1995 WL 373483
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver of First New York Bank for Business, Plaintiff,
v.
Joel BOYARSKY, Defendant.

No. 94 Civ. 7482 (RWS).
|
June 22, 1995.

Attorneys and Law Firms

Friedman Siegelbaum, New York City (James B. Daniels, Of Counsel), for plaintiff.

Robert A. Smith, Long Beach, NY, for defendant.

OPINION

SWEET, District Judge.

***1** In this action to collect on a promissory note, plaintiff Federal Deposit Insurance Corporation ("FDIC") moves, pursuant to Fed. R. Civ. P. 56, for an order granting summary judgment. Plaintiff Joel Boyarsky ("Boyarsky") also moves, pursuant to Fed. R. Civ. P. 12(b)(1), for an order dismissing defendant's counterclaim for lack of subject matter jurisdiction or, alternatively, staying the counterclaim pending adjudication of defendant's claim through the FDIC's claims review process. For the reasons set forth below, plaintiff's motions will be granted. Defendant's counterclaim will be dismissed with leave to replead.

The Parties

The FDIC is an instrumentality of the United States created pursuant to 12 U.S.C. § 1811, having its headquarters at 550 17th Street, N.W., Washington, D.C. 20429. The FDIC is empowered to maintain suits in its own name and in any capacity pursuant to 12 U.S.C. § 1819.

Boyarsky is a natural person residing in Lawrence, New York.

Prior Proceedings

The FDIC, in its capacity as receiver of First New York Bank for Business (the "Bank"), filed its complaint in this action on October 17, 1994, seeking to enforce a promissory note executed by Boyarsky in favor of the Bank. On November 30, 1994, Boyarsky answered and lodged a counterclaim for damages arising out of the FDIC's freezing of an account he maintained at the Bank. Boyarsky amended his answer on December 8, 1994.

On February 22, 1995, the FDIC moved to dismiss Boyarsky's counterclaim or, alternatively, to stay the claim pending its adjudication through the FDIC's claims review process.

On March 14, 1995, the FDIC moved for summary judgment on its claim against Boyarsky. Boyarsky responded on March 29, 1995. Oral argument was heard on both motions on April 5, 1995, at which time both motions were deemed fully submitted.

Facts

Prior to 1991, the Bank made a loan to B&G Partnership in the amount of $2,200,000 (the "B&G Loan"). B&G Partnership's partners were Boyarsky and David Geula ("Geula"). The B&G Loan was secured by a mortgage on certain real property owned by Boyarsky and located in Far Rockaway, New York. Shortly after the Bank made the B&G Loan, Geula went bankrupt, and Boyarsky negotiated with the Bank to purchase the B&G Loan by making a $200,000 downpayment and taking a $2,000,000 loan from the Bank (the "Boyarsky Loan"). To complete this transaction, Boyarsky and the Bank entered into a Participation Agreement, dated March 28, 1991, (the "Participation Agreement"), effecting the sale to Boyarsky of all amounts received and owing under the B&G Loan, and a Security Agreement, also dated March 28, 1991, (the "Security Agreement"), by which the Bank took a security interest in Boyarsky's right, title and interest in the Participation Agreement (the "Collateral"). Under the Security Agreement, the Bank was entitled to take immediate possession of the Collateral upon a default on the Boyarsky Loan.

The Boyarsky Loan was evidenced by a promissory note, dated March 28, 1991 (the "Note"), in the principal amount of $2,000,000 with an adjustable interest rate. The Note had a maturity date of July 1, 1992 and provided for a default interest rate at the adjustable rate plus 3%, to apply after the maturity date or upon acceleration after an event of default. In addition, the parties established an account (the "Account") at the Bank for the deposit of payments made on the B&G Loan, which payments were applied against amounts due under the Boyarsky Loan. Boyarsky made monthly payments into the Account in payment of the B&G Loan and was credited for such payments against amounts owing on the Boyarsky Loan. Because the interest rate on the Boyarsky Loan was lower than the rate on the B&G Loan, however, there was an incremental positive cash flow into the Account, inuring to Boyarsky's personal benefit.

