UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5037

GLEN W. MORGAN,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
Manager Receiver for FSLIC as Receiver
for HEIGHTS SAVINGS ASSOCIATION, ET AL.,

Defendants,

FIRST HEIGHTS BANK, FSA,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(1:88cv960)

(September 30, 1994)

Before GARWOOD and BARKSDALE, Circuit Judges, and SHAW,[*] District Judge.

GARWOOD, Circuit Judge:[**]

---

[*] Chief Judge of the Western District of Louisiana, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Glen Morgan (Morgan) appeals the district court's order granting First Heights Bank, FSA (New Heights) some $18,000 in attorneys' fees.

Facts and Proceedings Below

On January 8, 1987, Morgan filed this action in Texas state court against Heights Savings Association (Old Heights) and its seven individual directors alleging mismanagement of an escrow account related to his home mortgage loan outstanding to Old Heights. During 1988, Morgan and Old Heights reached a tentative agreement to settle the lawsuit in exchange for Old Heights' allowing a $25,000 credit against Morgan's loan. However, the contemplated settlement agreement was never executed. On September 9, 1988, Old Heights was declared insolvent and placed into Federal Savings and Loan Insurance Corporation (FSLIC) receivership. The FSLIC-receiver sold substantially all of Old Heights' assetsSQincluding Morgan's home loanSQto New Heights, a newly created savings and loan.

On October 7, 1988, FSLIC-receiver removed Morgan's state lawsuit to federal court. On September 8, 1989, Morgan amended his complaint by joining New Heights as a defendant. As to New Heights, Morgan alleged that the loan had been transferred to it, that it continued to carry the loan "in an amount that does not reflect the $25,000 settlement," and prayed that he be granted "a $25,000 credit [on the note] and a reamortization of Plaintiff's mortgage to reflect the $25,000 credit over the term of the note." New Heights on October 18, 1989, filed its answer asserting Morgan was not entitled to any relief from it. On February 20, 1990, New

Heights filed a motion for summary judgment that Morgan take nothing from it based in part on the *D'Oench Duhme* doctrine.[1]

While the lawsuit was pending, Morgan, although the settlement agreement was never prepared and signed, acted as if the settlement had been executed and carried out, and he accordingly unilaterally reduced the amount of his mortgage payments to New Heights. Morgan's reduction in his mortgage payments constituted a default under the terms of his home loan agreement. New Heights accepted the reduced payments without question until May 1, 1990. On that date, New Heights sent Morgan a letter threatening to accelerate his loan if he did not pay all past due amounts by June 6, 1990.[2]

On May 16, 1990, New Heights filed a motion for leave to file a counterclaim. Attached to and filed with the motion was New Heights' proposed counterclaim, which demanded: (1) the overdue mortgage payments and (2) reasonable and necessary attorneys' fees associated with both prosecuting the counterclaim and defending Morgan's claims. On June 7, 1990, the district court granted New Heights' motion for leave to file the counterclaim. On June 11, 1990, the district court granted summary judgment in favor of New Heights on all of Morgan's claims.

On June 18, 1990, New Heights sent Morgan another letter stating that the loan would be accelerated if all past due amounts were not received by June 27, 1990. On June 19, 1990, New Heights

---

[1] This doctrine protects the FDIC and its receivers from secret or oral agreements made by the insolvent bank. *See D'Oench Duhme v. Federal Deposit Ins. Corp.*, 62 S.Ct. 676 (1942).

[2] Morgan did not make the requested payment by the June 6 deadline.

filed its counterclaim, the same as that attached to its May 16, 1990, motion, for the amounts past due under Morgan's note, as well as reasonable and necessary attorneys' fees.[3] Morgan did not file an answer to the counterclaim, but paid the overdue balance on June 27, 1990, bringing the note current.[4]

As Morgan had paid his overdue balance, the only remaining issue between Morgan and New Heights was New Heights' claim for attorneys' fees. On March 21, 1991, New Heights filed a motion for summary judgment on its counterclaim for attorneys' fees. On July 29, 1992, the district court granted the motion by ordering Morgan to pay New Heights $18,813.75 in attorneys' fees.

On appeal, Morgan first argues that the district court's order is void because it fails to satisfy Federal Rule of Civil Procedure 58. In the alternative, Morgan challenges the summary judgment on the issue of attorneys' fees.

Discussion

I. Rule 58

The district court did not enter its order granting New Heights' counterclaim on a separate document. Instead, the court

---

[3] Morgan complains about the filing of a counterclaim after summary judgment was rendered on all of his claims against New Heights. We find nothing improper with the subsequent filing since (1) the district court had granted leave to file the counterclaim before it rendered summary judgment; (2) the district court and Morgan were aware of the counterclaim New Heights intended to file; and (3) the lawsuit was not closed, due to Morgan's then pending remaining claims against other parties. The claims against the other parties were ultimately resolved in the district court.

