IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4512
Summary Calendar

BLS JOINT VENTURE, JEROME S. SCHECHTER, Individually, Partner, Guarantor, DEBORAH JO SCHECHTER, Individually, Guarantor, BARNETT N. BOOKATZ, Individually, Partner, Guarantor, DENISE C. BOOKATZ, Individually, Guarantor, and PAUL W. LEA, Individually, Partner, Guarantor,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Intervenor-Plaintiff,
Defendant-Appellee,

BANC HOME SAVINGS ASSOC., ET AL.,

Defendants,

BANC HOME SAVINGS ASSOC., & FAMILY DEVELOPMENT CORPORATION.,

Defendants-Appellees,

AMWEST SAVINGS ASSOCIATION, f/k/a OLNEY SAVINGS AND LOAN ASSOCIATION,

Intervenor-Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Texas
(S-88-298-CA)

(January 28, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

BLS Joint Venture and numerous partners and guarantors thereof appeal from the district court's entry of summary judgment on behalf of Family Development Corporation (FDC) and Amwest Savings Association (Amwest). Finding that there are no genuine issues of material fact and that judgment should be awarded as a matter of law, we affirm.

I.

In the mid-1980s, Barnett Bookatz, Jerome Schechter, and Paul Lea (appellants) -- all practicing dentists -- decided to enter into a joint venture that would acquire a tract of land for the purpose of constructing a medical/dental professional building. Appellants Bookatz and Schechter located approximately seven acres of land in Collin County, Texas, which they believed were suitable for development. They approached Independence Bank, a Texas institution, which expressed an interest in facilitating the purchase of the land. On March 1, 1985, appellants obtained a $1.7 million loan from Independence and proceeded to close the sale of the property. The appellants also entered into a letter of credit arrangement with Independence, whereby Independence issued a standby letter of credit in favor

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

of the sellers of the property; the appellants accordingly executed a promissory note in the amount of the letter of credit, payable to Independence.

Abruptly, in November, 1985, Independence informed appellants that, as a result of a demand by banking examiners, Independence was required to jettison the loan; appellants were given 90 days in which to remove the Independence loan to another lending institution. Soon thereafter, appellants became aware that Home Savings Association (HSA) was a possible candidate for assuming the loan. HSA was not interested in a making a long-term construction loan, but agreed to make a loan that would enable the appellants to "carry" the property for an extended period of time so as to permit the appellants to sell it to a third-party buyer.

In March, 1986, HSA and appellants entered into a loan agreement, whereby HSA lent $2.7 million to the appellants, with which the Independence loan was retired. A promissory note, guaranty agreement, and collateral agreement (with the tract of land serving as collateral) were also executed.[2] HSA also was designated the beneficiary of the standby letter of credit issued by Independence. The loan agreement contained a provision for a "partial release," which contemplated future good-faith negotiations between HSA and appellants regarding two acres of the larger seven-acre tract on which appellants still wished to

[2] The wives of Appellants Bookatz and Schechter joined their husbands and Appellant Lea as guarantors.

build a medical/dental complex. That provision provided, in pertinent part:

> 2. Partial Releases. It is anticipated that BLS JOINT VENTURE will wish to obtain the release of a presently unspecified 2.0 acres more or less of the real estate Collateral (herein called the "Release Tract") for the purpose of constructing an office building. Lender shall negotiate in good faith with BLS JOINT VENTURE for the purpose of granting such release. It is not possible at this time for the parties to know the terms of any such release, but BLS JOINT VENTURE acknowledges that a partial release shall not be permitted:
> (a) to the extent it would adversely affect the ratio of (i) all sums secured by the real estate Collateral to (ii) the value of the real estate Collateral remaining after such partial release is granted;
>
> (b) if the effect of the transaction would materially impair the ability of BLS JOINT VENTURE or any Guarantor to provide full payment and performance to Lender; or
>
> (c) unless all loans obtained in connection with or relating to the tract to be released provide for at least 24 months during which all payments for such loans would be funded by the proceeds of the loan obtained.
>
> Lender shall not unreasonably withhold or unduly delay its consent to any easements required by Governmental Authorities and not having any material adverse effect on unreleased tracts.
>
> Provided the configuration and location of the Release tract is reasonably satisfactory to Lender and there is no Event of Default which remains uncured, Lender shall not unreasonably withhold or unduly delay its consent to a release of the Release Tract at a price of $7.04 per square foot.

