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United States District Court, E.D. Pennsylvania.
FEDERAL DEPOSIT INSURANCE CORPORATION Statutory Successor To Resolution Trust Corporation In Its Capacity As Receiver For Atlantic Financial Savings, F.A.
v.
PARKWAY EXECUTIVE OFFICE CENTER
FEDERAL DEPOSIT INSURANCE CORPORATION Statutory Successor To Resolution Trust Corporation In Its Capacity As Receiver For Atlantic Financial Savings, F.A.
v.
Richard L. EVANS and Helene Evans
Nos. CIV.A. 96-121, CIV.A. 96-122.

Jan. 9, 1998.

PADOVA.

MEMORANDUM

***1** Plaintiff, Federal Deposit Insurance Corporation ("FDIC"), moves *in limine* to exclude certain of the evidence of Defendants Parkway Executive Office Center ("Parkway") and Richard and Helene Evans ("Evanses") regarding recoupment and offset damages. More specifically, Plaintiff seeks to exclude from Defendants' case any evidence of expenditures made or damages incurred by Defendants after January 11, 1990, the date the Resolution Trust Corporation ("RTC") was appointed Receiver of Atlantic Financial Federal, and any evidence of the value of the building at issue, known as Five Logan Square. For the reasons that follow, Plaintiff's Motion is denied.

I. Background

A full recitation of the facts in this case are set forth in detail in the Court's Opinion dated August 18, 1997. *See FDIC v. Parkway Executive Office Center and Dr. and Mrs. Evans,* No. 96-121, 1997 WL 535164 (E.D.Pa. August 18, 1997). Only those facts necessary to the instant determination will be recounted here. This is a suit for money lent by Atlantic Financial Federal ("Atlantic") to Parkway Executive Office Center pursuant to a Construction Loan and Security Agreement ("Construction Loan"), for which Parkway executed a Note and Dr. and Mrs. Evans executed a Guaranty. On January 11, 1990, the Director of the Office of Thrift Supervision, Department of the Treasury, declared Atlantic in an unsafe and unsound condition to transact business and ordered it closed. That day, the RTC was appointed Receiver of Atlantic and thereby took possession of its assets. Four and one-half months later, on May 22, 1990, exercising its powers under the Financial Institutions Reform and Recovery Act, 12 U.S.C.A. § 1821(e) (West 1989 & Supp.1997) ("FIRREA"), the RTC acted to repudiate the undisbursed balance of the Construction Loan. This Court dismissed Defendants' counterclaim for repudiation damages in its August 18, 1997 Opinion. However, Defendants are permitted to assert repudiation as an affirmative defense and may attempt to set-off statutory damages for repudiation against the money owed to the FDIC. It is the nature of the evidence that Defendants offer in support of their repudiation damages defense that is the subject of the instant motion.

As represented in their Final Pretrial Memorandum, Defendants intend to present evidence at trial of the diminution in value of the building that resulted after the RTC's repudiation. It is Defendants' contention that the difference between the value of the mortgaged building with the loans in place and the value of the building "as is" without the funding under the Construction Loan, constitutes "actual direct compensatory" damages, which are recoverable under 12 U.S.C.A. § 1821(e)(3).[FN1] Plaintiff argues that the Court must not consider any evidence of the diminution in value of the building because diminution in value does not constitute repu-

diation damages under FIRREA in that: (1) Defendants' claim was not "fixed, certain and vested" at the time of the appointment of the Receiver; and (2) the injury to the value of the building occurred after the RTC's appointment and any diminished market value constitutes lost profit or opportunity, specifically excluded by § 1821(e)(3)(B)(ii).

FN1. In their opposition brief, Defendants make several alternative arguments for admitting the disputed evidence. Since the Court finds herein that damages for diminution in value are recoverable under § 1821(e)(3), it need not reach these alternative arguments.

