IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10287
Summary Calendar

FEDERAL DEPOSIT INSURANCE CORPORATION,
in Its Corporate Capacity,

Plaintiff-Counter
Defendant-Appellee,

VERSUS

AMBIKA INVESTMENT CORPORATION, et al.,

Defendants,

AMBIKA INVESTMENT CORPORATION, et al.,

Defendants-Counter
Plaintiffs-Appellants,

VERSUS

NATIONSBANK,
Formerly Known as
NCNB Texas National Bank, N.A.,

Counter Defendant-
Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-2702-P)

(December 1, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

The Federal Deposit Insurance Corporation ("FDIC") sued Ambika Investment Corporation, Vino T. Patel and Usha V. Patel, d/b/a Ambika Mobile Home Park, V. T. Patel, a/k/a Vino T. Patel, and Usha V. Patel (hereinafter collectively "Ambika") to recover the unpaid balance of promissory notes (the "notes") secured by liens on real property on which the FDIC had foreclosed and by personal guaranties. After reviewing the record, we adopt the findings of fact set forth by the district court in its opinions of October 19 and November 9, 1993.

I.

A.

First, Ambika argues that the district court erred in holding, on the FDIC's motion for summary judgment, that as a matter of law the FDIC had proved it was the "assignee, endorsee, owner and holder" of the notes at issue. This court reviews a district court's grant of summary judgment _de novo_. _Matagorda County v. Law_, 19 F.3d 215, 217 (5th Cir. 1994). Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56.

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* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

The party opposing the motion for summary judgment prevails if it presents any material evidence tending to support its claim; furthermore, all evidence must be viewed in the light most favorable to the nonmovant. Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 292 (5th Cir. 1990). The Supreme Court has addressed the question of how this standard applies to issues upon which the nonmovant would bear the burden of proof at trial, holding that there is no requirement "on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Ambika's argument that the district court erred in finding the FDIC to be the assignee, endorsee, owner, and holder of the notes rests on the assertion that the district court made various evidentiary errors. We review the evidentiary rulings of the district court for abuse of discretion. Richardson v. Oldham, 12 F.3d 1373, 1378 (5th Cir. 1994). The FDIC's principal summary judgment evidence on the issue of note ownership was two documents, each entitled "Memorandum of Assignment of Note and Lien," and referencing the transfer of note interests to and from the FDIC in its receiver and corporate capacities.

Ambika argues that these documents were admitted in violation of the hearsay and best evidence rules because they purport to state, for the truth thereof, the contents of two purchase and assumption agreements not entered into evidence. Ambika's argument is purely evidentiary; it does not claim that the FDIC is not, in fact, the owner of the notes.

This court has held that an affidavit attesting to the ownership of a promissory note is evidence adequate to support summary judgment, "unless the defendant points to evidence in the record supporting a legitimate fear that the plaintiff is not the owner and holder of the note, and that some other party will later appear and demand payment." NCNB Texas Nat'l Bank v. Johnson, 11 F.3d 1260, 1265 (5th Cir. 1994). See also Dalton v. FDIC, 987 F.2d 1216, 1223 (5th Cir. 1993); FDIC v. McCrary, 977 F.2d 192, 194 (5th Cir. 1992); RTC v. Camp, 965 F.2d 25, 29 (5th Cir. 1992). The affidavits of Steve Sieling and Michael Enslin, admitted in support of the motion for summary judgment, are adequate proof under this line of cases. Furthermore, Ambika has not claimed to have a "legitimate fear," in the language of Camp, that the FDIC is not the owner of the notes.

We find no abuse of discretion in the admission of the Enslin and Sieling affidavits into evidence. Since Ambika failed to submit any controverting evidence, the district court did not err in holding the FDIC to be the owner of the notes.

B.

Next, Ambika contends that the district court erred in holding, on summary judgment, that the FDIC's substitution of the NationsBank prime rate of interest for the rate of the defunct bank was allowable under FDIC v. Blanton, 918 F.2d 524, 532-33 (5th Cir.

1990). The notes at issue provided for a rate of interest to be determined annually based upon the prime rate of InterFirst Bank Dallas, N.A., which rate ceased to exist on July 29, 1988. The FDIC substituted the prime rates of NCNB and NationsBank, the successor owners of the notes, although the notes themselves did not explicitly allow this substitution or make any other provision for an alternate rate of interest.

Ambika argues that the FDIC, as plaintiff, bears the burden of pleading and proving a factual or legal basis for modifying the interest term of the contract. In addition, Ambika argues that the FDIC failed to show that the NCNB prime rate was "analogous" to the note rate so as to fall under this court's holding in Blanton. In Blanton, this court stated in dicta that the district court "could have applied an analogous prime rate as consistent with the intent of the parties." Blanton, 918 F.2d at 532.

