1980

Sterling'S Service v. Robert B. Maughan and Candy Maugha : Respondent'S Brief

Utah Supreme Court

George w. Preston; Attorneys for DefendantsRaymond N. Malouf; Attorney for Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

STERLING SERVICES,

Plaintiff, Respondent

SCT #16918

vs.

ROBERT B. MAUGHAN and
CANDY MAUGHAN,

Civil No. 17590

Defendant, Appellant

RESPONDENT'S BRIEF

Appeal from the First District Court

Judge VeNoy Christoffersen

Raymond N. Malouf
MALOUF, MALOUF & JENKINS
21 West Center Street
Logan, UT 84321
Attorney for Plaintiff, Respondent

George W. Preston
HARRIS, PRESTON & GUTKE
31 Federal Ave.
Logan, UT 84321
Attorneys for Defendants, Appellants

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HARRIS, PRESTON & GUTKE
31 Federal Ave.
Logan, UT 84321
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STATUTES CITED

CASES CITED

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The District Court dismissed Defendant's Counterclaim which alleged that Plaintiff violated Utah's Uniform Consumer Credit Code.

RELIEF SOUGHT ON APPEAL

Respondent seeks a confirmation of the District Court's Order of Dismissal of Defendant's Counterclaim.

STATEMENT OF THE FACTS

The Plaintiff owns and operates a service station and grocery store in Garden City, Utah. The Defendants became indebted to the Plaintiff through purchases made on an open account between 1973 and 1977 because they failed to pay for all the goods and services received. The parties had orally agreed that no interest would be charged if the account was kept current, however, since the account had been left

delinquent for so long, the Plaintiff believed he was entitled to the amount of interest printed on some of the sales receipts, 12%. The trial court awarded the Plaintiff principal in the amount of $2,833.19 with 6% per annum interest for 13 months of $184.16, or $3,017.35. Prior to suit, Defendant had paid $3,000, which was applied to the account. The Court dismissed Plaintiff's claim for unpaid rents for use of premises owned by Plaintiff because the limitations period had expired.

The parties also entered into a conditional sales security agreement for a snowmobile executed December 30, 1974 in which the Plaintiff was the Seller and the Defendant was the Buyer. The parties contemplated selling the contract to a bank, but the bank would not accept assignment of the contract and the parties thereafter agreed to certain conflicting terms regarding the agreement. The trial court awarded the Plaintiff $1,300.00 principal still owed on the snowmobile. The Plaintiff asked for the highest interest rate allowable, 18% to be levied on the contract. Since confusion had resulted over the snowmobile contract, the Court found that the contract had been abandoned and had no force or effect. Accordingly, the Court awarded as a judgment in favor of the Plaintiff 6% interest per annum from Janury 25, 1975 to January 25, 1980 or $390.00. This brought the total amount awarded to the Plaintiff for the snowmobile contract to $1,690.00 including principal and simple interest.

The Court dismissed the Defendant's counterclaim, which was based on Plaintiff's alleged violation of Utah's Uniform Consumer Credit Code. This involves a penalty for creditors who contract for and receive a charge in excess of the allowable amount. The Court found as matters of fact that there was no contract and no money was received as a charge

in excess of the amount allowed by the U.C.C.C. The Court explained that just because the Plaintiff stated that a contract existed did not mean that the Plaintiff had contracted for or received payment in excess of the act. Defendant had denied its liability under a contract. Because there was no violation of the U.C.C.C., the Trial Court dismissed Defendant's counterclaim.

POINT I

The Trial Court properly dismissed Defendant's Counterclaim concerning Plaintiff's alleged violation of Utah's Uniform Consumer Credit Code because no contract existed between the parties and no monies were received as a charge in excess of the allowable amount.

If a creditor has contracted for or received a charge in excess of the amount allowed by the U.C.C.C., the debtor may recover a penalty from the creditor (U.C.A. 70B-3-201(4), 70B-5-202). The Trial Court found, as a matter of fact, that no contract existed between the parties. The Court also found, as a matter of fact, that the Plaintiff had not received money as a charge in excess of the amount allowed by the act. Since the U.C.C.C. only governs situations where a contract existed or monies were received as a charge in excess of the allowable amount, it has no application here.

POINT II

The Trial Court properly dismissed the Defendant's Counterclaim as it related to the Plaintiff's alleged violation of the U.C.C.C. for failure to disclose the interest rate charged.

The Trial Court made no finding that Plaintiff failed to disclose. The Court did not find that the Plaintiff should have disclosed any information beyond that which was disclosed. The Court's finding of a failure to disclose is necessary for recovery under this act.

