IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8181

RESOLUTION TRUST CORPORATION,
As Conservator for Sunbelt Federal Savings, FSB,

Plaintiff-Appellee,

VERSUS

BRIAN D. PARDO and ELIZABETH S. PARDO,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(W 91 CV 273)

(December 10, 1992)

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Brian D. and Elizabeth S. Pardo appeal the grant of summary judgment against them and in favor of the Resolution Trust Corporation ("RTC"). The district court held that the D'Oench, Duhme doctrine and its statutory counterpart, 12 U.S.C. § 1823(e), bars the Pardos, makers on a promissory note, from asserting their

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* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

affirmative defenses to its enforcement against the RTC, the ultimate holder of the note.[1] Finding no error, we affirm.

I.

On December 2, 1984, the Pardos executed a promissory note in the principal amount of $200,000 to Western Savings Association, payable in monthly installments beginning in January 1985 and maturing December 2, 1989. After November 2, 1987, the Pardos ceased to make required the monthly installments due under the note and failed to remit the balance of the note at maturity. The unpaid principal due is $198,499.37; as of February 11, 1991, $89,971.91 in unpaid interest had accrued on the note, with interest continuing to accrue at the rate of $73.42 per day.

In September 1986, Western Savings Association was declared insolvent by the Federal Home Loan Bank Board ("FHLBB"), and the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed receiver. Created as a successor corporation, Western Federal Savings Association acquired substantially all of Western Savings Association's assets, including the Pardos' note, from the FSLIC. On August 19, 1988, however, Western Federal Savings Association was declared insolvent, and substantially all of its assets and the note were transferred to Sunbelt Savings, FSB. This

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[1] The district court also ruled, in the alternative, that the Pardos' defenses were barred by the federal holder in due course doctrine. See B.L. Nelson & Assoc., Inc. v. Sunbelt Sav., 733 F. Supp. 1106, 1109 (N.D. Tex. 1990). Because application of the D'Oench, Duhme doctrine constitutes an adequate and independent basis upon which to sustain the grant of summary judgment, we do not reach the question of the federal holder in due course doctrine's applicability.

destination proved to be no more than a rest stop, however, for in April 1991, Sunbelt Savings, FSB, was declared unsafe to transact business, and the RTC was appointed its receiver; Sunbelt Federal Savings, FSB, subsequently was created and purchased substantially all of its assets. The RTC was appointed as conservator.

II.

Sunbelt Savings, FSB, originally brought suit in state court to collect the amount due on the note. Upon its insolvency, the RTC as conservator intervened as plaintiff and removed the action to federal court. On January 15, 1992, the RTC moved for summary judgment on all its claims, asserting that it had satisfied all elements for recovery on the note as a matter of law, that the RTC had assumed no liabilities arising out of the note, and that the affirmative defenses interposed by the Pardos were barred by the federal common law doctrine enunciated in D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942), and section 1823(e).

Conceding their default on the loan, the Pardos asserted, in opposition to the RTC's claim, the affirmative defenses of estoppel, fraudulent inducement, and lack of consideration. At the time the Pardos signed the note, Mr. Pardo's company, ASK Corporation, was indebted to Western Savings Association for approximately five million dollars, and Mr. and Mrs. Pardo were personally indebted to Western for approximately one million dollars. ASK Corporation maintained a depository account with Western in the amount of $2,000,000; the Pardos' personal indebtedness was secured by a lien upon ASK stock and upon certain real estate and machinery and equipment.

Two of ASK's directors)) Jarrett Woods, also the President and CEO of Western Savings Association, and Michael Vaughn, its general counsel)) approached Mr. Pardo in November 1984 in connection with his attempt to renew the loan. They informed him that while the original loan was adequately collateralized, any renewal would be conditioned upon his providing additional collateral. They suggested a "split" of the original loan into two, with additional collateral being attached to the original loan. This second loan)) signed on December 4, 1984, for $200,000, and secured by a second mortgage on the Pardos' Coryell County ranch property)) is the loan at issue in this case.