In addition to the loan agreement, HSA also requested that one of its wholly-owned subsidiaries, Family Development Corporation (FDC), be appointed as the broker for the sale of the property and receive a handsome commission. The appellants agreed, and the appellants and FDC subsequently entered into an

"open listing agreement." Under the terms of this brokerage agreement, FDC was to use its "best efforts" to market the property for the appellants.

In the months following, the appellants sought, pursuant to the "partial release" provision of the loan agreement, HSA's approval of the release of a two-acre portion of the tract of land on which the appellants desired to construct the proposed medical/dental complex. The appellants drafted plans, which were submitted to HSA. HSA, however, refused to accept the site chosen by the appellants and instead insisted on an alternative building site on the tract. The appellants informed HSA that the alternative site was unacceptable.

The appellants had apparently hoped to use investment revenue generated by potential investors in the proposed medical/dental complex to help repay the $2.7 million loan from HSA. Because HSA and appellants could not agree on a mutually suitable two-acre tract on which a complex could be built, HSA was forced to attempt to repay the loan by selling the entire tract of land. Meanwhile, FDC was unsuccessful in its brokerage efforts and no buyer could be found. Consequently, the appellants were unable to generate sufficient revenue with which to service the loan and, thus, went into default. HSA then presented the standby letter of credit to Independence. As a consequence of the demand, appellants sued HSA (which shortly thereafter changed its name to Banc Home Savings) and

Independence in Texas state court.[3] FDC was later added as a party defendant.

As the state court litigation was pending, Banc Home Savings was declared insolvent. The FDIC was appointed to be receiver and removed the case to the United States District Court for the Eastern District of Texas. The loan, which had been transferred to the FDIC, was in turn assigned to Amwest Savings Association as successor-in-interest. Amwest then filed a complaint-in-intervention against the appellants, and the FDIC was dismissed from the litigation.[4] Amwest filed a motion for summary judgment on its complaint-in-intervention, and FDC filed a motion for summary judgment on the appellants' claims against FDC. In separate orders, the district granted both motions for summary judgment. This appeal ensued.

II.

Initially, we note certain black-letter principles of law regarding summary judgment. In reviewing a summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989). We ask specifically whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

[3] The appellants' claims against Independence were soon dismissed.

[4] Even following the dismissal of the FDIC, the federal district court properly maintained federal subject matter jurisdiction. See FSLIC v. Mackie, 949 F.2d 818, 822 (5th Cir. 1992); FSLIC v. Griffin, 935 F.2d 691, 696 (5th Cir. 1991).

affidavits, if any, show 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." FED. R. CIV. P. 56(c). In answering the first part of this question, we view all evidence and the inferences to be drawn from the evidence in the light most favorable to the party opposing the motion. Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979) (citing United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993 (1962)). Furthermore, as the United States Supreme Court held in Cellotex Corp. v. Catrett, 477 U.S. 317, 322 (1986):

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and upon which that party will bear the burden of proof at trial. In such an action, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

A) Amwest's Motion for Summary Judgment

The district court held that:

> Amwest has presented sufficient summary judgment evidence to establish as a matter of law that Amwest is the owner and holder of the note executed and delivered by BLS [Joint Venture] with a guaranty, and that portions of the note remain unpaid according to the note, loan agreement, and guaranty. Amwest is entitled to recover unless counter-defendants establish a defense.

The district court then concluded that the two defenses[5] to breach of contract that were asserted by the appellants raised no genuine issue of material fact, had no basis in law, and thus did not prevent the entry of summary judgment on Amwest's behalf.

On appeal, the appellants have abandoned their defense based on the anti-tying statute and only assert that the note is unenforceable on the grounds that Home Savings Bank breached the "partial release" provision of the loan agreement -- a defense that, if true, would apply to the assignee of the note, Amwest. With respect to this defense, the district court observed that the only evidence offered by the appellants that attempted to defeat Amwest's motion for summary judgment were affidavits of Appellants Bookatz and Schechter. The district court held that the affidavits "made broad and conclusory statements about their belief that Home Savings unreasonably withheld or unduly delayed its consent to a partial release of property." As a result, the affidavits failed to establish a prima facie case regarding all elements of the appellants' breach of contract defense.

