IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8168

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, As Receiver for Lamar Savings Association,

Plaintiff,

versus

SOUTHWEST FEDERAL SAVINGS ASSOCIATION and the RESOLUTION TRUST CORPORATION, As Receiver for Southwest Savings Assoc.,

Plaintiffs-Appellees,

versus

THOMAS S. MACKIE,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A-88-CA-387-WS)

(May 10, 1994)

Before GOLDBERG, JOLLY, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

This controversy arises from a 1984 loan from Lamar Federal Savings ("Lamar") to Thomas S. Mackie to finance Mackie's acquisition and development of a tract of commercial real estate in Dallas County, Texas. On March 7, 1984, Lamar and Mackie entered into a "Construction Loan Agreement." Pursuant to that agreement, Mackie gave Lamar a promissory note and a deed of trust on the property as security.

At approximately the same time, the parties entered into a separate permanent loan commitment, which they were to close upon maturity of the construction loan. By agreement of the parties, the construction loan's maturity and the loan commitment's expiration were extended to July 31, 1986.

Under the terms of the Construction Loan Agreement, funds were to be advanced as construction progressed. Through January 1986, part of the loan funds was advanced each month to cover the accrued interest that Mackie was required to pay on the note. In February 1986, however, the interest reserve fund was exhausted, and Lamar did not advance any further money from the remaining loan funds to cover the accrued interest that was due. Mackie also failed to pay the interest directly. Failure to make these interest payments constituted a default under the note and entitled Lamar to accelerate the note's maturity.

Mackie admits that in February 1986 he failed to pay the interest that was due on the note. He alleges, however, that this

failure was caused by Lamar's breach of contract. It is Mackie's contention that Lamar agreed to fund construction costs, including interest, up to eight million dollars, and that Lamar breached its obligation by failing to advance interest when the full eight million dollars had not yet been used. The Resolution Trust Corporation (the "RTC")[1], on the other hand, asserts that Lamar was required to advance interest to Mackie only to the extent that the interest reserve had been funded in the "Construction Budget." The RTC alleges that by February 1, 1986, the interest reserve had been exhausted and that Lamar was under no duty to reallocate the funds remaining in other parts of the Construction Budget in order to pay the interest due.

In any event, on July 14, 1986, Lamar declared the note in default, accelerated its maturity, and had the property posted for foreclosure based on Mackie's failure to pay the interest that had accrued on the note from February 1, 1986 through July 1, 1986.

II

On July 29, 1986, Lamar filed suit in state court in Travis County, Texas, to enforce and to collect on the promissory note. In May 1988, Lamar became insolvent and the Federal Savings and Loan Insurance Corporation (the "FSLIC") was appointed receiver. The FSLIC transferred all of Lamar's assets, including the note, to Southwest Savings Association ("Southwest Savings"). Southwest

[1]The RTC is party to this case as the ultimate receiver of Lamar's rights.

Savings, however, assumed no liability. The FSLIC and Southwest Savings filed an amended petition, and the FSLIC removed the case to federal court.

On September 14, 1989, Southwest Savings moved for summary judgment. Mackie responded by asserting various affirmative defenses and counterclaims, including breach of the permanent loan commitment, breach of the duty to deal in good faith, fraud, and usury. In May 1990, the district court granted summary judgment in favor of Southwest Savings.[2]

Mackie appealed, and on January 6, 1992, this court rendered its first decision on the initial appeal. FSLIC v. Mackie, 949 F.2d 818 (5th Cir. 1992). On May 29, 1992, this court withdrew the original opinion and issued its opinion on rehearing. FSLIC v. Mackie, 962 F.2d 1144 (5th Cir. 1992). The case was remanded to the district court.

On remand, the RTC-Receiver filed another motion for summary judgment, and on December 24, 1992, the district court granted RTC-Receiver's motion for summary judgment. On February 1, 1993, the district court filed a final judgment in favor of RTC-Receiver, against Mackie, and Mackie has appealed, once again.

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[2]In June 1990, Southwest Savings was placed into receivership and the RTC, as Southwest Savings's receiver, transferred all of Southwest Savings's assets to Southwest Federal Savings Association ("Southwest Federal"). On July 26, 1991, the RTC was appointed receiver for Southwest Federal, and the RTC is now a proper party in this lawsuit against Mackie.

