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Briefs and Other Related Documents
Resolution Trust Corp. v. EdieD.N.J.,1994.Only the Westlaw citation is currently available.

United States District Court, D. New Jersey.
RESOLUTION TRUST CORPORATION, Plaintiff,
v.
William G. EDIE, Joseph G. Marcianti, William J. Jordan, William J. Zester, Maurice M. Eaton, Robert C. Moore, III, Raymond Bsales, and Albert L. Tallia, Defendants.
Civ. No. 94-772 (DRD).

Oct. 4, 1994.

James Segreto, Segreto & Segreto, North Haledon, NJ, for defendants Edie, Zester, and Eaton.
Tarquin Jay Bromley, Apruzzese, McDermott, Mastro & Murphy, Liberty Corner, NJ, for defendant Marcianti.
Kevin P. Harrington, Catania and Harrington, North Haledon, NJ, for defendant Jordan.
Lynda S. Korfmann, Evans Hand, West Peterson, NJ, for defendant Moore.
Jonathan J. Lerner, Starr, Gern, Davison & Rubin, P.C., Roseland, NJ, for defendant Bsales.
Robert S. Moraff, Schwartz, Tobia & Stanziale, P.C., Montclair, NJ, for defendant Tallia.
David A. Mazie, Nagel & Rice, Livingston, NJ, for plaintiff Resolution Trust Corp.

OPINION

DEBEVOISE, District Judge.

*1 Plaintiff, Resolution Trust Corporation ("RTC"), moves to strike certain affirmative defenses raised by the defendants and to dismiss a counterclaim raised by defendant Bsales. For the reasons set forth below, the motion is granted in its entirety.

BACKGROUND

This action concerns the closing and liquidation of Irving Savings and Loan Association ("Irving"), a federally chartered bank with eleven branch offices in New Jersey including a main office in Paterson.

On January 17, 1991, the Office of Thrift Supervision of the United States Department of Treasury placed Irving in receivership pursuant to § 5(d)(2)(B)(i) of the Home Owner's Loan Act of 1933, as amended by § 301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183.

Under the provisions of FIRREA, the RTC was designated as the receiver for the failed institution. In its normal process of assuming control of such institutions, the RTC takes on the guise of several legally distinct entities. As such, on February 21, 1992, the RTC acting in its capacity as receiver ("RTC-Receiver") executed a Contract for Sale to transfer all of Irving's assets to the RTC acting in its corporate capacity ("RTC-Corporate"). The transferred assets included the right to bring claims against the institution's former officers, directors, and agents.

On February 17, 1994, RTC-Corporate instituted this action against eight former officers and directors of Irving, alleging liability for the institution's losses due to professional negligence and breach of fiduciary duties. Each of the defendants has served an answer and crossclaims which include various affirmative defenses. Defendant Bsales has also submitted a counterclaim for indemnification under New Jersey corporate and banking law.

The plaintiff, RTC-Corporate, now moves pursuant to Fed.R.Civ.P. 12(f) to strike certain affirmative defenses of each defendant, and also moves pursuant to Rule 12(b)(6) to dismiss defendant Bsales' counterclaim.

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STANDARD FOR A MOTION TO STRIKE

Rule 12(f) exists as a means for testing the legal sufficiency of a defense. It provides:
Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 12(f) motions are generally disfavored because "they require the court to evaluate legal issues before the factual background of a case has been developed through discovery." *F.D.I.C. v. White,* 828 F.Supp. 304, 307 (D.N.J.1993) (citing *Cippolone v. Liggett Group, Inc.,* 789 F.2d 181, 188 (3d Cir.1986)); *United States v. 416.81 Acres of Land,* 514 F.2d 627, 631 (7th Cir.1975); *Glenside West Corp. v. Exxon Corp.,* 761 F.Supp. 1100, 1115 (D.N.J.1991).

*2 Although a motion to strike should only be granted "when a defense is legally insufficient under any set of facts which may be inferred from the allegations of the pleading," *Glenside,* 761 F.Supp. at 1115, in such cases it properly serves to avoid unnecessary discovery and thereby streamlines the process of litigation. *White,* 828 F.Supp. at 307; *Glenside,* 761 F.Supp. at 1115.

