IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8362

INDEPENDENCE HILL, LIMITED, ZI INVESTMENT BUILDERS, INC.,
and
STEVEN L. ZELVIN,

Plaintiffs-Counter-Defendants-Appellants, Cross-Appellees,

VERSUS

PULLER MORTGAGE ASSOCIATES, INC.,

Defendant-Third Party, Plaintiffs-Appellees, Cross-Appellants,

KENNETH PULLER,

Defendant-Appellee-Cross-Appellant,

HENRY G. CISNEROS, Secretary of Housing and Urban Development,
and
THE UNITED STATES OF AMERICA,

Defendants-Counter-Plaintiffs-Appellees,

VERSUS

SERVICE TITLE COMPANY
and
BUTLER & BINION,

Third-Party Defendants-Cross-Appellees.

Appeals from the United States District Court
for the Western District of Texas
(SA-91-CA-22)

(August 10, 1994)

Before KING and SMITH, Circuit Judges, and KENT,[*] District Judge.

JERRY E. SMITH, Circuit Judge:[**]

Independence Hill, the developer of a multiunit retirement housing project, and others filed a lawsuit against Puller Mortgage Association ("PMA") and its president, charging that PMA, among other things, misappropriated certain loan proceeds and did not promptly provide adequate loan advances for the construction of the housing project. Independence Hill also sued the Secretary of Housing and Urban Development ("HUD") and the United States. HUD responded with a counterclaim for double damages. PMA instituted a third-party claim against Service Title Company and the law firm of Butler & Binion for misappropriating an escrow fund.

The district court dismissed Independence Hill's claims on all counts, ruled favorably on HUD's counterclaim, dismissed PMA's third-party action, and refused to award attorneys' fees to PMA. We affirm, except that we reverse the granting of PMA's motion for declaratory judgment and reverse the award of double damages to HUD for certain expenses paid by PMA.

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[*] District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I. Facts.

Plaintiff Steven L. Zelvin decided to develop and operate a senior citizen retirement community in San Antonio (the "project"). He formed the Independence Hill limited partnership to own and develop the project. The limited partnership had two general partners: Zelvin and ZI Investment Builders, Inc. ("ZI"), a corporation he owned. ZI served as the project's general contractor. The limited partnership solicited buyers for its partnership units and borrowed the money to build the project.[1]

Independence Hill negotiated with PMA and its president, Kenneth A. Puller, for PMA to make a loan of approximately $14 million that would be coinsured by HUD under the government's so-called section 221(d) coinsurance program. See 12 U.S.C. § 1715l. The loan money would be used for the construction and initial operating expenses of the project.

The entity within HUD that administers mortgage coinsurance programs is the Federal Housing Administration ("FHA"), which was created in 1934 under the National Housing Act ("NHA"), 12 U.S.C. §§ 1701-1750, was transferred to HUD in 1965, and now exists as an organizational unit of HUD.[2]

The National Housing Act provides that HUD can coinsure those mortgages for which it has statutory authority to provide full mortgage insurance. Id. § 1715z-9. If the borrower defaults, HUD

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[1] Where appropriate, the three plaintiffs))Zelvin, Independence Hill, and ZI))are referred to collectively as "Independence Hill."

[2] We sometimes use the terms "HUD" and "FHA" interchangeably.

pays the coinsuring lender a portion of its loss. PMA was an approved coinsuring lender under the NHA. Coinsuring lenders were governed by HUD regulations. 24 C.F.R. § 251 (1986) (repealed). In this case, PMA would be responsible for the first 5% of the loss; the remaining 95% would be split with HUD, with PMA allocated 15% and HUD 85%.

In preparation for the construction loan, the Bexar County Health Facilities Development Corporation issued and sold tax-free municipal bonds (the "1985 bonds"), the proceeds of which were placed into the so-called acquisition fund, a trust fund controlled by the 1985 bond trustee. Citibank, N.A., bought the 1985 bonds and delivered $14,760,000 to the initial bond trustee. Texas Commerce Bank succeeded the initial bond trustee on May 1, 1986.

On April 29, 1986, PMA and Independence Hill entered into a firm commitment agreement (the "firm commitment") that provided that PMA "as coinsuring mortgagee, acting herein on behalf of [HUD] . . . has agreed to provide mortgage insurance to you [Independence Hill], as Mortgagor . . . ." Puller signed the last page of the document for PMA as the coinsuring lender and as agent for HUD.

In May 1986, PMA and Independence Hill entered into the final agreement covering their loan arrangement by executing a number of documents, including (1) the deed of trust note (the "note"), (2) the deed of trust, (3) the security agreement, (4) the building loan agreement, (5) the regulatory agreement, and (6) the construction contract. After the closing, the required documents were

submitted to HUD, whose representative endorsed the note. The note and deed of trust were executed by Independence Hill in trust to PMA.

The building loan agreement, executed on May 30, 1986, provided that PMA would loan $14,782,400 to Independence Hill at an interest rate of 10.25%. The term of the loan was 40 years. Independence Hill was obligated to make monthly payments of $128,432.18, representing principal and interest, from April 1, 1988, through March 1, 2028.

The building loan agreement does not specify a minimum construction period but states that the project must be completed by December 30, 1987. The loan was coinsured by HUD. The Government National Mortgage Association ("GNMA") approved private entities to issue securities "based on and backed by" mortgages insured by federal agencies such as FHA. See 12 U.S.C. § 1721(g)(1). GNMA guarantees the payment of the securities.

One type of GNMA security is a Construction Loan Certificate ("CLC"). A private construction lender can issue CLC's and use the proceeds to fund its loan to a borrower. Pursuant to a contract with GNMA, the private issuer must make payments of principal and interest to the purchasers of the CLC's. Furthermore, the issuer must provide GNMA with a security interest in the underlying mortgage, to be enforced if the issuer fails to meet various GNMA requirements. Id. The issuer pays GNMA various fees and charges for participation in the program.

During construction, Independence Hill and ZI made monthly

draw requests to PMA to fund construction. As PMA approved construction draws, it issued CLC's to the 1985 bond trustee in increments of $5,000. The bond trustee held the CLC's in a trust account called the "bond fund" and paid for the CLC's by making disbursements out of the acquisition fund to the disbursing agent, Service Title Company ("Service Title"). The disbursing agent would make payments to Independence Hill and its creditors. It was contemplated that the entire acquisition fund would be paid in monthly advances to Independence Hill or its creditors during the period of construction from June 1986 to December 1987. These monthly payments would satisfy PMA's obligation to loan money to Independence Hill under the building loan agreement.

PMA would pay interest on the CLC's to the bond trustee, who, in turn, would make monthly payments to the holder of the 1985 bonds out of the bond fund during the forty-year term of the bonds. It was agreed that all of the CLC's would be exchanged by the 1985 trustee prior to November 1, 1988, for a GNMA-guaranteed project loan security, also to be issued by PMA and to be held by the trustee as the permanent security and source of payment for the bonds. PMA did not obtain all of the funds for the construction loan by issuing GNMA securities, as four percent of the loan came from PMA's warehouse line of credit from a private lender.

The building loan agreement provided that Independence Hill would apply monthly for advances of mortgage proceeds and would be entitled to only such amount as may be approved by PMA. The agreement specifically stated that Independence Hill would receive only

such amount as PMA approved and that Independence Hill must apply for an advance at least ten days before it was needed.

In June 1986, a disbursement agreement was entered into between Independence Hill, PMA, and National Title Company of San Antonio ("National Title") governing the use of National Title as disbursing agent. Before construction began, Service Title succeeded National Title as disbursing agent. After construction was completed, there remained $129,081 in the escrow fund, then managed by Service Title. Apparently, the purpose of this balance was to cover any outstanding subcontractor liens at final closing and to permit the issuance of a title policy.

The project was sold at foreclosure, thus extinguishing any subcontractor liens. There remained $129,081 in escrow. On February 11, 1991, Butler & Binion, Independence Hill's law firm, wrote a letter to Service Title opining that Independence Hill was entitled to the escrow money because final closing would never occur. Service Title distributed the money to Butler & Binion, which retained a portion and paid the remainder to Independence Hill.

At the initial closing in 1986, Independence Hill entered into an agreement with Basic American Medical, Inc. ("Basic American"), whereby Basic American would manage the project. The relationship soon soured. Basic American sued Independence Hill for breaching the management agreement by failing to provide sufficient working capital. Independence Hill counterclaimed, arguing that Basic American had embezzled funds. ZI, the general contractor, began managing the project around March 1, 1988.

After PMA pressured Independence Hill to hire a new management company, Independence Hill signed an agreement with Classic Residences by Hyatt ("Hyatt"). The agreement was subject to a condition precedent that Independence Hill establish a working capital fund. Independence Hill failed to establish such a fund, and Hyatt terminated the contract. PMA won a judgment in state court requiring Independence Hill to hire another management company. Independence Hill did so, but the company soon terminated the management agreement because Independence Hill again had failed to provide sufficient working capital.

