IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2905
Summary Calendar

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Huntsville National Bank,

Plaintiff-Appellee,

versus

ALTAF ADAM, ET AL, Defendants,

ALTAF ADAM, Defendant-Appellant,

versus

FAYAZ FAIZ, Defendant-Appellee, Appellant,

DOUGLAS C. GOERNER, Defendant-Appellee,

Appeals from the United States District Court for the Southern District of Texas
(CA-H-90-3704)

(February 25, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

I

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

On June 21, 1985, Altaf Adam ("Adam"), Fayaz Faiz, and five other makers[1] ("the Borrowers") entered into a loan agreement with the Huntsville National Bank ("Huntsville National"), whereby Huntsville National loaned $1 million to the Borrowers to acquire seventy percent of the capital stock of Community Bank, N.A. The loan was evidence by a promissory note in the original principal amount of $1 million executed by the Borrowers and payable to Huntsville National.[2] The loan was secured by a pledge of the Community Bank capital stock.

The loan agreement required Adam and the other Borrowers to ensure that Community Bank was operated and managed in a prudent manner. To that end, the loan agreement required Community Bank to maintain a seven percent primary capital ratio, and failure to do so would constitute an event of default under the agreement. If an event of default were to occur, Huntsville National, pursuant to the loan agreement, would be required to provide written notice to Adam, who was designated in the loan agreement as the party to receive all notices on behalf of the Borrowers. After notice and upon the expiration of ten days without a cure of the default condition, Huntsville National would then be free of any credit obligations, and it would be entitled to accelerate the note

[1]This group included Taufig Adam, Kadir Adam, Arif Adam, Khaleel Rahman, and Samier Aziz.

[2]This original promissory note was renewed on June 21, 1986, and this subsequent renewed promissory note was subject to the terms, conditions, and provisions of the original loan agreement.

without further notice. Moreover, under the loan agreement, any delay on the part of Huntsville National in enforcing any of its acceleration rights would not constitute a waiver of its rights.

On February 20, 1987, Huntsville National sent Adam, the Chief Financial Officer and advisory director of Community Bank, written notice (hereafter referred to as "the February Letter") that the Borrowers had violated the loan agreement and that a default condition existed--specifically, Community Bank had a capital ratio of 5.5 percent rather than the seven percent ratio required by the Loan Agreement.[3] The February Letter asked Adam to provide Huntsville National, within twenty-one days, with a plan demonstrating its strategy for rectifying the default condition.

On or about March 27, Adam was indicted and arrested by federal authorities for failure to properly report cash transactions.[4] In April 1987, approximately two months after

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[3]Section 3.10 of the loan agreement describes that as a condition of the loan, "Borrower will cause Community [Bank] to maintain a ratio of capital to average assets of at least 7%, or such other ratio (if greater than 7 %) as may be determined by any regulatory authority . . . at all times during this Loan Agreement." Section 5.1(c) states that "default in the observance or performance of any of the covenants, terms, conditions or agreements of this Loan Agreement" constitutes an "Event of Default."

[4]According to Adam's brief, he and three other bank employees were indicted of 132 felony counts of violating banking laws, including failure to file cash transaction reports. On February 1989, Adam agreed to plead guilty to one count. In exchange for the guilty plea, the remaining 131 counts against all defendants were dismissed. Adam was sentenced to three years probation and a $5,000 fine. Adam has completed his probation and has paid his fine. Adam's indictment constituted an event for which he and the

notifying Adam of the default condition via the February Letter, Huntsville National issued a letter to each Borrower notifying each of Huntsville National's intent to accelerate the note. Because the Borrowers failed to pay the balance of the note, Huntsville National issued additional letters on May 7 indicating that it intended to foreclose on the capital stock securing the note. On May 22, Huntsville National foreclosed on the capital stock of Community Bank, leaving a deficiency of $535,867.74.

II

After foreclosing on the capital stock securing the note, Huntsville National sued the Borrowers in Walker County, Texas, (Cause No. 15,738), seeking payment of the deficiency. Faiz and Rahman filed counterclaims against Huntsville National and cross-claims against Adam. Likewise, Adam filed cross-claims against Faiz and Rahman alleging breach of contract, breach of fiduciary duties, and seeking contribution and indemnity.

After Huntsville National filed Cause No. 15,738, Adam sued Huntsville National in Cause No. 15,772 claiming that Huntsville National had harmed the plaintiffs by foreclosing on the capital stock and other acts. This suit was consolidated into Cause No. 15,738. Thereafter, Adam sued Huntsville National, Malcolm Cook, T. W. Keeland, Thomas Keeland, Doug Goerner, Bob Vest, and William

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other Borrowers should have provided notice to Huntsville National pursuant to the terms of the loan agreement, but they failed to do so.

