

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6077
(Summary Calendar)

EGH FIRST TRUST and
ROBERT W. HANCOCK,

Plaintiffs-Appellants,

versus

MARK R. RILEY, SUBSTITUTE
TRUSTEE, ET AL.,

Defendants,

FEDERAL DEPOSIT INSURANCE
CORPORATION, as receiver of
UNITED SAVINGS ASSOCIATION OF
TEXAS and UNITED FINANCIAL
CORPORATION

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(CA-H-89-0202)

(November 19, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants EHH First Trust (the Trust) and Robert W. Hancock appeal adverse rulings by the district court 1) dismissing the Trust's claim for failure of the Trust to retain counsel to represent it in those proceedings, 2) entering summary judgment for the failed financial institution's successor and the Federal Deposit Insurance Corporation (the FDIC), in its capacity as receiver for the failed institution, and 3) granting a directed verdict for a subsidiary of the successor financial institution as assignee of the contract under litigation here. Finding no reversible error by the district court, we affirm.

I

FACTS AND PROCEEDINGS

The Trust, through its trustee, Hancock, entered into a Sale and Purchase Agreement with United Financial Corporation (UFC) for the purchase by the Trust of a condominium. At closing, the Trust executed a promissory note (the Note) in the principal sum of \$446,107.20. The Note was secured by a Deed of Trust and Security Agreement.

The Trust then leased the condominium back to UFC for three years and UFC, in turn, subleased the condominium to Hancock,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

individually. UFC subsequently assigned its interest in the Note to United Savings Association of Texas, a Texas savings and loan association ("Old United"). UFC was a wholly-owned subsidiary of Old United.

The parties performed their payment obligations under the various instruments for about one year. Then, the Trust and Hancock discontinued making payments on the Note and sublease. Several months later, Old United accelerated payments on the Note and instituted foreclosure proceedings. The Trust and Hancock filed a state court action seeking to enjoin the foreclosure proceeding, and Old United counterclaimed. A Temporary Restraining Order was entered but Hancock failed to post the required bond, and the property was sold to Old United at sheriff's sale on July 7, 1987.

On July 6, 1987, however, the Trust had purported to sell the condominium to Hancock. At that time, Hancock was a Chapter 11 debtor. Ultimately, the bankruptcy stay was lifted and Hancock was evicted from the condominium.

Old United was declared insolvent in December 1988 and the Federal Savings and Loan Insurance Corporation (the FSLIC) was appointed receiver by the Federal Home Loan Bank Board, which formally determined that unsecured creditors of Old United would have received no dividend if the institution had been liquidated. The FSLIC entered into a purchase and assumption agreement with United Savings Association of Texas, FSB ("New United"), under which New United did not assume Old United's obligations to

unsecured creditors. After the purchase and assumption agreement was confected, UFC became a wholly-owned subsidiary of New United.

The FSLIC intervened in the state court action and removed the case to federal court. New United then intervened. Thereafter, the FDIC, in its capacity as Manager/Receiver of the FSLIC Resolution Fund, was substituted as Receiver for Old United.

After each of the parties had moved for summary judgments, the district court entered summary judgment for New United and the FDIC and denied the motions for summary judgment filed by the Trust, Hancock and UFC. The Trust's claim was dismissed prior to trial because it was a legal entity unrepresented by counsel.

After Hancock presented his case, the district court took UFC's motion for directed verdict under advisement. Thereafter, the district court entered judgment in favor of the FDIC, New United and UFC and against the Trust and Hancock. Hancock's claims were dismissed and New United was awarded unpaid interest from the Trust in the amount of \$27,774.11 plus pre-judgment interest fixed at 18% from October 5, 1987 to September 3, 1991, attorney's fees equal to 10% of the total due under the Note, court costs and post-judgment interest fixed at 5.68%. The Trust and Hancock timely filed a notice of appeal.

II

ANALYSIS

A. Dismissal of the Trust's Claim

At the final pre-trial conference the district court warned the Trust that it could not proceed pro se. The Trust failed to

heed that warning, so when it remained unrepresented on the date of the trial, the Trust's claim was dismissed on motion of New United. Hancock and the Trust do not challenge the district court's conclusion that the Trust could not appear without counsel; they only dispute the validity of the money judgment ultimately entered against the Trust on New United's counterclaim.

The district court's dismissal of the Trust's claim was based on our holding in In re K.M.A., Inc., 652 F.2d 398 (5th Cir. Unit B July 1981), that "a corporation as a fictional legal person can only be represented by licensed counsel. . . . This is so even when the person seeking to represent the corporation is its president and major stockholder." Id. at 399; see Southwest Express Co., Inc. v. Interstate Commerce Comm'n, 670 F.2d 53 (5th Cir. 1982). Under Texas law, a trust is a fictional legal person. Tex. Gov't Code Ann. § 311.005(2) (West 1988). As such, the Trust could not appear at trial (or, for that matter, in this appeal) except through an attorney at law.

Under Rule 41(b), an action or claim may be dismissed with prejudice for "failure . . . to prosecute or to comply with these rules or any order of court . . ." Fed.R.Civ.P. 41(b).

[D]ismissal with prejudice for failure to prosecute is an extreme sanction which is to be used only when the plaintiff's conduct has threatened the integrity of the judicial process in a way which leaves the court no choice but to deny that plaintiff its benefits. . . . [W]e have consistently refused to permit a court to impose this sanction unless the history of a particular case discloses both (1) a clear record of delay or

contumacious conduct by the plaintiff, and (2) that a lesser sanction would not better serve the best interests of justice.