The Pardos' affirmative defenses arise principally from the fact that Woods and Vaughn's advice was provided after Western received a temporary order to cease and desist from the FHLBB dated June 22, 1984, as a consequence of the thrift's precarious financial condition and its alleged pursuit of unsafe and unsound banking practices. Western waived administrative review, and the order became permanent by stipulation on June 27, 1984. Woods never informed Pardo of the bank's predicament.[2] Pardo claims that had he known of Western's financial difficulties, he would not have

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[2] The Pardos intimate that Woods's actions with respect to the recollateralized loan constituted one of the "drastic measures to avert regulatory action" with which the Federal Deposit Insurance Corporation ("FDIC") charged Woods in its civil complaint against him filed October 19, 1990.

renewed the note. Additionally, Pardo contends that the note lacked consideration, as Western had not given new value for it.

The district court granted summary judgment in favor of the RTC and found the Pardos' affirmative defenses insufficient as a matter of law. According to the court, the D'Oench, Duhme doctrine and section 1823(e) bar the Pardos' claims and defenses because they relate to collateral issues unrecorded in Western and Sunbelt's records. The court also concluded, in the alternative, that the purchase and assumption agreement between the RTC and Western Federal Savings Association did not include any unsecured claims arising from the thrift's conduct. Hence, the RTC could not be liable; any theories upon which the Pardos sought recovery were therefore properly asserted against the FSLIC in its capacity as receiver.

III.

We review de novo the district court's decision to grant summary judgment. Samaad v. City of Dallas, 940 F.2d 925, 937 (5th Cir. 1991). The pertinent test is supplied by Fed. R. Civ. P. 56(c), which provides that summary judgment shall issue if the record evidence presented by the parties "show[s] 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." A material fact is in genuine dispute when the evidence, viewed in the light most favorable to the non-movant, would permit a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 248 (1986).

IV.

The instant promissory note is a negotiable instrument governed by Texas law, specifically Tex. Bus. & Comm. Code art. 3. Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 797 (Tex. 1992) (holding variable-rate notes such as the one at issue here to be negotiable instruments governed by article 3); Ackerman v. FDIC, 973 F.2d 1221, 1223 (5th Cir. 1992) (applying Amberboy). Recovery on the note is governed by Tex. Bus. & Comm. Code § 3.307(b) (Vernon 1968) (Texas UCC). Under section 3.307 and Texas caselaw interpreting it, the RTC has the burden of proving that the note was executed, the note is in default, RTC is the present holder of the note, and a certain balance is due and owing. B.L. Nelson & Assoc., 733 F. Supp. at 1109. Proof of these elements will establish the RTC's right to recover from the Pardos.

It is undisputed that the RTC has established these elements in its motion for summary judgment and accordingly is entitled to recovery on the note. Unless the Pardos' affirmative defenses present a contested issue of material fact, we must affirm the summary judgment.

The district court concluded that the Pardos' defenses were barred by application of D'Oench, Duhme and section 1823(e). Under either of these, "[n]o agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC]" unless it meets four specific requirements.[3]

The D'Oench, Duhme doctrine is "a common law rule of estoppel precluding a borrower from asserting against the FDIC defenses based upon secret or unrecorded `side agreements' that alter[] the terms of facially unqualified obligations." Bell & Murphy & Assoc. v. InterFirst Bank Gateway, N.A., 894 F.2d 750, 753 (5th Cir.), cert. denied, 111 S. Ct. 244 (1990). The focus of the court's inquiry must be upon the instrument itself; consideration of collateral evidence intended to prove the instrument void or invalid is prohibited. "Simply put, transactions not reflected on the bank's books do not appear on the judicial radar screen either." Bowen v. FDIC, 915 F.2d 1013, 1016 (5th Cir. 1990). As the Court noted in Langley v. FDIC, 484 U.S. 86, 91-92 (1987), a

