UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re	Case Nos.:
MICHAEL FORTE, ROMET CORP., SETRE CORP., and FOREAL HOMES, INC.	94-70708-511 94-20709-511 94-70710-511 94-70711-511
Debtors	
MICHAEL FORTE, SETRE CORP. and FOREAL HOMES, INC. Plaintiffs	
-vs-	Adv. No. 094-7077-511
FIRST UNION NATIONAL BANK OF FLORIDA, as the successor in interest to the Federal Deposit Insurance Corporation, as Receiver for SOUTHEAST BANK, N.A., & FARRELL, FRITZ, CAEMMERER, CLEARY, BARNOSKY & ARMENTANO, P.C. Defendants	

BERKMAN HENOCH PETERSON & PEDDY
777 Zeckendorf Boulevard
Garden City, New York 11530

Attorneys for Plaintiffs/Debtors-in-Possession

Michael J. Healy, Esq.
FARRELL, FRITZ, CAEMMERER, CLEARY
BARNOSKY & ARMENTANO, P.C.
EAB Plaza
West Tower - 14th Floor
Uniondale, New York 11556-0120

Attorneys for Defendant

In this adversary proceeding, four related Chapter 11 Debtors-in-Possession seek to expunge any claim asserted in their

cases by First Union National Bank of Florida, N.A. ("First Union" or "the Bank") and seek money judgment against the Defendant on various theories. Debtors' action on similar theories against Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano, the Bank's counsel, has been severed from this action. Presently before the Court is the Bank's motion for summary judgment, seeking to dismiss the complaint in its entirety.

A motion for summary judgment asks a court to decide a case on the merits given all of the facts that are not in dispute. Neither party here has mentioned the current status of discovery, and the Debtor fails to offer much evidence, even informally, with which to raise triable issues of fact. Mr. Forte's affidavit as to matters not personally known to him is virtually useless in this regard. *See* Fed. R. Civ. P. 56(e). The parties seem to have treated this motion for summary judgment as if it were a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim upon which relief can be granted. In arguing a 12(b)(6) motion, it makes sense to not dispute the facts, since such a motion presumes that as a matter of law there can be no fact pattern that would give rise to judgment on the merits for the plaintiff.

In contrast, in deciding a summary judgment motion, a court must know which facts are controverted and which are stipulated or beyond genuine dispute. Here, although certain facts are crucial to the outcome of the adversary proceeding, the

parties have not offered explicit statements about which facts are undisputed, and which are contested. Nonetheless, enough crucial issues of fact have been implied by the parties' affidavits and briefs to warrant a trial, or at least further discovery. (Why the Debtors have not complained of insufficient discovery under Rule 56(f) escapes the Court.)

The gravamen of the Debtors' complaint is that the Bank is wrongfully seeking to enforce guarantees, notes and mortgages against the Debtors, which, it is alleged, the Bank knows are unenforceable.

The view that the guarantees, notes and mortgages are unenforceable is based on two theories. The first theory that Debtors argue is that the guarantees, notes and mortgages comprised an inextricable part of a $4 million credit facility which required Southeast Bank (First Union's predecessor-in-interest) to issue and maintain $2 million in standby letters of credit. Those letters of credit, however, were not maintained because Southeast became insolvent and was taken over by the FDIC, which subsequently repudiated the letters of credit pursuant to 12 U.S.C. § 1821(e). Debtors also offer the alternative theory that the mortgages were given by Setre and Foreal as security for the obligations of another entity, Related Partners, and therefore constituted a fraudulent transfer as to the creditors of Setre and Foreal, which fraudulent transfer was known to the bank.

First Union's motion for summary judgment is based upon four theories, as follows:

> A. Pursuant to 12 U.S.C. § 1821(d), the Court is without subject matter jurisdiction to adjudicate any of the claims asserted by the debtors against First Union in the amended complaint;
>
> B. Even if the Court concludes that it has subject matter jurisdiction in this case, the claims asserted against First Union are nonetheless barred as a matter of law by the doctrine of estoppel established in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S.C. [sic] 447, 62 S.Ct. 676, 86 L.Ed. 9565 (1942), and its statutory counterpart, 12 U.S.C. § 1823(e), and by the Federal Holder in Due Course Doctrine;
>
> C. At a minimum, even if the Court concludes that the five damage claims against First Union are not otherwise barred, those claims should nonetheless be dismissed under Rule 19 of the Federal Rules of Civil Procedure, on the ground that without the FDIC as a defendant, this Court lacks an indispensable party; and
>
> D. Even assuming that the Court has jurisdiction, and even assuming that the claims against First Union are not otherwise barred, the fraudulent conveyance claims contained in counts six through nine of the amended complaint fail as a matter of law, thus requiring in any event the summary dismissal of those claims as against First Union.

Michael J. Healy's Affidavit in support of Motion for Summary Judgment, ¶ 50.

