IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4525

Summary Calendar

CHARLSIE J. GARY,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for First State Bank/Frisco,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(CA4 89 39)

(December 23, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Charlsie Gary appeals from the district court's judgment for the Federal Deposit Insurance Corporation (FDIC), contending that her certificate of deposit ("CD") funds were wrongfully converted to offset an amount owed on a promissory note executed by her son, Charles Gary. Finding that Charlsie, under the terms of the

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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 Pursuant to that rule, we have determined that this opinion should not be published.

CD signature card agreement, expressly agreed to allow the First State Bank of Frisco ("the Bank") to setoff the CD funds against Charles' debt, we affirm.

I

This case arises from two transactions involving Charlsie, Charles, and the Bank. In the first transaction, which took place in December 1984, Charles borrowed $130,000 from the Bank and gave the Bank a promissory note in that amount plus interest at a rate of 13.25% per year. The note was payable on demand but, in the absence of a demand, was due on March 20, 1985.[1]

In the second transaction, which took place in February 1985--approximately one and one-half months prior to the due date of Charles' note, the Bank issued a CD in the amount of $100,000 payable to "Charlsie J. Gary or Charles R. Gary."[2] Although the signature card agreement accompanying the CD states "Name of Account" as "Charlsie J. Gary or Charles R. Gary" and designates the account as a joint account with right of survivorship,[3]

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[1] In March 1984, Charles also signed a promissory note payable to the Bank for $3,500.

[2] Although the CD was purchased with a cashier's check payable to the order of either "Charlsie J. Gary or Charles R. Gary," the parties stipulated that Charlsie would testify that the CD was purchased solely with her funds. The district court made no finding on this issue.

[3] Although Charlsie has stipulated that she had the CD also issued in Charles' name "so that in the event of her death she would have left something for [Charles,]" Charlsie did not select the "Pay-on-Death" ownership option on the signature card agreement. Rather, she selected the "Joint Account--With Survivorship" option.

the agreement was executed solely by Charlsie. Gary did not sign this agreement.

The Bank issued six interest checks payable to "Charlsie J. Gary or Charles R. Gary" for interest accrued on the CD from February 1985 to August 1985. However, just prior to the CD's maturity date of August 5, 1985, Charlsie requested that the CD be renewed in her name only, and the Bank subsequently issued three interest checks payable only to her. Nevertheless, the parties are in dispute as to whether the CD signature card agreement was in any way altered to reflect a change in ownership of the account.

In March 1985, the Bank demanded payment of Charles' December 1984 note, and Charles failed to pay in any part. In October 1985, the Bank offset the principal amount of the CD against the delinquent $130,000 note and ceased sending interest checks to Charlsie. Charlsie then brought an action in Texas court against the Bank for conversion, and the Bank responded by filing a cross-action against Charles for $100,000 in the event that Charlsie were to prevail and the Bank were required to return the CD funds. The Bank also obtained a judgment against Charles for the deficiency left on the $130,000 note after the $100,000 CD setoff.

State banking officials closed the Bank in June 1987, and the FDIC accepted appointment as receiver and was substituted as defendant and cross-plaintiff in this action. The FDIC removed the case to federal court pursuant to 12 U.S.C. § 1819, and the

district court entered an interlocutory default judgment indemnifying the FDIC in the event that Charlsie were to succeed in her suit. Also, finding that the signature card and setoff agreement entitled the Bank to apply the CD funds against Charles' debt, the district court entered a final judgment in favor of the FDIC and against Charlsie. Charlsie appeals.

II

The parties are in agreement that, under the version of 12 U.S.C. § 1821(g) in force at the time the Bank was closed, Texas law controls the determination of ownership of the CD funds. See Federal Deposit Insurance Corp. v. Sumner Financial Corp., 602 F.2d 670, 681 (5th Cir. 1979) (quoting the relevant version of section 1821(g), and interpreting it to state that, "in the case of a closed state bank, the rights of the depositors, and thus the rights of FDIC as subrogee, are to be determined under state law.") (citations omitted). Under Texas law,

> The provisions of a certificate of deposit form a contract which creates the relationship of debtor and creditor between the bank and its depositor . . . . Such contract determines the manner in which the funds of the depositor may be withdrawn and is subject to the law of contracts.

Ames v. Great Southern Bank, 672 S.W.2d 447, 449 (Tex. 1984) (citations omitted); see TEX. REV. CIV. STAT. ANN. art. 342-701 (West Supp. 1993) ("The depository contract between a bank and a depositor, whether evidenced by deposit tickets, signature cards, notices provided for in Section 2 of this article, resolutions, rules and regulations, or otherwise shall be deemed a contract in writing for all purposes."); Cushman v. Resolution Trust Co., 954

F.2d 317, 323 (5th Cir. 1992) ("In Texas, a depository contract, including a signature card, is a contract in writing for all purposes."); id. at 324 n.11 (stating that certificates of deposit are "savings accounts" under Texas law).