[3] The full text of § 1823(e) provides,

> No agreement which tends to defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement))
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> (1) shall be in writing,
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> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
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> (3) was approved by the Board of Directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
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> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

As the policies to be served by the D'Oench, Duhme doctrine and § 1823(e) are identical, the reasoning applied in D'Oench, Duhme cases is applicable to § 1823(e) cases, and vice-versa. Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n, 885 F.2d 266, 274 (5th Cir. 1989). Our analysis in what follows, therefore, will not distinguish among those cases applying one and not the other.

central goal of the statute is to protect the FDIC from undisclosed "secret" agreements that, if credited, would undermine the value of a failed thrift's assets:

> One purpose of the § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when . . . the FDIC is deciding whether to liquidate a failed bank or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank. The last kind of evaluation, in particular, must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

(Quoting Gunter v. Hutcheson, 674 F.2d 862, 865 (11th Cir.), cert. denied, 459 U.S. 826 (1982).) (Citations omitted.)

Under D'Oench, Duhme, a claim or defense against a federal institution will be estopped where the borrower has "lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled." D'Oench, Duhme, 315 U.S. at 460. In Langley, the Court extended the reach of D'Oench, Duhme to estop the borrower's assertion, against the FDIC, of the defense of fraud in the inducement to a note executed to finance the purchase of a parcel of land. The bank, as original holder of the note, allegedly had misrepresented the amount of land and mineral acreage in the tract and falsely warranted that there were no outstanding mineral leases on the property. Finding that the truth of an express or implied warranty constituted a condition upon the obligation to repay and therefore was part of the "agreement" to which the recording requirements of section 1823(e) apply, the Court concluded that where such alleged conditions fail to meet the statute's requirements, they are not assertable as defenses against the FDIC. Langley, 484 U.S. at 96.

More recently, the Eleventh Circuit found Langley dispositive of a case presenting a factual scenario nearly identical to that of the case before us. In FSLIC v. Gordy, 928 F.2d 1558, 1565 (11th Cir. 1991), the borrower asserted the personal defense of fraud in the factum)) which Langley had conceded in dicta might not be barred by D'Oench, Duhme, see 484 U.S. at 93 ("[r]espondent conceded at oral argument that the real defense of fraud in the factum . . . would take the instrument out of § 1823(e)"))) where Vernon Savings & Loan, the original holder of the note, was conceded to have misrepresented its financial condition and concealed the fact of its insolvency throughout the period in which the terms of the note were negotiated. 928 F.2d at 1560-61. See also FDIC v. Payne, 973 F.2d 403 (5th Cir. 1992) (citing Langley in applying D'Oench to estop guarantor's assertion of defense of bank's fraudulent inducement that misrepresented maker's financial condition).

The Eleventh Circuit rejected the borrower's contention that such misrepresentations went to the character or essential terms of the note and therefore constituted fraud in the factum. Rather, Vernon's misrepresentations of solvency)) like those the Pardos allege to have been made by Western Savings Association)) merely induced the borrower to enter into the agreement. As such, the misrepresentations were prototypical fraud in the inducement,[4] assertion of which against the FDIC was barred by the logic of Langley.

The conclusion reached in Gordy reinforces our belief that Langley precludes the Pardos' assertion of their defense to the RTC's enforcement. As an implied condition to the Pardos' obligation to repay their loan, the truthfulness of Western Savings Association' misrepresentations (or deceptive omissions) as to its financial plight constituted a part of the "agreement," as that term is used in section 1823(e). As such, the lack of notice to the FDIC resulting from the Pardos' failure to record these conditions in accordance with section 1823(e)'s provisions invoked that section's prohibition. They may not now assert, as a defense, Western's fraud, inasmuch as the FDIC could not have had notice of it when contemplating the takeover of the failing thrift.

