IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT KOLODGE D/B/A RSK PROPERTIES,
Appellant,
vs.
F. GRAHAM HOLLISTER, JR.,
Respondent.

No. 42922

FILED

DEC 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment permanently enjoining a foreclosure sale. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge.

NRCP 52(a) states that as to bench trials, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." And, "[a]s this court has stated on numerous occasions, findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous."[1]

California usury law

Article XV(2) of the Constitution of the State of California limits commercial lending interest rates to "a rate not exceeding the higher of (a) 10 percent per annum or (b) 5 percent per annum plus" the rate charged by the Federal Reserve Bank. However, several exceptions are provided, including "any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in

[1]Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996) (citing Trident Construction v. West Electric, 105 Nev. 423, 426, 776 P.2d 1239, 1241 (1989)).

whole or in part by liens on real property." The statutory rate of interest provided in Article XV is seven percent per annum.

"In usury cases the trier of fact is vested with the power to resolve many issues attending and including the ultimate question of whether a particular transaction is usurious."[2] "[A] note must be tested for usury with reference to the actual sum given by the lender to the borrower, and not by the mere face of the note."[3]

If a note is found to be usurious, "the interest provisions [a]re void, and the note [is to be] properly treated as if it call[s] for no interest."[4] However, once the note matures, "[t]he payee of a noninterest-bearing note is entitled to interest at the legal rate from the date of maturity to the date of judgment."[5]

Since the notes here call for interest at fourteen percent per annum, we conclude that there was substantial evidence to support the district court's decision that the notes were usurious on their face. Unless the broker exemption applies, or the savings clause is effective, the district court did not err in finding the loans to be usurious and the interest void until the date of maturity of each note.

Loans "made or arranged" by a broker licensed in California are not limited by the constitutional interest limits.[6] Section 1916.1 of the

---

[2]Stickel v. Harris, 242 Cal. Rptr 88, 93 (Ct. App. 1987).

[3]Taylor v. Budd, 18 P.2d 333, 334 (Cal. 1933).

[4]Green v. Future Two, 225 Cal. Rptr. 3, 6 (Ct. App. 1986).

[5]Id.

[6]Cal. Const. art. XV, § 1(2).

California Civil Code codifies the constitutional usury limitations. In attempting to define how a broker can "arrange" a loan, the statute mandates first acting "for compensation or in expectation of compensation," then gives as examples a broker "soliciting, negotiating, or arranging the loan for another," or "selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property or a business for another."

A California Court of Appeals held that the broker exemption applied in a case where the broker performed substantial acts that could be considered "arranging" the loan, including "title searches, document reviews, consultation and advisement, calculation of principal and interest, preparation of loan documents, discussion of documents and terms with lender and borrower, [and] securing execution of documents."[7] The court found the broker's "services were not nominal or ostensibly pretextual," and did not find "evidence that [the broker] merely lent his license to [the lender] to avoid the 10 percent interest limitation."[8]

Similarly, in Jones v. Kallman, the Court of Appeals affirmed application of the broker exemption where the broker determined rates and points, set the terms of the loan, and reviewed the loan documents after they were prepared by another.[9] "The trial court found such involvement 'minimal' but legally sufficient to bring the transactions within the exemption. We cannot fault this determination."[10]

---

[7]Del Mar v. Caspe, 272 Cal. Rptr. 446, 453 (Ct. App. 1990).

[8]Id.

[9]244 Cal. Rptr. 609 (Ct. App. 1988).

[10]Id. at 611.

Kolodge asserts that since Hansen of the Jack Warner Group, a licensed broker, received a commission on the transactions, no further analysis was needed, and the loans should not have been found to be usurious. Kolodge further argues that the Warner Group's review of the documents is enough to satisfy the legislative intent in allowing usury exemptions for transactions "made or arranged" by licensed brokers. We disagree.

The evidence makes it clear that Coffman arranged the loan and that he was not a licensed broker. Additionally, substantial evidence supports the district court's finding of fact that no broker from the Jack Warner Group participated in arranging the loan in a manner substantial enough to invoke the exemption. One partner stated that he knew nothing of the deal, and the testimony of the other partner was that he did not specifically recall reviewing the documents, but that he presumed his partner must have. There was also testimony by Kolodge that supports an inference that the so-called "participation" of Coffman's licensed supervisor was a deliberate attempt to skirt the usury laws. Therefore, we conclude that substantial evidence supports the district court's determination that the broker exemption to California's usury laws did not apply here.

Next, Kolodge claims that the savings clause in the deed of trust securing the second loan was effective in preventing the loans from being found usurious, and that the cases relied on by the district court to find that a savings clause cannot salvage a note that is usurious on its face do not apply here, since the parties relied on the broker exemption. We disagree.

