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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001821-MR

THOMAS BEAN APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 10-CI-405021

VNB NEW YORK, LLC; AS SUCCESSOR BY MERGER TO VNB NEW YORK CORPORATION, AS SUCCESSOR IN INTEREST TO THE PARK AVENUE BANK; ALEXANDER & ALEXANDER RISK SERVICES, LLC; AVIATION SOLUTIONS, LLC; RIVER FALLS HOLDINGS, LLC; RIVER FALLS INVESTMENTS, LLC; SDH REALTY, INC.; SHERI D. HUFF; W. ANTHONY HUFF; HUFF GRANDCHILDREN'S TRUST, C/O W. ANTHONY HUFF AND SHERI D. HUFF, CO-TRUSTEES; MICHELE BROWN; RONALD E. HEINEMAN; STEPHEN B. PENCE; FIFTH THIRD BANK, KENTUCKY, INC.; BLOOMFIELD STATE BANK; JAMES A. AND DORIS A. ROEMER; LOCUST CREEK COMMUNITY ASSOCIATION; OXMOOR WOODS RESIDENTS ASSOCIATION, INC.; VESTA HOLDINGS I, LLC; AMERICAN

TAX FUNDING, LLC; LOUISVILLE
JEFFERSON COUNTY METRO
GOVERNMENT; CITY OF HURSTBOURNE,
KENTUCKY; AND CITY OF
MIDDLETOWN, KENTUCKY APPELLEES

AND

NO. 2015-CA-001822-MR

STEPHEN B. PENCE APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 10-CI-405021

VNB NEW YORK, LLC, AS SUCCESSOR
BY MERGER TO VNB NEW YORK
CORPORATION, AS SUCCESSOR
IN INTEREST TO THE PARK AVENUE BANK;
ALEXANDER & ALEXANDER RISK
SERVICES, LLC; AVIATION SOLUTIONS, LLC;
RIVER FALLS HOLDINGS, LLC;
RIVER FALLS INVESTMENTS, LLC;
SDH REALTY, INC., SHERI D. HUFF;
W. ANTHONY HUFF; HUFF GRANDCHILDREN'S
TRUST, C/O W. ANTHONY HUFF AND
SHERI D. HUFF, CO-TRUSTEES; MICHELE
BROWN; RONALD E. HEINEMAN;
THOMAS BEAN; FIFTH THIRD
BANK, KENTUCKY, INC.; BLOOMFIELD
STATE BANK; JAMES A. AND DORIS
A. ROEMER; LOCUST COMMUNITY
ASSOCIATION; OXMOOR WOODS
RESIDENTS ASSOCIATION, INC.;

VESTA HOLDINGS I, LLC;
AMERICAN TAX FUNDING, LLC;
LOUISVILLE JEFFERSON COUNTY
METRO GOVERNMENT; CITY OF
HURSTBOURNE, KENTUCKY; AND
CITY OF MIDDLETOWN, KENTUCKY APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Thomas Bean brings Appeal No. 2015-CA-001821-MR and Stephen B. Pence brings Appeal No. 2015-CA-001822-MR from January 12, 2015, and November 17, 2015, Orders of the Jefferson Circuit Court rendering summary judgment upon their defenses and counterclaims of fraud in the factum and illegality. We affirm in part, vacate in part, and remand Appeal No. 2015-CA-001821-MR and Appeal No. 2015-CA-001822-MR.

The underlying substantive and procedural facts are complex. To aid in the disposition of these appeals, only those facts necessary to our resolution will be recited.

The genesis of these appeals emanate from 2009 loan agreements between River Falls Holdings, LLC, River Falls Investments, LLC, and the Park Avenue Bank. Particularly, in March 2009, River Falls Holdings, and River Falls Investments executed a Revolving Line of Credit Secured Promissory Note

(Revolving Line of Credit) with Park Avenue Bank for a loan in the principal amount not to exceed 1.5 million dollars.[1] Thomas Bean was manager of River Falls Investments and signed the Revolving Line of Credit in such capacity. Stephen B. Pence was manager of River Falls Holdings and also signed the Revolving Line of Credit in such capacity. Both Bean and Pence also executed a Guarantee, personally promising to guarantee payment of any sums loaned under the Revolving Line of Credit.[2] Pursuant to Pence's direction, Park Avenue Bank disbursed $1,485,000 under the Revolving Line of Credit into a checking account of River Falls Holdings on March 23, 2009; thereafter, $1,480,000 was transferred from the River Falls Holdings' checking account to an account at Park Avenue Bank held by SDH Realty, Inc. The president of SDH Realty was Sheri D. Huff, and W. Anthony Huff was the vice-president.[3]

Approximately one year later, on March 12, 2010, the New York Banking Department seized Park Avenue Bank as a failed bank, and the Federal Deposit Insurance Corporation (FDIC) was appointed as receiver for the Park Avenue Bank. In its capacity as receiver, effective the same date, the FDIC entered into a Purchase and Assumption Agreement and an Assignment and Purchase Agreement with Valley National Bank New York Corporation (VNB).

