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Peoples Finance & Thrift Company of Salt Lake City v. Wayne T. Blomquist : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

PEOPLES FINANCE & THRIFT
COMPANY OF SALT LAKE
CITY, a Utah corporation,

Plaintiff-Respondent,

vs.

WAYNE T. BLOMQUIST,

Defendant-Appellant.

1964

Clerk, Supreme Court, Utah

No.
10106

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
for Salt Lake County
Honorable A. H. Ellett, Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff industrial loan corporation on a note and chattel mortgage which defendant claims is usurious because of a provision in the note and mortgage for payment of reasonable attorneys fees in the event of default.

DISPOSITION IN LOWER COURT

The Court granted plaintiff judgment as prayed and awarded reasonable attorneys fees.

STATEMENT OF FACTS

Plaintiff-Respondent, hereinafter referred to as plaintiff, a Utah industrial loan corporation, commenced a foreclosure suit upon a note secured by a chattel mortgage, admittedly in default, to collect the unpaid amount due under said note and mortgage, together with interest, costs and reasonable attorneys fees. (R. 1-4). After suit was commenced, defendant-appellant, hereinafter referred to as defendant, tendered all sums owing with the exception of attorneys fees. Plaintiff accepted said tender upon the parties entering into a stipulation agreeing that the sole issue to be determined is whether or not a Utah industrial loan corporation may contract for and recover reasonable attorneys fees in the event of default in payment by the borrower. (R. 13, 14).

ARGUMENT

POINT I. UTAH INDUSTRIAL LOAN CORPORATIONS MAY CONTRACT FOR AND RECOVER REASONABLE ATTORNEYS FEES IN THE EVENT OF DEFAULT IN THE PAYMENT OF A LOAN.

Defendant, upon executing a note and chattel mortgage, agreed to pay all costs incurred by plaintiff in collecting or attempting to collect the note and chattel mortgage, including a reasonable attorneys fee. (R. 3). The general Utah interest statute is set forth at Title

15, Utah Code Annotated, 1953, entitled, Contracts and Obligations in General, and Title 15-1-2 provides:

“Maximum rates.—The parties to any contract may agree in writing for the payment of interest for the loan or forbearance of any money, goods or things in action, not to exceed ten per cent per annum, provided:

(a) That a loan or any renewal thereof except a loan made under subsection (g) may specifically provide for a service charge, which charge shall not exceed four per cent of the principal sum of said loan; such service charge shall not be subject to any additional charge or interest;

(b) That a loan may provide for reasonable collection costs and for a reasonable attorney’s fee in the event of default or delinquency;

* * * *

(d) That licensees under the Utah Small Loan Act may contract for and receive interest at the rates and subject to the limitations provided in chapter 10, Title 7, Utah Code Annotated 1953;

(e) That credit unions may contract for and receive interest and charges at the rates and subject to the limits contained in chapter 9, Title 7, Utah Code Annotated 1953;

(f) That industrial loan corporations may contract for and receive interest and charges at the rates subject to the limitations contained in chapter 8, Title 7, Utah Code Annotated 1953;

(g) That any corporation, except small loan licensees, operating under the supervision of the state banking department of Utah, and any national bank or federal savings and loan associa-

tion doing business in the state may add to or deduct in advance from the proceeds of any loan repayable in installments over a period of not more than 63 months and not exceeding \$5,000.00 in principal amount, interest or discount at a rate not exceeding seven per cent per annum upon the principal amount of the loan for the entire period thereof; provided, however, such amount added on or discounted shall be computed in accordance with rate charts yielding the lender interest which shall not exceed 14% per annum. Provided further, the debtor may satisfy in full the indebtedness of any installment date before its final maturity and in so satisfying said indebtedness, shall receive a refund credit of unearned interest or discount computed in accordance with such reasonable formula based upon recognized commercial practice as the state banking commissioner shall, by regulation prescribe; provided further, that where the amount of such refund credit would be less than \$1, no refund need be made."

Chapter 8, Title 7, Utah Code Annotated, 1953, as amended, as referred to in Section (f) above, provides:

"General powers.—Every industrial loan corporation shall have power:

(1) (a) To lend money and contract for and receive charges not exceeding the charges authorized by paragraphs b, c, and d of this subsection subject to compliance with all applicable provisions of this chapter. Every loan contract made under this section may provide for repayment in a single payment or installment payments. Charges may be added to the principal of the loan and included in the face of the loan contract.

