

2/1/04

NO. 227642
COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

CASHMERE VALLEY BANK, a Washington corporation,

Respondent

v.

TERRY B. BRENDER, a single man,

PETITIONER

APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY NO. 03-2-00268-7

BRIEF OF PETITIONER

Douglas J. Takasugi
WSBA No. 12139
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I. ASSIGNMENT OF ERROR

The trial court erred in granting Cashmere Valley Bank's Motion for Summary Judgment and denying Terry Brender's Motion for Summary Judgment on the issue of whether the Federal Truth in Lending Act applies to the facts of this case.

Mr. Brender submits that the Federal Truth in Lending Act does apply to his loan with Cashmere Valley Bank since the primary purpose of the loan was personal.

II. STATEMENT OF THE CASE

This case involves an action by Cashmere Valley Bank (hereinafter "CVB") against Terry Brender (hereinafter "Brender") seeking judgment for money due on a Promissory Note, foreclosure of a Deed of Trust, and to recover personal property. (CP 513-534) Brender has asserted counterclaims and affirmative defenses as follows: (1) violations of the Federal Truth in Lending Act; (2) violations of the Washington State Consumer Protection Act; (3) fraud and/or misrepresentation; (4) breach of the covenant of good faith and fair dealing; and (5) breach of contract. (CP 505-512)

In May 1993, Brender sought a loan from CVB. Brender's personal banker at CVB was Jim Geary (hereinafter "Geary"). (CP 486-488)

The only reason Brender had to borrow money was because of his divorce. (CP 272-274)

Brender went to CVB to borrow about \$150,000.00 to settle his divorce. (CP 272-274) Geary and CVB knew that this was the purpose of the loan. (CP 61-65, 272-274, 396-398)

At the time that Brender went to CVB to borrow money to settle his divorce, he had an existing unsecured loan with CVB of about \$203,000.00. (CP 396-398)

When CVB loaned Brender the money to settle his divorce, CVB consolidated it with Brender's pre-existing unsecured loan. The only money received by Brender from the loan was the approximately \$150,000.00 that he used to settle his divorce. (CP 61-65, 396-398, and 406-408)

Brender was told by Geary that he would have to make sixty (60) quarterly payments of \$7,500.00 on the loan and that the loan would be paid off in fifteen (15) years. (CP 408-413)

The Note that Brender signed on May 6, 1993, was for \$358,095.70. The Note called for quarterly payments of \$7,500.00

and was to pay off in fifteen (15) years. (CP 486-488) As security for the Note, Brender had to give CVB a Deed of Trust on his home, orchard and mill. (CP 207) CVB has failed to produce the Note signed by Brender. Geary says he has searched CVB's files but cannot find it. He could not recall if it was given back to Brender or thrown in the waste basket. (CP 410-413)

Sometime after the loan was made to Brender, Geary discovered that he had made a mistake in amortizing the loan. (CP 414) Geary did not give written notice of the problem to Brender. In fact, Geary did not even tell anyone at CVB about the problem. (CP 419) To cover up the mistake, Geary created another Note, increasing the quarterly payments to \$7,840.67 and forging Brender's signature on the Note. Brender was unaware of the existence of this Note. (CP 231-232 and 511)

In September 1993, when Brender went to CVB to make his first quarterly payment of \$7,500.00, Geary told Brender that he needed to pay a little bit more because of interest. Geary had Brender write CVB a check for \$7,840.67. (CP 415)

In October 1993, while Brender was in the bank on an unrelated matter, Geary had him come back to his office. Behind closed doors and without any prior notice, Geary insisted that

Brender sign additional documents that Geary had prepared regarding Brender's loan. Geary told Brender "You will sign." "You have to sign." "You are going to sign." Geary even went so far as to tell Brender that he would get fired if Brender did not sign the documents. Geary did not give Brender the opportunity to take the documents home and to review them. What Geary had Brender sign was a new Note that called for eleven (11) quarterly payments of \$10,694.44 with a balloon payment due on June 6, 1996. This new Note was dated back to the original loan date of May 6, 1993. (CP 434-439, 451-452, 462-464, and 512)

The backdated Note has been renewed twice, on June 26, 1996, and on November 30, 2001, with modified quarterly payments, differing maturity dates, and other modifications to the terms, all without prior notice to Brender and without providing him with any federally required disclosure or rescission statements. (CP 505-512)

Because Brender trusted Geary, he signed what he was told to sign. Brender would ask Geary "Should I be reading this?" Geary's response to Brender was "No, it's the same loan." Copies were never given to Brender. (CP 486-488) Brender always

believed that the total of all of the payments under his loan would be \$450,000.00. (CP 272-274)

CVB admits that it did not provide Brender with any federal disclosures or rescission statements. CVB's position is that it had no obligation to do so. (CP 499-504)

The trial court on summary judgment found that the Federal Truth in Lending Act did not apply to the facts of this case. (CP 18-28)

Brender filed his Motion for Discretionary Review on the issue of whether the Federal Truth in Lending Act applies to the facts of this case and the motion was granted by Commissioner Slak on April 16, 2004.

