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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1868**

Stearns Bank, N.A.,
Appellant,

vs.

Jane A. Burnes-Leverenz
aka Jane A. Burnes Leverenz
aka Jane A. Burnes
aka Jane Leverenz
aka Jane Burnes
aka Jane A Leverenz, et al.,
Respondents,

Kevin A. Hofstad,
Defendant.

**Filed July 23, 2012
Affirmed in part, reversed in part, and remanded
Hudson, Judge**

Pine County District Court
File No. 58-CV-09-706

Stephanie A. Ball, Eric S. Johnson, Fryberger, Buchanan, Smith & Frederick, P.A.,
Duluth, Minnesota (for appellant)

Kevin S. Sandstrom, Eckberg, Lammers, Briggs, Wolff & Vierling, PLLP, Stillwater,
Minnesota (for respondents)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant successor bank challenges the district court's summary judgment concluding that it had subject-matter jurisdiction to consider respondents' claims relating to loans with appellant's predecessor bank, arguing that respondents failed to exhaust administrative remedies with the Federal Deposit Insurance Corporation (FDIC), as required by 12 U.S.C. § 1821 (2006), a portion of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Because we conclude that respondents' failure to exhaust administrative remedies precludes the district court from exercising jurisdiction over some of respondents' asserted claims, but not certain defenses, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

Between 2004 and 2006, respondent Jane Burnes Leverenz obtained several loans from Pine City Bank, later known as Horizon Bank. The loans were secured by mortgages on several properties in Pine County. Jane Leverenz's daughters, respondents Leva M. Leverenz and Jozie R. Leverenz, were also obligated on one of the loans. On June 26, 2009, the FDIC closed Horizon Bank and acquired its assets, including respondents' loans, in a receivership. The next day, the Horizon Bank offices reopened as branches of appellant Stearns Bank, NA, which had entered into a purchase-and-assumption agreement with the FDIC, assuming the assets and liabilities of Horizon Bank. At about the same time, the FDIC published on its website a notice that persons

with claims against Horizon Bank who had not received communication should contact the FDIC at a certain address.

Respondents defaulted on the loans by failing to make payments as due, and appellant filed a complaint in district court, alleging breach of the loan contracts and unjust enrichment by retaining the money due under the contracts, and seeking damages and foreclosure of the mortgages. Respondents filed an answer, alleging counterclaims and defenses. Respondents' specific asserted defenses included: (1) failure to state a claim on which relief could be granted; (2) contributory fault on the part of appellant; (3) causation of damages by other parties over whom respondents lacked control; (4) estoppel or waiver; (5) laches; (6) the statute of frauds; (7) the statute of limitations; (8) unclean hands; (9) failure to plead with particularity the failure of performance or occurrence of conditions precedent; (10) accord and satisfaction; (11) modification of the loans by mutual agreement; (12) duress; and (13) release. Respondents asserted counterclaims for breach of contract, declaratory judgment, injunctive relief, and consumer-protection violations. They sought damages; an order enjoining further foreclosure and collection activities; attorney fees, costs, and disbursements; and civil penalties and fines.

Jane Leverenz alleged that she and her late husband had used Horizon Bank for nearly all of their banking needs, that she executed the relevant loan documents before and after her husband's death, and that her signature on one of the mortgages was forged. She also alleged that, in 2007, when she was having difficulty making payments on the loans, she discussed loan modification with Steven Schmidt, who was then president of

Horizon Bank. She maintained that Schmidt promised to set up a line of credit for her, which he failed to do; that Schmidt arranged for her to provide deeds in lieu of foreclosure with respect to several properties in exchange for payment and restructuring of her debt, but Horizon Bank failed to grant her credit as promised; and that Horizon Bank continued to withdraw funds from her accounts to satisfy the debts. She alleged that Schmidt told her to ignore notices of default from Horizon Bank and that he continued to promise that he would “straighten out” her loan situation, but that never occurred.

