IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2317

FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for NCNB TEXAS NATIONAL BANK,

Plaintiff-Appellee,

VERSUS

VICTOR KORMEIER, JR., et al.,

Defendants,

VICTOR KORMEIER, JR.,
and
JERRY R. LACY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-3657)

(April 29, 1994)

Before SMITH and BARKSDALE, Circuit Judges, and WALTER,[*] District Judge.

PER CURIAM:[**]

Defendants Victor Kormeier, Jr., and Jerry Lacy appeal a

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[*] District Judge of the Western District of Louisiana, sitting by designation.

[**] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

(1) grant of partial summary judgment in favor of plaintiff Federal Deposit Insurance Corporation (the "FDIC") on defendants' joint and several guaranty of a limited partnership's $1.4 million promissory note, (2) denial of defendants' motion for partial summary judgment to absolve them of such guarantor liability on that note, and (3) directed verdict, for failure to state a cause of action, in favor of plaintiff NCNB Texas National Bank,[1] denying defendants' counterclaim for breach of an alleged oral contract.

I.

In 1984, Oaks of Ashford-Phase II, Ltd. ("Oaks"), a limited partnership, signed a $1.4 million promissory note ("Oaks's note") payable to InterFirst Bank Houston, N.A. ("IFBH"). Defendants individually)) not in their capacities as the sole general partners of Oaks)) executed a guaranty of Oaks's indebtedness to IFBH (the "Guaranty"). Also in 1984, defendants borrowed $1 million personally from IFBH, signing a promissory note in that principal amount ("defendants' note"), on which they were jointly and severally liable. This note was renewed in 1985 with a new maturity date of January 31, 1988.

Oaks's note was scheduled to mature on October 14, 1986, but IFBH and Oaks agreed to renew it. Before that agreement was signed, the defendants' guaranty of Oaks's note was modified to limit defendants' liability as guarantors to $540,000 in principal,

[1] For ease of reference, we will refer to NCNB Texas National Bank by its present name, NationsBank.

plus interest and other costs and expenses. Under the agreement to renew Oaks's note, the maturity date of the note would be extended, and the renewal would be non-recourse as to Oaks and as to its partners, both general and limited. In the course of renewing Oaks's note, three documents were executed that are of import here: a Letter Agreement; a Guaranty Reaffirmation; and a Renewal, Extension, and Modification Agreement ("Renewal Agreement").

A.

Dated November 4, 1986, the Letter Agreement specifies that (1) the maturity of Oaks's note would be extended to October 14, 1988, and (2) the defendants would continue to guarantee Oaks's note, but their maximum liability on the principal would be reduced from $1.4 million to $540,000. IFBH and the defendants signed the Letter Agreement. Although it does not reflect the date of execution, Lacy states in his affidavit that the Letter Agreement was signed on or about November 4, 1986, a fact not disputed by the FDIC.

B.

Dated October 14, 1986, the Guaranty Reaffirmation was signed by IFBH and defendants, the latter expressly signing in their capacities as guarantors. It references the Renewal Agreement, reaffirms the defendants' continuing obligations as guarantors, and acknowledges the reduction of defendants' liability on their guaranty of Oaks's indebtedness from $1.4 million to $540,000 in

principal, plus accrued interest and attorneys' fees. The Guaranty Reaffirmation declares unequivocally that without the defendants' consent and confirmation, IFBH would not execute the Renewal Agreement or otherwise consent to the extension of the maturity date of Oaks's note.

The Guaranty Reaffirmation, like the Letter Agreement, does not reflect the date on which it was signed by defendants, a fact vigorously disputed by the parties. The FDIC contends that the Guaranty Reaffirmation was executed on December 23, 1986, at the same time and during the same closing as the Renewal Agreement. Defendants, on the other hand, assert that the Guaranty Reaffirmation was executed on or about November 4, 1986,[2] and was superseded)) per the parties' agreement)) by the Renewal Agreement, which was executed (subsequently, they insist) on December 23, 1986. Competing affidavits are relied upon in support of the parties' respective proffered dates on which the Renewal Agreement was supposed to have been executed.

C.

1.