McNeal v. Papasan, 842 F.2d 787, 790 (5th Cir. 1988).

Rule 41(b) dismissals are reviewed for abuse of discretion. Id. at 789-90. Despite the court's instructions to the Trust to obtain counsel to represent it at trial, it attempted to appear through Hancock, its trustee, who is not an attorney. The Trust has not appealed the district court's ruling; neither has it suggested that it would obtain counsel if given the opportunity to do so. The dismissal of the Trust's claim should not be viewed as a sanction for contumacious conduct. The district court's ruling was more in the nature of a jurisdictional order--the court in essence lacked jurisdiction in personam to hear the claim of an unrepresented legal entity. Such an order clearly does not constitute an abuse of discretion.

Nevertheless, the Trust and Hancock contend that a judgment could not be entered against the Trust because it was dismissed prior to trial. This argument rests on the erroneous premise that the dismissal of the Trust's claim resulted in its dismissal as a party to the entire litigation. The dismissal of the Trust's claim, however, did not result in the dismissal of New United's pending counterclaim against the Trust. In re K.M.A., Inc. does not stand for the proposition that an entity may not be sued unless it is represented by counsel; only that it may not appear in court without a lawyer.

B. Evidence of Payments Made

Hancock also insists that he presented evidence of timely payments on the Note, as well as "additional evidence to the fact that Defendants had not advanced funds and/or payments as had been promised by the sales staff and as it was obligated under the contracts." It is clear from Hancock's factual statement in his brief, however, that these claims relate to sums owed to him personally and not to the trust:

Hancock had done work for Defendants on a 59 unit project and had difficulty in collections. It was for this reason that funds were not advanced to Defendants first. . . .

During the completion work, Hancock had billed Defendants for additional material. Billing was ignored for several months. As a last resort to collect, Hancock withheld the amount owed from [sic] his February 1987 mortgage payment.

Beginning in March 1987, Defendants failed to make the lease payment . . . and supplemental financing payment . . . to Hancock. Hancock subsequently withheld his payments. . . .

In other words, Hancock apparently labored under the mistaken belief that, as trustee, he was entitled to withhold the Trust's payments due under the Note from Old United and offset those sums against sums owed to him, in his individual capacity, by UFC or Old United. He does not contend here that Old United breached any obligation it owed the Trust.

In any event, even if Hancock had had personal claims that he could have interposed in defense of an action brought by Old United against the Trust, those personal claims and defenses cannot now be asserted against New United. 12 U.S.C. § 1823(e); see First Indiana Federal Savings Bank v. FDIC, 964 F.2d 503, 506 (5th Cir.

1992) (unsecured personal claims against insolvent institution did not survive transfer of assets to new institution). Although the purchase and sale agreement contains language that is generally supportive of Hancock's argument, it does not qualify under the exception to the general rule of § 1823(e) prohibiting the assertion of personal claims and defenses against the successor to the failed institution. The agreement was not executed by Old United contemporaneously with Old United's acquisition of the Note; neither has there been a showing that the agreement was approved by the Board of Directors of Old United or that it was made a part of the official record of the institution. See 12 U.S.C. § 1823(e).

The FDIC, in its capacity as receiver of Old United, is not liable for any sums beyond those that Hancock would have received in a liquidation of Old United. 12 U.S.C. § 1821(i)(2). That the assets of Old United were insufficient to yield any dividend to unsecured creditors such as Hancock, and that Hancock would not have received any dividend in a liquidation of Old United, is undisputed. Therefore, we need not reach the merits of Hancock's claims against Old United; those claims are moot. First Indiana, 964 F.2d at 506-07.

Hancock does not dispute that the Trust discontinued making payments on the Note. Apart from his personal defenses, which could not be asserted against New United, Hancock has presented no valid reason why the district court should not have entered judgment against the Trust on New United's counterclaim. There is no genuine issue of material fact, and New United and the FDIC are

entitled to judgment as a matter of law. Fed.R.Civ.P. 56. Accordingly, we conclude that the district court properly granted the motions for summary judgment by New United and the FDIC.

C. No Cause of Action

The district court held that the cause of action against UFC for wrongful foreclosure did not belong to Hancock because he was not a party to the purchase and sale agreement, the Note, or the Deed of Trust. Consequently, the district court did not address the merits of the wrongful foreclosure claim. Hancock contends that the claim was his by virtue of his having purchased the condominium from the Trust. The district court held that the sale from the Trust to Hancock was invalid for lack of consideration and therefore unenforceable. In essence, the district court held that Hancock did not have standing because there had not been a valid sale. Hancock disputes only the district court's factual finding that the sale was not supported by consideration.

Factual findings of the district court are reviewed for clear error. Fed.R.Civ.P. 52(a). Hancock argues in his brief on appeal that he assumed responsibility for the Trust's obligations under the mortgage. The only evidence in the record regarding the consideration given in exchange for the sale of the condominium, however, is a copy of a warranty deed reflecting that the sale to Hancock was for the sum of \$10.00 and "other valuable consideration," without mention of assumption. There is no evidence from which we could conclude that the district court's finding was clearly erroneous, so we must accept that finding as

correct. Therefore, the holding of the district court based on that finding is unassailable.

III

CONCLUSION

For the reasons set forth above, we find no reversible error in the rulings of the district court here under review. Therefore, such rulings are hereby

AFFIRMED.