***2** Prior to January of 1992, Boyarsky requested, and the Bank intended to grant, a one year extension of the Boyarsky Loan. To this end, on September 14, 1991, the Bank mailed Boyarsky a renewal note for his signature. On October 1, 1991, the bank mailed a second note. Subsequently, one of the Bank's account officers visited Boyarsky in person to deliver still another renewal note, which Boyarsky refused to sign. Boyarsky explained to the officer that he had already executed a renewal note and returned it to the Bank. This issue -- whether a renewal note was ever executed by Boyarsky and returned to the Bank -- is the only factual issue disputed by the parties. In support of its motion for summary judgment, FDIC includes the affidavit of its bank examiner stating that his review of the Bank's records uncovered no such renewal note. Defendant, in opposition to the motion, submits a photocopy of an executed renewal note, dated December 30, 1991, and, as indicated by the electronic time and date stamp on its face, transmitted by the Bank to Boyarsky via fax on January 8, 1992. This renewal note bears a maturity date of July 1, 1993.

On November 13, 1992, the Superintendent of Banks of the State of New York declared the Bank to be in an unsound condition, closed it, and appointed the FDIC as its receiver. Five days later, on November 18, 1992, the FDIC sent Boyarsky a letter informing him that the FDIC's review of the Bank's records indicated that the Boyarsky Loan was in arrears, and notifying him that the Account would be "frozen" pending the FDIC's review of the loan. By letter dated November 30, 1992, Boyarsky protested the freezing of the Account and asserted that all payments due on the Boyarsky Loan were current. Although the Account remained frozen, Boyarsky continued to make monthly payments on the loan.

On May 24, 1993, the FDIC sent Boyarsky a letter demanding payment of the entire unpaid principal balance of the Boyarsky Loan, in the amount of $1,800,000, together with accrued interest thereon in the amount of $36,000. A second demand letter was sent on February 18, 1994, and a third on August 16, 1994, by which time accrued interest amounted to $97,312.50.

Boyarsky suspended principal payments after receipt of the first demand letter, approximately seven months after the FDIC froze the Account. Boyarsky alleges that a renewal Note was issued with a maturity date of July 1, 1993 and, therefore, that the FDIC's action in freezing the account constituted a breach of the Participation Agreement, releasing him from his obligations thereunder. As a result of the freezing of the Account, the mortgage on the Far Rockaway property remained outstanding and Boyarsky was unable to sell the property, although he received offers to purchase it. The FDIC alleges that no renewal note was ever issued and, therefore, that Boyarsky's failure to repay the loan by the original maturity date of July 1, 1992 constituted a default, justifying the FDIC in seizing the Collateral. In any event, the FDIC argues, Boyarsky's obligation to repay the Boyarsky Loan is independent of the FDIC's obligations under the Participation Agreement.

Discussion

Rule 56 Standard for Summary Judgment

***3** The Rule 56 motion for summary judgment is an "integral part" of the Federal Rules of Civil Procedure and facilitates the overall purpose of the Rules stated in Rule 1, namely, "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). A motion for summary judgment may be granted only when there is no genuine issue of material fact remaining for trial and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Silver v. City Univ. of New York,* 947 F.2d 1021, 1022 (2d Cir. 1991).

The Second Circuit has repeatedly noted that "[a]s a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party." *Brady v. Town of Colchester,* 863 F.2d 205, 210 (2d Cir. 1988) citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 330 n.2 (1986) (Brennan, J., dissenting) and *Adickes v. S.H. Kress & Co.,* 398 U.S. 114, 158-59 (1970); *see* *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962); *Cartier v. Lussier,* 955 F.2d 841, 845 (2d Cir. 1992); *Burtnieks v. City of New York,* 716 F.2d 982, 983-84 (2d Cir. 1983). If, when "[v]iewing the evidence produced in the light most favorable to the nonmovant ... a rational trier could not find for the nonmovant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Binder v. Long Island Lighting Co.,* 933 F.2d 187, 191 (2d Cir. 1991). This standard is applied to the instant motion.