IFBH and Oaks formally signed the Renewal Agreement on December 23, 1986. It stated that it was retroactively effective to October 14, 1986, the date originally specified in Oaks's note as its maturity date. The Renewal Agreement renewed Oaks's note

[2] If true, this would mean that both the Letter Agreement and the Guaranty Reaffirmation, which contain the same terms with regard to defendants' liability as guarantors on Oaks's note, were signed contemporaneously.

effective that date and extended its maturity to October 14, 1988. Individually, the defendants were not parties to the Renewal Agreement but signed it only in their representative capacities as general partners of Oaks. In this agreement, IFBH and Oaks agreed that Oaks's note thenceforth would be non-recourse as to Oaks (the maker) and as to all of the partners of Oaks)) both general and limited. Reference to Oaks's partners was generic, not by individual names. The Renewal Agreement made no reference to the Letter Agreement or the Guaranty Reaffirmation; neither did it mention the defendants by name or their liability as guarantors. On the other hand, neither the Letter Agreement[3] nor the Guaranty Reaffirmation states that Oaks's note would become non-recourse as to Oaks or its partners.

So much for the loan modification documents. In 1987, IFBH was merged into First RepublicBank Houston, N.A. ("FRBH"). Defendants' note matured in January 1988 but was not paid upon maturity. In the summer of 1988, FRBH failed, and the FDIC as receiver for that bank assigned both Oaks's then-current note and defendants' then-delinquent note to NationsBank.[4] Oaks's note matured in October 1988 but, like defendants' note before it, was not paid upon maturity.

Defendants contend that in April 1989 NationsBank offered to

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[3] NationsBank asserts that the Letter Agreement provides that Oaks's note would be non-recourse to Oaks, the maker, but we do not find this expressly set forth therein.

[4] NationsBank, then NCNB Texas National Bank, was created as the bridge bank for some forty failed First RepublicBanks in Texas.

renew defendants' personal note. But NationsBank's proposal of April 1989, which rejected defendants' earlier proposal to restructure defendants' note, expressly stated that it was not an offer but merely a suggestion of terms that the loan officer would recommend to NationsBank's senior management for restructuring that note. This proposal contained, among other recommendations, the following: (1) Past-due interest would be recalculated at a rate of four percent per annum and would be paid in cash to NationsBank at closing of the defendants' note as restructured; (2) the restructured note would bear interest at the rate of four percent per annum, payable monthly; and (3) the specified maturity date of the restructured note would be two years after the renewal date, with defendants to have an option further to extend the restructured note one more time for up to two additional years.

The proposal was silent as to prepayment: It did not state whether defendants would be allowed to prepay the renewed note; neither did it mention prepayment penalties. Finally, defendants were told to respond to the proposal by May 2, 1989, but they apparently failed to do so satisfactorily.

In June 1989, NationsBank noticed public foreclosure sales for the collateral described in the deeds of trust securing each of the notes)) undeveloped real property in Harris County. The foreclosure sales were scheduled for Tuesday, July 4, 1989.[5]

Defendants state that they met with representatives of

[5] Under Texas law, a lender may conduct a foreclosure sale on a national holiday. Koehler v. Pioneer Am. Ins. Co., 425 S.W.2d 889, 891 (Tex. Civ. App.))Fort Worth 1968, no writ).

NationsBank on July 3, 1989)) the day before the foreclosure sale)) to negotiate an extension of defendants' note. Defendants also state that at this meeting they and representatives of NationsBank orally agreed that the maturity date of defendants' note would be extended for two years under the terms of the April renewal proposal. Defendants assert that during the course of the July 3 meeting they informed NationsBank's representatives that they (defendants) would not guarantee Oaks's note. Later during that meeting, say the defendants, NationsBank's representatives excused themselves for a private discussion, after which they returned and advised defendants that NationsBank would extend the maturity of defendants' note only on the condition that defendants also personally guarantee Oaks's note. Defendants insist that they rejected the addition of this condition to the "agreement," whereupon NationsBank refused to renew defendants' note.