[4] New Heights did not cash Morgan's check paying off his past indebtedness until Morgan acknowledged that New Heights' claim for attorneys' fees remained before the court.

simply ordered, in a memorandum opinion, that Morgan pay New Heights' attorneys' fees in the amount of $18,813.75. Morgan argues that the district court's failure to comply with the separate judgment requirement renders its memorandum order void and requires this Court to remand for rendition of a Rule 58 judgment. New Heights, however, contends that Morgan, by virtue of this appeal, has waived the requirements of Rule 58. Thus, the question is whether we should take jurisdiction over this appeal in the absence of a Rule 58 judgment.

A. Purpose of Rule 58

Federal Rule of Civil Procedure 58 provides that "[e]very judgment shall be set forth on a separate document." The sole purpose of Rule 58 is "to clarify when the time for appeal . . . begins to run." *Bankers Trust Co. v. Mallis*, 98 S.Ct 1117, 1120 (1978). Rule 58's separate document requirement was designed to "avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely." *Id.* at 1120. Thus, Rule 58 is intended to "function as a life preserver [for an appeal] rather than a heavy anchor." *Ellison v. Conoco, Inc.*, 950 F.2d 1196, 1200 (5th Cir. 1992). However, this Court usually will decline to hear appeals "if [1] the status of a post-judgment motion is unclear due to the lack of a Rule 58 judgment or [2] if the notice of appeal would have been untimely if the order appealed had constituted a Rule 58 judgment." *Whitaker v. City of Houston*, 963 F.2d 831, 834

(5th Cir. 1992).

B. Purpose of Morgan's Objection

Morgan does not contend that the district court's failure to render a Rule 58 judgment caused him uncertainty about whether its judgment was "final" or prevented his filing of a timely appeal.[5] Instead, Morgan asserts that the district court's failure to issue a separate document under Rule 58 voids its decision awarding New Heights over $18,000 in attorneys' fees. Further, Morgan maintains that this Court should abate the award of attorneys' fees and remand the case to the district court for proper rendition of a Rule 58 judgment.[6] Hence, the purpose of Morgan's argument is to invalidate an unfavorable order, rather than clarify and preserve his right of appeal, which he has in any event timely and properly perfected. We find that Morgan did not raise a proper Rule 58 objection, in accordance with its purpose of preserving an appeal, and as a result, his timely appeal and proper prosecution thereof have waived this issue.[7]

---

[5] Morgan, in fact, timely filed his notice of appeal on October 8, 1992 (within thirty days of the district court's September 17, 1992, order denying his motion for rehearing). Therefore, it appears Morgan had no difficulty in determining that the district court's opinion was a "final" judgment on the issue.

[6] Morgan incorrectly assumes that the failure of the district court to issue a separate document invalidates its opinion. Morgan likewise fails to understand that if this Court does not have jurisdiction, we cannot review or in any way alter the district court's order.

[7] Typically, Rule 58 concerns are raised: (1) by the appellate court *sua sponte* when it is uncertain about the status of post-judgment motions, *see Hanson v. Town of Flower Mound*, 679 F.2d 497, 499 (5th Cir. 1982); (2) by an appellee arguing the appeal was premature, *see Ellison*, 950 at 1199; or (3) by an

C. Election to Take the Appeal

In *Hanson*, this Court held that "we may take jurisdiction of an appeal from a 'final decision' . . . even though no separate judgment has been entered, when the parties fail to raise the issue." 679 F.2d at 501. Pursuant to *Hanson*, we conclude that we may elect to take jurisdiction in the instant case because both parties failed to *properly* raise a Rule 58 objection, *i.e*. Morgan did not object in accordance with the purpose of Rule 58, and New Heights did not object at all.

In the interest of preserving judicial resources we retain jurisdiction of the instant appeal. We conclude that there is no logical reason to decline to exercise jurisdiction, since upon dismissal the district court would simply file and enter a separate judgment, from which Morgan would have to file another appeal. Dismissal would only cause unnecessary delay and "[w]heels would spin for no practical purpose." *Bankers Trust*, 98 S.Ct. at 1120. "[A]s there is little to be gained from dismissing now and inflicting this case on another panel later, we accept jurisdiction over [this] appeal." *Whitaker*, 963 F.2d at 834.

II. Grant of Attorneys' Fees under Texas Law

Morgan argues that the district court erred in granting New Heights attorneys' fees because it failed to properly segregate fees incurred to prosecute the counterclaim from fees incurred to

---

appellant arguing that if he has filed an untimely appeal, it is due to uncertainty about the district court's "final decision." *See United States v. Perez*, 736 F.2d 236, 237 (5th Cir. 1984). Morgan, an appellant who indisputably filed a timely appeal, is not a party in need of the protections of Rule 58.

defend Morgan's claim. Morgan contends that, under Texas law, New Heights is only entitled to attorneys' fees associated with its prosecution of the counterclaim, which it did not seek to file until May 1990.

