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Beehive Security Thrift and Loan v. John T. Hyde et al : Brief of Appellant

Utah Supreme Court

William G. Fowler; Attorney for Appellant;
John G. Marshall; J. Reed Tuft; Attorneys for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

BEEHIVE SECURITY THRIFT & LOAN, a Utah corporation,

Plaintiff and Appellant,

vs.

JOHN T. HYDE and MARY C. HYDE, his wife, KERMIT R. ESKELSON, LARSON PAINTING COMPANY, and UNITED STATES OF AMERICA,

Defendants and Respondents.

No. 10232

APPELLANT'S BRIEF

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

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff to declare a promissory note in default and foreclose a mortgage. Defendants, Kermit R. Eskelson and John T. Hyde, counterclaimed asserting the loan was usurious.

DISPOSITION IN LOWER COURT

At pretrial, the Honorable A. H. Ellett ruled as a matter of law that the promissory note in favor of appellant, Beehive Security Thrift & Loan, violated the usury laws of the State of Utah and, that the mortgage note and mortgage are in default and entitled to be closed.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order granting respondents' counterclaim that the note is usurious.

STATEMENT OF FACTS

Appellant, Beehive Security Thrift and Loan, a Utah corporation, is a licensed industrial loan corporation. On or about April 18, 1961, John T. Hyde and Kermit R. Eskelson executed and delivered to Beehive Security Company, now known as Beehive Security Thirft and Loan, a mortgage note, and John T. Hyde and Mary C. Hyde executed and delivered a real estate mortgage to secure the payment of said mortgage note. The note was in the principal amount of $7,128.00, representing cash loaned of $5,000.00, life insurance of $484.71, recording fees of $20.00 and a setting up charge of $1,603.29.

This action was commenced by Beehive Security Thrift and Loan to foreclose on its note and mortgage executed by Eskelson and the Hydes.

Payments totaling $694.00 were made by John T. Hyde, after which he defaulted on the loan.

The Honorable A. H. Ellett, at pretrial, ruled as a matter of law that the loan was usurious; and, that interest may not be charged by an industrial loan company on a loan in excess of $5,000.00. The trial court determined that of the total sum paid, $539.24 should be credited as principal, and the balance to interest, resulting in a tripled amount of $464.28. Attorney fees were assessed against appellant in the sum of $141.00, resulting in a net set-off of $1,144.52, and judgment of $3,855.48.

ARGUMENT

POINT 1. AN INDUSTRIAL LOAN COMPANY CAN CHARGE INTEREST ON A LOAN IN EXCESS OF $5,000.00.

Interest charges for industrial loan corporations are regulated by Section 15-1-2 and Chapter 8, Title 7, Utah Code Annotated, 1953, which provide as follows:

Section 15-1-2:

> "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 percent per annum; provided:

"(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;"

Section 7-8-3:

"Every industrial loan corporation shall have power:

* * * *

"(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 note in excess of $2,000.00 and at the rate of ¾ of 1% per month or less on that part of the loan in excess of $2,000.00, but not in excess of $5,000.00, without regard to any requirement for installment payments, (subject to the refund for prepayment in full as set forth in paragraph d)."

The issue presented by this appeal is a question of first impression with this Court. Moreover, the issue has never been decided by any court.

As a basic premise, it would seem that there is no question but what an industrial loan corporation may loan in excess of $5,000.00 to any one person. The only restriction as to the amount of loans to any one person is contained in Section 7-8-5, Utah Code Annotated, 1953, which provides as follows:

"No such corporation shall:

* * * *

"(2) Hold at any one time the obligation or obligations of any one person aggregating more

than five precent of the amount of its paid up capital and surplus."

Since the Utah Code permits an industrial loan company to lend in excess of $5,000.00 to any one person ,the issue is squarely, Can the industrial loan corporation collect interest on that portion of the loan in excess of $5,000.00?

The code provision, Section 15-1-2, Utah Code Annotated, 1953, sets the maximum interest rate which may be charged by lenders generally, and in addition permits a greater rate to be charged by industrial loan corporations. Section 7-8-3, Utah Code Annotated, 1953, permits the industrial loan corporation higher rates up to $5,000.00, but in no way purports to deny interest to lenders who loan in excess of $5,000.00 to any one person.