(b) To charge interest for the full term of the loan computed on the original amount of the loan (excluding charges) at the rate of 1% or less per month on that part of the loan not in excess of \$2,000.00 and at the rate of $\frac{3}{4}$ of 1% per month or less on that part of the loan in excess of \$2,000, but not in excess of \$5,000.00, without regard to any requirements for installment payments (subject to the refund for prepayment in full as set forth in paragraph d).

(c) To charge a fee of \$2.00 or less on loans of \$100.00 or less and not to exceed 2% or \$20.00, whichever is smaller, on loans in excess of \$100.00 for expense incurred by it in examining and investigating the character and circumstances of the borrower. In no event shall the fee charged exceed the actual expense incurred by the corporation. Said fee shall not be assessed by the same company to the same borrower more often than once in six months, except that upon any new loan or renewal made to such a borrower after sixty days, then the fee may be charged and collected on that portion of the subsequent loan not used to pay any portion of the prior loan, provided that no fee shall be charged or collected unless a loan shall have been made.

(d) The debtor may satisfy in full the indebtedness on any installment date before its final maturity and in so satisfying said indebtedness, shall receive a refund credit of unearned interest or discount computed in accordance with such reasonable formula based upon recognized commercial practice as the state banking commissioner shall, by regulation prescribe; provided further, that where the amount of such refund credit would be less than \$1.00, no refund need

be made. No refund shall be required for any partial prepayment.”

Title 7-8-4, UCA 1953 provides:

“Utah Business Corporation Act applicable. —In addition to the powers enumerated in the preceding section, every such corporation shall have the general powers conferred upon corporations by the Utah Business Corporation Act, and shall be governed by the provisions of said act, except as otherwise provided herein.”

It should be noted at the outset that an industrial loan corporation may loan money by reason of the provisions of 15-1-2 at a rate not to exceed ten percent per annum, or by reason of the provisions of 15-1-2(g) at a rate not to exceed fourteen per cent per annum, or by reason of the provisions of 7-8-3(b) at a rate not to exceed one percent per month, discounted in advance. Clearly, a loan under the provisions of 15-1-2 or 15-1-2(g) may provide for reasonable collection costs and for a reasonable attorneys fee in the event of default or delinquency, as set forth in paragraph (b) of 15-1-2.

It is also apparent that attorneys fees may be claimed in a foreclosure proceeding by reason of Title 78-37-9, Utah Code Annotated, 1953, provided the fees are reasonable. As this action was commenced as a foreclosure proceeding, perhaps the trial court's award of attorneys fees can be supported by this statute.

The real issue, however, is whether or not the provisions of 7-8-3 contains “limitations” prohibiting the collection of reasonable attorneys fees, as clearly a loan

may provide for attorneys fees unless 15-1-2(f), which states that, "industrial loan corporations may contract for and receive *interest and charges* at the rates subject to the *limitations* contained in Chapter 8, Title 7, Utah Code Annotated, 1953," implies that attorneys fees are to be considered "interest and charges". It will be noted immediately that the only limitations contained within 7-8-3 are with respect to *charges* as those *charges* are defined in paragraphs (b), (c) and (d) of that statute. Paragraph (b) speaks only of the charge for interest. Paragraph (c) speaks only of the charge for investigating the character and circumstances of the borrower, and paragraph (d) speaks only of a mandatory refund of unearned interest. It further clearly contemplates that *charges* are items that are determinable at the time the loan is made, and that, "charges may be added to the principal of the loan and included in the face of the loan contract." *Peoples Finance & Thrift Co. v. Varney*, 75 Utah 355, 285 Pac. 304; *Seaboard Finance Co. v. Wahlen*, 123 Utah 529, 260 P.2d 556. Thus, "charges" must be determinable items in precise dollar amounts at the time the loan is made. There are absolutely no provisions in the entire title prohibiting industrial loan corporations from assuring that the note will be paid when due and from preventing loss in the event of default with respect to attorneys fees incurred in attempting to enforce the provisions of the note. The only forbidden acts in the statute are set forth in Title 7-8-5, none of which are remotely connected with the issue of attorneys fees. It would seem, therefore, that it can

be stated with certainty that Title 7, Chapter 8, contains no limitations with respect to the charging of attorneys fees in the event of default.