III

A

At the close of oral argument in this case, we instructed the parties to provide this court with additional briefing in an effort to separate the claims that might have merit from the claims that were obviously barred by D'Oench Duhme. Specifically, we asked Mackie to set out precisely the theory and the supporting evidence that would allow a jury to return a verdict in his favor. This task has now been done; Mackie's claim has been concisely presented, and the case is ready for decision.

B

Mackie argues that Lamar agreed to loan him eight million dollars, and that Lamar breached this agreement by failing to advance the February 1986 interest payment when the eight-million-dollar cap had not yet been reached. Mackie relies on the language of the Construction Loan Agreement, which provides in pertinent part that the lender will make advances under the note for construction costs and that "[t]he Cost of Construction shall be deemed to include . . . interest and other financing charges."

The Construction Loan Agreement, however, also placed certain limitations on Lamar's duty to advance funds. Specifically, at Section II, Paragraph 3(a), the agreement provides:

> Any provision to the contrary notwithstanding, advances will be made only for those construction costs listed in Exhibit C attached hereto and as later may be approved and amended by the parties to the limits as shown thereon. As to any category item of cost listed in

> Exhibit C the Lender shall not be obligated to make any advance hereunder of such items of cost which, when added to prior advances of such category item, will cause such advances to aggregate in excess of (i) an amount equal to the total cost to Borrower of such category item(s) of construction then completed and due and payable or (ii) the loan proceeds allocated to such category item in Exhibit C.

These contractual words show that the parties contemplated that the construction costs would be listed, item by item, in an exhibit ("Exhibit C") that would be attached to the Construction Loan Agreement. The total loan amount of eight million dollars was to be divided and allocated among the listed construction cost items, item by item.

There was, however, a small glitch: Exhibit C was not completed in the fashion contemplated in the Construction Loan Agreement; that is, it did not contain a list of construction cost items or an allocation of the construction loan funds. Instead, the Exhibit C that was actually attached to the Construction Loan Agreement simply contained the words "Left Blank," and "<u>To be agreed upon by Lender and Borrower prior to advances for construction costs.</u>" We have emphasized this contractual sentence because it is significant to our disposition of this case.

On June 6, 1984, ninety days after Lamar and Mackie executed the Construction Loan Agreement, Lamar and Mackie reduced to writing a budget for construction costs. The parties recorded a list of the various construction cost items and allocated the total loan amount among those items (the "Construction Budget"). The

Construction Budget, however, was not executed with, nor attached to, the Construction Loan Agreement as the contemplated Exhibit C. Further, the Construction Budget is only a simple accounting work sheet document, containing neither the signatures of the parties nor any reference to the Construction Loan Agreement. In fact, there is no recorded evidence to show that the Construction Budget represents the parties' agreement under the attached Exhibit C. The original Construction Budget provided that only $788,000 would be paid in interest, but the interest reserve category was amended on June 19, 1985, to allow for $1,368,000 in interest.[3] As previously noted, this dollar amount allocated to this interest reserve category in the Construction Budget was completely depleted by February 1986.

Mackie argues that under the Construction Loan Agreement, Lamar had a duty to advance funds for construction costs until the eight-million-dollar cap was reached. He further argues that the Construction Loan Agreement must be read in the complete absence of Exhibit C and the Construction Budget because Exhibit C was left blank and the Construction Budget does not reference the Construction Loan Agreement. There is no basis, therefore, to assert that Lamar's duty to advance funds for interest ended when the interest reserve in the Construction Budget was depleted. Mackie thus contends that Lamar breached the Construction Loan

[3]In fact, the Construction Budget was amended a total of six times after it was originally created on June 6, 1984.

Agreement by failing to advance the February interest payment when the eight-million-dollar cap had not yet been reached.[4]

C

(1)

Mackie's factual allegations, however, are insufficient to support a reasonable jury in finding that Lamar breached any legal duty that it owed to Mackie. Even if we assume that the parties never intended for the Construction Budget, with its cost itemization, to replace and serve as Exhibit C, Lamar still owed no unlimited duty to advance eight million dollars to Mackie. The Exhibit C that was actually attached as part of the Construction Loan Agreement specifically provided that <u>both parties must agree</u> before Lamar was required to advance funds for any of the various construction costs. Specifically, this Exhibit C attachment stated only that it was "Left Blank," and that the disbursement of monies

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[4]If the parties did intend for the Construction Budget to represent their agreement under Exhibit C, it is absolutely clear that Lamar had no duty to advance funds to cover Mackie's February 1986 interest payment because of the provisions of Paragraph 3(a) in the Construction Loan Agreement, which provides:

> As to any category item of cost listed in Exhibit C the Lender shall not be obligated to make any advance hereunder of such items of cost which, when added to prior advances of such category item, will cause such advances to aggregate in excess of . . . the loan proceeds allocated to such category item in Exhibit C.

