IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20242
Summary Calendar

JAMES RICHARD FOXHOVEN,
Plaintiff-Appellant,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for
First City Bank of Northline and
Collecting Bank, N.A.,

Defendant-Appellee,

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-0253)

(February 2, 1995)

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

JERRY E. SMITH, Circuit Judge:[*]

James Foxhoven appeals a federal district court's adoption of a state trial court's judgment in favor of the Federal Deposit Insurance Corporation ("FDIC"). The state case, based upon a dispute over a negotiable instrument, is being reviewed in the federal system only because of the extraordinary removal provisions

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of 12 U.S.C. § 1819(b)(2)(B) (West Supp. 1994). Concluding that Foxhoven's counterclaims, generally based upon theories of fraud, are foreclosed by the FDIC's defenses under the D'Oench, Duhme doctrine and that the grant of summary judgment on the claim favorable to the FDIC was proper, we affirm.

I.

A simple commercial deal has turned into a procedurally complex lawsuit. Foxhoven signed a $110,000 note as collateral for a loan from First City Bank ("First City") to M.L. Kerns Inc. ("M.L. Kerns"). The proceeds of the loan, which Foxhoven believed would be used to develop a computer program, were depleted in paying off M.L. Kerns's overdrafts at First City. When M.L. Kerns did not meet the payments on the note, First City sought to collect from Foxhoven.

When Foxhoven refused to pay, Fist City sued him in state court. Foxhoven answered and counterclaimed, alleging state and federal claims generally based upon fraud. First City, however, transferred the note to Collecting Bank (collectively the "banks"), which moved for summary judgment on the original claim. Foxhoven failed to respond, and summary judgment was granted.

Foxhoven did not let his counterclaims against First City lapse, however. The counterclaims, pared down to the state law issues of fraud, statutory fraud, and an alleged violation of the Texas Deceptive Trade Practices Act, was tried before a jury, which returned a verdict for Foxhoven and awarded damages of $265,000.

In response to a motion for judgment n.o.v. by First City, the court ruled that Foxhoven should take nothing. The trial court also awarded attorneys' fees and interest to the banks on the original claim against Foxhoven. Foxhoven began to perfect his appeal in the state system.

Before the Texas appeal could be decided, however, First City and Collecting Bank became insolvent. Accordingly, the FDIC was appointed receiver and intervened. Then, under § 1819(b)(2)(B), the FDIC removed to federal district court, where it moved for entry of judgment. The district court "adopted" the judgment of the state trial court and entered judgment in favor of the FDIC. This appeal followed.

II.

The Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub.L. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.) ("FIRREA"), vests broad powers in the FDIC to regulate and supervise financial institutions. One such power of the present version of FIRREA is the broad right of removal created by § 1819(b)(2)(B). In relevant part, that section provides that "the Corporation may . . . remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date of the action, suit or proceeding is filed against the Corporation or the Corporation is substituted as a party."

Section 1819(b)(2)(B) authorizes the FDIC to remove pending

state court appellate proceedings prior to the state system's final judgment. FDIC v. Meyerland Co. (In re Meyerland Co.), 960 F.2d 512, 514-17 (5th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 967 (1992). Where such removal occurs, "[a] case removed from state court simply comes into the federal system in the same condition in which it left the state system." Id. at 520 (citing Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 435-36 (1974)). Moreover, the general practice for district courts is to "take the judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review." Id.

Here, the state trial court had decided both the banks' claim and Foxhoven's counterclaims and had granted summary judgment for the amount owed on the note. After trial on the counterclaims, the state trial court rejected the verdict and entered judgment n.o.v. for the FDIC. Upon removal, the district court, following the procedures of Meyerland, "adopted" this judgment. After entering final judgment, the federal district court also rejected a FED. R. CIV. P. 60(b) motion. Thus, the procedural posture of the case before us is the same as if the federal district court had entered the summary judgment and the judgment n.o.v.

On appeal, Foxhoven argues that this judgment n.o.v. should be overturned, because significant evidence supported the jury verdict. He also argues that the grant of the banks' motion for summary judgment on the claim on the note was error, because Collecting Bank's service of process was insufficient and questions

of material fact existed as to the consideration for the note, the true holder of the note, and the amount of attorneys' fees.

