

FILED
JUL 09 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289788

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

Wells Fargo Bank, *Respondent*

v.

Robert Main, *Appellant*

APPELLANT BRIEF

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Robert Main

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A. ASSIGNMENT OF ERROR

Assignment of Error

1. Did the trial court err when it granted counterclaim defendant's motion for summary judgment?

Issues Pertaining to Assignment of Error

Is a loan properly characterized as commercial solely because the application paperwork and employee contact occurred within the commercial loan department of a bank? What distinguishes a commercial loan from a loan primarily for personal, family, or household purposes? If a home construction loan includes financing for construction of a home based business, is the loan transaction a commercial loan or a home loan?

Standard of Review

The standard of review is that the non-moving party's evidence must be accepted as true with all favorable inferences that may reasonably be drawn from them.¹

B. STATEMENT OF THE CASE

Introduction and Case History

Counterclaim plaintiff obtained a \$250,000 draw down line of credit from counterclaim defendant on or about August 25, 2004 for the purpose of constructing a home and a shop. The shop was for the purpose of operating a for-profit business, and the home was intended to be the primary residence of the counterclaim defendant. The loan funds were expended in full during the course of construction, and at that time the

¹ *Lockwood v. A C & S, Inc.* 44 Wn.App. 330, 353, 722 P.2d 826 (1986), *aff'd* 109 Wn.2d 235 (1987).

general contractor indicated an additional \$103,000 was required in order to complete the construction project. CP 130-132. The borrower and general contractor met with a loan officer employed by the counterclaim defendant for the purpose of obtaining an additional and separate loan for \$103,000. CP 103-132. On the date of the meeting the loan officer told the contractor to continue with the construction project, indicating the counterclaim defendant would indeed approve the loan and that the construction should continue. CP 135-143.

To further confirm the counterclaim defendant's commitment to loan the additional funds, counterclaim plaintiff contacted this same loan officer by telephone, indicating that he was intending to purchase cabinets, appliances, and other materials for use in the home with the loan proceeds he was anticipating. The loan officer told him to "go ahead". CP 135-143.

The loan was never funded. Counterclaim plaintiff defaulted on his loan obligations, the subject property was foreclosed upon by the contractor and the bank sued the borrower for non-payment, resulting in a judgment against counterclaim plaintiff of over \$200,000. CP 118-129.

Counterclaim defendant filed a motion with the trial court seeking summary judgment. CP 130-132. The trial court granted the motion for summary judgment. CP 144-150. Counterclaim defendant filed a motion for reconsideration, arguing that RCW 19.36.120 exempts the subject transaction from the applicability of the Credit Agreement Statute of

Frauds.² The trial court denied counterclaim plaintiff's motion for reconsideration, and this appeal followed.

C. ARGUMENT

RCW 19.36 *et seq* contains the definition of credit agreement, and identifies the same as "...an agreement, promise, or commitment to lend money..."³ However, this statutory provision does not apply to every agreement entered into in this State the subject of which is the borrowing or lending of money. In fact, the statutory provisions found in this title exclude the applicability of the Credit Agreement Statute of Frauds to any such transactions including credit cards or charge cards, and, of import to the present matter, loans of money primarily for personal, family, or household purposes, and not primarily for investment, business, agricultural or commercial purposes.⁴

As the counterclaim defendant conceded in briefing before the trial court, there is no Washington case which has interpreted RCW 19.36.120⁵. CP 157-162. Counterclaim defendant sought to analogize to the Federal Truth in Lending Act, thus invoking a "quantitative approach" whereby the court looks to determine whether a majority of the funds were used for personal or commercial purposes. CP 157-162. The argument of the counterclaim defendant fails for two reasons.

² RCW 19.36.110.

³ *Id.*

⁴ RCW 19.36.120

⁵ *Citibank South Dakota v. Macheid*, 154 Wn.App. 1033, No. 63409 -7-I (2010) was published following the briefing completed in this matter. The *Macheid* decision does analyze RCW 19.36.120 within the confines of a credit card agreement, and therefore, is admittedly not on point.

