UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7560
Summary Calendar

RESOLUTION TRUST CORPORATION AS
RECEIVER OF REPUBLIC BANK FOR SAVINGS, F.A.,

Plaintiff-Appellee,

versus

PORCHIE F. GRADY, ET AL.,

Defendants,

PORCHIE F. GRADY, RIO SYSTEMS, INC.,
and C. L. BALLARD,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-3:90-006(B)(N))

(May 24, 1994)

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

PER CURIAM:[*]

Defendants-Appellants Porchie F. Grady, Rio Systems, Inc., and C. L. Ballard (collectively, the borrowers) appeal the final

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

judgment of the district court, contending that the district court erred in its (1) grant of summary judgment in favor of Plaintiff-Appellee Resolution Trust Corporation (the RTC), (2) denial of the borrowers' Objection to RTC's Motion for Summary Judgment and Motion to Strike, (3) denial of the borrowers' request for additional time to supplement their "response" to the motion for summary judgment, and (4) denial of the borrowers' Motion for New Trial. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

The RTC[1] filed suit against the borrowers in February 1990 to recover on five promissory notes and several guaranties for loans totalling in excess of $3.8 million excluding interest.[2] The common thread in the lawsuit was Porchie Grady, who signed or guaranteed the five promissory notes that were payable to Republic Bank for Savings, F.A. The remaining defendants were relatives, business associates, or businesses participating with Grady in his various business ventures.

Note 1 was executed by Ted Oliver, Inc. and Gulf Pacific Construction Co., Inc. on March 6, 1986 for principal in the amount of $1.2 million. Grady signed an agreement in April 1987

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[1]The RTC was acting as conservator of Republic Bank for Savings, F.A. when the suit was filed. In June 1990, Republic Bank was ordered closed and the RTC was appointed receiver. In January 1991, RTC as receiver for Republic Bank was substituted as the proper party plaintiff.

[2]Five other defendants were sued but are not parties to this appeal.

guaranteeing Note 1.

In September 1986, Grady executed Note 2 in the amount of $300,000. Grady executed another promissory note, Note 3, in June 1987, for $750,000.

Grady and C. L. Ballard signed personal guaranties of Note 4, which was executed by R.I.O. Systems, Inc. in September 1986 in the principal amount of $253,000. Grady also signed a promissory note, Note 5, as additional evidence of that $253,000 debt.

After the five promissory notes became due, the borrowers and guarantors defaulted on their obligations to Republic Bank. When sued by the RTC, the borrowers alleged twenty separate affirmative defenses[3] and a $10.5 million counterclaim for compensatory and punitive damages.[4]

The district court's amended scheduling order required completion of discovery by June 30, 1991 and the filing of motions

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[3]The affirmative defenses include (1) failure to state a claim; (2) waiver; (3) actions and conduct as bar; (4) unclean hands; (5) implied joint venture, doctrine of pari delicto; (6) fraudulent inducement; (7) failure to join party (Gulf Pacific); (8) breach of good faith and fair dealing; (9) diversion of funds, implied joint venture, breach of good faith, fair dealing and fiduciary relationship; (10) inadequate consideration; (11) implied joint venture; (12) illegality, equitable subordination, failure of consideration, assumption of risk, release, laches, waiver and/or avoidance; (13) recoupment; (14) FDIC foreclosure of other indebtedness; (15) litigation between the borrowers and Union Carbide, estoppel, promissory estoppel and/or waiver; (16) failure to comply with regulation, waiver; (17) failure to join party; (18) accord and satisfaction; (19) anticipatory repudiation; and (20) impossibility of performance.

[4]The Borrowers' counterclaims are based on misrepresentations by bank officers, detrimental reliance, fraud, gross negligence, diversion of funds, breach of good faith and fair dealing, and breach of an alleged agreement between Porchie Grady and Republic Service Corporation.

by July 30, 1991. The borrowers filed a "Motion for Relief from and to Set Aside Status Conference Order," and requested that the court extend the discovery deadline to October 31, 1991. The court did not grant the four-month extension but ordered that discovery be completed by August 30, 1991, and extended the filing date for motions. It required that "[a]ll motions, with the exception of evidentiary in limine motions, shall be served on or before September 30, 1991."

