STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1396

Brickwell Community Bank, et al.,
Respondents,

vs.

Wycliff Associates II, LLC, et al.,
Appellants.

Filed April 5, 2011
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Ramsey County District Court
File No. 62CV089627

Jeff C. Braegelmann, Matthew C. Berger, Gislason & Hunter, L.L.P., New Ulm, Minnesota (for respondents)

Patrick W. Michenfelder, Frederick M. Young, Gries & Lenhardt, P.L.L.P., St. Michael, Minnesota (for appellants)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellants, makers and personal guarantors of three defaulted commercial loans, challenge summary judgment granted to respondents, lending bank, and lending bank's

successor-in-interest, that resulted in the dismissal of appellants' defenses and counterclaims asserted in an action by bank to collect on the loans. Appellants assert that (1) material questions of fact exist regarding the application of estoppel to respondents' statute-of-frauds defense to appellants' counterclaims based on oral agreements to lend money; (2) the district court erred by concluding that an obligation to release a mortgage is a credit agreement within the applicable statute of frauds; (3) respondent successor-in-interest bank waived arguments based on 12 U.S.C. § 1823(e); and (4) appellants' claims do not fall within the ambit of 12 U.S.C. § 1823(e), or alternatively, questions of material fact exist making summary judgment based on this statute inappropriate. We affirm in part, reverse in part, and remand.

FACTS

Appellant Joseph Berg is an experienced businessman who formed appellant Wycliff Associates II, LLC (Wycliff) to purchase and lease commercial real estate on Wycliff Street in St. Paul (Wycliff building). In early 2006, Berg also formed appellant Royalston Foods, LLC, d/b/a Royalston Desserts (Royalston), to purchase and operate a business that produced and distributed ice cream pies. The purchase included a building located on Empire Drive in St. Paul (Empire building), out of which the business was operating at the time of the purchase.

Brickwell Community Bank, which had done business with Royalston Desserts before Berg's purchase, actively solicited Berg to continue banking with Brickwell and assured Berg that Brickwell could and would accommodate the business's ongoing need for operating capital.

Berg agreed to finance the purchase of the Royalston business through Brickwell. As security for this loan, Berg granted Brickwell a security interest in equipment owned by Wycliff, a mortgage on the Empire Building, and guarantees from Royalston, Berg, and his wife, appellant Barbara Berg.[1]

From the outset, Royalston had significant need for operating capital. Brickwell initially made the necessary operating funds available by clearing Royalston's overdraft checks that would otherwise be returned as unpaid due to insufficient funds, telling Berg that it would "document[] the loan at a later date."

In the spring of 2007, Berg determined that he needed to upgrade his equipment and move to a larger location than the Empire building to take advantage of other business opportunities available to Royalston. Brickwell agreed to finance Royalston's move to the Wycliff building and the purchase of equipment. Brickwell, on certain conditions, including requiring Royalston to hire Jack Granlund, a financial consultant selected by Brickwell, reaffirmed its promises to finance Royalston's operating-capital needs and, on May 22, 2007, made a $4.5 million commercial loan to Wycliff and Royalston (Loan No. 50588). As security for this loan, Wycliff executed a combination mortgage and a security agreement and fixture-financing statement that, in relevant part, granted Brickwell a second mortgage on the Wycliff building and associated real

[1] Barbara Berg is named in the caption of all documents in this matter and is identified in appellants' answer filed in district court as a defendant in the original suit. Although she is not specifically named in the list of answering defendants, it appears that appellants intend for her to be included in all collective references to defendants and appellants.

property. Loan 50588 was also guaranteed by Royalston, Joseph Berg, and Barbara Berg.

A portion of the proceeds from Loan No. 50588 was used to pay off the initial loan for the purchase of Royalston that should have resulted in Brickwell's release of the mortgage it held on the Empire building. Brickwell, however, for reasons not explained in the record, failed to release the mortgage.

