1969

Frank Riggle and Geneva H. Riggle v. Daines Manufacturing Company, and R. Daines, R. M. Daines and J. Norman Daines : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK RIGGLE and
GENEVA H. RIGGLE, his wife,
Plaintiffs and Respondents,

vs.

DAINES MANUFACTURING COMPANY, a partnership, D. R. DAINES, R. M. DAINES and J. NORMAN DAINES,
Defendants and Appellants.

Case No. 11629

RESPONDENTS' BRIEF

Appeal from a judgment of the Third
District Court of Salt Lake County,
Honorable Stewart M. Hanson, Judge

BIELE, JONES &
W. JEFFERY
117 East Fourth South
Salt Lake City, Utah
Attorneys for Respondents

RICHARD J. O'ROURKE,
L. DELOS DAINES,
Kearns Building
Salt Lake City, Utah
Attorneys for Appellants

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

TABLE OF CONTENTS — (Continued)

Texts

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK RIGGLE and
GENEVA H. RIGGLE, his wife,
Plaintiffs and Respondents,
vs.
DAINES MANUFACTURING COMPANY, a partnership, D. R. DAINES, R. M. DAINES and J. NORMAN DAINES,
Defendants and Appellants.

Case No. 11629

RESPONDENTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

Suit for collection of the amount due on a promissory note.

DISPOSITION IN LOWER COURT

The cause was tried to the Court, the Honorable Stewart M. Hanson, Judge. The Court entered judgment for the balance due on the promissory note in favor of the Plaintiffs and against the Defendants, Daines Manufacturing Company, a partnership, D. R. Daines and J. Norman Daines.

RELIEF SOUGHT ON APPEAL

Defendants - Appellants, seek to reverse the judgment of the District Court.

STATEMENT OF FACTS

The Plaintiffs - Respondents, Frank Riggle and Geneva H. Riggle, are hereinafter referred to as "Riggle", the Defendants - Appellants, Daines Manufacturing Company, a partnership, D. R. Daines and J. Norman Daines, are hereinafter referred to as "Daines."

This is an appeal from a judgment granted in the favor of Riggle by the Salt Lake County District Court after trial and upon entry of Findings of Fact and Conclusions of Law.

The statements of fact offered by Daines are not entirely supported by the record and we should like to note the following matters which are inconsistent with the facts or not supported by the record:

A. On page two of Daines' Brief, reference is made to a lost or destroyed written agreement. No written memoranda or other acceptable evidence of the employment contract with the partnership has been offered or proposed in evidence and no lost or destroyed contract has been established.

B. At page two of their brief, Daines claims a corporation assumed partnership obligations. The maker was never released or substituted. Riggle's only remedy is against the Daines for payment of the note they executed.

C. At page three of Daines' Brief, it is claimed that Riggle demanded a bonus for making the

loan. No bonus or inducement has been proved. Riggle proposed that 5% of gross profits of Daines be applied to pay the obligation. Payment arrangements are only good business.

D. At page four, the Daines' Brief states, "The ground was fertile for a usurious contract." Such a statement is not a fact, not supported by evidence and contrary to the findings of the Judge of the District Court. (R-47,48)

The restated facts supported by the record are as follows:

On July 8, 1954, Riggle loaned Daines $10,000.00 by delivery of his check (P-1) and in exchange received a promissory note in the amount of $10,000.00 carrying interest payable at 6% per annum. The promissory note was executed by each partner - D. R. Daines, R. M. Daines and J. Norman Daines. (P-3)

Riggle was told by the Daines that they needed money and at their request made the loan. Riggle investigated the company and believed it had an excellent chance for success if properly managed.

There were several discussions with the partners on the method for payment of the loan. All discussions were concerned with payment of the principal of the note on a regular basis as no installment payment terms were contained in the note.

Daines and each of them admit the execution of the note, that their signatures are genuine, that the promissory note was not paid, and that the account as itemized

by Riggle and stated in the Findings of Facts and Conclusions of Law was correct. (R-122) Daines also agreed that there is a balance on the note for principal and interest in the amount of $18,963.92 as of February 11, 1969. (P-2, P-5, P-6, and D-4)

ARGUMENT

POINT I:

NO SUPPLEMENTAL AGREEMENT RELATED TO THE EXECUTION OF THE PROMISSORY NOTE.

Daines claim usury from an oral or lost written employment agreement that was created as an inducement to the loan.

