IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4736
(Summary Calendar)

TEAM BANK, N.A., F/K/A
Deposit Guaranty Bank, Etc.,
Plaintiff-Appellee

versus

JAMES R. GRANT, III., ET AL., Defendants,

DOLORES BANNER
Defendant-Appellant

Appeal from the United States District Court
for the Easter District of Texas
(S-89-211-CA)

(January 8, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges

PER CURIAM:[*]

In this action on a promissory note and guaranty agreement, Defendant-Appellant Dolores Banner appeals the district court's grant of summary judgment in favor of the Plaintiffs-Appellees Team Bank and the FDIC. Banner insists that the district court erred (1) by granting Team Bank's motion for a protective order, and (2) by holding that her claims of fraud, economic duress, and mutual

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

mistake were barred by the D'Oench, Duhme doctrine. As we find that the district court committed no reversible error in either instance, we affirm.

I

FACTS AND PROCEEDINGS

In 1984, Texas American Bank (TAB) approached Banner and requested that she sign a promissory note in the principal sum of $250,000 on behalf of Babcock Auto Stores, Inc. (Babcock), an establishment owned by Banner's husband prior to his death in 1982. Both Banner and TAB mistakenly believed that she had received her husband's interest in Babcock. In reality, however, Mr. Banner had given his interest to his daughters prior to his death. Mrs. Banner claims to have been unaware of this fact until the spring of 1987, five years after her husband's death. Additionally, Banner insists that she signed the note without fully understanding its significance. She emphasizes that she never graduated from high school, although she later obtained her GED, and claims that the president of TAB told her that it was necessary for her to sign the agreements to preserve her interest in the company.

In April 1987, Babcock filed for bankruptcy and TAB accelerated the maturity of the promissory note. Banner refused to remit payment on the note and TAB filed suit. In her answer and counterclaim, Banner alleged TAB's misrepresentation, common law fraud, wrongful acceleration, breach of contract, breach of implied covenant to act in good faith and in fair dealing, and breach of fiduciary duty. Shortly thereafter, Banner filed her first request

for production of documents, directed at TAB. TAB did not respond to Banner's discovery request until February 10, 1989, almost two years later, at which time TAB requested that other parties be notified before it released the documents. Banner notified the designated parties, and TAB produced a number of the requested documents.

In July 1989, the Comptroller of the Currency declared TAB insolvent and appointed the FDIC as receiver. At the same time, Team Bank purchased the assets of TAB, including the Banner note. As successor to TAB, Team Bank entered the litigation in February, 1990, and the FDIC intervened pursuant to Fed. R. Civ. P. 25(c). After Team Bank's entry into the case, Banner again requested production of those documents that had not been produced by TAB. Team Bank responded by producing some additional documents plus a list of documents withheld under a claim of privilege. It notified Banner that a motion for a protective order would be filed requesting an in camera inspection of the documents sought to be protected.

Banner objected to this motion, filing her own motions seeking sanctions and production of the documents. Banner claimed that TAB had failed to object to her discovery requests within thirty days[1]

[1] At the time of Banner's first discovery request, the parties were still in state court. Texas Rule of Civil Procedure 167 states: "The party upon whom the request is served shall serve a written response and objections, if any, within 30 days after service of the request." After the FDIC intervened, the case was removed to federal court. Federal Rule of Civil Procedure 34 contains similar language: "The party upon whom the request is served shall serve a written response within 30 days after the service of the request."

and had thereby waived any claims of privilege. She imputes this waiver of privilege to Team Bank, TAB's successor in the litigation, and to the FDIC as intervenor. The district court granted Team Bank's motion for a protective order and dismissed Banner's requests for sanctions.

After resolution of this discovery dispute, the district court ruled on Team Bank and the FDIC's joint motion for summary judgment. The court granted summary judgment, finding that there existed no genuine issue of material fact. The court ruled that Banner's defenses and counterclaims were barred by D'Oench, Duhme & Co. v. FDIC.[2] Specifically, the court held that the D'Oench, Duhme doctrine barred her defenses of fraud in the inducement, fraud in the factum, economic duress, and mutual mistake. Banner timely appealed.

II

DISCOVERY DISPUTE

A. STANDARD OF REVIEW

We review a district court's grant of a protective order for abuse of discretion.[3] "Even when based on a conclusory [sic] statement of cause, discovery orders by the trial court are rarely reversed for an abuse of discretion."[4] Similarly, in reviewing a district court's decision concerning the grant or denial of

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[2] 315 U.S. 447 (1942).

[3] Scott v. Monsanto Co., 868 F.2d 786, 792 (5th Cir. 1989).

[4] Id.

discovery sanctions, we apply the abuse of discretion standard.[5]

B. MOTION TO PROTECT DOCUMENTS

Team Bank and the FDIC first argue that the we do not have jurisdiction to review the district court's order granting a protective order because Banner failed to refer to this order in her notice of appeal. Banner's notice of appeal reads:

> Notice is hereby given that Dolores Banner, Defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 21st day of May, 1992.

Team Bank argues that Banner may attack only the May 21st grant of summary judgment because she specifically mentions that order, but fails to mention the discovery order, which was granted on October 11, 1991. Team Bank bases its argument on the rule that "when an appellant `"chooses to designate specific determinations in his notice of appealSQrather than simply appealing from the entire judgmentSQonly the specified issues may be raised on appeal."'"[6]

Although Team Bank states the rule correctly, the rule is inapplicable to the instant case. In her notice of appeal, Banner states that she is appealing from the final judgmentSQusing language virtually identical to that suggested in the appendix to the Federal Rules of Appellate Procedure. By contrast, the cases cited by Team Bank involve notices of appeal that either deviate

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[5] Lamar Financial Corp. v. Adams, 918 F.2d 564, 567 (5th Cir. 1990).

