IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5658

Summary Calendar

RESOLUTION TRUST CORP. as Receiver for
Banc Iowa Federal Savings Bank,

Plaintiff-Appellee,

versus

JACK PAUL LEON and ROSEMARY U. LEON,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(SA 90 CA 407)

March 19, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

The Resolution Trust Corporation brought this suit against the Leons for a deficiency judgment on four promissory notes. The district court granted summary judgment in favor of RTC, holding that the affirmative defenses asserted by the Leons were barred by the D'Oench, Duhme doctrine and its codification, 12 U.S.C. § 1823(e). We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

On December 27, 1984, Jack and Rosemary Leon executed four promissory notes and corresponding deeds of trust to finance the purchase of four condominium units from Park Greene Townhomes, Ltd. The notes contained variable interest rate provisions based on U.S. Treasury Bills. The notes, whose principal amounts totalled $242,800, were unqualified on their faces regarding the Leons' personal liability as makers.

In opposing RTC's motion for summary judgment, the Leons submitted evidence concerning the execution of the notes. They claim that Park Greene's agents represented that, under the terms of the notes, the Leons could not be held personally liable. Three to seven months before the execution of these notes, Park Greene showed the Leons other documents relating to the townhouses which were not used when the sale and financing were completed. The Leons believe that those documents expressly excluded the Leons' personal liability. The Leons claim that Park Greene represented that the notes at issue here contained the same terms as those previously examined. They also maintain that Park Greene stated that the notes would not be transferred. It is undisputed that at the time of execution Jack Leon, an attorney, noticed and deleted a paragraph from the notes and deeds which he believed was contrary to the agreement.

The notes were soon transferred to Banc Iowa Savings Bank, which notified the Leons that they were delinquent in their payments in May, 1986. Other purchasers of Park Greene townhouses filed suit against Banc Iowa and Park Greene, alleging unfair trade

practices. Their notes were voided and Banc Iowa acquired their townhouses as part of a settlement. The Leons did not join that litigation, but avoided foreclosure by executing four "Renewal, Modification and Extension" notes on July 31, 1986. By these documents the Leons agreed to pay Banc Iowa the principal due from the original notes on essentially the same terms as before.

When Banc Iowa sold all of the Park Greene townhouses it controlled, which did not include the Leons' units, in 1989 the Leons complained of unfair dealing. According to the Leons, this dispute was resolved by an agreement among them, Banc Iowa, and the purchaser of the other townhouses, the Frankel Family Trust. As part of this agreement, Banc Iowa would accept $150,000 as satisfaction of the debts, with $100,000 coming from the Trust to purchase the townhouses plus a $50,000 unsecured note from the Leons. The townhouse sale, however, was never consummated due to title problems. No payments were made after April 1, 1989, and Bank Iowa gave notice of default and intent to accelerate on October 10, 1989. Six days later, Banc Iowa was declared insolvent. Its assets of Banc Iowa were immediately transferred to Banc Iowa Federal Savings Bank under the conservatorship of RTC. In January, 1990, the four townhouses were sold at foreclosure to the Trust. RTC subsequently became receiver for Banc Iowa Federal Savings Bank and sued the Leons to recover for the deficiencies remaining after foreclosure.

Acting on the recommendation of the magistrate judge, the district court granted summary judgment against the Leons. Summary

judgment is appropriate if the record discloses "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). We review the grant of summary judgment de novo and "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." FDIC v. Laguarta, 939 F.2d 1231, 1236 (5th Cir. 1991) (citations omitted).

This case turns on the viability of the Leons' affirmative defenses. They asserted fraud in the inducement, fraud in the factum, failure of consideration, accord and satisfaction, and novation. The district court concluded that each of these defenses was barred by § 1823(e) and the related doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676 (1942). The Leons raise three principal arguments on appeal. First, they contend that § 1823(e) does not apply to non-negotiable instruments. Second, they claim to have established a fraud in the factum defense that may be asserted despite § 1823(e) and D'Oench, Duhme. Third, they maintain that RTC cannot enforce the notes because of a novation.

Recent decisions dispose of the Leons' first position. We have held that notes providing for publicly ascertainable, variable interest rates executed in Texas are negotiable instruments. Ackerman v. FDIC, 973 F.2d 1221, 1223 (5th Cir. 1992) (relying on answer to certified question given in Amberboy v. Societe de Banque Privee, 831 S.W.2d 792 (Tex. 1992)). Even if this negotiability issue was unresolved, § 1823(e) and D'Oench, Duhme would govern

because they apply "irrespective of whether the note is negotiable." Park Club, Inc. v. RTC, 967 F.2d 1053, 1055 (5th Cir. 1992).

Next, the Leons claim that misrepresentations regarding personal liability constituted fraud in the factum, an arguably viable defense despite D'Oench, Duhme and § 1823(e).

Supreme Court dictum noted a concession by the FDIC that

> the real defense of fraud in the factum--that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents--would take the instrument out of § 1823(e), because it would render the instrument entirely void . . . .