An examination of the evidence and record will not support Daines' contention and upholds the trial court's Finding of Fact that there was no usurious transaction.

Daines admit executing the promissory note. Daines did not offer any document or other written proof of any written agreement or obligation with Riggle other than the promissory note.

Only one partner testified that there was a written employment agreement entered into at the time of the making of the note.

This alleged agreement is Daines basis for the claim of usury. D. R. Daines, a partner, testified that he prepared the alleged written agreement on his stated terms, that he had it in his control, but that it is lost, although all other company records are available.

Daines then tried to establish the alleged written contract by oral evidence. There are specific, accepted procedures for introduction of secondary evidence to prove a writing. Daines have not even offered to prove secondary evidence, such as copies, memorandums, etc. of the purported agreement.

Allegation of the existence of a written agreement does not establish an agreement.

Riggle has denied making any other agreement with Daines at the time of the loan. (R-13, 36) Riggle entered into an oral, month to month employment agreement some two months after the note was executed and he had paid the $10,000.00 to Daines.

There is no real evidence of a written employment agreement between Daines and Riggle. Daines, as the party claiming that a written agreement existed, has the burden of proving the agreement in the absence of producing the original writing.

Daines must establish a lost or destroyed document by clear convincing evidence.

Daines has not carried the burden required to establish a lost or destroyed document. A comparison of the evidence adduced as against the required burden of proof indicates that Daines has not established the existence of a usurious contract or any other contract.

In order to establish the terms of a lost contract, the following matters must be established by a preponderence of the evidence. (29 Am. Jur.2d Evidence, Sec. 460; 23A CJS Evidence, Sec. 836 - 842)

A. Original existence of the document. Daines claimed that an employment agreement was prepared by himself on his own terms, but that such an agreement cannot be found. Daines prepared the alleged agreement, had control over it and control of the partnership records and cannot locate the agreement, though all other records are available. Daines does not state whether or not copies were prepared, a memorandum made or any other secondary evidence available to prove the existence of the agreement. No other partner substantiated the claimed agreement. Nothing has been produced to substantiate the claim of the existence of the document and Riggle denies existence of any written agreement.

B. Execution of the original document. There is no testimony of the matuality of the claimed written agreement or that Riggle executed any agreement. Daines claimed that each of the partners executed the agreement, yet no supporting evidence was adduced from the other partners. Riggle denies that he executed any agreement with the Daines partnership.

C. Delivery and acceptance of the document. Daines testified that he typed the agreement at the office of Riggle, apparently thereby claiming that there was a delivery of the document. Daines said he prepared the alleged agreement on his own terms, that he had pos-

session of the agreement and the company's records and yet this is the only company record that he cannot find. There is no supporting evidence of the delivery of any original contract or of Riggle's acceptance of any written agreement. Even assuming that Mr. D. R. Daines is truthful when he says he prepared the document there is no evidence of its delivery to Riggle or his acceptance thereof. In fact, all the independent evidence indicates that Riggle was employed substantially after the date of the note. (P-5) (R-47, 81)

D. Terms or contents of the agreement. Riggle denies the coincidental written agreement. There is no other evidence supporting a written agreement. No written contract has been established by agreement among the parties. Daines testified as to certain terms of the alleged contract, all of which were denied by Riggle. No contract was proved or proffered which was enforceable, by either Daines or Riggle. If the contract is not sufficiently well established to afford Riggle a cause of action thereunder, then it certainly is not sufficiently well established to cause him to forfeit his ten thousand dollars.

Daines testimony about the terms of the alleged agreement was recitation of a contract executed over a year after the making of the loan (R-113, 114). The contract referred to was a contract between Mr. Riggle and a corporation (Daines Manufacturing Company, Inc.) a completely different legal entity from the partnership and not a party to this action. (D-7)

Riggles admits the execution of an employment contract with a corporation a year after he had paid the

partnership $10,000 and denies any other written agreement.

Daines did not relate the two employment contracts.

The corporation willingly entered into the employment agreement a year after the loan to the partnership.