III.

A.

We need not reexamine the evidence related to the fraud claims to determine whether the judgment n.o.v. was proper. It is well-settled that federal regulators who intervene post-judgment may assert their special defenses for the first time on appeal to support a judgment in their favor. 5300 Memorial Investors, Ltd. v. RTC (In re Memorial Investors, Ltd.), 973 F.2d 1160, 1164 (5th Cir. 1992); RTC v. McCory, 951 F.2d 68, 71 (5th Cir.), cert. denied, 113 S. Ct. 459 (1992); Union Fed. Bank v. Minyard, 919 F.2d 335, 336 (5th Cir. 1990); FDIC v. Castle, 781 F.2d 1101, 1106 (5th Cir. 1986). The judgment of the state trial court was in favor of the FDIC, and this rule applies.

The FDIC here raises the D'Oench, Duhme doctrine, which bars the use of unrecorded agreements between the borrower and the bank as the basis for claims and defenses against the FDIC. See D'Oench, Duhme & Co. v. FDIC, 315 U.S. 477 (1942); see also 12 U.S.C. § 1823(e) (West 1989) (statutory codification of doctrine). Our review in determining the application of the D'Oench, Duhme doctrine is necessarily de novo. Cf. McMillan v. MBank Fort Worth, N.A., 4 F.3d 362, 368 (5th Cir. 1993) (applying D'Oench, Duhme bar on appeal as a matter of law).

We have examined the record, including the trial exhibits, and

no written evidence shows any agreement beyond the terms of the note. Foxhoven's fraud claims are based solely upon alleged oral misrepresentations by First City officials. Accordingly, Foxhoven's fraud claims are barred under D'Oench, Duhme.

B.

Foxhoven argues that summary judgment on the banks' claim was improper, because they failed to serve proper notice. The district court, and the state trial court by implication, found, however, that the evidence did not support Foxhoven's claim that Collecting Bank failed to serve him notice of intervention. The district court's determination of whether service was proper is reviewed for abuse of discretion. Cf. Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 645 (5th Cir. 1994) (reviewing dismissal for ineffective service for abuse of discretion), cert. denied, 130 L. Ed. 2d 492 (1994).

Here, the notice of intervention includes a certification by Collecting Bank's attorney stating that the notice had been served on Foxhoven's attorney of record in the First City suit. With exceptions not relevant here, TEX. R. CIV. P. 21(a) (West 1994) allows notice and motions to be served on a party's attorney of record. Moreover, the rule states that "[a] certificate by . . . an attorney of record . . . shall be prima facie evidence of the fact of service." Id. Of course, a party who was supposed to be served, but was not, may offer evidence of the failure of service. Id. Foxhoven failed to present any affirmative evidence to rebut

the certificate and show that notice of intervention was not served upon his attorney of record. The district court did not abuse its discretion in concluding that service was proper.

C.

Foxhoven argues that the summary judgment in favor of the banks was error, because disputed material factual questions remained unsettled. He claims that the validity of the note was in question, the true holder of the instrument unsettled, and the amount of reasonable attorneys' fees open to dispute. He also argues that the trial court abused its discretion by not allowing him to file a counterclaim.

In the federal system, grants of summary judgment are reviewed de novo, applying the same standard as the trial court. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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); see also TEX. R. CIV. P. 166(c) (West 1994).

Here, competent summary judgment evidence was presented on every element of the plaintiffs' claim. Moreover, the summary judgment evidence supports the conclusions that consideration was given on the note, Collecting Bank was holder of the note, and the attorney fees were reasonable. As Foxhoven did not respond to the

summary judgment motion, no competent summary judgment evidence was before the court contradicting the banks' evidence. The trial court did not err in refusing to consider Foxhoven's tardy affidavits. See TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.").

We need not consider whether the state trial court abused its discretion in denying Foxhoven's motion to add counterclaims against Collecting Bank, as we may affirm on any ground that appears in the record. Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1146 (5th Cir. 1993). Here, the counterclaims are barred on this appeal under the D'Oench, Duhme doctrine, as they are based upon alleged oral misrepresentations by banking officials to Foxhoven.

AFFIRMED.