On January 28, 1988, PMA certified the project as being substantially complete but, six days later, rescinded this certification, claiming that Independence Hill had failed to install emergency call systems in certain buildings. Independence Hill bought furniture and other goods from Studio Interiors, Inc. ("Studio Interiors"), on credit. In April 1988, Independence Hill agreed to give Studio Interiors the right to remove goods from the project in order to satisfy Independence Hill's debt to it; later, after HUD had taken over the project, Studio Interiors did so.

In the early fall of 1988, Zelvin complained to John Maxim, general counsel for HUD, concerning alleged improprieties by PMA. According to Zelvin, Maxim agreed to look into the complaints and take appropriate action.

Independence Hill had borrowed $14,600,577 of the contemplated $14,782,400 loan by March 26, 1988. During 1988, Independence Hill was short of funds and defaulted on its principal and interest

payments to PMA.

In December 1988, a "bond refunding" was performed to raise new capital. The bond refunding was a complicated financial transaction involving eighteen written contracts and forty-eight supporting documents. New bonds were issued by the Bexar County Health Facilities Development Corporation. Proceeds from the new bonds were used to pay off the 1985 bonds. Disbursement instructions were executed directing the trustee for the 1988 bonds to pay $1,238,000 of the 1988 bond proceeds to PMA to reimburse it for certain transaction expenses.

At the time of the refunding, $778,810.33 remained in the 1985 bond acquisition fund. At least $720,157.84 of this money was used by the bond trustee to help pay off the 1985 bonds.

Independence Hill used $10,750 of its tenants' security for operating expenses. During the construction period, PMA overcharged Independence Hill interest in the amount of $66,267. PMA agreed to credit this overcharge on Independence Hill's account.

In April 1989, HUD suspended PMA as an approved lender under the HUD coinsurance programs. A month later, GNMA terminated PMA's authority to act as issuer or servicer of GNMA mortgage-backed securities and declared that PMA was in default under the guaranty agreement. Pursuant to the guaranty agreement, GNMA succeeded to all of PMA's rights to the mortgage. The assignment of PMA's mortgage rights to GNMA transformed HUD's obligation of partial coinsurance in favor of PMA into an obligation of full insurance in favor of GNMA. See 24 C.F.R. § 251.826(d).

GNMA, as the new holder of the note, demanded that Independence Hill make its monthly mortgage payments. Independence Hill failed to do so and thus remained in default.

In December 1989, GNMA assigned to HUD "all rights and interest arising under the Mortgage and Credit Instrument so in default, and all claims against the Mortgagor, or others, arising out of the Mortgage transaction." GNMA filed a claim for insurance benefits with HUD, which HUD paid in the amount of $13,835,219.51.

On May 2, 1990, HUD sent Independence Hill notice of default for failure to make required payments. On June 1, 1990, HUD sent Independence Hill a notice accelerating the amount due on the note and notifying it that unless the defaults were cured, the project would be sold on July 3, 1990, pursuant to the deed of trust. On that date, the project was sold at a foreclosure sale. There were no other bidders but HUD, which bought the project for $4 million.

The day before the foreclosure sale, Independence Hill had filed a notice of lis pendens. In October 1992, it filed a new notice of lis pendens.

Independence Hill never paid back the money it borrowed from PMA, and PMA seized various letters of credit that Independence Hill had deposited with it. The Independence Hill partnership lost approximately $2,500,000 in capital contributions and $1,300,000 in equity.

II. Proceedings in the District Court.

Independence Hill, ZI, and Zelvin sued PMA, Puller, the United

States, and the Secretary of HUD. Against PMA and Puller, Independence Hill alleged breach of contract, fraud and misrepresentation, conversion, unjust enrichment, Deceptive Trade Practices Act violations, breach of the duty of good faith and fair dealing, breach of confidential relationships and fiduciary duties, and constructive fraud. Independence Hill sought to hold HUD liable for PMA's breaches of contract under a theory of agency and claimed unjust enrichment against HUD. Against the United States, Independence Hill alleged liability under the Federal Tort Claims Act ("FTCA") for negligent supervision of PMA. As an alternative means of relief, Independence Hill sought to rescind the foreclosure.

HUD filed a counterclaim against Independence Hill for double damages and declaratory judgment. PMA filed a counterclaim against Independence Hill for declaratory relief and attorneys' fees and filed a third-party action against Service Title and Butler & Binion, alleging misappropriation of $129,081 in escrow funds.

On the magistrate judge's recommendation, the district court dismissed Independence Hill's claims against PMA and Puller, declined to levy FED. R. CIV. P. 11 sanctions against Independence Hill, and entered declaratory judgment in favor of PMA and Puller. The court denied PMA's motion for attorneys' fees of $78,457.50. Following the magistrate judge's recommendation, the district court dismissed Independence Hill's cause of action against HUD and the United States, allowed HUD to recover double damages from Independence Hill totaling $889,755.88, and canceled Independence Hill's notices of lis pendens.

The magistrate judge recommended denial of Butler & Binion's motion to dismiss PMA's third-party action against Service Title and Butler & Binion based upon lack of standing and jurisdiction. Disregarding the magistrate judge's recommendation, the district court granted Butler & Binion's motion based upon lack of standing.

The magistrate judge also had recommended denial of Service Title's motion to dismiss PMA's third-party complaint. In its motion, Service Title had argued that it was not a party to the disbursement agreement. As part of his recommendations regarding Independence Hill's action against PMA, the magistrate judge also recommended denial of PMA's motion for summary judgment against Service Title and Butler & Binion regarding PMA's third-party action. Because of its earlier dismissal of the third-party complaint on the basis of standing, the district court did not need to reach either of these recommendations.

III. Independence Hill's Claims Against PMA.

We review grants of summary judgment de novo. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "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 a judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case.

Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks, 953 F.2d at 997.

A. Breach of Contract Claims.

PMA argues that the district court erred by granting summary judgment in favor of PMA and Kenneth Puller on Independence Hill's claims against them for breach of contract, fraudulent misrepresentation, DTPA, unjust enrichment, breach of the duty of good faith and fair dealing, breach of fiduciary duty, and constructive fraud. We consider first the contract claims and conclude that the district court properly ruled against Independence Hill on those claims.

1. Interest Overcharges.

Independence Hill argues that PMA overcharged it interest in the amount of $66,267. According to the magistrate judge, during the period of the interest overcharge, Independence Hill failed to pay interest due to PMA. Therefore, Independence Hill did not suffer any damage from the interest overcharge. Eventually, the $66,267 error was rectified by PMA. In absence of any proof of damages, we affirm the district court's adoption of the magistrate's recommendation that PMA should be granted summary judgment on this issue.

2. Failure To Advance Construction Draws.

The district court correctly held that PMA's practice of unilaterally reducing the construction draw amounts submitted by Independence Hill did not constitute a breach of the building loan agreement, paragraph 4(a) of which provides that Independence Hill would apply monthly for construction draw amounts and would be entitled to only such amount as may be approved by PMA:

> [Independence Hill] shall make monthly applications on PMA/HUD Form No. 2403 for advances of mortgage proceeds from [PMA]. Applications for advances with respect to construction items shall be for amounts equal to (i) the total value of classes of the work acceptably completed; plus (ii) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; less (iii) 10 percent (holdback) and less prior advances. The "values" of both (i) and (ii) shall be computed in accordance with the amounts assigned to classes of the work in the "Contractor's and/or Mortgagor's Cost Breakdown", attached hereto as Exhibit "B" and made a part hereof. Each application shall be filed at least ten days before the date the advance is desired, and the Borrower [Independence Hill] shall be entitled thereon only to such amount as may be approved by [PMA].

As the magistrate judge concluded, the amount of the construction draws was wholly within PMA's discretion. The last line of paragraph 4(a) provides that "the Borrower shall be entitled thereon only to such amount as may be approved . . . ."

Independence Hill contends that it was entitled to determine the monthly draw amount because the inspecting architect, employed by Independence Hill, was responsible for estimating the percentage of completion. The problem with Independence Hill's argument is that the value of completion determined the amount of the borrower's initial request for a monthly draw but not the amount of

the actual payment. The plain language of the building loan agreement gives PMA the authority to approve the final payments.

Independence Hill makes much of GNMA's suspension of PMA from the mortgage-backed securities program. GNMA wrote a letter to PMA stating that

> GNMA has been advised that Puller [PMA] has failed to make construction loan advances, thus breaching the terms of its building loan agreements with mortgagors under loans which provide for the backing for GNMA mortgage-backed securities.

GNMA's letter is not evidence of PMA's breach of the construction loan agreement, as it does not refer to PMA's contract with Independence Hill but instead to PMA's contracts with borrowers generally.

Although PMA loaned less money than Independence Hill applied for each month, PMA loaned a total of $14,600,577 to Independence Hill over the course of construction. This represented the entire amount of PMA's loan obligation, with the exception of the final mortgage advance of $181,823.18 to be made only at final endorsement and $128,081 held in escrow by Service Title.

3. Untimely Payment of Construction Fund Draws.

Independence Hill argues that PMA waited too long to pay the construction draws after Independence Hill had applied for them. The building loan agreement provides merely that Independence Hill had to apply for a construction draw more than ten days before the draw could be paid and does not impose a deadline for Independence Hill's final payment of the construction draws.