Dean in Cause No. 90-04891 in Harris County, Texas, alleging fraud, interference with business relations, conspiracy, conversion, and defamation. This action was also consolidated into Cause No. 15,738 in Walker County.

Meanwhile, Adam was involved in a separate lawsuit filed by Community Bank against Adam and two other people for breach of fiduciary duty and other violations of law. In turn, Adam sued Community Bank for release of his deposits. According to Adam, he had deposit accounts in his name at Community Bank that he was unable to withdraw after he had been arrested. The two suits were eventually consolidated (hereafter referred to as "the Deposit Account Case"), although this suit remained separate from Cause No. 15,738 in Walker County.

On May 31, 1990, Huntsville National was declared insolvent and the Federal Deposit Insurance Corporation ("FDIC-Receiver") was appointed receiver. FDIC-Receiver transferred the note at issue to the FDIC in its corporate capacity ("FDIC-Corporate"). FDIC-Corporate then intervened in Cause No. 15,738, and removed the case to federal district court under 12 U.S.C. § 1819(b)(2).

FDIC-Corporate then moved for summary judgment against Adam, Rahman, and Faiz. Faiz likewise moved for summary judgment against Adam on his cross-claim, and Douglas Goerner moved to dismiss or, in the alternative, for summary judgment against Adam. On March 27, 1992, the district court granted all three motions for summary judgment against Adam. The court entered final judgment on

July 22 in favor of the FDIC for $535,876.74 plus interest and attorney's fees against Adam, Faiz, and Rahman, and ordered that Adam take nothing in its claim against the FDIC. Adam and Faiz now appeal.

III

A

On appeal, both Faiz and Adam contend that the district court erred in granting summary judgment in favor of the FDIC. We review the grant of summary judgment de novo, using the same criteria used by the district court. FDIC v. Ernst & Young, 967 F.2d 166, 169 (5th Cir. 1992). However, in reviewing the record, we are not limited to the grounds articulated by the district court; if required, we may affirm the judgment on other grounds. Harbor Ins. Co. v. Urban Constr. Co., 990 F.2d 195, 199 (5th Cir. 1993).

A party is entitled to summary judgment if there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On those issues in which the movant has the burden of proof at trial, the movant has the initial burden of demonstrating that there is no genuine issue of material fact. Id. at 256. If the issue is one in which the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence supporting the non-movant's case. Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has pointed to an absence of evidence supporting the non-

movant's case, the burden shifts to the non-movant to come forward with evidence demonstrating that a genuine issue of fact exists requiring trial. Anderson v. Liberty Lobby, Inc. 477 U.S. at 256.

In its order granting summary judgment, the district court held that because the FDIC was a holder in due course of a negotiable instrument, Faiz and Adam's personal defense--that no notice of default or opportunity to cure had been provided--could not shield them from liability on the note. Faiz and Adam contend, however, that the district court failed to recognize that their personal defense fell within a "narrow exception" because it arose from the face of the note, and as such, that personal defense could defeat liability on the note. It is unnecessary for us to consider the question of the effect of this "narrow exception" against the FDIC's holder in due course status because the FDIC now concedes that it cannot be considered a holder in due course.[5] Thus, the question now before us concerns whether there is an issue of material fact concerning whether Huntsville National, prior to its takeover by the FDIC, provided sufficient notice and opportunity to cure before accelerating the note.

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[5]In September 1992, after summary judgment had been entered against Faiz and Adam, this court held that the FDIC cannot be a holder in due course of a non-negotiable instrument. FDIC v. Payne, 973 F.2d 403, 408 (5th Cir. 1992). The FDIC concedes that the note in question cannot be negotiable because it is conditioned upon "the terms, conditions and provisions of that certain Loan Agreement . . . between the Maker and Payee. . . ." See TEX. BUS. & COM. CODE ANN. § 3.105(b)(1).

Faiz and Adam contend that a question of fact exists as to whether Huntsville National provided notice of the default condition or an opportunity to cure. We disagree. The FDIC as movant has provided evidence that it complied with all requirements of the loan agreement and the note. The FDIC provided evidence that it sent notice via the February Letter to Adam indicating that Community Bank's current 5.5 percent primary capital ratio constituted a "default condition." This letter was mailed to Adam who, pursuant to the express terms of loan agreement, was designated as the agent to receive notice for the other Borrowers.[6] In April 1987, long after the ten-day period to cure the default condition had expired,[7] Huntsville National issued letters to all Borrowers notifying them that Huntsville National was accelerating the note. Although Faiz and Adam argue that they received neither

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[6]Paragraph 6.8 of the loan agreement provided that all notices to be given the "Borrower" were to be given to Adam. "Borrower" was specifically defined to be the seven borrowers, including Faiz. Under Texas law, notice to the agent is the equivalent of giving notice to the principal. Sturtevant v. Pagel, 130 S.W.2d 1017, 1018 (Tex. 1939). Moreover, notice to the agent is sufficient to impute notice to the principal, regardless of whether the agent ever actually notifies the principal. Woodward v. Ortiz, 237 S.W.2d 286, 290 (Tex. 1951). Thus, Faiz's assertions that he "was not furnished any information by the Bank as to why it had accelerated the Note" or that he was not "otherwise notified of such letter's content prior to the foreclosure of the stock" are without merit.

