

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RESOLUTION TRUST CORPORATION,)
in its capacity as Conservator)
for First Federal Savings)
Association,)
)
Plaintiff)
)
v.) **Civil No. 92-334-P-DMC**
)
JUDITH A. LACHAPELLE, et al.,)
)
Defendants)

**MEMORANDUM DECISION ON
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ¹**

In this foreclosure action, the plaintiff, Resolution Trust Corporation ("RTC"), acting as conservator for First Federal Savings Association, assignee of First Federal Savings Bank ("FFSB"), has secured default judgments against defendant Ronald Lachapelle ("Ronald") and parties-in-interest Donald Dion, Jr. and George Binette. Before the court now is the plaintiff's motion for summary judgment against the remaining defendant, Judith Lachapelle ("Judith").² For the reasons detailed below, I deny the motion.

¹ Pursuant to 28 U.S.C. 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

² The only other party to the action is party-in-interest Fleet Bank of Maine which asserts a real estate attachment affecting the subject real estate in the amount of \$316,897.66.

I. SUMMARY JUDGMENT STANDARDS

Fed. R. Civ. P. 56(b) provides that "[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted 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 moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. FACTUAL CONTEXT

The essential facts may be summarized briefly.³ The subject property was acquired by Judith and Ronald in October 1966. In August 1984 the Lachapelles secured construction financing with a mortgage on the property. In May 1987 they executed and delivered to the bank an acknowledgement of acceptance of the bank's offer of a \$50,000 mortgage loan made in response to their application. The purpose of this loan was to convert the construction loan into a fifteen-year residential mortgage. In September 1987 the Lachapelles executed and delivered to the bank an acknowledgement of their receipt of a notice of their right to cancel the as yet to be consummated transaction.

On November 10, 1987 Ronald executed and delivered to the bank a fifteen-year \$50,000 note and first mortgage on the property which reflected the terms of the bank's offer. Unbeknownst to the bank, however, Ronald forged Judith's signature on each document. The loan proceeds were used to repay the construction loan and past due property taxes. On January 14, 1988 Ronald executed and delivered to the bank a \$42,000 note and second mortgage on the property, again forging Judith's signature on each instrument. The proceeds of this loan were used to repay a number of Ronald's personal debts.

Judith has resided at the subject property since July 1985 but has neither paid rent nor made any mortgage payments except for one in February 1991 totalling \$4,050.28. She attempted a second mortgage payment on July 15, 1991, but this was refused by the bank since foreclosure proceedings had begun. Under a separation and divorce agreement, Judith acquired Ronald's interest in the property on May 13, 1991, subject to her assumption of the \$50,000 note.

Both notes are in default and the conditions of the mortgages have been breached. As of December 31, 1991 the balance owing on the \$50,000 note was \$58,843.49, with interest accruing

³ Although the plaintiff's statement of material facts fails in several respects to satisfy the requirements of Fed. R. Civ. P. 56(e) and Local R. 19(a), the parties agreed during a telephone conference of the court and counsel on December 27, 1993 that the facts recited herein properly reflect the summary judgment record.

thereafter at the daily rate of \$15.20, and the balance owing on the \$42,000 note was \$43,868.85, with interest accruing thereafter at the daily rate of \$12.27, plus attorney fees and costs. FFSB commenced a state court action for foreclosure in July 1991. Pursuant to 12 U.S.C. 1441a(a)(11), RTC, as receiver for FFSB, removed the state court action to this court.

III. LEGAL ANALYSIS

RTC has moved for summary judgment against Judith based on her "signatures" on the two notes and mortgages. It contends that she is precluded from denying the validity of the signatures. Though the specific theories of preclusion are difficult to glean from its muddled memorandum of law, RTC apparently argues that either the *D'Oench, Duhme* doctrine, Judith's implied consent or her ratification of the transactions preclude her from raising the defense of forgery and denying the validity of the notes and mortgages. I find that none of these theories has merit on the record now before me.

A. The *D'Oench, Duhme* Doctrine

The *D'Oench, Duhme* doctrine, a federal common law rule of equitable estoppel, bars defendants from using unrecorded side agreements to defend against attempts by the FDIC or its assignees to collect on notes acquired from failed banks. See *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 459-62 (1942); *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 49-50 (1st Cir. 1991); *FDIC v. Rusconi*, 808 F. Supp. 30, 38 (D. Me. 1992). The doctrine, common law in origin, has since been codified and clarified, see 12 U.S.C. 1823(e); *FDIC v. P.L.M. Int'l, Inc.*, 834 F.2d 248, 253 (1st Cir. 1987), and applies to the RTC when, as here, the RTC acts in its capacity as receiver, see 12 U.S.C. 1441a(b)(4)(A). The doctrine applies to both negotiable and nonnegotiable instruments. *P.L.M. Int'l*, 834 F.2d at 255.