In 2007, based on the financial plan created by Granlund, Royalston needed (1) a standard commercial-mortgage loan in the amount of $2 million to satisfy the first mortgage on the Wycliff Building; (2) a standard commercial loan in the amount of $1 million to satisfy an outstanding tax liability; and (3) a $1 million revolving line of credit for operating expenses. Brickwell promised to immediately extend the needed $4 million and any additional funds necessary to facilitate the operation of Wycliff and Royalston per Granlund's plan. But Brickwell did not immediately complete loan documents. Instead, Brickwell agreed to advance the funds by allowing substantial overdrafts on appellants' accounts until the loan documents were completed.

On August 15, 2007, loan documents were executed between Brickwell and appellants for a $1 million discretionary revolving line of credit (Loan No. 50627). The loan agreement and promissory note were subsequently amended on December 28, 2007, to increase the principal amount of Loan No. 50627 to $2.5 million, and on February 14, 2008, to increase the principal amount to $3 million. Loan No. 50627 was secured to the full-amended amount by a combination mortgage, security agreement, and fixture-financing statement, granting Brickwell a mortgage on the Wycliff Building. The loan

was also guaranteed by Royalston up to the original amount of $1 million and by Berg and Barbara Berg for the full-amended amount.

In October of 2007, Brickwell and Berg discussed Royalston's continuing financing needs. Brickwell assured Berg that a $1 million operating line of credit would be "no problem," but Brickwell required a first-position mortgage on the Wycliff Building as security for such a transaction. Berg then arranged, at some personal expense, to buy out a partner's ownership interest in the Wycliff building and to obtain financing from Brickwell to pay off the approximately $1.9 million balance on the first mortgage on the Wycliff building.

Brickwell presented documentation for a $1 million operating line of credit on or around December 28, 2007. Berg informed Brickwell that the documents did not reflect the parties' agreement because it did not provide for sufficient funds to pay off the first mortgage on the Wycliff property and only provided sufficient funds to pay off the approximately $500,000 in overdrafts that had accrued, leaving only a $500,000 line of credit available. Brickwell told Berg that the documents had been "completed erroneously by mistake," and Brickwell assured Berg that more funds would be made available. Based on the assurances of more funds to come, appellants executed the "mistaken" documents (Loan No. 50738) on February 14, 2008. This loan was secured with a first mortgage on the Wycliff building and fixtures and the personal guaranties of Joseph and Barbara Berg.

Appellants later learned that promised funds were not included in Loan No. 50738 because Brickwell had reached its lending limit with respect to appellants and could not

advance anything further without involvement of a participant lending institution, which Brickwell had not been able to obtain. Brickwell did not disclose this information to Berg.

After appellants signed Loan No. 50738, Brickwell's president and appellants' contact person at Brickwell were both fired. Berg subsequently met with Iver Peterson, appellants' new contact at Brickwell, to discuss the shortfall in the financing under Loan No. 50738. Berg stressed that by April, appellants required the $1 million line of operating credit that they had been promised. Peterson assured Berg that the funds would be available when needed. Meanwhile, Brickwell continued to make the necessary operating funds available to appellants by covering substantial overdrafts.

In April 2008, a newspaper article falsely accused Berg of tax evasion. Brickwell then refused to make additional funds available to appellants, and Peterson finally told Berg that Brickwell had reached its lending limit for appellants and was "cutting off all of the financing to the company," including the practice of covering overdrafts. Appellants were unsuccessful in obtaining financing elsewhere, in part due to Brickwell's failure to release the mortgage on the Empire building. It is undisputed that appellants defaulted on Loans Nos. 50588, 50627, and 50738.

