

1971

Peoples Finance & Thrift Company of Ogden, A Utah Corporation v. Michael Doman and Sheryl Doman : Brief of Appellant People's Finance and Thrift Company of Ogden

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PEOPLES FINANCE & THRIFT
COMPANY OF OGDEN, a Utah
Corporation, *Plaintiff-Appellant,*

vs.

MICHAEL DOMAN and SHERYL
DOMAN, *Defendants-Respondents.*

Case No.

50895

12432

BRIEF OF APPELLANT Peoples Finance and Thrift Company of Ogden

Appeal from Second District Court of Weber County
Honorable John F. Walquist

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE APPELLANT DID NOT RELY ON THE FALSE AND FRAUD- ULENT FINANCIAL STATEMENT	5
CONCLUSION	18

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Corporation, *Plaintiff-Appellant,*

vs.

MICHAEL DOMAN and SHERYL
DOMAN, *Defendants-Respondents.*

Case No.
50395

BRIEF OF APPELLANT
Peoples Finance and Thrift Company
of Ogden

STATEMENT OF THE NATURE
OF THE CASE

This is an action brought against the Respondent Michael Doman for fraudulently obtaining a loan from the Appellant by the use of a false and fraudulent financial statement.

DISPOSITION IN THE LOWER COURT

After trial without jury the Court in a memorandum decision held that the Defendant Sheryl Doman was guilty of no fraud, that the Defendant and Respondent Michael Doman was guilty of fraud in that he submitted to Appellant a false and fraudulent financial statement with the intent to deceive the Appellant and obtain said loan; however, the Court found that the Appellant did not rely upon said false and fraudulent financial statement and accordingly judgment was entered against the Appellant.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the finding of the Court of "no reliance" set aside as a matter of law and judgment entered against the Respondent Michael Doman for the relief prayed in Appellant's complaint.

STATEMENT OF FACTS

That on February 2, 1969, the Respondent Michael Doman entered the Appellant's place of business in Ogden, Utah, and requested of Appellant's employee Gene Fessler a renewal of an outstanding loan and an additional amount of \$478.25, which loan with finance charges and other miscellaneous costs totalled \$2,543.76. That at the time Respondent requested said loan Mr. Fessler told him that he would have to fill out a financial

statement, the form for which was supplied to him. The Respondent left the premises, filled out the financial statement and returned the same to Mr. Fessler that afternoon at which time, upon information supplied from the financial statement and from Mr. Doman orally a loan application was completed. (R. 83.) Subsequently, on February 6, 1969, said loan was granted and the proceeds paid accordingly. Shortly thereafter, the Respondent was adjudicated a bankrupt by the United States District Court for the District of Utah and the claims of the Appellant in the sum of \$2,047.76, with interest at 10 per cent per annum from July 15, 1969, and a reasonable attorney's fee as provided by the note of \$425.00 were listed in his schedules for discharge.

The financial statement and the loan application did not contain the following debts which the Respondent had at the time he filled out said documents: Zions First National Bank, \$1,376.06; Thomas Dee Memorial Hospital, \$604.12; Bloch's Clothing Company, \$193.44; and miscellaneous accounts at the Bon Marche, B & B Clothes Store and other retail establishments which miscellaneous open accounts were in the approximate amount of \$500.00. (R. 51-52.) Mr. Fessler advised the Respondent that before a loan could be considered the financial statement and loan application would have to be completely filled out and a credit check made with the Ogden Credit Bureau. (R. 83.) The credit check was made and because of the limited coverage of the Ogden Credit Bureau, the debts in question were not uncovered. (R. 86.) At the time of said transaction Mr. Fessler was

Assistant Manager and Loan Officer of the Ogden branch of Peoples Finance & Thrift Company who's policy and procedure was not to grant any loan whether a renewal or a first loan without a credit check and financial statement, and accordingly, Mr. Fessler required said items from the Respondent. (R. 89.) Mr. Fessler upon the information furnished him by the financial statement, loan application, and oral statements of Respondent filled out the reverse side of the loan application wherein the Respondent's monthly expenses and budget were computed. The Respondent had a net income of approximately \$493.00 per month and had living expenses and payments on obligations which he did disclose totalling \$449.50 per month leaving approximately \$43.50 per month unencumbered, thus presenting a financial picture sufficiently favorable to allow the loan. (R. 62, 63.) However, Respondent's monthly obligations when considered in their entirety with the undisclosed items were substantially more than his income, and had said additional obligations been known to the Appellant the budget analysis would have been unfavorable and the loan could not have been made. (R. 63, 83.) At no time did Respondent divulge the debts in issue to Mr. Fessler. Respondent testified that Mr. Fessler told him he did not have to list his "little open accounts" but that in response thereto Respondent did not list any open accounts. (R. 74.) The Respondent had several business dealings with Mr. Fessler prior to February 2, 1969, who was then working for First Thrift & Loan Company, which company did not require a financial statement.