A. By Contract

Under Texas law, "[a] party may recover attorney's fees only if permitted by contract or by statute." *4M Linen & Uniform Supply Co. v. W.P. Ballard & Co.*, 793 S.W.2d 320, 327 (Tex. App.SQHouston [1st Dist.] 1990, writ denied). Pursuant to the loan agreement executed by Morgan and governing his note held by New Heights:

> "If the Noteholder must file a lawsuit to collect payment of all or any part of this Note, the Noteholder has the right to collect all reasonable costs and expenses of the lawsuit from the Borrower [Morgan], including among other costs, the Noteholder's reasonable attorneys' fees."

Under the plain language of the agreement, New Heights is entitled to recover attorneys' fees for work related to its counterclaim to collect amounts past due under the note. However, the language in the agreement does not affirmatively provide for fees connected with a lawsuit filed by the borrower, Morgan. Thus, the agreement itself does not purport to entitle New Heights to fees other than those in connection with its counterclaim.[8]

Although New Heights cannot recover attorneys' fees (other than those in connection with its counterclaim) under the agreement as such, the agreement does not address or in any way purport to limit New Heights' rights to attorneys' fees for other services (*i.e.* not in connection with its counterclaim) under Texas

[8] This work primarily involved preparing and filing the counterclaim and the sending of two demand letters.

statutory law.

B. By Statute

Pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 38.001, "[a] person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: . . . (8) an oral or written contract." The requisites to recover under the statute are: "1) recovery of a valid claim in a suit on an oral or written contract; 2) representation by an attorney; 3) presentment of the claim to the opposing party or a representative of the opposing party; and 4) failure of the opposing party to tender payment of the just amount owed before expiration of thirty days from the day of presentment." *Sikes v. Zuloaga*, 830 S.W.2d 752, 753 (Tex. App.SQAustin 1992).[9]

New Heights satisfies all four requirements of section 38.001. First, even though "a valid claim [pursuant to § 38.001] requires a final judgment where the case proceeds to trial [it] does not require one where the caseSQas hereSQdoes not progress that far, and the underlying claim is uncontested." *Southland Corp. v. Kilgore*,

---

[9] See also Tex. Civ. Prac. & Rem. Code Ann. § 38.002, which states:

> "To recover attorney's fees under this chapter:
>
> (1) the claimant must be represented by an attorney;
>
> (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
>
> (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented."

19 F.3d 1084, 1088 (5th Cir. 1994). Thus, under the first requirement, New Heights recovered on its valid claim on June 27, 1990, when Morgan paid the amounts past due under the mortgage note. New Heights also met the other three requirements since (1) it was represented by an attorney, (2) it presented the claim to Morgan in a May 1, 1990, demand letter, and (3) Morgan failed to tender payment within thirty days of presentment.

Morgan argues that even if New Heights meets the presentment requirements of section 38.001, it cannot recover for any attorneys' fees which are related to the defense of Morgan's claims. We disagree. "[W]hen the counterclaimant is forced to defend against all claims before it can recover on the counterclaim, it is entitled to recover attorney's fees devoted to defending against the claims." *Houston Lighting & Power Co. v. Russo Properties, Inc.*, 710 S.W.2d 711, 714 (Tex. App.SQHouston [1st Dist.] 1986); *see also Coleman v. Rotana, Inc*., 778 S.W.2d 867, 873 (Tex. App.SQDallas 1989, writ denied). New Heights had to prove that Morgan was not entitled to his claim for a $25,000 credit before it could recover past due amounts under the mortgage agreement. "A party may recover attorney fees rendered in connection with all claims if they arise out of the same transaction and are 'so interrelated that their prosecution or defense entails proof or denial of essentially the same facts.'" *Coleman*, 778 S.W. 2d at 874 (citation omitted). Because New Heights had to defeat Morgan's claim to recover on its counterclaim, we find that New Heights is not required to segregate its attorneys' fees.

However, it is evident that the attorneys' fees sought by New Heights and awarded by the district court, which gave the full amount sought, included fees for services since at least as early as its October 18, 1989, answer to Morgan's amended complaint. No demand or claim, whether by pleading or motion or otherwise, was made by New Heights on Morgan prior to New Heights' May 1, 1990, demand letter. Consequently, New Heights is not entitled to attorneys' fees for services prior to May 1, 1990, see section 38.002 (note 9, *supra*), although it is entitled to fees thereafter, whether in resisting Morgan's claim or pursuing its counterclaim. Accordingly, the judgment, which awarded New Heights all its fees, must be vacated and the cause remanded.

Conclusion

New Heights is entitled to recover its reasonable attorneys' fees and expenses in prosecuting its counterclaim, and also in defending against Morgan's claim against it, but only for services rendered after New Heights first presented a claim to Morgan, which was not prior to May 1, 1990. The district court erred in including in its award all attorneys' fees in defending Morgan's claims, as that embraced services prior to May 1, 1990.

Accordingly, the district court's judgment is vacated and the cause is remanded for further proceedings not inconsistent herewith.[10]

---

[10] Because of our action, we deny New Heights' motion for attorneys' fees on appeal.