Independence Hill alleges that PMA made an oral agreement to make construction draw funds available to it within ten days after receiving draw forms. According to Zelvin's affidavit, the oral agreement was made during his conversation with Puller and two other PMA officials on July 2, 1986. In a subsequent letter, Zelvin summarized the agreement as follows: "Pursuant to the Construction contract and closing discussions, funds should be made available to Independence Hill on or before 10 days from receipt of the approved draw forms."

We agree with the district court that the oral agreement violates the statute of frauds. Under Texas law, a contract not performable within one year must be in writing. TEX. BUS. & COM. CODE ANN. § 26.01(b)(6) (Vernon 1987); Texas Employers' Ins. Ass'n v. Welch, 643 S.W.2d 919, 920 (Tex. 1982) (per curiam).

That Zelvin attempted to memorialize the agreement in a letter does not save the agreement from the statute of frauds. The letter was not signed by PMA, the party to be charged with the agreement. See TEX. BUS. & COM. CODE § 26.01(a)(2) (Vernon 1987).

Independence Hill argues that the statute of frauds is inapplicable to agreements that require performance every month. On the contrary, the statute of frauds does apply to loan agreements calling for monthly payments. McCauley v. Drum Serv. Co., 772 S.W.2d 135 (Tex. App.))Houston [14th Dist.] 1989, writ denied).

On appeal, Independence Hill argues that the oral agreement could be performed within one year because construction could have

been completed within one year, and that therefore the agreement is not voided by the statute of frauds. We decline to consider Independence Hill's argument, as it is raised for the first time on appeal.

4. Withdrawal from the 1985 Bond Acquisition Fund.

Independence Hill's complaint charged that on December 15, 1988, one day before the bond refunding, the $778,810.33 balance of the 1985 bond acquisition fund was withdrawn and used for PMA's benefit. The district court rejected this claim because Independence Hill did not specify what contractual provision was violated. Only in response to interrogatories from HUD did Independence Hill even attempt to explain why the withdrawal from the acquisition fund was illegal, claiming that the withdrawal violated the note and the building loan agreement.

A bank statement of the acquisition fund shows a series of withdrawals from June 20, 1986, until February 3, 1988, corresponding to monthly construction advances. Only $778,810.33 remained in the acquisition fund as of February 3, 1988; this amount was withdrawn by the bond trustee on December 15, 1988.

The final withdrawal was made in response to a letter entitled "defeasance instructions," signed by representatives of PMA, Independence Hill, and ZI, ordering the bond trustee to defease the 1985 bonds as authorized by the 1985 trust indenture. The letter noted that the total amount of money due on the bonds was $15,320,157.84 in principal and interest. The instruction letter

also noted, in an apparent mistake, that the acquisition fund contained $795,197.89 from the 1985 bonds redemption. According to the bank statement, however, the balance of the acquisition fund remained at $778,810.33 from February 3, 1988, to December 15, 1988.

The letter instructed the trustee to pay off the 1985 bonds with $14,600,000 received by the trustee from the 1988 bond refunding and $720,157.84 from the acquisition fund. Thus, $720,157.84 from the acquisition fund was used to pay down the principal and interest on the 1985 bonds. Presumably, the payment was made to Citibank, the holder of the 1985 bonds.

Independence Hill does not challenge or explain the disposition of the rest of the acquisition fund not accounted for by the $720.157.84 payment. This remainder, $58,652.49, presumably was disposed of in accordance with the defeasance instructions.

Independence Hill argues that because PMA benefited from the final withdrawal, the withdrawal was illegal. According to Independence Hill, because PMA was obligated to pay on the CLC's securing the 1985 bonds, paying off the 1985 bonds somehow helped PMA.

Independence Hill's argument is based upon a misunderstanding of the 1985 bond transaction. The bond trustee advanced funds from the acquisition fund over the course of approximately eighteen months. The purpose of these advances was to satisfy PMA's obligations as a lender under the building loan agreement and related agreements. In return for these payments, PMA issued CLC's

in the same amount as the monthly advances.

A CLC is a promissory note obligating PMA to pay principal and interest to the bond trustee. PMA was never directly obligated to pay the bondholder or any other party. Thus, paying off the bond did not benefit PMA. PMA's obligations on the CLC's was separate from the bond trustee's obligation on the bond.

More fundamentally, Independence Hill fails to explain why the withdrawal of the acquisition fund is a breach of contract. Neither of the two contracts referenced in Independence Hill's response to interrogatories contains any provisions regarding the disposition of funds in the 1985 bonds acquisition fund.

The contractual provisions most relevant to the legality of the final withdrawal are contained in the 1985 indenture agreement, which is not even cited by Independence Hill. The indenture agreement contains provisions for the disposition of the acquisition fund. None of the provisions, however, prohibited the trustee from using the acquisition fund to defease the 1985 bonds.

Independence Hill argues that the defeasance instruction letter is invalid because it was not signed by Zelvin. Independence Hill claims that, at the bond refunding closing held on December 16, 1988, Zelvin signed a separate page that was later attached to the defeasance instructions. Zelvin never saw the final, completed document, Independence Hill claims.

We reject Independence Hill's argument as insignificant. Independence Hill does not explain or argue (1) why Zelvin's signature is legally defective, (2) why Zelvin needed to sign the

letter at all, or even (3) why the letter was necessary to authorize the bond trustee to make the withdrawal.

Independence Hill challenges the magistrate judge's recommendation because it "fails to account for" evidence that PMA had represented that only $181,000.00 remained in the acquisition account, when in actuality $778,810.33 remained. We refuse to consider this argument, as Independence Hill does not explain why such a representation is actionable. No theory of liability can be found in Independence Hill's response to PMA's motion for summary judgment or in its briefs on appeal.

In summary, the final withdrawal from the acquisition fund appears to be authorized by the defeasance instructions. Independence Hill has supplied us with no evidence or legal theory to the contrary.

5. Use of 1988 Bond Refunding Proceeds.

Independence Hill argues that PMA transferred $1,238,000 to itself out of the proceeds of the 1988 bond refunding and that such a transfer violated the 1988 bond trustee's disbursement instructions. The district court held that there was no evidence to support Independence Hill's contention that PMA used these funds for its own obligations.

An agreement entitled "escrow instructions" told the 1988 bond trustee how to distribute the 1988 bond proceeds:

> $1,238,000 to Puller Mortgage Associates, Inc. . . . representing amounts to reimburse it for certain transaction expenses advanced by it, amounts owed to it by [Independence Hill], and amounts to be used to fund

the operating loss reserve for [Independence Hill]. Independence Hill claims that portions of the $1,238,000 paid to PMA were used for purposes outside the scope of the escrow instructions.

First, Independence Hill claims that PMA used part of the money to engage in an interest rate hedge fee. PMA's accounting records verify that the 1988 bond trustee paid PMA $227,581 for a "[f]ee and interest rate hedge required by CLC Purchaser."

Independence Hill contends that the interest rate hedge relates to PMA's bond obligations, not transaction expenses. We disagree. It was originally contemplated that the approximately $14 million of CLC's would be retired and replaced with a project loan security. Because of Independence Hill's default and subsequent events, the 1985 bond trustee was not willing to exchange the CLC's for a project loan security, and PMA had to find another buyer for the CLC's. The eventual buyer demanded that PMA provide an interest rate hedge as part of the purchase of the CLC's. The cost of such a hedge qualifies as a "transaction expense" under the escrow instructions. Thus, PMA did not violate the escrow instructions.

Furthermore, the building loan agreement obligated Independence Hill to pay the costs associated with the use of GNMA mortgage-backed securities. Part 1 of the building loan agreement provides that the rate of interest paid by Independence Hill on the building loan "does not include the trustee fee and/or custodial fee in the event tax-exempt bonds and/or GNMA mortgage-backed

securities are utilized. These fees and additional costs will be paid by the Mortgagor [Independence Hill]." (Emphasis added.)

Second, PMA's accounting records show that the bond trustee paid PMA $12,592 to "[r]eimburse PMA for tax escrow advance." This payment was authorized under the escrow instructions because it related to "amounts owed to [PMA] by [Independence Hill]."

Third, PMA's accounting records indicate that the 1988 bond trustee paid $40,000 to "[r]eimburse PMA for legal expenses incurred." Independence Hill claims that this payment was improper but does not explain why. Specifically, Independence Hill does not explain why the legal expenses were not a transaction expense or an amount owed to PMA by Independence Hill.

6. Operating Deficit Guaranty.

At the time of the bond refunding, the Independence Hill project was running an operating deficit. The escrow instruction letter obligated PMA to deposit an "operating deficit guarantee" into the escrow account. Independence Hill maintains that PMA failed to make the deposit, thus breaching the escrow instructions. The magistrate judge rejected this argument because (1) Independence Hill's repudiation of the sources and uses agreement relieved PMA of its obligation to provide the guaranty, and (2) the signing of a management agreement with Hyatt was a condition of the payment of funds under the guarantee.