[7]The loan agreement states that "[n]o failure to exercise and no delay in exercising, on the part of Huntsville, any right, power or privilege hereunder, shall operate as a waiver thereof. . . ." Thus, the fact that Huntsville National waited longer than ten days to accelerate the loan did not affect its right to do so.

proper notice nor an opportunity to cure, they have provided no evidence demonstrating the existence of an issue of fact warranting trial. We have observed in the past, and we observe again today that "suits on promissory notes provide fit grist for the summary judgment mill." FDIC v. Cardinal Oil Well Servicing Co., 837 F.2d 1369, 1371 (5th Cir. 1988).[8]

B

Next, Adam contends that the district court erred in granting summary judgment in favor of Douglas Goerner. Adam sued Goerner and various other directors of Huntsville National and Community Bank for fraud, tortious interference with business relations, conspiracy, conversion, and defamation. Adam now argues that, contrary to the district court's holding, he provided sufficient evidence to established ownership of the funds that Goerner allegedly converted, and that he was entitled to immediate

[8]Faiz in his reply brief makes several arguments against affirming the district court, none of which have merit. Likewise, Adam contends that the February Letter cannot constitute effective notice of default because it was sent to an address different from that listed in the loan agreement and because it was not sent by certified mail. In the light of the fact that Adam actually received the February Letter, we find such distinctions meaningless. Adam further contends that because he complied with the requests contained within the February Letter--that he submit a plan for providing for the required capital and that he submit personal financial information--the default condition was remedied. We disagree. The event of default Huntsville National complained of was the low capital ratio. The fact that Adam took initial steps toward correcting the default condition did not necessarily correct the default.

possession of those funds.[9] A review of the record demonstrates that Adam failed to provide sufficient evidence establishing that he was either the owner of the accounts or that he was entitled to possession. Eleven of the twelve accounts that Adam claims Goerner converted were in the names of other persons or other entities, and Adam provided no evidence linking himself to the accounts of those persons or entities. It appears that there may have been one account in Adam's name; however, Adam failed to provide any documentary evidence establishing the name of the bank in which that account was maintained, the account number, or that the account even existed at all. Although Adam submitted a conclusory and self-serving affidavit unsupported by any documentary evidence in which he states that he had an interest in those accounts and that he was entitled to possession at the time of the conversion, we find that this is insufficient evidence to create a genuine

[9]These two issues are elements that Adam must prove to prevail on his cause of action of conversion of funds. E.g., Lone Star Beer, Inc. v. Republic Nat'l Bank, 508 S.W.2d 686, 687 (Tex. Civ. App.--Dallas 1974, no writ). Although in his brief he initially states that he is appealing the district court's judgment concerning the conspiracy, the conversion, and the tortious interference with business contracts causes of action, Adam only argued issues pertaining to conversion. Because no other arguments are before the court, we deem that he has abandoned all other issues. Moreover, Adam contends that the district court consolidated this action with the "Deposit Accounts Case" pending in another court. Although there is some evidence that the district court considered consolidation, no consolidation order was ever entered. Thus, no consolidation occurred, and the record in the "Deposit Accounts Case" is not before this court in this appeal.

issue of material fact. As such, we affirm the district court's grant of summary judgment in favor of Goerner.

C

Finally, Adam contends that the district court erred in granting summary judgment in favor of Faiz and Rahman because Adam provided sufficient evidence to create a genuine issue of material fact. In his cross-action against Faiz and Rahman, Adam alleged in his petition that each Borrower orally agreed to pay a portion of the purchase price of the stock, to execute a promissory note to Huntsville National, and to pledge his stock as collateral, and that that agreement constituted a oral contract or a de facto partnership. Adam's petition further asserted that the other Borrowers breached their contractual and fiduciary duties by not paying their proportionate share of the note once it was accelerated by Huntsville National and by not selling their stock as a group. However, Adam has merely set forth allegations wholly unsupported by any evidence. As such, the district court's grant of summary judgment was proper.

IV

For the foregoing reasons, the grant of summary judgment by the district court is hereby

A F F I R M E D.