Legal Sufficiency of Boyarsky's Defense

In *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.,* 315 U.S. 447 *reh'g denied,* 315 U.S. 830 (1942), the Supreme Court established a doctrine that precludes persons who have lent themselves "to a scheme or arrangement whereby the banking authority on which the [FDIC] relied in insuring the bank was or was likely to be misled," *id.* at 460, from raising a defense to a collection action brought by the FDIC as the receiver of the failed bank based on the misleading scheme or arrangement. The "lending oneself to a scheme likely to mislead the FDIC" element of *D'Oench, Duhme* does not require that the debtor actually *intended* to mislead the FDIC, *see, e.g.,* *Bell & Murphy & Assocs. v. Interfirst Bank Gateway,* 894 F.2d 750, 753-54 (5th Cir.), *cert. denied,* 498 U.S. 895 (1990), or even that the FDIC was actually misled, *see, e.g.,* *Federal Deposit Ins. Corp. v. Investors Assocs. X., Ltd.,* 775 F.2d 152, 155-56 (6th Cir. 1985); *In re Woodstone Ltd. Partners,* 149 B.R. 294, 297 (E.D.N.Y. 1993) (Raggi, J.). Lending oneself to a scheme or arrangement merely refers to any unwritten arrangement of which the FDIC would not have been immediately aware. "Simply put, transactions not reflected on the bank's books do not appear on the judicial radar screen either." *Bowen v. Federal Deposit Ins. Corp.,* 915 F.2d 1013, 1016 (5th Cir. 1990).

***4** The *D'Oench, Duhme* doctrine is essentially a rule of estoppel. *See id.* at 475, (Jackson, J., concurring); *see also* *Federal Deposit Ins. Corp. v. McClanahan,* 795 F.2d 512, 515 (5th Cir. 1986). It prevents those who give promissory notes to federally insured institutions from raising defenses based on side agreements made with officers of failed institutions regarding the enforceability of the notes. Additionally, the doctrine encourages debtors to memorialize all agreements with their creditors in writing and reflects the principle that losses incurred as a result of unrecorded agreements should not fall on deposit insurers, depositors, or creditors, but rather upon the person who could best have avoided the loss -- the borrower. *See* *Woodstone,* 149 B.R. 294, 297; *Fair v. NCNB Texas Nat. Bank,* 733 F. Supp 1099, 1103 (N.D. Texas 1990).

In 1950, Congress codified the *D'Oench, Duhme* doctrine in § 13(e) of the Federal Deposit Insurance Act, codified at 12 U.S.C. § 1823(e). In 1989 Congress enlarged the scope of the doctrine by amending § 1823(e) to extend its protections to assets acquired by the FDIC through appointment as receiver for insolvent financial institutions. Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), Pub. L. No. 101-73 at § 217(4), 103 Stat. 183, 256 (1989). As amended, 12 U.S.C. § 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which

approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (1988 & Supp. IV 1992). These statutory requirements assure prudent consideration of unusual loan transactions by senior bank officials and protect against collusive reconstruction of loan terms by bank officials and borrowers, whose interests may well coincide when a bank is about to fail. *Langley et Ux. v. Federal Deposit Ins. Corp.,* 484 U.S. 86, 92-95 (1987). Failure to satisfy any one of the four requirements enumerated in § 1823(e) is fatal to the enforceability of an agreement against the FDIC. *See* *Federal Deposit Ins. Co. v. Giametti,* 34 F.3d 51 (2d Cir. 1994); *see also* *Federal Deposit Ins. Co. v. Bernstein,* 944 F.2d 101 (2d Cir. 1991).

As the Supreme Court has stated:

> One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets.... Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

***5** *Langley,* 484 U.S. 86 (1987). In *Langley,* in which a debtor alleged that the bank holding his promissory note hade made material misrepresentations in the land transaction underlying the issuance of the note, the Supreme Court unanimously held that "[a] condition to payment of a note, including the truth of an express warranty, is part of the 'agreement' to which the writing, approval, and filing requirements of 12 U.S.C. § 1823(e) attach." Because the bank's representations did not satisfy any of § 1823(e)'s requirements, they could not be asserted as a defense to the FDIC's collection on the note. *Id.* at 96.

The arrangement between Boyarsky and the Bank to extend the Boyarsky loan was an "agreement" under the *Langley* Court's broad reading of that term and under 12 U.S.C. § 1823(e). The policies underlying the *D'Oench, Duhme* doctrine shield depositors, creditors and insurers from the fallout of just such arrangements. Whether Boyarsky and the Bank ever effected such an "agreement," i.e., by exchanging the Note for a renewal note with a maturity date of July 1, 1993, is immaterial in light of the requirements of § 1823. Boyarsky does not allege that a renewal note was approved by the board of directors or loan committee of the Bank, that any such approval was reflected in the minutes of the board or committee, or that such a renewal note has been, from the time of its execution, an official record of the Bank.