The trial judge heard the evidence from all witnesses and made a finding of fact that the loan was the only agreement between the parties at the time Riggles paid $10,000 to the partnership. (R-47) The finding of fact is supported by clear and convincing evidence. (P-3, P-1, P-5) (R-74, 97, 100)

E. The loss, disappearance or destruction of the document. Daines testified simply that he was unable to find the agreement or any secondary evidence of the claimed agreement although the company books and records were available. He did not state the procedures or methods, if any, he used to attempt to find any document. He gave no explanation of its possible disappearance other than it could not be found. There was no supporting evidence of any loss or destruction. Daines had control of and was able to provide all other company records (R-112, 113) The testimony of record is not substantial nor clear and convincing that a search was made for any lost document or that the purported document ever, in fact, existed.

Proof of the alleged lost document is not established by testimony of the parties. Mr. Riggle emphatically denied several times in his testimony that there was an

agreement with the Defendants at the time of the loan (R-13, 36)

Mr. Riggle stated that there were discussion with each Defendant partner regarding ways of paying the promissory notes, both his proposals and proposals of the partners. In addition, there was a discussion of whether or not Mr. Riggle would be employed as a consultant for the partnership. These discussions were not agreements at the time of the execution of the promissory note. (R- 74, 79, 80, 81, 94, 99, 98)

In *Barcroft vs. Livacich,* 35 C.A.2d 710, 96 P.2d 951, 957, (1939), the Court stated that ". . . the burden of proving the fact necessarily carries with it more than the usual measure of responsibility . . . " to establish the contents of a lost instrument. The Court stated further that the evidence must show, without reasonable doubt, the substantial parts of the claimed lost instrument, " . . . the testimony of the witness need not be accepted as true, merely beause there is no direct evidence to contradict it, as evidence may, within itself bear the earmarks of falsity."

Whether or not evidence in any particular case establishes the instrument by clear, satisfactory and convincing evidence should be left to the trial court based upon the facts presented to him by the various witnesses whose credibility and demeanor it had an opportunity to observe. The Court may believe one, many or all of the witnesses or none of the witnesses, but it makes the determination. When there is substantial evidence in the

record to support the Judge's findings on whether or not there is such an agreement, the Court's finding on the question of the agreement should be sustained. *Von Hasseln vs. Von Hasseln,* 122 C.A. 2d 7, 264 P.2d 205 (1953); *Chichester vs. Seymour,* 28 C.A. 2d 696, 83 P.2d 301 (1938); *Gooch vs. Rodewald,* 432 P.2d 755, Colorado, (1967).

The Trial Court considered the testimony of the discussions and made the findings that they were discussions only. (R-47, Findings 7 & 8). The Court found that there was no other agreement or usury between the parties at the time of making the loan. (R-47, Finding 8). The Trial Court did conclude that Riggle was employed by Daines two months after the loan and the month to month unilateral employment agreement had no relationship to an inducement for the loan (R-13, 18, 19, 33, 36)

The Trial Court heard all evidence of the existence of the purported agreement and found that no agreement existed at the making of the loan. The Finding is supported by clear and convincing evidence in the record and the Trial Court should be upheld. (P-1, P-3, P-5) (R-47, 48, 74, 79, 80, 81, 94, 98, 100, 112, 113)

POINT II

EVIDENCE DOES NOT ESTABLISH A USURIOUS TRANSACTION.

The only proven and admitted written agreement between the parties to this action is the Promissory Note dated July 8, 1954, for $10,000. (P-3)

Daines employed Riggle on September 1, 1954, on a month to month oral agreement. The first payment of salary was September 16, 1954. Social Security tax and withholding tax were deducted from the gross amount of the check. (P-5)

The only employment agreement was a month to month arrangement between Riggle and Daines (R-74, 97). Daines voluntarily hired Riggle. The loan had been made and Daines used the funds (R-16). Riggle could not compel Daines to hire him. The employment had no relationship to the loan. (R-47, 74, 97, 79, 80, 81)

As the trial judge found there was discussion of an employment arrangement between the parties, both prior to and subsequent to the loan, but the employment was a separate agreement consummated after the loan, and had no relationship to the loan. (R-49)

A bonus or commission agreement for a loan must be a part of the loan arrangement at the inception of the loan and be compensation for use of the borrowed funds to be incorporated into the loan transaction and to be usurious. The mere identity of parties to alleged and unproved agreements are insufficient to taint a prior transaction with usury. (91 CJS Usury, Sec. 61)

In a recent Utah case, *United-American Life Insurance Company vs. Willey,* 21 Utah 2d 279, 444 P.2d 755, (1968) the Court determined that no usury was involved where the Defendant deposited certain amounts with the Plaintiff from loan proceeds. Some of the deposits were a bonus or finders fee for the loan and some of the de-

posit was for excess payment in case of default. The Court stated that in determining the question of usury, the entire agreement must be considered as it existed in the inception of the loan agreement.

