UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2065
Summary Calendar

UNION FEDERAL SAVINGS BANK OF INDIANAPOLIS,

Plaintiff-Appellee,

VERSUS

JOHN V. LISOTTA, ET AL.,

Defendants,

JOHN V. LISOTTA and STAN MARKLE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
CA H 90 3065

October 6, 1993

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

This case arises out of an indebtedness created by a note and guaranty agreement. Union Federal Savings Bank (Union) holds the note, which is guaranteed by the Appellants, John Lisotta (Lisotta) and Stan Markle (Markle). Union sued the Appellants, seeking the deficiency between the amount received at the foreclosure sale and the total amount due on the note. The

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court granted summary judgment for Union. We affirm.

I.

A $665,000 promissory note was executed by Burk Collins and d/b/a Burk Collins Investments, payable to North American Mortgage Company. This note was secured by a deed of trust on a parcel of real property. The note and deed were later transferred to Arsenal Savings Association. The property which secured this instrument was sold in 1984 to Trojan Partners. Trojan assumed the indebtedness, and the Appellants guaranteed this obligation by signing a Guaranty Agreement dated July 25, 1984. Arsenal became insolvent, and the FSLIC, acting as receiver for Arsenal, transferred some assets of the defunct institution to Union.

The makers defaulted on the note. Union appointed a Trustee to conduct a foreclosure sale of the liened property. When the sale failed to fully satisfy the debt, Union sought to recover the deficiency from the note's guarantors. Union accordingly gave Lisotta and Markle, along with other guarantors not party to this appeal, notice of the deficiency. The guarantors did not honor their agreement, and this suit followed.

Union moved for summary judgment, and supported this request with affidavits from Jack Tudor (Tudor), Vice-President of Union. He averred that the responsibilities of vice-president include acting as custodian of Union's records, and that he was personally familiar with this matter. Tudor recited that Union

presently owned and held the note and guaranty agreement. Based on Tudor's affidavits and the other summary judgment evidence, the district court concluded that there was no genuine issue of material fact, and that Union was entitled to judgment as a matter of law.

II.

Summary judgment is appropriate if the record discloses "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." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

III.

On appeal, Lisotta and Markle raise three related issues.

First, they argue that Tudor's affidavits were not proper summary judgment evidence; second, Appellants contend that Union failed to prove that it was owner and holder of the note; and, lastly, it is urged that Union's failure to prove possession and ownership of the instrument should have legally precluded it from appointing the trustee who oversaw the foreclosure sale.

We focus on the sufficiency of Tudor's affidavits which the district court relied on in concluding that Union owned and held the note and its accompanying guaranty. The Appellants do not deny signing the guaranty agreement, or that they are responsible as guarantors of the note.

"The affidavit of an employee who is the custodian of records, generally suffices as proof of a note's ownership for summary judgment." FDIC v. McCrary, 977 F.2d 192, 194 (5th Cir. 1992) (citing Resolution Trust Corp. v. Camp, 965 F.2d 25, 29 (5th Cir. 1992)). Appellants argue that Tudor's affidavits amount to hearsay evidence, which is not proper summary judgment evidence. This reasoning ignores the holding in McCrary, supra, where we concluded that affidavits based on personal knowledge were sufficient to prove the ownership of an instrument. See also FDIC v. Selaiden Builders, Inc., 973 F.2d 1249, 1254 (5th Cir. 1992), cert. denied, 113 S.Ct. 1994 (1993); Resolution Trust Corp. v. Camp, 965 F.2d 25, 29-30 (5th Cir. 1992). Moreover, while the Appellants maintain that Tudor lacked the personal knowledge necessary to make an acceptable affidavit, they do not point to any factual inaccuracies in his statements.

Appellants' argument that Tudor's second affidavit contradicts his first one, and therefore raises doubts as to Tudor's credibility, is without merit.[2] The two affidavits may not represent the most artful drafting; however, when the statements are read in context, their meaning is clear: Union acquired substantially all of Arsenal Savings Association's assets, including the note and guaranty at issue here. The fact that the phrasing of the two statements fails to perfectly mesh does not render this evidence deficient for summary judgment purposes. See McCrary, 977 F.2d at 194; Selaiden Builders, Inc., 973 F.2d at 1254; Camp, 965 F.2d at 29-30.

Appellants next contend that an issue of material fact remains as to the ownership of the note and guaranty. Union submitted an authenticated copy of the instrument in lieu of the original. Additionally, the instrument only bears an endorsement transferring the note from North American Mortgage (the original payee) to Arsenal.

Tudor's affidavits recite that Union possessed the instrument, receiving it when the FSLIC approved the transfer of Arsenal's assets to Union. Appellants point out that the McCrary court reversed the determination that the FDIC possessed the note in question. There, as in the present case, the affidavit and

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[2] In his first affidavit, Tudor states that "I am Vice President of Union Federal Savings Bank of Indianapolis (formerly Arsenal Savings Association, F.A.)...." R.Ex. 32. The latter affidavit states "On September 23, 1988, Union Federal Savings Bank of Indianapolis acquired substantially all of the assets of Arsenal Savings Association, F.A." R. 426.

supporting documentation revealed that the Acquisition Agreement between the FSLIC/FDIC and the assuming institution did not list which assets were being transferred. See McCrary, 977 F.2d at 195; R. 423 (transfer of "substantially all of [Arsenal's] assets...."). This lack of specificity raised a genuine issue of ownership in McCrary: "In opposing summary judgment, McCrary pointed to the Contract for Sale between FDIC-Receiver and the FDIC, which shows that certain unnamed assets of the Bank were sold to Compass and other unnamed assets were sold to the FDIC." 977 F.2d at 195.

In the instant case, Union was the only institution involved. Tudor's affidavit recites that Union owns the note and guaranty, thus negating the possibility that the FSLIC may have retained the instrument. Appellants offer no contrary evidence; because the Appellants fail "to point to anything in the record to establish their legitimate fear that an entity other than [Union] owns and holds the note, summary judgment was appropriate." Selaiden Builders, Inc., 973 F.2d at 1254 (citing Resolution Trust Corp. v. Camp, 965 F.2d 25, 29-30 (5th Cir. 1992)).

IV.

Union established that it owned the note in question. Therefore, it had the legal right to appoint a receiver and conduct a foreclosure sale. See Lawson v. Gibbs, 591 S.W.2d 292, 294 (Tex. Civ. App. -- Houston 1979, writ ref'd n.r.e.). Consequently, Appellants' third point of error is without merit.

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