In sharp contrast, NationsBank contends that no agreement to extend defendants' note ever existed and that at the time FRBH failed (the summer of 1988), defendants' note had already matured and remained unpaid. By 1989, observes NationsBank, both notes were seriously in default. NationsBank contends that the purpose of the eleventh-hour communications with defendants on July 3 was to determine whether the notes would be paid.

Finally, NationsBank asserts, the Guaranty Reaffirmation)) which it insists was signed on December 23, 1986, contemporaneously with the closing of the renewal of Oaks's Note)) preserved defendants' liability as guarantors. That being the case, reasons

NationsBank, it had no cause to seek, and in fact did not seek, defendants' personal guaranty on the Oaks's note as a condition of renewing defendants' note. With the defendants' guaranty already in hand, there were simply no guaranties to be sought.

The collateral for each note was sold at public foreclosure sale as scheduled. A principal deficiency of $514,109.03 remained on Oaks's note; a principal deficiency of $438,277.83 remained on defendants' note.

2.

In August 1990, NationsBank sued Oaks and the defendants for the deficiencies on those notes, but later nonsuited Oaks. (Oaks's note had been made non-recourse as to Oaks, and Oaks had never been liable on defendants' note.) Defendants counterclaimed, alleging that NationsBank had breached its oral agreement to renew defendants' note and that the condition imposed by NationsBank for renewal of that note violated the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972. While suit was still pending in state court, NationsBank assigned both notes to the FDIC in its corporate capacity, effective November 30, 1991. Shortly thereafter, the FDIC intervened, then timely removed the case to federal district court.

Defendants moved for partial summary judgment on Oaks's note on the ground that the express language of the Renewal Agreement eliminated liability in personam as to defendants. The FDIC opposed defendants' motion and cross-moved for partial summary

judgment on both Oaks's note and defendants' note. Defendants did not contest their liability on the latter note.

Additionally, NationsBank moved for partial summary judgment rejecting defendants' tying counterclaim under the Bank Holding Company Act. Neither Nationsbank nor defendants moved for summary judgment on defendants' counterclaim against NationsBank for breach of an alleged oral contract.

The district court granted the FDIC's partial summary judgment motion on both notes but denied defendants' motion for partial summary judgment on Oaks's note. The court held defendants jointly and severally liable to the FDIC on Oaks's $1.4 million note, in the principal amount of $540,000, plus accrued interest and attorneys' fees. Defendants also were adjudged personally liable for the deficiency of $438,277.83 on defendants' $1 million note, plus accrued interest and attorneys' fees.

The case proceeded to trial on the remaining claims. Before a jury was empaneled, however, the district court directed a verdict in favor of NationsBank, rejecting defendants' counterclaim that NationsBank had breached the alleged oral agreement to renew defendants' note. The court reasoned that as defendants were already bound to repay the existing indebtedness on the note with interest, another promise thus to repay was not made for valid consideration.[6]

The district court entered final judgment (1) in favor of the

[6] The court also believed defendants lacked a change in position or circumstance, i.e., reliance and harm damages.

FDIC in the amounts owed by defendants on the two promissory notes and (2) in favor of NationsBank on defendants' counterclaim for breach of an alleged oral contract. Defendants timely moved to alter or amend the judgment; the district court denied the motion, and this appeal resulted.

Defendants seek reversal of the (1) grant of partial summary judgment in favor of the FDIC on defendants' joint and several guaranty of Oaks's note, (2) denial of defendants' motion for partial summary judgment on that note, and (3) directed verdict, for failure to state a cause of action, dismissing defendants' counterclaim for breach of the alleged oral contract. Defendants do not, however, appeal the summary judgment on the deficiency under their individual $1 million note; neither do they appeal the summary judgment rejecting their counterclaim that NationsBank violated the anti-tying provisions.

II.

A.

1.

We review the district court's grant or denial of summary judgment de novo, "reviewing the record under the same standards which guided the district court." Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is proper when no genuine issue of material fact exists that would necessitate a trial. Celotex Corp v. Catrett, 477 U.S. 317, 323-25 (1986); see FED. R. CIV. P. 56(c). In determining whether the grant of a

summary judgment was proper, all fact questions are viewed in the light most favorable to the nonmovant. Walker, 853 F.2d at 358. Questions of law)) including interpretation of an unambiguous contract)) are always decided de novo. Id.

