maximum liability of the FDIC to a claimant is the amount that claimant would receive if the failed institution were liquidated and its claims paid according to the preference rules of the state in which the institution is located. 12 U.S.C.A. § 1821(i)(2) (1988). *See* 12 C.F.R. § 569c.11 (1988), amended and redesignated 12 C.F.R. 389.11 (1990), repealed 1991 (state law preferences); *Gulley v. Sunbelt Savings, F.S.B.*, 902 F.2d 348, 350 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 673 (1991) (explaining priority scheme).

The date on which the liability of the FDIC as receiver is fixed, under 12 U.S.C. § 1821(i)(2), is the day that the FHLBB determines that an institution is insolvent and turns over the failed institution to the FDIC as receiver. We have stated that the FHLBB's determination of insolvency and the worthlessness of unsecured creditor claims is binding and cannot be collaterally attacked in claims against the FDIC. *First Indiana*, 964 F.2d at 506-07 n.7; *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38-39 (5th

Cir. 1991), *cert denied,* 112 S. Ct. 933 (1992). *See also FDIC v. Browning*, 757 F.Supp. 772, 773 (N.D. Tex. 1989).[7] Subsequent transactions by the FDIC in disposing of assets and settling liabilities of failed institutions do not affect the FHLBB's insolvency determination and do not affect the district court's reliance thereon or its determination of insolvency. Thus, even if a defendant obtained a judgment for money damages against the FDIC, the amount of damages owed by the FDIC is the amount that a defendant is entitled to in liquidationsQnothing.

The FHLBB determined in 1988 that Gibraltar Savings was insolvent and unable to pay the claims of depositors or secured creditors, let alone unsecured creditors. Appellants do not question the accuracy of that determination when made or even claim that it was not accurate as of the trial court's judgment (or is not accurate now); they only claim that it "was possible" that the receivership's financial condition might change over time so that assets would become available to make some payment to unsecured creditors. That theoretical possibility does not prevent mootness here.

Second, defendants claim that the failure to notify them prevented them from using successful counterclaims against the FDIC to offset their liability on the note to First Gibraltar. The right of offset is inapplicable here because the FDIC does not hold

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[7] FHLBB findings can be directly challenged under the Administrative Procedure Act, *Onion*, 938 F.2d at 38, but defendants failed to appeal the FHLBB findings as to Gibraltar Savings. More than three years passed between the FHLBB determination and the FDIC motion for summary judgment.

defendants' note against which the claims would be offset. *First Indiana*, 964 F.2d at 508; *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1249 (5th Cir. 1990); *FDIC v. Texas Country Living, Inc.*, 756 F. Supp. 984, 989 (E.D. Tex. 1990). Thus, defendants have no right to offset their liability on the note held by First Gibraltar by counterclaims against the FDIC.

Although this Court has a strong tradition of requiring notice to allow parties to present their case, there are no issues of fact or law argued in defendants' briefs that would change the holding of the district court. Moreover, the summary judgment order here was interlocutory and defendants allowed the balance of the case pending before the district court to proceed for over a year without raising this lack of notice issue in the district court. Since the error below was plainly harmless, we affirm the FDIC's summary judgment against Foxwood and Ogg. We affirm the FDIC's summary judgment against Sowell because he has not challenged it on appeal.

III. First Gibraltar's Motion for Summary Judgment

After proper notice to all parties to the suit, First Gibraltar was granted a summary judgment holding Foxwood Properties, Foxwood, Ogg, Sowell, and Mahaffey jointly and severally liable for the deficiency balance due on the promissory note plus interest and attorneys' fees.

Preliminarily, all parties agree that the district court erred in granting summary judgment against "Foxwood Properties, Ltd. #1," a party not named or served in this lawsuit. They request that we reform the judgment to that extent. We also note that "Foxwood

Properties Ltd. #1" was named in the district court's judgment, but not in its order. Therefore, the judgment of the district court against Foxwood Properties Ltd. #1 is vacated.

We now turn to defendants' other challenges to the summary judgment in favor of First Gibraltar. A district court may enter a summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Judwin*, 973 F.2d at 435 (citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986)). The movant for summary judgment has the initial burden of establishing the absence of genuine dispute over material facts and that it is entitled to a judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(e).[8] When no opposition is made to a motion for summary judgment, the movant is only required to make a *prima facie* showing of its right to judgment. *Savers Federal S & L v. Reetz*, 888 F.2d 1497, 1501 (5th Cir. 1989); *Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988). In considering whether a movant presented a sufficient *prima facie* case, the nonmovant is not entitled to offer rebuttal evidence on appeal or to raise there new issues of fact or law. *Reetz*, 888 F.2d at 1501; *Eversley*, 843 F.2d at 174. We will only examine the summary judgment evidence offered below and determine whether it suffices to support the judgment in movant's favor. *Reetz*, 888 F.2d at 1501 n.4. We look skeptically at appeals from summary judgments when no defenses were raised below to discourage "trial by ambush." *Id.*

[8] "Such a showing shifts the burden of production to the non-movant to delineate specific facts which demonstrate a genuine issue for trial." *Judwin*, 973 F.2d at 435.

