

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20433
Summary Calendar

MICC, LP,

Plaintiff-Appellee,

VERSUS

DONALD R. BERING and ELEANOR BACARISSE BERING,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-2929)

(February 21, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Donald R. Bering, *et ux.*, appeal a summary judgment of liability for principal and interest due on a defaulted promissory note owned by MICC, and for its attorney's fees. We **AFFIRM**.

I.

On June 30, 1987, the Berings executed a promissory note for \$165,000 in favor of Harris County Bank-Houston, N.A., payable on or before January 6, 1988. The Federal Deposit Insurance Corporation (FDIC) became the receiver of the bank, and assigned

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

the note to CRG-1, which, in turn, assigned it to MICC.² The note being in default, MICC made demand on the Berings; and, when this proved unsuccessful, it commenced this action, and obtained summary judgment against the Berings for the \$165,000 face value of the note, interest, and attorney's fees.

II.

The Berings contend that: (1) the court failed to give credit for collateral allegedly pledged by Mrs. Bering; (2) judgment against Mr. Bering was improper; and, (3) the summary judgment evidence was insufficient.

It goes without saying that we review a summary judgment *de novo*. 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 movant has the initial burden of demonstrating the absence of material fact issues. ***Topalian v. Ehrman***, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82 (1992). The nonmovants must then "go beyond the pleadings and by [their] own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial'." ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)).

² MICC is a limited partnership with CRG-1 as its sole general partner. In turn, CRG-1 is also a limited partnership, with Pi Financial Group (PFG) its sole general partner.

It is the duty of the nonmovant, not the court, to identify the specific evidence that would present a triable issue. See, e.g., **Skotak v. Tenneco Resins, Inc.**, 953 F.2d 909, 915 & n.7 (5th Cir.) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 98 (1992). "Although on summary judgment the record is reviewed *de novo*, this court, for obvious reasons, will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the motion." **Id.** at 915.

A.

The Berings assert that, as collateral for the note, Mrs. Bering transferred equitable title to a real estate note that had a face value of \$215,000. Accordingly, they contend that they are entitled to some undetermined credit against the balance due. They maintain further that, upon transferring the note to MICC, the predecessor holder of the promissory note, CRG-1, failed to transfer its interest in the collateral.

In their response to MICC's summary judgment motion, the Berings first raised remotely the possibility that collateral existed which would offset the amount due on the principal. They claimed an "entitlement" to documents which supported their contention of an offset, and that the absence of these documents precluded them from asserting this possible defense. In addition to not seeking a continuance pursuant to Rule 56(f), they failed to

identify specifically any summary judgment evidence demonstrating a dispute over the amount due on the note. Instead, they relied simply upon a conclusional statement that the absence of those documents "brings into question ... if the amounts upon which [MICC] sues are, in fact, true and correct." On the other hand, during discovery, MICC propounded the following interrogatory to the Berings:

If you claim any credit or offset for which you have not previously been given credit, please state specifically the specific sum you claim as credit or offset, and the specific grounds of each such credit or offset.

They responded: "N/A".

Because the Berings failed to identify to the district court any summary judgment evidence which would create a dispute on the amount due, this contention fails.

B.

Next, the Berings contend that Mr. Bering should not have been held liable. When the FDIC transferred the note to CRG-1, included was a computer printout of notes CRG-1 was purchasing. For the note at issue, the printout listed only Mrs. Bering. Thus, the Berings maintain that the FDIC did not transfer Mr. Bering's obligation on the note; and that MICC, as successor to CRG-1, could not obtain a judgment against him.

Despite the fact that MICC sought, in both its complaint and summary judgment motion, to hold the Berings jointly and severally liable, the Berings failed to raise, before the district court, whether the summary judgment evidence indicates that CRG-1

purchased only Mrs. Bering's obligation on the note. Therefore, we will not consider the issue on appeal.

C.

Finally, the Berings challenge the summary judgment evidence as it relates to: FDIC's initial, and MICC's eventual, ownership of the note; and, an alleged defect in the transfer of the note from CRG-1 to MICC.

"[M]ere possession of the original of an 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." **Resolution Trust Corp. v. Camp**, 965 F.2d 25, 29 (5th Cir. 1992). "Generally, however, the affidavit of a custodian of records is sufficient proof, 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).

1.

The Berings contend that MICC failed to produce evidence that CRG-1 transferred its interest to MICC. In support of its summary judgment motion, MICC submitted an affidavit of Polly Buster, the president of PFG (sole general partner of CRG-1), which stated, *inter alia*, that CRG-1 had assigned the note to MICC. Expressing concern over what it characterized as a conclusional statement not supported by reference to any document, the district court ordered MICC to supplement its motion. In doing so, MICC did not produce

any document indicating the transfer of the note to it from CRG-1. Rather, Buster stated, by supplemental affidavit, that the transfer from CRG-1 to MICC was indicated by an indorsement on the second page of the original note (which had already been submitted as evidence); MICC maintained that this satisfied the requirements of § 3.201 *et seq.* of the Texas Business and Commerce Code.

The Berings contend apparently that MICC's failure to produce additional evidence of the note's transfer creates a material fact issue. The indorsement on the note to which Buster referred stated: "Pay to the order of MICC, LP without Recourse"; Buster signed the indorsement in her capacity as president of the general partner of CRG-1. This indorsement, together with Buster's affidavit, provide sufficient evidence that MICC is the owner of the note; the Berings failed to identify any evidence creating a dispute as to this fact.

2.

Next, the Berings seek to undermine the chain of title to the note by challenging the affidavit of Donald W. Allen, which established the FDIC's initial receipt of the note and the transfer to CRG-1. They maintain that Allen's affidavit fails to set forth his title with the FDIC, thus providing no basis of knowledge for his declarations. The affidavit, however, provides uncontroverted testimony that Allen is the custodian of FDIC records. As noted above, the affidavit of a custodian is generally sufficient proof of ownership. In response to the summary judgment motion, the Berings made a general, conclusional statement that they may face

the risk of multiple exposure on the note. They fail to identify specifically any evidence in the record supporting a legitimate fear that another party will later demand payment. The district court properly considered Allen's affidavit in order to establish the chain of ownership.

3.

Lastly, the Berings contend that defective transfers of the note occurred between the FDIC and CRG-1, as well as between CRG-1 and MICC. They failed to raise this issue before the district court; as before, we will not consider it on appeal.

III.

For the foregoing reasons, the judgment is

AFFIRMED.