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UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re TRACY BANCORP, a Utah corporation, Debtor.	Bankruptcy Case No. 86C-03259
PEOPLES NATIONAL BANK OF WASHINGTON, a national banking association, Plaintiff, vs. TRACY BANCORP, a Utah corporation, et al., Defendants.	Adversary Proceeding No. 86PC-0861
KENNETH A. RUSHTON, Chapter 7 Trustee of the Bankruptcy Estate of Tracy Bancorp, a Utah corporation, Intervening Plaintiff, vs. FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver, Defendant.	MEMORANDUM OPINION AND ORDER

The matter presently before the court is a motion filed by the defendant, the Federal Deposit Insurance Corporation, in its capacity as Receiver ("FDIC-R"), for First RepublicBank Dallas, N.A. ("Republic"), for dismissal, or alternatively, for summary judgment of the above-captioned adversary proceeding. A hearing was held on April 26, 1989. Gary G. Kuhlmann appeared on behalf of the trustee, Kenneth Rushton. Paula K. Smith, Glen E. Keller, Jr., and Elizabeth S. Conley appeared on behalf of the FDIC-R. Counsel presented argument after which the court took the matter under advisement. The court has carefully considered and reviewed the arguments of counsel and memoranda submitted by the parties and has made an independent review of the pertinent authorities. Now being fully advised, the court renders the following decision.

BACKGROUND

A brief recapitulation of the underlying adversary proceeding is necessary for an understanding of the defendant's motion presently before the court.

In 1982, the plaintiff, United States Bank of Washington, N.A. ("U.S. Bank"),[1] extended Tracy Bancorp ("the debtor"), a Utah corporation, an unsecured one million

[1]In 1988, Peoples National Bank of Washington changed its name to United States Bank of Washington, N.A. For purposes of this opinion we shall refer to the bank by its current name.

dollar line of credit. Said line of credit was subsequently drawn on in part by the debtor.

In 1983, as part of a financing arrangement between Republic and the debtor's holding company, Trabanc, the debtor granted Republic an unconditional guarantee and pledge agreement on funds lent by Republic to Trabanc. In addition, the debtor subsequently gave several notes to Republic on behalf of Trabanc.

U.S. Bank learned of the debtor's obligations to Republic in 1985 and thereafter filed a complaint in Utah state court seeking equitable subordination or avoidance of them alleging, in relevant part, that a number of defendants other than Republic had engaged in a conspiracy to defraud it and that the conspiracy was completed with the participation and knowledge of Republic.

On February 14, 1986, the debtor was declared insolvent by the Commissioner of Financial Institutions for the State of Utah ("Commissioner"). Pursuant to bank insolvency proceedings in Utah state court, the Commissioner sold the debtor's only asset, Tracy Collins Bank stock ("stock"), to Republic for cancellation of fifteen million dollars of the debtor's obligation to Republic. Counsel for both U.S. Bank and the debtor were present at the state court insolvency proceeding and neither objected to the stock sale.

On August 1, 1986, U.S. Bank filed an involuntary bankruptcy petition against the debtor, and this court entered an order for relief under Chapter 7 of the Bankruptcy

Code. An interim trustee was appointed, and U.S. Bank's state court litigation, which comprises the subject of the present motion, was removed to this court.

On June 30, 1987, the trustee ("trustee") filed a complaint in intervention seeking to intervene as a party plaintiff in the present underlying action. The trustee seeks to recover the Tracy Collins Bank stock bought by Republic in the state court insolvency proceedings claiming that the obligations granted by the debtor to Republic were unenforceable against the debtor because it received no consideration for them. Alternatively, the trustee argues that the obligations granted to Republic should be subordinated because of the alleged fraudulent schemes and conspiracy between the debtor, Republic, and the other defendants. The trustee also maintains that the obligations granted to Republic and the state court's sale of the stock are avoidable as fraudulent conveyances.