In September 2008, Brickwell sued appellants to enforce the loans and associated mortgages, security interests, and guaranties. Appellants' answer asserted that Brickwell's claims are "barred by the doctrines of material breach, fraud and fraud in the inducement, estoppel, breach of fiduciary duty, unclean hands, duress and undue control and/or influence over [appellants], and because [Brickwell] unlawfully declared one or

more defaults." Appellants also asserted the following counterclaims: (1) fraud; (2) misrepresentation; (3) tortious interference with corporate governance; (4) tortious interference with prospective economic advantage; (5) breach of fiduciary duty; (6) breach of contract; (7) slander of title; and (8) promissory estoppel.

Brickwell moved for summary judgment on September 11, 2009, arguing that appellants' claims are barred by the statute of frauds contained in Minn. Stat. § 513.33 (2010). On the same day, the Federal Deposit Insurance Corporation (FDIC) was appointed to act as receiver of Brickwell, and entered into a Purchase and Assumption Agreement (PA agreement) with respondent CorTrust Bank, N.A. (CorTrust) for CorTrust's purchase of certain assets of Brickwell, including the three loans at issue in this case. Under the PA agreement, CorTrust assumed, in relevant part, "all asset-related offensive litigation liabilities and all asset-related defensive litigation liabilities, but only to the extent such liabilities relate to assets subject to a Shared-Loss agreement, and provided that all other defensive litigation and any class actions with respect to credit card business are retained by the Receiver."

After CorTrust acquired Brickwell, CorTrust, as Brickwell's successor-in-interest, moved to substitute itself as plaintiff in Brickwell's action against appellants with respect to Brickwell's claims against appellants for the defaulted loans. CorTrust, asserting that 12 U.S.C. § 1823(e) (2010) and the unambiguous language of the PA agreement preclude CorTrust's liability for appellants'counterclaims, requested that it not be substituted for Brickwell with respect to those claims. In the alternative, CorTrust requested that summary judgment be granted in its favor with respect to the counterclaims.

At the hearing on Brickwell's summary judgment motion and CorTrust's substitution motion, appellants objected to consideration of issues raised for the first time by CorTrust in an untimely "reply" brief. The parties and the district court discussed the fact that CorTrust was not the proper party with regard to appellants' claims based on Brickwell's failure to release the mortgage on the Empire building. The district court gave the parties additional time to brief the new issues.

After receiving supplemental briefing, the district court issued its order. The district court added CorTrust as a named plaintiff and granted summary judgment in favor of Brickwell and CorTrust, concluding that appellants' defenses and counterclaims are barred under Minn. Stat. § 513.33 and 12 U.S.C. § 1823(e). In an attached memorandum, the district court determined the amounts due under each of the three loans. Judgment was entered on January 15, 2010. Subsequently, an amended judgment was entered, correcting some errors in the prior judgment, dismissing appellants' counterclaims, determining the amount owed to CorTrust, authorizing CorTrust to dispose of certain collateral, and confirming the sheriff's report of the foreclosure sale of the mortgaged property. This appeal followed.

D E C I S I O N

I. Summary judgment standard of review

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary

judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

In this action, it is not disputed that the three loans that are the subject of respondent's action against appellants are in default. What is in dispute is whether appellants have defenses to collection and/or counterclaims to offset collection on the loans.

II. Credit agreement statute of frauds

Minn. Stat. § 513.33 provides, in relevant part, that "[a] debtor may not maintain an action on a credit agreement[2] unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." Minn. Stat. § 513.33, subd. 2 (2010). And the statute specifically provides that, unless an agreement satisfies the requirements of subdivision 2, a creditor's agreement to enter "into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements," does not give rise to a claim that a new credit agreement is created. *Id.*, subd. 3(3) (2010). The district court correctly concluded that Brickwell's oral promises that appellants relied on for advancement of additional funds constitute credit agreements as defined by the statute.

[2] A "credit agreement" is defined as "an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation." Minn. Stat. § 513.33, subd. 1(1) (2010).