Independence Hill responds that (1) its breach of the sources and uses agreement did not affect the enforceability of the escrow

instructions, and (2) the escrow instructions does not expressly contain a condition precedent that Independence Hill sign a management agreement with Hyatt. We disagree with Independence Hill and agree with the district court.

The escrow instruction letter and the sources and uses agreement should be read together. The escrow instruction letter provides that the parties would would make certain deposits into the escrow fund. If one party failed to do so, the escrow trustee was obligated to return the other deposits upon demand. The sources and uses agreement contains nothing more than two handwritten lists: a list of deposits to be made by the parties and a list of future expenditures. The list of deposits contained in the sources and uses agreement is the same as that contained in the escrow instruction letter, which is merely a formal counterpart to the sources and uses agreement. Independence Hill's repudiation of the sources and uses agreement is tantamount to repudiation of the escrow instruction letter and therefore discharges PMA of its obligations under the escrow instruction letter. See Panasonic Co., Div. of Matsushita Elec. Corp. v. Zinn, 903 F.2d 1039, 1042 (5th Cir. 1990).

7. Refusal To Present Note.

Independence Hill contends that the magistrate judge and district court failed to address the issue of whether PMA failed to "do everything necessary" to reach final endorsement of the note before December 20, 1988. On the contrary, the magistrate judge

did reach the issue, holding that Independence Hill's own actions precluded final endorsement. The district court adopted the magistrate judge's general recommendation to dismiss Independence Hill's claims against PMA, one of which was that PMA failed to "do everything necessary."

Independence Hill does not actually argue the substance of its claim about PMA's failure to reach final endorsement. Therefore, we affirm the district court's holding.

B. Fraud and Misrepresentation Claims.

Under Texas law, there are six necessary elements of a fraud claim: (1) a material representation, (2) falsity of the representation, (3) knowledge by the speaker that the representation was false, or recklessness of speaker without knowledge of its truth when representation is made as a positive assertion, (4) intent by the defendant for the representation to be acted upon, (5) reliance by the plaintiff, and (6) injury. Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983). In each of Independence Hill's claims of fraud, at least one of the required elements is missing.

1. Construction Draws.

Independence Hill argues that PMA fraudulently misrepresented when it would pay the monthly construction draws. According to Zelvin's affidavit, PMA promised to make construction draws available to Independence Hill within ten days of Independence

Hill's application therefor.

Over the course of construction, Independence Hill applied for, and PMA approved, twenty construction draws:

Draw No.	Date of Application	Date Approved
1	June 3, 1986	June 3, 1986
2	June 30, 1986	July 18, 1986
3	July 31, 1986	August 8, 1986
4	August 28, 1986	September 9, 1986
5	September 29, 1986	October 6, 1986
6	October 29, 1986	November 4, 1986
7	December 2, 1986	December 5, 1986
8	December 31, 1986	January 9, 1987
9	January 29, 1987	February 3, 1987
10	February 27, 1987	March 6, 1987
11	March 31, 1987	April 9, 1987
12	April 30, 1987	May 13, 1987
13	June 2, 1987	June 11, 1987
14	July 2, 1987	July 9, 1987
15	August 4, 1987	August 10, 1987
16	August 31, 1987	September 4, 1987
17	September 30, 1987	October 5, 1987
18	October 30, 1987	November 6, 1987
19	December 3, 1987	December 21, 1987
20	January 13, 1987	January 25, 1987

Some of the construction draws were approved more than ten days after Independence Hill applied for them. Even when PMA approved the draws within ten days, the money was not immediately available to Independence Hill. Thus, Independence Hill has presented evidence that PMA made a false representation.

Independence Hill has not provided evidence of injury from the purported misrepresentation. Although Independence Hill may have a tenable claim that it was injured by the late payment of construction draws, this is not the same as being injured by PMA's promise of earlier payment. Furthermore, there is no evidence that Independence Hill relied upon the alleged promise of early payment.

There is no issue of material fact regarding reliance and

injury, two essential elements of a fraud claim. We agree with the district court that PMA is entitled to summary judgment.

2. Substantial Completion.

PMA operated several escrow accounts on behalf of Independence Hill that were payable to it once the project was substantially completed. On January 28, 1988, Steven Puller wrote an interoffice memorandum stating that the project indeed had been substantially completed. Nonetheless, on February 3, 1988, PMA wrote a letter to rescind this certification based upon the lack of emergency call systems in the project. Later, the parties agreed that the date of substantial completion was March 14, 1988.

Independence Hill argues that PMA's original certification of substantial completion was a misrepresentation. Independence Hill alleges that it was forced to hire legal counsel to challenge PMA's subsequent denial that the project had been substantially completed. Furthermore, Independence Hill claims that it was injured because it received escrows from PMA six weeks late because PMA refused to certify substantial completion on January 28, 1988.

The magistrate judge recommended in favor of PMA, noting that Independence Hill had provided no evidence that any representation by PMA as to the substantial completion date was made knowing the representation was false or with reckless disregard for the truth. Independence Hill protests that Texas law does not require direct proof of intent for fraud and that intent may be inferred from the surrounding facts and circumstances. See Spoljaric v. Percival

Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986); Turboff v. Gross, 833 S.W.2d 235 (Tex. App.))Houston [14th Dist.] 1992, writ denied).

Even if Independence Hill can prove intent, the record is devoid of any evidence of reliance. In order to recover against PMA for fraud, Independence Hill must have relied upon PMA's statement that the project had not been substantially completed. Far from relying upon PMA's assertion of no substantial completion, Independence Hill hired an attorney to challenge PMA's assertion.

We can affirm a district court's grant of summary judgment on grounds not considered by the district court if that ground appears in the record. Sojourner T. v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992), cert. denied, 113 S. Ct. 1414 (1993). Without evidence of reliance, Independence Hill has no action in fraud.

3. Loan Default.

In March 1988, PMA wrote a letter to Independence Hill claiming that Independence Hill had failed to pay $125,117.24 of mortgage payments due on February 15, 1988, and that Independence Hill would be in default if the unpaid balance were not paid by March 15, 1988. Independence Hill alleges that PMA's letter was fraudulent. The letter claimed that "the amount of $125,117.24 is still outstanding for January interest due February 15, 1988." Independence Hill argues that the January interest figure was inflated by a $66,247.00 interest overcharge.

Independence Hill has failed to produce any evidence to support the elements of fraud. Specifically, it does not explain

why PMA's letter was material, how Independence Hill relied upon the letter, or how the letter injured Independence Hill.

4. Bond Refunding.

In October 1988, PMA and Independence Hill were negotiating the refunding of the 1985 bonds. In a letter dated October 11, 1988, PMA outlined the components of the plan:

> You [Steven Zelvin], Steven Rosenberg (acting on behalf of Graystone Securities, Inc.) and Tom Jager (acting on behalf of Graystone Securities, Inc.) have proposed to PMA a current bond refunding for the purpose of generating additional funds necessary, in your opinion, for the final endorsement and continued operation of the project.

Independence Hill claims that this sentence amounts to a representation by PMA that money from the bond refunding would be used for the continued operation of the project. Independence Hill asserts further that none of the money from the bond refunding was used for project operations.

An action in fraud requires that the plaintiff rely upon a false misrepresentation. Independence Hill claims that it would not have agreed to the 1988 bond refunding absent PMA's alleged promise to use part of the proceeds to fund the project. This assertion is belied by the Zelvin affidavit, stating that PMA's bargaining power gave Independence Hill no choice but to agree to the 1988 bond refunding:

> Neither I nor IHill nor ZI Builders "decided" to use a financial transaction known as a "bond refunding." PMA told me, in written correspondence and in oral communications over the telephone, that PMA would foreclose unless IHill agreed to do a unique type of "bond refunding." In 1988, I knew nothing about the

> type of "bond refunding" that PMA was requiring. PMA required IHill to enter into the bond refunding transaction. PMA told me that if IHill would agree to participate in the bond refunding of the existing loan, that PMA would approve of the Hyatt contract, secure HUD approval of the Hyatt contract, obtain HUD's final endorsement of the Note within three days following the bond refunding transaction, and release operating escrow funds to IHill that were desperately needed to continue operation of the Project.

Thus, Independence Hill's own summary judgment evidence defeats its claim for fraud.

C. Fiduciary Duties of PMA Toward Independence Hill.

The district court held that there was no fiduciary or special relationship between PMA and Independence Hill. Independence Hill's causes of action for unjust enrichment, breach of the duty of good faith and fair dealing, breach of fiduciary duty, and constructive fraud depended upon such a relationship. See Shwiff v. Priest, 650 S.W.2d 894, 902 (Tex. App.))San Antonio, 1983, writ ref'd n.r.e.) (unjust enrichment and constructive fraud); FDIC v. Coleman, 795 S.W.2d 706, 708-09 (Tex. 1990) (duty of good faith and fair dealing); Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962). Therefore, the district court dismissed these four causes of action.

The relationship between PMA and Independence Hill is that of a lender to a borrower. Every court that has considered the issue under Texas law has held that no fiduciary or special relationship

exists between a lender and a borrower.[3] Under the circumstances of this case, we decline to impose a fiduciary or special duty on PMA.