A test was put forth in the *United-American* case to determine whether or not the surrounding circumstances make the agreement usurious. "If there is a promise to pay a contingent sum which should make the agreement usurious, it still would not be usurious if the contingency is one which is under the control of the borrower. On the other hand, if the borrower cannot control a contingency, then the contract would be usurious if the amount promised to be paid as interest is greater than that allowed by law. The contingency must be a part of the agreement with the lender in order to taint the transaction with usury."

In the case in hand, Daines claim usury because of the loan and a subsequent agreement by the partnership employing Riggle. The contingency of employing Riggle was entirely under the control of the Daines. Riggle had no control over the contingency and no written agreement, no right to demand employment, no right to demand any other payments, no right of recourse on the failure of the Daines to employ him and no right to de-

clare default in the loan upon failure to pay salary or to employ him.

Riggle had no right to maintain his employment once employed.

Riggle had an agreement to be paid $10,000.00 on the maturity date of the promissory note. A later consumated employment agreement was not part of the loan agreement at the inception of the loan.

Riggle did not commence employment for Daines until September 1, 1954, two months after the promissory note execution. Daines now tries to relate their voluntary agreement back to the time of making the promissory note and claims that the Daines were compelled to pay Riggle for two obligations.

Daines and Riggle could contract for as many separate obligations as they desired and as long as the obligations are not compensation one for the other, usury cannot be claimed by Daines.

The rule that usury must exist at the inception of the loan has been upheld by numerous cases. Two notable cases with similar factual situations where the Supreme Court upheld the Trial Courts determined that there was not usurious transaction are the *Goldenzwig* and ***Knoll*** cases hereafter cited.

Both cases involved payments to the lender by the borrower beyond the payments required on the face of

the instrument. In both cases, the payments were additional compensation for the lender. The Court found the payments not related to the loan. The Court also found the payments by the borrowers were voluntary and were not usurious interest extracted or received because the additional payments were not agreed to at the inception of the loan.

The Court held that ". . . a contract is not usurious where it does not in its inception require payments which are usurious, even though sums are subsequently paid by the obligor to the obligee as bonuses, which coupled with the interest paid amount to a sum in excess of the legal rate of interest." *Goldenzwig vs. Shaddock,* 31 C.A. 2d 719, 722, 88 P.2d 933, 934, (1934). See also *Knoll vs. Schleussner,* 112 C.A. 2d 876, 247 P.2d 370, (1952).

The Court in the *Goldenzwig* case stated that contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction.

The *Goldenzwig* facts are similar to this case. The borrower made substantial bonus payments in conjunction with the quarterly interest payments while paying very small principal payments. The Court determined that the bonus payments were entirely voluntary by the borrower.

In the case at hand, there was no usury in the inception of the loan. The salary payments made later to Riggle resulted from a later independent negotiation.

The agreement to hire Riggle does not relate back to the inception of the loan.

Another fact claimed by Daines as supporting usury is that Riggle was inexperienced in their business and therefore could not render effective service to Daines. It made no difference to the partnership whether or not Riggle had experience in their particular line of work because their company's product was unique (R-78, 105, 117, 118). Riggle was experienced in business and was able to impart the benefit of his experience accumulated over 50 years.

Daines claimed as another basis for usury that the employment contract (D-7) between Riggle and Daines Manufacturing Company, Inc. is also connected with partnership loan, although executed more than one year after the loan and between different parties.

Daines partners disaffirm assumption of corporate obligations, (D-7, P-3) and yet claim the contract relates to the time of the loan transaction and claims involvement of all parties at the inception of the loan.

Such a conclusion cannot be drawn logically or legally from the facts.

The corporation was organized six and one-half months after the partnership loan. (R-105). The corporation employment agreement was executed over one year after the loan and six months after the birth of the corporation. (D-7) Parties not in existence at the inception

of the loan could not have agreements prior to its existence. The latter born party cannot have its obligations and agreements relate to third party agreements consummated prior to existence.

