UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2753
Summary Calendar

NORTHSHORE BANK,

Plaintiff,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Intervenor-Plaintiff-Appellee,

VERSUS

JACK E. WALTON, ET AL.,

Defendants,

JACK E. WALTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-4362)

(September 8, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant, Jack Walton, appeals from the district court's grant of summary judgment for the FDIC. The FDIC, in its corporate

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

capacity, sued Walton seeking recovery of sums due under two promissory notes. We affirm.

BACKGROUND

On February 23, 1984, Walton & Son Stevedoring and Jack Walton executed a promissory note in the principal amount of $185,000 in favor of First National Bank of Crosby ["February note"]. The note was secured by a first preferred mortgage on the tug NIKKI W. The note was assigned to Northshore Bank. On June 14, 1984, Andrew Walton and Jack Walton executed a continuing guaranty in favor of Northshore to perform the obligations on any agreement "heretofore or hereafter" made by Walton & Son Stevedoring. The second note was executed on December 21, 1984, by Walton & Sons Stevedoring, Donald G. Watts, Andrew Walton and Jack Walton in the principal amount of $280,000 in favor of Northshore Bank ["December note"].

On July 24, 1985, Walton & Son Stevedoring filed for Chapter 11 bankruptcy protection. The only debtor filing for protection was Walton & Son Stevedoring. On November 8, 1986, Northshore was declared insolvent, and the FDIC was appointed as receiver. As receiver, the FDIC sold some of the bank's assets, including the two promissory notes and guaranty at issue, to the FDIC in its corporate capacity.

The FDIC-Corporate filed suit to collect on the promissory notes against the NIKKI W, in rem, Jack Walton and Andrew Walton. The tug was sold on April 5, 1990, and a default judgment was rendered for the FDIC against Andrew Walton. Relying primarily on the affidavits of a FDIC employee, Cynthia Krohn, the FDIC moved

for summary judgment against Jack Walton. Walton raised numerous defenses, most of which he has abandoned on appeal. The district court rejected all of Walton's defenses and, finding no genuine issue of material fact, granted summary judgment for the FDIC. Walton appeals.

DISCUSSION

I.

We review a summary judgment de novo. Abbott v. Equity Group, Inc., 2 F.3d 613, 618 (5th Cir. 1993), cert. denied, 114 S. Ct. 1219 (1994). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Williams v. Adams, 836 F.2d 958, 960 (5th Cir. 1988). Once the moving party has carried that burden, the non-moving party must show that summary judgment should not be granted. Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. Williams v. Weber Management Servs., Inc., 839 F.2d 1039, 1041 (5th Cir. 1987).

II.

To establish Walton's liability on the two promissory notes and guaranty, the FDIC must establish that 1) the defendant signed the notes and the guaranty agreement; 2) the FDIC is the present owner or holder of the notes; and 3) the notes are in default. FDIC v. Selaiden Builders, Inc., 973 F.2d 1249, 1254 (5th Cir. 1992), cert. denied, 113 S. Ct. 1944 (1993). The FDIC submitted photocopies of the notes to prove these three elements. Cynthia

Krohn, a liquidation assistant with the FDIC, testified that the copies were true and correct.

Walton argues that the district court erred in finding that the FDIC was the owner and holder of the notes. First, Walton contends that there is a genuine issue as to whether the February note was assigned to Northshore Bank from First National Bank of Crosby. Walton explains that the note is made to the order of First National Bank of Crosby, and there is no endorsement indicating a transfer to Northshore Bank.

We acknowledge that the mere possession of the original of an unendorsed note payable to the order of another is not alone sufficient evidence under Texas law to prove that one is the owner and holder. See Northwestern Nat'l Ins. Co. v. Crockett, 857 S.W.2d 757, 758 (Tex. Ct. App. 1993 no writ). The FDIC submitted, however, a document signed by the president of First National Bank of Crosby assigning the note to Northshore. Absent endorsement, possession may be accounted for by proving the transaction through which the note was acquired. Crockett, 857 S.W.2d at 758. Walton argues that the document assigning the note has no date, that it fails to indicate that it is an assignment, and that he never consented to the assignment. Walton has submitted no legal authority to this Court, and we have found none in our independent research, that invalidates the assignment submitted by the FDIC as a matter of law.