First Thrift & Loan Company however, had been purchased by Peoples Finance & Thrift prior to the loan in question and a financial statement was now required. In obtaining said loan certain items of personal property were listed as security which Respondent had previously pledged to other creditors, which duplication of security was not disclosed by Respondent to Mr. Fessler. (R. 51.) Mr. Fessler had appraised the property previously when it was pledged as security on a prior loan and did not therefore view it again.

ARGUMENT

THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE APPELLANT DID NOT RELY ON THE FALSE AND FRAUDULENT FINANCIAL STATEMENT.

Appellant recognizes its duty to prove by clear and convincing evidence that a fraud occurred and that the Appellant relied upon the same and was thereby damaged. The trial Court found that Appellant met its burden in regards to proving the wilfull fraud by the Respondent but then holds as follows in its Findings of Fact:

“7. That the Plaintiff, through its agent and employee, Gene Fessler, did not rely upon the fraudulent and false financial statement, by reason of the budget analysis (Plaintiff's Exhibit D), which is unrealistic in that a loan such as that

granted by Plaintiff would not have been requested by Defendant Michael Doman unless his financial problems were severe and that said loan was made by Mr. Fessler in order to increase his loan volume, and the preparation of Exhibit A, the financial statement, was made merely as a personal defense of his actions to the Plaintiff and as an answer in case of Defendant's future bankruptcy."

Such conclusion by the Court was totally unsupported by the evidence. The only persons testifying in this regard were the Respondent and Mr. Fessler. Appellant submits that review of their testimony shows as a matter of law that the Appellant relied upon the financial statement and that the Court erred in concluding otherwise. The evidence on this matter is as follows:

a. On direct examination, Mr. Doman testified as follows:

"Q. Isn't it true at this point, Mr. Doman, that you were in financial trouble at the time you went in Peoples Finance?

A. Definitely.

Q. And, you knew you were on the verge of bankruptcy, did you not?

A. No, I had a good job at the time and we were never in default in any payments.

Q. Well, you and Gene worked out your monthly payments and monthly obligations, didn't you, as to how much you could afford?

A. On this loan?

- Q. Yes.
- A. Yes.
- Q. And, didn't you work is out so you would have a total income of \$493.00, as a total net?
- A. That was about what it was, yes.
- Q. And, then you showed a first item, rent of \$95.00?
- A. Right.
- Q. Food of \$80.00?
- A. Yes.
- Q. Heat and light, water and telephone \$35.00?
- A. Yes.
- Q. Clothing \$20.00?
- A. Yes.
- Q. Transportation and car expenses \$45.00?
- A. (Nodding his head up and down.)
- Q. Showing a total of living expenses of about \$275.00, would that be about right?
- A. (Nodding his head up and down.)
- Q. Answer audibly.
- A. Yes.
- Q. Then you had a car payment of \$32.00?
- A. Yes.
- Q. That was to Commercial Credit?
- A. Yes.
- Q. A payment of \$26.00 to somebody else? It

says S & C payment, do you know who that would have been to?

A. S & C?

Q. Would that have been to Aetna Finance?

A. Yes.

Q. And Peoples Loan payment of \$60.00?

A. Yes.

Q. Which would be on the new contract?

A. (Nodding his head up and down.)

Q. And, the Federal Credit Union for \$56.50?

A. Yes.

Q. All right, now, that totaled up to \$449.50, leaving a balance or a remaining amount free for use of \$43.50?

A. (Nodding his head up and down.)

Q. Now, is that about the way you remember it?

A. That is about the way it was, yes.

Q. All right. Now, isn't it true that had the obligations that we have talked about here today been listed and that you and Gene had talked about that the monthly payments on those items would have been enough that you would have been operating in the hole based on this calculation that we have just talked about?

A. Yes, I'm sure it was.

Q. You knew also, didn't you, if you told him those things, if you told him these facts and that he knew that you would be operating in

the red that he would not lend you that money and work out this loan?

A. Yes, that is true, I'm sure. (Tr. 18-20, R. 61-63.)

b. And on cross examination he reaffirmed the same:

“Q. Answer my question. You say you were robbing Peter to pay Paul, in the application made out here, that is Exhibit D, had you disclosed the information there with the other information disclosed, you would have been in the red?

A. Yes.

Q. You would have been operating on a minus budget, is that correct?

A. Yes.” (Tr. 33, R. 76.)

c. Then on cross-examination while testifying in his own case Respondent stated as follows:

“Q. And, when you approached Mr. Fessler on February 4 to obtain the loan which is in question today, did you, at that time, ask Mr. Fessler if you had to list your open accounts?