III. Doctrine of estoppel as a bar to enforcement of statute of frauds

Appellants argue that the "doctrine of estoppel" precludes the application of the statute of frauds contained in Minn. Stat. § 513.33 to Brickwell's oral promises to lend money to appellants. Generally, equitable or promissory estoppel may take an agreement outside the statute of frauds. *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984).

A. Promissory estoppel

Appellants have not precisely identified whether they rely on promissory or equitable estoppel.[3] The district court discussed only promissory estoppel and relied, in part, on *Greuling v. Wells Fargo Home Mortg., Inc.*, 690 N.W.2d 757, 762 (Minn. App. 2005) (rejecting the argument that promissory estoppel took an oral promise to refinance a home out of the statute of frauds contained in Minn. Stat. § 513.33).

"Promissory estoppel is the name applied to a contract implied in law where no contract exists in fact." *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 283, 230 N.W.2d 588, 593 (1975). Because appellants plainly entered into contracts on the three loans which are the subject of respondents' enforcement action, promissory estoppel is not available as a *defense* to those contracts.

In *Greuling*, we concluded that to allow promissory estoppel to remove an oral promise to extend credit from the application of Minn. Stat. § 513.33 would nullify the statute. *Greuling*, 690 N.W.2d at 762; *Del Hayes*, 304 Minn. at 283–84, 230 N.W.2d at

[3] In their answer and counterclaim, appellants pleaded an affirmative defense of "estoppel" and a counterclaim of "promissory estoppel." At oral argument on appeal, counsel for appellants appeared to equate the elements of promissory and equitable estoppel, but identified equitable estoppel as the type of estoppel asserted by appellants.

594 (noting that many courts have rejected the view that promissory estoppel can remove an oral contract from the statute of frauds because to do so would "likely render the statute of frauds nugatory"). Therefore, insofar as appellants rely on promissory estoppel take their counterclaims out of the statute of frauds, their reliance is misplaced.

B. Equitable estoppel

"Equitable estoppel is a type of equitable doctrine applicable not only to the statute of frauds but also to any of a number of different claims and defenses." *Del Hayes*, 304 Minn. at 285, 230 N.W.2d at 594. The elements of equitable estoppel are as follows:

> 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of . . . said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed . . . . 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon . . . . 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon.

Id. at 594–95 (emphasis omitted) (quotation omitted). In *Greuling*, due to Greuling's failure to raise the issue at trial, we did not reach the argument that equitable estoppel could prevent the application of Minn. Stat. § 513.33. *Grueling*, 690 N.W.2d at 762. And respondents have not called our attention to any authority for the proposition that equitable estoppel is not available as a defense to the statute of frauds.

Appellants assert that the doctrine of equitable estoppel takes Brickwell's oral promises to extend credit out of the statute of frauds, and that they have presented sufficient evidence of the elements of equitable estoppel to make summary judgment inappropriate. As to respondent Brickwell, we agree.

Appellants allege that Brickwell made representations about its ability to advance timely additional credit in the amount needed by appellants to continue Royalston's business, concealing the arguably material facts that it had reached the limit of loans it could extend to appellants without a lending participant and had been unable to find a lending participant. Appellants allege that these facts were known to Brickwell and unknown to appellants, that Brickwell intended to have appellants rely on the representations so that they would continue to borrow from Brickwell, and, as a consequence, when Brickwell failed to extend the promised credit, appellants eventually became unable to conduct business and repay the notes. These assertions raise material fact questions on the applicability of the doctrine of equitable estoppel and application of the statute of frauds against appellants' counterclaims seeking to enforce Brickwell's oral promises for additional credit. Because there are questions of material fact, we conclude that the district court erred by granting summary judgment dismissing appellants' counterclaims against Brickwell based on Minn. Stat. § 513.33. But, as discussed below,

the district court did not err in granting summary judgment to CorTrust on appellants' counterclaims.[4]

IV. Doctrine of part performance not applicable in action at law

Appellants also assert that part performance precludes application of Minn. Stat. § 513.33 in this case. We disagree. The equitable doctrine of part performance does not apply to an action at law for money damages. *See Becker v. Fst Am. State Bank of Redwood Falls*, 420 N.W.2d 239, 241 (Minn. App. 1988). Because appellants are not seeking specific performance, the doctrine of part performance is not applicable.