Because a promissory note is signed only by the debtor, it is not possible to determine, based on the current record, whether Boyarsky's facsimile renewal note, if *bona fide,* was ever authoritatively approved by the Bank before it went into receivership. For the purposes of resolving the instant motion, however, it is sufficient that the renewal note, if issued, did not meet the statutory requirements of § 1823. *See* *Beighley v. Federal Deposit Ins. Corp.,* 868 F.2d 776, 783-84 (5th Cir. 1989). In *Beighley,* plaintiff produced 71 documents which purportedly reflected the bank's agreement to finance a credit-worthy buyer to purchase certain property, but since the asserted agreement was "not clearly evidenced in the bank's records, and would not be apparent to bank examiners," the plaintiff's evidence was not sufficient to overcome *D'Oench, Duhme,* 868 F.2d at 783-84; *see also* *Bell & Murphy & Assocs. v. Interfirst Bank Gateway,* 894 F.2d 750, 754 (5th Cir. 1990). Since there is no genuine issue of material fact as to whether the renewal of the Note was reflected in the Bank's records before the court, therefore, the FDIC's motion for summary judgment must be granted.

This Court Does Not Have Jurisdiction Over Boyarsky's Counterclaim

12 U.S.C. § 1821(d)(13)(D) provides:

(D) Limitation on judicial review

> Except [after administrative remedies are properly exhausted under 12 U.S.C. § 1821(d)(6)(a)], no court shall have jurisdiction over--
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or
>
> ***6** (ii) *any claim relating to any act or omission of such institution or the [FDIC] as receiver* (emphasis added).

Section 1821(d)(13)(D) thus operates as a jurisdictional bar to "claims" brought in civil court prior to exhaustion of the FDIC's claims review process. *See Federal Deposit Ins. Corp. v. Betancourt,* 865 F. Supp. 1035, 1043 (S.D.N.Y. 1994); *see also* *Circle Industries v. City Federal Savings Bank,* 749 F.Supp. 447, 455 (E.D.N.Y. 1990), *aff'd o.b.,* 931 F.2d 7 (2d Cir. 1991). FIRREA, however, contains no section defining what constitutes a "claim" for the purposes of § 1821(d)(13)(d)'s jurisdictional bar.

Congress enacted FIRREA in 1989 to enable the federal government to respond effectively to the worsening condition of the nation's banks and savings institutions. The statute revised procedures for winding up the affairs of failed banks, including provisions for the presentation, determination and payment of claims against a failed bank's assets. 12 U.S.C. § 1821(d)(3)-(14). Subsections 1821(d)(3)(B) and (C) of the act instruct the FDIC, as receiver of a failed bank, to publish and mail to "creditor[s] shown on the institution's books," notice of the bank's liquidation, providing at least 90 days for such creditors to file "claims." Within 180 days of the date a claim is filed, the FDIC must make a determination whether the claim is allowable. *Id.* § 1821(d)(5)(A)(i). If the claim is disallowed, the FDIC must inform the "claimant" of the reason for the disallowance. *Id.* § 1821(d)(5)(A)(iv). A "claimant" may file a civil action within 60 days after receipt of a notice of disallowance.

Boyarsky's counterclaim alleges that, by freezing the Account when Boyarsky was not in default on the Note, the FDIC failed to perform the Bank's obligations under the Participation Agreement. Thus, Boyarsky's claim was not an existing "claim" against the Bank which the FDIC inherited by virtue of its appointment as the Bank's receiver. Rather, Boyarsky's claim arises from the FDIC's allegedly improper actions in managing the Bank's assets after it had entered receivership. Thus it must be determined whether 12 U.S.C. § 1821(d)(13)(D) jurisdictionally bars federal district courts from considering claims such as Boyarsky's, which arise from the FDIC's actions in managing a failed institution's assets *after* -- rather than before -- the institution enters receivership, pending exhaustion of the administrative remedies provided under FIRREA, codified in relevant part at 12 U.S.C. § 1821(d)(3)-(13). The parties have presented no Second Circuit cases providing guidance on this distinction.

