IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5203
Summary Calendar

FEDERAL DEBT MANAGEMENT, INC.,

Plaintiff-Appellee,

versus

HERBST RESOURCES, INC., ET AL.,

Defendants,

GORDON H. EDWARDS,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana
(92-CV-504)

(January 12, 1994)

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

PER CURIAM:*

This appeal arises from a grant of summary judgment in favor of Federal Debt Management, Inc. ("FDMI"). The appellant, Gordon H. Edwards, argues that summary judgment was inappropriate, first, because FDMI failed to discharge its summary judgment burdens, and,

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

second, because the district court improperly denied Edwards a continuance to conduct additional discovery. For the reasons discussed below, we affirm the district court's judgment.

I

FDMI is the holder in due course of a note ("the Note") in the principal amount of $158,992.09 payable on demand to The Bank of Commerce, Shreveport, Louisiana (the "Bank") and executed by Peter W. Herbst as President of Herbst Resources, Inc. This note was secured by a pledge of a collateral mortgage. Furthermore, payment was guaranteed to the Bank, its successors and assignees under continuing guaranty agreements ("Guaranty Agreements") signed by Peter W. Herbst, Dianne Peck, and the appellant, Gordon H. Edwards.

In June of 1986, the Commissioner of Financial Institutions for the State of Louisiana declared the Bank insolvent. The Bank was subsequently closed. The Commissioner appointed the Federal Deposit Insurance Corporation ("FDIC") receiver and became the owner of the Note and the Guaranty Agreements. In March 1991, FDMI purchased for value all of the FDIC's rights, title, and interest in the Note and all security, including the Guaranty Agreements. As a result of this transaction, FDMI became the holder in due course of the Note, and it is the assignee for value of the Guaranty Agreements.

II

On March 25, 1992, FDMI filed suit against four defendants: Herbst Resources, Inc., the maker of the note; Peter Herbst and his former spouse, Diane Peck, on the Herbst Guaranty Agreement; and Edwards on his Guaranty Agreement. After commencing litigation, FDMI settled its claim against Peter Herbst and Dianne Peck for $7,000, and this amount was deducted from the total debt owed. FDMI continued its suit against Edwards, seeking full payment from Edwards under his Guaranty Agreement. FDMI also sought payment of the actual fees and costs incurred in enforcing the Note and the Guaranty Agreement.[1]

On February 8, 1993, nearly a year after the suit was filed, Edwards filed an answer.[2] In this answer, Edwards asserted three

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[1]The Guaranty Agreement signed by Edwards provides that the "guarantor agrees to pay in addition to said sum, all costs, expenses, attorney's fees which said bank may pay or incur in collecting, or endeavoring to collect, said debts and liabilities, and in enforcing this guaranty."

[2]The record demonstrates that Edwards has engaged in a pattern of dilatory tactics. FDMI was compelled to hire a private process server to serve Edwards after he refused to accept service by mail. Following service, FDMI entered into settlement negotiations with Edwards. During these negotiations, FDMI gave Edwards several informal extensions of time in which to file an answer. After the settlement discussions reached an impasse, FDMI, both orally and in writing, informed Edwards's attorney that Edwards must file an answer to FDMI's complaint. Edwards refused, and FDMI took a default against Edwards on September 24, 1992. FDMI then invited Edwards's attorney to set aside the default and file an answer before FDMI incurred the expense of finalizing the default judgment. Edwards refused. FDMI then finalized the default judgment against Edwards on October 14, 1992. Only then did Edwards file his first pleading--a motion to set aside the default judgment. The district court granted the motion on January 7,

affirmative defenses: [1] that FDMI's petition failed to state a claim; [2] that the Bank had by agreement released him from his obligation; and [3] laches. FDMI then filed a motion for summary judgment on March 18, and the hearing was set for April 17. After the motion had been set for hearing, and shortly before Edwards's response was due, FDMI and Edwards stipulated that Edwards could have a sixty-day continuance--which would expire on June 4--to conduct discovery. Although FDMI agreed to the continuance specifically so that Edwards could conduct discovery, Edwards failed to take immediate advantage of the extension. In a letter dated April 15, 1993, FDMI wrote Edwards expressing concern that Edwards had not yet undertaken any discovery. In this letter, FDMI reiterated that no further extensions of time would be forthcoming. About one month later, and approximately two weeks before Edwards' opposition to FDMI's motion for summary judgment was due, Edwards served FDMI with interrogatories, requests for production, and a notice of deposition. The answers to these discovery requests were due after the expiration of the extension period, and the deposition was set on a date three weeks after Edward's response was due. After the period for discovery and for opposing the motion for summary judgment had expired, the district court set a hearing the summary judgment motion for July 14. On July 13, one

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1993. That order, however, provided that Edwards must file an answer within thirty days, and that FDMI "may then request summary judgment and/or request for a speedy trial. The case would then be set immediately."

day before the district court was scheduled to take the matter under advisement, and without filing a response opposing FDMI's motion for summary judgment, Edwards filed a motion for a further continuance. The district court denied Edward's motion and granted FDMI's motion for summary judgment.