On July 29, 1988, prior to a hearing on the action, Republic was declared insolvent by the Office of the Comptroller of the Currency. On that same day the FDIC was appointed receiver of Republic and, acting in that capacity, initiated a purchase and assumption transaction whereby it transferred Republic's assets and liabilities to NCNB, Texas, a "bridge bank" created by the FDIC in its corporate capacity pursuant to 12 U.S.C. § 1821(i) (1987). Among the assets the FDIC-R transferred to NCNB was the stock in question in the present action. On February 14, 1989, the FDIC-R was substituted for Republic as a party defendant in this case; and on January 3, 1989,

FDIC-R filed the instant motion for dismissal, or alternatively, for summary judgment of U.S. Bank's complaint and the trustee's complaint in intervention. The FDIC-R argues that its motion be granted on the basis that 12 U.S.C. § 1823(e) and the United States Supreme Court's holding in *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), bar U.S. Bank and the trustee from asserting their claims of fraud, conspiracy, lack of consideration, and fraudulent transfer against it.

DISCUSSION

In *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), the Supreme Court held that one who gives a note to an FDIC-insured bank cannot defend an action on the note brought by the FDIC as a purchaser of bank assets on the basis of an unwritten agreement that the note would be unenforceable. "[T]he principles enunciated in [*D'Oench*] have since been codified and expanded into more generally applicable language by Congress in the Federal Deposit Act § 2[13](e) codified at 12 U.S.C. § 1283(e)." *FDIC v. T.W.T. Exploration Co.,* 626 F.Supp. 149, 154 (W.D. Okla. 1985); *see also Grubb v. FDIC,* 868 F.2d 1151, 1158 (10th Cir. 1989); *FDIC v. VanLaanen,* 769 F.2d 666, 667 (10th Cir. 1985). Section 1823(e)[2] is a clear

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[2]12 U.S.C. § 1823(e) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid

(continued...)

Congressional intent to protect the FDIC by permitting "federal and state banking examiners to rely on a bank's records in evaluating the fiscal soundness of the institution. Thus, the FDIC need not have concern about undisclosed conditions on notes when assessing the assets of a failed bank and making the often speedy decision whether to liquidate the bank's assets or to initiate a purchase and assumption transaction." *Grubb v. FDIC,* 868 F.2d at 1158; *see also Langley v. FDIC,* 484 U.S. 86, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987); *FDIC v. VanLaanen,* 769 F.2d at 667. On the basis of both *D'Oench* and § 1823(e) (hereinafter referred to collectively as "the estoppel doctrine"), courts have consistently barred the makers of facially valid notes or guarantees from asserting claims such as fraud, conspiracy, or lack of consideration against the FDIC. *See, e.g., Langley v. FDIC,* 108 S.Ct. at 401; *FDIC v. VanLaanen,* 769 F.2d at 667.

U.S. Bank and the trustee assert several reasons why the estoppel doctrine is not applicable as a bar to their claims in the present case.

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[2](...continued)

> against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

First, U.S. Bank and the trustee claim that § 1823(e) specifically refers to the FDIC as a "corporation" and, therefore, the statute is not applicable in cases such as the present where the FDIC is acting in its capacity as a receiver. In *FDIC v. VanLaanen,* 769 F.2d 666, however, the Tenth Circuit upheld the district court's decision granting the FDIC's motion for summary judgment based on the estoppel doctrine. In *VanLaanen,* the FDIC was acting in its capacity as a receiver. Moreover, the FDIC-R's ability to raise the estoppel doctrine was recently recognized by the Tenth Circuit in *Grubb v. FDIC,* 868 F.2d at 1159.