Independence Hill contends that a special relationship exists because PMA possessed superior knowledge and information. In Sanus/New York Life Health Plan v. Dube-Seybold-Sutherland Management, 837 S.W.2d 191, 199 (Tex. App.))Houston [1st Dist.] 1992, writ dism'd by agr.), the court determined that a special relationship existed between a health maintenance organization and a group of dentists who agreed to treat the HMO's patients. Only the HMO knew which patients were eligible for treatment and how much money was owed by the HMO to the dentists for patients who had not used any dental services. Id. at 194. The court held that the dentists' dependence on the HMO for this crucial information created a special relationship. Id. at 193.

In an attempt to invoke the Sanus case, Independence Hill claims that PMA refused to disclose important information such as (1) the ultimate disposition of the bond refunding proceeds,

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[3] E.g., Security Bank v. Dalton, 803 S.W.2d 443, 448-49 (Tex. App.))Forth Worth 1991, writ denied); Nance v. RTC, 803 S.W.2d 323, 333 (Tex. App.))San Antonio 1990, writ dism'd); Herndon v. First Nat'l Bank, 802 S.W.2d 396, 399 (Tex. App.))Amarillo 1991, writ denied); Pentad Joint Venture v. First Nat'l Bank, 797 S.W.2d 92, 98 (Tex. App.))Austin 1990, writ denied); Georgetown Assocs., Ltd. v. Home Fed. Sav. & Loan Ass'n, 795 S.W.2d 252 (Tex.App.))Houston [14th Dist.] 1990, writ dism'd w.o.j.); Nautical Landings Marina v. First Nat'l Bank, 791 S.W.2d 293, 299 (Tex. App.))Corpus Christi 1990, writ denied); Victoria Bank & Trust Co. v. Brady, 779 S.W.2d 893, 902 (Tex. App.))Corpus Christi 1989), aff'd in part and rev'd in part on other grounds, 811 S.W.2d 931 (Tex. 1991)); Jhaver v. Zapata Off-Shore Co., 903 F.2d 381, 385-86 (5th Cir. 1990); Lovell v. Western Nat'l Life Ins. Co., 754 S.W.2d 298, 302-03 (Tex. App.))Amarillo 1988, writ denied); FDIC v. Byrne, 736 F.Supp. 727, 732 n. 8 (N.D. Tex. 1990); FDIC v. Claycomb, 945 F.2d 853, 859 (5th Cir. 1991), cert. denied, SHWC, Inc. v. FDIC, 112 S. Ct. 2301 (1992)); see also FDIC v. Coleman, 795 S.W.2d at 709.

(2) the requirement by GNMA that four percent of the loan be withheld at the final closing, (3) the legality of charging interest on undisbursed loan proceeds, (4) whether management by ZI was acceptable to HUD, and (5) whether the first management company, Basic American, was bonded. Unlike the information withheld from the dentists in Sanus, probably all of these pieces of information were obtainable by Independence Hill. See Sanus, 837 S.W.2d at 194 (reasoning that because dentists "had no independent means of verifying the information thus provided, [they] had to rely completely on [the HMO] to determine eligible members and capitation payments").

The disposition of the bond refunding proceeds could have been determined by reading the relevant escrow agreements. The four-percent requirement was contained in GNMA regulations. The legality of interest charges could be determined by consulting applicable legal authorities. To determine whether owner-management was acceptable to HUD, Independence Hill could have asked HUD. Independence Hill could have determined the bond status of Basic American by asking Basic American. Moreover, even if Independence Hill could not have obtained the information independently, the information in question is not so crucial to Independence Hill's operations that Independence Hill could not operate without it.

D. DTPA Claims.

Independence hill lodged an action under the Texas Deceptive

Trade Practices Act (DTPA), TEX. BUS. & COM. CODE §§ 17.41-17.63 (Vernon 1987 & 1994 Supp.), contending that (1) PMA used escrow funds for its own benefit in violation of sections 17.46(b)(5), 17.46(b)(7), and 17.45(b)(12), (2) PMA violated an implied warranty to provide workmanlike services under section 17.50(a)(2) by misusing escrow funds and "mishandling" negotiations, and (4) PMA acted unconscionably in violation of sections 17.45(5)(a), 17.45(5)(b), and 17.50(a)(3) by taking advantage of Independence Hill's ignorance and misusing the escrow funds. The district court held that the DTPA claims were barred by limitations and were not supported by summary judgment evidence. We agree that the statute of limitation barred Independence Hill's DTPA claims.

The statute of limitations for DTPA claims is provided by TEX. BUS. & COM. CODE § 17.565, which states,

> All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.

Independence Hill filed suit on January 9, 1991.

Independence Hill should have discovered any causes of action by January 9, 1989, the day the statute of limitations expired. Any misconduct by PMA regarding the escrow funds was committed by December 16, 1988, by which date all the escrows were either disbursed, or agreements and instructions had been made for their disbursement.

Independence Hill claims that it did not know about PMA's

alleged misuse of the proceeds from the 1988 bond refunding until March 23, 1989, the date PMA wrote a letter informing Independence Hill of the disposition of the proceeds. But the proceeds were distributed in accordance with the contracts and escrow instructions signed in December 1988. Therefore, Independence Hill should have known about the disposition of the bond proceeds at the time of the bond refunding.

Independence Hill knew about its causes of action. In December 1987, Zelvin already was accusing PMA of misconduct concerning the escrow accounts and loan proceeds, thus demonstrating Zelvin's awareness of his causes of action prior to January 9, 1989.

Furthermore, when Zelvin met with HUD in officials in Washington in October 1988, he complained about PMA's actions, including PMA's alleged mishandling of the proceeds of the bond refunding money and fraudulent default notices. The fact that PMA was suspended by HUD in April 1989 does not affect the statute of limitations, as Independence Hill already knew about any causes of action related to the suspension.

Finally, Independence Hill argues that (1) PMA promised to work toward a final endorsement of the project note, and (2) the final endorsement never occurred. The district court held that the alleged promise by PMA was not a misrepresentation under the DTPA. We agree. Thus, we need not reach the issue of whether the statute of limitations bars Independence Hill from suing regarding the lack of final endorsement.

E. Liability of Puller.

The magistrate judge found that Puller could not be held personally liable for the acts of PMA. On appeal, Independence Hill argues that Puller is not protected by the corporate veil because he operated PMA as his personal business conduit. Because we hold that PMA did not engage in any actionable misconduct, we need not reach the issue of whether Puller is personally liable for PMA's actions.

F. Declaratory Judgment.

The district court entered declaratory judgment that PMA had not breached any contracts with Independence Hill, that Puller had not personally breached any contracts with Independence Hill, and that Zelvin did not have standing to pursue contract claims. The district court's reasons were, respectively, (1) that PMA had not breached any contracts, (2) that Puller could not be held liable because he did not sign any contracts, and (3) that Zelvin could not recover damages because a shareholder cannot recover for wrongs done to a corporation. Independence Hill claims that it was improper for the district court to enter a declaratory judgment. We agree.

The Texas Uniform Declaratory Judgment Act ("TUDJA") provides that declaratory judgments are appropriate to decide certain questions of contract interpretation:

> (a) A person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal

relations thereunder.

(b) A contract may be construed either before or after there has been a breach.

TEX. CIV. PRAC. & REM. CODE § 37.004(a) (Vernon 1986). A court may not enter a declaratory judgment to settle disputes currently pending before the court. Heritage Life Ins. Co. v. Heritage Group Holding Corp., 751 S.W.2d 229, 235 (Tex. App.))Dallas 1988, writ denied).

In Heritage, a buyer sued a seller to recover earnest money on an unconsummated sale. 751 S.W.2d at 235. The seller defended the suit on the ground that the buyer had breached the contract, and the seller brought a counterclaim for declaratory judgment that the buyer had breached the contract. Id. The appellate court held that the trial court properly had rejected the counterclaim because it "merely restate[d] [the] Seller's defenses to issues already raised under [the] Buyer's action for return of the earnest money." Id.

In a suit for breach of contract in which the defendant has invoked the statute of frauds as a defense, the defendant cannot also seek a declaratory judgment that the statute of frauds is a defense to the contract. Hitchcock Properties v. Levering, 776 S.W.2d 236, 239 (Tex. App.))Houston [1st Dist.] 1989, writ denied). Declaratory judgment was improper because it would have determined the defendant's rights in the pending suit. Id.; see also Staff Indus. v. Hallmark Contracting, 846 S.W.2d 542, 545 (Tex. App.))Corpus Christi 1993, no writ).

PMA's counterclaim for declaratory judgment merely restates

defenses that were at issue in Independence Hill's underlying suit. Specifically, PMA asked the district court to enter a declaratory judgment that (1) PMA did not breach its contracts with Independence Hill, (2) Zelvin did not have standing to sue, and (3) Puller was not personally liable. The district court therefore erred in granting declaratory judgment for PMA.

G. PMA's Motion for Attorneys' Fees.

The district court denied PMA's post-judgment motion for an award of attorneys' fees in the amount of $78,457.50. The TUDJA provides that in a proceeding for declaratory judgment, a court "may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (1986).

