UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2939
Summary Calendar

FIRST SOUTH SAVINGS ASSOCIATION, ET AL.,

Plaintiffs-Appellees,

VERSUS

WALTER H BURNAP, ET AL.,

Defendants,

WALTER H. BURNAP, WILLARD H. BURNAP and KITTIE PARTNERS 1984-1,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA H-89-2720)

(November 23, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

DUHÉ, Circuit Judge:[1]

Defendant-Appellant Willard A. Burnap appeals the district court's final judgment declaring that a settlement between Plaintiff RTC-Conservator and Burnap's co-defendants, Max Burleson and Daniel Linnartz, was reasonable. We affirm that determination of reasonableness.

I. Facts and Procedural History

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In 1984 Walter Burnap (son of Appellant) formed Kittie Partners 1984-1 with Burleson, Linnartz, and Lester Kelley. Appellant Willard Burnap joined the partnership later in the same year. Walter Burnap individually executed a $3.2 million dollar promissory note payable to Plaintiff First South Savings, RTC's predecessor, which Linnartz, Burleson, and Kelley guaranteed. In 1985 the note was modified to add Kittie Partners as an obligor.

Upon withdrawing from Kittie Partners in 1986, Linnartz and Burleson entered a release and indemnity agreement which eventually brought Appellant into this case. That agreement provided that Kittie Partners through its remaining partners (Burnap, Burnap, and Kelley) and Walter Burnap individually would indemnify Linnartz and Burleson for "any . . . liability [that the withdrawing partners] may have undertaken to pay (as . . . guarantor[s]) . . . on behalf of [Kittie] Partners or [Walter] Burnap." 3 R. 1328.

In 1987-88 Kelley resigned, Appellant sold his interest to Walter Burnap, and Walter Burnap became the sole remaining partner. Kittie Partners then incorporated, and First South released the former partners from the note, with the exception of "Walter Burnap or any person who has executed a personal guaranty . . . with regard to the Note." 3 R. 1491. Thus, Linnartz's and Burleson's obligations as guarantors continued.

After default and a foreclosure, First South and its conservator sued Walter Burnap, Burleson, Linnartz, Kelley, and Kittie Partners to collect a $1.35 million deficiency. After two defendants, Kelley and Walter Burnap, filed bankruptcy, RTC settled

with Linnartz and Burleson. Those two defendants consented to entry of a deficiency judgment against them and assigned to RTC their contractual indemnity right against Kittie Partners and Walter Burnap. RTC agreed to seek collection against Kittie Partners and the remaining individual partners before seeking to collect from Burleson or Linnartz.

In accordance with that settlement, RTC amended its complaint to add Appellant as a defendant, claiming recovery under the indemnity agreement assigned to Plaintiff by Linnartz and Burleson. The district court summarily ruled that the RTC could collect under the indemnity agreement against Appellant. In an earlier appeal, this Court affirmed, but remanded "for a finding as to the reasonableness of the amount of the settlement." 2 R. 1639. In the judgment now appealed, the district court ruled that the settlement was reasonable and enforceable under Texas law. 1 R. 1882.

II. Reasonableness

The district court found the settlement reasonable. We agree that Linnartz and Burleson met their burden of showing that their settlement was "reasonable, prudent, and in good faith under the circumstances." See Getty Oil Corp. v. Duncan, 721 S.W.2d 475, 477 (Tex. App.))Corpus Christi 1986, writ ref'd n.r.e.).

Appellant argues that the settlement is nevertheless unreasonable because of the relatively minor exposure of Linnartz and Burleson as compared to the exposure of Burnap on the deficiency. This argument is based on the faulty premise that

Linnartz and Burleson are exposed to a maximum of $25,000. Compare Appellant's Br. at 13 (describing a "maximum" $25,000 obligation on the part of Linnartz and Burleson) (quoting First South Savings v. Linnartz, No. 90-2875, slip. op. at 18 (5th Cir. Dec. 2, 1992) (Williams, J., concurring)) with majority opinion in Linnartz, slip. op. at 14, 2 R. 1645 (explaining three ways RTC might collect against Linnartz and Burleson). We also reject Appellant's contention that additional indicators[2] show that the settlement was unreasonable.

III. Validity and Enforceability

Appellant argues that the court erred in failing to recognize that the settlement constitutes an invalid agreement under Texas law. On remand, the district court ruled not only on the reasonableness of the settlement but also on its validity. Appellant argues that the district court erred in failing to recognize the settlement as a Mary Carter agreement unenforceable under Texas law.[3]

Appellant raised identical arguments in his Petition for Rehearing to this Court in the earlier appeal. See Pet. Reh'g filed 12/16/92 in No. 90-2875 at 5-12. This Court denied Burnap's

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[2] Appellant notes, without citation to authority, that the settlement is unreasonable either because 1) prospective purchasers proposed higher prices than the bank attained via foreclosure on the property securing the note, or 2) First South failed to credit the deficiency with condemnation proceeds it obtained in connection with the encumbered property. In any case Appellant must be considered to have abandoned these claims because they are inadequately briefed. See Villanueva v. CNA Ins. Cos., 868 F.2d 684, 687 n.5 (5th Cir. 1989).

[3] See Elbaor v. Smith, 845 S.W.2d 240 (Tex. 1992).

Petition for Rehearing. Order on Pet. Reh'g filed 12/31/92. That rejection of Burnap's argument constitutes the law of the case. See Louisiana Land & Exploration Co. v. FERC, 788 F.2d 1132, 1137 (5th Cir. 1986) (argument disposed of with the mandate of an appellate decision is "no longer open" and will not be reexamined in subsequent appeal).

We will not undo the summary judgment previously granted and upheld by this Court on the basis of an argument that the agreement was unenforceable or invalid.

IV.

In accordance with the foregoing, we affirm the judgment of the district court. Appellants' motion to compel mediation is denied and Appellants' supplemental motion to mediate asking the court to order the parties to mediate within the next sixty days and stay all further proceedings in the appeal pending mediation is denied.

Judgment AFFIRMED; Appellants' motion to compel mediation DENIED; Appellants' supplemental motion DENIED.