[1] The Revolving Line of Credit Secured Promissory Note (Revolving Promissory Note) was also secured by a mortgage upon real property located in Louisville, Kentucky, and owned by SDH Realty, Inc.

[2] Although not at issue, the Guarantee was also signed by Sheri D. Huff.

[3] SDH Realty, Inc., was a Kentucky Corporation.

Under the agreements, VNB purchased the assets and liabilities of Park Avenue Bank, which included the Revolving Line of Credit and Guarantee, at issue in this case.

Thereafter, on April 1, 2010, River Falls Investment and River Falls Holdings defaulted under the terms of the Revolving Line of Credit. Despite notice of the default, neither Bean nor Pence satisfied the outstanding indebtedness per the terms of their Guarantee.

In December 2010, VNB, as successor to Park Avenue Bank, filed a complaint in the Jefferson Circuit Court against, *inter alios*, River Falls Holdings, River Falls Investments, Bean, Pence, the Huffs, and SDH Realty. Relevant to this appeal, VNB claimed that River Falls Holdings and River Falls Investments defaulted under the terms of the Revolving Line of Credit and owed a total of $1,500,000 in principal and $288,916.82 in outstanding interest, as of December 9, 2010. VNB also claimed that Bean and Pence were jointly and severally liable upon default of the Revolving Line of Credit for the outstanding balance of principal and interest in the amount of $1,788,916.82 per the terms of their Guarantee.

Subsequently, VNB filed a motion for summary judgment upon the issue of Bean and Pence's liability under the Guarantee.[4] In its memorandum of

[4] Actually, Valley National Bank New York, Corporation (VNB) filed two Motions for Summary Judgment in this case, one in 2011 and one in 2013. The order on appeal emanates from the motion filed on October 23, 2013. At first blush, we question whether a final and appealable judgment has actually been entered on the respective individual guarantor liability pursuant to

law filed in support of the motion for summary judgment filed on October 23, 2013, VNB outlined the alleged criminal conspiracy that led to Park Avenue Bank's ultimate failure and eventual receivership by the FDIC:

> On September 27, 2012, the sealed indictment of Anthony Huff and two other men was unsealed in the United States District Court in the Southern District of New York . . . . As alleged in the Huff Indictment, Anthony Huff controlled 22 affiliated entities, referred to in the indictment as the "Huff-Controlled Entities." These entities include some of the Defendants herein including [River Falls Holdings, River Falls Investments and SDH Realty].
>
> One of the other men indicted in the Huff Indictment was Matthew Morris ("Morris"), a Senior Vice President at Park [Avenue] Bank. Morris managed Park [Avenue] Bank's relationships with Huff and the Huff-Controlled Entities. Another man mentioned in the Huff Indictment is Charles Antonucci ("Antonucci"). He served as President of Park [Avenue] Bank. Prior to the release of the Huff Indictment, on October 8, 2010, Antonucci had been separately indicted and pled guilty. Antonucci pled guilty to criminal charges of fraud against the U.S. Treasury's Troubled Asset Relief Program ("TARP"), securities fraud, self-dealing, bank bribery, and embezzlement of Park [Avenue] Bank funds.
>
> According to the Huff Indictment, in violation of Park [Avenue] Bank policies, while working with Huff, Antonucci and Morris allowed the Huff-Controlled

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Kentucky Rules of Civil Procedure (CR) 54. No specific amount of liability has been awarded by judgment, including accrued interest and attorney's fees. Additionally, the findings of the Master Commissioner were not incorporated into the orders on appeal regarding the guarantor liability. However, the circuit court also granted judgment to VNB on Stephen B. Pence (Pence) and Thomas Bean's (Bean) counter claims, which directly relates to the affirmative defenses of fraud in the factum and illegality, as asserted by Pence and Bean to the allegations in the complaint. Further, the orders on appeal included the requisite language set forth in CR 52.04. We thus have addressed those claims as final per *Watson v. Best Financial Services., Inc.*, 245 S.W.3d 722 (Ky. 2008).