In FDIC v. Massingill, 24 F.3d 768, 780 (5th Cir. 1994), this court stated:

> The district court accepted the FDIC's contention, as a matter of law, that the agency properly could apply the prevailing prime rate of the bank which assumed the Notes, i.e., United Bank, in lieu of the presently unascertainable "Base Lending Rate" of the defunct Moncor Bank, in order to determine the rate of interest due upon the Notes. We agree.

The Massingill opinion also notes that several other courts have allowed the substitution of the successor note owner's rate of interest. See, e.g., FDIC v. La Rambla Shopping Center, Inc., 791 F.2d 215, 223 (1st Cir. 1986); FDIC v. Condo Group Apts., 812 F. Supp. 694, 699 (N.D. Tex. 1992); FDIC v. Cage, 810 F. Supp.

745, 747 (S.D. Miss. 1993).

Ambika also argues that the court's substitution of interest rates was error because the FDIC did not introduce any evidence of reasonableness as required by Bailey, Vaught, Robertson & Co. v. Remington Investments, Inc., No. 05-93-00911-CV, 1994 WL 521911 (Tex. App.))Dallas 1994). In Bailey the court, after reviewing this circuit's jurisprudence in Blanton and Massingill, wrote:

> We hold that, in order to calculate the amount due on a promissory note where the prematurity interest rate is based on the no-longer-published prime rate of a defunct inancial institution, the trier of fact should apply a "reasonable" rate of interest, considering the facts of each case. Here, the parties agreed in the note that prematurity interest is payable on the note. Therefore, it is proper to imply a contract term to effectuate the intent of the parties. This holding is in keeping with the Texas policy of giving a reasonable construction to promissory notes regarding interest. The trier of fact should determine what rate of interest is reasonable. In this case, there is no summary judgment evidence regarding a reasonable rate of interest as a substitute for the interest rate stated in the note. Reasonableness is generally a fact question. Because there is no summary-judgment evidence establishing the applicable prematurity rate of interest as a matter of law, Remington failed in its sumary-judgment burden to establish the amount due on the note. We hold that the trial court erred in granting summary judgment in favor of Remington on its suit on the note.

1994 WL 521911, at *5 (emphasis added, citations and footnotes omitted). In a footnote, the court distinguished Massingill, pointing out that in Massingill the substitution-of-interest rate issue was decided after a bench trial, rather than on a motion for summary judgment. 1994 WL 521911, at *5 n.8. Bailey is squarely on point. As the FDIC did not present any summary judgment evidence about the reasonableness of the substituted rate, the district court erred in granting summary judgment on that issue.

C.

Ambika argues that the district court erred by failing to give it credit for the fair market value of the property securing the note. Under Texas law, defendants are entitled to a credit against any deficiency claim in the amount of the foreclosure bid or the fair market value of the real property securing the loan as of the date of the foreclosure, whichever is greater. TEX. PROP. CODE ANN. § 51.003(b)-(c) (Vernon 1994). The statute specifies that the court should take into account evidence including, but not limited to, "comparable sales . . . anticipated marketing time and holding costs . . . cost of sale, and . . . the necessity and amount of any discount to be applied to the future sales price or the cashflow generated by the property" to arrive at a current fair market value. Id. § 51.003(b).

After a bench trial, the district court ruled that the 1991 tax appraisal of the property, at $1,779,510, was a more accurate measure of its value than either of the figures submitted by Ambika and the FDIC. The court distinguished older Texas cases holding that tax appraisals are not competent evidence to prove market value of property, reasoning that comprehensive changes in the Texas tax appraisal system have undermined the foundations of those opinions. The court then proceeded to reduce the tax appraisal amount by three percent (sales commission) and an additional twelve percent (present value discount). Ambika claims that these discounts constituted "double counting" of the commission and present value factors. This argument is semantic and wholly meritless.

The Texas statute instructs the court to take into account both a measure of the base value of the property (such as the price of comparable sales) and discounts for such items as cost of sale in arriving at a fair market value figure. The district court simply substituted the 1991 tax appraisal for another base value figure, such as one produced by evidence of comparable sales. This type of substitution based upon the available competent evidence is plainly contemplated by the statute. Ambika does not argue that the tax appraisal figure actually included discounts for sales commission and present value; if this were true, Ambika's argument might have some merit.

D.