III

Edwards now contends that the district court erred in granting summary judgment in favor of FDMI. Specifically, Edwards argues that because FDMI did not negate the validity of his affirmative defenses, FDMI failed as movant to discharge its summary judgment burden. We review de novo a district court's grant of summary judgment, applying the same standards the district court applied. Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2558, 91 L.Ed.2d 265 (1986). However, where the non-movant bears the burden of proof at trial on a dispositive issue, the non-movant must demonstrate by competent summary judgment proof that there is a genuine issue of material fact warranting trial. Id. at 2553. There is no issue warranting trial unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91

L.Ed.2d 202 (1986). Although Rule 56 requires the nonmovant to "set forth specific facts showing that there is a genuine issue for trial," id., the movant need merely point to the absence of evidence supporting the non-movant's case. Id. at 2554; see also, Moody v. Jefferson Parish School Board, 2 F.3d 604, 606 (5th Cir. 1993); Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 190 (5th Cir. 1991).

In this case, FDMI discharged its initial summary judgment burden by providing evidence that established each element of its prima facie case.[3] With respect to Edwards's affirmative defenses, on which Edwards had the burden of proof at trial, FDMI pointed to the absence of evidence supporting his affirmative defenses. At that point, FDMI discharged its summary judgment burden, and the burden shifted to the non-movant, Edwards, to demonstrate that there was a genuine issue of material fact.

To prevail on the affirmative defense that he had been released by the Bank,[4] Edwards would have to satisfy the strict requirements of the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e). See, e.g., Park Club, Inc. v. Resolution Trust Corp., 967 F.2d 1053, 1055 (5th Cir. 1992); Resolution Trust Corp. v. Oaks

[3]Edwards has never argued that FDMI failed to prove its prima facie case.

[4]On appeal, Edwards relies solely on the affirmative defense of release. Edwards failed to address the other affirmative defenses he raised in the district court, and, as such, he has abandoned those defenses.

Apartments Joint Venture, 966 F.2d 995, 998 (5th Cir. 1992). He has, however, satisfied neither. The D'Oench, Duhme doctrine provides that a "secret" agreement that tend to mislead or deceive creditors or the public authority may not be raised as a defense against the FDIC when it seeks to enforce a note unless the "secret" agreement is duly recorded in the bank's records. FSLIC v. Griffen, 935 F.2d 691, 698 (5th Cir. 1991), cert. denied, 112 S.Ct. 1163, 117 L.Ed.2d 410 (1992). Edwards, however, presented no evidence that any "secret" agreement to release him was recorded in the Bank's records. Similarly, 12 U.S.C. § 1823(e) "forbids defenses based on an agreement with a failed depository institution unless the agreement meets all four criteria enumerated in [the statute]." Resolution Trust Corp. v. McCrory, 951 F.2d 68, 71 (5th Cir. 1992). The statute requires that

> such an agreement [1] shall be in writing, [2] shall have been executed by the bank and the person or persons claiming an adverse interest thereunder,including the obligor, contemporaneously with the acquisition of the asset by the bank, [3] shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and [4] shall have been, continuously, from the time of its execution, an official record of the bank.

12 U.S.C. § 1823(e) (1989). Edwards provided no evidence to demonstrate that there was a written agreement, that it was executed by the Bank and Edwards, that the execution was contemporaneous with the alleged acquisition of the security from Edwards, or that the agreement was approved by the board and reflected in the minutes of the Board or Loan Committee. In short,

Edwards completely failed to furnish any evidence supporting his affirmative defenses, much less sufficient evidence that would allow a jury to return a verdict in his favor.

Finally, Edwards argues that he was unable to provide competent summary judgment evidence because he was unable to conduct adequate discovery. As such, he contends that the district court abused its discretion when it denied his eleventh-hour request for a continuance. We disagree. After being subjected to a pattern of dilatory tactics by Edwards, FDMI nonetheless voluntarily agreed to grant Edwards a sixty-day continuance precisely so that Edwards could conduct the discovery required to respond to FDMI's motion for summary judgment. Under that stipulation, Edwards was to complete the necessary discovery and file his response to FDMI's motion for summary judgment before the June 4 deadline. Rather than diligently conducting discovery, Edwards did nothing until two weeks before the expiration of the sixty-day continuance, when Edwards managed to serve a set of discovery requests and a notice of deposition. Based on this pattern of delay, we certainly cannot say that the district court abused its discretion in denying the continuance.

IV

Based on the foregoing reasons, the judgment of the district court is

A F F I R M E D.