Attorneys' fees are not available to a party that brings a declaratory judgment action by way of a counterclaim if the counterclaim involves only matters already at issue in the pending action. See Heritage, 751 S.W.2d at 235; B.M.B. Corp. v. McMahan's Valley Stores, 869 F.2d 865, 869-70 (5th Cir. 1989). PMA's counterclaim and Independence Hill's breach of contract claims involve the same issues. Therefore, the district court did not err in denying PMA's motion for attorneys' fees.

IV. PMA's Third-Party Action.

In its third-party complaint, PMA alleged that Service Title violated its duties as escrow agent by paying $129,081 of escrow

funds to Butler & Binion. The district court held that PMA had suffered no injury, and thus had no standing to sue, as it did not have a property interest in the funds held at Service Title. The court dismissed PMA's third-party action for lack of jurisdiction. We agree with this disposition.

Article III of the Constitution gives federal courts jurisdiction over only "cases or controversies." The doctrine of standing serves to identify those disputes that are appropriately resolved through the judicial process. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). A party bringing a federal claim must demonstrate that it has suffered an injury in fact and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision. Id.; Giddings v. Chandler, 979 F.2d 1104, 1108 (5th Cir. 1992). It is the burden of the party invoking federal jurisdiction clearly to allege facts demonstrating that it is a proper party to invoke judicial resolution of the dispute. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990). Although PMA initially may have had legal rights to the escrow account, any such rights were extinguished through the operation of PMA's guaranty agreement with GNMA. The escrow account served as a conduit for turning the monthly construction loan advances made from the 1985 bond acquisition fund into specific payments to Independence Hill and its creditors. The account was governed by a disbursement agreement signed by Independence Hill, PMA, and National Title on June 3, 1986, providing that National Title would serve as the disbursing agent

for the construction loan advances:

> It is hereby understood and agreed that the Title Company will serve as Disbursing Agent in connection with construction mortgage advances made under the referenced mortgage for the duration thereof and that preliminary to each and every advance the Title Company shall continue title down to the date of each disbursement and the Company shall furnish to the mortgagee a continuation report in the form of a policy endorsement amending the effective date and amount of coverage, as well as, setting forth any additional exceptions to title and shall thereafter disburse only upon authorization of the mortgagee.

The escrow was transferred from National Title to Service Title in August 1987. From August 20, 1987, to February 1, 1989, Service Title made hundreds of disbursements to Independence Hill's creditors. Each disbursement was authorized by Independence Hill. On February 1, 1989, there remained $129,081 in the escrow account.

On May 10, 1989, GNMA declared PMA in default under its guaranty agreement with PMA and delivered written notice to PMA that all of PMA's rights under the mortgage were extinguished. Section 8.03 of the guaranty agreement provided that certain material changes would result in default:

> In addition to the events of default set forth and provided for above in this Article, GNMA, in its discretion and on its election, with notice thereof in writing directed to the Issuer, may declare as an event of default under this Agreement:
>
> . . .
>
> (2) Any change with respect to the business status of the Issuer, whether or not subject to the reporting requirements of section 5.02 above, which materially adversely affects GNMA under this Agreement, which shall constitute an event of default as of the date of notice as aforesaid, directed to the Issuer . . . .

PMA does not contest that the conditions for default were met. Section 8.05 of the guaranty agreement provides that, in case of

PMA's default, GNMA would succeed to all of PMA's rights to the mortgage:

> On the occurrence or development of any event of default as set forth or provided above in this Article . . ., GNMA may, under this section 8.05, by letter directed to the Issuer, pursuant to section 306(g) of the National Housing Act [12 § 1721(g)(1)], effect and complete the extinguishment of any redemption, equitable, legal, or other right, title, or interest of the Issuer in the mortgage pooled under this Agreement, and any or all other project or construction mortgages which form the base and backing for other issues by the Issuer of GNMA guaranteed project or construction loan securities . . . .

In December 1989, GNMA assigned to HUD "all rights and interest arising under the Mortgage and Credit Instrument so in default, and all claims against the Mortgagor, or others, arising out of the Mortgage transaction." In 1991, Service Title released the remaining $129,081 to Butler & Binion. After deducting its legal fees, Butler & Binion transferred the escrow money to Independence Hill.

PMA has failed to meet its burden of proving that it has constitutional standing. PMA's default on the guaranty in May 1989 extinguished all of its rights as mortgagee that were transferred to GNMA under the guaranty agreement. Among the rights transferred by PMA was the right to dispose of the undisbursed mortgage proceeds contained in the escrow account. HUD in turn acceded to GNMA's rights in December 1989. Thus, PMA had no legal right to the escrow funds transferred to Butler & Binion.

V. Independence Hill's Claims Against HUD.

Independence Hill's theory of recovery against HUD is that

(1) HUD is responsible for PMA's breaches of contract under a theory of agency, (2) the foreclosure of the project by HUD should be rescinded, and (3) HUD is liable under a theory of unjust enrichment for foreclosing on the project. The district court granted summary judgment for HUD, and we agree, concluding that none of Independence Hill's theories is meritorious.

A. HUD's Liability for PMA's Actions.

The district court held that HUD was not liable for any breaches of contract by PMA because PMA did not have the authority to bind HUD. We need not reach the issue of whether breaches of contract by PMA would be attributable to HUD, as the summary judgment evidence does not establish any breaches of contract by PMA.

B. Rescission of the Foreclosure and Unjust Enrichment.

Independence Hill seeks to rescind the foreclosure of the project by HUD. The federal government cannot be sued unless it waives sovereign immunity. The Quiet Title Act, Pub. L. 92-562, 28 U.S.C. § 2409a, serves as the sole basis for a waiver of sovereign immunity as to claims involving title to real property. Block v. North Dakota, 461 U.S. 273, 280 (1983).

An action under the Quiet Title Act cannot actually divest the United States of ownership of the property in question but can only provide the plaintiff with money damages:

> The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days;

> and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

28 § 2409a(b). Thus, Independence Hill cannot sue to set aside HUD's sale of the project. Therefore, the district court was justified in rejected the remedy of rescission.

As for money damages, we first must determine whether Independence Hill properly lodged an action under the Quiet Title Act. Section 2409a(d) requires the following:

> The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

Independence Hill's complaint contains these required elements. It does not matter that the complaint fails to mention by name the Quiet Title Act or § 2409a.

In considering the merits of Independence Hill's challenge of the foreclosure, the district court adopted the magistrate judge's recommendation that the foreclosure was legal under federal law. Independence Hill challenges this holding, arguing that the foreclosure was illegitimate because HUD somehow caused Independence Hill to default on the construction loan, see, e.g., American Bank v. Waco Airmotive, 818 S.W.2d 163 (Tex. App.)Waco, 1991, writ denied), and because HUD was unjustly enriched by the foreclosure. We reject these arguments.

Federal rather than state law governs any claim concerning

HUD's enforcement of a security interest. See United States v. Sylacauga Properties, 323 F.2d 487, 491 (5th Cir. 1963); see also United States v. Victory Highway Village, Inc., 662 F.2d 488, 497 (8th Cir. 1981). Independence Hill has not cited any federal law supporting its attack on the foreclosure, nor are we aware of any.

Independence Hill claims that HUD has been unjustly enriched by purchasing the project at the foreclosure sale for $4 million. Yet, Independence Hill has not shown that the value of the project is greater than $4 million.

VI. Lis Pendens.

Around the time HUD foreclosed on Independence Hill's property, Independence Hill filed a notice of lis pendens in Bexar County, Texas. A notice of lis pendens is "[a] notice filed on public records for the purpose of warning all persons that the title to certain property is in litigation, and that they are in danger of being bound by an adverse judgment." BLACK'S LAW DICTIONARY 932 (6th ed. 1990). The district court, on the magistrate judge's recommendation, canceled the notice because Independence Hill's action for rescission was unmeritorious. We agree that rescission is unavailable.

We need not reach HUD's argument that Independence Hill failed to object to the magistrate's recommendation to cancel lis pendens. Nor do we need to reach HUD's argument that the notice of lis pendens be cancelled because Independence Hill untimely filed its motion for notice of lis pendens.