In *Greenberg vs. Manganese*, 39 Wash, 2d 794, 238 P.2d 1194, (1951), the Court stated " . . . the rule is that a bonus given or paid by a stranger to a contract of loan for his own purposes or reasons to induce the making of such contract by the lender does not make the contract usurious."

In the *Greenberg* case, a person owned stock and gave it to a lender if the lender would loan the money to a borrower, a different entity from the owner of the stock. The Court reasoned that the subject transaction could not be usurious because the person owning the stock had the entire control and ownership and right to determine the disposition of that stock without the control of the borrower, and he was not compelled to pledge the stock. The Court concluded that the agreement is not usurious as it does not relate to the inception of the loan.

Here Riggle was voluntarily paid by Daines and neither entity was compelled to hire Riggle. Daines could have terminated employment at any time.

Any agreements occurring after the date of the promissory note could not be related to the time of the loan transaction so as to taint the loan as a usurious transaction. The loan was a single transaction and complete by itself at the time made.

POINT III

EVEN ASSUMING AN EMPLOYMENT CONTRACT WAS EXECUTED, THIS DOES NOT CREATE USURY.

The Trial Court found that no employment contract was in existence at the time the promissory note was executed. (R-47, Findings 7 & 8) Assuming that such a contract had been established, this in itself would not be usury. The fact is that Daines did employ Riggle at a later time and failed to follow his management suggestions and failed in their business. (P-5, R-98, 116, 124)

It is further obvious that if Riggle did not or could not perform his part of the employment contract, the employer could terminate the same for cause and avoid additional payments thereunder and, therefore, the wage payments were not unconditionally required. Services must be performed in order to earn payment. Three-days consultation were required per month for a retainer of $150.00 or $55.00 per day to advise at a business located in a distant city. This is hardly an exorbitant rate.

POINT IV

THE LAW DOES NOT SUPPORT THE DEFENDANT'S CONTENTIONS.

Several cases are cited by Daines to support their position but examination of these cases indicate that they do not apply to the case at bar.

In the *Aspeitia vs. California Trust* case 158 C.A. 2d 150, 322 P.2d 265, (1953) the promissory notes were admittedly issued for an amount in excess of the amount

advanced. Thereafter in order to pay the usurious loan the debtor borrowed the full amount from a third party to pay the original lender. This case is clearly a case of usury and is clearly not applicable to the instant cases.

In the cases of *Richardson vs. Foster, et al,* 100 Wash. 57, 170 Pac. 321 and *Westman vs. Dye,* 214 Cal. 28, 4P.2d 134 (1931) were actions on renewal transactions between identical parties. The continuity of transaction was apparent and all documents were before the Court.

In *Grannis vs. Stevens* 111 N.E. 263 (New York) and *Conner Airlines, Inc. vs. Aviation Credit Corporation,* 280 F.2d 895, (5th Circuit), written agreements were before the Court and the Courts merely interpreted the written agreements. There was no question as to the continuity of the parties. In the *Conner* case the transaction became usurious when an unconscionable amount was charged to extend the due date. No such situation exists in the instant case.

The case of*Riggle vs. Daines Manufacturing Company, Inc.,* 20 Utah 2d 391, 438 P.2d 808 (1968) is a case between the Plaintiff and the corporation, that succeeded to the Daines operations. The District Court granted Riggle a summary judgment which was appealed and this Court reversed on the basis that further evidence should be taken. There was no ruling relating to the issues of this case.

CONCLUSION

Riggle has obtained a judgment against a partnership and two of the individual partners for the balance due on a promissory note. Daines attempted to establish a coincidental agreement with the promissory note and that usury resulted from the additional agreement. No original agreement was introduced or proffered, Daines instead relying on oral testimony.

Having failed to establish a coincidental agreement, Daines next attempt to characterize an agreement with a corporation which was formed after the promissory note and the agreement executed one year after the note to somehow become a part of the original promissory note.

The parties in the corporation were different from the parties in the partnership and there was no continuity of parties among all the claimed agreements and notes. There was no obligation between Riggle and Daines for the execution of any other agreement nor opportunity for Riggle to enforce any agreements against Daines other than the note.

There is overwhelming evidence in the record to support the Findings of Fact and Conclusions of Law determined by the Trial Court, and the Judgment of that Court in favor of Riggle against Daines should be affirmed.

Respectfully submitted,
Biele, Jones & Murphy, and
W. Jeffery Fillmore
Attorneys for Plaintiffs and
Respondents