Cite as 2012 Ark. App. 160

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-787

LARRY PAYTON APPELLANT	Opinion Delivered February 22, 2012
	APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DIVISION, [NO. CV-2009-820]
V.	
	HONORABLE DAVID N. LASER, JUDGE
TROY COLEMAN APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a verdict for plaintiff-appellee in a lawsuit on a note. Appellant contends that the trial court erred in finding that the suit was not barred by the five-year statute of limitations and in finding that the note was not usurious. We affirm.

Appellant executed a promissory note on December 11, 2002. The note was payable to appellee in the amount of $268,500, bore interest at five percent per annum, and was payable on June 11, 2003. Appellant argues that, because the alleged default took place on June 11, 2003, and because appellee filed his complaint on October 2, 2009, appellee's suit was barred by the statute of limitations, and that the trial court erred in finding that the statute of limitations was tolled by partial payment. We do not agree.

The applicable statute of limitations is Ark. Code Ann. § 16-56-111 (Repl. 2005), which provides that suits on notes not issued by a bank[1] must be brought within five years after the cause of action accrues. Subsection (b) of that statute provides, however, that the statute of limitations is tolled by partial payment. When, in an action on a promissory note, the debtor pleads the statute of limitations as a bar to the action and the plaintiff alleges partial payment to remove the bar, the plaintiff has the burden to prove the fact and date of the partial payment. *Smith v. Grimsley*, 215 Ark. 279, 220 S.W.2d 428 (1949). Here, the record shows that the collateral for the note was a large industrial crane purchased by appellant. After default on the note, the crane was heavily damaged in a fire, and appellant brought an action on the policy against the company that insured the crane. After appellee intervened in the insurance suit, all parties agreed on a distribution of the insurance proceeds, resulting in an Agreed Order for Distribution of Proceeds, pursuant to which appellee received payments totaling $22,344.60 in April and June of 2006. Whether the distribution pursuant to the agreed order constituted voluntary payment on the note depends on the intent of the parties at the time of the agreed settlement, and the testimony regarding intent was in sharp conflict. Given the conflicting evidence, we cannot say that the trial court clearly erred in finding that the distribution was intended as payment on the note.

Appellant next asserts that, despite the note's stated interest rate of five percent per annum, the interest rate was usurious. Usury occurs when a lender charges more than the

[1] *See Ernest F. Loewer, Jr., Farms v. Nat'l Bank of Ark.*, 316 Ark. 54, 870 S.W.2d 726 (1994).

legally permissible maximum rate of interest, defined by article 19, section 13 of the Arkansas Constitution, as amended by amendment 60. *Kennedy Funding v. Shelton*, 2010 Ark. App. 438. For an agreement to be usurious, it must be so at the inception of the transaction. *Id*. Usury will not be presumed, imputed, or inferred where an opposite result can be fairly and reasonably reached; the party asserting usury has the burden of proof by clear and convincing evidence. *Id*. The test for usury is to determine the amount that the borrowers would pay on the principal at the maximum rate of interest, and then compare that amount to what would actually be paid. *Davidson v. Commercial Credit Equipment Corp.*, 255 Ark. 127, 499 S.W.2d 68 (1973). Parol evidence may be considered for the purpose of showing usury. *Aclin Ford Co. v. Cordell*, 274 Ark. 341, 625 S.W.2d 459 (1981).

We cannot say that the trial court clearly erred in finding that appellant failed to prove by clear and convincing evidence that the contract was usurious. Appellant asserts that the actual loan amount was $200,000 and that the additional $68,500 was interest disguised as principal. However, there was extensive testimony to show that the note arose out of a joint venture by the parties in which appellant approached appellee and asked for the loan of $200,000 in order to buy a damaged crane. Appellant said that he could repair the crane and operate it profitably, estimated the profits at $100,000, and offered to halve those profits with appellee if appellee could secure funding for the enterprise. Appellee was not a lending institution or a retailer, did not have the requisite funds to loan appellant, and would himself be required to secure a loan at seven percent interest to obtain the $200,000 necessary to buy into the enterprise. Appellee agreed to secure the loan if appellant paid the interest on the

bank note as it accrued and issued a personal note to appellee in the amount of $250,000. After appellant purchased the crane, however, he was consistently unable to make the interest payments on the bank note as he had agreed to do and was unable to pay the personal note to appellee when it came due. The parties agreed to a novation by which appellee would forebear from suing on the past-due note and extend the time for payment for a consideration of $18,500. The original personal note in the amount of $250,000 was thus destroyed and replaced by the note for $268,500, which is the subject of the present action.

A contract by which a lender acquires the right to a speculative profit in addition to a fixed rate of interest ordinarily presents a question of fact as to usury. *Am. Insurers Life Ins. Co. v. Regenlod*, 243 Ark. 905, 423 S.W.2d 551 (1968). However, there is no basis for a finding of usury when the one advancing the money risks losing both principal and interest if the venture fails. *Id.* We think that the trial court could properly find that appellee took such a risk. First, appellee did not have the funds available, but was required to borrow them from a bank at an interest rate two percentage points higher than that stated on the personal note between the parties. Second, appellee depended on appellant to make the interest payment on the bank note as he agreed to do; as it turned out, appellant largely failed to do so, and appellee was required to make these interest payments himself to avoid defaulting on his own note to the bank. Third, the venture depended on appellant's ability to transport the crane from Georgia to Arkansas (requiring fourteen truckloads), to repair the crane, and to earn the estimated amount of profit by operating it. We think that such a venture could

properly be found to entail a risk of losing both principal and interest, and we cannot say that the trial court clearly erred in so finding.

Affirmed.

GLADWIN and MARTIN, JJ., agree.

Eichenbaum, Liles & Heister, P.A., by: *Mitchell L. Berry*, for appellant.

Chad R. Oldham, for appellee.