Despite wholly failing to make any response whatever in the district court, defendants contend on appeal that the district court erred in granting this summary judgment because First Gibraltar failed to make its *prima facie* showing of facts supporting the elements of its cause of action. The elements of an action for breach of a promissory note and guaranty that First Gibraltar had to establish are: 1) that the note and guaranty existed; 2) that defendants signed the note and guaranty; 3) that the plaintiff legally owned and held the note and guaranty; 4) that default occurred; and 5) that a certain balance remains due and payable on the note. *Clark v. Dedina*, 658 S.W.2d 293, 295 (Tex App. Houston [1st Dist.] 1983], *writ dismissed*); *NCNB Texas Nat'l Bank v. Goldencrest Joint Venture*, 761 F.Supp. 32, 34 (N.D. Tex. 1990).

Defendants' main argument is that First Gibraltar failed to prove that they were in default. Defendants claim that First Gibraltar's only evidence of default, an affidavit by its vice president, was conclusory and insufficient to meet its burden of presenting a *prima facie* case.

We have stated that "unsupported allegations or affidavits setting forth `ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985) (citing C. Wright, et al., *Federal Practice and Procedure: Civil* 2d § 2738 (1983)); *May v. Department of Air Force*, 777 F.2d 1012, 1015 (5th Cir. 1985). "We have long recognized that mere statements of conclusions of law or ultimate

fact cannot shift the summary judgment burden to the nonmovant." *Galindo*, 754 F.2d at 1221. "[T]here is a level of conclusoriness below which an affidavit must not sink if it is to provide the basis for a genuine issue of material fact" or for summary judgment. *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.*, 922 F.2d 220, 224-25 (5th Cir. 1991); *Lechuga v. Southern Pacific Transportation Co.*, 949 F.2d 790, 798 (5th Cir. 1992)(affidavit insufficient if conclusory, unspecific, or based on conjecture); *Transcontinental Gas v. Transportation Insurance Co.*, 953 F.2d 985, 995 (5th Cir. 1992). We look suspiciously at conclusory affidavits by experts on issues such as whether a party was grossly negligent, especially where the affidavit does not provide the foundation for the expert's opinion. *Id.*

There is also a middle level of conclusoriness where we will accept the contents of a conclusory affidavit as true, *if they are not challenged below*.[9] *RTC v. Camp*, 965 F.2d 25, 29 (5th Cir. 1992)("We would not hesitate to reverse summary judgment had Appellants pointed to evidence in the record . . . ."); *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992)(where debtor offered no evidence to rebut deposition testimony, summary judgment on note affirmed); *Colony Creek, Ltd. v. RTC*, 941 F.2d 1323, 1325 (5th Cir.

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[9] A court cannot grant summary judgment *merely* because the nonmovant failed to oppose the motion. *John v. State of Louisiana*, 757 F.2d 698 at 707-09 (5th Cir. 1985). In *John*, *id.* at 707-09, we held that a local rule from the Western District of Louisiana requiring a response to a motion by the opposing party, subject to the penalty that the court will grant the unanswered motion, was inconsistent with Fed. R. Civ. P. 56. *See* Local Rule 6(E), United States District Court for the Southern District of Texas.

1991).[10] This is the same standard we apply to evidence or testimony, including hearsay, not objected to at trial, which we consider as valid evidence on appeal. *See, e.g.,* Edward Cleary, *McCormick on Evidence* 140-141 (1984). There is no reason to apply a different rule to unobjected to summary judgment "evidence."

We have written that "because of the relative simplicity of the issues involved, suits to enforce promissory notes `are among the most suitable classes of cases for summary judgment.'" *Colony Creek*, 941 F.2d at 1325-26 (5th Cir. 1991), (citing *Lloyd v. Lawrence*, 472 F.2d 313, 316 (5th Cir. 1973)). *See also FDIC v. Selaiden Builders, Inc.*, 973 F.2d 1249 at 1253 (5th Cir. 1992). Statements concerning who owns a promissory note, whether a party has defaulted on a note, or what the outstanding balance is on a note are often proven with somewhat conclusory testimony.[11] Such assertions are usually easy to rebut with a contrary affidavit or with evidence such as cancelled checks, other receipts for payment, or the like. These differ from a statement like "defendant was grossly negligent," which is in effect a wholly general and normative conclusion.

