UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40019
Summary Calendar

S. HARRY KERR, ET AL.,

Plaintiffs,

S. HARRY KERR and JEAN KERR,

Plaintiffs-Appellants,

versus

BLUEBONNET SAVINGS BANK, FSB,

Intervenor-Plaintiff-Appellee,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, Etc., ET AL.,

Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of FSLIC Resolution Fund, as Successor to the FSLIC as Receiver for Home Savings & Loan Association of Lufkin, Texas,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(9:89-CV-11)

(October 21, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

S. Harry and Jean Kerr appeal from the summary judgments dismissing their claims against Bluebonnet Savings Bank, FSB, and the Federal Deposit Insurance Corporation. We **AFFIRM**.

I.

In 1983, the Kerrs executed a note for approximately $413,000 in favor of Home Savings and Loan Association of Lufkin, Texas, secured by real property. And in 1984, the Kerrs' family business, Kerr's, Inc., executed a note for $350,000 in favor of Home Savings, secured by the assets of Kerr's, Inc., and personally guaranteed by the Kerrs. In 1986, the Kerrs allegedly entered into a restructuring agreement with Home Savings.

In September 1987, Home Savings declared both notes in default and informed the Kerrs that it intended to institute foreclosure proceedings. In response, the Kerrs filed suit in state court against Home Savings to enjoin the foreclosure; they also sought damages for breach of representation, violation of the Texas Deceptive Trade Practices Act, breach of fiduciary duty, and breach of contract, resulting from the alleged restructuring agreement. The state court denied injunctive relief, and Home Savings foreclosed on the property securing the notes.

In December 1988, the Federal Home Loan Bank Board declared Home Savings insolvent, and appointed the Federal Savings and Loan Insurance Corporation as receiver. The FSLIC intervened in the Kerrs' state court action, and removed it to federal court. (The FDIC succeeded the FSLIC as receiver, and was substituted as a defendant.) In addition, the FSLIC assigned certain Home Savings'

assets, including the Kerr notes, to Consolidated Federal Savings Bank. Consolidated intervened and filed a complaint against the Kerrs for a deficiency judgment. (Consolidated was succeeded by Bluebonnet as assignee of the Kerr notes, and Bluebonnet intervened.) The district court granted Bluebonnet's and FDIC's motions for summary judgment, awarding a deficiency judgment to Bluebonnet, and dismissing the Kerrs' claims against the FDIC as receiver for Home Savings.[2]

II.

As is more than well-established, "[w]e subject the grant of summary judgment to de novo review, applying the same standards used by the district court". ***Resolution Trust Corp. v. Marshall***, 939 F.2d 274, 276 (5th Cir. 1991). "Summary judgment is proper when the `pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.'" ***Id***. (quoting Fed. R. Civ. P. 56(c)).

A.

The Kerrs contend that Bluebonnet was not entitled to summary judgment because it did not establish the absence of a genuine issue of material fact as to the disposition of the collateral in a commercially reasonable manner. Under Texas law, "[a]

---

[2] Earlier, the district court had dismissed the Kerrs' claims against seven of Home Savings' directors and had severed and remanded the Kerrs' claims against Home Savings' chief executive officer and one of its vice presidents.

commercially reasonable disposition of collateral is in the nature of a condition to a creditor's recovery in a deficiency suit". ***Greathouse v. Charter Nat'l Bank-Southwest***, 851 S.W.2d 173, 176 (Tex. 1992).

> [A] creditor in a deficiency suit must plead that disposition of the collateral was commercially reasonable. This may be pleaded specifically or by averring generally that all conditions precedent have been performed or have occurred. *If pleaded generally, the creditor is required to prove that the disposition of collateral was commercially reasonable only if the debtor specifically denies it in his answer*. Should the creditor plead specifically, then it must, of course, prove the allegation in order to obtain a favorable judgment.

Id. at 176-77 (emphasis added).

In its first amended complaint, Bluebonnet alleged that "[a]ll conditions precedent to [its] entitlement to recover the foregoing relief have occurred or been performed". The Kerrs did not file an answer to the complaint.[3] And, in response to Bluebonnet's summary judgment motion, they asserted that "Bluebonnet failed to present any competent evidence showing the personality [*sic*] was disposed of in a commercially reasonably manner" and that "[t]here is no competent evidence produced by Bluebonnet that the real property was disposed of at a fair or unfair price".[4] The district court

---

[3] The Kerrs did not, and were not required to, file an answer to Bluebonnet's complaint as intervenor. *See* Fed. R. Civ. P. 7(a), 8(d), 24.

