IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-9594
Summary Calendar

JACK N. LEE, Individually and as the Administrator of the Estate of Verna B. Meyers,

Plaintiff-Appellant,

versus

BRUCE M. H. CLARK, ET AL.,

Defendants-Third Party Defendants,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant-Third Party Complaint-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana
(92-CV-707-K(1))

(September 20, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Jack N. Lee and his late wife, Verna B. Meyers ("the Lees") filed suit in Louisiana state court to dissolve the sale of two apartment complexes to Bruce and Sandra Levy Clark ("the Clarks"). After removing the case to federal court, the Federal Deposit Insurance Corporation ("FDIC"), who currently holds title to the two properties after foreclosing on the Clarks, moved for summary judgment, arguing that the Lees could not dissolve the sale because of the "hold harmless" agreement signed by the Lees in favor of the First City Bank ("FCB").[1] The district court granted summary judgment to the FDIC and the Lees filed this appeal. For the reasons stated below, we affirm.

I

In the spring of 1985, the Clarks purchased two apartment complexes located in Louisiana from the Lees pursuant to an act of credit sale. Under this act of credit sale, the Clarks made a cash down payment to the Lees and delivered a $415,000 note for the balance of the purchase price. Payment of this note was secured by the vendor's lien and mortgage.

At about the same time, FCB loaned approximately $1.125 million to the Clarks for the purchase and renovation of the apartment complexes and other properties owned by the Clarks. That loan was secured by a pledge of a $1.5 million collateral mortgage

[1]On May 17, 1991, the FDIC was appointed receiver of First City Bank. The FDIC was then substituted in place of First City Bank in this litigation.

note secured by a collateral mortgage on the two apartment complexes. At the request of FCB, the Lees agreed to subordinate their vendor's lien and mortgage as to one of the properties in favor of FCB's collateral mortgage, but the Lees retained their vendor's lien and mortgage on the second property.

In June of 1987, the Clarks needed an additional $200,000 to complete the renovation of the apartment complex on which the Lees held the vendor's lien and mortgage. The Clarks contacted many sources to borrow the additional money, but they were unable to find a willing lender. The Clarks' inability to obtain the loan left the Lees in the first lien position on an unfinished, untenantable, non-revenue producing property. After negotiation among the Lees, the Clarks, and FCB, FCB agreed to loan the Clarks the $200,000. In return, the Lees agreed to subordinate their mortgage on the second property in favor of FCB and agreed to sign a "hold harmless" agreement. FCB then loaned the Clarks the requested $200,000. Eventually, however, the Clarks defaulted on the debt to FCB, and FCB foreclosed on both properties, acquiring title at a judicial sale. The Clarks also failed to make timely payments to the Lees on the original purchase-money note, and the Lees never received full payment for the properties. The Clarks have since filed for bankruptcy relief.

II

In May of 1989, the Lees sued the Clarks and FCB in Louisiana state court to dissolve the sale of the properties to the Clarks in

an effort to recover the properties from FCB.[2] At about the same time, the FDIC was appointed receiver of FCB, and was substituted as a party in this litigation. The FDIC removed the case to federal court pursuant to 12 U.S.C. § 1821(d)(6)(A)(ii) and moved for summary judgment, arguing that the hold harmless agreement signed by the Lees prevented them from asserting any causes of action arising as a result of the credit transactions among the Lees, the Clarks, and FCB. The magistrate granted the FDIC's motion, stating that the hold harmless agreement prevented the dissolution of the sale. The Lees filed a motion for reconsideration asserting two additional arguments, but the motion was denied. The Lees then filed this appeal.

III

The issue in this case is whether the hold harmless agreement signed by the Lees prevents the Lees from dissolving the sale of the properties to the Clarks. The review of an entry of summary judgment is de novo. FDIC v. Myers, 955 F.2d 348, 349 (5th Cir. 1992). We review the record independently to determine if the movant is entitled to judgment as a matter of law, drawing any factual inferences in the light most favorable to the non-movant.

[2]Louisiana law allows an unpaid vendor to demand the dissolution of the sale by judicial process. Robertson v. Buoni, 504 So.2d 860, 862 (La. 1987). This right of dissolution places "matters in the same state as though the obligation had not existed." Id. In the sale of immovables, this right of dissolution exists against the original purchaser and also against third persons acquiring real rights or title to the property. Id.

Degan v. Ford Motor Co., 869 F.2d 889, 892 (5th Cir. 1989). In this case, there are no issues of material fact.

