**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

---

No. 94-20830

---

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of the Seaman's Bank for Savings, F.S.B.,

Plaintiff-Appellee,

VERSUS

LONE STAR BUILDING, LTD., PACER DEVELOPMENT CO.,
DAN W. SHARP, and LEO WOMACK,

Defendants,

GEORGE GILMAN,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93 2026)

---

October 5, 1995

Before KING, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge,[*]

George Gilman is the guarantor of a promissory note originally held by Commonwealth Savings Association and now owned by the FDIC.

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

After the note went into default, the FDIC filed this action seeking indemnification from Gilman. When it moved for summary judgment, however, the FDIC could not locate the note. It presented only a photocopy of the note and an affidavit from FDIC officer Lloyd Brown certifying that the photocopy was a "true and correct copy" of the original. On the basis of that evidence, the district court granted summary judgment for the FDIC. We affirm.

The district court listed four reasons supporting summary judgment; Gilman raises objections to each. We do not address those reasons, however, because we affirm on a ground upon which the district court did not rely: Texas's lost instruments provision. TEX. BUS. & COM. CODE § 3.804 (West 1994). The record supports summary judgment under § 3.804 because Gilman called the district court's attention to that statute and because no new evidence is necessary to apply § 3.804. See Cherokee Pump & Equip., Inc. v. Aurora Pump, 38 F.3d 246, 249 (5th Cir. 1994) (holding that we may affirm summary judgment on any basis supported by the record).

Section 3.804 states:

> The owner of an instrument which is lost, whether by destruction, theft, or otherwise, may maintain an action in his own name and recover from any party liable thereon upon [1] due proof of his ownership, [2] the facts which prevent his production of the instrument and [3] its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

Gilman does not contest the FDIC's ability to meet the first requirement of § 3.804, ownership. Instead, he contends that the FDIC cannot demonstrate the second element, "the facts which prevent [its] production of the instrument." He argues that the

FDIC can prove this element only by explaining the actual process through which it lost the note.

We disagree. Many an object is lost precisely because its owner cannot explain the process by which he misplaced it. To accept Gilman's reading of § 3.804 would thus render the statute useless to many or most owners of lost instruments. Section 3.804 requires only that an owner demonstrate that a document is lost. The FDIC met this requirement by submitting Lloyd Brown's affidavit declaring that despite an extensive search of FDIC records, neither he nor any other FDIC employee could locate the original promissory note.

The final issue is whether we should remand for the district court to determine whether the FDIC must post security indemnifying Gilman against further claims on the note. Under § 3.804, the district court has the discretion to do so. We do not believe security is necessary, however. Gilman has offered no reason why additional claims on the note are even remotely possible. The note was due on July 5, 1991, over four years ago. Texas has a four-year statute of limitations on promissory notes. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (West 1986). No other claims on the note have appeared. We therefore find security unnecessary, even if the FDIC otherwise might be required to post it.

AFFIRMED.