To prove that defendants were in default, First Gibraltar offered Donna Bailey's affidavit, which states: "Foxwood

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[10] We also accept affidavits that are procedurally defective, where the defect was not challenged below. *McCloud River R. Co. v. Sabine River Forest Products*, 735 F.2d 879, 882 (5th Cir. 1982) (unsworn and untimely).

[11] *Cf*. Texas Rule of Civil Procedure 185, under which a sworn affidavit stating that a note is due "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial . . . ."

Properties, Ltd. #1, Foxwood Management, Sumner, Sowell, Ogg, and Mahaffey defaulted on the note . . . ." This affidavit, though it stated no supporting specifics, directly addressed the issue whether defendants had defaulted and did not leave material questions unanswered. *Compare Galindo*, 754 F.2d at 122 (affidavit insufficient because it left unanswered questions). While of a somewhat conclusory nature, this affidavit sufficed to present a *prima facie* case on the issue of default and is binding since it was not challenged below. Had defendants either challenged this affidavit below as too conclusory or had they offered contrary evidence that they were not in default, the affidavit might have been rebutted and summary judgment not granted. *See Galindo*, 754 F.2d at 1221-1222 (affidavit challenged below rejected on appeal).

Defendant's second argument is that the above stated elements required First Gibraltar to place in evidence the Deed of Trust securing the note. This argument is without merit. The Deed of Trust was in the record, it was just mislabeled.

Next, defendants complain that a promissory note of January 11, 1980, was not offered in evidence in violation of the first element. They claim that the March 1981, promissory note that is the basis of this lawsuit was subject to the terms of the January note, meaning that the complete note was not offered in evidence. This argument is without merit. The language of the March 1981 note does not incorporate the terms of the prior note, it merely refers to it, so the prior note need not be in the record. *See Continental National Bank of Fort Worth v. Conner*, 214 S.W.2d 928, 930-931 (Tex. 1948).

Defendants claim that a sixth element exists under Texas law, that in a deficiency suit movant must prove that dispositions of real and personal collateral were commercially reasonable. In *Greathouse v. Charter Nat'l Bank*, 851 S.W.2d 173 (Tex. 1992), the Texas Supreme Court held that this element must be proven in all cases where the collateral is personal property but the court left open the issue whether it must be proven where real property is used as collateral. Whether the element of commercial reasonableness applies to real property is an issue of law that was not raised in the court below, and we will not consider it on appeal. *Reetz*, 888 F.2d at 1501 ("even a pleaded theory was waived when it was not raised in opposition to a motion for summary judgment."). Since no evidence in the record below showed that movants had foreclosed on any personal property, it does not matter whether movants proved that a personal property foreclosure was commercially reasonable. These arguments are without merit.

Defendants also contend that First Gibraltar failed to offer evidence that they were personally liable on the note or guaranty. Defendants signed the promissory note in their capacity as general partners of Foxwood, which was acting as the general partner of the maker, Foxwood Properties. Parties who sign a note in a representative capacity are normally not personally liable merely because they signed the note in that capacity. Regardless of whether they signed a note, parties can still be personally liable because of their legal relationship to the maker of the note. Under Texas law, general partners are liable for partnership debts and can be sued directly by third parties on partnership debts

without the partnership being named as a party to the lawsuit. Tex. Rev. Civ. Stat. Ann. art. 6132(b) § 15 (Vernon Supp. 1993); *Foster v. Daon Corp.*, 713 F.2d 148, 151 (5th Cir. 1983). Here, defendants were personally liable on the note because they were general partners in a general partnership that was the general partner in the limited partnership that was the maker of the note. Because defendants were personally liable on the note, there was no need for First Gibraltar to prove that defendants were personally liable for signing the guaranty agreement. This argument is also without merit.

Defendants make a one-sentence argument that First Gibraltar did not prove its ownership of the note. The note appears to be unendorsed. Yet, based on *Camp*, 965 F.2d at 29, defendants have not given us a legitimate fear that First Gibraltar did not own the note. This contention is without merit.

Conclusion

Accordingly, the judgment of the district court against Foxwood Management Company, Ogg, and Sowell is affirmed. The judgment against Foxwood Properties Ltd. #1 is vacated.

AFFIRMED in part; VACATED in part.