Third District Court of Appeal

State of Florida

Opinion filed June 10, 2020.

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No. 3D16-2678
Lower Tribunal No. 12-41555

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Michael Rosen,
Appellant,

vs.

Harborside Suites, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rodney Smith, Judge.

Gunster, and Angel A. Cortiñas and Jonathan H. Kaskel, for appellant.

The Lehman Law Firm PLLC, and Gary E. Lehman; Nelson Mullins Broad and Cassel, and Beverly A. Pohl and Christina Lehm (Fort Lauderdale), for appellee.

Before LOGUE, SCALES[1] and LINDSEY, JJ.

On Harborside's Motion for Rehearing of our July 2019 Opinion

PER CURIAM.

[1] Did not participate in oral argument.

Our initial opinion in this case, issued on December 12, 2018, affirmed a summary judgment for appellee, plaintiff below, Harborside Suites, LLC ("Harborside"). Appellant, defendant below, Michael Rosen, then timely filed a motion for rehearing. After carefully reviewing Rosen's rehearing motion, Harborside's response to same, and again scrutinizing the summary judgment evidence in a light most favorable to Rosen, we issued a second opinion in this case on July 17, 2019, that granted Rosen's motion for rehearing, withdrew our initial opinion, and reversed the trial court's summary judgment for Harborside ("July 2019 Opinion"). Harborside then filed a motion for rehearing, correctly asserting that neither our initial opinion, nor our July 2019 Opinion, had discussed, much less adjudicated, an issue Harborside asserts is dispositive in this case: whether the trial court was correct when it concluded that the *D'Oench* doctrine[2] applied in this case so as to prevent, as a matter of federal law, Rosen from even asserting the affirmative defense that he was released from his guaranty of the underlying loan. While it

[2] As discussed in more detail, *infra*, the *D'Oench* doctrine, codified at 12 U.S.C. § 1823(e), requires any agreement that impairs an asset of a failed financial institution to be in writing and contained within the books and records of the failed institution. The doctrine is named for D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). While the common law *D'Oench* doctrine and its companion statutory provision are neither identical nor interchangeable, see Lassiter v. Resolution Tr. Corp., 610 So. 2d 531, 535-36 (Fla. 5th DCA 1993), for the purposes of this opinion, differences between the two are irrelevant. For ease of reference, when we refer to the inapplicability of "the *D'Oench* doctrine" in this opinion, we include the inapplicability of the statutory provision.

might have been implicit in the remand instructions of our July 2019 Opinion, we now explicitly hold that the *D'Oench* doctrine does not preclude Rosen from asserting the affirmative defense that he was released from the guaranty of the underlying loan. We, therefore, withdraw both our initial opinion and the July 2019 Opinion, and replace them with this opinion, reversing the trial court's summary judgment and remanding the case for further proceedings consistent with this opinion.

I. Relevant Facts and Procedural Background

In September 2005, Ohio Savings Bank (also known as AmTrust) (the "Bank") entered into a construction loan agreement with a consortium of borrowers (the "Developer"), memorializing the terms of a $41 million construction loan. The purpose of this loan was to facilitate the Developer's construction of a condominium project in Hillsborough County.

Rosen, a principal of the Developer, executed an Unconditional and Continuing Guaranty and Indemnity Agreement ("guaranty agreement"), whereby Rosen personally guaranteed the loan. Pursuant to a provision contained in section 2.3 of the guaranty agreement, Rosen would be released from his guaranty obligations "*upon* Borrower's satisfaction of the Pre-Sales Requirement in accordance with the terms and conditions of the [construction loan] Agreement."

(Emphasis added).[3] The "Pre-Sales Requirement" is a defined term in the construction loan agreement that requires the Developer to execute and deliver to the Bank a minimum of 125 "valid, binding and then effective Approved Sales Contracts." The construction loan agreement defines an "Approved Sales Contract" as a bona fide, enforceable, non-contingent agreement in a form approved by the Bank. Pursuant to the construction loan agreement, the Developer would be in default of the construction loan agreement if the Developer failed to satisfy the Pre-Sales Requirement on or before February 28, 2006.