The purpose of the *D'Oench, Duhme* doctrine, both in its common law and statutory

variants, is to protect the FDIC, and hence the RTC, from alleged side agreements or misrepresentations that would tend to diminish or defeat its interest in assets acquired from failed banks. *See id.* at 252-53; *Fleet Bank of Maine v. Wilson*, 780 F. Supp. 841, 844-46 (D. Me. 1991). For example, the maker of a facially unqualified note could not defend against the FDIC's efforts to collect on that note based on an informal, oral understanding between her and the bank. For such an arrangement to be valid against the FDIC it must be formally recorded as a part of the bank's official records. *See Desmond v. FDIC*, 798 F. Supp. 829, 834 (D. Mass. 1992). The doctrine thereby encourages the proper recording of loan transactions, guards against the deceptive restructuring of loan terms and permits the receiver of a failed bank to rely on the bank's records in evaluating its assets. *Langley v. FDIC*, 484 U.S. 86, 91-93 (1987); *FDIC v. Caporale*, 931 F.2d 1, 2 (1st Cir. 1991).

RTC asserts, quite perfunctorily, that the notes and mortgages at issue here are facially sufficient and that the *D'Oench, Duhme* doctrine thus estops Judith from raising the defense of forgery. This contention, however, is an inaccurate and overreaching reading of the doctrine. Neither *D'Oench, Duhme* nor its statutory counterpart bars *all* defenses to attempts by the FDIC or RTC to collect on a note or foreclose on a mortgage; they only preclude those defenses that derive from unrecorded side agreements or misrepresentations concerning the obligation. *See In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1345 (1st Cir. 1992); *Rusconi*, 808 F. Supp. at 38-39; *Desmond*, 798 F. Supp. at 837. Where the crux of the defense is that the underlying obligation sought to be enforced is entirely void, as is the situation here, the *D'Oench, Duhme* doctrine presents no barrier to its assertion. *See Langley*, 484 U.S. 93-94; *604 Columbus Ave.*, 968 F.2d at 1346; *Rusconi*, 808 F. Supp. at 39-40; *Desmond*, 798 F. Supp. at 837.

Thus, for instance, the doctrine does not bar defenses based on fraud in the factum. *Langley*, 484 U.S. at 93-94; *604 Columbus Ave.*, 968 F.2d at 1346-47; *Rusconi*, 808 F. Supp. at 39-40. Fraud in the factum involves "the fraudulent procurement of a party's signature to an instrument without knowledge of its true nature." *Caporale*, 931 F.2d at 2-3 n.1; *604 Columbus*

Ave., 968 F.2d at 1346. The classic example of fraud in the factum is that of a person tricked into signing a note in the belief that it is nothing more than a receipt. See 11 M.R.S.A. 3-1305 cmt. 1. This sort of fraud renders the instrument void from creation, thereby leaving no interest capable of transfer to the RTC from the failed bank. *Langley*, 484 U.S. at 93-94; *Caporale*, 931 F.2d at 2-3 n.1; *Rusconi*, 808 F. Supp. at 40. Since the instrument is invalidated by acts independent of any side agreement or misrepresentation, the instrument simply does not come within the purview of the *D'Oench, Duhme* doctrine. See *FDIC v. Bracero & Rivera, Inc.*, 895 F.2d 824, 829-30 (1st Cir. 1990).

This situation is distinguished from fraud in the inducement, that is, fraudulent representations concerning the underlying transaction, not the document to be signed. See *Black's Law Dictionary*, 661 (6th ed. 1990). Such fraud renders the instrument merely voidable, not void. *Langley*, 484 U.S. at 94. Because voidable title constitutes a valid interest capable of transfer from the failed bank to the RTC, fraud in the inducement does not remove the instrument from the ambit of the *D'Oench, Duhme* doctrine. *Id.*; *604 Columbus Ave.*, 968 F.2d at 1346. To prevail, the defense of fraud in the inducement would then require proof of the fraudulent misrepresentation, which falls squarely within the doctrine's prohibition against raising misrepresentations concerning the obligation as a defense. See *McCullough v. FDIC*, 987 F.2d 870, 873-74 (1st Cir. 1993); *Rusconi*, 808 F. Supp. at 39 n.19. The defense of fraud in the inducement is thus unavailing against the RTC.