U.S. Bank and the trustee next argue that the estoppel doctrine cannot be asserted by the FDIC-R as a defense to their affirmative claims inasmuch as the doctrine is typically invoked by the FDIC-R in cases in which it is attempting to enforce an obligation that has come into its possession as a party plaintiff. This argument is rejected because if this court were to allow U.S. Bank and/or the trustee to bring an action against the FDIC-R based on agreements Congress has specifically precluded them from using in defense is to allow "an end run around § 1823(e)." *FDIC v. Lattimore Land Corp.,* 656 F.2d 139, 146 n.13 (5th Cir. 1981), *quoted in Beighley v. FDIC,* 679 F.Supp. 625, 627 (N.D. Tex. 1988). "[T]he effect of such an approach would be to reduce actions Congress has allowed the FDIC to pursue to nullities since defendants could counterclaim and recover what they lost." *Beighley v. FDIC,* 676

F.Supp. 130, 132 (N.D. Tex. 1987), *aff'd on reconsideration, Beighley v. FDIC,* 679 F.Supp. at 627.

U.S. Bank and the trustee maintain that the estoppel doctrine shields the FDIC from only state law claims. They argue that since their claims involve Federal bankruptcy law, the doctrine cannot be invoked by the FDIC-R in this case.[3] In support of this contention U.S. Bank and the trustee both cite *First City Financial Corp. v. FDIC,* 61 B.R. 95 (Bankr. N.M. 1986), and *LaMancha Aire, Inc. v. FDIC,* 41 B.R. 647 (Bankr. S.D. Fla. 1984). Those cases, however, which were both decided prior to the Supreme Court's expansive decision in *Langley v. FDIC*, 108 S.Ct. 396, are not persuasive. The court notes further that the estoppel doctrine has been used to bar federal law claims against the FDIC in several cases. *See, e.g., CTS Truss v. FDIC,* 859 F.2d 357 (5th Cir. 1988); *FDIC v. Investors Associates X,* 775 F.2d 153 (6th Cir. 1985); *Gillman v. FDIC,* 660 F.2d 688 (6th Cir. 1985).

As their fourth argument, U.S. Bank and the trustee claim that because the FDIC-R allegedly knew of the action pending against Republic at the time of the purchase and assumption transaction it cannot claim the benefit of the estoppel doctrine. In *Langley v. FDIC,* 108 S.Ct. at 401-402, however, the Supreme Court ruled that § 1823(e) may be used by the FDIC regardless of its knowledge of pending lawsuits against, or

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[3]U.S. Bank summarily argues that its claim is analogous to a preferential transfer under 11 U.S.C. § 547. The trustee raises a fraudulent transfer claim under 11 U.S.C. § 548.

misconduct by, a bank. *See also Grubb v. FDIC,* 868 F.2d at 1158; *FDIC v. Galloway,* 856 F.2d 112, 115 (10th Cir. 1988). Similarly, U.S. Bank's contention that it acted in good faith and played no part in the alleged conspiracy is irrelevant under the estoppel doctrine. *FDIC v. VanLaanen,* 769 F.2d at 667; *FDIC v. T.W.T. Exploration Co.,* 626 F.Supp. at 157.

Finally, U.S. Bank and the trustee argue that because their claims do not involve an unwritten side "agreement" they cannot be estopped from asserting the claims against the FDIC-R. This argument is disposed of by the Supreme Court's broad interpretation of the word "agreement" in § 1823(e) in *Langley v. FDIC,* 108 S.Ct. at 401-402.[4]

Accordingly, IT IS HEREBY ORDERED that FDIC-R's motion to dismiss this adversary proceeding pursuant to Bankruptcy Rule 7012 and Rule 12(b)(6) of the Federal Rules of Civil Procedure is granted.

DATED this 29 day of September, 1989.

BY THE COURT:

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

[4]U.S. Bank cites *In re Longhorn Securities Litigation,* 573 F.Supp. 278 (W.D. Okla. 1983), to support its contention that § 1823(e) is not applicable in the present case because an "agreement" does not exist. *Longhorn,* however, was decided prior to *Langley*; and its precedential value was recently questioned in *FDIC v. T.W.T. Exploration Co.,* 626 F.Supp. 149, 155 n.5 (W.D. Okla. 1985).