The RTC filed a motion for summary judgment on September 30, 1991, the final day for filing dispositive motions under the district court's scheduling order, but did not serve it on opposing counsel until the next day (October 1). In response to the motion, the borrowers filed an "Objection to the RTC's Motion for Summary Judgment and Motion to Strike" (Motion to Strike) without submitting responsive or opposing affidavits or other evidence of genuine material facts to be tried. Paragraph 9 of the borrower's Motion to Strike reads as follows:

> Defendannts [sic], as adverse parties, request additional time and reserve pursuant to Rule 56(e) the right to supplement this response by further filing of additional objections, responses, and affidavits in opposition to RTC's Motion for Summary Judgment, if any need therebe; Defendants further reserve their right to depose Lynn Johnson and Charles Butler . . . and thereafter file further responses in opposition to RTC's Motion for Summary Judgment and controverting affidavits in support thereof, if any need therebe.

Although the district court did not rule on the RTC's motion for summary judgment for six months, the borrowers never responded to the motion on substantive grounds. Instead, they rested on their technical objection to the motion. Neither did the borrowers

engage in any additional discovery.

The district court denied the borrowers' Motion to Strike. It held that the RTC's motion had been filed timely under the scheduling order and, even if the motion had been served one day late, the borrowers were entitled to no relief as there had been no showing of prejudice. The court also held that Rule 56(e) did not grant a right to supplement responses at any time but required the demonstration of specific facts showing a genuine issue for trial, and that the borrowers' technical objection and their failure to make a substantive response to the RTC's motion was insufficient to create any genuine issue of material fact. Moreover, it held that the borrowers had failed to establish that any of the affirmative defenses or claims asserted in their answer would not be barred by 12 U.S.C. § 1823(e) and D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

On April 3, 1992, the court granted judgment for over $4 million in unpaid principal and interest in favor of the RTC on all five promissory notes.[5] The judgment did not become final, however, until August 1993, when the RTC's claims against each defendant were finally decided.

[5]The judgment for principal and interest on the five promissory notes through March 31, 1992 totalled $4,071,986.18. The district court also awarded interest to the RTC at the rate of 4.58% per annum from the date of judgment. As each promissory note contained a provision requiring Borrowers' to pay attorneys' fees and collection costs, and the guaranty agreements covered all amounts due under the promissory notes, the district court awarded attorneys' fees as part of its summary judgment and apportioned those fees among the five promissory notes.

II

ANALYSIS

A. Motion to Strike

The borrowers moved to strike the RTC's motion for summary judgment because of an alleged failure timely to serve the motion as required by the scheduling order. The district court denied the borrowers' Motion to Strike. The standard of review of the district court's decision not to sanction the RTC is abuse of discretion.[6] We find none.[7]

"Federal Rule of Civil Procedure 16(f) provides that a court may impose penalties `[i]f a party or party's attorney fails to obey a scheduling or pre-trial order.'"[8] Here, the district court was required to consider aggravating factors including whether the RTC contributed to the delay, whether the borrowers suffered actual prejudice, and whether the delay was intentional.[9] Nothing in the record before us indicates that the one-day delay was intentional,

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[6]John v. Louisiana, 828 F.2d 1129, 1131 (5th Cir. 1987) (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642, 96 S. Ct. 2778, 2780, 49 L. Ed. 2d 747, 751 (1976)).

[7]The borrowers describe the issue as whether the district court had good cause to modify the scheduling order. The district court did not modify the order; rather, it simply refused to sanction the RTC for its alleged failure timely to serve the borrowers.

[8]John, 828 F.2d at 1131. The borrowers describe the issue as whether the district court had good cause to modify the scheduling order. The district court did not modify the order; rather, it simply refused to sanction the RTC for its alleged failure timely to serve the borrowers.

[9]Id. (citing National Hockey League, 427 U.S. at 642).

or was calculated to prejudice the borrowers. The borrowers have claimed no prejudice))either before the district court or before this court))as a result of the delay. The one-day delay in serving the motion for summary judgment did not in fact prejudice the borrowers. Consequently, we find no abuse of discretion in the court's denial of the borrowers' Motion to Strike.