ANALYSIS

1. The Affirmative Defenses

As with nearly every action in which negligence is asserted, the defendants have raised a multitude of potential affirmative defenses. The defendants' primary contention in this motion, however, is that the Supreme Court's recent decision in *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), significantly alters the legal landscape and requires a new approach in determining the validity of these defenses.

In *O'Melveny,* the Supreme Court addressed the narrow question of the validity of affirmative defenses for tort claims raised against attorneys who provided legal services to a failed bank in a suit brought by the FDIC [FN1] in its capacity as receiver. 512 U.S. at ----, 114 S.Ct. at 2051. The specific question which the Court addressed was whether, in a suit by the FDIC as receiver of a federally insured bank, it is a federal law rather than a state law rule of decision that governs the tort liability of attorneys who provided services to the bank before the bank was taken over by federal authorities. In *O'Melveny,* the defendant attorneys urged that California law governed the question of whether the bank's officers' knowledge of a fraud must be imputed to the bank, thus providing an estoppel defense to the FDIC's claim. The FDIC urged that federal common law governed and precluded an estoppel or other defense against the FDIC. The Court determined that because there is no federal common law, and because the FDIC in its capacity as receiver "steps into the shoes" of the failed institution, the validity of the defenses relating to the action must also be determined under state, and not federal, law. 512 U.S. at ----, 114 S.Ct. at 2054.

Justice Scalia wrote for a unanimous Court:
In answering the central question of the validity of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.

O'Melveny, 512 U.S. at ----, 114 S.Ct. at 2054.

Specifically rejecting the notion that a "federal common law" rule of decision should be applied in the case, the Court continued,
It is hard to avoid the conclusion that [FIRREA] places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional ' federal common-law' exceptions is not to ' supplement' this scheme, but to alter it.

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*3 *Id.*

Because the FDIC, acting as a receiver, was merely asserting a state cause of action previously held by the institution, no sufficient federal policy could be asserted to require the application of a federal rule of decision as to the validity of the potential defenses.

The Court specifically avoided extending its analysis to defenses raised against the FDIC or RTC for actions undertaken within their regulatory discretion. The Court wrote,
The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred.

O'Melveny, 512 U.S. at ----, 114 S.Ct. at 2055.

In other words, the decision has nothing to do with the RTC's conduct, either before or after the takeover. It only relates to causes of action which the institution could have asserted against private parties prior to its failure.

Having set forth the parameters of the *O'Melveny* decision, I will now address each of the affirmative defenses raised by the defendants according to the following categories:

a. The Duty Based Defenses:
1. Contributory/comparative negligence
2. Failure to mitigate damages
3. Avoidable consequences
b. The Equitable Defenses:
1. Collateral estoppel
2. Equitable estoppel, waiver, ratification, and laches
c. Proximate Cause and Related Defenses:
1. Conduct not negligent
2. Proximate causation
3. Third parties caused damages
4. No duty owed

a. The Duty Based Defenses

By invoking the defenses of contributory/comparative negligence,FN2 mitigation of damages,FN3 and avoidable consequences,FN4 the defendants assert that the RTC may share responsibility for losses of the institution due to the agency's own mismanagement subsequent to takeover.

The plaintiff contends that a claim for negligence cannot be sustained against it because the RTC is protected by the "no duty" rule, which holds that by virtue of its unique situation as a statutorily appointed receiver and now assignee in the form of RTC-Corporate, the RTC holds no duty to former officers or directors of a failed institution. *See, e.g., First State Bank of Hudson County v. United States,* 599 F.2d 558, 562-66 (3d Cir.1979), *cert. denied* 444 U.S. 1013 (1980); *White,* 828 F.Supp. at 308-10. Because it holds no duty to the defendants, defenses which arise as breaches of purported duties cannot be sustained.