The summary judgment record reflects that, on or about May 5, 2005, prior to finalizing the loan documents, the Developer delivered to the Bank 125 contracts that the Developer characterized as "valid, binding and then effective" Approved Sales Contracts. An internal Bank memo, dated February 2007, acknowledges that the Developer had met its Pre-Sales Requirement. Additionally, at no point did the Bank ever provide notice to the Developer (or, for that matter, Rosen) that the Developer had defaulted under the construction loan agreement (or any other document memorializing the loan) for not satisfying the Pre-Sales Requirement.

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[3] The relevant provision of the guaranty agreement reads as follows:

> Notwithstanding anything to the contrary contained herein, upon Borrower's satisfaction of the Pre-Sales Requirement in accordance with the terms and conditions of the Agreement, Guarantor shall thereafter be released from his obligations under this Guaranty with respect to matters occurring from and after the date of such release.

Indeed, the Bank continued to fund the loan after February 28, 2006, the date that the Developer was contractually required to satisfy the Pre-Sales Requirement.

The record reflects that the condominium project was built to completion in May 2007; however, due to the housing market recession, a majority of the 125 contracts that had been delivered to the Bank by the Developer went into default and the unit buyers identified in those contracts failed to close on their contracted-for units. The Developer defaulted on its obligations to the Bank in September 2007, and, in 2009, the Bank sued the Developer in the Hillsborough County Circuit Court for foreclosure. Rosen was not named as a defendant in that foreclosure action.

On December 4, 2009, the federal Office of Thrift Supervision took possession of the business and property of the Bank and appointed the Federal Deposit Insurance Corporation ("FDIC") as its receiver. Ultimately, the FDIC assigned the note, mortgage and guaranty agreement to Harborside. On June 20, 2012, the Hillsborough County Circuit Court entered a final judgment of foreclosure against the Developer, which was subsequently assigned to Harborside. On October 17, 2012 (after the Developer defaulted on its obligations to the Bank), Harborside filed the instant action in the Miami-Dade County Circuit Court against Rosen, seeking to recover approximately $39 million allegedly due and owing by Rosen pursuant to the guaranty agreement. Rosen defended against the action alleging, among other things, that, pursuant to the above-cited provision contained in section

2.3 of the guaranty agreement, Rosen was released from his obligations under the guaranty agreement because the Developer had satisfied the Pre-Sales Requirement of the construction loan agreement. Specifically, in the general allegations incorporated into his affirmative defenses, Rosen asserts: "The Pre-Sales Requirement was met and any liability of Rosen under the Guaranty terminated long before any default on the Loan."

Notwithstanding Rosen's affirmative defense, the trial court entered the challenged summary final judgment for Harborside against Rosen, awarding Harborside approximately $24 million. Neither the summary judgment, nor the trial court's order denying rehearing on same, explain the trial court's reasoning. While not elucidated in the trial court's written orders, in the transcript of the September 16, 2016 summary judgment hearing, the trial court concluded that the *D'Oench* doctrine was applicable to preclude it from even considering Rosen's affirmative defense.[4]

For the reasons outlined below, we reverse the trial court's summary judgment and remand for further proceedings.

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[4] In granting summary judgment, the trial judge stated: "I've reviewed the evidence, heard arguments of counsel as presented to this Court. . . . I believe the Plaintiff has met its burden of proof. . . . There's no genuine issue of material fact. . . . So with that said, and all the arguments advanced by the counsels here . . . the FDIC rule does apply, not those other federal cases that were cited by defense counsel here, and is governed by the 1823 statute as well. . . . And so therefore, I'm granting summary judgment. You're entitled to it."

II. Analysis

A. The Inapplicability of the D'Oench Doctrine

As mentioned in footnote 2, above, the *D'Oench* doctrine, and its statutory counterpart codified in 12 U.S.C. § 1823(e),[5] require that, to be enforceable against either the FDIC or a successor institution,[6] any agreement that impairs an asset of a failed institution must be in writing and contained in the books and records of the failed institution. The purpose of the doctrine is to allow the FDIC quickly and accurately to value the assets of a failed bank to facilitate the transition of the failed

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[5] Section 1823(e)(1) reads as follows:

> (e) Agreements against interests of Corporation
> (1) In general
> No agreement which tends to diminish or defeat the interest of the Corporation 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 Corporation unless such agreement –
> (A) is in writing,
> (B) 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,
> (C) 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
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