2.

Although the parties insist that the Renewal Agreement is unambiguous, they dispute the interpretation of the following portion (non-recourse portion):

> Notwithstanding any contrary provision of the Note or any related papers, no holder thereof shall sue Borrower or any of its partners, general or limited, seeking a personal judgment for any of the debt evidenced thereby, principal or interest, or seek, recover or enforce any judgment for deficiency after foreclosure upon the security therefor, but shall instead undertake to effect repayment of the Note after default only through realization upon security for the Note.

Defendants contend that they had negotiated with IFBH to be released from all personal liability on Oaks's note)) not just as partners but as guarantors, too)) and that these negotiations resulted in the non-recourse portion of the Renewal Agreement.[7]

Defendants argue that the non-recourse portion unambiguously relieves them of all liability on Oaks's note, as both partners and guarantors. Defendants rely most heavily upon the following

[7] In support of their position, defendants assert that they were also relieved from personal liability on a $1.6 million note, for which Oaks was the maker, at the same time they were negotiating to be relieved of personal liability on the $1.4 million note. (For this assertion, they refer this court to a blank page in the record.) It is likely that defendants believe their position is supported by the Letter Agreement, which refers to the $1.6 million note and reflects that defendants were not liable as guarantors on that note. The Letter Agreement, however, does reflect that defendants were to remain liable as guarantors on the $1.4 million note in the amount of $540,000.

phrases from the non-recourse portion of the Renewal Agreement: "[n]otwithstanding any contrary provision of . . . any related papers" and "partners)) general or limited." The phrase "any related papers," defendants argue, refers to, inter alia, the Letter Agreement. Defendants also contend that the reference to general partners (Defendants were Oaks's only general partners.) not only insulates them from suit for any deficiency on Oaks's note in their capacities as partners, but also prevents them from being sued in their capacity as guarantors.

Not surprisingly, the FDIC disputes any interpretation of the non-recourse portion that would relieve defendants of liability as guarantors. In the alternative, the FDIC contends that any unwritten agreement or understanding that the Renewal Agreement would release defendants from personal liability as guarantors)) i.e., any agreement that is not in writing, approved by the board of directors or loan committee of the lender bank, and reflected in the minutes of its board or loan committee)) is barred by D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). Because we consider the agreement to be unambiguous on release of liability, we need not consider whether D'Oench precludes the admission of extrinsic evidence of side agreements in order to clarify an ambiguous loan agreement, an issue that a previous panel of this court has left open. See Pollock v. FDIC, No. 92-9010, slip op. 3375, 3379 n.6 (Apr. 4, 1994) ("The district court on remand will be faced with the question of whether D'Oench can be raised by the FDIC to preclude the admission of extrinsic evidence of side agreements in

clarifying the ambiguous loan agreement. We leave this issue to the district court which should be allowed not only the first bite at this apple, but an opportunity to consume the entire core.").

The Renewal Agreement does state plainly that thenceforth the bank shall not sue any general partner personally for any deficiency on Oaks's note. But both the Letter Agreement and Guaranty Reaffirmation state with equal clarity that the guarantors of Oaks's indebtedness will remain liable under their guaranty. Defendants would have this court construe the "general partner" language of the Renewal Agreement to release them from personal liability, not just as partners qua partners, but in any and every capacity)) including that of guarantors.

FDIC v. Singh, 977 F.2d 18 (1st Cir. 1992), is directly on point. Singh was an action against individual partners under a joint and several guaranty executed in connection with a loan to their partnership. The original note was signed and guaranteed by all general partners. The terms of that note were revised two years later, at which time a non-recourse provision was added so that the note became non-recourse to all partners. The bank in Singh, like IFBH here, promised to "look solely to its [c]ollateral for satisfaction of the [partnership's] obligations . . . and not to the personal assets of any partner, General or Limited." Id. at 20. Simultaneously with the execution of the revised note, the bank and the partnership jointly executed an instrument that is comparable to both the Letter Agreement and the Guaranty Reaffirmation in the instant case, which stated, "[T]he Guaranty . . . shall

remain in full force and effect and all the terms thereof are hereby ratified and confirmed . . . ." Id.

