

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8005  
(Summary Calendar)

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FEDERAL DEPOSIT INSURANCE CORP.,

Plaintiff-Appellee,

versus

JOHN BUSHMAN,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(M-90-CV-88)

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(December 8, 1992)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM\*:

Defendant-Appellant John Bushman appeals the district court's holding that the Plaintiff-Appellee Federal Deposit Insurance Corporation (FDIC) was legally entitled to obtain a judgment on a promissory note made by Bushman in connection with a loan made to him by the FDIC's predecessor in interest. Finding no reversible error, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## FACTS AND PROCEDURAL HISTORY

In early 1983, Bushman executed a promissory note (the Note) for \$6,054,215, the amount that he borrowed from First National Bank of Midland (FNB) to purchase two savings and loan associations, which he then merged. The resulting entity became known as Banc Home Savings (Banc Home). Bushman was the sole shareholder of Banc Home and served as chairman of its board of directors. His Banc Home stock certificate was held by FNB as security on the loan.

In October 1983, the Comptroller of Currency declared FNB insolvent and appointed the FDIC as receiver. The FDIC/Receiver then transferred many former FNB assets, including the Note, to the FDIC acting in its corporate capacity (FDIC/Corporate), pursuant to court approval.

Bushman made payments on the Note until August 1988. In October 1988, the Federal Home Loan Bank Board (FHLBB) declared Banc Home insolvent and appointed the FSLIC as receiver. As a result of Banc Home's insolvency, Bushman's stock in Banc Home))the collateral security on the Note))was worthless.<sup>1</sup>

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<sup>1</sup>Bushman stridently objects to the FDIC's inclusion as an addendum to its brief the FHLBB's resolution concerning Banc Home's insolvency. The addendum, contrary to the Bushman's assertions in his reply brief to this court, does not introduce the issue of the worthlessness of the stock, which was held as collateral. The district court specifically stated that "even though the collateral was no longer of value the defendant still had to pay his debt." (Emphasis added). The district court found, and we see no clear error in the factual determination, that the assets of the thrift)) if liquidated))would not cover the creditors' claims or subordinated debt, much less provide any

The instant case arose when the FDIC sued Bushman in federal district court for the balance due on the Note. Bushman asserted a number of defenses, none of which were persuasive to the district court. That court entered judgment against Bushman in December 1991 for \$4,123,980.56, with interest continuing to accrue. Bushman timely appealed.

## II

### ANALYSIS

#### A. Standard of Review

This case was tried to the district court without a jury. Findings of fact are thus reviewed for clear error.<sup>2</sup> Matters of law are, of course, reviewed de novo.<sup>3</sup>

#### B. Bushman's Assertion

Bushman's assertion of error to this court is essentially the same argument that he made to the district court. We are, as was the district court before us, singularly unimpressed.

Bushman claims that when the FHLBB declared Banc Home insolvent, he was not afforded a real opportunity to bid on the assets. He argues that the sale of the assets was conducted in an unreasonable manner. And, insists Bushman, according to Texas jurisprudence,<sup>4</sup> the unreasonable sale of assets precludes the  

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return for the stockholder.

<sup>2</sup>See FED. R. CIV. P. 52(a).

<sup>3</sup>See Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

<sup>4</sup>See Greathouse v. Charter Nat'l Bank)S.W., 1992 WL 148109 (Tex.); Tannenbaum v. Economic Lab., Inc., 628 S.W.2d 769 (Tex. 1982).

FDIC's ability to sue for the balance of the indebtedness on the loan. He theorizes that because the FDIC did not act to stop the FHLBB and the FSLIC from disposing of the assets of Banc Home in an allegedly unreasonable manner, the FDIC is estopped from suing him for a deficiency judgment on the obligation. The district court stated that Bushman's defense that "other government agencies impaired the collateral by not allowing [him] to purchase Banc Home, and thus hindered his paying the obligation then due seems obscure."<sup>5</sup> The district court's use of the word "obscure" to describe Bushman's argument is an act of genteel understatement. That defense is disingenuous legal legerdemain.

Even if we were to make the bizarre assumption that the FHLBB and the FSLIC sought to destroy Bushman and Banc Home, and that Bushman was not given a real opportunity to bid on the assets of Banc Home because, inter alia, the "Plan . . . supervisor did not like him," the FDIC's right to obtain a personal judgment against Bushman on the Note still would not be affected. The FDIC held the Note secured by stock in Banc Home, and Bushman was the maker of the Note. When Bushman defaulted, the FDIC had the option of either (1) bringing a personal action against Bushman as maker or (2) foreclosing on the collateral, having it sold in a commercially reasonable manner, and then suing Bushman for the remaining balance due on the debt. The FDIC elected the first alternative, so neither deficiency judgment nor commercially reasonable disposition was ever at issue.

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<sup>5</sup>(Emphasis added).

When the loan went into default, the collateral that the FDIC held))Bushman's stock in Banc Home))was, as the district court stated, "no longer of value." Understandably, the FDIC did not pursue its second option of foreclosure. As the FDIC did not foreclose on the collateral, Greathouse and Tannenbaum simply are not implicated in the instant case.

In his reply brief to this court, Bushman concedes that "[t]he FDIC-Corporate did not have liability for the actions of the FSLIC of the FHLBB directly." He asserts, however, that the FDIC, as holder of the collateral, had a duty to act to preserve the collateral, "and the fact that other agencies of the United States acted in the disposition of the collateral does not excuse the FDIC-Corporate." Bushman's assertion is nothing less than frivolous. Although a holder of collateral might have a duty to preserve the asset if he or she has possession of the collateral itself, the only thing held by the FDIC was one stock certificate. If the FDIC had any preservation obligation, it was to preserve the stock certificate that was in its possession))which it did. The FDIC did not have an obligation to preserve the value of the corporation's capital stock represented by that certificate, much less the underlying assets of the corporation.

The Texas jurisprudence relied on by Bushman is wholly inapplicable to the case. The Greathouse decision, for example, involved a note holder who, in connection with a foreclosure, had seized and disposed of the collateral securing the note, then sought a deficiency judgment against maker of the note. Here, the

FDIC did not seize and dispose of the collateral))i.e., the stock in Banc Home; neither did the FSLIC or the FHLBB, for that matter. Rather, the FDIC simply sued the maker of the Note personally, as was its right.

### III

#### CONCLUSION

The district court properly concluded that the FDIC was within its right to sue Bushman personally on the indebtedness under the Note. Bushman's assertion that the FDIC is estopped from collecting on the Note because it failed to stop the FHLBB and the FSLIC from allegedly disposing of the assets of Banc Home in a commercially unreasonable manner is, as discussed above, wholly without merit. Finding no reversible error in the judgment of the district court, we

AFFIRM.