V. Failure to release mortgage not a credit agreement

The district court's decision does not specifically address appellants' counterclaim based on Brickwell's failure to release the Empire building mortgage. But the district court's dismissal of appellants' counterclaims based on Minn. Stat. § 513.33 implies that the district court considered Brickwell's failure to satisfy the mortgage to be a credit agreement within the scope of Minn. Stat. § 513.33. Appellants assert that the district court erred in granting summary judgment on this claim because failure to release the mortgage is not a credit agreement within the scope of Minn. Stat. § 513.33. We agree.

The mortgage on the Empire building was part of a written loan agreement between Brickwell and appellants and satisfaction of the mortgage on repayment of the loan was an integral part of that transaction. *See Carlson v. Estes*, 458 N.W.2d 123, 127

[4] On appeal, appellants have focused on the viability of their counterclaims and have not analyzed their claims as *defenses* to respondents' action on the defaulted notes. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Therefore we do not address the district court's dismissal of appellants' defenses to the collection action.

(Minn. App. 1990) (holding that an oral promise not to record a mortgage was not an oral "credit agreement," but rather an integral part of a written credit agreement). Nothing in the record supports summary judgment dismissing appellants' claim against Brickwell for failure to release the mortgage on the Empire building. We therefore reverse summary judgment granted to Brickwell on this issue.

But appellants' assertion of this claim against CorTrust is misplaced. The Empire building mortgage was granted in connection with a loan that was not acquired by CorTrust. And CorTrust correctly asserts that it could not release the mortgage or otherwise grant relief for Brickwell's failure to release the mortgage. Even if the district court erroneously applied the statute of frauds to this claim, it did not err in granting summary judgment to CorTrust on this claim because there are no questions of material fact concerning CorTrust's lack of liability on this claim. *See Presbrey v. James*, 781 N.W.2d 13, 16 (Minn. App. 2010) (stating that this court "will affirm a district court's grant of summary judgment if it can be sustained on any grounds").

VI. 12 U.S.C. § 1823(e) as a bar to appellants' claims

A. District court's consideration of CorTrust's reply brief

Appellants assert that the district court abused its discretion by considering CorTrust's arguments under 12 U.S.C. § 1823(e), which were raised by CorTrust in an untimely reply brief. We disagree.

Minn. R. Gen. Pract. 115.03(c) states that a reply memorandum is limited to new legal or factual matters raised by an opposing party's response to a motion. But, to obtain relief from a district court's consideration of an argument raised for the first time in a

reply memorandum, the opposing party must show prejudice. *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).

Here, Brickwell moved for summary judgment on the same day that the FDIC was appointed as its receiver; therefore, the application of 12. U.S.C. § 1823(e) was not reasonably known at the time that the memorandum supporting summary judgment was filed. When appellants objected to the timeliness of CorTrust's reply memorandum to appellants' memorandum opposing summary judgment and its assertion of defenses under 12 U.S.C. § 1823(e), the district court delayed submission of the matter to provide appellants an opportunity to respond to the new argument. Appellants submitted a supplemental memorandum of law addressing the applicability of 12 U.S.C. § 1823(e). On this record, appellants are not able to establish that they were prejudiced by the district court's consideration of the reply brief including the argument under 12 U.S.C. § 1823(e). We conclude that the district court did not abuse its discretion by considering the reply brief and, alternatively, that any abuse of discretion does not justify relief on appeal because appellants were not prejudiced. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