Against the application of Langley to the facts of the instant case, the Pardos urge that a more appropriate guide is provided by

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[4] With this conclusion as to Western's alleged misrepresentations the Pardos are apparently in accord. Attempting to distinguish the instant case from Langley, their brief nonetheless presents a classic fraud-in-the-inducement defense:

> However, the instant case is distinctly different from Langley. Whereas in Langley a condition of repayment of the loan was the truthfulness of the affirmative representations made by the lender, the instant case establishes a situation where the borrower was induced into signing the subject note based on the concealment of material facts on the part of the lender (i.e. the fact that the lender was in a financially precarious state). Had Defendants been aware of the precarious financial condition of the lender, Defendants would not have entered into the subject note.

While the misrepresentations made by the bank in Langley are indeed distinguishable in their nature from those made by Western Savings Association, Gordy demonstrates that any such distinction is one without a difference. Fraud in the inducement, however arising, is a defense barred by § 1823(e), so long as its anti-secrecy provisions have not been complied with.

FDIC v. Meo, 505 F.2d 790 (9th Cir. 1974). In carving out of D'Oench, Duhme's expansive contours an exception for innocent makers harmed by a bank's misrepresentations, the Ninth Circuit reasoned,

> A bona fide borrower, like Meo, is not an insurer of financial representations of the bank with whom he conducts business. We conclude that a bank borrower who was neither a party to any deceptive scheme involving, nor negligent with respect to, circumstances giving rise to the claimed defense to his note is not estopped from asserting such defense against the bank's receiver.

Id. at 793.

Were we to apply Meo's "innocent maker" exception to the Pardos' situation, we perhaps would find that section 1823(e) posed no bar to the Pardos' assertion of the thrift's fraud, where the Pardos themselves come before us bearing clean hands. We must reject, however, any contention that such an equitable exception survived Langley.[5] While D'Oench, Duhme is triggered whenever a borrower has "lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled," intent to deceive on the borrower's part is not required to invoke the section's operation. The doctrine applies "even when the borrower does not intend to deceive banking authorities [and even if] the underlying transaction [is not] fraudulent." Bowen, 915 F.2d at 1016 (quoting Beighley v. FDIC, 868 F.2d 776, 784 (5th Cir. 1989).

Indeed, Langley resolved a circuit split on this very point, affirming the Fifth Circuit's opinion expressly rejecting any such

[5] See Payne, 973 F.2d at 406-07 (noting that the "Langley Court destroyed the `wholly innocent borrower' exception to the D'Oench, Duhme doctrine").

innocence exception[6] and overruling two cases suggesting that D'Oench, Duhme poses no bar where a borrower enters into a loan based in part upon a bank's misrepresentations as to its financial condition. See FDIC v. Hatmaker, 756 F.2d 34, 37 (6th Cir. 1985) (dictum); Gunter v. Hutcheson, 674 F.2d 862, 867 (11th Cir.), cert. denied, 459 U.S. 826 (1982). See also Gordy, 928 F.2d at 1564 n.12 (noting Langley's resolution of circuit split in favor of estoppel). Even if we were to find Meo applicable to the Pardos' situation, we cannot accept that it has survived the Supreme Court's plain rejection of its reasoning in Langley.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment.

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[6] See FDIC v. Langley, 792 F.2d 541, 545 (5th Cir. 1986), aff'd, 484 U.S. 86 (1987):

> Further, the courts have held that under section 1823(e) and D'Oench, the obligor's intent in deceiving bank examiners or in creating incomplete records is immaterial; rather, "[t]he statute, by its terms does not require that the obligor lend himself to a deceptive scheme in the sense of participating with culpability in a fraud."

(Quoting Chatham Ventures, Inc. v. FDIC, 651 F.2d 355, 361 (5th Cir. Unit B July 1981), cert. denied, 456 U.S. 972 (1982).) Cf. Langley, 484 U.S. at 93 ("We conclude, however, that neither fraud in the inducement nor knowledge by the FDIC is relevant to the section's application.").