1965

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

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. ESKELSEN, LARSON PAINTING COMPANY, and UNITED STATES OF AMERICA,

Defendants and Respondents.

NO. 10232

BRIEF OF RESPONDENTS JOHN T. HYDE, MARY C. HYDE and KERMIT R. ESKELSEN

STATEMENT OF FACTS

Respondents agree with the Statement of Facts set forth in Appellant's brief, and for that reason Respondents make no separate statement of facts.

For the purpose of argument, Respondents will consolidate their answers to Points I and II of Appellant's brief under Point I of Respondents' brief.

ARGUMENT

POINT I. THE COURT DID NOT ERR IN RULING THAT THE PROMISSORY NOTE SUED UPON IS USURIOUS

The trial court, in its Conclusions of Law, concluded as follows:

"2. That the note sued upon is usurious and that interest may not be charged by an industrial loan company on a loan in excess of $5,000.00."

Section 15-1-2, Utah Code Annotated, 1953, as it applies to this case provides as follows:

"The parties to any contract may agree in writing for the payment of interest for the loan or forebearance 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;

* * *

(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 association 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 charges yielding the lender interest which shall not exceed 14% per annum . . ." (Emphasis added.)**

It should be noted that Section 15-1-2, Utah Code Annotated, 1953, attempts to provide a comprehensive schedule of maximum rates that may be charged as interest with respect to any loan under any circumstances. However, it should also be noted that the permissible interest rates vary, depending on the amount loaned and the identity of the lender. Thus, the statute permits anyone to charge up to ten per cent per annum as interest, and it also contains provisions which apply to industrial loan corporations, and other corporations supervised by the state banking department.

Appellant in its brief asserts that the rate applicable to this transaction is subsection (f), which applies to industrial loan corporations. Respondents submit however, that whether the lender is an industrial loan corporation or not, is a question of fact.

Respondents respectfully submit that there is no allegation in plaintiff's complaint, nor is there any admission on the part of the defendants, offer of proof by the Appellant, or any finding by the trial court, that the Appellant is an industrial loan corporation. Accordingly, the maximum interest rate allowable would have been ten per cent per annum. Since the note in question provided for an interest rate in excess of nineteen per cent (19%) per annum,

the trial court was justified in finding that the note was usurious. On this ground alone the trial court should be sustained.

However, even if Appellant were an industrial loan corporation (which Respondents do not admit), the trial court was still correct in concluding that the note sued upon was usurious.

Appellant takes great exception to that part of the Conclusions of Law which states that interest may not be charged by an industrial loan company in excess of $5,000.00. Respondents believe that this statement was inserted in the Conclusions of Law by Appellant as a straw-man type issue. Respondents have never contended that an industrial loan company cannot charge interest on a loan in excess of $5,000.00. The real question involved here is: What interest rate may be charged by an industrial loan company, or anyone else, on a loan in excess of $5,000.00?

Appellant in its brief lays great emphasis on an opinion of the Attorney General; but Appellant has cited only part of the opinion. The rest of the opinion discloses that the Attorney General's opinion was in response to the question: "Are industrial loan corporations limited to loans of $5,000.00 maximum?"

The real substance of the opinion of the Attorney General was that Sections 15-1-2 and 7-8-3, Utah Code

Annotated, 1953, do not constitute a limitation on the maximum amount which may be loaned by an industrial loan corporation.

Section 7-8-3, Utah Code Annotated, 1953, provides:

> **"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 not 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 repayment in full as set forth in paragraph d)."**

The words, "every industrial loan corporation **shall have power"** (emphasis ours) apparently caused the Utah State Banking Commissioner to wonder whether an industrial loan corporation could make a loan in excess of $5,000.00; hence the request for the Attorney General's opinion. The Attorney General, however, reasoned that these words should not be construed as a limitation on the amount of money that an industrial loan corporation could loan. Respondents agree with this reasoning up to this point. The Attorney General, however, went further and reasoned that an industrial loan corporation could charge the maximum rates specified in Section 7-8-3, Utah Code Annotated, 1953, on amounts up to $5,000.00, **and in addition thereto**

could charge 10% per annum pursuant to Section 15-1-2, Utah Code Annotated, 1953, on all amounts in excess of $5,000.00. Respondents respectfully disagree with this part of the Attorney General's opinion. To allow such a result would mean that an industrial loan corporation making a loan in excess of $5,000.00 would be governed under Section 7-8-3, Utah Code Annotated, 1953, as to part of the loan, and under Section 15-1-2, Utah Code Annotated, 1953, as to the remainder of the loan. Furthermore, there would be no apparent prohibition on charging the four per cent service charge allowed by subsection (a) of Section 15-1-2, Utah Code Annotated, 1953.

It is clear that the statutes cited do provide maximum rates of interest that may be charged, and that Section 15-1-2 (g) at least does not apply to this case, because by its express terms it is limited to loans not exceeding $5,000.00. Respondents further submit that Section 15-1-2 (f), (which refers to Section 7-8-3, Utah Code Annotated, 1953) does not apply to this transaction because it makes no allowance for any interest to be charged on any loan in excess of $5,000.00.