II. Discussion

***2** Title 12 U.S.C.A. § 1821(e)(1) gives a Receiver the right to disaffirm or repudiate any contract that the bank may have made before receivership if the FDIC decides "in its discretion" that performance will be "burdensome" and that disavowal will "promote the orderly administration" of the failed bank's affairs. 12 U.S.C.A. § 1821(e)(1); *McCarron v. FDIC,* 111 F.3d 1089, 1093 (3d Cir.1997). While the repudiation frees the receiver from having to comply with the contract, it is treated as a breach of contract that gives rise to an ordinary contract claim for damages. *See Id.* at 1095; *Howell v. FDIC,* 986 F.2d 569 (1st Cir.1993); *Resolution Trust Corporation v. Management, Inc.,* 25 F.3d 627, 631 (8th Cir.1994). The damages for which the FDIC is liable, however, are limited significantly under FIRREA. *See Heiko v. FDIC,* No. 93-8638, 1995 WL 117604, at *2 (S.D.N.Y. March 17, 1995). The liability of a receiver for repudiation of a contract "shall be limited to actual direct compensatory damages" and are to be "determined as of the date of the appointment of the conservator or receiver." 12 U.S.C.A. § 1821(e)(3)(A); *Citibank, N.A. v. FDIC,* 827 F.Supp. 789 (D.D.C.1993),*modified in part on other grounds* 857 F.Supp. 976 (D.D.C.1994); *In re Miraj and Sons, Inc.,* 192 B.R. 297, 312 (Bankr.D.Mass.), *modified,* 197 B.R. 737 (Bankr.D.Mass.1996). The term "actual direct compensatory damages" specifically excludes:

(I) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii)damages for pain and suffering.

12 U.S.C.A. § 1821(e)(3)(B).

A. Measure of Damages under FIRREA

Citibank, N.A. v. FDIC, sets out a method for determining whether damages caused by repudiation are sufficiently "fixed, certain and vested" as of the date of the appointment of the receiver to be recoverable under 12 U.S.C.A. § 1821(e)(3).

Under § 1821(e)(3)(A)(ii), damages caused by repudiation are measured on the date the Receiver was appointed, not on the date of repudiation. Damages caused by repudiation which are fixed and determined on the date of Receivership are recoverable. A recoverable claim must represent an amount due and owing at the time of the declaration of insolvency, although the specific amount of the claim may be established later. The Court must first consider whether the contractual right at issue vested prior to the appointment of the FDIC as Receiver.

Citibank, 827 F.Supp. at 791 (internal citations omitted); *see also Heiko,* 1995 WL 117604, at *3 ("case law suggests that damages must be fixed, certain and vested at the time of the FDIC's appointment as receiver").

***3** To determine whether a right has vested on the date a bank is taken over by the RTC, courts look to whether the "insolvent bank's promise was binding and enforceable under contract law at that time." *Nashville Lodging Co. v. RTC,* 59 F.3d 236, 244 (D.C.Cir.1995) (internal quotations omitted). Defendants' claim meets this test. In the Court's Opinion, entered August 18, 1997, the Court specifically noted that the Promissory Note, the Note Modifica-

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tion Agreement and the Construction Loan and Security Agreement "imposed obligations on both parties. Atlantic was obligated under the Promissory Note to disburse funds to Defendants. Defendants had a concomitant obligation to make payments of interest and principal to repay those disbursements." *Parkway and Dr. and Mrs. Evans,* 1997 WL 535164, at *12. Thus, this Court has already found that Defendants' contractual right to funding vested prior to the appointment of the RTC as Receiver.