Appellant moved for summary judgment, asserting that the district court lacked jurisdiction because respondents’ counterclaims and affirmative defenses were subject to administrative review under FIRREA, and respondents had failed to exhaust administrative remedies as required by 12 U.S.C. § 1821(d)(3)(D) (2006). Appellant also alleged that no genuine issues of fact existed and that respondents’ claims failed as a matter of law. In response, respondents argued, inter alia, that FIRREA did not apply to respondents’ claims because the bank was not the receiver and respondents were not provided with the required notice of the need to submit an administrative claim. They maintained that, even if some of their claims could be construed as counterclaims, which might be barred under FIRREA, they should be permitted to recast those claims as affirmative defenses, which are not barred.

The district court denied summary judgment. The district court determined that respondents had alleged affirmative defenses of failure to state a claim; contributory fault; acts or omissions by others not in respondents’ control; estoppel or waiver; laches;

statute of frauds; unclean hands; failure to plead conditions precedent with particularity; duress; release; that the loans were not properly assigned to appellant; that the loans were invalid because an executive of appellant's acted as attorney-in-fact for the FDIC as receiver; and that the loans may be unenforceable as void or illegal as a result of violations of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667 (2006), and the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617 (2006). The district court determined that respondents had asserted counterclaims that because of the forged signature, Jane Leverenz had no intent to encumber respondents' homestead and the mortgage on the homestead was void, and that counterclaims also were brought for breach of contract, declaratory judgment, injunctive relief, and consumer-protection violations. The district court, without further explanation, concluded that genuine issues of material fact existed, precluding summary judgment.

Appellant filed an interlocutory appeal of the denial of summary judgment. This court noted that the district court did not expressly rule on the issue of whether it had subject-matter jurisdiction to consider the matter, dismissed the appeal, and ordered a remand for the district court to rule on that issue. We noted that, if the district court issued an order denying summary judgment based on lack of subject-matter jurisdiction, appellant may file a new appeal, limited to appellant's argument that the district court lacks subject-matter jurisdiction under FIRREA.

On remand, respondents submitted Jane Leverenz's supplemental affidavit, with an accompanying letter from her attorney, stating that she had attempted to contact the FDIC after the failure of Horizon Bank, that she was never informed that she should file

an administrative claim, and that an FDIC representative told her by telephone to deal directly with Stearns Bank to resolve her claims. Appellant moved to strike the affidavit and letter, but the district court did not rule on the motion. The district court concluded that it had subject-matter jurisdiction to decide the controversy and that genuine issues of material fact existed, precluding summary judgment. The district court made “findings of fact,” stating it was relying on the parties’ arguments, as well as their additional submissions. The district court noted that Jane Leverenz had numerous contacts with the FDIC after the failure of Horizon Bank and had received no information that she was to file an administrative claim. This appeal follows.

D E C I S I O N

I

In reviewing the district court’s decision on summary judgment, this court “review[s] de novo whether a genuine issue of material fact exists” and whether the district court erred in its conclusions of law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). Whether subject-matter jurisdiction exists and the determination of the meaning of statutes relating to subject-matter jurisdiction present legal issues, which this court also reviews de novo. *Wareham v. Wareham*, 791 N.W.2d 562, 564 (Minn. App. 2010).

If a district court lacks subject-matter jurisdiction to address an issue, its judgment relating to that issue is void. *Jinadu v. Centrust Mtg. Corp.*, 517 N.W.2d 84, 86 (Minn. App. 1994), *review denied* (Minn. July 27, 1994). And although generally, the denial of a motion for summary judgment is not appealable, a party may immediately appeal an

order denying a motion for summary judgment based on lack of subject-matter jurisdiction. *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 832–33 (Minn. 1995).

To determine whether the district court properly exercised subject-matter jurisdiction, we begin by examining the exhaustion requirements of FIRREA, Pub. L. No. 101-73 103 stat. 183 (codified in scattered sections of 12 U.S.C.). FIRREA was enacted “to promote ‘the efficient resolution of failed financial institutions.’” *Jinadu*, 517 N.W.2d at 86 (quoting *Fed. Deposit Ins. Corp. v. Shain, Schaffer & Rafanello*, 944 F.2d 129, 131 (3d Cir. 1991)). FIRREA provides “a comprehensive claims review process for claims against the assets of failed banks held by the FDIC as receiver.” *Tri-State Hotels, Inc. v. Fed. Deposit Ins. Corp.*, 79 F.3d 707, 712 (8th Cir. 1996) (citing 12 U.S.C. § 1821(d)(3)–(13)). Under this process, when the FDIC is appointed receiver for a failed bank, the FDIC must mail notice to all of the bank’s known creditors and publish notice that creditors must file their claims by a specified date, not less than 90 days after the publication date. 12 U.S.C. § 1821(d)(3)(B), (C). The FDIC then makes an administrative determination to allow or disallow the claim. 12 U.S.C. § 1821(d)(5)(A)(i). The administrative review process applies to claims asserted with respect to debtors seeking relief, as well as creditors of the failed institution. *Tri-State Hotels*, 79 F.3d at 714.

