

No. 15-56800

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHERI FU and THOMAS FU

Debtors, Defendants and Appellants,

v.

CITY NATIONAL BANK, N.A.

Creditor, Plaintiff and Appellee.

**APPELLANTS' RESPONSE AND OPPOSITION TO APPELLEE'S
MOTION TO TAKE JUDICIAL NOTICE**

On Appeal From Order Of U.S. District Court, C.D. Cal., So. Div., in Case No. 8:15-cv-00676-CJC, Affirming Partial Summary Judgments Entered U.S. Bankruptcy Court, C.D. Cal., So. Div., in Adv. No. 8:13-ap-01255-TA, arising in Case No. 8:09-bk-22699-TA (Jointly Administered with 8:09-bk-22695-TA)

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CHERI FU and the Estate of THOMAS FU, deceased

Debtors, Defendants, and Appellants Cheri Fu and the Estate of Thomas Fu, deceased (the "Fus") hereby respond and object to the motion to take judicial notice (the "Motion") filed by Creditor, Plaintiff and Appellee City National Bank, N.A. ("CNB") (ECF Dkt. # 28) as follows:

I. ARGUMENT: THE EXHIBITS TO CNB'S MOTION FOR JUDICIAL NOTICE DO NOT SUPPORT THE CONTENTIONS FOR WHICH THEY ARE PROFFERED

First, CNB states that it "never had possession of the collateral and took no action to foreclose on it, so this new argument is irrelevant to CNB's recovery for breach of the guaranty" and that "The Fus can present no evidence otherwise." (Motion at 2:6-9.) But the Exhibits to the Motion do not support those statements. The Fus requested, but were denied, discovery on that issue, which prevented them from developing and presenting any evidence in that regard. Indeed, the improper denial of that discover is one of the Fus' key complaints under Fed. R. Civ. Proc. 56(d) in this appeal.

Second, CNB states the Fus "are making this Commercial Code argument [regarding CNB's failure to mitigate its losses] here on appeal for the first time[.]" (Motion at 2:21-22.) That also is incorrect. The Fus' failure-to-mitigate Affirmative Defense, their challenge to CNB's claimed 100% loss, their charge that CNB failed to properly locate and monetize the GUSA collateral securing its loans, and the Fus' requested discovery on those issues, were raised repeatedly in the proceedings below. (*See, e.g.*, ER Vol. V, Tab 33 at EA000991, ll.6-8, ER Vol. V, Tab 33 at EA000990, ll.16-21, ER Vol. V, Tab 32 at EA000840, ll.4-11, ER Vol. V, Tab 32 at EA000840, ll.12-17, ER Vol. V, Tab 32 at EA000840, ll.18-27, ER Vol. III, Tab 23 at EA000484, ll.9-15, ER Vol. III, Tab 23 at EA000489, ll.3-8, ER Vol. IV, Tab 30 at EA000644, ll.10-21, ER Vol. III, Tab 22 at EA000409-412, 422-423, 450-452.)

Third, CNB disingenuously argues that because the Bankruptcy Court subsequently entered summary judgment on CNB's third loan (Motion, Exhibit C) after permitting discovery regarding that loan, "the Fus' request for additional discovery has again been proven futile." (Motion at 3:1-13). That argument misstates the record. As made clear in Judge Theodor Albert's Tentative Ruling (which he adopted as his is final Order), Judge Albert granted very limited discovery "on narrow issues" relating to alleged fraud prior to October 2008. (ER Vol. I, Tab 3 at EA000048-49.) At the hearing on CNB's motion for summary judgment, the Court made clear that it was not allowing any discovery relating to the two loans on which it granted partial summary judgment, and, in particular, was not permitting discovery regarding the existence, amount, and liquidation of GUSA collateral securing the CNB loans that the Fus guaranteed. (ER Vol. III, Tab 22, at EA000461-463.). No such discovery was permitted.

Finally, the documents showing the approval of the sale of GUSA assets and the final accounting by the GUSA Bankruptcy Trustee (Motion at 3-4) do not "directly refute" any arguments made by the Fus in this appeal. The issue is what happened to all of the collateral (in transit and landed inventory and accounts receivable) prior to the appointment of the Bankruptcy Trustee, what CNB did or failed to do in that regard to mitigate its losses, what the other creditor banks did or failed to do in that regard, as fully secured creditors, and whether CNB in fact was entitled to foist upon the Fus as guarantors 100% of GUSA's loans as if no payments were ever made and not one cent of collateral existed for the 100%-secured CNB loans. The Exhibits to the Motion do not refute or render futile discovery about those issues. CNB should have been permitted to assert defenses and third party claims on those issues, and to conduct discovery about them.

II. CONCLUSION

Even if the Court is inclined to take judicial notice of the Exhibits to CNB's Motion (which in effect constitute an improper end run around the word-count limitations for CNB's Answering Brief), the Exhibits proffered do not support CNB's contentions. The record establishes, and the Exhibits do not contradict, that the Fus were denied discovery about the existence, amount, and monetization of the GUSA collateral securing CNB's loans, about CNB's failure to mitigate its damages in a commercially reasonable manner as a secured creditor, and about the true amount and causes of CNB's alleged 100% losses. Nor do the proffered Exhibits support CNB's contention that such discovery (and the Fus proposed Third Party Claims against other creditor banks which contributed to CNB's claimed losses) would have been futile. Judicial notice is improper under Paragraph (b)(2) of Rule 201 of the Federal Rules of Evidence because the Exhibits to the Motion do not contain or otherwise support "a fact that is not subject to reasonable dispute . . ."

For these reasons, CNB's Motion should either be denied entirely or disregarded as not supporting the contentions for which the Exhibits to the Motion were proffered.

DATED: May 26, 2016

MARK ANCHOR ALBERT & ASSOCIATES

By: s/Mark Anchor Albert
 Mark Anchor Albert
 Attorneys for Debtors, Defendants, and
 Appellants Cheri Fu and the Estate of
 Thomas Fu, deceased

9th Circuit Case Number(s) 15-56800

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