III. ARGUMENT

1. Standard of Review.

Appellate review of a summary judgment is de novo. Harbberd v. City of Kettle Falls, 120 Wn.App. 498, 507, 84 P.3d 1241 (2004). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). Viewing all facts and reasonable inferences in the light most favorable to the nonmoving

party, the moving party has the burden of showing there is no genuine dispute as to any material fact. Berger v. Sonneland, 144 Wn.2d 91, 102-103, 26 P.3d 257 (2001).

2. The Federal Truth in Lending Act Applies to Brender's Loan with Cashmere Valley Bank.

No disclosures in this case were made under the Federal Truth in Lending Act (15 U.S.C. § 1601 et seq.).

Brender's argument is that the Federal Truth in Lending Act applies because his loan was incurred primarily for a personal purpose. CVB's argument is that the Federal Truth in Lending Act does not apply because Brender's loan was incurred primarily for a business purpose.

In Conrad v. Smith, 42 Wn.App. 559, 563, 712 P.2d 866 (1986), the court stated:

Whether a loan is for personal or business purposes appears to be a factual question to be answered only after evaluating the circumstances surrounding the transaction. See Thorns v. Sundance Properties, 726 F.2d 1417, 1419 (9th Cir. 1984); Tower v. Moss, 625 F.2d 1161, 1166-67 (5th Cir. 1980).

The court in Conrad found that the loan in that case was for a business purpose. However, the court specifically stated:

Here, the record is devoid of evidence the Smiths (the lender) were aware the loan was for any purpose other than "business".

42 Wn.App. at 566.

In this case, the evidence is overwhelming that CVB was aware that the purpose of Brender's loan was personal.

Brender has stated the following:

The purpose of the loan was to pay a divorce settlement to my ex-wife. Jim Geary knew the only purpose I needed the loan funds was to pay the divorce settlement. I had no other reason to obtain a loan from Cashmere Valley Bank. Had I not required loan funds to settle my divorce, I would never had made this loan with Cashmere Valley Bank.

(CP 272-274)

Geary, when deposed, stated the following:

Q Okay. And what were the reasons that Mr. Brender came to see you about this loan?

A He was about to settle a divorce.

(CP 396)

What happened in this case is clear from CVB's own internal memorandum dated 2-9-93.

Terry has been a well regarded borrowing customer of the bank for about 30 years. For the past year and a half he has been in the middle of a complicated and costly divorce proceeding. These new funds being requested would finally settle the divorce and allow him to retain full ownership of his orchard and mill which provide his livelihood. This past year and a half

has been an unproductive and costly time for Terry as he has been defending himself in the divorce proceeding, which has distracted him from his main activity of cutting and selling shakes. Also during this time he has been forced to pay out considerable sums to both attorneys. These new funds and the restructuring of our present debt would put the bank in a fully secured and amortizing position. (Emphasis added.)

A copy of CVB's "Memorandum for Credit File" is attached hereto as Appendix A. The "Loan Purpose" is stated "Divorce settlement & consolidation".

Any reliance by CVB on Toy National Bank v. McGarr, 286 NW.2d 376 (Iowa 1979), would be misplaced. The court in Toy was faced with the determination of the status of a loan which consolidated an existing consumer loan and an existing business loan. The loan in this case is not a consolidation of two existing loans. Thus, this case does not involve a true "hybrid" loan of the type presented in the Toy case. Instead, this case presents a situation where Brender goes to CVB for a loan and CVB consolidates the loan with an existing loan. The restructuring of Brender's pre-existing unsecured loan may have facilitated the obtaining of the loan but was not the purpose for which it was obtained. See First Nat'l Bank v. Skidis, 82 Ill.App. 3d 601, 38 Ill.Dec. 41, 403 NE2d 56 (1980), also cited in Conrad. The reason

Brender went to CVB in May of 1993 was to borrow money to settle his divorce.

