IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10551
(Summary Calendar)

FEDERAL DEPOSIT INSURANCE CORPORATION
in its Corporate Capacity, ET AL.,

Plaintiffs,

FEDERAL DESPOSIT INSURANCE CORPORATION
in its Corporate Capacity,

versus

Plaintiff-Appellee,

LANDMARK HOTEL CORPORATION, ET AL.,

Defendants,

LANDMARY HOTEL CORPORATION,

Defendant- Appellant.

Appeal from United States District Court
from the Northern District of Texas
(3:91-CV-2832-X)

(March 7, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.*

CARL E. STEWART, Circuit Judge:

This case involves the issue of whether a guarantor should be released from its guaranty because of a drop in the credit rating of the creditor, despite the fact that the guaranty itself contains

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 "Pursuant to that Rule, the Court has determined that this opinion should not be published.

no provision relating to a required credit rating. The guarantor contends that the change in credit rating constituted a material alteration of the guaranty and/or a failure of consideration, releasing it from liability. The Federal Deposit Insurance Corporation ("FDIC"), as holder of the guaranty, contends that there was no material alteration of the guaranty or failure of consideration, and furthermore, that such affirmative defenses of failure of consideration and release by alteration are barred by the D'Oench, Duhme[1] doctrine and 12 U.S.C. § 1823(e). The district court granted summary judgment in favor of FDIC. We affirm.

Facts

The guaranty involved in this lawsuit was executed in connection with the financing of a Holiday Inn in East Peoria, Illinois. The City of East Peoria had issued 13% Industrial Development Revenue Bonds for the benefit of Brock Hotel Corporation (now Integra-A Hotel and Restaurant Company) to build the hotel. On February 1, 1986, East Peoria Hotel Corporation ("EPHC") borrowed $9,000,000 from the City. Appellant Landmark Hotel Corporation ("Landmark") owns 50% of EPHC. The City funded the loan by selling Floating Rate Weekly Demand Industrial Development Refunding Revenue Bonds. E.F. Hutton sold the bonds pursuant to a Bond Purchase Agreement entered into with the City. One of the conditions of the Bond Purchase Agreement was that Standard & Poor assign the bonds ratings of "AA" or "A-1+" or equivalent ratings. Neither RepublicBank nor Landmark was a party

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[1] D'Oench, Duhme and Company, Inc. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).

to the Bond Purchase Agreement.

EPHC used the $9 million loan proceeds to purchase the hotel by paying off the City's previously sold 13% Industrial Development Revenue Bonds. To secure payment of the principal, interest, and other obligations under the bonds, EPH obtained an irrevocable letter of credit from RepublicBank Dallas, N.A., in the amount of $9.146,250. EPHC entered into a Reimbursement Agreement with RepublicBank dated February 1, 1986, in which EPHC agreed to reimburse RepublicBank for all amounts drawn under the letter of credit, together with interest, costs, and expenses.

That same day, Landmark also executed a guaranty of all obligations and liabilities of EPHC to RepublicBank under the Reimbursement Agreement, and Brock executed a guaranty of all obligations of EPHC to RepublicBank under the Reimbursement Agreement. EPHC later went into default under the loan agreement with the City and the Bonds. On April 27, 1988, the RepublicBank letter of credit was drawn upon in the amount of $9,051,000.64.

Subsequently, First RepublicBank, the successor to RepublicBank, was declared insolvent. The FDIC was appointed receiver of First RepublicBank. FDIC established a bridge bank known as JRB Bank, N.A. JRB was assigned certain assets and assumed deposits and specified liabilities of First RepublicBank, including the Reimbursement Agreement of EPHC and RepublicBank, the guaranty of Landmark, and the guaranty of Brock. JRB later changed its name to NCNB Texas National Bank. ("NCNB") NCNB is now known as NationsBank.

This lawsuit was first filed in Texas state court by NCNB. NCNB sued Landmark and Integra as co-defendants on their respective guaranties of the indebtedness of EPHC. NCNB assigned and transferred its right, title and interest in the guaranties, as well as its claims in this lawsuit, to FDIC. The FDIC intervened in the state court action and timely removed the action to the federal district court in Texas.

FDIC moved for summary judgment against both guarantors, asserting that it is the owner and holder of the Reimbursement Agreement and the guaranties. Landmark and Integra opposed the motions, and filed cross-motions for summary judgment, contending that RepublicBank's credit rating dropped, which resulted in the letter of credit being called, and that the drop in credit rating constituted a material alteration of the guaranty or a failure of consideration, thus releasing them from liability. The trial court granted summary judgment in favor of FDIC and denied Landmark's cross-motion for summary judgment. Landmark has appealed.