The defendants contend that *O'Melveny* requires the rejection of the no duty rule by characterizing it as a rule of "federal common law" contrary to the Supreme Court's assertion that "there is no federal general common law," 512 U.S. at ----, 114 S.Ct. at 2053 (citations omitted). This characterization overlooks the fact that *O'Melveny* 's narrow holding leaves the no duty rule undisturbed. *RTC v. Moskowitz,* No. 93-2028 (D.N.J. Aug. 12, 1994) (" *Moskowitz II* ") (reconsidering and upholding previous decision granting motion to strike affirmative defenses).

*4 When the RTC becomes a receiver under FIRREA and steps into the shoes of the failed institution, it becomes the owner of the institution's assets. Those assets, eventually transferred to RTC-Corporate, include causes of action held by the institution against private parties which, like other assets, have a potential monetary value. RTC-Corporate's duty under FIRREA is to liquidate the assets of the institution and return the money to the national insurance fund which compensated the failed bank's account holders.

There is an important distinction between the defense raised in *O'Melveny* and those asserted in

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this action. No aspect of the cause of action asserted in *O'Melveny* or the defense raised thereto implicated actions undertaken by the FDIC in its discretionary capacity. *O'Melveny* 's defense based on imputation of knowledge was one that could have been asserted in its entirety against the bank had the action been brought before insolvency. It did not implicate FDIC decisions or actions.

In the instant case, however, the defendants raise defenses which inherently implicate discretionary actions undertaken by the RTC. In asserting a cause of action against the failed bank's former directors and officers, the RTC is attempting to hold them personally liable for damages sustained by the bank because of their alleged negligence. The defendants, however, counter with the defense that mismanagement by the RTC may inflate the damages for which they may ultimately be held liable, and that it is unjust to hold them liable for such mismanagement. Defendants ignore the reality that this result is exactly what the no duty rule was designed to effectuate.

In addressing this precise question, Judge Sarokin wrote:
[N]othing could be more paradoxical or contrary to sound policy than to hold that it is the public which must bear the risk of errors of judgment made by its officials in attempting to save a failing institution-a risk that would never have been created but for defendants' wrong-doing in the first instance.

White, 828 F.Supp. at 308-09 (quoting *FDIC v. Baker,* 739 F.Supp. 1401, 1407 (C.D.Cal.1990), quoting in turn *FSLIC v. Roy,* No. 8-1227, 1988 WL 96570 (D.Md. June 12, 1988)).

Although the defendants rely upon *O'Melveny* as means of avoiding the severe effect of the no duty rule, that reliance is misplaced. To the extent that defenses arise from objections to the RTC's discretionary powers to dispose of assets as they see fit, they lie outside *O'Melveny* and remain precluded by the no duty rule. Defendants can only assert defenses that were complete against the institution before the RTC assumed control. Any defense which arises as a challenge to subsequent conduct by the RTC cannot be said to have arisen from the claim held by the institution at the time of its failure.

The affirmative defenses of contributory/comparative negligence, mitigation of damages, and avoidable consequences relate solely to discretionary action undertaken by the RTC and do not arise as a function of claims held by the institution at the time of its failure. Because the RTC owes no duty to the officers or directors of a failed institution, and because the these defenses presuppose such a duty, I will grant the RTC's motion to strike them.

b. The Equitable Defenses

***5** The defendants raise the full gamut of equitable defenses, including collateral estoppel, equitable estoppel, waiver, ratification, and laches.

1. Collateral estoppel [FN5]

Attempts by the defendants to rely on collateral estoppel are misplaced. The requirements for collateral estoppel are that (1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought to be estopped was either a party to the prior action or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the same issue in a prior action. *Wellons, Inc. v. T.E. Ibberson Co.,* 869 F.2d 1166, 1168 (8th Cir.1989) (citations omitted). There being no prior action asserted as a basis for collateral estoppel, the defenses will be stricken.

2. Equitable estoppel [FN6], waiver [FN7], ratification [FN8], and laches.[FN9]

In keeping with the public policy justifications underlying the no duty rule explained above, courts in this Circuit have held that the equitable defenses of estoppel, waiver, ratification, and laches cannot be asserted against the RTC. *RTC v. Moskowitz,*

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No. 93-2080, 1994 WL 229812, at *21-25 (D.N.J. May 24, 1994) ("*Moskowitz I* "); *White,* 828 F.Supp. at 310-14.