A. Yes, I did.

Q. What was his answer?

A. To what I recall, I said, I looked at the things, he said, I need you to fill out this financial statement. That is the first financial statement I had ever filled out. I said, do I have to, this is supposed to include all my

little charge accounts, I am sure 'little' is the word I used, little charge accounts, and he said, no, just your big ones, and I left every charge account out of this.

Q. Did Mr. Fessler give any reason why the loan would not be granted on that date that you returned the financial statement?

A. I remember him telling me that they were being audited at that time, that he was a little over extended and they were auditing just like a bank and it would be a couple days, to check back." (Tr. 53-54, R. 96-97.)

d. On direct examination Mr. Fessler testified:

"Q. And, do you recall having any conversation with him about the financial statement?

A. Other than I gave him one. He was on his lunch hour as has been indicated and I told him I needed this filled out. These were new forms and I would need it filled out in detail and to bring it back and I would need his wife's signature.

Q. To your knowledge, had you ever had him fill out similar documents before?

A. No, let me clarify this. When Peoples First Thrift purchased First Finance and Thrift the new forms were involved. Prior to that time First Finance and Thrift did not use a financial statement.

Q. To your knowledge did Mr. Dowan ever fill out the financial statement to you?

A. No.

Q. Prior to this date?

- A. (Shaking his head horizontally.)
- Q. This is the first time he had presented one to you?
- A. Yes.
- Q. Did you, at any time, tell him that he did not have to list any certain types of debts?
- A. I don't recall ever indicating that, no.
- Q. Can you tell us why you know you didn't say that?
- A. It was the practice of Peoples First Thrift to have all of the information filled out on a financial statement and it was necessary to fill out the obligations as the statement indicated.
- Q. How had this practice been brought to your attention as an employee?
- A. Of Peoples, when I went to work, I stayed with Peoples after they purchased First Finance, I went to Salt Lake for a week to get familiar with their operation. This was in June of 1968. At this time I was told that these forms were to be used and how they were to be used and so forth.
- Q. All right. Now, you gave him a form and then when did he bring it back, do you recall?
- He took it during his lunch hour, the financial statement, when did he bring it back, do you recall?
- A. I think that same afternoon.
- Q. Did you have any discussion with him then concerning the substance of that statement?

- A. No, I don't believe so.
- Q. Did he ever, at any time, tell you that he had obligations that were not listed on that paper?
- A. I don't think I asked him whether he had them or not.
- Q. Why didn't you ask him?
- A. Because I relied on the information that was there.
- Q. Did he ever tell you voluntarily that there were other items not listed?
- A. I don't remember. I can't answer that affirmatively or negatively. I really don't remember.
- Q. Had you ever known at the time this contract was entered into that Mr. Doman had, let's say, thirty-six hundred dollars in obligations having at least \$60.00 more a month to take out of his paycheck, would this in any way have influenced your decision in making the loan?
- A. I couldn't have made the loan because of the company's requirements at that time." (Tr. 39-41, R. 82-84.)
- "Q. Would it have affected this loan that we are talking about had you know he had duplicated security?
- A. Yes.
- Q. Now, there has been some mention here of a credit check being run. Let me mark this as an Exhibit.
- Plaintiff's Exhibit E. Tell us what this yel-

low paper is. (Whereupon, Plaintiff's Exhibit D & E marked for identification.)

A. This is a credit clearance statement wherein, when a loan applicant comes in we take the information on the loan application, then we check the man's credit to see if it is approved, if he pays his obligations and so on.

Q. All right.

Q. When you make the check with the Credit Bureau, is there any way that obligations that are not disclosed to you will come up automatically, to your knowledge, through this credit check?

A. No. Not unless that company had previously called the credit bureau and put their information on file there.

Q. And, had that occurred with any one of Zions First National Bank, Blocks, or the insurance company, or the Dee Hospital, in this credit check?

A. Not in this credit check.

Q. So from your credit check, was there anything?

A. Let me indicate that the credit check reflected there had been a credit of \$35.00 on February 4, 1969 and the February credit check showed that account had been paid in full.

Q. So there was nothing in the credit check that indicated the other obligations that we have enumerated?

A. No.

Q. All right. So I take it you went ahead and made the loan not knowing the existence of the obligations we have discussed?

A. Right." (Tr. 42-45, R. 85-86.)

"Q. Now, what generally, what was your procedure when you were working for this company in extending a loan, would you look at a financial statement and call them back in several days later and say they could have the loan or how was it generally done?

A. Which company, Peoples First Thrift?

Q. This is Peoples Finance and Thrift Company?

A. The procedure there was to take a loan application, to have a financial statement filled out, to make an appraisal slip, if there was collateral involved, get all the information possible to proceed to grant a loan.