Entities to overdraw their accounts at Park [Avenue] Bank in amounts exceeding $9 million, funds which were taken out of and lost by Park [Avenue] Bank. In exchange for cash payments and other benefits, the Huff Indictment alleges that Antonucci abused his powers at Park [Avenue] Bank to allow the three (3) Borrowers to obtain three (3) separate line of credit approvals of up to $1.5 million for a total of up to $4.5 million. . . . (alleging that Anthony Huff "paid hundreds of thousands of dollars to Morris and Antonucci in exchange for Morris and Antonucci providing Huff favorable treatment at Park Avenue Bank"). The Huff Indictment notes that the $1.5 million was the limit of Antonucci's individual authority for real estate secured loans. Those loans violated the provisions of the Park [Avenue] Bank Credit Policy, including, but not limited to, the treatment of cross-collateralized loans as a single loan, which caused the loan to exceed Antonucci's approval threshold. . . . The Huff Indictment alleges that the lines of credit for up to $4.5 million were taken to mask the excessive overdrafts of the Huff-Controlled Entities. These overdrafts and other regulatory concerns would have prevented Park [Avenue] Bank Board of Directors from approving additional debt to the Huff-Controlled Entities if bank procedures had been followed and the loans had been sent to the Board for review.

According to the Indictment, Huff and Antonucci devised a plan to deceive Park [Avenue] Bank and to "circumvent" Park [Avenue] Bank's policies so that the loans would appear legitimate to the Park [Avenue] Bank Board of Directors and to bank regulators who may review the bank's transactions.

They did this by, unbeknownst to Park [Avenue] Bank, making false representations about the need for working capital for the Borrowers and by overstating the net worth of the Guarantors. Ultimately, the three (3) loans were approved by Antonucci without the required approval of the Park [Avenue] Bank Board of Directors. The funds were used to pay down the overdraft of the

> Huff-Controlled Entities, funds which has already left the bank.

VNB's Memorandum of Law in Support of its Motion for Summary Judgment at 10-12 (citations omitted). VNB maintained that as an assignee of the FDIC it was entitled to the protections of the *D'Oench Duhme* doctrine, which barred most claims or defenses asserted by borrowers/guarantors to prevent enforcement of notes or guarantee instruments.[5] VNB argued that Bean and Pence breached the terms of the Guarantee by failing to pay the outstanding balance owed under the Revolving Line of Credit, and summary judgment was proper against them.

Bean and Pence filed responses to the motion for summary judgment. Therein, Bean and Pence claimed to have possessed no knowledge of the criminal scheme relating to loans from Park Avenue Bank and claimed to also have been victims thereof. Bean and Pence argued that the Guarantee was unenforceable due to fraud in the factum and illegality of the agreement. Both Bean and Pence pointed out that these defenses are exceptions to the *D'Oench Duhme* doctrine.

The circuit court referred the motion for summary judgment to the master commissioner for consideration. On August 11, 2014, the master commissioner filed a report recommending that VNB's motion for summary judgment against Bean and Pence be granted. In so recommending, the master commissioner concluded that the *D'Oench Duhme* doctrine barred Bean and Pence's defenses and that no exceptions thereto existed:

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

> Pence and Bean have not alleged any facts which fall into the category of fraud in the factum. They do not dispute that they knew they were signing a guarant[ee]. The terms of the guarant[ee] were spelled out in the instrument they each signed and the contents of the instrument were not changed after they signed it. The Sixth Circuit Court of Appeals has construed *D'Oench* [*Duhme & Co., v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942)] to preclude a maker from asserting any personal defenses against the FDIC, regardless of the maker's intent, when it can be said he "lent himself to a transaction which is likely to mislead banking authorities." Therefore, at best, the defense of fraud which has been asserted by Bean and Pence is fraud in the inducement which is precluded by Section 1823(e).

Master Commissioner's Report at 11 (citations omitted).

On October 15, 2014, Pence filed a motion for leave to file an amended answer and counterclaim against VNB. In the amended answer, Pence sought to add the defense of fraud in the factum as a bar to prevent VNB from enforcing the Guarantee. And, in the proposed counterclaim, Pence alleged that employees of the Park Avenue Bank fraudulently misled and induced him to sign the Guarantee. It appears that Bean also made an oral motion for leave to file a similar counterclaim.