The Bank's arguments are understandable if one accepts the Bank's statement of the issue before the Court. At paragraphs 2 and 3 of its Affidavit in Support of Motion for Summary Judgment it states:

> 2. First Union is the successor in interest to the Federal Deposit Insurance Corporation ("FDIC"), as receiver for Southeast Bank, pursuant to an Assistance

> Agreement dated September 19, 1991. At issue is a series of mortgage documents First Union acquired from the FDIC under that agreement.... By virtue of First Union's acquisition of those mortgage documents, First Union obtained a first mortgage lien on certain real property owned by Setre and Foreal.
>
> 3. In this adversary proceeding, the Debtors seek to hold First Union liable under the mortgage documents for actions taken by the FDIC as receiver for Southeast Bank and to avoid the underlying mortgage -- even though it is undisputed that, in violation of 12 U.S.C. § 1821, the Debtors failed to exhaust the administrative claims procedure established with the FDIC, and that First Union acquired the mortgage documents for value and in good faith.

The Court does not accept this recitation of the issues before it. Indeed, that recitation begs the questions before the Court. What is in fact before the Court is the question of whether defenses that would otherwise be available to a Chapter 11 debtor-in-possession in an action by the lender are lost if the FDIC has taken over as receiver for the lender and repudiated the lender's obligations to that debtor, but sold to a third party the debtor's obligations to the lender. The Debtors here would like an opportunity to prove at trial that First Union, the purchaser of the guarantees, notes and mortgages from the FDIC, was aware of all the salient facts of the loan and credit package. The present motion would, if granted, prevent the matter from reaching that point.

DISCUSSION

First Union argues that this Court lacks subject matter jurisdiction to decide this adversary proceeding. To the extent that the Debtors seek "expungement" of certain claims, their motion is really nothing more than an objection to such claims, and subject matter jurisdiction is conferred by 11 U.S.C. § 502, 28 U.S.C. §§ 1334 and 157(b)(2)(B), and the General Order of Reference entered by the District Court of the Eastern District of New York. In sum, the suggestion that this Court has no jurisdiction to hear objections to claims asserted here cannot be seriously entertained.

Similarly, to the extent that a fraudulent transfer is alleged, subject matter jurisdiction is conferred by 11 U.S.C. §§ 544, 548, and 550, 28 U.S.C. §§ 1334 and 157(b)(2)(H), and the said General Order.

To the extent that these provisions must be reconciled with 12 U.S.C. §§ 1821(d)(13)(D) and 1821(e)(3), it is readily seen that even if First Union were "the successor in interest to the FDIC" (and it is not, as discussed below), those sections do not apply to the present case. The type of "claim" contemplated by § 1821(d) is one that arises out of the conduct of the failed bank and is of the type that would yield a distribution from the assets of the receivership. *Heno v. F.D.I.C.*, 996 F.2d 429, 433 (1st Cir. 1993). 12 U.S.C. § 1821(e), on the other hand,

recognizes claims against the FDIC for acts of the FDIC, as opposed to acts of the failed bank. *Id.* at 433. The Debtors here assert claims against First Union for acts of First Union, not acts of the FDIC or of the failed bank. 12 U.S.C. § 1821 simply does not apply. If First Union has acted tortiously, for example, it may not place itself beyond adjudication by choosing to characterize the action as a "claim" against the FDIC.

It is not the Bank alone that focuses inappropriately on the FDIC. The Debtors also make too much of their claim that the FDIC caused them harm. This adversary proceeding, as the Court sees it, takes the FDIC's actions as a "given," and questions the actions of First Union after FDIC decided not to honor Southeast's obligation to Related Partners.

Furthermore, First Union is not the "successor in interest to the FDIC" for present purposes. First Union bought an $80 million portfolio of assets and liabilities from the FDIC, and has an "Assistance Agreement" with the FDIC. It does not stand in the FDIC's shoes. If the indemnification provisions of that agreement have any meaning at all, then it must be understood that First Union did not take "free and clear" of all defenses to those alleged assets and did not succeed to all of the FDIC's attributes. *See* Article XIV of the "Assistance Agreement."

The FDIC's repudiation of the claim that arose out of the standby letters of credit did not constitute an

extinguishment of the borrower's defenses as against First Union; rather, it constituted a decision by the FDIC neither to pay anything to the Debtors nor to require someone else to assume the liability to issue and maintain the letters of credit. The decision not to require First Union or some other entity to assume the liability to issue and maintain the standby letters of credit could not have the effect of rendering the notes and mortgages immune to defenses of which First Union was aware. The fact that a note and mortgage "passed through" the FDIC on the way to a diligent buyer "with knowledge" ought not strip away defenses such as a failure of consideration. It might be useful to look at the analogous situation of insurance claims that do not involve the FDIC. (The FDIC is, after all, an insurer.) If two vehicles are involved in an accident, one driver might ask her insurer to pay. The insurance company might repudiate (disclaim) for one reason or another. This might leave the driver with a suit for wrongful disclaimer against the insurance company. That action, however, has no bearing at all upon any suit between the two drivers.