B. Effect of 12 U.S.C. § 1823(e)

Congress enacted the Federal Deposit Insurance Act of 1950, now found at 12 U.S.C. § 1823(e), codifying much of the federal common-law policies discussed in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676 (1942), "to protect bank

examiners and the FDIC and RTC as receivers from covert agreements not appearing in the bank's records, and to encourage prudent lending and proper recordation of banking transactions." *Kessler v. National Enters., Inc.*, 165 F.3d 596, 598–599 (8th Cir. 1998). "In the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Congress broadened § 1823(e) to protect assets acquired by FDIC as receiver for a failed bank." *Kessler*, 165 F.3d at 598. Section 1823(e) provides, in relevant part:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it . . . as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution.
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

The district court correctly recognized that any reliance by CorTrust on *D'Oench* was misplaced because the common-law doctrine expressed in *D'Oench* was preempted by FIRREA. *See DiVall Insured Income Fund Ltd. P'ship v. Boatmen's First Nat'l Bank of Kansas City*, 69 F.3d 1398, 1402 (8th Cir. 1995) (holding that FIRREA, as construed in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994) preempted the common law *D'Oench* doctrine).[5]

[5] CorTrust explained on appeal that it does not dispute that the federal statute preempts the common-law doctrine and that it referred to cases decided under the common-law

The district court concluded that 12 U.S.C. § 1823(e) applies to defeat appellants' claims against CorTrust because the agreements relied on by appellants "are not in writing; were not approved by Brickwell's board of directors; and have not been part of Brickwell's official records." The district court thereby implicitly concluded that the agreements alleged by appellants tend to diminish or defeat CorTrust's interests in assets it acquired from the FDIC.

Appellants argue that, because the oral agreements asserted do not diminish the specific loans acquired by CorTrust, 12 U.S.C. § 1823(e) does not apply to their claims. Appellants rely on *Murphy v. FDIC*, 61 F.3d 34, 36–37 (D.C. Cir. 1995) (distinguishing between claims that diminish the overall value of a bank from claims that diminish an interest in a specific asset and holding that section 1823(e) does not apply to the former). Appellants also rely on *Kessler*, in which the Eighth Circuit Court of Appeals stated that "it is not realistic to apply the bar of § 1823(e) to non-banking transactions or other types of agreements which would not customarily be scrutinized, approved, and recorded by the bank's executive committee or board." 165 F.2d at 599–600 (quotation omitted). But appellants do not explain why or point to any evidence in the district court record to suggest that their claims of oral agreements to extend additional credit constitute a non-banking or other transaction that would not have been subjected to board approval. And the assertion of these claims as defenses to collection of the loans plainly affects the value of the loans to CorTrust.

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doctrine because 12 U.S.C. § 1823(e) codified the *D'Oench* doctrine, making such precedent that interprets and applies the *D'Oench* doctrine useful in applying the terms of the statute.

Appellants counter that, even if 12 U.S.C. § 1823(e) precludes its asserted *defenses* to collection of the defaulted loans, the statute does not preclude those same claims asserted as counterclaims because the counterclaims have no direct effect on the value of the acquired loan assets. But the counterclaims based on oral credit agreements remain unenforceable against CorTrust under Minn. Stat. § 513.33. Appellants concede that they do not have any equitable arguments with regard to CorTrust, and, under the PA agreement, CorTrust did not assume responsibility for Brickwell's conduct that arguably gives rise to a claim of equitable estoppel as to Brickwell. CorTrust assumed liability only for asset-related claims. And, despite appellants' assertion that the unfulfilled oral promises are part of the loans acquired by CorTrust, we conclude that Brickwell's oral promises are not assets acquired by CorTrust.[6] Therefore, the district court did not err by granting summary judgment to CorTrust on all of appellants' counterclaims.

Affirmed in part, reversed in part, and remanded.

[6] And, to the extent that these oral promises could be considered part of the loans acquired by CorTrust, appellants' counterclaims are barred by 12 U.S.C. 1823(e).