This case hinges on the meaning and effect of the hold harmless agreement signed by the Lees. Under Louisiana law, a court is required to enforce a contract according to the intent of the parties as evidenced in the contract. Ransom v. Camcraft, Inc., 580 So.2d 1073, 1077 (La. Ct. App. 1991); Liem v. Austin Power, Inc., 569 So.2d 601, 608 (La. Ct. App. 1990). When the words of the contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. LA. CIV. CODE ANN. art. 2046 (West 1952); see also Massachusetts Mutual Life Insurance Co. v. Nails, 549 So.2d 826, 832 (La. 1989); Ransom v. Camcraft, Inc., 580 So.2d at 1077. The rules of construction cannot be used to create ambiguity where none exists and a court cannot create a new contract where the language employed expresses the true intent of the parties. Ransom v. Camcraft, Inc., 580 So.2d at 1077. The general rules governing the interpretation of contracts also apply when construing indemnity contracts. Liem v. Austin Power, Inc., 569 So.2d at 608.

The hold harmless agreement signed by the Lees states in part that the Lees "agree to indemnify and hold harmless [FCB] from any and all causes of actions [sic] arising as a result of the credit transactions between [the Clarks, the Lees and FCB] including in particular but not limited to the execution of an Act of Subordination by [the Lees] unto [FCB]." The Lees' right to

dissolve the sale of the properties to the Clarks is derived directly from the credit sale of the properties itself. See LA. CIV. CODE ANN. art. 2561 (West 1952).[3] Clearly, the sale of the properties that gave rise to the right to dissolve was a credit transaction between the Lees and the Clarks. Because the hold harmless agreement expressly applies to "any and all causes of actions [sic] arising as a result of the credit transactions between [the Lees, the Clarks and FCB]," the Lees cannot dissolve the sale of the properties.

The fact that FCB was not a party to the act of credit sale does not mean that the act of credit sale was not covered by the hold harmless agreement. Under Louisiana law, a court should avoid a construction that renders the contract meaningless in favor of a construction that gives the contract its intended effect. Home Insurance Co. v. National Tea Co., 588 So.2d 361, 364 (La. 1991). To construe the hold harmless agreement as covering only those transactions in which all three parties had active roles would render the hold harmless agreement meaningless. During the course of events leading up to this litigation, the Clarks experienced financial difficulties that limited their ability to

[3]LA. CIV. CODE ANN. art. 2561 states "If the buyer does not pay the price, the seller may sue for the dissolution of the sale. This right of dissolution shall be an accessory of the credit representing the price, and if it be held by more than one person all must join in the demand for dissolution; but if any refuse, the others by paying the amount due the parties who refuse shall become subrogated to their rights."

raise additional funds to complete the renovations on the apartment complex on which the Lees held the first lien. At that point, the Lees must have realized that there was a risk that the Clarks might default on the purchase-money note.[4] However, because of the partially finished renovations, the apartment complex was not a revenue-generating property, thus making foreclosure by the Lees an unattractive alternative. Instead, the Lees, who were represented by counsel, took part in negotiations with the Clarks and FCB, and these negotiations resulted in FCB loaning an additional $200,000 to the Clarks. In exchange for the loan to the Clarks, the Lees subrogated their vendor's lien in favor of FCB and the Lees agreed, as evidenced by the hold harmless agreement, to shoulder any risk that they may never receive payment of the purchase price from the Clarks. One of the possible risks assumed by the Lees was that FCB might foreclose upon the properties pursuant to the subrogation agreements, leaving the Lees with no collateral securing their purchase-money note. Now that it is unlikely that the Lees will receive payment of the purchase price from the Clarks, they cannot shift their loss to FCB (now the FDIC) by dissolving the sale and recovering title to the properties. Construing the hold harmless agreement as inapplicable to the act of credit sale between the

[4]According to the Lees' brief, at the time the $200,000 loan was negotiated, the Clarks had been making monthly installments on the purchase money loan, however, "most of which were late and did not keep up with accruing interest." This, coupled with the Clarks' inability to find a lender should have put the Lees on notice that the Clarks were in a financially precarious position.

Lees and the Clarks would gut this bargained-for agreement and render it meaningless.[5]

IV

For the foregoing reasons, the order of the district court granting summary judgment in favor of the FDIC and dismissing the Lees' suit to dissolve the sale is

A F F I R M E D.

[5]The Lees presented three arguments why the hold harmless agreement should not prevent the dissolution of the sale of the properties. First, they argue that FCB was negligent in failing to obtain a waiver of the right to dissolve the sale of properties, and that the hold harmless agreement does not indemnify the FCB against its own negligence. This argument fails because FCB holds title to the properties because of the subrogation agreements and the hold harmless agreement, not because of any negligent act on the part of FCB. The Lees presented two additional arguments which that were raised for the first time in their motion to reconsider, which the district court denied. Because a motion to reconsider cannot be used to relitigate old issues or advance new theories, the district court properly denied the motion to reconsider. See In the Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388, 393 (5th Cir. 1989), cert. denied, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 763 (1990), and overruled on other grounds, Advanced United Expressways v. Eastman Kodak, 965 F.2d 1347, 1352 (1992).