FIRREA further states:

Except as otherwise provided in this subsection, no court shall have jurisdiction over—

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

12 U.S.C. § 1821(d)(13)(D). Under 12 U.S.C. § 1821(d)(6)(A), state and federal courts obtain jurisdiction over enumerated claims only after they have first been presented under the administrative-review process. *Tri-State Hotels*, 79 F.3d at 712.

We have previously concluded that, “[i]n enacting FIRREA, Congress expressly withdrew jurisdiction from all courts over any claim to a failed bank’s assets that are made outside the procedure set forth in section 1821.” *Jinadu*, 517 N.W.2d at 87. Therefore, “[t]he administrative claims procedure must be followed in any case involving liquidation.” *Id.*

Respondents initially argue that the FDIC’s failure to mail them notice that their claims were subject to the administrative-exhaustion requirement supports the district court’s determination that it had subject-matter jurisdiction to consider those claims. They maintain that, because the FDIC did not mail notice to them, but only published notice, they were not required to submit claims through the administrative-review process. But “[t]here is no statutory provision granting courts jurisdiction if [the FDIC] does not comply with notice requirements.” *Id.* Therefore, respondents’ failure to receive mailed notice from the FDIC regarding the submission of claims does not relieve them of the obligation to follow FIRREA’s claims process. “The *only* statutorily-

specified exemption from the strict requirements of the administrative claims process is provided if ‘the claimant did not receive notice of the appointment of the receiver in time to file . . . [a] claim.’” *Freeman v. Fed. Deposit Ins. Corp.*, 56 F.3d 1394, 1402 (D.C. Cir. 1995) (quoting 12 U.S.C. § 1821(d)(5)(C) (emphasis omitted)). Respondents have not asserted that they lacked notice of the FDIC’s appointment as receiver within the time frame for filing an administrative claim.

Respondents also assert that the FDIC misrepresented to Jane Leverenz that respondents were required to pursue a legal remedy against appellant, rather than follow the administrative-claims process, and this conduct amounted to affirmative misconduct, which operated as an exception to the administrative-review requirement. This argument is based on Jane Leverenz’s affidavit submitted to the district court, in which she stated that an FDIC representative informed her by telephone that she should pursue claims directly against appellant.

We reject this argument for two reasons. First, we conclude that the district court abused its discretion by considering the untimely affidavit and accompanying letter from respondents’ attorney in its denial of summary judgment. *See Am. Warehousing & Distribut., Inc. v. Michael Ede Mgmt., Inc.*, 414 N.W.2d 554, 557 (Minn. App. 1987) (concluding that district court did not abuse discretion by refusing to consider affidavit submitted after summary-judgment hearing). Those documents were submitted nearly six months after the summary-judgment hearing. The district court did not schedule an additional hearing or otherwise allow appellant an opportunity to respond to respondents’ allegations. Appellant moved to strike the affidavit and letter as untimely, but the district

court failed to rule on the motion. The Minnesota Rules of General Practice require that the nonmoving party must respond to a dispositive motion by serving and filing any affidavits and exhibits on the opposing party at least nine days before the hearing. Minn. R. Gen. Pract. 115.03(b). We conclude that, under these circumstances, appellant has shown prejudice from the district court's consideration of the untimely affidavit and letter without affording appellant a meaningful opportunity to respond. *See Bradley v. First Nat'l Bank of Walker, NA*, 711 N.W.2d 121, 128 (Minn. App. 2006) (stating that prejudice is an issue of fundamental fairness and can be "demonstrated by lack of notice, procedural irregularities, or lack of a meaningful opportunity to respond"). Therefore, the district court improperly considered those documents in its summary-judgment ruling.