This question has been presented to the Attorney General of the State of Utah, and an opinoin was expressed by his office to the effect that a loan could be made in excess of $5,000.00 and interest at the maximum legal rate as provided in Section 15-1-2, Utah Code Annotated, 1953, could be charged on the amount in excess of $5,000.00. The applicable portion of the opinion is as follows:

"We are of the opinion that the foregoing statute does not establish a maximum loan which may be made by an industrial loan corporation, but rather fixes the maximum rate of interest which may be charged on loans not in excess of

$5,000.00 and parts thereof. Section 15-1-2, U.C.A. 1953, as amended, provides in part:

> "The parties to any contract may agree in writing for the payment of interest for the loan or for forbearance of any money, goods or things in action, not to exceed ten per cent per annum; provided:
>
> * * * *
>
> (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. * * * " (Emphasis added.)

"It follows from the foregoing statute that any party, including an industrial loan corporation, may charge the legal rate of interest provided in Section 15-1-2, supra, on any loan without regard as to amount. We conclude that an industrial loan corporation may charge the interest rate permitted in Section 7-8-3, supra, for loans not in excess of $5,000.00, and the legal rate of interest authorized under Section 15-1-2 for that part of a loan in excess thereof.

"Persuasive in reaching this conclusion is the legislative treatment of small loan corporations and the limitations imposed thereon as to the amount of the loans and interest charged. Section 7-10-13(a), U.C.A. 1953, as amended, provides as follows:

> '(a) Every licensee qualified under this act may contract for and receive, on any loan of money not exceeding $600.00 in amount, charges at a rate not exceeding 3% per month on that part of the unpaid principal balance

not in excess of $300.00 and at a rate of 1% per month on that part of the unpaid principal balance in excess of $300.00 but not in excess of $600.00 * * * '

"Section 7-10-15, U.C.A. 1953, as amended, provides in part:

'If any licensee shall loan or contract for the loan of an amount in excess of $600.00 to any one borrower, whether as a part of one transaction or as the aggregate of more than one transaction, he shall not be permitted to charge, contract for, or receive, either directly or indirectly, upon any such loan or aggregate of such loans, or upon any part thereof, interest in excess of that which he would be permitted by law to charge if he were not licensed hereunder. * * * '

"In view of the foregoing authority, we reason that had the Legislature intended to limit industrial corporations to a maximum loan amount, or had the Legislature intended that for loans in excess of $5,000.00 the industrial loan corporation could not take advantage of the greater rate permitted under Section 7-8-3, express provision would have been made therefor. Under the Small Loan Act the Legislature did not restrict the small loan corporation from making loans in excess of a specific amount, but rather expressly provided for a lower interest rate on the entire loan in the event the loan exceeded a $600.00 maximum.

"Since the legislature did not so expressly provide in the case of an industrial loan corporation, we hesitate to apply any generous interpretations to that effect and would, therefore,

conclude that in the event an industrial loan corporation makes a loan in excess of $5,000.00, it may charge the rate of interest provided in Section 7-8-3, supra, on the amounts not in excess of $5,000.00, and on that part of the loan in excess of $5,000.00, the industrial loan corporation may charge that rate of interest which would be permitted by law if it were not licensed as an industrial loan corporation.

"Of course, the amount of any loan is limited by Section 7-8-5(2), which prohibits any industrial loan corporation from holding at any one time an obligation or obligations of any one person aggregating more than five percent of the amount of its paid up capital and surplus."

This court, in discussing statutory construction and the manner in which usury statutes should be interpreted, said in *Cobb v. Hartenstein,* 47 Utah 147, 152 P. 424:

"Since usury laws are quasi-penal, the courts will not hold a contract to be in violation of the usury laws, unless upon a fair and reasonable construction of all its terms, in view of the dealings of the parties, it is manifest that the intent of the parties was to engage in such a transaction as is forbidden by those laws. If two reasonable constructions are possible, by one of which the contract will be legal and valid, while by the other it will be usurious and invalid, the court will always adopt the former. In short, the general rule of interpretation and construction of contracts may be said to be that the contract is not usurious when it may be explained on any other hypothesis."