To the extent that the defendants claim that the RTC has acted improperly and should therefore be equitably estopped from asserting a claim against them, they rely on the incorrect presumption that the RTC has a duty to act equitably toward them. *See Moskowitz I,* 1994 WL 229812, at *21; *White,* 828 F.Supp. at 311. And to the extent the defendants claim that some action by the RTC has effectuated a waiver of their potential liability, they likewise incorrectly presume that equitable defenses lie against discretionary actions undertaken by the RTC. *Id.* Defendant Bsales' claim that the RTC may have ratified his actions is precluded for the same reason: it implicates direct actions by the RTC which are not subject to equitable defenses. *Moskowitz I,* 1994 WL 229812, at *23.

As to laches, it is clear that the RTC, as an instrumentality of the United States, is not subject to the defense of laches. *Id.* at *25. This result is consistent with the no duty rationale, in that the defense of laches inherently implicates discretionary conduct of the RTC and is therefore unavailable to the defendants.

The equitable defenses of estoppel, waiver, ratification, and laches will therefore be stricken.

c. Proximate Cause and Related Defenses

The defendants raise a number of defenses which directly challenge the assertion of negligence raised by the plaintiffs. They include lack of proximate causation,[FN10] third parties are responsible,[FN11] and that the defendants had no duty, are not liable, or that the actions complained of occurred prior to their service.[FN12]

*6 None of these statements qualify as affirmative defenses because they merely serve to rebut the *prima facie* elements of negligence for which the plaintiff will bear the burden of proof. *See Moskowitz I,* 1994 WL 229812, at *25-26; *White,* 828 F.Supp. at 312. To the extent that the defendants claim failure of such elements, they should be raised in rebuttal to the plaintiff's case in chief, not as affirmative defenses. *Id.; See also, RTC v. Kerr,* 804 F.Supp. 1091, 1100 (W.D.Ark.1992). Likewise, if the defendants believe others are responsible for liability asserted against them, they should implead the appropriate parties. *Moskowitz I,* 1994 WL 229812, at *26.

STANDARD FOR A MOTION TO DISMISS

Pursuant to Rule 12(b)(6), a claim or counterclaim must be dismissed for failure to state a claim if the opponent demonstrates "beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Craftmatic Securities Litigation v. Kraftsow,* 890 F.2d 628, 634 (3d Cir.1989); *Johnsrud v. Carter,* 620 F.2d 29, 33 (3d Cir.1980). All allegations set forth in the claim or counterclaim must be accepted as true, *see Cruz v. Beto,* 405 U.S. 319, 322 (1972), and all reasonable inferences must be drawn in the claimant's favor. *Schrob v. Catterson,* 948 F.2d 1402, 1405 (3d Cir.1991). On a 12(b)(6) motion, the district court is limited to the facts alleged in the complaint or response asserting counterclaims, not those raised for the first time by counsel in its legal memorandum. *Hauptmann v. Wilentz,* 570 F.Supp. 351, 364 (D.N.J.1983), *aff'd without opinion,* 770 F.2d 1070 (3d Cir.1985), *cert. denied,* 474 U.S. 1103 (1986); *Seevers v. Arkenberg,* 726 F.Supp. 1159, 1165 (S.D.Ind.1989) ("This court is not at liberty, however, to consider allegations which do not appear in the complaint, but which are averred only in legal briefs."). The Third Circuit, however, has held that a "court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss," without converting the motion into a motion for summary judgment, "if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993), *cert. denied,* 114 S.Ct. 687 (1994).

2. Defendant Bsales' Counterclaim for Indemnification

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Defendant Bsales has raised a counterclaim for indemnification against the plaintiff pursuant to *N.J.S.A.* 17:12B-73, which governs indemnification of Savings and Loan Association officers, directors, and employees, and *N.J.S.A.* 14A:3-5, which controls indemnification under general corporate law.