Walton also argues that neither the February nor the December note was endorsed over to the FDIC in its corporate capacity.

Under the standard we announced RTC v. Camp, 965 F.2d 25, 29 (5th Cir. 1992), Walton must point to evidence in the record that he has 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 him demanding payment. The FDIC as receiver became owner and holder of the notes by operation of law when it took over the insolvent Northshore Bank. See 12 U.S.C. § 1821(d)(2)(A). The notes were then endorsed from the FDIC as receiver to the FDIC-Corporate. These endorsements are reflected on the copies of the promissory notes attached as exhibits to the supplemental affidavit of Cynthia Krohn. Walton has adduced no summary judgment evidence that suggests a legitimate fear that the FDIC-Corporate is not the owner and holder of the notes.[2]

III.

Walton next argues that the district court erred in determining that the affidavit of Cynthia Krohn was sufficient evidence to support the FDIC's motion for summary judgment. Walton contends that the affidavit was inadequate because 1) Cynthia Krohn did not have personal knowledge of the loan as required by Federal Civil Procedure Rule 56(e); 2) the original affidavit and supplemental affidavit have numerous unexplained discrepancies; and 3) the affidavit did not include sworn and certified attachments

[2] Walton argues that there is a discrepancy between Cynthia Krohn's first affidavit and her supplemental affidavit because the promissory notes attached to the first affidavit do not contain the endorsements. The endorsements were made, however, on September 23, 1992, after Krohn's first affidavit. Walton has submitted no proof evincing bad faith or challenging the validity of the endorsements.

verifying the accurateness of the interest charged.

Krohn's affidavits were business record affidavits. See FSLIC v. Griffin, 935 F.2d 691, 702 (5th Cir. 1991), cert. denied, 112 S. Ct. 1163 (1992). If a witness testifies that to her own knowledge, the record in question was received and kept in the ordinary course of business activity, and that it was her regular business practice to receive the business record, the requirements of Rule 803(6) are satisfied. See United States v. Jones, 554 F.2d 251, 252 (5th Cir.), cert. denied, 434 U.S. 866 (1977). The affidavits demonstrated Krohn's personal knowledge to testify as custodian and established the required predicate for the admissibility of the attached documents under Federal Evidence Rule 803(6). To require an affiant to have precise personal knowledge of a particular note would be to set a standard so strict that summary judgment would be impossible for a plaintiff in cases such as these. Camp, 965 F.2d at 29.

The remainder of Walton's objections to Krohn's affidavit are raised for the first time on appeal. An affidavit that does not measure up to the standards of Rule 56(e) is subject to a timely motion to strike. In the absence of such a motion, or other objections, defects in the affidavit are waived. Auto Drive-Away Co. v. Interstate Commerce Comm'n, 360 F.2d 446, 448-49 (5th Cir. 1966).

IV.

Walton claims that the FDIC's delinquency in the disposition of the tug caused a decline in its value. The security agreement

that pledged the tug specifically states that the creditor is "not responsible for any decline in value of the property while it remains in [the creditor's] possession." This security agreement is binding on Walton as a signatory to the note in his individual capacity. Walton is also bound by the terms of the security agreement as he was an unconditional guarantor. See RTC v. Northpark Joint Venture, 958 F.2d 1313, 1321 n.13 (5th Cir. 1992), cert. denied, 113 S. Ct. 963 (1993).[3]

V.

Finally, Walton claims that the district court erred in granting summary judgment on his good faith and fair dealing claim. Walton's complaint is that the FDIC failed to timely foreclose on the collateral securing the promissory note. The UCC does not require diligence for good faith, and the FDIC owes no duty of good faith under state or federal common law. FDIC v. Coleman, 795 S.W.2d 706, 708-709 (Tex. 1990).[4]

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment for the FDIC is AFFIRMED.

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[3] The district court held that Walton was personally liable on the February note because he signed the note in his individual capacity and he was a guarantor. Walton does not challenge this holding on appeal.

[4] Walton argues that Coleman is distinguishable because in that case, it was a guarantor who was claiming that the FDIC owed a duty of good faith. Walton explains that the FDIC is claiming that he is also the maker of the notes. We find this contention meritless. See English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983) (relationship between mortgager and mortgagee does not ordinarily involve a duty of good faith).