The partners in Singh claimed that the revised note's non-recourse provision)) which eliminated personal liability of all partners, general and limited)) nullified by implication their liability under their separate guaranty agreements. Id. at 23. Rejecting that argument, the court held that the guaranty was unaffected by the non-recourse provision: The partners had incurred liability in two separate and distinct capacities; the negation of their liability as partners had no effect on their liability as guarantors. Id. at 22-23.[8]

Like the non-recourse note in Singh, the Renewal Agreement cannot be construed to absolve defendants of liability as guarantors for that portion of Oaks's note that they continued to guarantee. It unambiguously relieves partners qua partners from personal liability but does not negate defendants' liability as guarantors. As the Renewal Agreement is not ambiguous, there can be no genuine and material fact issue for summary judgment purposes as to the parties' intent.[9] We do not)) nay, must not)) consider the parol evidence of the parties' intent offered by defendants. Id. We determine the rights and liabilities of the parties by giving legal effect to the Renewal Agreement as written and hold

[8] Compare Commons West Office Condos v. RTC, 5 F.3d 125, 127-28 (5th Cir. 1993) (holding that partner was 100% liable for the entire deficiency after foreclosure as general partner of a limited partnership, even though guaranty executed by partner limited his liability to 25% of indebtedness).

[9] See Richland Plantation Co. v. Justiss-Mears Oil Co., 671 F.2d 154, 156 (5th Cir. 1982) (noting that only if a contract is found ambiguous does the question of the parties' intent become a fact question).

that defendants remained liable on Oaks's note in their capacities as guarantors. See Ideal Lease Serv. v. Amoco Prod. Co., 662 S.W.2d 951, 952 (Tex. 1983).

Even were we to assume arguendo the truth of defendants' assertion that the Guaranty Reaffirmation and the Renewal Agreement were not executed simultaneously, and that the documents could not be construed together as part of the same agreement, our conclusion would remain unchanged. The Renewal Agreement neither expressly nor implicitly supersedes or conflicts with the Guaranty Reaffirmation. The latter document confirms defendants' liability in their capacities as guarantors; the Renewal Agreement simply relieves them of liability in their capacities as partners. Moreover, the Guaranty Reaffirmation specifically refers to the Renewal Agreement. The defendants, by signing the Guaranty Reaffirmation, confirmed that NationsBank would not enter the Renewal Agreement without defendants' agreeing to remain liable as guarantors for $540,000 of the original note.[10]

B.

1.

The district court directed a verdict[11] on defendants'

[10] In their brief, the defendants argue that in Texas, guarantors are released when the principal is released. The defendants, at oral argument, acknowledged that they no longer advance this argument because it was not made to the district court.

[11] The court directed a verdict before opening statements, even before a jury was empaneled. A district court has broad discretion to dispense with opening statements. Clark Advertising Agency v. Tice, 490 F.2d 834, 836-37 (5th Cir. 1974); Defenders of Wildlife, Inc. v. Endangered Species Scientific

(continued...)

counterclaim that NationsBank breached an alleged oral contract. When a district court grants a directed verdict, it makes the determination that, as a matter of law, "there was no evidence of such quality and weight that fair-minded jurors in the exercise of impartial judgment might reach a different conclusion." In re Worldwide Trucks, Inc., 948 F.2d 976, 979 (5th Cir. 1991) (quoting Moore v. Johnson, 568 F.2d 1184 (5th Cir. 1978)). We review the grant of a directed verdict de novo. Id.

2.

The court determined that defendants had failed to state a claim upon which relief may be granted, reasoning that defendants had not alleged any valid consideration. Defendants contend that the court erred in dismissing their claim against NationsBank for want of consideration. In support of their contention, defendants assert alternative reasons: (1) defendants gave consideration to NationsBank, and (2) consideration was not required for the renewal and extension of defendants' note. See TEX. BUS. & COM. CODE § 3.408.