By Order entered January 12, 2015, the circuit court followed the Master Commissioner's recommendation and overruled the "objections" filed by Bean and Pence. Relevant herein, the circuit court concluded:

> [Bean and Pence] raise [the] argument that the *D'Oench* Doctrine and § 1823 are inapplicable to void contracts. There is little dispute the promissory notes

> were obtained through fraud, however Pence and Bean acknowledge they knew at the time they were signing documents to obligate their respective companies. There are, however, questions as to the oral agreement to not hold them personally liable, despite the language of the notes, the date and location of their execution, and purpose of the funds. Such considerations support a defense of fraud in the inducement, not fraud in the factum, and render the notes voidable not void *ab initio*.

January 12, 2015, Order at 3 – 4 (citations omitted).

Both Bean and Pence then filed motions seeking reconsideration of the January 12, 2015, Order. Pence argued the circuit court failed to rule on his motion to file an amended answer and counterclaim. By Amended Order entered November 17, 2015, the circuit court denied the motions and also denied Pence and Bean's motion to file an amended answer and counterclaim:

> Pence and Bean are experienced businessmen, and do not dispute knowing what documents they signed. Their primary defense is that they had an oral agreement with Anthony Huff that they would not be liable and no funds were actually disbursed. However, this side agreement is the precise scenario *D'Oench* and § 1823 are designed to avoid. A failed bank's records, such as the promissory notes and mortgages, essentially are viewed in a vacuum; only errors in the written documents themselves and the institution's records can overcome *D'Oench* and § 1823. As the Court previously determined, Pence and Bean understood the terms of the documents they executed, did not raise any objections to the terms, and Park Avenue Bank's records do not reflect any amendments or alterations to those written terms. Illegal transactions may still fall within the parameters of *D'Oench*. For these same reasons, Pence's and Bean's motions to file counterclaims against VNB are also

> denied. They are based on the same arguments that are barred by *D'Oench*.

November 17, 2015, Amended Order at 1 – 2 (citations omitted). These appeals follow.

APPEAL NOS. 2015-CA-001821-MR
AND 2015-CA-001822-MR

To begin, we will address both appeals simultaneously as Pence and Bean raise identical arguments in their respective briefs as to the propriety of the circuit court's summary judgment.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). When ruling upon a motion for summary judgment, all facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. *Steelvest, Inc.*, 807 S.W.2d 476. Our review proceeds accordingly.

Bean and Pence initially contend that the circuit court erred by rendering summary judgment upon their defenses of fraud in the factum and illegality. Bean and Pence maintain that these defenses are not barred by the *D'Oench Duhme* doctrine. Bean and Pence allege that material issues of fact existed upon these defenses and that the circuit court erred by concluding otherwise.

D'Oench Duhme Doctrine

The *D'Oench Duhme* doctrine was initially recognized by the United States Supreme Court in *D'Oench, Duhme & Co., Inc., v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and subsequently codified by congressional act in 12 U.S.C. § 1823(e).[6] The *D'Oench Duhme* doctrine is presently understood as shielding the FDIC or assignee bank from most claims or defenses raised to defeat

[6] 12 U.S.C. § 1823(e) provides:

> **(E) Deposit Insurance Fund available for intended purpose only**
>
> **(i) In general**
>
> After December 31, 1994, or at such earlier time as the Corporation determines to be appropriate, the Corporation may not take any action, directly or indirectly, with respect to any insured depository institution that would have the effect of increasing losses to the Deposit Insurance Fund by protecting--
>
> **(I)** depositors for more than the insured portion of deposits (determined without regard to whether such institution is liquidated); or
>
> **(II)** creditors other than depositors.
>
> **(ii) Deadline for regulations**
> The Corporation shall prescribe regulations to implement clause (i) not later than January 1, 1994, and the regulations shall take effect not later than January 1, 1995.
>
> **(iii) Purchase and assumption transactions**
> No provision of this subparagraph shall be construed as prohibiting the Corporation from allowing any person who acquires any assets or assumes any liabilities of any insured depository institution for which the Corporation has been appointed conservator or receiver to acquire uninsured deposit liabilities of such institution so long as the insurance fund does not incur any loss with respect to such deposit liabilities in an amount greater than the loss which would have been incurred with respect to such liabilities if the institution had been liquidated.

its action to enforce or collect upon a debt of a failed banking institution. *See Langley,* 484 U.S. 86. *Bell & Murphy and Assocs. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir. 1990); *UMLIC-Nine Corp. v. Lipan Springs Dev. Corp.*, 168 F.3d 1173 (10th Cir. 1999); *Fleet Bank of Maine v. Steeves*, 785 F. Supp. 209 (D. Maine 1992). The modern *D'Oench Duhme* doctrine represents an amalgamation of the federal common law with 12 U.S.C. § 1823(e) to form a far reaching and consequential rule of law in the area of banking. The underlying purposes of the *D'Oench Duhme* doctrine are twofold:

> One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities. . . .
>
> A second purpose of § 1823(e) is implicit in its requirement that the "agreement" not merely be on file in the bank's records at the time of an examination, but also have been executed and become a bank record "contemporaneously" with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. . . .