B. Request for Additional Time/Discovery

The borrowers assert that the district court erred when it denied their request for additional time to respond or to file controverting affidavits to the RTC's motion for summary judgment. We review the district court's decision for abuse of discretion.[10]

The borrowers requested an unspecified amount of additional time to respond and "reserve[d] their right" to depose additional witnesses over two months after discovery had ended, but never specified what facts or issues would be developed by additional time or additional discovery. They do not explain how or why the district court's denial of their request for additional time to respond amounts to an abuse of discretion, and we see none.

C. Summary Judgment

The grant of a motion for summary judgment is reviewed de novo, using the same criteria employed by the district court.[11] When a properly supported motion for summary judgment is made, the

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[10]Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1990) (reviewing district court's decision to grant or deny request for additional time for discovery under Federal Rule of Civil Procedure 56(f) for abuse of discretion).

[11]Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

adverse party may not rest upon the mere allegations or denials of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial to avoid the granting of the motion for summary judgment.[12] "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the moving party."[13] Summary judgment is mandated when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[14]

On appeal, borrowers attempt to identify "probable" fact "disparities." The borrowers argue that the district court failed to take judicial notice of genuine issues of material fact in the pleadings, exhibits attached to pleadings, responses to interrogatories, and admissions. The court owed a duty, borrowers contend, "to search the record sui sponte [sic] to determine if there was a genuine issue for trial."[15]

The borrowers' reliance on unsubstantiated allegations in their pleadings is misplaced. The borrowers were not entitled to rely upon the allegations and denials of their pleadings, but were

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[12]Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

[13]FED. R. CIV. P. 56(e).

[14]FED. R. CIV. P. 56(c).

[15]Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980); Stepanischen v. Merchants Dispatch Trans Corp., 722 F.2d 922, 930 (1st Cir. 1983).

required to respond by setting forth specific facts showing that there is a genuine issue for trial. "[R]ule 56 requires that the opposing party be diligent in countering a motion for summary judgment, and mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment."[16] And, although borrowers assert that their responses to interrogatories "raised numerous genuine issues of material fact in dispute," the borrowers state that "[r]ather than be redundant, [the borrowers] would ask the Appellant [sic] Court to take judicial knowledge of the record before it, of the ultimate facts, issues, and conclusions drawn from the answers and the record, to prevent a miscarriage of justice."[17]

As we have said before, "Judges are not ferrets!"[18] The borrowers' reliance on conclusionary allegations, and their failure to "set forth specific facts showing that there is a genuine issue for trial,"[19] inform this court that the district court correctly granted the RTC's properly supported motion for summary judgment on the RTC's claims. As for their affirmative defenses and counterclaims, the borrowers state that "D'Onche [sic] does have

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[16]Nicholas Acoustics & Specialty Co. v. H & M Constr. Co., 695 F.2d 839, 844 (5th Cir. 1983) (citing Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013, 1051 (5th Cir. 1967) (citations omitted)).

[17]Appellant's Brief at 16.

[18]Nicholas Acoustics, 695 F.2d at 847.

[19]FED. R. CIV. P. 56(e); United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 984-85 (5th Cir. 1984); Nicholas Acoustics, 695 F.2d at 844.

its limits," and cite cases from other circuits enumerating "exceptions" to D'Oench, Duhme and 12 U.S.C. § 1823(e). But the borrowers do not explain how any of the purported exceptions to D'Oench, Duhme or 12 U.S.C. § 1823(e) are relevant to their case; neither do the borrowers point to evidence in the record that supports their bald allegations.

Neither before the district court nor before this court have borrowers demonstrated that there are actual disputes over material facts on any claim, any affirmative defense, or any counterclaim that would necessitate a trial.

D. Motion for New Trial

On appeal, the borrowers simply contend that, as the district court failed to enforce its scheduling order and granted summary judgment when genuine issues of fact existed, the district court erred when it denied their Motion for New Trial. We review the district court's denial of the borrowers' Motion for New Trial for abuse of discretion.[20]

The district court denied the borrowers' motion as procedurally improper))there had been no trial. But it also construed the motion as a motion for reconsideration. It denied the motion because the borrowers had failed to establish any basis))factual or legal))for reconsideration of the summary judgment order. We find no merit in the borrowers' contention that the district court abused its discretion.

[20]Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 890 (5th Cir. 1983); Midland West Corp. v. FDIC, 911 F.2d 1141, 1145 (5th Cir. 1990).

III

CONCLUSION

For the foregoing reasons, the judgment of the district court is in all respects

AFFIRMED.