

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 92-5541

RTC AS RECEIVER FOR OCCIDENTAL
NEBRASKA FEDERAL SAVINGS BANK, ET AL.,

Plaintiffs-Appellees,

versus

J.D.R. CORPORATION, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas
(SA 89 CV 1581)

March 22, 1993

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:*

I. FACTS AND PROCEDURAL HISTORY

In 1981, Bluff Point, Ltd., (Bluff Point), a California partnership, purchased property in Bexar County, Texas to build a 108 unit condominium complex called the Sierra Royale Condominiums

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(the "Condominiums"). The project was originally funded by a \$5,500,000 loan from Republic Bank. On June 15, 1983, Bluff Point obtained a loan from the Richard Carolyn Company in the amount of \$6,300,000 and executed a construction deed of trust and security agreement covering the Condominiums.¹ The Richard Carolyn Company assigned the deed of trust and security agreement to Occidental/Nebraska Federal Savings Bank (Old Occidental), and Old Occidental filed the deed of trust on June 24, 1983. Bluff Point borrowed an additional \$1 million from Old Occidental, which was secured by a deed of trust filed November 1, 1984, covering the Condominiums.

Bluff Point hired J.D.R. Corporation (JDR) as the construction manager of the project. During the development of the project, a controversy arose between Bluff Point and JDR, which resulted in JDR filing a mechanic's lien on the Condominiums for \$37,733.39 on June 1, 1983 for work done in February and March of 1983.² Subsequently, Bluff Point experienced trouble in meeting its debt obligations, which resulted in Old Occidental and Bluff Point entering into a foreclosure and settlement agreement dated May 10, 1985.³ The settlement and foreclosure agreement allowed Old Occidental to foreclose on the Condominiums, and as a result Old Occidental obtained record title to the property under a Trustee's deed filed June 6, 1985.

¹ The loan was used to pay off Republic Bank.

² On June 24, 1983, JDR assigned a 45.05 percent interest in its mechanic's lien to Republic Bank in return for payment of \$17,000.

³ Bluff Point filed for bankruptcy on August 30, 1985. That bankruptcy was eventually dismissed.

On May 16, 1985, Shaeffer Construction Company (Shaeffer), a sub-contractor on the Condominiums project, filed a law suit in state court against Bluff Point and JDR. Two and one half years later, on January 19, 1988, JDR initiated a cross-action against Bluff Point in this same state court suit asserting for the first time a right to foreclose its mechanic's lien affixed back on June 1, 1983. On March 18, 1988, the state court entered a default judgment against Bluff Point on the JDR cross-action. On July 8, 1988 a sheriff's deed was issued granting JDR title to the property, and JDR subsequently sold the property to the Reenans. On September 16, 1988, JDR demanded that Old Occidental vacate the premises.

On January 18, 1989, Old Occidental sued JDR and the Reenans in a different state court seeking a declaratory judgment that it was the owner of the property. On July 13, 1989, the FSLIC was appointed receiver of Old Occidental, New Occidental was created, and the assets of Old Occidental were transferred to New Occidental pursuant to a transfer and acquisition agreement. The FSLIC and New Occidental then intervened in this second suit. On August 9, 1989, the RTC was substituted for the FSLIC by operation of law. The RTC removed this second state suit to the United States District Court for the Western District of Texas (USDC) on November 6, 1989. On February 7, 1991, the USDC, on the recommendation of the magistrate, held that the RTC was the owner of the property and granted it summary judgment. The USDC held that (1) Old Occidental was not in privity with Bluff Point and therefore the RTC was not bound by the prior state court judgment against Bluff Point; (2) JDR's claim on its mechanic's lien was barred by the four-year

statute of limitations; and (3) the provisions of the settlement and foreclosure agreement between Old Occidental and Bluff Point did not bind the RTC to the state court judgment because such agreement was barred by D'Oench, Duhme and 12 U.S.C. § 1823(e). The Reenans and JDR appeal the judgment of the USDC.

II. DISCUSSION

1. Privity

JDR and the Reenans contend that the principles of res judicata and collateral estoppel prevent Old Occidental from challenging the prior state court default judgment awarding title in the property to JDR.⁴ The RTC does not dispute the applicability of res judicata and collateral estoppel to the parties in the first suit--JDR and Bluff Point--, but contends that since Old Occidental obtained record title to the property before JDR asserted its cross-action and Old Occidental was never a party to the first state court suit, the RTC is not bound by that state court judgment.