Langley, 448 U.S. at 91-92. There are, however, recognized exceptions to the *D'Oench Duhme* doctrine, including the defenses/claims of fraud in the factum and illegality of the contract. The defenses that "survive are those . . . that void an

interest *ab initio*" thus rendering the instrument "void" and not transferable to the FDIC. 4 Law of Distressed Real Estate, *Real Defenses* § 45:18 (2016); *see Langley*, 448 U.S. 86.[7]

FRAUD IN THE FACTUM

Fraud in the factum occurs "when a party signs a document without full knowledge of the character of essential terms of the instrument." *McLemore v. Landry*, 898 F.2d 996, 1002 (5th Cir. 1990)(citations omitted); *see also* 4 Law of Distressed Real Estate, *Real Defenses – Fraud in Factum* § 45:19 (2016). The Restatement (Second) of Contracts § 163 (1981) sets forth fraud in the factum as follows:

> If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.

And, as to the *D'Oench Duhme* doctrine, the United States Supreme Court has recognized that fraud in the factum constitutes "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents." *Langley*, 484 U.S. at 93 (citations omitted). A commonly cited example of fraud in the factum occurred where a party "erased the original bank's

[7] Both Pence and Bean asserted fraud and illegality as affirmative defenses to the allegations set forth in the complaint. They reasserted these defenses in their objections to the Master Commissioner's Report.

name [on a guarantee] and inserted the name of another bank" after execution of the guarantee. *FDIC v. Turner*, 869 F. 2d 270, 274 (6th Cir. 1989).

In this case, Bean and Pence specifically argue that the Revolving Line of Credit and Guarantee are void due to fraud in the factum:

> Bean [and Pence] never knew that Huff and PAB's [Park Avenue Bank's] officials had masterminded this devious scheme to funnel money between several Huff controlled bank accounts at PAB to mask massive bank overdrafts and that bogus documents purporting to be loan documents, including the "guarantee" signed by Bean [and Pence], were a complete sham. Bean [and Pence] had no opportunity, much less a reasonable opportunity, to obtain knowledge that the documents purporting to be loan documents were contrived to conceal an **intra-bank**, money funneling scheme. . . .
>
> It is abundantly clear that the bogus PAB documents purporting to be loan documents were void *ab initio* . . . .
>
> . . . .
>
> All of the "loan documents" at issue in the case at bar are completely fictitious. They were concocted to cover up a criminal scheme to funnel money between several Huff controlled bank accounts at PAB to mask massive bank overdrafts. In other words, the fictitious guarantee at issue here was void *ab initio* and the fraud at issue here is "fraud in the factum.". . .
>
> . . . .
>
> Bean [and Pence] signed a document that was not only used for an "unforeseen and unrelated design," but a document that was not genuine! The guarantee and the loan documents in this case are undisputedly phony, contrived, and otherwise fake. They were concocted by PAB officials and Huff, and there is no evidence that

> Bean [and Pence] knew anything about the fact that they were bogus papers intended to cover up a criminal banking scheme to funnel money between several Huff controlled bank accounts at PAB to mask massive bank overdrafts. . . .

Bean's Brief at 9, 12, and 15 (citations omitted).

Viewing the facts most favorable to Bean and Pence, they have failed to raise material issues of fact as to fraud in the factum. Although the Revolving Line of Credit and Guarantee were part of a criminal scheme, it is undisputed that Park Avenue Bank disbursed loan proceeds in the amount of $1,485,000 under the terms of the Revolving Line of Credit and transferred said sums to a River Falls Holdings' checking account. Additionally, Bean and Pence knew they were signing a Revolving Line of Credit and knew the repayment terms of the Revolving Line of Credit. As observed by the circuit court, both Bean and Pence were "experienced businessmen." The fraud alleged by Bean and Pence simply does not constitute fraud in the factum but may raise facts more consistent with fraud in the inducement, which of course is negated under the facts of this case by the *D'Oench Duhme* doctrine. Accordingly, we are of the opinion that the circuit court properly rendered summary judgment upon Bean and Pence's defense of fraud in the factum.