VI. Independence Hill's FTCA Claim.

Independence Hill alleges that the United States, through HUD, failed to exercise due care in supervising PMA. Specifically, Independence Hill charges that employees of HUD (1) wrongfully approved PMA as a coinsuring lender, (2) failed to provide, implement, or enforce adequate controls, systems, and procedures over coinsuring lenders, (3) failed to enforce adequate controls, systems, and procedures as to PMA, (4) failed to monitor or enforce PMA's compliance with the HUD coinsurance handbook, (5) inadequately supervised PMA with respect to the project, (6) failed to obtain adequate proof of PMA's financial condition, (7) failed adequately to review documentation of the Independence Hill construction loan, (8) failed to require PMA to pay Independence Hill the full monthly construction draw amounts, (9) failed adequately to monitor PMA's interest payments, (10) failed to monitor or investigate PMA's handling of escrow accounts, (11) failed adequately to monitor or review PMA's decisions with respect to the selection of management and marketing entities for the project, (12) failed to monitor or review PMA's determination of the acceptability of proposed management agents' procedures for managing project operations, (13) failed to monitor or review PMA's on-site management entities, (14) failed to require surety bonds with respect to PMA's on-site managers of the project, (15) failed to review or investigate the project's readiness for final endorsement, (16) failed to provide or implement proper controls over PMA's access to loan proceeds held in the investment agreement

trust account, (17) failed to review PMA's request for refunding of the project in the fall of 1988, (18) failed to monitor, control, or review PMA's uses of the bond refunding monies, (19) failed to review or monitor PMA's actions taken with respect to completion assurance letters of credit and subsequent uses of those funds, and (20) failed to review, monitor, or enforce PMA's compliance with HUD regulations. The FTCA waives sovereign immunity from suits for negligence and wrongful acts of governmental employees when a private person would be liable under similar circumstances. Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955). On the magistrate judge's recommendation, the district court rejected Independence Hill's claims on two bases: (1) The claims were barred by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), see United States v. Gaubert, 111 S. Ct. 1267 (1991); and (2) a private person would not be liable under Texas law under analogous circumstances. Either of these grounds is sufficient to justify summary judgment in favor of HUD.

We affirm because "the United States, if a private person, would [not] be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). In this case, HUD performs the same functions as a private mortgage insurance company.

HUD is authorized to provides full mortgage insurance for a variety of mortgages. In 1974, section 244 of the NHA was added, which authorized HUD to provide coinsurance for mortgages that were also eligible for full mortgage insurance. 12 U.S.C. § 1715z-9(a).

The coinsurance contemplated by section 244 is different from that in the previous full insurance programs. With coinsurance, the lender would assume a percentage of the loss and would carry out certain administrative functions. Id.

Until 1990, HUD provided coinsurance for a number of full insurance mortgage programs, including loans for the new construction and substantial rehabilitation of rental housing (section 221(d) of the NHA), the sale or refinancing of existing rental projects (section 223(f) of the NHA), and the new construction and substantial rehabilitation of nursing homes, intermediate care facilities, and board and care homes (section 232 of the NHA). HUD's function in the coinsurance programs was that of a mortgage insurance company. If the borrower defaulted on the mortgage, HUD guaranteed to the lender that it would pay a percentage of the unpaid portion of the loan. In return for HUD's guarantee, the lender would pay HUD a mortgage insurance premium.

That a coinsuring lender would provide informational and oversight services to HUD does not frustrate the analogy of HUD to a private mortgage insurer. Independence Hill's allegations do not implicate the special services rendered to HUD by coinsuring lenders. Independence Hill merely alleges that HUD negligently selected PMA as a co-insuring lender.

Independence Hill also alleges that HUD failed to monitor PMA's activities. Although Independence Hill leaves unsaid what it expected HUD to do had HUD detected any misconduct, the relevant

regulations give HUD the power to suspend a coinsuring lender. See 24 C.F.R. § 251.104(a). A suspension of a coinsuring lender by HUD would not affect any currently outstanding mortgages but only would prevent the lender from receiving coinsurance on future mortgages. Id. § 251.104(b). Similarly, a private mortgage company could refuse to deal with a certain lender in the future, in effect "suspending" the lender.

Finding the analogy to private mortgage insurance satisfactory, we now turn to Texas law. In order for a plaintiff to maintain a claim for negligence, a plaintiff must establish a duty of the defendant to the plaintiff. See FSLIC v. Texas Real Estate Counselors, Inc., 955 F.2d 261, 265 (5th Cir. 1992).

In negligent hiring cases, Texas courts have held that certain employers have a duty to exercise reasonable care in selecting employees. See Deerings West Nursing Center, Div. of Hillman Corp. v. Scott, 787 S.W.2d 494, 496 (Tex. App.)El Paso 1990, writ denied) (nursing home liable for negligently hiring a nurse who had been convicted of theft sixty-two times). In negligent entrustment cases, the owner of a car has a duty to prevent unlicensed, incompetent, or reckless drivers from using the car if he knows or should know of such incompetence. Parker v. Fox Vacuum, Inc., 732 S.W.2d 722, 723 (Tex. App.)Beaumont 1987, writ ref'd n.r.e.).

In both negligent hiring and negligent entrustment cases, liability of the defendant requires that the immediate actor have committed wrongdoing. In order for the owner of a car to be held liable in a negligent entrustment case, the driver of the car must

have been negligent. Williams v. Steves Indus., 699 S.W.2d 570, 571 (Tex. 1985). All the negligent hiring cases cited to us by Independence Hill have involved wrongdoing by the employee.[4] In cases in which an employer has been held liable for the dangerous work of an independent contractor, such work has been performed negligently. Ross v. Texas One Partnership, 796 S.W.2d 206, 214 (Tex. App.))Dallas 1990, writ denied).

Independence Hill has not shown by summary judgment evidence any actionable conduct by PMA. Therefore, we must seriously question whether HUD could be held liable for negligently selecting or supervising PMA.

Furthermore, Independence Hill has not provided any authority for the proposition that a private mortgage insurance company has a duty to exercise due care in selecting or supervising a lender. Independence Hill merely asserts that "it would be no great stretch for a Texas court to impose a duty on HUD, were it a private individual, to ensure the competence of its coinsuring lenders." But we are aware of no Texas case imposing on a mortgage insurance company the duty to exercise reasonable care in selecting or supervising mortgagors. Indeed, we have found no such case in any state or jurisdiction. The only relevant authorities have held that the NHA do not impose a duty on the FHA on behalf of

[4] Deerings West Nursing Ctr. v. Scott, 787 S.W.2d at 495 (nurse assaulted eighty-year-old woman); Wilson N. Jones Memorial Hosp. v. Davis, 553 S.W.2d 180, 183 (Tex. Civ. App.))Waco 1977, writ ref'd n.r.e.) (in which employee of hospital failed to exercise ordinary care in removing catheter); Estate of Arrington v. Fields, 578 S.W.2d 173 (Tex. Civ. App.))Tyler 1979, writ ref'd n.r.e.) (in which security guard negligently shot customer).

borrowers.[5]

Independence Hill contends that a legal duty was created by Maxim's promise to investigate PMA. In Fort Bend County Drainage Dist. v. Sbrusch, 818 S.W.2d 392, 396 (Tex. 1991), the court discussed the conditions under which a service creates a basis for a legal duty. The court observed,

> The fact that an actor starts to aid another does not necessarily require him to continue his services. An actor may abandon his services at any time irrespective of his motivations for doing so unless, by giving the aid, he has put the other in a worse position than he was in before. A person is put in a worse position if the actual danger to him has been increased by the partial performance, or if in reliance he has been induced to forego other opportunities of obtaining assistance.

Id. at 397 (citations omitted). Independence Hill has produced no summary judgment evidence showing that it relied upon Maxim's promise or that Independence Hill forewent other alternatives. Therefore, Maxim's promise to investigate PMA did not give rise to a duty on the part of HUD toward Independence Hill.

VII. HUD's Counterclaims.

As a counterclaim, HUD contends that it is entitled to an offset against any judgment for Independence Hill and that it is entitled to double damages for certain violations by Independence

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[5] See United States v. Neustadt, 366 U.S. 696, 709 (1961) (reasoning that there is no legal relationship between the FHA and the individual mortgagor); Roberts v. Cameron-Brown Co., 556 F.2d 356, 360 (5th Cir. 1977) (finding no private right of action under NHA); DeRoo v. United States, 12 Cl. Ct. 356, 361 (1987); United States v. Chelsea Towers, Inc., 295 F. Supp. 1242, 1248 (D.N.J. 1967) ("[T]he FHA does not insure the mortgagor against his inability to perform his mortgage obligations, for no legal duty extends from the FHA to mortgage-borrowers.").

Hill of the regulatory agreement or the HUD regulations. Because we affirm the dismissal of Independence Hill's claims against HUD, HUD is not entitled to an offset.

The district court held that HUD could recover double damages from Independence Hill because Independence Hill used project assets or income in violation of the regulatory agreement and applicable regulations. Title 12 U.S.C. § 1715z-4a(c) provides that the United States can recover double damages for certain violations of multifamily project regulations:

> The Secretary of [HUD] may request the Attorney General to bring an action in a United States district court to recover any assets or income used by any person in violation of (A) a regulatory agreement that applies to a multifamily project whose mortgage is insured or held by the Secretary under title II of the National Housing Act; or (B) any applicable regulation. For purposes of this section, a use of assets or income in violation of the regulatory agreement or any applicable regulation shall include any use for which the documentation in the books and accounts does not establish that the use was made for a reasonable operating expense or necessary repair of the project and has not been maintained in accordance with the requirements of the Secretary and in reasonable conditions for proper audit.

As a threshold issue, Independence Hill argues that the United States is a named counterclaimant and is not entitled to bring suit under § 1715z-4a(c). That section specifically states that "[HUD] may request the [Attorney General] to bring an action. . . ." Therefore, it is proper for the United States to bring the counterclaim.