[6] Pope v. MCI Telecommunications Corp., 937 F.2d 258, 266 (5th Cir. 1991) (quoting Ingraham v. United States, 808 F.2d (5th Cir. 1987) (quoting McLaurin v. Fischer, 768 F.2d 98, 102 (6th Cir. 1985))).

considerably from the suggested language or specifically refer to an order other than the final judgment. Banner satisfies the requirements for notice of appeal when she states that she appeals from the final judgment. We conclude, therefore, that we possess jurisdiction to review the district court's discovery order.

Having established our jurisdiction in this cause, we turn to examine the merits of Banner's claim of waiver. Banner insists that the district court erred in granting the protective motion because TAB failed to object to Banner's document requests within thirty days and thus waived any claims to privilege. She imputes this waiver Team Bank. In other words, she argues that Team Bank is barred from seeking a protective order because TAB failed to object within thirty days to Banner's document requests. There is no evidence in the record, however, that Team Bank itself was dilatory in responding to discovery requests once it became a party, or that it was dilatory in seeking a protective order for certain of the documents. Reviewing the district court's decision for abuse of discretion, we find no error.

III

SUMMARY JUDGEMENT

A. STANDARD OF REVIEW

We review the district court's grant of summary judgment by "reviewing the record under the same standards which guided the district court."[7] A grant of summary judgment is proper when no

[7] Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

issue of material fact exists that would necessitate a trial.[8] We affirm a grant of summary judgment when "`we are convinced, after an independent review of the record, that "there is no genuine issue as to any material fact" and that the movant is "entitled to a judgment as a matter of law."'"[9] In determining whether the grant was proper, all fact questions are viewed in the light most favorable to the nonmovant. Questions of law, however, are reviewed de novo.[10]

B. MUTUAL MISTAKE AND THE D'OENCH, DUHME DOCTRINE

In D'Oench, Duhme, the Supreme Court held that oral side agreements cannot be used to defeat recovery by the FDIC. Moreover, the court rejected an innocent borrower defense, instead stating that the test is "whether the borrower `lent himself to a scheme or arrangement' whereby banking authorities are likely to be misled." The purpose of this rule is to protect the FDIC "against misrepresentation as to the securities or other assets in the portfolios of the banks which [it] insures or to which it makes loans."[11] This rule has been codified in part in FIRREA at 12 U.S.C. § 1823(e), which provides in part:

> No agreement which tends to diminish or defeat the right, title, or interest of the Corporation [FDIC] in

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[8] Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986); see FED R. CIV. P. 56(c).

[9] Walker, 853 F.2d at 358 (quoting Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1364 (5th Cir. 1987) (quoting FED. R. CIV. P. 56(c))).

[10] Id.

[11] D'Oench, Duhme, 315 U.S. at 457.

> any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

In the decades since the D'Oench, Duhme decision was handed down, the rule has been expanded to protect the FDIC from an increasing variety of misrepresentation defenses, including fraudulent inducement.[12] In its current form, the D'Oench, Duhme doctrine bars defenses that are based on facts not found in the failed institution's documents.[13] This statement of the rule deprives Banner of her defense that D'Oench, Duhme does not apply.

Banner first argues that D'Oench, Duhme does not apply because the FDIC has not alleged a secret agreement. This contention cannot stand in light of Langley v. FDIC,[14] in which the Supreme Court held that oral representations are agreements under D'Oench, Duhme. In any event, the district court found that Banner had lent herself to a scheme likely to mislead banking authorities, which is the test articulated by D'Oench, Duhme.

In her second argument, Banner insists that D'Oench, Duhme

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[12] FDIC v. Lafayette Inv. Properties, Inc., 855 F.2d 196 (5th Cir. 1988).

[13] Langley v. FDIC, 484 U.S. 86, 92-93 (1987); Clay v. FDIC, 934 F.2d 69, 72-73 (5th Cir. 1991); Beighley v. FDIC, 868 F.2d 776, 784 (5th Cir. 1989).

[14] 484 U.S. at 86.

does not apply to her claim because she alleges fraud in the factum, economic duress, and mutual mistake. Unfortunately for Banner, she offers no documentary evidence in support of these claims, but instead relies only on the oral representations allegedly made to her by TAB officials. Under D'Oench, Duhme, these oral statements cannot establish a defense to an FDIC claim when, as in this case, there is an unambiguous document. Moreover, we have specifically held that the defense of economic duress is barred under D'Oench, Duhme[15] and have twice refused to create an exception to D'Oench, Duhme based on a fraud in the factum defense.[16]

In light of the foregoing, we concur in the district court's determination that there existed no issues of material fact and that Team Bank and the FDIC were entitled to judgment as a matter of law. Consequently, the district court's decision is AFFIRMED.

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[15] Bell & Murphy & Assoc. Inc. v. Interfirst Bank Gateway, 894 F.2d 750 (5th Cir.), cert. denied, 111 S.Ct. 244 (1990).

[16] McLemore v. Landry, 898 F.2d 996 (5th Cir.) cert. denied, 111 S.Ct. 428 (1990); Templin v. Weisgram, 867 F.2d 240 (5th Cir.), cert. denied, 493 U.S. 814 (1989). Even if we were to read these cases narrowly, as Banner urges, her defense would not be successful. Banner alleges that she did not fully understand the contents of the note, but concedes that she knew she was signing a promissory notes. Thus, she fails to make out a case for fraud in the factum, which requires that she have been mistaken as to the nature of the document. Instead, her claim is one of fraudulent inducement, which we have held barred under D'Oench, Duhme. See Lafayette, 855 F.2d at 198.