Ambika also argues that the district court erred in entering judgment on the basis of Sieling's post-trial affidavit and in denying Ambika's motion to reconsider its summary judgment. The affidavit was submitted upon the court's request after its determination that Ambika was entitled to various credits against its deficiency.

In the affidavit, Sieling alleged that the revised accrued interest owed was $887,980.09 through November 16, 1993. Ambika argues that the court's admission of this affidavit, and reliance on it in entering judgment, was error because Ambika is unable to recreate the calculations leading to the final interest figure and because those calculations are not set forth in the affidavit itself.

Ambika, however, did not seek the opportunity to cross-examine the FDIC on the Sieling affidavit, nor did it submit its own calculations to the court in response to the affidavit. Accordingly, Ambika has provided no ground for reversal. The Texas Court of Civil Appeals rejected a claim like Ambika's in a case very similar to the one at bar:

> Defendant does not question the accuracy of the interest computation. He complains only that because the evidence does not demonstrate the method used to make the computation, the court could not determine its accuracy. This was not the court's burden. The affidavit was clear, positive and direct and could have been readily controverted. It was therefore defendant's burden to point out any inaccuracy in computation or, by proper response, to point out reasons for his inability to do so.

Sharpe v. Lomas & Nettleton Fin. Corp., 601 S.W.2d 55, 57 (Tex. Civ. App.))Dallas 1980, writ ref'd n.r.e.). Because there was no evidence controverting the Sieling affidavit and no attempt to introduce controverting evidence, the district court did not err in relying upon the affidavit.

E.

Ambika argues that the district court erred in entering judgment for post-foreclosure interest calculated at a fixed rate of 12%. To support this contention, Ambika points to a pretrial stipulation, in which the FDIC provided that "[f]rom and after July 29, 1988, plaintiff [FDIC] has calculated interest allegedly due under the note at issue on the basis of the prime rate of interest published by NCNB Texas National Bank and/or Nationsbank."

The prime rate of NCNB, Ambika argues, did not rise above 6% in the year preceding the district court's final judgment, thus making the 12% figure charged from the date of foreclosure erroneous.

The FDIC argues that it could have charged even more than 12%. To support this claim, it points to a provision in both notes providing:

> If interest on this note is computed at a fixed rate, all past due principal and interest shall bear interest from maturity of such principal or interest at the Fixed Rate or 18% per annum, whichever is greater. If interest on this note is computed at a Variable Rate, all past due principal and interest shall bear interest at the maximum rate of interest permitted from time to time by applicable law.

The FDIC argues that the Notes were computed at fixed rates in accordance with the following provisions:

> The interest on said note shall be due and payable as follows:
>
> 1) During the period of 10/4/86 through 10/3/87, interest shall accrue at the rate of 9.5% fixed per annum.
>
> 2) During the period of 10/4/87 through 10/3/88, interest shall accrue at two percent (2%) in excess of the prime rate fixed at InterFirst Bank Dallas NA as it exists on October 4, 1987.
>
> 3) During the period 10/4/88, through 10/3/89, interest shall accrue at the rate of two percent (2%) in excess of the prime rate fixed at InterFirst Bank Dallas NA as it exists on October 4, 1988.

The FDIC contends that these provisions create a fixed rate, albeit one that was recalculated twice during the loan. Accordingly, the FDIC was entitled to charge the greater of the last fixed rate or 18% per annum, and it was simply a windfall to Ambika that the 12% rate was chosen. Ambika's argument stretches the language of the

FDIC's pretrial stipulation beyond its intended meaning and ignores pertinent clauses of the notes. Accordingly, we conclude that the district court did not err in allowing the 12% post-foreclosure rate of interest.

F.

Finally, Ambika argues that the district court erred in allowing the FDIC to apply property tax payments to accrued interest rather than principal. Following trial, the district court held that "[n]o evidence was presented by either side as to whether those payments [the $15,343.02 in question] were credited by the bank against the debt due," requiring the FDIC to reduce the deficiency balance by the amount disputed. The district court resolved the issue by relying upon the burden of proof, which it found to be with the plaintiff. The FDIC has not appealed this holding, although it cites several authorities indicating that payment is actually an affirmative defense, the burden of proof for which is on the defendant. Since the district court's holding on this issue benefited Ambika, we understand Ambika's complaint on appeal to be that the FDIC somehow failed to comply with the district court's order. Ambika cannot obtain redress in this court in regard to this portion of the judgment, of which Ambika does not complain.

II.

After reviewing the arguments raised by appellants, we REVERSE the district court's grant of summary judgment on the issue of the substituted interest rate and REMAND for proceedings consistent with this opinion. As to all other matters, the judgment is AFFIRMED.