POINT 2. THE LENDER CAN ALLOT PAYMENTS TO PRINCIPAL AND THERE IS NO INTEREST PAID WHICH CAN BE TREBLED.

Section 15-1-7, Utah Code Annotated, 1953, which permits the recovery of interest paid is as follows:

> " * * * In case the greater rate of interest has been paid the person by whom it has been paid or his legal representative, may recover back three times the amount of the interest thus paid from the receiver or taker thereof and reasonable attorneys fees, * * * "

From a careful reading of the statute, it is evident that usurious interest must be paid by the borrower before any penalty can be recovered.

In the case of *McBroom v. Scottish Mortgage and Land Investment Company,* 153 U.S. 318, 38 L. Ed. 729, 14 Sup. Ct. Rep., 852, the Supreme Court was called upon to interpret a New Mexico statute which provided that the collection of interest at a higher rate than 12% was a misdemeanor and which permitted the collection and recovery of double the amount so collected or received upon any action brought for the recovery of the same. After the first payment was made, the borrower brought his suit to recover under the statute. In discussing the statute, the court said:

> "By the statute of New Mexico it is provided that 'In written contracts for the payment of money it shall not be legal to recover more than 12% interest per annum;' that 'any person, per-

sons or corporation who shall hereafter charge, collect or receive from any person a higher rate of interest than 12 per cent per annum shall be guilty of a misdemeanor * * *; and such person, persons, or corporations shall forfeit to the person of whom such interest was collected or received, or his executors, administrators, or assigns, double the amount so collected or received upon any action brought for the recovery of the same * * *.' Our conclusion upon this branch of the case is that, upon principal and authority, the contract of loan, in question, providing for usurious interest cannot be held void except as to the interest in excess of what the statute allowed to be charged, collected or received.

"The contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute so long as the principal debt, with legal interest thereon, after deducing all payments, is unpaid. We are of the opinion that this question must be answered in the negative. While, under the statute, the mere charging of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest cannot be said to have been collected or received, in excess of what may be lawfully collected and received, until the lender has, in fact—after giving credit for all payments—collected or received more than the sum loaned, with legal interest."

It is submitted that no interest has been paid by respondents because the entire principal of the loan has not been repaid.

POINT 3. THE TIME IN WHICH THE ACTION FOR RECOVERY OF USURIOUS INTEREST HAS LAPSED CAUSING RESPONDENT'S COUNTERCLAIM TO BE BARRED.

Section 15-1-7, Utah Code Annotated, 1953, which permits the recovery of interest paid provides as follows:

> " * * * In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representatives, may recover back three times the amount of the interest thus paid from the receiver or taker thereof and reasonable attorney fees, *provided that such action is commenced within two years from the time the usurious transaction occurred.*" (Emphasis added.)

In the event the Court finds that the note is usurious and that interest has been paid, it is asserted that statutory period in which the action may be brought had expired. The original transaction between appellant and respondent occurred on April 18, 1961. Respondent Kermit R. Eskelson, filed an answer asserting usury on February 21, 1963; however, he is not entitled to this defense because it must be asserted by one who has paid the interest or his legal representative. The answer filed by the Hydes was not filed until January 21, 1964,

at which time the statutory two-year period had expired. The time period set out in the statute should be strictly construed, because the cause of action is created by statute. Treating with this matter is a statement from 34 *Am. Jur., Limitation of Actions,* §7:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability."

If the Court finds that an allocation can be made between principal and interest, then it necessarily would follow that the time in which "such action is commenced" must commence on the date the transaction is entered into and expire two years hence. Accordingly, assuming *arguendo* only, the correctness of the trial court's ruling

relative to the issue of usury, the respondents Hyde effectively are barred from asserting their counterclaim.

CONCLUSION

It is respectfully submitted that the trial court erred in ruling that appellant, an industrial loan corporation, is barred from charging interest upon the portion of a loan exceeding $5,000.00, and that respondents Hyde were not barred from asserting the claim of usury.

Respectfully submitted,

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