IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10668
Summary Calendar

Federal Deposit Insurance Corporation,
as Receiver for the First State Bank,

Plaintiff/Appellee,

versus

Paula L. Stringer,

Defendant/Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(3:93-CV-944-X)

(January 13, 1995)

Before JOHNSON, WIENER, and STEWART, Circuit Judges.[1]

JOHNSON, Circuit Judge:

Federal Deposit Insurance Corporation (FDIC), as receiver for the First State Bank--Abilene, brought this action to collect on two promissory notes. The district court granted summary judgment in favor of the FDIC and we AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

On January 11, 1982, Paula Stringer, for value received, executed two notes in favor of the First State Bank--Abilene, Texas. The first note, promissory note 12775, had a principal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

amount of $41,850 and the second note, promissory note 12778, had a principal amount of $116,657. Both notes were secured by a security agreement granting First State Bank a security interest in certain collateral.

On February 17, 1989, the Banking Commissioner of Texas closed First State Bank (hereinafter "the bank") and the FDIC was appointed as receiver. The two notes were among the assets placed into the receivership. After paying down a substantial portion of the notes, Stringer ceased making payments on the notes. After demand remained unsatisfied, the FDIC accelerated the maturity on the notes.

The FDIC filed suit to recover on these notes on May 21, 1993. In her answer, Stringer admitted that she had signed the notes, but denied any liability.

On March 7, 1994, the FDIC filed its motion for summary judgment. In support of that motion, the FDIC submitted the affidavit of Donna Kinser. In her affidavit, Ms. Kinser, a credit specialist for the FDIC, testified that she was the custodian of the bank's records relating to the litigation, that she had personal knowledge of the bank's closing and that the FDIC took ownership and possession of the promissory notes on the bank's closing.[2]

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[2] Proffered along with her affidavit were copies of both notes with handwritten schedules of payment for each, a copy of the security agreement, a copy of the order closing the bank, a copy of the letter appointing the FDIC as receiver of the bank, copies of the loan histories for each note as of February 24, 1989, and copies of bank histories.

In responding to this summary judgment, Stringer did not raise any defenses and she did not introduce any summary judgment evidence of her own. Instead, she merely made a shotgun attack on the adequacy of the Kinser affidavit to support the FDIC's motion. In particular, Stringer alleged that the affidavit was not made on personal knowledge and consisted of only opinion, speculation, hearsay and legal conclusions.

The district court rejected Stringer's assault on the Kinser affidavit, though, and granted summary judgment in favor of the FDIC. Stringer now appeals.

II. DISCUSSION

A. Standard of Review

We review the district court's grant of a summary judgment motion de novo. *See Davis v. Illinois C. R. Co.*, 921 F.2d 616, 617-18 (5th Cir. 1991). A summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party that moves for summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). If the moving party fails to meet this burden, the motion must be denied, regardless of the nonmovant's response. If the moving party does carry this burden, though, the onus

switches to the nonmovant to show that summary judgment is inappropriate. *Id.* at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), that party may not simply rest upon the allegations or denials in the pleadings, but rather must set forth specific facts demonstrating the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514 (1986); *see also*, *FDIC v. McCrary*, 977 F.2d 192, 194 (5th Cir. 1992).

B. The Summary Judgment Evidence

In order to recover under the notes in issue herein, the FDIC must show that: 1) Stringer signed the notes; 2) the FDIC-Receiver is the present owner or holder of the notes; and 3) the notes are in default. *FDIC v. Selaiden Builders, Inc.*, 973 F.2d 1249 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1944 (1993). In her answer, Stringer admitted that she signed the notes. Moreover, the Kinser affidavit and the attached documents, if valid, are sufficient to properly support the FDIC's motion for summary judgment as to the other two issues. Accordingly, to avoid summary judgment, Stringer would have to either submit facts which demonstrate a genuine issue for trial or, alternatively, demonstrate that the FDIC's motion is, in fact, not properly supported. *RTC v. Camp*, 965 F.2d 25, 29 (5th Cir. 1992). Stringer has not done the former. Instead, Stringer has attempted to do the latter by showing that the Kinser affidavit

is defective and thus that the FDIC's motion is not properly supported.