The contract at issue in this case--the CD signature card agreement drafted by the Bank and signed by Charlsie--is, to say the least, incomplete.[4] Nevertheless, our inquiry in this case is limited to determining whether Charlsie contractually agreed to allow the CD funds to offset Charles' obligation to the Bank. To make this determination, we look to the signature card agreement as an expression of Charlsie's intentions. See Stauffer v. Henderson, 801 S.W.2d 858, 861 (Tex. 1990) ("Frequently, the only written agreement of the parties which

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[4] First, the space on the signature card indicating the "number of signatures required for withdrawal" was left blank. Second, only Charlsie signed the agreement, despite the fact that the account was deemed a joint account under both Charlsie's and Charles' names, and the signature agreement explicitly provides that:

> Before you can make a withdrawal from this account, the certificate must be properly endorsed. This means that the proper people and the proper number of people must first sign this certificate. The proper people are only those of you who sign this account agreement (and anyone whose right to withdraw funds arises only because of the death of a depositor(s)). The proper number of people is that number of required endorsements. If only one endorsement is necessary, then any one of you who signed this account agreement may ask to make a withdrawal. If more than one endorsement is necessary then the number of you must endorse the certificate before we will honor your request.

Therefore, based upon the CD's contractual provisions and the information before this court, it is not possible to determine Charles' ownership interest in the CD funds and his right to make withdrawals from those funds.

might reflect their intent is the signature card . . . . The principal purpose of such forms, however, is to authorize the depository to pay funds in the account upon the direction of any party . . . ."); id. at 861 n.3 (noting that "[d]epositories obtain such agreements from joint account parties out of what appears to be an abundance of caution, as payment to or on order of a joint account party is protected by statute") (citations omitted).

First, Charlsie expressly designated the CD account a joint account with survivorship, despite the "Pay-on-Death" ownership option on the signature card agreement. Second, Charlsie established the account under Charles' name as well as her own. Third, and most importantly, Charlsie agreed to the following provision:

> **SET-OFF:** By signing this agreement you each understand and agree that we [the Bank]:
>
> (1) may[,] at any time, set off the funds in this certificate against any obligation any of you or any combination of you may have now or in the future to pay us money . . . .

According to Charlsie, "the conclusion is inescapable that the funds represented by the certificate of deposit belonged solely to [her], and that the Bank was aware of her exclusive ownership." To support this proposition, Charlsie contends that, although the Bank asserts that she never changed the CD signature card agreement, the Bank made the CD interest checks payable only to her following her request that the CD be renewed solely in her

name. Unfortunately for Charlsie, although she was apparently successful in convincing the Bank to make several CD interest checks payable only to her, any oral agreements she may have had with the Bank to change the CD account from a joint account to an individual account solely in her name have not made their way into the Bank's records. Accordingly, we are barred from considering them by the doctrine of D'Oench, Duhme,[5] codified at 12 U.S.C. § 1823(e). See Texas Refrigeration Supply v. FDIC, 953 F.2d 975, 981 (5th Cir. 1992) (tracing the development and expansion of the D'Oench doctrine, and stating that the doctrine protects the FDIC and federally-created bridge banks from agreements that for some reason do not become part of bank records); Bowen v. FDIC, 915 F.2d 1013, 1016 (5th Cir. 1990) (D'Oench bars the use of unrecorded agreements as the basis for defenses or claims against the FDIC).

Charlsie also contends that, because the CD was a liability of the Bank and not an asset, D'Oench does not bar her claim. We disagree. Although D'Oench originated as a bar to the assertion of defenses against actions by the FDIC, the doctrine has evolved to bar affirmative claims against the FDIC. See Bowen, 915 F.2d at 1015; see also 12 U.S.C. § 1821 (d)(9)(A) (any agreement that does not meet the requirement of 12 U.S.C. § 1823 (e) shall not form the basis of a claim against the FDIC); Texas Refrigerator, 953 F.2d at 980 (stating that "the modern D'Oench, Duhme doctrine

[5] See D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 456-62, 62 S. Ct. 676, 679-81 (1942).

has been expanded to bar the use of unwritten agreements as the basis of any defense or claim against the FDIC") (footnote omitted and emphasis in original).

In sum, we have found that (i) Charlsie contractually agreed to allow the Bank to offset Charles' debt with the CD funds, and (ii) Charlsie's assertion that the account was changed to an individual account solely in her name is barred by the D'Oench doctrine. Accordingly, we affirm the district court's judgment in favor of the FDIC.[6]

III

For the foregoing reasons, we AFFIRM the district court's judgment in favor of the FDIC.

[6] In the Reply Brief it submitted to this court, the FDIC also asserts, in a summary fashion, that (1) Charlsie's CD funds had already been applied to Charles' debt when it took over the Bank, and (2) Charlsie has waived any claim she may have had for deposit insurance because she "has never made a claim for or asserted an entitlement to payment of deposit of insurance under 12 U.S.C. § 1821(f), either in her Second Amended Original Petition or in this appeal." Because we have been able to decide this case on the basis of the express terms of the CD signature card agreement and the D'Oench doctrine, we do not reach these issues.