Second, we conclude that, even if the district court had properly considered the affidavit and letter, their contents would not negate the requirement of exhaustion of remedies. Although it has been suggested that affirmative misconduct by the FDIC may affect the exhaustion requirement in some cases, *Tri-State Hotels*, 79 F.3d at 717 n.14, the allegation that an FDIC representative informed Leverenz by telephone that she should proceed directly against appellant, even if true, would tend to show only negligence, not affirmative misconduct. *See Intercontinental Travel Mktg., Inc. v. Fed. Deposit Ins. Corp.*, 45 F.3d 1278, 1285 (9th Cir. 1994) (stating that FDIC's negligence in failing to mail notice was insufficient to excuse claimant from exhausting administrative remedies); *Sapp v. Fed. Deposit Ins. Corp.*, 876 F. Supp. 249, 253 (D. Kan. 1995) (concluding that claimant was required to exhaust administrative remedies when FDIC

did not intentionally conceal claims deadline). We therefore reject respondents' argument that the FDIC's conduct affected the administrative-exhaustion requirement.

II

Respondents next argue that the district court did not err by concluding that it had subject-matter jurisdiction because, once the FDIC transferred liability for the indebtedness secured by respondents' loans to appellant, exhaustion of remedies was no longer required. *See, e.g., Caires v. JP Morgan Chase Bank*, 745 F. Supp. 2d 40, 50 (D. Conn. 2010) (concluding that, because an agreement between an assuming bank and the FDIC provided that the bank assumed mortgage servicing rights and obligations of the failed bank, related claims were subject to judicial review without administrative exhaustion). But we agree with the majority of federal courts that have examined this issue and concluded that the jurisdictional bar of section 1821(d)(13)(D) operates with respect to certain claims asserted against a successor bank, as well as claims asserted against the FDIC. *See, e.g., Village of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373 (6th Cir. 2008); *Aber-Shukofsky v. JPMorgan Chase & Co.*, 755 F. Supp. 2d 441 (E.D.N.Y. 2010). "Section 1821(d)(13)(D)(ii) refers to 'any claim relating to any act or omission' of a failed institution and does not make its application contingent upon whom the claim is against. . . . Thus, the statutory provision, by its plain language, applies with equal force to a successor in interest to the failed institution." *Aber-Shukofsky*, 755 F. Supp. 2d at 447. Therefore, the issues of whether the successor bank contractually assumed its predecessor's liabilities or whether the FDIC was still acting as receiver have no legal relevance because "plaintiffs cannot claim successor liability and circumvent

FIRREA’s jurisdictional bar and mandatory exhaustion requirement simply by directing claims against the assuming bank that are encompassed by FIRREA’s jurisdictional bar.” *Id.* at 448; *see also Oakwood*, 539 F.3d at 386 (stating that “permit[ting] claimants to avoid [the] provisions of (d)(6) and (d)(13) by bringing claims against the assuming bank . . . would encourage the very litigation that FIRREA aimed to avoid”) (quotation omitted). Thus, the fact that respondents asserted claims against appellant, a successor bank, rather than against the FDIC, does not excuse respondents from complying with FIRREA’s administrative-exhaustion requirements.

III

Our conclusion that the FIRREA exhaustion requirement applies to claims asserted against appellant as a successor bank does not end our inquiry because we must also determine whether that requirement applies to all of respondents’ claims against appellant, or only to certain of those claims. We examine these claims in turn.

Declaratory and injunctive relief

Appellant argues that respondents’ claims for declaratory and injunctive relief are barred by the application of FIRREA. We agree. “An action for declaratory judgment is plainly an ‘action’” within the meaning of 12 U.S.C. § 1821(d)(13)(D)(i). *Nat’l Union Fire Ins. Co. v. City Savings, F.S.B.*, 28 F.3d 376, 385 (3d Cir. 1994). Because Congress has expressly provided that section 1821(d)(13)(D)’s jurisdictional bar applies to “any claim or action” that seeks a determination of rights with respect to assets of a failed institution, requests for declaratory relief fall within that bar. *Id.* at 386.