Utah Code Annotated 70(B)-5-203 provides for civil liability for violation of the U.C.C.C. disclosure provisions. This liability or penalty may be equal to the sum of the actual damage sustained by the person. Here the Defendant sustained no actual damages. The Court awarded the Plaintiff the principal sum of money still due him plus interest of 6% per annum. Since Defendant was not hurt in this situation, this provision of the U. C. A. is not applicable. U. C. A. 70(B)-5-203(b)(i) allows for liability of twice the amount of any finance charge used in connection with this situation. The amended Complaint shows that the Defendant's $3,000.00 payment in advance of suit was applied to the principal of the open account. The Court found, as a matter of fact, that no finance charge was collected by the Plaintiff. Since no finance charge was paid, this provision of the U.C.C.C. is inapplicable to this situation. Even if the Court found a finance charge existed, the liability in this section of the U.C.C.C. is not greater than $1,000.00. The Defendant's brief wrongly implies that this sum of money may be greater in this situation.

Defendant's counsel makes an unfair argument in asserting that the $3,000.00 paid was applied to an undisclosed interest charge. In his interrogatories, Defendant asked where the money was applied and the answer was that it was applied on the open account. The matter was thereafter brought to the Court and testimony was to the effect that $3,000.00 was payable towards the account according to whatever scheme the

Court found just. Although the Plaintiff asked that it be applied toward the 12% interest on the open account, the Court found against the Plaintiff on that issue. This does not mean that the interest was applied on an undisclosed interest charge, or that it was improperly implied.

The case of Bill Brown Motor, Inc. v. Crane 589 P2d 708 (Okla. 1978) involves a seller's failure to disclose credit information to a co-signer. The case stands on the principal that if a seller regularly engages in similar credit transactions, failure to disclose credit information will result in a fine or penalty. Plaintiff did not regularly sell snowmobiles. It was not part of his normal business. Defendant attempts to apply Brown to a situation that is not similar. Plaintiff merely asked the Court if he might charge 18% on the snowmobile contract. Plaintiff asked for 12% interest on the open account because some of the sales receipts had 12% printed on them. Plaintiff in good faith, felt he was entitled to interest on Defendant's delinquent account. The Court awarded Plaintiff 6% interest on the entire amount.

The case of Knox v. Thomas 512 P2d 664 (Utah 1973), a disclosure case, is not applicable because it alleged the Defendant failed to calculate the percentage rate and enter it. The reason this case is distinguishable is because there the issue was whether there was a calculation and whether it was entered. The Defendant in his Counterclaim failed to allege or prove any specific items that should have been calculated and entered that were not.

The Oklahoma case on which the Defendant relies and upon which he attempts to write Utah law, Kuykendall v. Malernee, 516 P2d 558 (Okla. 1973) can be distinquished. The case dealt with a situation which started out as a loan of money

and not a consumer or other purchase. The amount of the loan was $600.00 and was repayable in 6 months of $720.00. In fact, the parties post dated a check for $720.00 with which to make the repayment. The interest charge of $120.00 for 6 months was calculated to be about 40% interest. It is not surprising that the Court found the interest rate was clearly in excess of 18%. The Court also found the lender was a pawn broker and went on to actually find that there was a supervised loan. In Kuykendall, the Court made findings of a supervised loan, made a specific finding of a rate of interest, made a finding that there was a consumer loan, and made a finding that the lender was definitely subject to pawn broker requirements of the state of Oklahoma. Moreover, the Oklahoma statute required that loans in the excess of 10% (as compared to Utah's 18%) constituted a supervised loan. The Court also found that the matter was brought within the statute of limitations. Clearly the case is not precedent for the case being considered by this Court. None of the findings of the Oklahoma Court case were found or urged upon the Court. In fact, the allegations were not adequately presented nor was proof offered which would prevent a finding along the same line as was made in Kuykendall.

In our situation, the Trial Court found there was no failure to disclose on the Plaintiff's part. The Plaintiff in good faith felt that he could charge interest because the Defendant had failed to keep the revolving account current and because some of the sales slips had 12% printed on them and bore Defendant's signature or initials. The Plaintiff in good faith felt it was proper to charge interest because of Defendant's failure to keep the account current.

The Defendant's Counterclaim doesn't meet the criteria specified in Utah Code Annotated 70(b)-5-203 which provides for civil liability for violation of the U.C.C.C. disclosure provision:

A. No actual damage was incurred by the Defendant by any of Plaintiff's actions.

B. The Court found that no finance charge was levied by the Plaintiff.

C. Defendant attempts to construe this statute so that it implies that liability on Plaintiff's part, if there were any violation, would be greater than $1,000.

D. Defendant did not make his claim within the one or two year period required by the U.C.C.C.

E. The Court specifically found no contract existed.

Because the fact situation in this case is not applicable to any of the present statutes and because the Court found no failure to disclose on Plaintiff's part occured in this situation, the Trial Court properly dismissed Defendant's Counterclaim.

POINT III

The Trial Court correctly dismissed Defendant's Counterclaim as it related to Plaintiff's alleged attempt to receive excessive interest rates in violation of the U.C.C.C. provisions.

The Trial Court made no finding concerning excessive interest rates being charged by Plaintiff.

