IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7607

Summary Calendar

F.D.I.C., as Receiver of First National Bank of Corpus Christi, Texas, in its Receiver and Corporate Capacities,

Plaintiff-Appellee,

versus

TED D. COHEN & ASSOCIATES, ET AL.,

Defendants,

ROBERT OSHMAN and STEVEN OSHMAN

Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
CA C 90 229

(June 2, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Ted D. Cohen & Associates was a Texas joint venture comprised of Ted Cohen, Robert Oshman, Steven Oshman, and Scott Oshman. On June 21, 1985, the partnership acquired property in Hays County by borrowing $720,000 from Western National Bank. The partnership

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pledged the property as collateral. Additionally, each of the partners signed a guarantee of payment. After a transfer and bank failure, FDIC became the holder of the note and lien.

On January 1, 1990, the partnership defaulted on the loan. The bank then holding the note filed suit for the money due, naming the partnership and each partner as defendants. FDIC removed the suit to federal court. No effort has been made to foreclose on the collateral. The district court granted summary judgment against the two partners not in bankruptcy.

Despite the district court's failure to formally dismiss one defendant who entered bankruptcy before judgment, its decision is an appealable final order. Dimmitt & Owens Financial, Inc. v. United States, 787 F.2d 1186, 1190 (7th Cir. 1986).

The district court correctly held that the appellants are jointly and severally liable as partners for the obligation of the partnership note. Martin v. First Republic Bank, 799 S.W.2d 482, 487 (Tex. App.--Fort Worth 1990, writ denied); Rice v. Travelers Express Co., 407 S.W.2d 534, 537 (Tex. Civ. App.--Houston [1st Dist.] 1966, no writ); Tex. Rev. Civ. Stat. Ann. art. 6132b, § 15(1) (Vernon 1970). Moreover, it correctly found that appellants are primarily liable for the note as guarantors of payment. Ford v. Darwin, 767 S.W.2d 851, 854 (Tex. App.--Dallas 1989, writ denied); Tex. Bus. & Com. Code Ann. § 3.416 (Vernon 1968). Any argument based on the premise that appellants are secondarily liable as accommodation makers, sureties, or otherwise, is without merit.

The FDIC had no duty to foreclose upon the collateral rather than enforcing the note. See FDIC v. Coleman, 795 F.2d 706, 710 (Tex. 1990); Garza v. Allied Finance Co., 566 S.W.2d 57, 62 (Tex. Civ. App.--Corpus Christi 1978, no writ), appeal after remand, 626 S.W.2d 120. Appellants may not rely upon representations from Western National that it would foreclose before attempting to collect from them personally. 12 U.S.C. § 1823(e); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676 (1942).

Appellants contend that by dismissing the partnership at the time it entered summary judgment, the district court discharged their liabilities as well. A partner may not be held liable unless the liability of the partnership itself is established. In this case, the partnership was named as a defendant along with its partners. Texaco, Inc. v. Wolfe, 601 S.W.2d 737 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.), is thus inapposite. The record before the district court established that the partnership made the note and defaulted on it. The partnership's liability was thus clearly established at the time that judgment was entered against appellants.

> Once liability is established against the partnership, joint and several liability of each individual partner follows as a matter of law, and section 17.022 allows a judgment to be entered against any partner served.

Fincher v. B & D Air Conditioning & Heating Co., 816 S.W.2d 509, 513 (Tex. App.--Houston [1st Dist.] 1991, writ denied) (citing Tex. Civ. Prac. & Rem. Code § 17.022.) The contemporaneous dismissal of the partnership, which never answered the lawsuit, was irrelevant.

AFFIRMED.