IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40630

NATIONSBANK, ET AL.,

Plaintiff-Appellant,

versus

PERRY BROTHERS INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(9:91 CV 181)

(August 24, 1995)

Before JOLLY, DAVIS, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

The questions presented in this case concern the sufficiency of the evidence to support the district court's finding of liability and its award of damages. After reviewing the briefs and the relevant parts of the record, and after hearing oral argument, we are convinced that the judgment of the district court must be affirmed in part, vacated in part, and remanded for further proceedings, as follows.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Perry Brothers complains that a "one-two punch" from Nationsbank, _i.e._, first, its refusal to renew a loan agreement on certain terms, and, second, its subsequent setting off of Perry Brothers's depository accounts, are the sources of its damages. After a five-day bench trial, the district court agreed, and entered a judgment awarding Perry Brothers more than $6 million. From that judgment, Nationsbank appeals. Perry Brothers argues that the judgment of the district court as to both "punches" may be sustained on several theories of liability: breach of the duty of good faith and fair dealing, breach of an oral contract, promissory estoppel, fraud, wrongful setoff, conversion, and business disparagement.

With respect to the first "punch," we find that Perry Brothers's assertion that Nationsbank owed it a duty of good faith and fair dealing is inconsistent with the applicable Texas law. As an initial matter, we should note that the Texas Supreme Court has expressed reticence toward implying a duty of good faith and fair dealing into business relationships, warning that such a practice "would abolish our system of government according to settled rules of law and let each case be decided upon what might seem 'fair and in good faith,' by each fact finder." _English v. Fischer_, 660 S.W.2d 521, 522 (Tex. 1983). In a concurring opinion, Justice Spears synthesized several earlier Texas Supreme Court opinions, and explained that Texas courts "have read a duty of good faith and fair dealing into many types of contractually based transactions"

where the "common thread" is a "special relationship" between the parties that "either arises from the element of trust necessary to accomplish the goals of the undertaking or has been imposed by the courts because of an imbalance of bargaining power." Id. at 524 (Spears, J., concurring). Justice Spears catalogued these special relationships: they include insurance, oil and gas, partnerships, joint venturers, and agency relationships. Id.

It is not contended that any of these relationships are present in this case. Although the record reflects that this particular relationship between Perry Brothers and Nationsbank may have been infused with elements of trust and confidence that arguably surpassed the customary relationship between a bank and its customers, and, although, as the relationship progressed, Nationsbank might have occupied a dominant position to the significant disadvantage of Perry Brothers, we cannot say that any inherent feature of this or any other lender-debtor relationship marks it as "special," as the Texas cases have used this term. In our view, characterizing this particular relationship between Nationsbank and Perry Brothers as "special," such as to impose the duty of good faith and fair dealing, would deprive this narrow doctrine of Texas law of any meaningful limitation and thus would invite precisely the abuse that prompted the Texas Supreme Court's earlier-quoted expression of concern. Perry Brothers was, in short, simply an established and valued customer of Nationsbank. That Perry Brothers depended upon Nationsbank for it critical

financing requirements, and often shared its business-related confidence with Nationsbank, does not change the fact that the parties stood in a relationship that was no more "special" than the relationships that develop daily and ordinarily in myriad similar banking situations. Accord Cockrell v. Republic Mortg. Ins. Co., 817 S.W.2d 106, 116 (Tex. App.--Dallas 1991, no writ) (no implied duty of good faith and fair dealing arises in a lender-borrower relationship).

Second, based on certain oral promises, Perry Brothers contends that Nationsbank may be held liable for its refusal to renew Perry Brothers's loan agreement. We agree, however, with Nationsbank that the parol evidence rule prevents Perry Brothers from contradicting the clear written terms of the loan agreement, which left the renewal decision to Nationsbank's discretion. Similarly, we find that Perry Brothers's effort to invoke promissory estoppel is unavailing. Although Perry Brothers has not defined its theory of promissory estoppel with great precision, we are convinced that its argument is simply a recasting of its allegations of an oral contract to renew the loan agreement.

Our review of the record leads us to conclude, however, that the evidence may support the district court's finding of liability on a theory of fraud. The district court's findings of fact concerning the essential elements of fraud and the damages proximately caused by the alleged acts of fraud are not sufficiently specific, however, to permit meaningful appellate

review. Accordingly, we vacate the judgment of the district court finding liability and damages with respect to this first "punch" and remand for much more specific findings of fact and conclusions of law, solely on the theory of fraud.

Turning to the second "punch," i.e., the setoff, Nationsbank's counsel acknowledges that there is no written contract in the record that gives it the right to setoff Perry Brothers's deposits, and that it had relied on its common law right to setoff. Our review of the record leads us to conclude that the district court's findings that there was an oral contract not to setoff the deposits while workout negotiations were proceeding, and that Nationsbank breached this contract, are sufficiently supported. Accordingly, the district court's finding of liability with respect to the setoff is affirmed. We vacate any finding of damages that may be associated with the claim, however. To the extent that additional theories may have been advanced to support liability for this second "punch," we find it unnecessary to consider them.

Finally, with respect to the claim that Nationsbank disparaged Perry Brothers's business reputation, we are similarly unable to conduct a meaningful appellate review on the findings of fact and conclusions of law made by the district court. The case is therefore remanded for further findings and conclusions with respect to this claim. Of course, to the extent that the claim arises from Nationsbank's dishonoring checks drawn on Perry Brothers's accounts after the wrongful setoff, our determination

that the setoff was wrongful establishes liability for the communication of disparaging information related to the dishonored checks; in this respect, only findings on causation and damages need to be made on remand.

To sum up: the judgment of the district court is AFFIRMED as to liability on the wrongful setoff claim and on the business disparagement claim (to the extent that it is based on the dishonored checks caused by the wrongful setoff). In all other respects, the judgment is VACATED, and the case is REMANDED for further proceedings not inconsistent with this opinion. In particular, more specific findings should be made on the fraud theory; causation and damages, including the damages awarded pursuant to the recommendation of the magistrate judge, must be specifically linked to the predicate for liability. We leave to the district court's discretion whether to conduct supplemental hearings. We should make clear that in reconsidering its findings and conclusions, the district court will not be bound by any of its previous findings and conclusions, except to the extent that we have affirmed its previous finding of liability relating to the wrongful setoff and disparagement claims as noted above.

AFFIRMED in part, VACATED in part, and REMANDED.