[6] While the statute contemplates that the doctrine will be asserted to protect federal regulators, such as the FDIC, assignees of the FDIC may assert the doctrine, too. See Porras v. Petroplex Sav. Ass'n, 903 F.2d 379, 381 (5th Cir. 1990).

bank's assets to the acquiring bank. See Langley v. FDIC, 484 U.S. 86, 91-92 (1987). Hence, the doctrine precludes, as a matter of law, the enforcement of a secret agreement or a side deal between a borrower and the failed bank. See Kasket v. Chase Manhattan Mortg. Corp., 695 So. 2d 431, 435 (Fla. 4th DCA 1997).

To the extent the trial court concluded that the *D'Oench* doctrine precluded Rosen's release defense, this was error. Rosen's release defense is not premised upon any secret agreement or side deal that Rosen had with the Bank. Rather, Rosen's affirmative defense that he is not liable under the guaranty is based on an *express provision contained in the written guaranty agreement that Harborside seeks to enforce against Rosen*. Section 2.3 of the guaranty agreement that forms the basis of Harborside's claim against Rosen expressly provides that Rosen's obligations under that guaranty cease upon the Developer satisfying the Pre-Sales Requirement.

Hence, the "agreement" that may impair the guaranty agreement is neither secret nor undisclosed; it is an operative provision in the very same document Harborside seeks to enforce against Rosen. The *D'Oench* doctrine, therefore, is not implicated. See Howell v. Continental Credit Corp., 655 F.2d 743, 746 (7th Cir. 1981) (holding that section 1823(e) is inapplicable where the document the FDIC seeks to enforce "facially manifests bilateral obligations" and no secret or collateral agreement exists to alter the agreement found in the bank's files); Lassiter, 610 So.

2d at 534-35 (holding that mortgagors' affirmative defenses are not barred by the *D'Oench* doctrine when bilateral obligations are shown on the face of loan documents); see also FDIC v. McFarland, 33 F.3d 532, 536-37 (5th Cir. 1994) ("We hold that 12 U.S.C. § 1823(e) applies only to separate and collateral agreements; not to agreements found in the loan documents themselves."); Oklahoma Radio Assocs. v. FDIC, 987 F.2d 685, 692 (10th Cir. 1993) (reversing summary judgment in favor of the FDIC based on the *D'Oench* doctrine because a letter, reflecting the failed bank's obligation to renew an apparently expired note, was in the bank's files); Acciard v. Whitney, No. 2:07-CV-00476-FtM-36DNF, 2011 WL 4552564, at *7-9 (M.D. Fla. Sept. 30, 2011) (holding certain defenses are not barred by the *D'Oench* doctrine when they are based on the terms and conditions of the agreement the regulatory agency seeks to enforce); Kasket, 695 So. 2d at 435 (declining to apply the *D'Oench* doctrine to bar truth-in-lending defenses because the defenses arose from the loan documents in the failed bank's files).

Because Rosen's release defense is founded upon a bilateral obligation evident on the face of the very document Harborside seeks to enforce against Rosen, we conclude that the *D'Oench* doctrine is inapplicable to bar this defense.

B. Harborside's Summary Judgment Burden

Having concluded that the *D'Oench* doctrine is not applicable to preclude Rosen from asserting the affirmative defense that he was relieved of liability under

the guaranty because the Pre-Sales Requirement was satisfied, we now turn to whether Harborside met its summary judgment burden to conclusively disprove Rosen's affirmative defense. Harborside asserts that it is entitled to summary judgment because the Bank never executed a written release of Rosen.

In our view, though, the issue is not whether the Bank executed a written release, but rather, whether Rosen was entitled to one. Whether the Bank actually executed a written release (it did not) is not determinative of whether Rosen was discharged of his guaranty obligation. The issue framed by Rosen's affirmative defense – an issue vigorously disputed by the parties – is whether the Developer's May 5, 2005 delivery to the Bank of 125 contracts met the Pre-Sales Requirement, thereby discharging Rosen's obligation under the guaranty agreement. The appellate issue before this Court, in its *de novo* review[7] of the summary judgment evidence, is whether, taking all inferences flowing from the summary judgment evidence in Rosen's favor,[8] Harborside met its summary judgment burden to establish the lack of a genuine issue of material fact on this issue.[9] We conclude that Harborside failed

[7] See Gorrin v. Poker Run Acquisitions, Inc., 237 So. 3d 1149, 1153 (Fla. 3d DCA 2018).

