IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20852

KS FINANCIAL GROUP, INC.,

Plaintiff-Appellee,

versus

STATES & LITTLE MORTGAGE COMPANY, L. GERRY STATES and L. LLOYD LITTLE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93 4082)

September 21, 1995

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

States and Little Mortgage Company, L. Gerry States, and L. Lloyd Little appeal the district court's grant of summary judgment to the Federal Deposit Insurance Corporation on a promissory note and related guaranty agreement. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 1988, States and Little Mortgage Company ("S & L Mortgage"), as maker, executed and delivered to NCNB Texas National Bank ("NCNB")(now NationsBank of Texas, N.A.) a promissory note ("Note") in the original principal amount of $297,500.00, payable to NCNB. The Note by its terms would become due and payable on August 15, 1989. On the same day that the Note was executed, L. Gerry States and L. Lloyd Little executed and delivered to NCNB a guaranty agreement pursuant to which they agreed, jointly and severally, to pay to NCNB when due or declared due the Guaranteed Indebtedness, as defined in the Guaranty Agreement, of S & L Mortgage to NCNB. On September 13, 1990, States and Little entered a modification and extension agreement with NCNB which extended the maturity of the Note until December 31, 1990. The Note matured by the terms of the modification on December 31, 1990 and is due and payable. S & L Mortgage has failed to pay the Note and States and Little have failed to pay according to the Guaranty Agreement. These facts are not disputed by S & L Mortgage, States or Little. On November 30, 1991, NCNB conveyed the Note to the Federal Deposit Insurance Corporation ("FDIC").

The FDIC filed suit in the district court against S & L Mortgage, States, and Little to recover on the Note and the Guaranty Agreement on December 31, 1993. On June 23, 1994, the district court granted the FDIC's motion for summary judgment, holding that the FDIC shall recover from S & L Mortgage, States

and Little under the Note and the Guaranty Agreement $272,500.00 of principal, $47,075.24 of prejudgment interest, plus attorneys' fees, costs and postjudgment interest. S & L Mortgage, States and Little filed a motion for reconsideration, which was denied on October 4, 1994. S & L Mortgage, States and Little filed a timely notice of appeal.

The FDIC was the owner and holder of the Note on the date of the summary judgment. Since that time, the FDIC has assigned to KS Financial Group, Inc. all of the FDIC's right, title and interest in the judgment, and this court has substituted KS Financial Group, Inc. for the FDIC in this appeal.

II. STANDARD OF REVIEW

We review the grant of summary judgment de novo, applying the same criteria used by the district court in the first instance. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). First, we consult the applicable law to ascertain the material factual issues. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). We then review the evidence bearing on those issues, viewing the facts and inferences to be drawn therefrom in the light most favorable to the non-moving party. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); F.D.I.C. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), cert. denied, 114 S. Ct. 2673 (1994). Summary judgment is proper "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 judgment as a matter of law." FED. R. CIV. P. 56(c).

III. DISCUSSION

States and Little contend that the district court erred in granting summary judgment to the FDIC for two reasons.[1] First, they argue that the FDIC cannot recover under the Guaranty Agreement because Paragraph 11 of the agreement creates a condition precedent, which the FDIC has failed to satisfy. Additionally, they allege that KS Financial Group, Inc., does not have standing to enforce the judgment because it also has failed to satisfy the condition precedent set forth in Paragraph 11. Second, States and Little contend that summary judgment was improper because the FDIC failed to present any evidence that it is the owner or holder of the Guaranty Agreement.

A. Interpretation of the Guaranty Agreement

States and Little assert that summary judgment was improper because Paragraph 11 of the Guaranty Agreement creates a condition precedent that the FDIC failed to satisfy. Paragraph 11 provides:

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[1] Although S & L Mortgage is named as an appellant, the appellants' brief raises no arguments that the district court erred in granting summary judgment against S & L Mortgage. Therefore, the district court's grant of summary judgment to the FDIC against S & L Mortgage is affirmed.