It is 12 U.S.C. § 1823, the *D'Oench, Duhme* Doctrine,[1] and the "Holder in Due Course" Doctrine that spell out precisely what the rights of First Union are. First Union has clearly not

[1]*See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942).

brought itself within the protection of certain of these doctrines, and the Court, as finder of fact, would benefit from trial to determine whether First Union has brought itself within the shelter of others of the doctrines.

Before addressing the doctrines, it is useful to examine what few facts we have. The Assistance Agreement was signed on the day that Southeast Bank was declared insolvent. This strongly implies that First Union examined the assets of Southeast before the FDIC took over as receiver. First Union surely did not buy a "pig in a poke." The Debtors should be given an opportunity at trial to prove the extent of First Union's familiarity with this loan arrangement before it entered into the Assistance Agreement with the FDIC, and before it undertook to enforce the guarantees.

Additionally, First Union did not simply purchase the guarantees, notes and mortgages. According to paragraph 18 of First Union's affidavit, it also acquired the Loan Agreement. The Loan Agreement is the master document that integrates the notes, mortgages and letters of credit into one transaction. The Bank therefore knew that $2 million of the consideration for the notes, mortgages, and guarantees, consisted of the issuance and maintenance of standby letters of credit. In light of these two factors, First Union's reliance upon the *D'Oench, Duhme* Doctrine and 12 U.S.C. § 1823 is unavailing. The *D'Oench, Duhme* Doctrine and 12 U.S.C. § 1823(e) protect the F.D.I.C. from undocumented

side agreements between an obligor and the failed bank. For the reasons set forth in the Debtors' Memorandum of Law in opposition to First Union's motion for summary judgment, the Court agrees that there are no "secret agreements" here at issue from which First Union might be entitled to protection.

As to the Holder in Due Course Doctrine, which "bars the makers of promissory notes from asserting various 'personal' defenses against the FDIC in connection with purchase and assumption transactions involving insolvent banks," *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990) (citation omitted), there can be no question but that the FDIC is entitled to the benefit of the Doctrine where it has no actual knowledge of the personal defenses at issue. It is possible here that the FDIC did not have actual knowledge of the totality of the loan transaction at the time that it took over Southeast, since the repudiation of the letters of credit did not occur until later. However, First Union is not the FDIC, and it is not at all clear that First Union is entitled to the benefit of the Holder in Due Course Doctrine where, as here, it is not a mere "holder." It acquired the guarantees, mortgages, and notes, as part of a bulk purchase of assets. An agreement of more than 65 pages specified the terms of the acquisition. Many provisions of the agreement contemplated the possibility that some of the assets were unenforceable or uncollectible. *See, e.g.*, paragraph 3.3 of the Assistance Agreement, by which First Union agreed that

it was purchasing all assets "without any warranties whatsoever ... with respect to title, enforceability, collectibility, documentation or freedom from liens or encumbrances (in whole or in part), or any other matters." First Union admits that it acquired the Loan Agreement, and so it is not entitled to a ruling that, as a matter of law, it was a holder in due course without actual knowledge of the personal defenses being raised.

As to the fraudulent transfer claims, it may be that the Debtors' motion for substantive consolidation of the bankruptcy cases, which motion has since been withdrawn, will undermine the Debtors' ability to establish at trial that the consideration which flowed to Related Partners was not good consideration as to these Debtors. For now, it need only be noted that that motion was silent in all regards concerning Related Partners, and at issue in the fraudulent transfer causes of action is whether that entity was or was not an entity separate from the present Debtors.

As to the matter of the pendency of the action between Michael Forte and the FDIC in the Eleventh Circuit, the attention devoted by the briefs to the question of the FDIC has clouded the issues currently before the Court. It seems clear that the United States District Court for the Middle District of Florida, in its decision of June 16, 1992, deemed the issues raised by Michael Forte's counterclaims to constitute an assertion by Forte of "an entitlement to the assets of a depository institution for

which the FDIC has been appointed receiver," which assertion "must fully comply with the FDIC's administrative claims procedures." *First Union Nat'l. Bank v. Forte*, No. 91-773-Civ-ORL-20, slip op. at 2 (M.D. Fla. 1992), *appeal pending.* The present adversary proceeding involves a very different issue. The Debtors are not seeking anything from the FDIC or any distribution of assets of the failed bank.

Debtor Michael Forte must decide whether he wishes to pursue his appeal of matters resolved elsewhere against him, and in favor of First Union. However, it is not clear that the present actions are foreclosed in all regards as to Michael Forte as plaintiff. Issues of collateral estoppel, res judicata and the like as between Michael Forte and First Union may be addressed in the present litigation when specific questions related thereto arise in the course of discovery or other preparation for trial. As explained above, the present action is different from that addressed in the Middle District of Florida.

CONCLUSION

The summary judgment motion is denied in all respects, but without prejudice to the filing of the same or similar motion, after a Rule 16 conference with the presiding judge, once it is clear that sufficient discovery has been completed. The parties are directed now to seek a Rule 16 conference with a

judge at Hauppauge to set discovery deadlines, if such a meeting is not already calendared.

Dated: Buffalo, New York
December , 1994

/s/Michael J. Kaplan
U.S.B.J.