ILLEGALITY

The illegality of an agreement or contract with a banking institution is also a recognized exception to the *D'Oench Duhme* doctrine when the effect of the

illegality is to render the underlying note or instrument void. 4 Law of Distressed Real Estate, *Real Defenses – Illegality* § 45:20 (2016). However, where the effect of the illegality merely renders the underlying note or instrument voidable, there is no exception to the *D'Oench Duhme* doctrine, and the defense or claim is barred thereunder. *FDIC v. Hudson,* 800 F. Supp. 867 (N.D. Cal. 1990); *In re Settlers' Housing Serv. Inc. v. Schaumburg Bank & Trust Co., N.A.*, 514 B.R. 258 (N.D. Ill. 2014). To determine whether an agreement is void or voidable, the court may look to both state and federal law; however, if state law is in contravention of federal law, the federal law will control. *FDIC v. Turner*, 869 F.2d 270 (6 Cir. 1989). And, federal case law holds that not every agreement violative of law or public policy will render the underlying note or instrument void. *CMF Virginia Land, L.P. v. Brinson*, 806 F. Supp. 90 (E.D. Va. 1992); *Settlers Housing Serv.*, 514 B.R. 258.

Based on the record in this case, neither the circuit court nor the master commissioner fully considered the issue of illegality of the underlying bank transactions, as alleged by Pence and Bean. The circuit court made merely one cursory reference to illegality in its orders, and the master commissioner failed to even acknowledge the issue entirely in his report. Moreover, in their respective briefs, Bean and Pence have not set forth the specific legal authority that would support a legal argument to render the Revolving Line of Credit or Guarantee void. Notwithstanding, if Huff and Antonucci, and perhaps others, engaged in an

elaborate shell game in the various bank loan transactions to shield a criminal enterprise unbeknownst to Pence and Bean, then their defense could possibly prevail. Of course, when the lid is lifted off of Pandora's Box, any alleged complicity, knowledge or participation by Pence and Bean in the criminal enterprise shall be open to scrutiny and discovery, which could negate the illegality defense under various legal doctrines, which is not properly before this Court at this time.

Therefore, in view of the complexity of this case and current posture thereof, we conclude that summary judgment was prematurely rendered upon the defense of illegality and vacate the summary judgment upon said defense.

COUNTERCLAIMS

Bean and Pence also argue that the circuit court erred by denying their motion to file a counterclaim against VNB. Bean and Pence maintain that their claims of fraud in the factum and illegality were not barred by the *D'Oench Duhme* doctrine. In the circuit court's November 17, 2015, Order, it concluded that Bean and Pence's "motions to file counterclaims against VNB are also denied. They are based on the same arguments that are barred by *D'Oench*."

It is clear that the *D'Oench Duhme* doctrine bars both defenses and claims raised against the FDIC or assignee bank. *Bowen v. FDIC*, 915 F.2d 1013 (5th Cir. 1990); *FSLIC v. Gemini Mgmt.*, 921 F.2d 241 (9th Cir. 1990). As previously discussed in this Opinion, we held that the circuit court properly

rendered summary judgment upon Bean and Pence's fraud in the factum defense. As their counterclaim is based upon identical law and facts, we conclude that their fraud in the factum counterclaim was, likewise, barred. *See Bowen*, 915 F.2d 1013; *Gemini Mgmt.*, 921 F.2d 241. However, in this Opinion, we have also held that summary judgment was premature upon Bean and Pence's illegality defense; likewise, we view Bean and Pence's motion to file a counterclaim raising the claim of illegality as prematurely denied.

SUMMARY

In summation, we hold that the circuit court properly rendered summary judgment upon Bean and Pence's defense of fraud in the factum and properly denied Bean and Pence's counterclaim also based upon fraud in the factum. We, however, conclude that the circuit court prematurely rendered summary judgment upon Bean and Pence's defense of illegality and also prematurely denied their motion to file a counterclaim based upon illegality.[8] Therefore, we vacate the circuit court's orders as to the defense and counterclaim of illegality and remand for additional proceedings.

[8] Our Opinion should not be misconstrued as holding that Thomas Bean or Stephen B. Pence has set forth a valid claim or defense upon illegality. We merely conclude that the circuit court's ruling upon illegality was premature. Upon additional consideration by the circuit court, including additional discovery if the circuit court deems necessary, summary judgment for VNB may, indeed, be properly granted against such defense and counterclaim.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed in part, vacated in part, and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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