UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1590
Summary Calendar

FEDERAL DEPOSIT INSURANCE CORP.,

Plaintiff-Appellee,

VERSUS

ELAINE E. NELSON, ET AL.,

Defendants,

ELAINE E. NELSON, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-0635-D)

(March 15, 1994)

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

PER CURIAM*:

Defendants-Appellants Elaine E. Nelson and Galen B. Edwards challenge the district court's conclusion that their failure to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

specifically deny the authority of an agent made them liable on a note in which they were named as makers by that purported agent. Defendants-Appellants Bedford D. Edwards and Joyce Edwards contest the district court's determination that they waived their defense of res judicata against Plaintiff-Appellee Federal Deposit Insurance Corporation ("FDIC") by failing to object to claim-splitting by the FDIC. Finding no error, we affirm.

I

FACTS AND PROCEEDINGS

The facts relevant to this appeal are undisputed. In October 1988, Bedford Edwards executed a promissory note ("Note 1") with an original principal sum of $100,323.23 payable to NCNB Texas National Bank ("NCNB"). Bedford Edwards signed this note as follows:

> /s/ Bedford D. Edwards
> BEDFORD D. EDWARDS, Individually and as
> ATTORNEY-IN-FACT for GALEN B. EDWARDS
> and ELAINE E. NELSON

Galen Edwards and Elaine Nelson (the "Note One Defendants") are the adult children of Bedford Edwards.

NCNB assigned Note 1 to the FDIC, which filed the instant suit. The FDIC alleged that Note 1 matured 90 days from the date of its making; that it has remained unpaid; and that on November 1, 1992 the sum of $99,965.55 in principal and $34,913.88 in accrued interest was due on that note.

In May 1988, Bedford Edwards and his wife, Joyce Edwards (the "Note Two Defendants"), executed a written promissory note ("Note 2") with an original principal sum of $80,000.00 payable to First

RepublicBank Waco. Eventually, NCNB acquired this note and also assigned it to the FDIC. In the instant suit, the FDIC alleged that Note 2 is secured by certain real property in McLennan, Texas; that Note 2 matured in May 1990 but remains unpaid; and that on November 1, 1992 the sum of $80,000 in principal and $31,866.40 in accrued interest was due on that note.

A.N.E. Properties, a non-party to the instant appeal, filed a suit related to the McLennan property, which was allegedly encumbered as collateral for Note 2. In A.N.E. Properties v. NCNB Texas National Bank, this non-party sued NCNB and the United States of America to quiet title to that property. The FDIC intervened in that action and also filed a third-party complaint therein against the Note Two Defendants for, inter alia, fraud and misrepresentation in executing the deed of trust purporting to encumber that property as collateral for Note 2. The A.N.E. Properties litigation and the instant case were prosecuted simultaneously, albeit the A.N.E. Properties litigation was the first to reach judgment.

Neither of the Note Two Defendants objected to this parallel litigation as constituting claim-splitting by the FDIC. After judgment was entered in A.N.E. Properties, however, those defendants attempted to raise a defense of res judicata in the instant case.

Thereafter, the FDIC moved for summary judgment on Note 1 and

on Note 2. In the issues relevant to this appeal,[1] the district court concluded that the Note One Defendants' failure specifically to deny the authority of Bedford Edwards as their agent made them liable on Note 1. As to Note 2, the district court concluded that the Note Two Defendants' failure to object to the purported splitting of claims by the FDIC constituted waiver of their res judicata defense. Accordingly, the district court granted summary judgment in favor of the FDIC on both Note 1 and Note 2. All four Defendants-Appellants timely appealed.

II

DISCUSSION

A. Failure to Deny Authority of Agent

Bedford Edwards signed Note 1 individually and as attorney-in-fact for the Note One Defendants. The FDIC produced Note 1 to establish the liability of the Note One Defendants, but offered no proof of the authority of Bedford Edwards to sign the note as their agent. For their part, the Note One Defendants never specifically denied the authority of Bedford Edwards to act as their agent. They contend, however, that they need not deny such authority, insisting instead that the FDIC had the burden of proving the authority of the agent, and that the FDIC failed to carry its burden.

We disagree. Section 3.403 of the Texas Business and

[1]The FDIC sued to collect on four notes. On appeal, the Defendants-Appellants have raised only two arguments regarding two of those four notes and none as to the remaining two notes. Any arguments not made on appeal are deemed waived. E.g., Kincade v. General Tire & Rubber Co., 635 F.2d 501, 504-06 (5th Cir. 1981).