Standard of Review

We review a district court's grant of summary judgment de novo. Topalian v. Ehrman, 954 F.2d 1125 (5th Cir. 1992). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits filed in support of the motion, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Discussion

Landmark does not dispute that it is a guarantor, that it executed the guaranty in question, or that EPHC was in default. Thus, Landmark concedes that the guaranty agreement was valid and due, absent some defense. Landmark has forwarded a whole host of defenses and assignments of error, which are inextricably interwoven but which we deem meritless because they rely on circumstances and alleged implied agreements extrinsic to the guaranty and loan documents themselves.

Landmark's arguments and defenses center around an alleged agreement or "understanding" between the players in this transaction that RepublicBank would maintain its "AA" credit rating, apparently during the life of the various bonds and loans. The credit rating allegedly made the bonds more marketable and favorably impacted the interest rate under the Loan Agreement. Landmark argues that it bargained for and issued its guaranty in support of the loan whose only hope of avoiding default was if it received the benefits of the materially reduced interest rates of the lower floater bonds. Landmark contends that the lower floater rates were available only so long as the bonds could be sold. The bonds could be sold only so long as the credit behind them in the form of Republic's letter of credit was trustworthy. Thus, Landmark contends that when Republic's credit failed, the whole transaction failed, and therefore, the credit rating of RepublicBank was a contingency of the entire transaction. We disagree.

The bond purchase agreement between EPHC and E.F. Hutton, which issued the bonds, required that the bonds have a Standard & Poor's rating of "AA" and "A-1+" or "equivalent ratings. However, as FDIC points out, neither RepublicBank nor the guarantors are a party to the bond purchase agreement, nor is it referenced in the guaranty agreement under which Landmark obligated itself. Moreover, the bond purchase agreement refers to the rating of the bonds, not the bank, and simply limits E.F. Hutton's obligation to purchase the bonds. The existence of a contingency pertaining to credit rating of the bonds in the bond purchase agreement cannot be construed as an express condition of the guaranty relating to the credit rating of the bank. Moreover, none of the documents to the transaction require that RepublicBank maintain any particular credit rating. If the success or failure of the entire transaction depended upon the credit rating of RepublicBank, the documents should have been drafted accordingly.

Material Alteration/Failure of Consideration

Landmark contends that the drop in RepublicBank's credit rating constituted a material alteration of the agreements to which Landmark lent its guaranty, thereby releasing Landmark. Material alteration is a defense to payment on a guaranty which is recognized under Texas law. Vastine v. Bank of Dallas, 808 S.W.2d 463, 464-65 (Tex. 1991); McKnight v. Virginia Mirror Co., 463 S.W.2d 428, 430 (Tex. 1971). Under this defense, a guarantor may be released from liability if there is a material alteration and/or deviation from the terms of the contract between the debtor and the

creditor without the guarantor's consent and to the guarantor's prejudice. Ibid.

The trial court held that the express terms of the written guaranty expressly waived material alteration as a defense to liability. The guaranty states:

> [Landmark] hereby agrees that its obligations under the terms of this Guaranty shall not be released, diminished, impaired, reduced, or affected by the occurrence of any one or more of the following events: (a) the taking or accepting of any other security or guaranty for any or all of the Guaranteed Indebtedness; (b) any release, surrender, exchange, subordination, or loss of any security at any time existing in connection with any or all of the Guaranteed Indebtedness . . . .

Landmark's first contention is that the district court erred in finding that the above-cited language constituted a waiver of the defense of material alteration. It points out that Republic's letter of credit was never "security at any time existing in connection with any or all of the Guaranteed Indebtedness." Landmark points out that the Letter of Credit was in fact called and paid, not released, surrendered, exchanged, subordinated or lost. Landmark contends that the failure of Republic's credit was, however, a major and material alteration of the Agreements to which Appellant lent its guaranty.

We conclude that even if there was no waiver of the defense of material alteration, there was in fact no material alteration of the guaranty such that Landmark would be released from liability.

The question of whether a material alteration has occurred is one of law and not of fact. Spin-Line Co. v. United Concrete Pipe Corp., 420 S.W.2d 744, 752 (CCA-Dallas 1967), affirmed in part,

revs'd in part on other grounds, 430 S.2d 360 (Tex. 1968)

Other language in the guaranty relied upon by the district court provides that " . . . this guaranty being a guaranty of payment and not of collection, **and in no way conditional or contingent."** (Emphasis added.) Based upon this language, it is clear that Landmark and Integra's obligation to pay was not dependent upon any condition such as the credit rating of RepublicBank. Neither the guaranty itself nor any of the loan documents required that RepublicBank maintain any particular credit rating. Thus, because the credit rating of RepublicBank was not a condition or term of the guaranty, a change in the credit rating of RepublicBank is not a material alteration of the guaranty or of the arrangement between EPHC and RepublicBank and will not absolve Landmark of liability.

