SUPREME COURT OF VIRGINIA

SUPREME COURT BUILDING
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219
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Granted Appeal Summary

Case
DAVID M. BEKENSTEIN, ET AL. v. BANK OF AMERICA, N.A.
(Record Number 180511)

From
The Circuit Court of the City of Richmond; B. Cavedo, Judge.

Counsel
Henry W. McLaughlin (The Law Office of Henry McLaughlin, P.C.) for appellants.

James L. Windsor (Kaufman & Canoles, P.C.) for appellee.

Assignments of Error

1. The Circuit Court of the City of Richmond ("the trial court") erred in its Opinion and Order of September 28, 2017 sustaining a demurrer by respondent/defendant Bank of America, N.A. ("Bank of America") holding that the complaint in this case of the petitioners, David M. Bekenstein and Michelle B. Bekenstein ("the Bekensteins") failed to plead a claim for usury. This was error because the Bekensteins did plead a claim for usury for reasons including the following:

A. The subsidiary mortgage loan ("the loan") that is a subject of this case (pled in the alternative) was governed by Va. Code Ann. Section 6.1 330.72 ("Section 6.1-330.72[”]) which specified which charges are to be allowed to be charged to borrowers or paid by borrowers in such loans.

B. Section 6.1-330.72 provided that, other than exceptions not relevant to this case, "no other charge of any kind" could be imposed on or charged to a borrower.

C. One of the allowed charges specified in Section 6.1-330.72 was money actually paid to government for recordation fee(s).

D. The lender (or an agent of the lender) charged the Bekensteins $31 for a charge disclosed in the HUD-1 as a recordation charge to the clerk's office as a "release fee."

E. This $31 charge was not paid as a "release fee" [but] rather was secretly pocketed by the lender or its agent. Section 6.1-330. 72 forbade that phantom $31 charge.

F. As indicated in *Garrison v. First Federal Savings and Loan*, 402 S.E. 2d 25 (1991) that disallowed $31 fee was usurious interest.

2. The trial court's September 28, 2017 Opinion and Order sustaining Bank of America's demurrer to the Bekensteins' usury claims (Count Three of the Complaint) also erred in holding that a $75 "Tax Service Fee" imposed by the lender on the borrower in the loan could be subsumed in the attorney's fees, appraisal fees, or survey fees permitted by Section 6.1-330.72. This was error because the $75 "Tax Service Fee" was not paid to the lawyer to whom a lawyer's fee was disclosed in the HUD-1 or to any surveyor or appraiser, but to the lender, according to the HUD-1. Further, such holding was error because Section 6.1-330.72 specifies certain permissible charges that did not include a "Tax Service Fee" and provided that no other charge "of any kind" may be charged the borrower.

3. The trial court's September 28, 2017 Opinion and Order sustaining Bank of America's demurrer to the Bekensteins' usury claims also erred in holding that the Bekensteins did not plead usury in averring that the lender charged "Additional amounts stated to have been paid which were not, in fact, paid as a part of the loan, rather retained as a hidden charge either by the lender or agent of the lender, chargeable to the lender because of respondeat superior." In the said September 28, 2017 order, the trial court held that the complaint "vaguely alleges other fees and hidden charges but fails to specify those charges" and stated, "Even taking this allegation as true, these fees and hidden charges may be subsumed within those charges permitted by Va. Code Section 6.2-328 or collateral services that were contracted for and paid in good faith." This was error because (a) Va. Code Ann. Section 8.01-273 allows a borrower to plead usury in "general terms;" (b) the complaint pled these charges as bogus charges claimed to have been paid to the borrower as loan proceeds but not in fact paid to the borrower and therefore a hidden fee. Such hidden charges could not have been imposed in good faith.

4. The trial court erred in that part of its September 28, 2017 Order sustaining with prejudice Bank of America's plea in bar holding that the Bekensteins' claim of forgery of Michelle Bekenstein's name was barred by the statute of limitations for fraud. This was error because Michelle Bekenstein never signed the deed of trust, which, therefore, was void ab initio as to which there was no statute of limitations.