The case of Frede v. Lauderdale,⁵ 322 S.W.2d 379, 381 (Tex. Civ. App.--San Antonio 1959, writ ref'd n.r.e.), is particularly instructive on the issue raised in the present case. In Frede, the defendant contended in a trespass to try title suit that he was the owner of a tract of land, because a link in the plaintiffs' chain of title was defective in that a default judgment had been taken against the plaintiffs' predecessor in interest. The court

⁴ Res judicata, or claims preclusion, bars relitigation of a claim that has been finally adjudicated as well as related matters, which in the exercise of due diligence, should have been litigated in the prior suit. Barr v. Resolution Trust Corp., ex rel. Sunbelt Federal Savings, 837 S.W.2d 627, 628 (Tex. 1992). Collateral estoppel, or issue preclusion, prevents the relitigation of issues previously resolved in a prior suit. Id. at 628, 629.

⁵ See also, Gray v. Joyce, 485 S.W.2d 311, 313 (Tex. Civ. App.--Tyler 1972, writ ref'd n.r.e.).

disagreed, holding that the judgment was not binding on the plaintiffs, who were the record owners of the property when the prior suit was filed, because they were not made a party to such suit. The court stated:

a suit brought against a record owner's predecessors in title without joining the record owner is not binding upon the record owner. Otherwise, one could accomplish as much, and more easily, by suing persons who have parted with their property as by suing the record owner. Predecessors in title often have little or no real interest in a suit for lands they no longer claim to own, and, [therefore] . . . may fail to contest the case.

Id. at 381.

JDR and the Reenans concede that generally a party to a suit concerning title to property must join the entity that presently is the record title owner to the disputed property in order for that entity to be bound by the suit; but, contend that Old Occidental and thus the RTC are bound by the judgment in the first state court case because Old Occidental was in contractual privity with Bluff Point such that "Bluff Point became the agent of Old Occidental for the purposes of litigating the lien claims" in that state court suit. Appellant's brief at 8. As support for that contention, JDR and the Reenans rely on the settlement and foreclosure agreement between Old Occidental and Bluff Point and the later agreed bankruptcy order, which they contend prove that Bluff Point was the agent of Old Occidental for litigating JDR's mechanic's lien.

The settlement and foreclosure agreement⁶ states in pertinent part that:

⁶ The agreed order issued by the bankruptcy court entitled "Order Authorizing And Directing Assumption Of Executory Contracts" was based on and did not alter the terms of the settlement and foreclosure agreement.

C. O/NFSB [Old Occidental] will not be assigned potential claims as now or hereinafter may be litigated by Bluff Pt. against any previous 'General' and/or Sub Contractors under contract with Bluff Pt. Bluff Pt. also agrees to indemnify O/NFSB from any such litigation and to hold O/NFSB harmless from any results therefrom. Bluff Pt. may proceed with the litigation as it sees fit and may claim all title, rights, and interest which may be forth coming as a result of such litigation.

E. The contracts, as may be existing between Bluff Pt. and the "General" Contractors will not be assigned to O/NFSB nor does O/NFSB claim or have any responsibilities for nor liabilities on such contracts and on which Bluff Pt. does hereby indemnify and hold harmless O/NFSB.

H. Immediately following foreclosure, O/NFSB shall obtain a title policy and to the extent that there are liens affecting the title of O/NFSB for which funds have been escrowed at Alamo Title, those funds shall be assigned to O/NFSB. All other funds that have been escrowed with Alamo Title Company shall be released to Bluff Pt. and Bluff Pt. shall assume the full responsibility of the litigating against any such claims for which liens do not follow the property into O/NFSB after foreclosure.

We do not interpret the agreement to provide that Bluff Point was responsible to Old Occidental for defending against all claims involving the property. The agreement provides that Bluff Point was allowed to prosecute offensive claims against various contractors and subcontractors, and that Bluff Point agreed to hold Old Occidental harmless from the results of those offensive actions. Further, the agreement provides that Bluff Point was to defend against all lien claims that did not follow the property into Old Occidental after foreclosure. The agreement contemplates and reflects the intent of the parties that funds would be escrowed with Alamo Title for lien claims that did follow the property into

Old Occidental after foreclosure--such as JDR's mechanic's lien-- and that Old Occidental would remain responsible for defending against those claims. We hold therefore that Bluff Point and Old Occidental were not in privity as to the JDR lien claim; and that Bluff Point was not an "agent" of Old Occidental for litigating JDR's mechanic's lien. As a result, the RTC is not bound by the state court judgment against Bluff Point.

III. CONCLUSION

Old Occidental succeeded to Bluff Point's ownership in the Condominiums before JDR filed the cross-action against Bluff Point. The foreclosure agreement did not provide that Old Occidental was in privity with Bluff Point so that Old Occidental was bound by the prior state court judgment. The RTC is therefore not bound by the prior state court judgment. We affirm on the first ground relied upon by the District Judge, and find it unnecessary to address the other two grounds for its ruling. For the foregoing reasons, the judgment of the district court is AFFIRMED.