First, the counterclaim defendant argued that because the home (2450 sq ft) was smaller than the shop (4000 sq ft) it must necessarily follow that the majority of the funds were used for commercial purposes. However, the record is devoid of any evidence, detail, or statistical support establishing how much money was to be spent on the home construction, no matter the square footage, as compared to how much money was to be spent on the shop construction. Thus, there was no evidence presented before the trial court supportive of this quantitative approach, and any reliance upon this theory by the trial court is in error.

Second, the counterclaim defendant referred in this argument to the original loan of \$250,000 not the subject loan of \$103,000 and thereby did not address the character (business vs. personal) of the \$103,000 loan. CP 157-162.

Next, the counterclaim defendant directed the trial court to apply the “business purpose” transaction analysis found in our State’s usury statute.⁶ The counterclaim defendant contended before the trial court that the usury statute, and the case law interpretation of the statute’s language, supported a decision to deny the motion for reconsideration. Specifically, the counterclaim defendant contended in a brief summary that the analysis of whether a transaction analyzed under the usury statute is for a business purpose is dependent, in part, upon the following factors:

1. The court must analyze the objective, rather than subjective, purpose of the transaction⁷;

⁶ RCW 19.52.980.

⁷ Brown v. Giger, 111 Wn.2d 76, 82, 757 P.2d 523 (1988).

2. A loan's purpose is principally established by the representations the borrower makes to the lender at the time the loan is procured⁸;
3. Of persuasive weight is the use of the funds for business purposes⁹;
4. When the borrower's oral representations are inconclusive the written statements may be dispositive¹⁰;
5. A borrower's contrary oral manifestations are relevant only where it appears the lender has "rigged" the written agreement to evade the usury laws¹¹.

In application of the above factors, the counterclaim defendant argued that the original \$250,000 loan was for the shop and home. Moreover, the counterclaim defendant argued that at the time of closing the \$250,000 loan the borrower provided the bank with a written warranty and representation that the \$250,000 loan was primarily for business purposes. CP 157-162.

In fact, it appears as the trial court agreed with the latter argument, for in its' letter opinion the trial court stressed that the borrower had identified the \$250,000 loan as a business loan, or a loan for business purposes, on loan application paperwork completed by borrower in securing the initial loan of \$250,000. CP 166-167.

The trial court erred in its analysis, for it focused upon the \$250,000 draw down line of credit agreement rather than upon the character of the separate \$103,000 loan required to complete construction

⁸ *Id.*, at 527.

⁹ *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn.App. 463, 471-72, 767 P.2d 961 (1989).

¹⁰ *Marashi v. Lannen*, 55 Wn.App. 820, 824, 780 P.2d 1341 (1989).

¹¹ *Jansen v. Nu-West, Inc.*, 102 Wn.App. 432, 442, 6 P.3d 98 (2000).

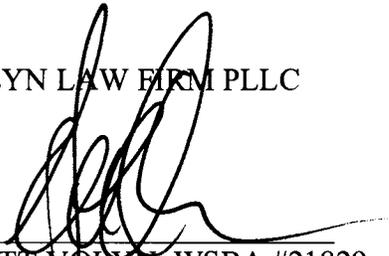
and also, according to the record provided by the counterclaim plaintiff, for the purchase of items required to outfit the home intended as a primary residence.

D. CONCLUSION

The trial court erred in this matter by analyzing the original loan agreement between the borrower and bank rather than the subsequent unfunded loan between the borrower and bank. For this reason the decision of the trial court should be reversed and the case should be remanded for trial on the issue of the applicability of promissory estoppel to the unfunded second loan agreement.

Respectfully submitted this 7th day of July, 2010

VOLYN LAW FIRM PLLC

A handwritten signature in black ink, appearing to read 'Scott Volyn', is written over a horizontal line. The signature is stylized and cursive.

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