Q. This is an initial loan?

A. Yes.

Q. What about a loan for extending the present loan that you already had with the person?

A. The same procedure under Peoples.

Q. The same procedure?

A. Yes. Treating each application as a new loan is their policy.

Q. Is there any reason why you told Mr. Doman that you couldn't get him a loan on the 4th of February 1969 but could on the 6th, two days later?

A. The possibility that the bank commissioner

was there auditing which was an annual thing, I am not sure that is when he was there.

Q. Were you concerned about this type of loan going through because of Mr. Doman's financial condition?

A. No.

Q. Could there have been a possibility that you could have granted the loan on that date because of your past dealings with Mr. Doman?

A. The only reason for the delay would have been because our loan cards and our books were tied up in audit procedure.

Q. From your direct testimony in answer to direct examination of Mr. Wilcox, you have stated that you never did on any occasion tell Mr. Doman that he would not have to list all of his open accounts? Is this correct?

A. It is the only time that he had been required to list his debts and there was no mention at this time." (Tr. 45-46, R. 88-89.)

"A. As I indicated before, under the Peoples First Thrift policy it was necessary to check out each applicant as a new loan, however, I will indicate that his past credit experience was good and that there was no question in my mind that his credit was good, but I still had to go through the procedure, the loan application, the budget analysis, and work out the mechanics of a loan based as though he were a new customer." (Tr. 50, R. 93.)

The above quotations constitute the applicable evidence to the issue of nonreliance. There simply is no con-

tradictory evidence that could lead one to believe that the Appellant did not rely upon the financial statement. The reasons given by the Court to support its conclusion of no reliance must fall one by one for complete lack of evidentiary support. The Court first of all concludes that the budget analysis on the loan application was unrealistic as written, that Fessler knew that there were other obligations not therein listed. This is pure conjecture. The budget analysis in the loan application encompasses all obligations which were known by Mr. Fessler and left an unobligated balance of \$43.50 per month after deducting debts and reasonable living expenses such as food, rent, clothing, etc. The financial condition of the Respondent depicted therein certainly is not such that would lead one to infer that the Respondent was near bankruptcy, but reflected a need for the loan in question. If anything, the budget analysis induced Mr. Fessler to grant the loan and as both he and the Respondent testified, had the non-disclosed items been reflected in the budget analysis, the loan would not have been granted. Even assuming that Fessler told the Respondent that he did not have to list the little open accounts, such would have no effect upon the reasonableness of the budget analysis inasmuch as such miscellaneous expenses would reasonably be absorbed out of the unobligated balance of \$43.50. The Respondent admitted that such conversation applied only to "little open accounts" but that he did not list "any open accounts" whether large or small knowing that the effect of such disclosure would kill the loan. Nowhere does the Respondent produce any evidence that

Mr. Fessler did not fully and completely rely upon the budget analysis and the information gleaned therein from the financial statement.

The second conclusion by the Court is that the loan was made by Mr. Fessler to increase his own loan volume and that the financial statement was required of Mr. Doman merely to protect Fessler in case of the Respondent's future bankruptcy. In effect, the Court concluded that Fessler knew Doman was in severe financial straits, that he would be taking out bankruptcy and nevertheless loaned him new money. This conclusion is not supported by any evidence. Mr. Fessler never wavered in his testimony that he did not know of the undisclosed obligations; that he granted the loan based upon the favorable budget analysis and the financial statement. At no time in the trial was there ever any mention of Mr. Fessler's loan volume, whether there was any advantage to him in a loan volume or any other aspect of that matter. Doman in his testimony never claimed that Fessler knew of his desperate situation, in fact, he repeatedly eluded to the fact that Fessler considered him a good credit risk from prior dealings. Respondent at no time propounded the thesis that Fessler was acting for his own benefit. Respondent's only defense apparently was that because Fessler knew Doman and considered him a good credit risk that there was no reliance on the financial statement. This the Court rejected and properly so since the evidence conclusively shows that despite said good feelings between Fessler and Doman, Fessler nevertheless required the financial statement, a credit check and a bud-

get analysis. We are thus left with the Court's concluding without evidence conduct and intent on the part of Mr. Fessler which was never in issue nor alleged by the Respondent.

At most, the Respondent has shown only that Mr. Fessler was a friendly, and accommodating loan officer which fact in no way detracts from the overwhelming evidence that Fessler did not know of the undisclosed items, that he required a favorable budget analysis, financial statement, and credit report and that without such the loan would not be granted.

CONCLUSION

Appellant respectfully submits that the Court must find that the trial Court was in error in concluding that the Appellant did not rely on the false and fraudulent financial statement, that in fact Appellant did rely upon the same and that as a result thereof, it has been damaged in the amount of \$2,543.76, plus interest and attorney's fees.

Respectfully Submitted,

Draper, Sandack and Saperstein
By L. Brent Wilcox