> 11. **Transferees of Debt.** This agreement shall inure to the benefit of Lender's [NCNB] successors and transferees; however, all Guaranteed Indebtedness due Lender shall be paid in full before the transferee of any Guaranteed Indebtedness shall receive any payment under this Guaranty.

The parties dispute the meaning of this provision. States and Little maintain that Paragraph 11 requires the FDIC, as a transferee of NCNB, to demonstrate that it has paid full consideration for the Note before it can recover from States and Little on the Guaranty Agreement. KS Financial Group responds that Paragraph 11 merely fixes the priority of payment from guarantors when NCNB (the original Lender) transfers only part of the Guaranteed Indebtedness to a third party. Under this interpretation, Paragraph 11 means that the assignee of a part of the indebtedness cannot collect from the guarantors until "all Guaranteed Indebtedness due Lender shall be paid in full."

A ruling on contract interpretation presents a pure question of law. F.D.I.C. v. Matheson, 804 F.2d 1382, 1383 n.2 (5th Cir. 1986). A provision in a guaranty agreement that has a clear and distinct meaning (i.e., that is not ambiguous) should be strictly construed. Frost Nat'l Bank v. Johnson, 729 S.W.2d 319, 320 (Tex. App.--El Paso 1987, writ ref'd n.r.e.).

This court has previously interpreted language almost identical to Paragraph 11 of the Guaranty Agreement in F.D.I.C. v. Matheson, 804 F.2d 1382 (5th Cir. 1986).[2] The Matheson

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[2] The provision interpreted in Matheson provided as follows:

> This guaranty shall inure to the benefit of the transferee, assignee, or holder of the principal debt;

court rejected the guarantors' interpretation of "all indebtedness to the Creditor shall first be paid in full" as requiring the assignee to pay the creditor 100 percent of the value of the indebtedness before the assignee could collect from the guarantor--the same interpretation urged by States and Little in this case. Id. at 1383. The Matheson court reasoned that such an interpretation would be unreasonable as it would make the promissory note secured by the guaranty virtually unassignable:

> In one and the same paragraph, the lender would have both provided for assignability of the note and inserted a condition that, as a practical matter, makes assignability impossible. For, if the lender itself needs a guaranty to make a loan acceptable, then, equally, any assignee of such loan would need the guaranty. Given that no rational buyer would take the assignment without the guaranty [and that this interpretation would mean that the lender is unable to sell the note at a discount] . . . [t]his would make the note virtually unassignable, though the assignability of the note with the guaranty is the primary object of [this provision].

Id. The Matheson court also recognized that the guarantors' interpretation was unreasonable because the payment from the assignee to the Creditor in that case for purchase of the note is not an indebtedness owed to the assignor by the assignee within the meaning of the agreement. Id. As in Matheson, the term "Guaranteed Indebtedness" in the Guaranty Agreement refers to amounts owed by the Debtor (S & L Mortgage) to the Lender

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> however, all indebtedness to the Creditor shall first be paid in full, before the assignee of any debt guaranteed shall receive any benefit of this contract of guaranty.

804 F.2d at 1382-83.

(NCNB).[3] Matheson also rejected as support for the guarantors' interpretation the argument that the purpose of the provision is to prevent transferees who pay less than the face value of the note but later collect the full amount (referred to as "bottomfeeders" by States and Little) from receiving a windfall:

> Loans are assigned at a discounted value because the risks of collection or a change in going interest rates lower their value. If the assignee collects the full amount eventually, it is not a windfall but compensation for the cost and risk undertaken.

Id. at 1384. The Matheson court determined that the disputed provision established a priority for payment when the lender transfers only a part of the guaranteed indebtedness. Id. Under this provision, the transferee may not collect from the guarantors on its portion of the debt until the original lender has been paid in full by the debtor or the guarantors. Id.; see also F.D.I.C. v. Fort Worth Aviation, 806 F.2d 575, 577 (5th Cir. 1986) (holding that language identical to Paragraph 11 "does not require the assignee to pay face value as a prerequisite to suing the guarantor"); Frost Nat'l Bank, 729 S.W.2d at 320 (adopting, at the urging of the guarantor, Matheson's interpretation of the disputed language).

