IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1533
Summary Calendar

LIBERTY NATIONAL BANK, ET AL.,

Plaintiffs,

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its separate corporate capacity,

Plaintiff-Appellee,

v.

JULIAN RORIE, MIKE RORIE and JERRY REID,
Individually and d/b/a REID, RORIE, and RORIE,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Texas
(3:89-CV-1553-P)

(April 6, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

PER CURIAM:

On June 12, 1985, defendants Julian Rorie, Mike Rorie, and Jerry Reid executed a promissory note payable to Morris Gregory and Jimmy D. Smith in the face amount of $200,000.[1] That same day,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] Gregory and Smith were third-party defendants below, but the district court granted plaintiff's motion for a separate trial of the third-party defendants. Its judgment for appellees was certified pursuant to Fed. Rule Civ. Proc. 54(b).

Gregory and Smith granted Liberty National Bank a security interest in the note in order to secure a letter of credit. Unable to obtain payment from Gregory and Smith on the letter of credit, Liberty held a public foreclosure sale at which it purchased the note for $1,000. Shortly after purchasing the note in August 1987, Liberty notified defendants of their default under the terms of the note and demanded payment. With no payment forthcoming, Liberty filed suit on the note in state court in Dallas. The case was removed to federal court after Liberty was declared insolvent and the FDIC appointed receiver.

Defendants moved for summary judgment on the ground that the FDIC could not prove that Liberty paid anything of value for the note and consequently that Liberty owned the note at the time it was declared insolvent.[2] After a joint pretrial order was filed, the district court denied the defendants' summary judgment motion and further ruled that the only issue to be tried before the jury would be whether the defendants had executed the note. In the same order, the district court ruled "in favor of the [p]laintiff with respect to all other contested issues of fact ... and with respect to all other contested issues of law" as set forth in the amended joint pretrial order.

Defendants moved to reconsider only the district court's ruling that the FDIC owned the note, but the court denied this

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[2] If Liberty did not own the note at the time the FDIC was appointed receiver, then it follows that the FDIC in its corporate capacity could not have acquired the note from the FDIC as receiver for Liberty.

motion.[3] Six months after the court's dispositive ruling, the sole issue of execution was tried to a jury, which found that defendants had executed the note. Final judgment was entered against defendants in the amount of $200,000 -- plus pre- and post-judgment interest -- based on the jury's verdict and the prior order ruling for the plaintiff on all contested issues in the pretrial order. Defendants appeal from this final judgment of the district court. Finding no error, we AFFIRM.

As an initial level of attack, the defendants contend that the district court's order denying their summary judgment motion and ruling for the plaintiff on *all* contested issues of law and all but one fact issue operated as an improper sua sponte summary judgment. Because defendants were provided no notice of the district court's contemplated action, they insist they were deprived of the opportunity to make their factual and legal arguments. The defendant-appellants further maintain that their own motion for summary judgment on the issue of ownership could not have put them on notice that the court might sua sponte rule in such a way as to effectively grant summary judgment for the plaintiff on all issues except for execution. Consequently, the district court's order -- or, as the defendants urge, the sua sponte grant of summary judgment for the plaintiff -- must be reversed. We are left unconvinced.

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[3] In ruling for the plaintiff on all other contested issues of law as put forth in the amended pretrial order, the district court thereby decided that the FDIC in its corporate capacity was the owner of the note payable to Gregory and Smith. For the sake of clarity, "FDIC" will refer to that agency operating in its corporate capacity, unless otherwise indicated.

A district court may grant summary judgment sua sponte, provided the adverse party has been given proper notice. See Arkwright-Boston Mfgs. Mut. v. Aries Marine Corp., 932 F.2d 442, 445 (5th Cir. 1991). The requirement of proper notice was arguably met here as the defendants' *own* motion for summary judgment on the issue of ownership put them on notice that the district court might conclude in its evaluation of the ownership issue that summary judgment for the nonmovant was appropriate. But in any event, the defendants -- having entered into the amended joint pretrial order with the plaintiffs -- were unquestionably aware of the consequences of a determination that the FDIC owned the note on the other contested issues of fact in the pretrial order. That is, the district court's permissible determination that the FDIC owned the note predictably obviated the determination of most of the other fact issues. In short, the defendants may not claim unfair surprise. And even if the court's dispositive ruling was unexpected, defendants could and did attempt to gain reconsideration of the issue of FDIC's status as owner and holder of the note. They had ample opportunity in the six months between that ruling and the trial to persuade the court to reverse other aspects of its order. Defendants' rights were not prejudiced by the court's action.

On the merits of the district court's sua sponte determination that the FDIC owned the note, the defendants make two

arguments.[4] First, they contend that the FDIC did not own the note as a matter of law because Liberty Bank never paid Smith and Gregory nor credited their account with the $1,000 foreclosure bid. While the record does not reflect a credit to the debtors' account in the amount of the foreclosure bid, the record does reflect that Liberty -- the sole bidder at the sale -- made a $1,000 bid at the foreclosure sale. As the appellee FDIC correctly points out, the absence of this accounting entry does not invalidate the sale, but at most may provide a damage remedy *to the debtors* for improper application of disposition proceeds.[5] See Tex. Bus. & Com. Code Ann. §9.507(a) (West 1991).

The defendant's second argument is that the FDIC failed to establish that the FDIC as receiver actually transferred the note to the FDIC in its corporate capacity because the receiver also transferred assets of the failed bank to an assuming bank. Specifically, the defendants maintain that this case is controlled by FDIC v. McCrary, 977 F.2d 192 (5th Cir. 1992) in which this court reversed summary judgment for the FDIC on the issue of note ownership. However, the court in McCrary reversed precisely

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[4] In reviewing a summary judgment ruling, we should not affirm unless "convinced, after an independent review of the record that 'there is no genuine issue as to any material fact' and that the movant is 'entitled to a judgment as a matter of law.'" Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1364 (5th Cir. 1987) (quoting Fed. R. Civ. P. 56(c)).

[5] The defendants also complain that they were entitled to notice of the foreclosure sale. Even assuming that the makers of a note serving *as security* for the underlying debt are entitled to notice as "debtors" under Tex. Bus. & Com. Code Ann. §9.504(c), any failure of the creditor to fulfill the duties of this provision are remedied by barring the creditor's suit for a deficiency. See Gray v. FDIC, 841 S.W.2d 72, 86 (Tex. App.-- Houston [1st Dist.] 1992, no writ). In short, the alleged failure of notice -- even assuming a duty to notify -- does not render the sale invalid.

because the defendant "pointed to evidence in the record demonstrating a legitimate fear that the FDIC is not the owner and holder of the Note in question" and that some other entity might later approach demanding payment. Id. at 195. McCrary is simply inapposite as the record before us creates no fear that the FDIC is not the owner of the note. In fact, the record clearly reflects that the assuming bank disavowed any interest whatsoever in the note, and that the note was transferred from the FDIC as receiver to the FDIC in its corporate capacity. In short, the appellant's argument is without merit.[6]

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

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[6] We briefly address the defendants' final contention -- namely that the doctrine of D'Oench, Duhme and its codification in 12 U.S.C. §1823(e) do not apply to a note to which a financial institution is not a party. This court has previously determined that the fact that a financial institution is not the initial obligee on a note is of no consequence. See Chatham Ventures, Inc. v. FDIC, 651 F.2d 355, 360 & n.10 (5th Cir. Unit B July 1981), cert. denied, 456 U.S. 972 (1982).