Kuehl v. Numerica CV-91-491-L 01-23-95

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Kuehl

v. #C-91-491-L

Numerica Financial Corp. et al.

ORDER

This court, by order dated November 28, 1994, requested counsel for plaintiffs and defendants to submit memorandums regarding the application of res judicata to plaintiffs' counterclaims/defenses relevant to the mitigation of damages on the notes held by defendants Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC). RTC has filed a Motion for Partial Summary Judgment on the Issue of Damages in which the FDIC concurs.

Procedural History

The court has previously found that plaintiffs' claims that some notes had been physically misplaced, that there has been a misapplication of proceeds from the various foreclosure sales by the FDIC and the banks overall conduct which may have contributed to plaintiffs' default, may be relevant to their liability on the notes. See Doc. 60, Order dated August 31, 1994.

However, the court subsequently found that the RTC and

FDIC[1] were entitled to federal common law holder in due course status, thus limiting plaintiffs' potential defenses to those listed in RSA 382-A:3-305(a)(1) with respect to liability on the notes. See Doc. 69 Order dated November 23, 1994. The court further found that plaintiffs' claims may be relevant to the issue of damages that RTC and FDIC claim under the notes. Id.

By order dated November 28, 1994 the court requested that counsel file memorandums of law on the issue of res judicata as to plaintiffs' claims. The parties have submitted their memorandums and the court now turns to a discussion of this issue.

Discussion

The plaintiffs' claims against the FDIC and RTC each involve different issues and therefore the court will address the plaintiffs claims against each defendant separately.

I) Plaintiffs' Claims Against FDIC

i) Misapplication of Proceeds

Plaintiffs contend that the foreclosure proceeds for each note which the FDIC held were applied against the balance due on November 7, 1992. According to plaintiffs, however, the

---

[1] This court by order of November 23, 1994 ruled that RTC was entitled to holder in due course status. The court assumes for purposes of this order that FDIC would likewise qualify for holder in due course status.

foreclosure of the properties occurred sometime in November, 1991, one full year before the foreclosure proceeds were applied against the debts. Plaintiffs contend that during that one year period, interest presumably continued to accrue on the original balances shown rather than on the lesser balances which would have been realized had the proceeds been applied promptly. Plaintiffs apparently did not become aware of this issue until August 1, 1994, when they received the affidavit of Julie Biron, Account Officer with Bank One New Hampshire Asset Management Corporation, servicing agent for FDIC as Receiver for Numerica Savings Bank, FSB. See Doc 56.

The FDIC and RTC argue that this claim is barred by res judicata. The court disagrees. Plaintiffs could not have asserted this claim any earlier than August 1, 1994, the date on which they first learned of the alleged misapplication of proceeds. Thus res judicata has no application here as this claim was not raised nor could it have been raised in the plaintiffs' complaint or amended complaint. See Aunyx Corp. v. Canon U.S.A., Inc., 978 F.2d 3, 6 (1st Cir. 1992).

The FDIC and RTC also contend that their status as holders in due course bars plaintiffs from raising this claim as it does not fall within those defenses listed in § 3-305.

"The federal holder in due course doctrine was fashioned precisely for the purpose of expediting the purchase and assumption transaction." In Re 604 Columbus Ave Realty Trust, 968 F.2d 1332, 1353 (1st Cir. 1992).

> The FDIC must have some method to evaluate its potential liability in a purchase and assumption versus its potential liability from a liquidation. Because of the time constraints involved, the only method of evaluating potential loss open to the FDIC is relying on the books and records of the failed bank to estimate what assets would be returned by a purchasing bank and to estimate which of these assets ultimately would be collectible.