The RTC argues that in its current guise of RTC-Corporate, it only holds the assets of the former S & L. It reasons that the liabilities are still held by RTC-Receiver and that RTC-Receiver is therefore the only party against which such claims may be asserted.

*7 By virtue of the contract for sale entered into between RTC-Receiver and RTC-Corporate, only Irving's assets were transferred to RTC-Corporate. Article II, § 2.1 of the contract provided that the assets were transferred

free and clear of any lien, encumbrance or reserved right, title or interest of any kind in favor of the Receiver ... in and to any and all actions, judgments or claims of the Receiver against (i) any officer, director, employee, accountant, attorney, or any other Person employed or retained by the Failed Association....

(Mazie Aff. Ex. I.)

Likewise, Article IV of the contract provided that the corporation "does not assume or discharge any liability of the failed Association...." *Id.* Other courts addressing this issue have held that these provisions insulate the RTC in its corporate capacity from counterclaims for indemnification raised by former directors of failed S & Ls. *See, e.g., RTC v. Gallagher,* No. 92-C-1091, 1992 WL 370248 (N.D.Ill. Dec 2, 1992).

Therefore, the counterclaim may not be asserted against the plaintiff, RTC-Corporate, and it will be dismissed. As such, there is no need to address additional arguments raised by the RTC addressing the validity of the counterclaim.

As a final point, defendant Jordan claims that the RTC's motion should be denied because it was filed more than 60 days following service of the last answer. He asserts that the answer of defendant Bsales was filed on May 6, 1994, that the RTC was required to file the motion within twenty days, and that the motion filed on July 11, 1994, was therefore late.

Defendant Jordan is incorrect in several regards. First, the answer of defendant Bsales was filed on May 9, not May 6. Second, as an agency of the United States pursuant to 12 U.S.C. § 1441a(b)(1)(B), the RTC has sixty days under Fed.R.Civ.P. 12(a)(3) to file its motion. That period is extended by three days under Fed.R.Civ.P. 6(e) because service was effected by mail. Accordingly, the motion filed on July 11, 1994, was timely.

CONCLUSION

For the reasons set forth above, the plaintiff's motion to strike certain affirmative defenses and to dismiss the counterclaim of defendant Bsales will be granted in its entirety.

FN1. Under 12 U.S.C. § 1441a(b)(1)(B), the RTC has the same powers when acting as a conservator or receiver as the FDIC. For clarity of discussion, I will sometimes interchange the agencies.

FN2. Raised by defendants Tallia (defense no. 11), Jordan (defense no. 4), and Edie, Zester, and Eaton (defense no. 8).

FN3. Raised by defendants Tallia (defense no. 10), and Edie, Zester, and Eaton (defense no. 4).

FN4. Raised by defendants Tallia (defense no. 6), and Moore (defense no. 5).

FN5. Three of the defendants have asserted an "estoppel" defense with no recital of its factual basis (defendants Jordan (defense no. 5), Marcianti (defense no. 5), and Bsales (defense no. 2)). I will address these defenses as both collateral

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and equitable estoppel.

FN6. Raised by defendants Jordan (defense no. 5), Marcianti (defense no. 5), and Bsales (defense no. 2). *See* n. 5, *supra.*

FN7. Raised by defendants Bsales (defense no. 2), and Marcianti (defense no. 4).

FN8. Raised by defendant Bsales (defense no. 2).

FN9. Raised by defendants Tallia (defense no. 9), Jordan (defense no. 6), and Marcianti (defense no. 3).

FN10. Raised by defendants Bsales (defense no. 9), Tallia (defense no. 7), Jordan (defense no. 10), Moore (defense no. 6), and Edie, Zester, and Eaton (defense no. 3).

FN11. Raised by defendants Bsales (defense no. 7), Tallia (defense no. 8), Jordan (defense no. 3), Marcianti (defense no. 6), and Edie, Zester, and Eaton (defense no. 7).

FN12. Raised by defendants Bsales (defense no. 8), Tallia (defense no. 2), and Jordan (defense no. 7).

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• 1:94cv00772 (Docket) (Feb. 17, 1994)

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