Further, any oral agreement creating a duty beyond those created by the Construction Loan Agreement (e.g., a duty for Lamar to reallocate budgeted funds whenever requested by Mackie) would be barred by the common law <u>D'Oench, Duhme</u> doctrine. <u>See</u> <u>D'Oench, Duhme & Co. v. FDIC</u>, 315 U.S. 447, 62 S.Ct. 676 (1942).

was "[t]o be agreed upon by Lender and Borrower prior to advances for construction costs." This language creates no duty on Lamar to advance funds solely upon Mackie's request. Thus, in February 1986, when Lamar did not agree to cover the interest that was due on Mackie's loan, Lamar did not breach the terms of the Construction Loan Agreement. Cf. Traweek v. Radio Brady, Inc., 441 S.W.2d 240, 242 (Tex.Civ.App.--Austin 1969, writ ref'd n.r.e.) (stating that a mere agreement to agree creates no contractual obligation) (citing Radford v. McNeely, 104 S.W.2d 472, 474 (Texas 1937)).

(2)

Mackie further argues, however, that Lamar's decision not to fund the February interest payment was made in bad faith. The Texas courts have stated on some occasions that where the duty to perform under a contract is conditioned upon the personal approval of one of the parties, that party must act in good faith in exercising his judgment. See First Tex. Sav. Ass'n v. Dicker Ctr., 631 S.W.2d 179, 182-83 (Tex.App.--Tyler 1982, no writ) (citing The B.B. Smith Co. v. Huddleston, 545 S.W.2d 559, 562-63 (Tex.Civ.App.--San Antonio 1976, writ ref'd n.r.e.); Black Lake Pipe Line Co. v. Union Construction Co., Inc., 538 S.W.2d 80, 88 (Tex. 1976)). The RTC, on the other hand, argues that this line of cases has no application to the present case in the light of the sound holding that there is no general duty of good faith and fair

dealing imposed on contracting parties in Texas.[5] We do not have to decide the appropriate rule of law to be followed under the Texas cases, however, because Mackie has made no showing of bad faith in the present case.

Lamar ceased advancing funds to cover interest, Mackie argues, because it wanted to avoid its ultimate obligation to close the permanent loan in order to comply with a supervisory agreement from the FSLIC under which Lamar was operating that restricted its ability to fund further commercial construction loans. "To prove bad faith some improper motive must be shown." King v. Swanson, 291 S.W.2d 773, 775 (Tex. Civ. App.--Eastland 1956, no writ); SEE ALSO BLACK'S LAW DICTIONARY 139 (6th ed. 1990) (defining bad faith as "a neglect or refusal to fulfill some duty or some contractual obligation [prompted] by some interested or sinister motive. . . . [I]t implies the conscious doing of a wrong because of dishonest purpose or moral obliquity"). Even if Lamar's decision not to advance further funds for Mackie's interest payments was motivated by the requirements of its supervisory agreement, attempting to satisfy bank regulators is certainly not an "improper" or "sinister" motive. Accordingly, Mackie cannot support his claim

[5]The duty of good faith and fair dealing is imposed on contracting parties in Texas only when there is some special relationship. FDIC v. Coleman, 795 S.W.2d 706, 708-09 (Tex. 1990); Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 482 (Tex.App.--Corpus Christi 1989, writ denied). The borrower-lender relationship is not such a special relationship. Hall v. Resolution Trust Corp., 958 F.2d 75, 59 (5th Cir. 1992).

that Lamar breached the Construction Loan Agreement by failing to use good faith in making its lending decisions under Exhibit C.

Finally, Mackie clearly could not prove that an extraneous oral agreement created a duty beyond those created by the Construction Loan Agreement, because evidence of such agreement would be barred by the common law D'Oench, Duhme doctrine. See D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676 (1942).

IV

As we have earlier noted, Mackie fervently urges that we reverse the district court's grant of summary judgment and remand this case so that a jury can hear and decide the merits of his affirmative defenses. After examination of his arguments, however, we hold that his affirmative defenses have no merit and that no jury would be supported in finding for Mackie. Accordingly, the district court's grant of summary judgment is

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