Id. at 1349-1350(quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979)). The federal common law holder in due course doctrine is inapposite with regard to the present claim as that doctrine is concerned with barring potential claims or defenses on the underlying transaction, which claims or defenses existed at the time the FDIC purchased the notes and of which the FDIC had no actual knowledge from bank records. In the present case, plaintiffs' claim is based upon actions or inactions of the FDIC subsequent to its purchase and assumption of the notes and thus allowance of the same would not act to inhibit expedition of the purchase and assumption transaction, the very purpose of the federal holder in due course doctrine. Plaintiffs will therefore be allowed to raise the issue of alleged misapplication of proceeds by the FDIC for the purpose of mitigation of those damages claimed by FDIC.

By order dated August 31, 1994, the FDIC was ordered to produce to plaintiffs an accounting pursuant to RSA 479:13 including the calculations used to arrive at the totals for principal and interest. The record before the court contains no such accounting, except for the affidavit of Julie Biron attached to Doc. 56, which was received on August 1, 1994. The FDIC is further ordered to indicate the date of each foreclosure sale, the date on which the foreclosure proceeds were applied to the principal amount outstanding on each note and how the proceeds were distributed, i.e., fees, costs etc.

ii) Physical Misplacement of Two of Six Notes Held by FDIC.

The FDIC misplaced two of the six notes it held on plaintiffs' properties and does not presently seek recovery on these missing notes. One of these missing notes was in the amount of $45,000 which plaintiffs claim was on their home which they believe sold for somewhere in excess of $100,000 at foreclosure. However, plaintiffs have received no indication of where the excess money went. The foreclosure of this mortgage took place in November 1991, according to plaintiffs' account. See Doc. 7, pp. 1-2.

With respect to the issue of res judicata, the First Circuit requires that a plaintiff present all the claims for relief that he may have against the defendant arising out of the same `transaction'. See Johnson v. SCA Disposal Services of New England, 931 F.2d 970 (1st Cir. 1991); See also 1b Moore's Federal Practice, ¶ 0.410[1]. Plaintiffs' present claim that the FDIC has withheld proceeds from the sale of their home is barred by res judicata as it arises from the same transaction or series of connected transactions that were the subject of plaintiffs' original and amended complaint. Plaintiffs could have raised this claim in the amended complaint as the foreclosure sale occurred in November 1991 and the plaintiffs were given the opportunity to amend in February 1992.

iii) Banks' Conduct as Contributing Factor to Plaintiffs' Default

Plaintiffs' original and amended complaints contained various allegations of misconduct by the banks and their officers and employees. The amended complaint was dismissed and this court subsequently ruled that the dismissal constituted a decision on the merits thus precluding plaintiffs from relitigating these claims. Moreover, this court's finding that FDIC and RTC are holders in due course precludes the plaintiffs from raising these claims with respect to damages. What the plaintiffs are complaining of is the banks' conduct prior to their being placed in receivership. The federal common law holder in due course doctrine shields the FDIC and RTC from such claims.

II) Plaintiffs' Claims Against RTC

On or about october 7, 1991, Homebank took over the management and rent collection for all of the plaintiffs' properties securing the five notes held by Homebank. The RTC took over Homebank on October 10, 1991, and continued to manage properties and collect rents. According to plaintiffs, under the provisions of the assignments of rents, Homebank was required to provide plaintiffs with an accounting of all money received.

However, plaintiffs claim they have never received this accounting.

The RTC submitted an affidavit with five exhibits, one for each of the notes, showing the amounts received by RTC and the manner in which the amounts were applied against each note. See Doc. 62, Exhibits 1-5. Plaintiffs contend that this is the only information they have received regarding these notes. Plaintiffs contend that the information provided is incomplete.

The RTC is hereby ordered to provide plaintiffs with an explanation for the fluctuation in payments and interest as reflected in exhibits 1, 4 and 5. The RTC shall also indicate what other costs, including taxes and utilities, were paid on these properties.

January 25, 1995

Martin F. Loughlin
Senior Judge

Carol J. Holahan, Esq.
Michael Lenehan, Esq.
Alex Komaridis, Esq.
Donald J. Williamson, Esq.
Steven A. Solomon, Esq.