It should be noted that in *Seaboard Finance Co. v. Wahlen*, supra, and *National Finance Co. v. Valdez*, 11 Utah 2d 339, 359 P.2d 9, attorneys fees were sought by the two industrial loan companies in question, and though the issue on appeal did not directly deal with the attorneys fees, this court impliedly validated the claim for same.

To blandly conclude, as respondent does, that because the statute limits interest and charges for investigating credit that we need only apply a Latin maxim that everything else under the sun is accordingly excluded, is absurd. This conclusion would prevent industrial loan corporations from claiming court costs, as the right to claim court costs comes from a separate statute, just as the right to contract for attorneys fees does.

Other than as limited by express statutory provisions of loan statutes, provisions for the payment by the borrower of expenses of collection in the event of default are commonly sustained. While the lender has no right to exact more than the legal rate of interest and charges, he may impose such conditions as will enable him to receive the principal of the loan without further loss or expenses occasioned by the default of the borrower. 55 Am. Jur., Usury, Sec. 70, p. 372. Hence, a stipulation that the borrower will pay attor-

neys fees incurred in collecting a note not paid at maturity is not usurious so long as the fee agreed upon is reasonable. *Fowler v. Equitable Trust Co.*, 141 U.S. 411, 35 L.Ed. 794, 12 S. Ct. 8.

The recovery of attorneys fees in the event of default is no new or additional compensation for the use of the money involved, but a provision simply against possible future loss or damage which can only result as a consequence of the neglect or default of the borrower. See annotation L.R.A. 1915B 944.

The Restatement of Contracts, Sec. 526, defines a usurious bargain as:

“A bargain under which a greater profit than is permitted by law is paid, or is agreed to be paid to a creditor by or on behalf of the debtor for a loan of money, or for extending the maturity of a pecuniary debt, * * * ”

Section 528 of the Restatement of Contracts provides:

“A bargain accompanying and collateral to a bargain for a loan of money or for extending the maturity of a pecuniary debt, if providing for only a fair equivalent to the creditor for the consideration that he gives, is not taken into account in computing the creditor's profit, in order to determine whether the bargain for a loan or an extension is usurious, unless his intention is to secure a greater profit for the loan or extension than is allowed by law.”

Section 533 of the Restatement of Contracts, provides:

“Payments made by a borrower to the lender for expenses incurred, or for services rendered in good faith in making a loan or in obtaining security for its repayment are not included in determining whether the loan is usurious, but payments made to the lender or from which he derives an advantage if they exceed the reasonable value of services actually rendered are included.”

It becomes apparent that attorneys fees incurred in collecting a delinquent note are not included within the scope of usurious consideration to the lender. The lender makes no profit or illegal gain by requiring the borrower to pay the expenses of collecting a defaulted, otherwise lawful, bargain.

This Court in *Mathis, et al. v. Holland Furnace Co.*, 109 Utah 449, 166 P.2d 518, in line with the decisions from other jurisdictions and the principles set forth in the Restatement of Contracts, concluded that a provision in a note for interest after maturity on the entire balance at the highest lawful contract rate, and for fifteen per cent of the principal and interest of the note or, at the option of the holder, a reasonable sum as attorneys fees, did not violate the usury statutes.

It becomes apparent, therefore, that usury is not the issue herein in any respect, but the issue, if any, is one of statutory construction in determining if the legislature intended to prohibit, beyond the realm of usury laws, industrial loan companies from claiming attorneys fees when incurred.

It is interesting to note that the Utah Industrial Loan Act was first adopted in 1925 as Chapter 116, 1925 Session Laws of Utah. Industrial loan companies are distinguishable from small loan institutions in that they are usually not limited to loaning small sums of money, and also may receive deposits and pay interest on deposits, somewhat in the same manner as commercial banking institutions. The Act remained substantially the same until 1955, when the legislature by the Laws of Utah, 1955, reduced the interest allowed, provided for a maximum amount of an industrial loan, and established a thirty-seven month limitation on the term of industrial loans. This Act was entitled,

“An Act Amending 7-8-3(1) and 7-8-5(1) Relating to the Interest to be Charged by Industrial Loan Corporations, the Refunds to be Made in Case of Repayment, and Limit of Time and Amount of Such Loans.”