The Ninth Circuit Court of Appeals applied California's usury laws to a bankruptcy dispute to determine if a savings clause was adequate to render a transaction nonusurious.[11] The clause at issue was clearly worded to apply strictly to the interest rate on the loan, but the court noted that the bankruptcy court was

> aware of the danger that such a clause could be a subterfuge or sham, designed to permit the collection of a usurious rate of interest without an appearance of violation of the law. It was therefore appropriate to take evidence, as the bankruptcy court did, on what the parties entering the agreement intended the actual interest rate to be.[12]

The court went on to affirm the judgment that the loan was not usurious because of the savings clause, holding that the bankruptcy court's decision was based on uncontroverted testimony of the intent of the parties, and therefore was not clearly erroneous.[13]

Applying Arizona law, the Ninth Circuit Court of Appeals in Kissell Co. v. Gressley held that a savings clause did not "purif[y] what might otherwise be a usurious transaction."[14] The clause was narrowly tailored to the possibility of a usurious rate, but the court upheld the trial

---

[11]In re Dominguez, 995 F.2d 883 (9th Cir. 1993).

[12]Id. at 887.

[13]Id.

[14]591 F.2d 47, 52 (9th Cir. 1979).

judge's finding that it was wrongdoing on the part of the lender that caused the interest rates to exceed those permitted by law.[15]

The district court here found that Kolodge intended to earn an effective interest rate of eighteen percent, and that the loans were not made or arranged by a broker, and that therefore he did not qualify for the broker exemption to California usury laws. Both of those findings are supported by substantial evidence. The savings clause at issue here is not specific to interest rates and is essentially buried in the midst of many other boilerplate provisions of a seventeen-page deed of trust document. The district court concluded that "[i]t is not reasonable to allow a lender to charge a usurious rate, have it declared void, and then allow the lender to use a savings clause to recover the legal rate. Such a result is against public policy." We agree. Kolodge purportedly relied on the broker exemption to make the interest rates legal, but as the lender and the party responsible for drafting the agreements, he did so at his peril. The district court's conclusion that the savings clause did not salvage a usurious rate was supported by substantial evidence of the intent of the parties, and comports with California law.

<u>Offer of tender</u>

Section 1504 of the California Civil Code reads as follows:

> An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the

[15]<u>Id.</u> (finding wrongful acts by the lenders caused the borrower to stop development of an apartment complex, thus triggering acceleration clauses in the loan that resulted in usurious interest rates).

> obligation, and has the same effect upon all its incidents as a performance thereof.

Section 2076 of the California Code of Civil Procedure reads as follows:

> The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.

Kolodge contends that the letter from Rolfe offering to settle the amounts owing on the loans by signing over the Starlight property was not a proper tender to trigger California Civil Code section 1504, which tolls the accrual of interest upon tender. Kolodge argues that the offer made was conditional, not specific, and was not for cash; thus, it fails to meet the mandates of section 1504.

Hollister counters that the offer satisfied section 1504, because the statute permits a tender of property, and because Kolodge failed to object to the form or amount of the offer under California Code of Civil Procedure section 2076.

The letter in which the offer was made was not included in the record; nor are any significant passages from the letter quoted anywhere in the record. This court has held that "[w]hen evidence on which a district court's judgment rests is not properly included in the record on

appeal, it is assumed that the record supports the lower court's findings."[16] Therefore, we conclude that the district court's judgment that the offer was sufficient to stop the running of interest on the loan should be affirmed.

However, it is clear from the record that the property offered by Rolfe was appraised at over $1.3 million near the time of the offer, and that Kolodge did not respond to the offer except to refuse or to ignore it.[17] The amount owing on the loans at that time is not evident from the record, but we can calculate from Mrs. Kolodge's partial accounting a total original principal amount owing of just over $1.5 million as of three months before the offer was made. Deducting prepaid interest from the amount owing, the total principal would be just over $1.3 million. Rolfe testified that by that time payments totaling approximately $600,000 had been made. Since the interest on the loans was void as discussed above,

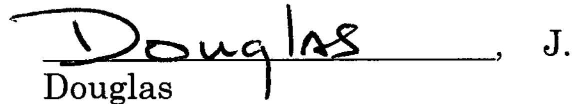
---

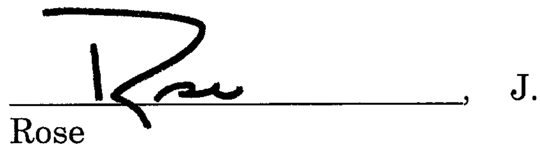
[16]Stover v. Las Vegas Int'l Country Club, 95 Nev. 66, 68, 589 P.2d 671, 672 (1979) (citing City of Las Vegas v. Bolden, 89 Nev. 526, 516 P.2d 110 (1973)).

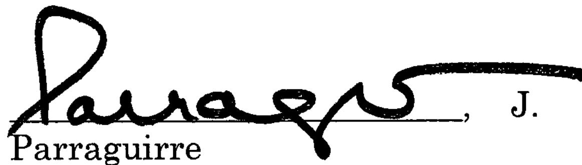
[17]Rolfe testified that Kolodge refused the offer; Kolodge testified that he ignored the offer.

substantial evidence supports the conclusion that the offer made was adequate to satisfy the debt. Therefore, this court affirms the judgment of the district court that the offer was sufficient to stop the accrual of interest on the loans. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_______________, J.
Douglas


_______________, J.
Rose


_______________, J.
Parraguirre

cc: Hon. Michael P. Gibbons, District Judge
Judith A. Otto
Evan Beavers & Associates, P.C.
Terra Law LLP
Douglas County Clerk