The bedrock of Stringer's argument is that Kinser's affidavit was not made on personal knowledge.[3] It was not made on personal knowledge, Stringer contends, because Kinser, an FDIC credit specialist, did not work for the failed bank and thus she was not present during, and did not have personal knowledge of, the making of the notes and/or several of the other documents proffered with her affidavit. Kinser's knowledge arose only after the bank was placed into receivership. Accordingly, Stringer argues that Kinser's testimony cannot properly authenticate these documents under Fed. R. Evid. 901 or qualify them under the business records exception to the hearsay rule. Fed. R. Evid. 803(6).

Stringer's argument clearly fails. This is because this Court has recently held that "an affidavit of an FDIC account officer is not defective solely because the officer did not have personal knowledge of the loan transaction when it occurred, and only learned about the loan after the bank went into receivership." *Dalton v. FDIC*, 987 F.2d 1216, 1223 (5th Cir. 1993). To decide otherwise would be to hold the receiver to such a strict standard that summary judgment would be all but impossible for plaintiffs in cases such as these. *Id.* This

[3] Fed R. Civ. P. 56(e) states that "[s]upporting affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated therein."

would be contrary to our prior jurisprudence which provides that suits on promissory notes provide "fit grist for the summary judgment mill." *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1372 (5th Cir. 1988).

The genesis for the *Dalton* holding was this Court's decision in *Camp*, 965 F.2d 25. In *Camp*, this Court upheld the sufficiency of an affidavit even though the affiant, who did not work for the failed bank at the time the note was made, did not have precise personal knowledge of the particular note. *Id.* at 29. In so doing, we recognized that the mere possession of the original unendorsed note payable to the order of another is not alone sufficient evidence under Texas law to prove that one is the owner and holder of the note. *See Jernigan v. Bank One, Texas, N.A.*, 803 S.W.2d 774, 776-77 (Tex.App.--Houston [14th Dist.] 1991, no writ). For that reason, we stated that we

> would not hesitate to reverse summary judgment had Appellants pointed to evidence in the record to the effect that they had a legitimate fear that the [FDIC] was not the owner and holder of the note in question and that some other entity might later approach them demanding payment.

Camp, 965 F.2d at 29; *See also*, *NCNB Texas Nat. Bank v. Johnson*, 11 F.3d 1260, 1265 (5th Cir. 1994); *McCrary*, 977 F.2d at 194. However, in *Camp*, the appellants did not produce any evidence to indicate any legitimate fear that any other entity was the owner of the note. Thus, the affidavit in that case sufficed and summary judgment was appropriate. *Id.* at 30.

In the same way, the Kinser affidavit in this case suffices even though Kinser did not have precise personal knowledge of the

note at the time it was made. Had Stringer pointed to any evidence showing a legitimate fear that some other entity might later approach her and demand payment for the note, we would have reason to reject the Kinser affidavit. However, as she has not, the affidavit of Kinser, the account officer in charge of the documents at the FDIC, is sufficient. As Kinser's affidavit is sufficient, the FDIC has properly authenticated the documents attached to that affidavit and has qualified those documents as business records.

In a final argument, Stringer contends that the FDIC's evidence presented in the Kinser affidavit runs afoul the original writing rule, Fed. R. Evid. 1002. This is because, Stringer argues, the documents attached to the affidavit were photocopies and because Kinser allegedly testified concerning the contents of those documents. Stringer's arguments have no merit.

First, it is true that in order to prove the contents of a writing, Fed. R. Evid. 1002 commands that the original writing is required. However, Fed. R. Evid. 1003 provides that a "duplicate is admissible to the same extent as an original unless 1) a genuine issue is raised as to the authenticity of the original . . ." Stringer has in no way challenged the authenticity of the originals here and thus there is no reason the photocopies presented with the Kinser affidavit should not be admissible as duplicates.

Second, that certain facts are contained in a document does not prevent an affiant from testifying as to those facts from her

personal knowledge.[4] The FDIC could seek to prove such facts by both the documents and Kinser's testimony based on personal knowledge. However, in reality, this point is moot. This is because even if Kinser has inappropriately testified as to the contents of the documents, this would only taint her testimony, and not the documents. As the contents of the documents as to these facts are sufficient to properly support the FDIC's summary judgment motion, Kinser's testimony as to these facts is not needed.

Accordingly, we reject Stringer's argument based on the original writing rule.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

[4] The Advisory Committee Notes to Fed. R. Evid. 1002 provide that "an event may be proved by nondocumentary evidence, even though a written record of it was made."