In addition, a related provision of FIRREA states that “no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as . . . receiver.” 12 U.S.C. § 1821(j). This provision precludes a court from granting injunctive relief if borrowers “seek a declaratory judgment that would effectively ‘restrain’ the FDIC from foreclosing on their property.” *Freeman*, 56 F.3d at 1399. We conclude that this provision prohibits a grant of injunctive relief against a party, such as appellant, who has purchased property from a federal receiver. *See Pyramid Constr. Co. v. Wind River Petroleum*, 866 F. Supp. 513, 518 (D. Utah 1994) (concluding that granting injunctive relief would circumvent statutory language and violate congressional intent of enacting broad scheme to wind up affairs of failed institution). Therefore, to the extent that the district court denied summary judgment on these claims, it erred by doing so.

Assertion of affirmative defenses

Appellant argues that all of respondents’ counterclaims and affirmative defenses are barred for lack of subject-matter jurisdiction. *See, e.g., Fed. Deposit Ins. Corp. v. Updike Bros., Inc.*, 814 F. Supp. 1035, 1040 (D. Wyo. 1993) (concluding that both counterclaims and affirmative defenses are barred “because they seek a determination of rights with respect to the assets of [the failed institution] and they relate to acts of . . . the institution”). But we agree with respondent that the better reasoning is that, although counterclaims are barred, the district court retains jurisdiction over certain affirmative defenses that have not been presented to the FDIC. *Tri-State Hotels*, 79 F.3d at 715; *see, e.g., Resolution Trust Corp. v. Love*, 36 F.3d 972, 977–78 (10th Cir. 1994); *Resolution Trust Corp. v. Schonacher*, 844 F. Supp. 689, 694 (D. Kan. 1994). The reasoning behind

this approach is that “[a]dministrative exhaustion would require [the unreasonable result that] parties, who are not creditors and thus do not receive notice, to present all potential affirmative defenses that they may have to actions by the [FDIC], even though such actions may be unknown and unasserted.” *Love*, 36 F.3d at 977.

But merely labeling a response a counterclaim or affirmative defense is not dispositive. *Schonacher*, 844 F. Supp. at 694. In order to determine whether it has been divested of jurisdiction, a court “must evaluate whether an asserted defense or counterclaim could have been brought against the receiver or the institution independently.” *Id.* If a claim could have been brought independently, exhaustion of remedies is required, and the court lacks jurisdiction to determine that claim. *Id.* Therefore, under this framework, we assess whether respondents’ counterclaims could have been brought independently, so that the district court lacked subject-matter jurisdiction to consider them because respondents failed to exhaust administrative remedies.

Traditional affirmative defenses

Respondents’ defenses of accord and satisfaction, release, duress, estoppel, waiver, statute of limitations, and the statute of frauds operate as affirmative defenses. *See* Minn. R. Civ. P. 8.03 (requiring affirmative pleading of these defenses). In the context of this action, these defenses were asserted only in response to appellant’s allegations of breach of contract and unjust enrichment. Stated otherwise, they could not have been brought—and were not brought—independently. Unclean hands, a traditional equitable defense, was also asserted solely as a defense. Failure to state a claim is also a

defense, which was asserted only in response to appellant's actions for breach of contract and foreclosure. *See* Minn. R. Civ. P. 12.02 (characterizing motion to dismiss for failure to state a claim as a defense). Finally, failure to plead with particularity the failure of performance or occurrence of conditions precedent also operates solely as a defense. Therefore, we conclude that respondents need not have exhausted administrative remedies with respect to these defenses, and the district court did not err by determining that it had subject-matter jurisdiction to address them. *See Schonacher*, 844 F. Supp. at 696 (permitting assertion of affirmative defenses of failure to name or join necessary parties, waiver, estoppel, and failure to state a claim because those claims "have no independent bases").

Causation of damages and modification of contract

On the other hand, respondents' claims for contributory fault and causation of damages by other parties over whom respondents lacked control, although labeled as defenses, would support an independent cause of action for negligence against appellant or Schmidt. Appellant did not assert a tort action against respondents. Similarly, because respondents have not alleged that the loans were modified other than by the alleged loan restructuring with Schmidt, their claim for modification by mutual agreement would form the basis for an independent cause of action for breach of an asserted restructured loan. Because these claims would have been available to respondents independently, they are subject to the exhaustion-of-remedies requirement, and the district court erred to the extent that it determined that it had subject-matter jurisdiction to consider them.