Commercial Code provides: "A signature [on a note] may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation."[2] Regarding proof of authority, §3.307 of that same code provides in pertinent part:

> Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue:
>
> . . .
>
> (2) the signature is presumed to be genuine or authorized . . . .
>
> When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.[3]

Thus, as the district court aptly observed, under §3.307 the FDIC was entitled to a presumption that Bedford Edwards had the requisite authority once it produced Note 1. The failure of the Note One Defendants specifically to deny this authority or otherwise attempt to rebut this presumption made it conclusive.[4]

B. Waiver of Res Judicata Defense

The FDIC intervened in A.N.E. Properties, a suit involving the validity of the collateral provided for Note 2. In this suit, the FDIC filed a third-party complaint against the Note Two Defendants, alleging that they engaged in fraud when they executed the deed of trust used to provide collateral for Note 2. Although A.N.E.

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[2]TEX. BUS. & COM. CODE ANN. §3.403(a) (Vernon 1968).

[3]TEX. BUS. & COM. CODE ANN. §3.307 (Vernon 1968) (emphasis added).

[4]See, e.g., Holland v. First Nat. Bank, 597 S.W.2d 406, 411 (Tex. Civ. App.--Dallas 1980, no writ) (holding that production of the note itself is sufficient to establish the signature and the authority of the agent absent a specific denial).

Properties and the instant case were being litigated at the same time, the Note Two Defendants did not object to this arguable claim-splitting by the FDIC.[5] After judgment was entered in A.N.E. Properties, however, the Note Two Defendants attacked this claim-splitting indirectly by contending that this judgment barred the FDIC from collecting on Note 2. The district court concluded that the Note Two Defendants waived their res judicata defense by failing to object to the possible claim-splitting by the FDIC.

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[5]Claim-splitting occurs when a single "cause of action" is split by advancing one part in an initial suit and another part in a later suit. E.g., Texas Employers' Ins. Ass,n v. Jackson, 862 F.2d 491, 501 (5th Cir. 1988). Such "splitting" may subject the second claim to preclusion. As Judge Rubin aptly noted:

> The rules of res judicata, as the term is sometimes sweepingly used, actually comprise two doctrines concerning the preclusive effect of prior adjudication. The first such doctrine is "claim preclusion," or true res judicata. It treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." . . . When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." . . . Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the parties, whether or not raised at trial.

Kasper Wire Works, Inc. v. Leco Engineering & Mach., 575 F.2d 530, 535 (5th Cir. 1978) (emphasis added) (citations omitted). To determine what constitutes the same "claim" or "cause of action" we apply the "same transaction" test, i.e., whether the earlier and later claims are "based on the 'same nucleus of operative fact.'" Eubanks v. F.D.I.C., 977 F.2d 166, 171 (5th Cir. 1992) (quoting Howe v. Vaughn, 913 F.2d 1138, 1144-45 (5th Cir. 1990; In re Air Crash at Dallas/Ft. Worth Airport, 861 F.2d 814, 816 (5th Cir. 1988)). As we conclude that the Note Two Defendants have waived any res judicata defense, we need not decide whether a fraud claim related to a deed of trust used to collateralize a note arises out of the "same nucleus of operative fact" as a suit to collect on that same note.

As we agree with the district court, we quote with approval its reasoning and conclusion regarding waiver:

> Generally, if two actions are pursued simultaneously, the first judgment to be entered is entitled to res judicata effect without regard to the order in which the two actions were commenced. 18 CHARLES ALAN WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE §4402 at 22, 24 (1981). An exception to this rule has been recognized, however, when the defendant in the second action waives any objection to splitting the actions. Restatement (Second) of Judgments, §26 Comment a (1982) states:
>
> > Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.
>
> Courts in other jurisdictions have applied the Restatement to hold that defendants have waived the defense of res judicata in simultaneous actions. See, e.g., Calderon Rosado v. General Electric Circuit Breakers, Inc., 805 F.2d 1085, 1087 (1st Cir. 1986) (defendant waived res judicata defense when defendant did not complain of plaintiff's splitting cause of action and litigating in two forums simultaneously); Imperial Construction Management Corp. v. Laborers Int'l Union

Local 96, 729 F. Supp 1199, 1207 (N.D. Ill. 1990) [same]; Kendall v. Avon Products, Inc., 711 F. Supp. 1178, 1182 (S.D.N.Y. 1989) [same]. The [Note Two Defendants] did not object in either action to the two suits proceeding simultaneously. Accordingly, [the Note Two Defendants] have waived any defense based on res judicata [that] they may have had because of the A.N.E. Properties litigation.

III

CONCLUSION

The district court did not err in concluding that production of Note 1 by the FDIC entitled it to a presumption that the agent signing that note had authority to bind the named principalssQthe Note One Defendants. Those defendants' failure to deny such authority in an express and timely manner made that presumption conclusive. Neither did the district court err in concluding that the Note Two Defendants waived their res judicata defense by failing to object to claim-splitting by the FDIC; essentially, they slept on their rights, allowing both the instant suit and the A.N.E. Properties litigation to proceed simultaneously without any objection on their part, even though each arguably involved different facets of the same claim.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.