UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-5742
Summary Calendar

BERNARD WEAKLEY a/k/a Barney Weakley,

Plaintiff-Appellant,

VERSUS

SECURITY STATE BANK, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-90-CA-1035)

(March 25, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:[1]

Alleging improprieties in a secured loan and an ensuing foreclosure of real estate secured by a deed of trust, Bernard and Carol Weakley sued their bank, the bank president, their closing lawyer, his firm, and other attorneys in the firm. The Weakleys complained of their attorneys' conflict of interest in representing them in connection with the execution of the closing documents and their bank in connection with the foreclosure and the bank's action for a deficiency judgment against them. Plaintiffs alleged that

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

all Defendants conspired to defraud them of their equity in their real estate. Plaintiffs asserted civil rights violations, violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), fraud, statutory fraud, breach of fiduciary duties, violations of the Texas Deceptive Trade Practices Act (DTPA), and an unspecified tort.

The district court granted Defendants' motions for summary judgment and denied Plaintiffs' motion. Plaintiffs appeal,[2] and we affirm.

I. Civil Rights Claims

In support of claims of civil rights violations under 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, 1987, and 1988, Plaintiffs allege that their attorneys violated their Sixth Amendment right to counsel because of a conflict of interest or conspiracy to defraud them. Plaintiffs fail to state a claim under § 1981 or § 1982, because they have not alleged a deprivation of rights based on race, ancestry, or ethnic characteristics. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). As for § 1983, none of the defendants can be deemed state actors acting "under color of state law." Gipson v. Rosenberg, 797 F.2d 224, 225 (5th

[2] Bernard Weakley's timely notice of appeal is effective as to Carol Weakley. See Fed. R. App. Proc. 3(c) (providing that a notice of appeal "filed pro se is filed on behalf of the party signing the notice and the signor's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent"); see also Burt v. Ware, No. 93-3065, slip op. 2665, 2668 (5th Cir. Feb. 3, 1994) (holding that newly amended rules of appellate procedure should apply to notice of appeal filed before effective date unless their application would work injustice).

Cir. 1986) (private attorneys are not state actors), cert. denied, 481 U.S. 1007 (1987) ; Earnest v. Lowentritt, 690 F.2d 1198, 1201 (5th Cir. 1982) ("Initiation of foreclosure proceedings pursuant to a mortgage implicates no . . . 'authority of state law.'") (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1171 (5th Cir. 1975) (non-judicial foreclosure under power of sale conferred in deed of trust does not implicate state action).

As the Weakleys did not allege any racial or class-based discriminatory animus, they failed to state § 1985 and § 1986 claims. See Daigle v. Gulf State Utilities Co., Local No. 2286, 794 F.2d 974, 978-79 (5th Cir.) (§ 1985(2) and (3) require some class-based invidiously discriminatory animus behind conspirators' actions), cert. denied, 479 U.S. 1008 (1986); Dowsey v. Wilkins, 467 F.2d 1022, 1026 (5th Cir. 1972) (claim under § 1986 depends upon valid cause of action under § 1985).

Finally, since §§ 1987 and 1988 do not provide independent causes of action, the district court properly dismissed the claims brought under these sections. See 42 U.S.C. § 1987 (authorizing federal officials to prosecute violations of certain federal laws); Harding v. American Stock Exchange, Inc., 527 F.2d 1366, 1370 (5th Cir. 1976) (§ 1988 does not create federal cause of action for deprivation of constitutional rights). Accordingly, summary judgment dismissal of the civil rights claim was proper.

III. RICO and State Claims

The district court found that Weakleys' state law claims and

RICO claims were compulsory counterclaims that should have been litigated in the bank's deficiency action in the state court. The property at issue was sold at a non-judicial foreclosure for some $82,000 less than the balance due on the lien note. The Bank then brought an action for the deficiency in state court. Plaintiffs filed no counterclaims, and the state court summarily granted the Bank a deficiency judgment.

A party's failure to assert a compulsory counterclaim bars its assertion in a later action. Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 247 (Tex. 1988). Under Texas law[3] a counterclaim is compulsory if it 1) is within the jurisdiction of the court, 2) is not the subject of another pending action, 3) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and 4) does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. Tex. R. Civ. P. 97(a).

The Weakleys' RICO claim and state claims were within the jurisdiction of the state court. See Tex. Const. art. V. § 8; Tex. Gov't Code Ann. §§ 24.007 and 24.008 (West 1988); Tex. Bus. & Com.

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[3] Federal courts afford state court judgments "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. Federal courts apply the doctrine of claim preclusion, where applicable as a matter of state law, as faithfully as would a state court in the state in which the judgment was rendered. Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75, 81 (1984). Accordingly, the district court properly applied state law to determine the preclusive effect to be given to the Weakleys' state law claims and RICO claims. See Evans v. Dale, 896 F.2d 975, 977 (5th Cir. 1990).

Code Ann. § 17.62(c) (West 1987); Tafflin v. Levitt, 493 U.S. 455, 467 (1990).

The only other element of Rule 97(a) at issue is the "transaction or occurrence" requirement. Plaintiffs contend that their claims do not arise out of the same transaction or occurrence that was the subject matter of the bank's deficiency action.

The phrase "transaction or occurrence" has been broadly construed. See Griffin v. Holiday Inns of America, 496 S.W.2d 535, 539 (Tex. 1973) (claim in quantum meruit for paving of parking lot arose from same transaction as claim for breach of contract to pave the lot), overruled on other grounds by Barr v. RTC, 837 S.W.2d 627, 630 (Tex. 1992); Lamar Savings Ass'n v. White, 731 S.W.2d 715, 717-18 (Tex. App. -- Houston [1st Dist.] 1987, no writ) (borrower's suit for breach of contract, breach of confidential fiduciary duties, estoppel, usury, duress, and tortious interference were compulsory counterclaims to lender's foreclosure action arising from default on promissory note); Jack H. Brown & Co. v. Northwest Sign Co., 718 S.W.2d 397, 398-400 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.) (applying the broad "logical relationship" interpretation of similarly worded Fed. R. Civ. P. 13(a) to determine whether counterclaim is compulsory); Upjohn Co. v. Petro Chems. Suppliers, Inc., 537 S.W.2d 337, 340 (Tex. Civ. App. -- Beaumont 1976, writ ref'd n.r.e.) (seller's claim for unpaid invoices same transaction or occurrence as claim against seller for fraud in bribing buyer's agent); Burris v. Kurtz, 462 S.W.2d 347, 348 (Tex. Civ. App. -- Corpus Christi 1970, writ ref'd n.r.e.)

(suit for impropriety in handling retail installment sales contract same transaction as suit on the contract).

The Weakleys' claims arise from the purchase of the property, the preparation and execution of the deed of trust, the note acceleration, the notice of trustee sale and foreclosure on the property by the bank, and the bank's deficiency action.[4] Because the Weakleys' state law and RICO claims arise from the same transaction or occurrence as the bank's earlier deficiency action and otherwise meet the requirements of Rule 97(a), they are now barred.

The judgment in favor of Defendants is

AFFIRMED.

[4] Plaintiffs additionally argue that the illegal acts of Defendants were discovered during the pending state action. We reject the suggestion that Plaintiffs' claims were not mature or that Plaintiffs were unaware of their claims at the time they filed their answer in the deficiency action. As the magistrate judge noted, Carol Diane Weakley's response to the Bank's motion for summary judgment in the deficiency action raised the same factual allegations as are the basis of this action.