Amwest specifically argues that the appellants offered absolutely no evidence to show that certain essential terms of the "partial release" provision of the loan agreement were

[5] The two defenses were: i) the claim that the brokerage agreement between appellants and FDC violated the anti-tying provisions of 12 U.S.C. § 1464(q)(1); and ii) the claim that Home Savings breached the loan agreement by unreasonably refusing to release a portion of the property selected by the appellants for development under the "partial release" provision of the loan agreement.

breached by HSA. In particular, Amwest argues, the appellants offered no evidence that:

a) HSA did not "negotiate in good faith";

b) The plan rejected by HSA would "not adversely affect" the value of the remaining real estate;

c) The transaction would "not impair the ability of BLS" Joint Venture to perform;

d) BLS Joint Venture had "obtained a loan" regarding the tract to be released;

e) The configuration was "reasonably satisfactory" to HSA.

We agree that the appellants failed to present sufficient evidence to defeat Amwest's motion for summary judgment. As the district court observed, the appellants have done nothing but offer ipse dixit: they claim that HSA unreasonably refused to negotiate. They mistakenly believe that such a bare allegation creates a genuine issue of material fact and, thus, is a sure ticket to a jury trial. We disagree. As Amwest correctly contends, the "partial release" clause in the loan agreement provided for a specific set of conditions which had to be met before HSA could be considered in default for failing to negotiate to the satisfaction of appellants. See supra Part I. The appellants offered no evidence -- or even conclusory statements, for that matter -- regarding whether the majority of these conditions were in fact met. Because appellants are asserting that HSA breached the "partial release" clause, the appellants have the burden of coming forward with sufficient evidence to prove all elements constituting a breach of contract

on HSA's part. See Cellotex, supra. This simply was not done. We, therefore, affirm the district court's entry of summary judgment for Amwest.[6]

B. FDC's Motion for Summary Judgment

The district court also entered summary judgment on behalf of FDC, holding that the appellants did not present sufficient evidence to support the elements of their claim that FDC breached the "best efforts" clause of the brokerage agreement between the appellants and FDC. FDC offered favorable evidence in the form of deposition testimony -- including from Appellants Bookatz and Schechter -- and an affidavit to support its claim that it did not breach the brokerage agreement. The appellants attempted to defeat FDC's motion by offering affidavits from Bookatz and Schechter, which significantly contradicted their deposition testimony that had been offered by FDC. The district court held that the appellants' affidavits failed to "stat[e] an explanation for the contradiction" and, thus, could not be considered to defeat FDC's motion for summary judgment; the court also held that the affidavits were "conclusory" in their assertion that FDC

[6] On appeal, Amwest raises additional grounds in support of summary judgment. An appellate court is permitted to consider such new grounds so long as they are supported by factual material in the record. See Coral Petroleum, Inc. v. Banque Paribus-London, 797 F.2d 1351, 1355 n.3 (5th Cir. 1986). Because we essentially affirm the district court based on the same reasons set forth in the district court's opinion, we need not address Amwest's additional grounds.

did not use its "best efforts" to market the appellants' property.

Again, we agree with the district court. Schechter and Bookatz's affidavits offered to defeat FDC's motion for summary fail to explain essential contradictions between the new sworn assertions and the prior deposition testimony. While ordinarily "`[a]n opposing party's affidavit should be considered [in deciding a summary judgment motion] although it differs from . . . evidence given [by the same party] by deposition or another affidavit,'" Kennett-Murrary Corp. v. Bone, 622 F.2d 887, 893 (5th Cir. 1980) (citation omitted), such a contradictory sworn statement should not be considered when no explanation is offered for the inconsistency, Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1984). In the instant case, we agree with the district court that the two affidavits offered by the appellants in the attempt to defeat FDC's motion for summary judgment appear to be "sham" affidavits, Kennett-Murrary, 622 F.2d at 894, offered merely for the purpose of staving off summary judgment. Furthermore, even accepting the contradictory statements, Schechter and Bookatz's affidavits were almost entirely comprised of conclusory statements to the extent that FDC had not used "best efforts" as a real estate broker. They failed to make a prima facie case that FDC breached the brokerage agreement. Summary judgment was, therefore, proper.[7]

[7] Like Amwest, FDC on appeal offers additional grounds in support of summary judgment. Because we affirm on the grounds relied on by the district court, we need not address any

III.

For the foregoing reasons, we AFFIRM the district's entry of summary judgment in favor of both Amwest Savings Association and Family Development Corporation.

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additional grounds raised on appeal.