Langley v. FDIC, 484 U.S. 86, 93, 108 S. Ct. 396, 402 (1987) (citations omitted). As in Langley, we need not pass on the validity of that concession, because the facts asserted by the Leons constitute fraud in the inducement, not fraud in the factum.

Fraud in the factum exists "when a party signs a document without full knowledge of the character or essential terms of the instrument." McLemore v. Landry, 898 F.2d 996, 1002 (5th Cir.), cert. denied, 111 S. Ct. 428 (1990)(internal quotations omitted).[1] The Leons knew that the essential terms of the instruments made them promissory notes for known amounts of principal. The representation that the Leons would not be personally liable was fraud inducing them to execute the documents, not fraud disguising

[1]Fraudulent representations about the risk of a venture constitute fraud in the inducement, not fraud in the factum, where makers know that they are executing promissory notes to finance that venture. Kilpatrick v. Riddle, 907 F.2d 1523, 1527 n.6 (5th Cir. 1990), cert. denied, 111 S. Ct. 954 (1991).

the true character of the documents. In Langley, where the Court found no fraud in the factum, one of the representations made to the makers was that they would not be personally liable on the promissory notes. 484 U.S. at 89 n.1, 108 S. Ct. at 400 n.1.

The Leons contend that they were the victims of a document switch, so that they did not sign the instruments which they were originally shown and intended to sign.[2] Several months before the execution of these notes, Park Greene gave the Leons documents which the Leons believe protected makers from personal liability. The notes which the Leons executed in December, 1984 do not limit the makers' personal liability. Our analysis of fraud in the factum is guided by the Uniform Commercial Code, which requires that an instrument be signed "with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms." Tex. Bus. & Com. Code § 3.305 (Vernon 1968) (emphasis added); see also Restatement (Second) of Contracts § 163 (1981). The Leons' assertion of excusable ignorance[3] is belied by the undisputed fact that Jack Leon, an attorney, examined the documents presented to him in December and deleted a paragraph from each two-page note and three-page deed of trust which he signed. Even viewing the record in favor of the Leons, they have failed to

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[2]See Restatement (Second) of Contracts § 163 cmt. b, illus. 2 (1981); 1 James J. White & Robert S. Summers, Uniform Commercial Code § 14-9, at 732 (West 3d ed. 1988) ("Most cases arise because the defendant was tricked into signing another document different from the one which he read").

[3]See Tex. Bus. & Com. Code § 3.305, comment 7 (suggesting an "excusable ignorance" test which considers the sophistication of the maker).

establish a genuine issue of material fact regarding fraud in the factum.

The Leons also argue that the 1989 agreement constituted a novation which extinguished their obligations under the prior notes. Hence, they argue, RTC did not acquire enforceable notes when Banc Iowa failed and § 1823(e) is not implicated. The Leons rely on a case holding that the FDIC may not enforce a mortgage note when the corresponding promissory note was paid, automatically terminating the mortgage, before the lender failed. FDIC v. Bracero & Rivera, Inc., 895 F.2d 824, 830 (1st Cir. 1990); see also Langley, 484 U.S. at 93-94, 108 S. Ct. at 402 (noting that a void note would not be a "right, title, or interest" of the FDIC).

This attempted evasion of § 1823(e) fails. The Leons cannot rely upon an agreement that is not evidenced by the bank records in order to escape the requirement that all agreements diminishing the RTC's interests comply with § 1823(e). Jack Leon testified by affidavit that on July 21, 1989, he made a deal extinguishing his 1984 notes with Banc Iowa's chairman that was approved by Banc Iowa's board over the telephone. Banc Iowa's records do not indicate the approval of this ultimately unconsummated agreement.[4] For all practical purposes, an unrecorded novation does not differ

[4]An Asset Classification Report prepared by Banc Iowa sometime after June 30, 1989 states: "Mr. Leon would like to deed his buy-out hiss [sic] personal guaranty. We will be obtaining personal financial statement from Mr. and Mrs. Leon prior to accepting the note. If we do accept deeds in lien, we will sell the units to Dr. Frankel. Dr. Frankel has offered . . . Mr. Leon $25,000 per unit."

The deal was not completed because apparent title problems thwarted the sale of the Leons' townhouses to the Trust.

from a secret agreement between a lender and borrower that a note will not be enforced. We are not persuaded that Langley's obiter dicta regarding "void" notes applies under these circumstances.

The remainder of the Leons' arguments amount to no more than an appeal to equity and lack merit. "The requirements of § 1823(e) are certain and 'categorical.'" Beighley v. FDIC, 868 F.2d 776, 782 (5th Cir. 1989) (quoting Langley, 484 U.S. at 95, 108 S. Ct. at 403 (1987)). As the Court noted, "[o]ne purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's record in evaluating the worth of the bank's assets." Langley, 484 U.S. at 91-92, 108 S. Ct. at 401. The exception requested by the Leons would undermine that purpose.

AFFIRMED.