[4] In our Circuit, an affirmative defense can be raised in a response to a motion for summary judgment "only if that [response] is the first pleading responsive to the substance of the allegations". ***United States v. Burzynski Cancer Research Institute***, 819 F.2d 1301, 1307 (5th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988).

held that Bluebonnet was entitled to summary judgment because the Kerrs failed to specifically deny that the collateral was disposed of in a commercially reasonable manner.

The Kerrs contend that they satisfied their burden under ***Greathouse***, asserting that their allegation that there is no evidence that the disposal of the collateral was commercially reasonable constitutes "an implicit denial". We disagree. ***Greathouse*** requires a *specific* denial, not an implicit one. We agree with the district court that the Kerrs' allegation of no evidence of commercial reasonableness is not the equivalent of a specific denial, and thus was insufficient to shift the burden to Bluebonnet to prove that the collateral was disposed of in a commercially reasonable manner.[5]

B.

The district court granted summary judgment to the FDIC on the basis of prudential mootness, holding that Home Savings "will never possess sufficient assets by which to satisfy any judgment the Kerrs might be able to obtain, rendering their claims moot." *See* ***First Indiana Federal Sav. Bank v. FDIC***, 964 F.2d 503, 507 (5th Cir. 1992) ("A moot case exists when the court cannot grant relief that would affect the parties and redress the plaintiff's alleged wrongs"); ***Triland Holdings & Co. v. Sunbelt Serv. Corp.***, 884 F.2d 205, 208 (5th Cir. 1989) (where no means exist to collect on

[5] The evidence submitted by the Kerrs in response to Bluebonnet's motion for summary judgment was intended to show the existence of a restructure agreement between them and Home Savings; it did not address the commercial reasonableness of the sale of the collateral.

judgment, dismissal on prudential grounds is proper). In the alternative, it held that summary judgment was proper because the Kerrs' reliance on an alleged oral restructuring agreement was barred by ***D'Oench, Duhme & Co. v. FDIC***, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. § 1823(e).

1.

The Kerrs contend that, because the FDIC had actual notice of their claims against Home Savings, application of the ***D'Oench, Duhme*** doctrine would be inequitable. The FDIC counters that the Kerrs' ***D'Oench*** contention is unavailing, and the summary judgment therefore stands, on the basis that the Kerrs waived their right to challenge the primary ground for the judgment -- prudential mootness. The Kerrs respond in their reply brief that their opening brief, by addressing commercial reasonableness, implicitly challenged the propriety of the application of the prudential mootness doctrine. They maintain that the prudential mootness doctrine would be inapplicable if the sale is found to be commercially unreasonable and therefore rescinded, because Home Savings would have assets from which to satisfy all or part of any judgment eventually obtained by them.

Generally, we will not consider issues raised for the first time in a reply brief. *See, e.g.*, ***United Paperworkers Int'l Union v. Champion Int'l Corp.***, 908 F.2d 1252, 1255 (5th Cir. 1990); ***United States v. Prince***, 868 F.2d 1379, 1386 (5th Cir.), *cert. denied*, 493 U.S. 932 (1989). In their opening brief, the Kerrs

neither listed prudential mootness as an issue nor briefed its applicability. Accordingly, they abandoned that issue.

2.

In any event, even if we assume both that the issue was properly raised and that prudential mootness was an inappropriate ground for summary judgment, we nevertheless would affirm on the basis that the Kerrs' claims are barred by ***D'Oench, Duhme***. The Kerrs do not dispute the district court's holding that the alleged oral restructuring agreement is "precisely the type of side agreement forbidden by ***D'Oench, Duhme***." Instead, they maintain that ***D'Oench*** is inapplicable because the FDIC had actual notice of their claims against the failed institution as the result of their 1987 letters to the FSLIC, prior to its appointment as receiver, alerting the FSLIC to the existence of their claims against Home Savings. That contention is foreclosed by ***Langley v. FDIC***, 484 U.S. 86, 94 (1987) ("knowledge of the misrepresentation by the FDIC prior to its acquisition of the note is not relevant to whether § 1823(e) [the codification of the ***D'Oench*** doctrine] applies"), and ***Randolph v. Resolution Trust Corp.***, 995 F.2d 611, 615 (5th Cir. 1993) ("pleadings of a lawsuit do not constitute `records of the bank' for the purpose of applying ***D'Oench, Duhme***"), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1294 (1994).

III.

For the foregoing reasons, the summary judgments are

AFFIRMED.