Respondents submit that better reasoning would indicate that Section 15-1-2, Utah Code Annotated, 1953, and Section 7-8-3, Utah Code Annotated, 1953, are intended to provide for **alternative rates** rather than **supplementary rates,** and that unless a lender can bring his loan entirely within the provisions of

Section 7-8-3, relating to the alternative rate, the maximum rate applicable to his loan should be the same rate which applies to anyone else's who doesn't qualify for alternative rates; that is, that the maximum rate on the entire loan is 10% per annum. Thus, Respondents submit that these provisions, taken as a whole, do not prohibit an industrial loan corporation or anyone else from making a loan in excess of $5,000.00; but the statute does prohibit anyone, including industrial loan corporations, from charging more than 10% per annum as interest for the **entire amount** of any loan if the loan exceeds the sum of $5,000.00.

In the instant transaction, Beehive Security Thrift & Loan made a loan to the Hydes in the amount of $5,504.71 and charged interest thereon in the amount of $1,603.29 as add-on interest, which constitutes an interest rate in excess of 19% per annum. Consequently, Respondents submit that the trial court was clearly correct in holding that the note sued upon is usurious. Respondents submit that that part of the Conclusions of Law No. 2 which states, "that interest may not be charged by an industrial loan company on a loan in excess of $5,000.00" is not really critical to the decision; and pursuant to Rule 61, Utah Rules of Civil Procedure, if such a ruling constitutes error it is only harmless error and does not constitute a ground for disturbing the judgment, and should be disregarded by this Honorable Court.

POINT II. THE STATUTORY TIME FOR THE RECOVERY OF USURIOUS INTEREST HAD NOT LAPSED SO AS TO BAR RESPONDENTS' COUNTERCLAIM

Section 15-1-7, Utah Code Annotated, 1953, provides that the person by whom a greater rate of interest has been paid may recover back three times the amount of interest thus paid, together with reasonable attorney's fees; "provided that such action is commenced within two years from the time the usurious transaction occurred."

The record shows that the subject transaction occurred on April 18, 1961. The record further shows that within two years thereafter (on approximately February 13, 1963) plaintiff commenced this action, which was based upon the same transaction. Respondents concede that defendants Hyde filed their answer setting forth a claim for setoff by reason of usurious transaction more than two years after the transaction occurred; however, respondents submit that this does not bar defendants Hyde from asserting the defense of usury by way of setoff and of obtaining the benefit of the full relief allowed by the usury statute.

In the case of **Tom Reed Gold Mines Co. v. Brady, 99 P.2d 97 (Ariz. 1940)** the Supreme Court of Arizona decided that if a counterclaim or setoff is not barred by the Statute of Limitations at the **commencement of the action** in which it is pleaded, it does not

become so during the pendency of that action, although the statutory period may have elapsed before the filing of the answer setting it up.

In the case of **Whittier v. Visscher, 189 Cal. 450, 209 Pac. 23,** the Supreme Court of California held that the authorities were agreed that if a right of action relied on as a counterclaim was alive at the commencement of the suit the Statute of Limitations does not run against it, even though the full statutory period expires during the pendency of the action and before the counterclaim is pleaded by filing the counterclaim. (See also, to the same effect: **Union Sugar Company v. Hollister Estate, 3 Cal. 2d 740, 47 P.2d 273—1935.)**

In the case of **Zink v. Zink, 56 Ind. App. 677, 106 N.E. 381 (1914)** the Court said:

> **"A defendant may set up in a cross-complaint a cause of action which was not barred by the Statute of Limitations at the time the plaintiff's action was filed, and such cause of action cannot become barred by the statute during the pendency of the plaintiff's action."**

In the case of **Denton v. Detweiler, 48 Ida. 369, 282 Pac. 82 (1929),** the Supreme Court of Idaho stated the general rule to be that: "The defense of the Statute of Limitations is not available against a counterclaim during the pendency of the action unless the claim was barred when the action was commenced."

In **Bull v. United States, 295 U.S. 247, 55 S.Ct. 695, 79 L.ed 1421** it was held that although the Statute of Limitations barred the recovery back of a Federal Estate Tax erroneously assessed and paid, on the theory that certain moneys received by the executor of the decedent's estate was part of the corpus of the estate, the estate was entitled to have the amount so paid credited on an income tax subsequently assessed in respect of such moneys; and that where the claim for refund was not barred at the time the Government proceeded against the Executor for the collection of the income tax, such claim could be asserted by way of setoff, although the statutory period had run before the attempt to do so was made.

No recent cases were found with respect to this matter, but respondents believe that this is because the precedents are so well established that there is practically no other view. The precedence is so ancient that we have even found one English case decided in 1797, which holds this view. See **Ord v. Ruspini, 170 Eng. Reprint 458,** in which it was held that where there were cross demands between plaintiff and defendant which accrued at the same time, and both of which would have been barred by the Statute of Limitations had not the plaintiff saved the status of his demand by commencing an action, the defendant might set off his demand even though he did not file his answer until after the statutory time would have run.

As applied to this case, it would seem therefore that by way of offset defendants Hyde are entitled to the relief allowed under the Usury Statute, by reason of the fact that the plaintiff's complaint was filed within two years of the time the usurious transaction occurred, even though said answer was not filed until after the two years had passed.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the trial court did not err in holding and finding that the note sued upon is usurious and that Respondents are entitled to the credits and offsets which were allowed by the trial court, by reason of which this Honorable Court should sustain the judgment of the trial court.

Respectfully submitted,

J. REED TUFT
53 East Fourth South
Salt Lake City, Utah

Attorney for Respondents John T. Hyde and Mary C. Hyde

JOHN G. MARSHALL
53 East Fourth South
Salt Lake City, Utah

Attorney for Respondent Kermit R. Eskelsen