Independence Hill also argues that HUD cannot recover under § 1715z-4a(c) unless Independence Hill has improperly kept its books and records. But improper recordkeeping is merely an example

of actionable conduct under § 1715z-4a(c), not a requirement for successfully recovering double damages. We now turn to the specific violations of § 1715z-4a(c) alleged by HUD.

A. Transfers to Studio Interiors.

Independence Hill purchased furnishings and decorating services from Studio Interiors on credit. In April 1988, while ZI was managing the housing project, Independence Hill agreed to give Studio Interiors the right to remove "any and all goods" from the project. Under the agreement, if Studio Interiors removed any goods, it would credit Independence Hill for the value thereof. After HUD took over the project, Studio Interiors exercised its right to repossess the furniture in the project.

The district court properly awarded double damages for the repossession of furniture. Title 24 C.F.R. § 251.601(c)(1) requires that a mortgagor obtain approval from both HUD and the lender before "[c]onveying, assigning, transferring, encumbering or disposing of any legal interest in the project." Independence Hill violated this regulation: Without approval, it conveyed a right to repossess project property. Independence Hill's violation of the regulation is actionable under § 1715z-4a(c): "[A]ssets or income" were "used by any person" in "violation of . . . (B) any applicable regulation."

Independence Hill argues that the repossessions occurred during HUD's management of the project, but this does not get Independence Hill off the hook. The violation of section

251.601(c)(1) occurred when Independence Hill granted Studio Interiors the right to repossess project property.

B. Distributions to Independence Hill.

Service Title acted as a disbursement agent for the loan proceeds advanced by PMA to Independence Hill. Service Title held some of the loan funds in escrow to be used to satisfy subcontractor liens at the final endorsement of the project's note. The liens eventually were extinguished. In February 1991, after the project had been sold to HUD, Independence Hill persuaded Service Title to distribute the $129,081.00 remaining in the escrow account to Independence Hill and Butler & Binion.

The § 221(d) coinsurance regulations provide that a borrower can spend project funds in only four ways:

> (1) Payment of Mortgage obligations;
>
> (2) Payment of reasonable expenses necessary to the proper operation and maintenance of the project (including deposits to required reserves);
>
> (3) Distributions of Surplus Cash permitted under § 251.705.
>
> (4) Repayment of Mortgagor advances authorized by the Commissioner's administrative procedures.

24 C.F.R. § 251.704(b). Title 24 C.F.R. § 251.705(3) provides, "No Distribution may be paid from borrowed funds, or when payments due under the note, Mortgage, or regulatory agreement have not been made." The escrow account consisted of proceeds from the construction loan from PMA. Thus, the escrow account consisted of "borrowed funds" that cannot be "distributed."

Title 24 C.F.R. § 251.3(e) defines "[d]istribution" as the

"withdrawal of any cash or asset of the project excluding outlays for (1) Mortgage payments, (2) Reasonable expenses necessary for proper operation and maintenance of the project; and (3) Repayment of advances from the owner when such repayments are authorized by the Commissioner." Summary judgment evidence shows that Independence Hill used the escrow money for its own benefit. The use of the escrow money was therefore a distribution. Because the distribution was made from borrowed funds, it violated section 251.705(3).

Independence Hill argues that counsel for PMA authorized the payment of the funds and that therefore the use of the funds was authorized by 24 C.F.R. § 251.704(c), which provides,

> The Mortgagor may not use project funds to liquidate liabilities related to the construction of the project, other than the Coinsured Mortgage, unless the lender authorizes this use in accordance with the Commissioner's administrative procedures.

We reject this argument for reasons relied upon by the magistrate judge, who stated,

> Plaintiffs refer to an April 5, 1989 letter as evidence that PMA authorized Independence Hill to take these funds. This letter was written while the project was ongoing and while there existed a possibility that lien claimants, for whom the escrow fund existed, would have to be paid. Distribution was not made until after the liens were extinguished by foreclosure.

Independence Hill next argues that the escrow funds were to be used at the final endorsement of the project's note, that the final endorsement of the project's note never took place, and that therefore Independence Hill was entitled to the funds. This argument is unconvincing. Merely because the escrow funds could

not be put to their expected use does not mean that Independence Hill was entitled to them. Accordingly, we affirm the award of double damages for the distribution of $129,081 in escrow money.

C. Misappropriation of Security Deposits.

Independence Hill admits that it spent $10,750 in tenants' security deposits to pay for operating expenses, thus violating the regulation that a mortgagor may not intermingle security deposits with the other funds of the project. See 24 C.F.R. § 251.704(d). We therefore affirm the district court's award of double damages regarding the security deposits.

D. Impermissible Expenses.

Independence Hill spent other funds related to (1) the 1988 bond refunding, (2) Independence Hill's lawsuit with its former property manager, (3) negotiating with prospective management agents, (4) disputes over loan administration and other matters with PMA, and (5) negotiations and disputes with HUD. The district court awarded double damages to HUD for these expenses.

On appeal, Independence Hill defends only the first three types of expenses. We hold that the second and third types of expenditures, and those expenditures only, were payments of reasonable expenses necessary to the proper operation and maintenance of the project. We therefore reverse the district court with respect to these expenditures.

With exceptions not relevant here, a borrower can spend

project funds only for "reasonable expenses necessary to the proper operation and maintenance of the project." 24 C.F.R. § 251.704(b)(2). The same requirement is also found in Independence Hill's regulatory agreement, which limits use of project funds to "reasonable expenses necessary to the operation and maintenance of the project," among other things.

In determining whether an expense is a reasonable operating or maintenance expense, courts have held that expenditures made for the benefit of the housing project are permissible, whereas those made for the benefit of the investors are impermissible. In United States v. Frank, 587 F.2d 924, 927 (8th Cir. 1978), the court held that legal fees paid from a project's operating account to challenge HUD's termination of forbearance agreements and to stop HUD's foreclosure of the mortgage were not reasonable operating expenses. The court stated,

> A proper construction of this provision requires distinguishing expenses incurred primarily on behalf of the personal interests of the investors from those expenses related to the everyday operation of the enterprise.

Id. (citations omitted). See also Thompson v. United States, 408 F.2d 1075, 1080 (8th Cir. 1969) (distinguishing payments made for the benefit of investors from those for the benefit of the project).

As a practical matter, it is difficult to distinguish between the good of the investors and the good of the project. We agree with the view, however, that it is impermissible for a borrower to spend money to prevent a change of ownership, to prevent

foreclosure by HUD, or to garner additional financing. Such efforts secure one party's control over a housing project but do not contribute directly to the construction or maintenance of multifamily housing projects. On the other hand, expenses related to management are necessary to the proper operation and maintenance of a housing project.

The bankruptcy court in In Re Garden Manor Assocs., 70 B.R. 477, 482 (Bankr. N.D. Cal. 1987), held that reasonable operating expenses did not include legal fees to defend against a HUD foreclosure initiative or legal fees for filing a chapter 11 bankruptcy petition. The court believed that everyday legal fees would have been permissible, such as legal fees for "collecting rent, evicting tenants and the like." Id.

In two other instances, courts have held that legal fees to litigate foreclosure actions were not permissible. See United States v. Berk & Berk, 767 F. Supp. 593, 598 (D.N.J. 1991); In re EES Lambert Assocs., 63 B.R. 174 (N.D. Ill. 1986). One court has held that attorneys' fees related to repayment of the loan are not an operating expense. See Thompson v. United States, 408 F.2d 1075, 1080 (8th Cir. 1969).

The first type of spending at issue is Independence Hill's expenditures associated with the 1988 bond refunding. The 1988 bond refunding was a financial transaction. Therefore, the district court correctly held that the expenses related to the refunding were impermissible.

Second, Independence Hill incurred legal fees related to a

lawsuit by Basic American in which Basic American alleged that Independence Hill breached the management agreement by failing to provide sufficient working capital. Independence Hill counterclaimed, alleging that Basic American had misappropriated funds.

Although the record does not reveal the outcome of the lawsuit, the expense associated with this type of dispute was necessary to the proper operation of a housing project. Both issues in the lawsuit were related to the management of the project. Management, in turn, is a function necessary to the proper operation of a housing project.

The third type of spending at issue is the legal fees expended in negotiating with prospective management agents. We hold that such expenses were permissible. Management of an apartment building is necessary to its operation. Negotiating with potential managers is a necessary part of the task of securing competent management services, even if the management company is not ultimately retained.

The case of United States v. Frank, 587 F.2d 924, 928 (8th Cir. 1978), cited by HUD, is inapposite. In Frank, the borrower continued to pay its management company even though HUD had terminated the management contract with the company and the project had no liability to the company. Such payments were unnecessary and unreasonable, as the borrower had made payments to a company not entitled to payments. Such was not the case here. Accordingly, we reverse the district court's award of double

damages for expenses related to (1) negotiations with prospective management agents and (2) the lawsuit against Basic American.

VIII. Conclusion.

We REVERSE the district court's granting of PMA's motion for declaratory judgment. We REVERSE in part the district court's granting of HUD's motion for double damages for certain expenses incurred by Independence Hill. We AFFIRM all other aspects of the judgment and REMAND for further appropriate proceedings.