The next question therefore, is whether the damages caused by the repudiation were fixed and certain "as of" the date of the appointment of the Receiver. Plaintiff argues that Defendants' claim was speculative on the date of insolvency because it did not arise until the FDIC repudiated the loan four and one-half months later. "Although superficially such reasoning appears consistent with § 1821(e), this argument conflicts with the statutory intent of FIRREA to allow claims for contracts in force prior to insolvency. [Plaintiff's] reasoning could be extended to deny any contractual claim arising from repudiation. Such claims are always contingent on the date of insolvency because a receiver cannot repudiate a contract until after it is appointed." *Citibank,* 827 F.Supp. at 791. In this case, the contract right that gave rise to Defendants' claim was created before the FDIC was appointed Receiver. So long as this right existed on January 11, 1990, the damages that result from the repudiation of the obligation are sufficiently fixed and certain. *See McMillian v. FDIC,* 81 F.3d 1041, 1050 (11th Cir.1996). The damages are simply calculated "as of" the appointment date.[FN2] *See Citibank,* 827 F.Supp. at 791. Any contrary interpretation "would permit recovery only when a contract had been breached before receivership-a result clearly contrary to the plain language of the statute, Congress' intent, and the common law." *McMillian,* 81 F.3d at 1050.

> FN2. Accordingly, any appraisal testimony and exhibits presented at trial relevant to diminution in value must compare the value of the building "as of" January 11, 1990 with the building's value after May 22, 1990, the date the loan was repudiated.

B. The Scope of "Actual Direct Compensatory Damages"

In order for the evidence pertaining to the building's diminution in value to be admissible for purposes of establishing offsetting repudiation damages, the Defendants' claim must meet the standard for recoverable damages codified in 12 U.S.C.A. § 1821(e)(3)(A), which allows only "actual direct compensatory" damages. Plaintiff argues that damages for diminution in value are not "actual" because they were not expended prior to RTC intervention; they are not "direct" in that they do not inevitably flow from the repudiation. Further, Plaintiff argues, these damages are not compensable because they constitute lost profits or opportunities, which are specifically not included as repudiation damages under FIRREA. 12 U.S.C.A. § 1821(e)(3)(B)(ii).

***4** There is no illuminating legislative history as to the meaning of the phrase "actual direct compensatory damages." Consequently, courts have looked to the plain meaning of the phrase in determining its scope.

> We begin with the plain meaning of the phrase ... [A]ctual direct compensatory damages appear to include those damages, flowing directly from the repudiation, which make one whole, as opposed to those which go farther by including future contingencies such as lost profits and opportunities or damages based on speculation.

McMillian, 81 F.3d at 1054-55 (internal quotations and citations omitted).

Two cases have addressed the issue of whether damages for diminution in value are "actual direct compensatory" damages under § 1821(e)(3)(a). In *In re Miraj and Sons, Inc.,* 192 B.R. 297

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(Bankr.D.Mass.), *modified,* 197 B.R. 737 (Bankr.D.Mass.1996), the FDIC repudiated an insolvent bank's obligation to provide "end loan financing" for the resale of properties owned by the borrower. Upon repudiation, the FDIC assigned the notes to a third party. The borrower could not repay the notes, because it could not resell the properties without end loan financing for buyers of the properties. The third party moved to foreclose on the properties and the borrower filed for bankruptcy. The borrower sought to offset the third party's claims with the damages it suffered as a result of the FDIC's repudiation. The third party argued that the proposed calculation of damages included lost profits. The Court applied § 1821(e)(3) and stated:

[The third party] argues that the Debtor's calculation of damages inappropriately includes a measure of lost profits. The Court disagrees. The Debtor is not seeking profits lost as a result of being unable to sell the Units for quick resale. Rather, the Debtor is seeking to offset the difference between the value of the Units on quick resale (which would have been available with the benefit of end loan financing) against the value of the Units as rental units (necessitated by the absence of end loan financing). Such damages constitute actual direct compensatory damages." FN3

FN3. At the trial on the Debtor's Objections to the third party's Proofs of Claim, the *In re Miraj* court heard testimony of an appraiser as to the value of the units with and without end loan financing.

In re Miraj, 192 B.R. at 312.

At oral argument on the instant Motion, the Court asked Plaintiff for an explanation as to how *In re Miraj* differs from the case at hand. Plaintiff's only response was that there was no "end loan financing" in the instant case. The Court does not consider this distinguishing factor critical. Rather, the Court finds the reasoning employed in *In re Miraj* persuasive. Just as in *In re Miraj,* the contract between the parties in this case provided that Defendants would receive funding for their project. That contract was in full force at the time of the appointment of the Receiver. When the RTC chose to repudiate that contract, it knew that it would be held responsible for the "actual direct compensatory" damage that the repudiation caused Defendants.