Consumer-protection claims

Because a violation of consumer-protection statutes may support an independent cause of action, absent exhaustion of remedies, such claims are generally precluded under FIRREA. *Cf. Jinadu*, 517 N.W.2d at 87 (concluding that, because plaintiff did not exhaust administrative remedies, district court lacked jurisdiction to determine plaintiff's claims for violations of Minnesota Drug and Alcohol Testing in the Workplace Act). Respondents have alleged TILA and RESPA violations arising out of their loans with appellant. Because these violations could have formed the basis for independent causes of action, and they were not previously unknown to respondents, so that it would be unreasonable to require their submission to the administrative claims process, *Love*, 36 F.3d at 977, we conclude that the district court erred by determining that it had jurisdiction to consider them.

Counterclaims as recoupment

Respondents assert that, even if their claims are characterized as counterclaims, they may properly be cast as recoupment defenses, which are not subject to exhaustion of remedies. Recoupment is defined as the “[r]eduction of a plaintiff’s damages because of a demand by the defendant arising out of the same transaction.” *Molde v. Citimortgage, Inc.*, 781 N.W.2d 36, 44 (Minn. App. 2010) (quotation omitted). Recoupment is distinguished from a counterclaim, which may arise from a separate transaction and allows for recovery in excess of the amount sought by the plaintiff, or a setoff, which involves a transaction unrelated to the plaintiff’s claim. *Household Fin. Corp. v. Pugh*, 288 N.W.2d 701, 704 n.5 (Minn. 1980).

Respondents maintain that their counterclaims asserted in defense of the mortgage foreclosures amount to recoupment because they assert an offset to the mortgage loans. But recoupment is not applicable to an action for mortgage foreclosure when the relief sought by the plaintiff is recovery of the mortgaged property, not damages. *Molde*, 781 N.W.2d at 44. Therefore, recoupment is not available as a defense to appellant's foreclosure action. *Id.* at 44–45. In addition, to the extent that respondents seek damages from the enforcement of an alleged agreement entered by Schmidt, such a claim arises from a separate transaction, and therefore cannot be characterized as recoupment. *Household Fin. Corp.*, 288 N.W.2d at 704 n.5.

We note that, generally, recoupment may be available as a defense to a deficiency action seeking payment on a mortgage loan if foreclosure does not satisfy the loan. But in this situation, even if recoupment might otherwise have been available, because respondents' counterclaims seeking damages fall within the scope of FIRREA's claims process and could have been asserted independently against appellant, they remain subject to the exhaustion-of-remedies requirement. *See Schonacher*, 844 F. Supp. at 695 (stating that a "claim for set-off or recoupment is clearly a claim for payment from the assets of the failed institution, and therefore falls within the scope of Section 1821(d)(13)(D)"); *cf. Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999) (stating in dicta that, under some circumstances, recoupment doctrine might allow assertion of Equal Credit Opportunity Act defense preemptively to avoid statute of limitations). Therefore, respondents' attempt to characterize their counterclaims as

recoupment defenses does not confer jurisdiction on the district court to address those claims.

Summary

We affirm the district court's summary judgment to the extent that it concluded that it had subject-matter jurisdiction over respondents' affirmative defenses of accord and satisfaction, release, duress, estoppel, waiver, statute of limitations, the statute of frauds, unclean hands, failure to state a claim, and failure to plead with particularity the failure of performance or occurrence of conditions precedent. But we reverse the district court's summary judgment relating to jurisdiction to decide respondents' claims of injunctive and declaratory relief, causation of damages by other parties or contributory fault, consumer-protection violations, and modification of the loans as it relates to asserted transactions with Schmidt. We therefore remand for further proceedings relating to those claims over which the district court has subject-matter jurisdiction. Because the lack of mailed notice to respondents is not legally significant, and because appellant was prejudiced by the district court's consideration of the Jane Leverenz affidavit and attorney letter without notice to appellant, we direct the district court on remand to strike those documents from the record.

Affirmed in part, reversed in part, and remanded.