Landmark's also argues that the decrease in RepublicBank's credit rating constituted a failure of consideration. It contends that the trial court misunderstood its defense in this regard. The trial court stated that there was no requirement in the guaranty or the Reimbursement Agreement that RepublicBank maintain any particular credit rating or that the guaranty was contingent upon RepublicBank's credit rating; thus, the trial court regarded as meritless Landmark's contention that the decline in First RepublicBank's credit rating was a material alteration of the guaranty or a failure of consideration. We agree.

However, Landmark contends that when the credit of RepublicBank failed, the consideration for Landmark's guaranty

failed. In brief, Landmark asks rhetorically, "Why was Republic lending its letter of credit to the transaction?" This single unanswered question forwarded by Landmark seems to form the entire basis for its "failure of consideration" argument. In this regard, Landmark seems to overlook the fact that letters of credit are widely used in commercial transactions. We reject Landmark's contention that the failure of RepublicBank's credit constituted a failure of consideration of the guaranty. As FDIC correctly notes, what Landmark argues, in effect, is that any change in circumstance which could force it to honor its guaranty is a material alteration or failure of consideration. In other words, Landmark argues that the guaranty agreement never anticipated payment by the guarantor. We refuse to read the very clear and express terms of the guaranty in this way.

D'Oench, Duhme and 12 U.S.C. § 1823(e)

FDIC also points out that the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e) are applicable to an agreement such as this guaranty which has been acquired by the Federal Deposit Insurance Corporation. Accordingly, FDIC contends that Landmark is barred from asserting any defense based upon an inferred or implicit understanding among the parties which was not made a part of the guaranty and related documents. We agree.

12 U.S.C. § 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--

> (1) is in writing,
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

There is nothing in any of the written documents relating to this transaction which establish that Landmark's guaranty was contingent upon RepublicBank's credit rating. Thus, under 12 U.S.C. § 1823(e), Landmark's contentions fail because such a contingency, even if understood by the parties to be the "real deal" at the time, was not put into writing, executed, approved by the board of directors, and made an official part of the bank's records as the statute requires.

The D'Oench, Duhme doctrine likewise is designed to protect the interests of the FDIC in assets it acquires as receiver of a failed bank. The doctrine prevents the introduction of such unrecorded or "side" agreements which would contravene the express terms of contracts and defeat the government's reliance on a bank's records. D'Oench, Duhme, *supra*. Thus, the doctrine bars defenses and claims based on unrecorded agreements with the failed bank. NCNB Texas Nat'l Bank v. Johnson, 11 F.3d 1260, 1267 (5th Cir. 1994).

Landmark implies in brief that the D'Oench, Duhme doctrine would not be applicable in this case because it contends that it is

not relying on a secret or oral agreement. Landmark argues that RepublicBank's agreement is implied by the other bank documents and is further evidenced by deposition testimony[2] establishing what it contends to be the true understanding of the parties. Such a scenario is precisely that prohibited by D'Oench, Duhme. Application of the doctrine is not limited to surreptitious or deceitful side agreements, and extends to any defense tending to undermine the integrity of debt instruments of failed financial institutions or to diminish the funds available for the satisfaction of depositors and creditors of those institutions.

As FDIC points out, Landmark is attempting to string a series of documents together through cross-references to infer an obligation by RepublicBank to maintain its Standard & Poor's credit rating. In light of the D'Oench, Duhme doctrine and § 1823(e), we cannot permit Landmark to escape its liability on the inference of such an agreement. "Scattered evidence in corporate records from which one could infer the existence of an agreement does not meet the requirements of the statute. The purpose of the doctrine is certainty and an "inference" of an alleged agreement does not meet

[2]Landmark also contends that the district court erred in refusing to consider extrinsic evidence of the alleged credit rating contingency established Landmark attempted to establish through parol evidence. The trial court stated: "Landmark's attempts to alter through deposition testimony the specific agreements contracted for in the guaranty and other documents are contrary to the parol evidence rule, which bars admission of evidence at trial of a prior oral agreement." Because we find that the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e) are applicable, the existence of parol evidence which might establish an implicit understanding among the parties as to a required credit rating is inapposite.

the requirements of § 1823(e)." (internal citation omitted.) Castleglen, Inc. v. Resolution Trust Corp., 984 F.2d 1571, 1579 (10th Cir. 1993). Accordingly, summary judgment in favor of FDIC was appropriate.

Conclusion

For the foregoing reasons, the district court's grant of summary judgment in favor of FDIC and its denial of Landmark's cross-motion for summary judgment are AFFIRMED.