UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-9182
Summary Calendar

IN THE MATTER OF: JAMES W. SMITH, II,

Debtor.

JAMES W. SMITH, II,

Appellant,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of VERNON SAVINGS AND LOAN ASSOCIATION, FSA,

Appellee.

No. 94-10391
Summary Calendar

IN THE MATTER OF: VERNON S. SMITH, JR.,

Debtor.

VERNON S. SMITH, JR.,

Appellant,

VERSUS

FDIC, AS MANAGER OF THE FSLIC RESOLUTION FUND
as Receiver FOR VERNON SAVINGS AND LOAN ASSOCIATION,

Appellee.

Appeals from the United States District Court
for the Northern District of Texas
(3:93-CV-226-D & 3:93-CV-351-X)

(October 21, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

In these consolidated appeals, Appellants James W. Smith II and Vernon S. Smith Jr. appeal from district court determinations that a claim against them is non-dischargeable under Section 523(a)(6) of the Bankruptcy Code. The district courts affirmed the ruling of the bankruptcy court. We affirm.

FACTS

The Smiths worked together as real estate developers. In 1985, they owed over $34,000,000 to Vernon Savings & Loan Association (VSLA) and sought to extend their repayment period. At the same time, Dondi Residential Properties, Inc. (DRPI), a subsidiary of VSLA, owned real estate projects that were unmarketable and losing money. VSLA needed to remove the projects from DRPI's books by mid-1985 to avoid a serious negative impact on VSLA. VSLA's chief officers asked VSLA's major borrowers to purchase these projects using VSLA funds. The scheme would conceal VSLA's losses and mislead FSLIC regulators.

VSLA asked the Smiths to purchase one of the projects known as the Cedar Springs Property. The Smiths understood that VSLA would reward their favor with future financial assistance. In 1985, the Smiths purchased Cedar Springs for $5,595,000, which the Smiths

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

financed by giving three notes to VSLA.[2] Oral side agreements provided that the Smiths would pay no interest on the notes, that VSLA would provide the Smiths with funds to repay the principal, and that VSLA would take back the property at some point from the Smiths. The oral agreements effectively hid the scheme from bank examiners.

In 1987 VSLA was declared insolvent and the FSLIC became its receiver.[3] The Smiths soon after filed bankruptcy petitions under Chapter 7 of the Bankruptcy Code. The bankruptcy court determined that the secured note held by the FDIC as receiver was non-dischargeable in bankruptcy under Section 523(a)(6).[4] The district court, speaking through Judge Fitzwater for James Smith and Judge Kendall for Vernon Smith, affirmed.[5] The Smiths appeal.

DISCUSSION

Section 523(a)(6) of the Bankruptcy Code renders a debt nondischargeable in bankruptcy "for willful and malicious injury by

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[2] Two notes, one for $4,340,000 and the other for $1,085,000, were secured against the appraised value of the property. The third note for $170,000 was unsecured and represented the amount the price exceeded the property's appraised value. The secured note for $1,085,000 is the subject of the FDIC's claim against the Smiths.

[3] The FDIC later replaced the FSLIC as receiver.

[4] The FDIC had asserted the § 523(a)(2)(A) and (a)(6) exceptions to discharge. The bankruptcy court originally found § 523(a)(2)(A) applicable, so it did not reach the (a)(6) question. See 113 B.R. 297 (Bankr. N.D. Tex. 1990), rev'd, 133 B.R. 800 (N.D. Tex. 1991). On remand, the bankruptcy court adopted its previous factual findings and determined that § 523(a)(6) applied.

[5] Judge Fitzwater's opinion is published at 160 B.R. 549 (N.D. Tex. 1993).

the debtor to another entity or to the property of another entity." We will set aside findings of fact by the bankruptcy court only when they are clearly erroneous. Luce v. First Equipment Leasing Corp. (In re Luce), 960 F.2d 1277, 1280 (5th Cir. 1992). We review the bankruptcy court's conclusions of law de novo. Id.

The Smiths contend that § 523(a)(6) does not apply to them because the FDIC did not prove an independent recognized tort. Section 523(a)(6) requires the debtor's act to be willful, malicious, and lead to harm. In re Culp, 140 B.R. 1005, 1014 (Bankr. N.D. Okla. 1992); In re Lefeve, 131 B.R. 588, 602 (Bankr. S.D. Miss. 1991). Appellants cite no authority requiring the debtor's act to be an independent recognized tort. A plain reading of the statute uncovers no such requirement. We conclude that a debtor need not commit an independent recognized tort for § 523(a)(6) to apply.[6]

Each Appellant raises one other legal issue, both of which we may dispatch quickly. James Smith contends that the FDIC waived its (a)(6) ground when it did not appeal the bankruptcy court's original decision, which determined that the claim was non-dischargeable under (a)(2)(A). The bankruptcy court did not reach the (a)(6) ground because it relied on (a)(2)(A). No waiver occurred because the FDIC prevailed in the bankruptcy court the first time around. Having prevailed it had no ground to or reason

[6] James Smith argues that fraud cannot be included within § 523(a)(6) because subsections (a)(2)(A) and (a)(6) are mutually exclusive. In re Stokes, 995 F.2d 76, 77 (5th Cir. 1993), forecloses this argument.

for appeal. Vernon Smith raises an equitable estoppel issue for the first time on appeal.[7] Smith would impute the knowledge of the scheme from VSLA's chief officers to the FDIC in its role as receiver. Such knowledge, Smith asserts, would estop the FDIC from asserting its claim. We review issues raised for the first time on appeal under a plain error standard, which requires the error to be clear under current law. Highlands Ins. Co. v. National Union Fire Ins. Co., 27 F.3d 1027, 1032 (5th Cir. 1994). We detect no plain error.[8]

The bankruptcy court found that the Smiths' actions were willful, malicious, and caused harm to the FDIC. We see no clear error. Both sides offered evidence on whether the Smiths participated willfully and without just cause or excuse in the Cedar Springs transaction. The bankruptcy court was in the best position to weigh the evidence and judge the credibility of the witnesses. The evidence also shows that the Smiths' actions caused

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[7] Smith characterizes his new estoppel argument as "one of the Appellee's arguments throughout this case, i.e., that the FDIC-receiver has failed to establish an injury to itself proximately caused by Vernon Smith." Vernon Smith Reply Brief at 9 n.2. Smith's no proof of injury argument concerns the FDIC's dual capacities as receiver and insurer and before now never mentioned equitable estoppel.

[8] Smith cites O'Melveny & Myers v. FDIC, 114 S.Ct. 2048 (1994), and FDIC v. Ernst & Young, 967 F.2d 166 (5th Cir. 1992), in support of his estoppel argument. The Fifth Circuit in Ernst & Young expressly limited its holding to the facts presented, which do not apply here. 967 F.2d at 172. The Supreme Court in O'Melveny & Myers rejected the application of federal common law to the knowledge of the FDIC in a state law cause of action. 114 S.Ct. at 2054-56. The FDIC's claim in this case, however, is asserted under the Bankruptcy Code. No plain error exists under current law.

harm to the FDIC. The Smiths never repaid the outstanding secured note, and the FDIC had to absorb the loss. The FDIC's dual capacities of insurer and receiver do not prohibit the FDIC from asserting a claim in one capacity that it absorbed in the other. We conclude that the bankruptcy court's findings were not clearly erroneous.

For the foregoing reasons, the district courts' judgments are AFFIRMED.