In short, fraud in the factum, as opposed to fraud in the inducement, represents a "real defense" that, based on the nullity of the underlying obligation, survives the application of *D'Oench, Duhme* and 12 U.S.C. 1823(e). See *604 Columbus Ave.*, 968 F.2d 1346. This principle governs here. Forgery, as the false making of a person's signature to a document, constitutes a species of fraud identical to fraud in the factum. See *Black's Law Dictionary* 650. There is no substantive difference between the situation where a party is tricked into signing a note and where another signs her name without her knowledge or consent. Though the methods differ, the result is the same --

the instrument on which the person's signature appears is utterly void as to that person. *See, e.g., Branz v. Stanley*, 142 Me. 318, 320 (1947). In fact, the situation is perhaps worse when forgery is involved because the neglect of the person whose signature appears, in failing to examine the document closely, is not at issue, as it may be in cases involving fraud in the factum. *See* 11. M.R.S.A. 3-1305 cmt. 1. Because the defense of forgery is premised on the invalidity of the underlying obligation, the *D'Oench, Duhme* doctrine does not bar its assertion in cases involving the FDIC or RTC.

Accordingly, based on the arguments presented in the parties' written submissions, I find that the *D'Oench, Duhme* doctrine, both in its common law and statutory forms, does not preclude Judith's defense of forgery. *Accord Buchanan v. FSLIC*, 935 F.2d 83, 85 (5th Cir.), *cert. denied*, 112 S.Ct. 639 (1991) (dicta); *FDIC v. McClanahan*, 795 F.2d 512, 515 (5th Cir. 1986) (dicta); *FDIC v. Powers*, 576 F. Supp. 1167, 1171 (N.D. Ill. 1983), *aff'd*, 753 F.2d 1076 (7th Cir. 1984) (dicta).

B. Implied Consent

In a somewhat disjointed fashion, RTC also appears to argue that Judith impliedly consented to her husband's signing of the November 1987 note and mortgage. Specifically, citing her endorsement of the May 1987 acknowledgment of acceptance and the September 1987 notice of right to cancel, RTC claims that Judith expressed her written consent to the first note and mortgage. RTC goes on to say that Judith "would have signed her own name to the document[s] had her former husband given her the opportunity." Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (Docket No. 18) at 6-7 ("Plaintiff's Memorandum of Law").

There is no merit to the plaintiff's contentions on this record. Aside from the weak factual predicate for these contentions, RTC cites no legal authority in support of its apparent theory of implied consent. For instance, it offers no legal authority to explain how the November 1987 mortgage, a conveyance of an interest in real property, satisfies the signing requirements of the

statute of frauds under its implied consent theory. *See* 33 M.R.S.A. 51. Accordingly, I deny its motion for summary judgment on the grounds of implied consent due to the lack of supporting legal authority. *See* Fed. R. Civ. P. 56(c); Local R. 19(a).

C. Ratification

Citing a provision of the Maine Uniform Commercial Code, the plaintiff lastly argues that Judith is estopped from asserting forgery as a defense to the collection and foreclosure of the January 1988 note and mortgage because "she retained benefits received in the transactions with knowledge of the unauthorized signatures." Plaintiff's Memorandum of Law at 8. This is apparently a theory of ratification. *See* 11 M.R.S.A. 3-1403 cmt. 3. The benefit Judith ostensibly received was the opportunity to live at the mortgaged residence without having to pay any rent or property taxes.

This contention is meritless. In support of its theory of ratification the plaintiff cites Article 3 of the Maine U.C.C., which has since been superseded by Article 3-A. *See* P.L. 1993, ch. 293, A-1, A-2 (effective October 13, 1993). Article 3, however, now Article 3-A, does not apply to the January 1988 mortgage since it constitutes a document of title, not a negotiable instrument. *See* 11 M.R.S.A. 3-101, 3-103 (repealed); 11 M.R.S.A. 3-1102(1), cmt. 2. As for the January 1988 note, applying the ratification principles embodied in the U.C.C I find absolutely no basis on the grounds asserted by RTC to determine that Judith ratified her husband's forgery. The plaintiff cites Judith's continued residence at the mortgaged property as her ratification of the forgery of the January 1988 note. *See* 11 M.R.S.A. 3-404 cmt. 3 (repealed); 11 M.R.S.A. 3-1403 cmt. 3. This is a frivolous assertion. Since 1966 Judith has been a joint owner of the property and has had an unqualified right to reside there. Her continued occupancy of her home was a "benefit" to which she was already entitled; it was not a product of the January 1988 loan. Moreover, the only facts presented on the use of the January 1988 loan proceeds is Ronald's testimony that he used it for his own personal needs, *see* Deposition of Ronald R. Lachapelle at 18-23; there is no evidence that any

of the proceeds benefited Judith or the mortgaged residence in any way. Consequently, the record contains no evidence that she retained any benefits connected to the January 1988 loan. Summary judgment on the basis of ratification must therefore be denied.

IV. CONCLUSION

For the foregoing reasons, plaintiff RTC's motion for summary judgment is **DENIED**.
Dated at Portland, Maine this 2nd day of March, 1994.

David M. Cohen
United States Magistrate Judge