The present usury statute for consumer loans in Utah is codified in 70B-3-201, U.C.A. This statute provides the maximum legal rate of interest in consumer loans to be 18% per year if the loan finance charge contracted for and received

does not exceed 1 and 1/2 percent per month. The Defendant failed to allege that the snowmobile contract was for consumer goods, and 70B-5-202 provides that in nonconsumer related transactions the parties may contract for any interest rate. The Court did not make a specific finding as to whether the snowmobile purchase was a consumer purchase or not. Thus, there is not justification for arguing penalties payable under 70B-5-202, as the Defendant did relative to the second paragraph of his Counterclaim. In fact, although the Defendant fails to specify wherein the Plaintiff allegedly violated 70B-5-202, the only possible subpart violated would be subpart (2), and that section, as well as all other sections, provides a one year statute of limitations (or under certain circumstances a 2 year statute of limitations) after which no action can be brought. According to the snowmobile contract admitted and upon which Defendants rely for their Counterclaim, the last payment would have been made 25 months after January 25, 1975. The Counterclaim is dated March 5, 1979, well beyond the period of limitations.

The Defendant rests his entire argument for the Counterclaim on the appearance of the 18.16% interest shown on the face of the alleged contract. That contract is the same the Court found the parties had both abandoned. Nowhere except in the argument does he allege that the Plaintiff actually attempted to enforce the rate of interest. Clearly the Plaintiff attempted to receive 18% interest on the complaint and in the amended complaint but never more than that amount. As the evidence showed, the actual calculation was based on 16.97%. The Plaintiff did not ask for any other interest rate than the highest legal rate and at all times acknowledged and asserted a rate at 18% per annum or less. No evidence showed that the actual rate charged would be 18.16% was either offered or presented or found by the Court. Even if the Court would have found that the Plaintiff received excessive interest rates, the U.C.C.C. would not have applied.

The U.C.C.C. provision 70(B)-2-104 provides for maximum interest charges for consumer related transactions. A consumer credit sale is defined as:

a. The granting of credit by "a seller who regularly engages as a seller in credit transactions of the same kind,"

b. A buyer who is a person other than an organization,

c. The goods and services are purchased primarily for personal, family, household or agricultural purchases, and,

d. The debt is payable in installments.

The Defendant's counterclaim alleged that the Plaintiff attempted to charge interest in excess of that allowed by law. The entire case hinges upon the fact that 18.16% was written on the face of the snowmobile contract. The Defendant simply assumes that the U.C.C.C. provision incorporates the Plaintiff. The statute emphasises that the seller must regularly engage as a seller in credit transactions of the same kind. Plaintiff was regularly engaged in a gas and grocery business in Rich County and did allow some revolving credit accounts, such as Defendants, but he did not attempt to collect an interest rate higher than 12% on such accounts.

> "Distinctions must be drawn between persons engaging in the business of making loans and those who make infrequent loans, for occasional acts of loaning money to accommodate ones customers and friends does not constitute engaging in the business of loaning money." Hammond v. Reeves 552 P2d 1237, 89N.M. 389.

In Hammond the lender was shown to have made 5 small loans. The majority of his business came from a different

source of income. The Court of Appeals affirmed the trial court decision that the lender was not engaged in the business of lending.

As Hammond explains, whether one engages in the business of lending money or credit transactions is to be determined from all the circumstances. A careful examination of the facts shows that the selling of the snowmobile on the Plaintiff's part was a unique situation and that the Plaintiff did not regularly engage in credit transactions of the same kind. Since 70(B)-2-104 applies to those who regularly engage as "sellers in credit transactions of the same kind," it is not applicable to our present situation. Since Defendant's entire counterclaim rests upon the fact that the contract for the snowmobile had 18.16% interest per annum printed on its face it fails because the U.C.C.C. is not applicable in this situation.

In summary, the trial court made no finding of excessive interest rates in this case. The calculations of the amount charged resulted in an actual rate less than the allowable rate provided by the U.C.C.C. No charge was ever received in this case. No compensable harm was incurred by the Defendant, who kept the item without even paying principal until this suit was filed. The U.C.C.C. does not apply to the snowmobile contract. Since the Defendant rested his entire counterclaim on the snowmobile contract, the Trial Court correctly dismissed it.

POINT 4

The Trial Court properly refused to award Defendant's attorney's fees because Defendant failed to show a violation of the U.C.C.C. There is no reason to pay Defendants attorney fees in this matter.

CONCLUSION

The Plaintiff may not have been successful in all he asked for, but he clearly showed that there was more due than had been paid on the open account. He also showed that there was a principal balance due on the snowmobile contract. He disclosed that the interest being charged on the open account was 12% and the full legal rate of 18% on the snowmobile contract. He may not have been successful in all his claims, but he was certainly successful in showing that he was entitled to be paid. The Court ruled on all of the issues and made findings which would foreclose any relief for the Defendant under its Counterclaim. The Court properly dismissed the Defendant's Counterclaim because no violation of the U.C.C.C. occured.

RESPECTIVELY submitted this 18 day of July, 1980.

Raymond N. Malouf, For

MALOUF, MALOUF & JENKINS
Attorneys for Plaintiff, Respondent
21 West Center
Logan, UT 84321