[8] See Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 349 (Fla. 3d DCA 2017).

[9] See Gidwani v. Roberts, 248 So. 3d 203, 207 (Fla. 3d DCA 2018).

to meet its burden to establish conclusively that the Developer did not satisfy the Pre-Sales Requirement.

In opposition to Harborside's summary judgment motion, and in support of its affirmative defense that he had been released from the guaranty, Rosen submitted the affidavit of Keith Lampitt who, at all material times, was the Operations Manager of the Developer. Lampitt's affidavit states that, on May 5, 2005, Lampitt delivered to the Bank 125 valid, binding and effective condominium purchase and sale agreements consistent with the Pre-Sales Requirement of the construction loan agreement. The Lampitt affidavit also asserts that the Bank accepted all 125 contracts and never provided any notice that these contracts failed to satisfy the Pre-Sales Requirement.

The Lampitt affidavit asserts that, after receiving these contracts, the Bank continued to disperse funds to the Developer consistent with the terms of the construction loan agreement. Rosen argues that the Bank would not have dispersed these funds if the Developer were in default under the construction loan agreement for failure to satisfy the Pre-Sales Requirement. Indeed, it is undisputed that the Bank never notified the Developer of any default of the construction loan agreement for the Developer's failure to satisfy the Pre-Sales Requirement, despite the express provision of the construction loan agreement stating that a failure to satisfy the Pre-Sales Requirement constituted a default. Additionally, an internal memorandum

prepared by the Bank, which was made part of the summary judgment record, reads in relevant part as follows: "In February 2007, Borrower met its presale requirement of 125 sold units with total revenues of not less than $60,652,920.00 and, as provided for in the loan documents, and [sic] believed Michael Rosen would be released from his guaranty."

It is well settled that, to be entitled to summary judgment, a plaintiff must conclusively refute a defendant's well pled affirmative defenses. Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 733 (Fla. 1991) ("A court cannot grant summary judgment where a defendant asserts legally sufficient affirmative defenses that have not been rebutted."); Maung v. Nat'l Stamping, LLC, 842 So. 2d 214, 216 Fla. 3d DCA 2003) ("The law is clear that where a defendant pleads an affirmative defense and the plaintiff does not, by affidavit or other sworn evidence, negate or deny that defense, the plaintiff is not entitled to summary judgment."); Delandro v. America's Mortg. Servicing, Inc., 674 So. 2d 184, 186 (Fla. 3d DCA 1996) ("Where, as here, the nonmoving party has asserted matters by way of affirmative defense, it is the responsibility of the moving party, in this case the lender, to demonstrate that there is no disputed issue of material fact with respect to the affirmative defenses."). By requiring Rosen, the non-movant, to produce a written release to be entitled to the benefit of his guaranty's release provision, the trial court relieved Harborside of its burden to establish that the Developer did not satisfy the Pre-Sales Requirement.

To be entitled to summary judgment, Harborside should have been required to meet this burden.

III. Conclusion

Pursuant to the clear and unambiguous terms of Rosen's guaranty agreement, Rosen was released from the guaranty's obligations "upon Borrower's satisfaction of the Pre-Sales Requirement in accordance with the terms and conditions of the [construction loan] Agreement." In response to Harborside's claim against Rosen premised upon this guaranty agreement, Rosen asserted the affirmative defense that he had been released from the guaranty because the Developer (i.e., the borrower) had satisfied the Pre-Sales Requirement. Because Rosen's affirmative defense is premised on the very document that Harborside seeks to enforce against Rosen, the *D'Oench* doctrine is not applicable to preclude Rosen from pleading and proving this affirmative defense.

We therefore withdraw both the initial opinion issued on December 12, 2018, and the July 2019 Opinion, and replace them with this decision. Accordingly, we reverse the challenged summary judgment and remand for proceedings consistent with this opinion.

Reversed and remanded.