Brender submits that the same rules applied to the state usury laws should apply to this case and the Federal Truth in Lending Act. In McGovern v. Smith, 59 Wn.App. 721, 731, 801 P.2d 250 (1990), the court stated:

A loan's purpose in the context of RCW 19.52.080 is "principally established by the representations the borrower makes to the lender at the time the loan is procured." *Brown v. Giger*, 111 Wash.2d 76, 82, 757 P.2d (1988). The business or personal nature of the loan is a factual question to be answered after evaluating the circumstances surrounding the transaction. *Conrad v. Smith*, 42 Wash.App. 559, 563, 712 P.2d 866, *review denied*, 105 Wash.2d 1017 (1986).

Where a borrower's representations are inconclusive, written statements in the loan documents may be dispositive. *Marashi v. Lannen*, 55 Wash.App. 820, 824, 780 P.2d 1341 (1989) (summarizing holdings of *Brown v. Giger* *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wash.App. 463, 767 P.2d 961 (1989), and *Conrad v. Smith*). A direct conflict in the evidence on the material issue of the loan's purpose, however, will normally create an issue for the jury. *Marashi, supra*. Thus, where a written certificate of purpose is in conflict with oral disclosures, the court cannot conclude as a matter of law that the lender was unaware of the true purpose of the loan and was entitled to rely on the statement contained in the borrower's written certificate. See *Marashi*, 55 Wash.App. at 825, 780 P.2d 1341; see also *Brown v. Giger*, 111 Wash.2d at 83, 757 P.2d 523 (objective manifestations of purpose are not always

determinative of applicability of business purpose exemption, since courts will not deny a borrower's protections against usury when a lender manipulates a loan's structure so as to evade usury restrictions.)

This is not a case where the lender was not aware of the purpose of the loan. CVB knew that Brender was there to borrow money to settle his divorce.

IV. CONCLUSION

The only reason Brender borrowed money from CVB in May of 1993 was so that he could settle his divorce. CVB was aware of the purpose of the loan. CVB should not be allowed to manipulate the loan structure so as to evade the requirements of the Federal Truth in Lending Act. The Federal Truth in Lending Act should apply to Brender's loan. Brender should be granted summary judgment on this issue.

RESPECTFULLY SUBMITTED this 16th day of June, 2004.

JEFFERS, DANIELSON, SONN
& AYLWARD, P.S.

By 
DOUGLAS J. TAKASUGI
WSBA # 07212
Attorneys for Appellant Brender

APPENDIX A

Memorandum for Credit File

Pre-Approval: _____
 Confirmation: _____
 Renewal: _____
 Line of Credit: _____
 Letter of Credit: _____

BORROWER: TERRY SKENDER

Date of Approval of Loan: 2-9-93 Amount: \$ 175,000/new
200,000/renew
 Interest Rate: 9.00% Interest Payable: Quarterly
 Loan Purpose: Divorce settlement & consolidation
 Repayment Agreement: 15 yrs/quarterly payments
 Source of Repayment: Business revenues
 Secondary Source: Liquidation
 Collateral: 1st lien on orchard, shake mill & equipment
 Collateral Value: \$525,000
 Present Debt: Secured: \$ _____
 Unsecured: \$ 203,178
 Deposit Balances: \$ _____ Related Balances: \$ _____

FINANCIAL CONDITION (For Commercial and Real Estate Loans Over \$25,000)	
Balance Sheet	Income Statement:
Dated: <u>3-18-91</u>	No. Months: _____
C.A. : \$ _____	Sales: \$ _____
F.A. : _____	Net Profit: _____
T.A. : _____	Depreciation: _____
C.L. : \$ _____	CASH FLOW: \$ _____
L.T.L.: _____	Draws/Bonus: \$ _____
T.L. : _____	Av. Debt. Sv.: _____
EQUITY: <u>1,613,500</u>	Debt Payments: _____
	Net Difference: \$ _____

Request Approved: mt Request Declined: _____
 If Declined, Reasons: _____

Recommendations to qualify for approval:

2-9-93

Committee Initial: mt

Pertinent Credit Comments:

Terry has been a well regarded borrowing customer of the bank for about 30 years. For the past year and a half he has been in the middle of a complicated and costly divorce proceeding. These new funds being requested would finally settle the divorce and allow him to retain full ownership of his orchard and mill which provide his livelihood. This past year and a half has been an unproductive and costly time for Terry as he has been defending himself in the divorce proceeding, which has distracted him from his main activity of cutting and selling shakes. Also during this time he has been forced to pay out considerable sums to both attorneys. These new funds and the restructuring of our present debt would put the bank in a fully secured and amortizing position.

Jerry Geary
 Lending Officer's Signature

RECORD OF LOAN REVIEW, RECOMMENDATIONS AND CORRECTIVE ACTION TAKEN:

LOAN REVIEW

JUL 14 1993

By: [Signature]

Loan Review Officer