***5** The Court is convinced that damages for diminution in value are "actual, direct, compensatory" damages recoverable under FIRREA. As a direct result of the repudiation, the building was changed from a partially renovated building with sufficient funding in place for its full development, into an incomplete building with insufficient financing for its completion and subject to foreclosure by the co-lender. Permitting Defendants to present evidence of the diminution in value of the building resulting from the repudiation would simply allow Defendants the possibility of being made "whole." *McMillian* 81 F.3d at 1054-55. Defendants are not seeking to present evidence of the difference between what the building would have been worth had the construction job been completed and what the building was worth on the day the RTC repudiated. Such damages would "go farther by including future contingencies such as lost profits and opportunities." *Id.* This is not the scenario here. Defendants here simply seek to prove the difference between the value of the building at Five Logan Square with the funding in place "as of" the date the Receiver was appointed, and the value of the building after the repudiation with no such funding in place.

The second case that has found that damages for diminution in value are "actual direct compensatory damages" is *Employees' Retirement System of Alabama v. RTC,* 840 F.Supp. 972 (S.D.N.Y.1993). In that case, the court held that the loss in market value of zero coupon bonds caused by the RTC's repudiation, constituted "actual direct compensatory damages." Particularly instructive for this Court, in light of Plaintiff's argument that only those ex-

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penses actually paid on or before the date of receivership are recoverable, is the fact that in *Employees',* the permissible repudiation damages consisted of a loss incurred only *after* the repudiation. The court explained:

These Bonds are marketable securities. They have an easily ascertained market value-a value at which they could be bought or sold at a given time. The market value of the securities of which they were deprived by the RTC's repudiation represents the Bondholders' actual direct compensatory damages. Where the loss is of a security having an ascertainable, immediately realizable, market value, no part of that loss consists of "lost profits or opportunity."

....

At the time of the RTC's appointment as receiver for the failing institution, there would have been an enormous difference between the market values of these well-secured Bonds and another issue of Franklin bonds, comparable in every detail except without security.

....

While many aspects of the various provisions of FIRREA are unclear, one aspect that appears clear is that where the repudiation consists of a deprivation of a security that is traded on a market, the actual direct compensatory loss is the loss of the value of that security.

***6** *Employees',* 840 F.Supp. at 988, 990, 991.

The reasoning of *Employees'* adds further support to the Court's view that damages for diminution in value are recoverable under § 1821(e)(3)(a). Although clearly the asset at issue in the instant case is not a "marketable security," the reasoning employed in *Employees* ' specifically instructs that damages for diminution in value are recoverable, despite the fact that Defendants' "expense" is incurred after the date of receivership. Although the amount of damages must be measured "as of" the date of the appointment of the Receiver, the actual direct damage to Defendants occurred when the funding for their project ceased. Again, as a direct result of the repudiation, Defendants suffered the loss of the market value of the building with the funding in place, which, but for the repudiation, they would have retained. This loss in value constitutes "actual direct compensatory" damages.

For the foregoing reasons, Plaintiff's motion is denied and Defendants are permitted to offer testimony at trial relating to expenditures made or damages incurred after January 11, 1990 and evidence of the value of the building at issue, known as Five Logan Square.

An appropriate Order follows.

ORDER

AND NOW, this day of January, 1998, upon consideration of Plaintiff Federal Deposit Insurance Corporation's Motion in Limine to Exclude Certain of Defendants' Evidence Regarding Recoupment and Offset Damages (Doc. No. 41), Defendants' Response thereto (Doc. No. 43), and Oral Argument held on Monday, November 17, 1997, IT IS HEREBY ORDERED THAT Plaintiff's Motion is DENIED.

E.D.Pa.,1998.
F.D.I.C. v. Parkway Executive Office Center
Not Reported in F.Supp., 1998 WL 18204 (E.D.Pa.)

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