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[3] The Guaranty Agreement defines Guaranteed Indebtedness as:

> (i) all interest as provided for in any agreement between Debtor [S & L Mortgage] and Lender [NCNB], plus all penalties, expenses, attorney's fees and other collection costs, plus (ii) the principal amount [up to a maximum of $297,500.00] of all indebtedness or other liability . . . which Debtor may now or at any time hereafter owe Lender.

Following Matheson, we hold that Paragraph 11 of the Guaranty Agreement imposes a requirement that, before the FDIC, as transferee, can collect from States and Little, the guarantors, it must first demonstrate that "all Guaranteed Indebtedness due Lender" has been paid in full. Consistent with this interpretation, the FDIC submitted in support of its summary judgment motion the affidavit of William D. Balta, an employee of NationsBank (formerly, NCNB), which attests that "there is no indebtedness owed by States and Little Mortgage Company to NationsBank." States and Little did not dispute this evidence. Therefore, no genuine issue of material fact exists that the FDIC did not satisfy the condition precedent created by Paragraph 11. We also reject States's and Little's argument that the district court erred in granting summary judgment before they had time to conduct discovery concerning the amount of consideration that the FDIC paid NCNB for the Note, because the purchase price of the Note is irrelevant.[4] In rejecting States's and Little's proffered interpretation of Paragraph 11, we also hold that KS Financial Group has standing to enforce the judgment because the Guaranty Agreement does not impose a requirement that a transferee have paid "100 cents on the dollar" for the Note before it may collect on the Guaranty Agreement.

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[4] Additionally, we note that this case was filed six months before summary judgment was granted, and the record reveals that, during that time, S & L Mortgage, States, and Little attempted no discovery.

B. Was the FDIC the Owner of the Guaranty Agreement

States's and Little's second argument is that summary judgment was improper because the FDIC failed to submit any evidence that it was the owner or holder of the Guaranty Agreement. As States and Little concede, the FDIC presented evidence that it was the holder of the Note, including the affidavit of Larry Powers, an employee of AMRESCO Management, Inc., the FDIC's service company, which states that the FDIC has possession of the Note, and a copy of the endorsement from NCNB to the FDIC on the reverse side of the Note. However, States and Little argue, the FDIC did not submit similar evidence showing that NCNB had endorsed the guaranty agreement over to it, or that the FDIC had actual possession of the original of the Guaranty Agreement.

We conclude that the FDIC presented sufficient summary judgment evidence to establish each element of its cause of action. First, we recognize that a guaranty agreement that is a separate document from the promissory note which it secures is not a negotiable instrument; therefore, general contract law applies. F.D.I.C. v. Nobles, 901 F.2d 477, 480 (5th Cir. 1990). Paragraph 11 of the Guaranty Agreement states that "this agreement shall inure to the benefit of Lender's successors and transferees." Under this provision, the FDIC, the owner of the principal debt, is entitled to recover under the Guaranty Agreement because the FDIC is NCNB's transferee.

To recover under the Guaranty Agreement, the FDIC must establish that (1) States and Little signed the Guaranty Agreement; (2) the FDIC is the owner or holder of the Note; and (3) the Note is in default. See NCNB Texas Nat'l Bank v. Johnson, 11 F.3d 1260, 1264 (5th Cir. 1994). States and Little concede the execution and existence of the Guaranty Agreement, and that the Note is in default. The FDIC presented evidence which demonstrated that it was the owner and holder of the Note. See First Gibraltar Bank v. Farley, 895 S.W.2d 425, 428 (Tex. App.--San Antonio 1995, writ denied)(holding that "testimony in an affidavit that a particular person or entity owns a note is sufficient to conclusively establish ownership even in the absence of supporting documentation if there is no controverting summary judgment evidence"). States and Little did not dispute this evidence. Therefore, the district court did not err in granting summary judgment that the FDIC recover from States and Little on the Note and the Guaranty Agreement.

IV. CONCLUSION

The judgment of the district court is AFFIRMED.