To the extent that the broad language of § 1821(d)(13)(D)(ii) barring claims "relating to any act or omission" of the FDIC is intended to bar claims for damages resulting from the FDIC's alleged breach of a claimant's contract with a failed bank, § 1821(d)(13)(D)(ii) is in conflict with § 1821(e)(1)-(3). Subsection 1821(e) expressly empowers the FDIC, as receiver, to repudiate contracts made by the failed financial institution prior to the FDIC's appointment, when the FDIC determines in its discretion that repudiation of such contracts would "promote the orderly administration" of the failed institution's affairs. 12 U.S.C. § 1821(e)(1). Although repudiation frees the FDIC from performing the failed institution's contract, it constitutes a breach for which § 1821(e)(3)(A) affords the injured contracting party a direct claim for compensatory relief against the FDIC. *See* *Heno v. Federal Deposit Ins. Corp.,* 996 F.2d 429, 433 (1st Cir. 1993); *Howell v. Federal Deposit Ins. Corp.,* 986 F.2d 569, 571 (1st Cir. 1993). Monetary recovery on any such "claims" is "limited to actual direct compensatory damages." 12 U.S.C. § 1821(e)(3)(A)(i).

***7** The apparent contradiction between the provisions for administrative review of "claims" under § 1821(d)(3)-(13) and the provisions for damages for "claims" based on the FDIC's repudiation of contracts under § 1823(e) has led the Tenth Circuit to conclude that the two sections are intended to govern very different types of "claims." *See* *Henry v. Office of Thrift Supervision,* 43 F.3d 507, 513 (10th Cir. 1994). Although it is established that the jurisdictional bar of § 1821(d)(13)(D) applies to claims against failed banking institutions which the FDIC inherits as receiver, *see* *Circle Industries v. City Federal Savings Bank,* 749 F.Supp. 447, 455 (E.D.N.Y. 1990), *aff'd,* 931 F.2d 7 (2d Cir. 1991), no Second Circuit case cited by the parties or known to this Court address the question of whether claims arising from the FDIC's breach of the bank's contracts are similarly barred. Circuits are split on this question. *Compare* *Homeland Stores, Inc. v. Resolution Trust Corp.,* 17 F.3d 1269 (10th Cir. 1994) (holding that the jurisdictional bar of § 1823(d)(13)(D) applies to creditor claims against failed institutions arising before such institutions entered receivership, but does not apply to claims arising from actions of the FDIC in managing a receivership asset) *with* *Heno v. Federal Deposit Ins. Corp.,* 20 F.3d 1204, 1209 (1st Cir. 1994) (acknowledging the FDIC's "administrative expertise" in resolving disputed claims and deferring to its interpretation of § 1821(d)(13)(D) as requiring exhaustion of administrative remedies before filing civil action for claims arising *post-receivership*).

As the First Circuit has noted, there are sound policy grounds for affording the FDIC an opportunity to evaluate all "claims" in the first instance, including contract repudiation claims that do not arise within the initial ninety-day period following notice of the FDIC's appointment as receiver. The administrative claims review process optimizes prospects for the expeditious and fair resolution of all claims, makes efficient use of the FDIC's expertise, and minimizes burdensome litigation in the federal courts. *Heno v. Federal Deposit Ins. Corp.,* 20 F.3d 1204, 1909 (1st Cir. 1994). These policy concerns persuade this Court that Section 1821(d), including the jurisdictional bar of § 1821(d)(13)(D), should be read to apply to claims directly against the FDIC for mismanagement of the failed bank's assets and for breach or repudiation of the bank's contracts with claimants, as well as to preexisting creditor claims. Accordingly, Boyarsky's counterclaim will be dismissed for failure to exhaust his administrative remedy.

Conclusion

For the reasons stated above, the FDIC's motions for summary judgment and dismissal of Boyarsky's counterclaim are hereby granted. Boyarsky's counterclaim is hereby dismissed with leave to replead within 60 days after final disposition of his claim within the FDIC's administrative claims review process.

***8** It is so ordered.

All Citations

Not Reported in F.Supp., 1995 WL 373483