The amendment in no manner purported to extend to anything other than (1) interest; (2) refunds of interest; and (3) limit of time and amount of loans. By the 1955 amendment, for the first time, the words, “*charges not exceeding* the charges authorized by paragraphs (b), (c) and (d),” appear. It is apparent nevertheless that the legislature was seeking to limit interest only. In view of the fact that industrial loan corporations have been in operation since 1925 and have continuously since that time, with the blessings of the bank commissioners, contracted for attorneys fees in the event of default, surely if the legislature intended to

change such practice, an express provision prohibiting attorneys fees would have been included within the 1955 amendment.

It is a fact that “small loan companies” in Utah, as distinguished from “industrial loan companies,” have historically not included within their notes provisions for attorneys fees in the event of default. There appears to be no express statutory prohibition even with respect to small loan companies claiming attorneys fees, but in any event, it should be observed that the small loan statute is quite different and much more restrictive than the industrial loan statute. Title 7-10-2(a) provides:

“No person shall engage in the business of lending in the amount of \$600.00 or less and contract for, exact, or receive, directly or indirectly, * * * any charges whether for interest, compensation, consideration or *expense*, which, in the aggregate, are greater than the interest * * * provided for herein.” (Emphasis supplied).

Title 7-10-3 sets forth the interest at three percent per month and subdivision (c) provides:

“In addition to the charges herein provided for, no further or other amount whatsoever shall be directly or indirectly charged, contracted for or received.”

No general corporate powers are given small loan companies as are given industrial loan corporations.

It can be seen immediately that the statute not only limits interest and the charges for investigating credit,

but any "expense" or "any other amount whatsoever, directly or indirectly, charged, contracted for or received." Even assuming that the legislature intended to prohibit attorneys fees as to small loan companies, Title 7-10-2(b) provides, however, that this act shall not apply to industrial loan corporations, and perforce, the legislature intended to exclude industrial loan corporations from the provisions of the small loan legislation.

Small loan statutes as distinguished from industrial loan statutes in many jurisdictions expressly limit the expenses the borrower may be required to pay, including attorneys fees. 55 Am. Jur., Usury, Sec. 85, 86, p. 382. Other than as limited by these express statutory provisions with respect to small loan statutes, however, provisions for the payment by the borrower of attorneys fees are commonly sustained even with respect to small loan legislation. 55 Am. Jur., Usury, Sec. 70, p. 372; annotation at 143 A.L.R. 1327. For example, in *Mason v. City Finance Co.*, 113 Fla. 73, 151 So. 521, a small loan act provided that interest might be charged at the rate of not to exceed three and one-half percent per month, and that in addition to the interest, "no further or other charge or amounts whatsoever for any examination, service, brokerage, commission or other thing or otherwise should be directly or indirectly charged, contracted for or received," and the court held that the statute did not prohibit an agreement for reasonable attorneys fees incurred after default. And, in *Walker v. Peoples Finance & Thrift Co.*, 45 Ariz. 226, 42 P.2d

405 (incidentally, no connection with plaintiff herein—an Arizona small loan company as distinguished from plaintiff industrial loan company), where the statute provided that “loans might be made at a rate not exceeding three and one-half percent per month inclusive of all charges incident to making the loan,” the court sustained a provision for attorneys fees in the event of default.

Even where the note provides for attorneys fees to be measured by a percentage of the face amount of the note, the courts unanimously hold that such stipulations are valid if reasonable. See annotation at 17 A.L.R. 2d 297; *Mathis, et al v. Holland Furnace Co.*, *supra*.

A careful search has been made of the statutes of every jurisdiction of the United States, and it has been determined that Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, Tennessee, Virginia, Washington and West Virginia have industrial loan statutes comparable to the Utah Act. Of these states, California, Colorado, Georgia, Hawaii, New York and Tennessee make specific provision in the statute for reasonable attorneys fees. The remaining eighteen statutes are silent, and it can be stated with some confidence that not a single case from any of these eighteen jurisdictions has construed the statutes to prohibit the inclusion of attorneys fees.

The statutory construction sought by respondent would not only prohibit industrial loan companies, but credit unions and perhaps commercial banks, from charging attorneys fees in the event of default, as the authority for these institutions to charge greater than the ten percent per annum rate of interest also comes from special legislation, silent as to any prohibition with respect to attorneys fees.

CONCLUSION

It is respectfully submitted that the trial court properly awarded plaintiff judgment for reasonable attorneys fees incurred by reason of defendant's default, and that said judgment should be affirmed.

Respectfully submitted,

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Dated: July 27, 1964.