In addition to disputing these contentions, NationsBank argues that, even if the district court erred in its reasoning based upon failure or lack of consideration, the statute of frauds prevents

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(...continued)
Auth., 659 F.2d 168, 182 (D.C. Cir.), cert. denied, 454 U.S. 963 (1981). Defendants concede that the district court has the inherent power in the proper case to direct such a verdict. See Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261, 266 (1880). As the facts of the instant case disclose an absolute defense to the breach of contract claim)) the statute of frauds)) this is a proper case for a directed verdict even before opening statements. The district court has not abused its discretion in dispensing with opening statements.

enforcement of the alleged oral agreement because it was not performable within one year. We agree that the statute of frauds, timely raised as an affirmative defense by NationsBank in its Amended Answer, bars enforcement of the alleged oral contract. We therefore need not)) and do not)) consider defendants' arguments regarding lack of consideration.[12]

Whether a given oral contract is unenforceable because of the statute of frauds is a question of law. Pruitt v. Levi Strauss & Co., 932 F.2d 458, 463 (5th Cir. 1991). The statute of frauds requires that for a contract that is not to be performed within one year from its date to be enforceable it must be in writing. Id. Thus the court must examine any oral agreement's duration of performance to determine whether it is rendered unenforceable by the statute of frauds. Id. If by its terms the oral agreement cannot be performed within one year, it cannot be enforced. Niday v. Niday, 643 S.W.2d 919, 920 (Tex. 1982). "The possibility of performance within one year must . . . have been within the contemplation of the parties" to satisfy the statute. First Nat'l Bank v. Trinity Patrick Lodge No. 7, 238 S.W.2d 576, 579 (Tex. Civ. App.))Fort Worth 1951, writ ref'd n.r.e.). An agreement that fixes a definite period longer than a year during which performance will continue demonstrates that the parties did not contemplate earlier performance. Mann v. NCNB Texas Nat'l Bank, 854 S.W.2d 664, 668

[12] It is well established that when a district court reaches the correct conclusion for an incorrect reason, the judgment may be affirmed on appeal if there is a valid basis for the decision. Jaffke v. Dunham, 352 U.S. 280, 281 (1957); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1387 (5th Cir. 1985); Bickford v. Int'l Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. Unit B Aug. 1981).

(Tex. App.))Dallas 1992, no writ). The theoretical possibility that defendants' note might be prepaid within one year is not enough, by itself, to satisfy the statute. Id.

Defendants readily concede)) nay, assert)) that the time for performance of the alleged agreement was two years. The April 1989 proposal from NationsBank contemplated a two-year renewal period for the note. Never is it suggested, either by defendants in their counterclaim or by NationsBank in the April 1989 proposal, that defendants could or might prepay defendants' note. In light of the facts of this case, we have no difficulty concluding that the possibility of prepayment was so remote and unforeseeable that it was not within the contemplation of the parties.

But even had the parties anticipated prepayment within the first year of the agreement, such a mere possibility alone would not be sufficient to overcome the statute of frauds hurdle. The parties plainly contemplated that performance would exceed one year. Therefore, as a matter of Texas law, the agreement by its terms is deemed incapable of being performed within a year for purposes of the statute of frauds and must be in writing to be enforced. See Niday, 643 S.W.2d at 920; Mann, 854 S.W.2d at 668-69.[13]

As the statute of frauds precludes enforcement of the alleged oral contract to renew defendants' note for two years, we may, and

[13] In oral argument, the defendants suggested that part of their agreement was to execute a renewal note)) an act that would be taken in less than a year. The defendants did not make this argument in regard to the statute of frauds in their opening brief, and they did not file a reply brief, so the agrument is waived.

do, affirm the dismissal of defendants' counterclaim against NationsBank for breach of the alleged oral contract. Whether the district court's reasoning, grounded in lack of consideration, was erroneous is of no consequence, given the statute of frauds' proscription of enforcement of the oral agreement.

III.

We conclude that the district court properly granted FDIC's motion for summary judgment and denied defendants' motion for summary judgment. As we can affirm on another basis)) the statute of frauds)) the dismissal of defendants' counterclaim against NationsBank for breach of an oral contract, that dismissal does not constitute reversible error. For the foregoing reasons, the judgment is in all respects AFFIRMED.