

**FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.**

In the Matter of

CORNELIUS CAMPBELL BURGESS,
Individually and as an institution-affiliated
party of

Herring Bank
Amarillo, Texas
(Insured State Nonmember Bank)

Docket Nos.:
FDIC-14-0307e
FDIC-14-0308k

**ORDER DENYING ENFORCEMENT COUNSEL'S
MOTION FOR PARTIAL SUMMARY DISPOSITION**

The Federal Deposit Insurance Corporation (“FDIC”) commenced this action against Respondent Cornelius Campbell Burgess (“Respondent”) on November 21, 2014, alleging that Respondent had abused his position as President and Chief Executive Officer at Herring Bank (“the Bank”) and seeking to remove him from those positions, prohibit him from further participation in the banking industry, and assess against him a \$200,000 civil money penalty. On August 17, 2017, following a hearing before this tribunal, the FDIC Board of Directors (“Board”) issued a removal and prohibition order and \$200,000 assessment against Respondent on the basis that he had “used the Bank’s cash, debit, and credit cards for personal expenses . . . and attempted to appropriate dividends for Bank stock that he knowingly kept off the Bank’s books.”¹

The matter was then remanded and reassigned to a different ALJ on July 19, 2018, after the Supreme Court’s decision in *Lucia v. SEC*.² The Board directed that, upon remand, the

¹ Decision and Order to Remove and Prohibit from Further Participation and Assessment of Civil Money Penalty, *In the Matter of Cornelius Campbell Burgess*, Nos. FDIC-14-0307e & -0308k, 2017 WL 4641701 at *1 (FDIC Aug. 17, 2017).

² 138 S. Ct. 2044 (2018).

reassigned ALJ conduct “a new hearing and fresh reconsideration of all prior actions.”³ The newly presiding ALJ subsequently retired and the undersigned was assigned to the case on November 26, 2019. On April 6, 2020, following the undersigned’s issuance of a Notice of Intention to Conduct Written Hearing, Respondent and Enforcement Counsel for the FDIC (“Enforcement Counsel”) agreed to rely on the testimony and exhibits from the original hearing in this matter so that the new hearing could largely be conducted on the papers rather than in person.⁴ In conjunction with this agreement, Respondent requested, and the undersigned granted, a supplemental in-person hearing to be limited to the issue of whether the FDIC’s actions and charges against Respondent were motivated by bias.⁵

On August 14, 2020, Enforcement Counsel filed a motion for partial summary disposition on the issue of bias (“Motion”),⁶ along with an accompanying declaration and exhibit appendix.⁷ The Motion requests that the undersigned permit oral argument on the Motion. Motion at 3. On September 25, 2020, Respondent filed a response to the Motion (“Response”), along with his “Objections to FDIC’s Declarations as Summary Disposition Evidence” (“Objections”). On September 30, 2020, Enforcement Counsel requested leave to file an omnibus reply to address Respondent’s Response, among other things, which the undersigned granted by Order dated September 30, 2020. On October 8, 2020, Enforcement Counsel filed an “Omnibus Reply” (“Reply”), along with a lengthy Appendix.⁸ As to Enforcement Counsel’s request for oral

³ July 19, 2018 Resolution and Order in Pending Cases (“Resolution and Order”) at 1.

⁴ See April 6, 2020 Joint Letter to ALJ Jennifer Whang at 1.

⁵ See *id.* at 1-2.

⁶ Respondent likewise filed a motion for partial summary disposition on this date, which is addressed in a separate order being issued concurrently.

⁷ The appendix to the Motion includes declarations from fourteen individuals, along with 8 FDIC exhibits, specifically numbers 893 through 901.

⁸ The appendix to the Reply contains the trial transcript for the testimony of Respondent in *O’Chesky v. Herring National Bank*, Case 11-02130-flj (ND Tex. Bankr.).

argument, the undersigned does not find it to be necessary; therefore, Enforcement Counsel's request for oral argument is hereby denied.

Summary Disposition Standard

The FDIC's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."⁹ A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."¹⁰ The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."¹¹ Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."¹² That means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.¹³

Discussion

Enforcement Counsel moves for summary disposition on Respondent's claim that the FDIC's Dallas Regional Office ("DRO") investigated Respondent's conduct at Herring Bank ("Bank") based on the DRO's "disagreement with the Bank's business plan and products and personal animosity towards Respondent," rather than for legitimate regulatory concerns. Motion at 2. Enforcement Counsel asserts that summary disposition is appropriate because there are no

⁹ 12 C.F.R. § 308.29(a).

¹⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹¹ *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (OCC July 10, 2017) ("*Blanton*"), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018) ("*Blanton II*").

¹² *Scott v. Harris*, 550 U.S. 372, 380 (2007).

¹³ *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019) (quoting *Anderson*, 477 U.S. at 248, 255).

genuine issues of material fact. Specifically, Enforcement Counsel asserts that the issue of the DRO's ostensible animosity towards Respondent is not material regarding credibility, because only the credibility of Respondent is at issue. Enforcement Counsel also asserts that there is no genuine issue because Respondent has failed to come forward with sufficient evidence to overcome the government's presumption of regularity. Finally, Enforcement Counsel asserts that even if the DRO did investigate and recommend an enforcement action due to the Bank's business plan and products or personal animus, investigatory bias is not an affirmative or general defense which excuses Respondent's misconduct. Enforcement Counsel contends that the motion for summary disposition should be granted, that the hearing, set for February 2021, should be canceled, and that the undersigned should proceed to resolve the remaining issues in this matter based on the existing record. *See id.* at 2-3.

Enforcement Counsel asserts that there is no direct evidence that the DRO investigated Respondent based on personal animus (*id.* at 22), and addresses the various pieces of circumstantial evidence (*id.* at 23-28). In addition, Enforcement Counsel asserts that Respondent has mischaracterized numerous documents and testimony (*id.* at 28-30), as well as taken documents out of context (*id.* at 30-34).

Respondent asserts that Enforcement Counsel is mischaracterizing its burden on summary disposition and that the burden is in fact on Enforcement Counsel to establish that there are no genuine issues of material fact, which it cannot meet. Response at 1. Respondent points out that Enforcement Counsel presented numerous declarations in support of its motion from witnesses that Respondent has never had the opportunity to cross-examine, and that the declarations themselves raise credibility concerns, which are more fully detailed in Respondent's Objections. *See id.* at 2, 5-6. In addition, Respondent asserts that while the documentary evidence is enough to

raise a genuine issue of material fact, he also has not had a full and fair opportunity to develop evidence, including an opportunity to investigate or cross-examine the witnesses that have submitted declarations. *Id.* at 10.

In its Reply, Enforcement Counsel asserts that the undersigned has now been presented with all the cards on the table to determine whether a supplemental hearing is necessary. Reply at 2. According to Enforcement Counsel, the supplemental hearing would amount to a fishing expedition if Respondent were permitted to cross-examine the witnesses that submitted declarations. *See id.* at 2-3. Enforcement Counsel asserts that partial summary disposition is appropriate here, based on the declarations submitted. *Id.* at 6.

The undersigned finds that summary disposition is not appropriate because genuine issues of material fact remain and that Respondent should be given a full and fair opportunity to present his case at a supplemental hearing, as planned. Accordingly, Enforcement Counsel's motion for partial summary disposition is hereby denied.

SO ORDERED.

Issued: November 16, 2020

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication