Promissory Note
Interpretation (Promissory Note)

Smith v. Gold Country Lenders — 9th Cir. # 00-36014
In Re Smith — Bankruptcy # 697-62183-aer13

5/16/02 9th Circuit (affirming Bankruptcy Appellate Panel (see Opinion # E00-15(21) which had affirmed Radcliffe in part, and reversed and remanded in part)(underlying bankruptcy court decision was a letter opinion)

Unpublished

In 1993, Debtor's predecessor in interest in certain California property, executed a note for $15,000 (the S.P.S. note), secured a trust deed on the California property in favor of a third party (the S.P.S. note). At some point the third party was paid off by another party, and Debtor's predecessor gave another note for $15,000 to the paying party (the Texeria note).

In 1994, as part of a purchase of the California property, Debtor borrowed $28,000.00 from Creditor, and along with her predecessor, executed a note (the $28,000 note) and trust deed on the California property in Creditor's favor. At the same time, Debtor executed alone a "Cross Collateral" Installment Note to Creditor for $43,000 at 12% interest and a "Cross Collateral" Trust Deed on property in Oregon to secure the $43,000 note. Interest was to be paid in conformity to the terms of the S.P.S. and $28,000 notes. The $43,000 note recited that it was given only as additional security for the S.P.S. and $28,000 notes and trust deeds and was not to be considered an "additional loan." It further stated that when the $28,000.00 and S.P.S. notes and trust deeds were paid in full, the $43,000 note would be cancelled and the trust deed would be reconveyed.

The $43,000 note went into default and Creditor filed a notice of default and election to sell the Oregon property under the trust deed.

Debtor then filed Chapter 13 and eventually got a plan confirmed. Creditor filed a claim to which Debtor objected, asserting various defenses, some of which were based on alleged Truth In Lending Act (TILA) violations. [Note: the case was eventually converted to Chapter 7.]

The bankruptcy court held Debtor liable on $43,000 principal, with interest thereon, and awarded costs and fees under § 506(b). The court offset the claim by $1000 plus $32.80 in costs as statutory damages under TILA for certain disclosure violations. The court did not award any "actual" TILA damages.

Debtor appealed. The Bankruptcy Appellate Panel (BAP) affirmed in part and reversed and remanded in part. See Opinion #E00-15(21). Creditor appealed and Debtor cross appealed to the 9th Circuit.

The 9th Circuit affirmed the BAP.

The BAP correctly reduced the claim's principal by $15,000. Creditor did not prove it was entitled to a claim based on either the S.P.S. or Texeria notes. The $43,000 note referenced the S.P.S. note. However that note had been paid off at the time the $43,000 note was executed. Further, there was no evidence Debtor agreed to assume the Texeria note in that the $43,000 note specifically referenced only the S.P.S. note, and the Texeria note had a higher interest rate than the S.P.S. note. The Circuit did not assume Debtor intended to assume responsibility for a note materially different from the one incorporated by the $43,000 note's explicit language.

The Circuit noted it agreed with the BAP's analysis of the other issues in Debtor's cross appeal, in part referencing a separate published opinion (289 F.3d 1155 (E02-3(5)), where the Circuit (in affirming the BAP & Bankruptcy Court), discussed certain issues relating to Truth In Lending Act damages].

The Court remanded for recalculation of the claim in light of its holding, including the reasonableness of Creditor's attorney's fees.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GERALDINE KAY SMITH,

Debtor.

GOLD COUNTRY LENDERS,

Appellant,

v.

GERALDINE KAY SMITH,

Appellee.

No. 00-36014

BAP Nos. OR-99-1543-RyKM

In re: GERALDINE KAY SMITH,

Debtor,

GERALDINE KAY SMITH,

Appellant,

v.

GOLD COUNTY LENDERS,

Appellee.

No. 00-36032

BAP No.
OR-99-01542-RyKM

MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel

Klein, MacDonald and Ryan, Bankruptcy Judges, Presiding

Argued and Submitted March 6, 2002
Portland, Oregon

Before: B. FLETCHER, O'SCANNLAIN and BERZON, Circuit Judges.

Gold Country Lenders ("Gold Country") appeals the Bankruptcy Appellate Panel's ("BAP") decision which, *inter alia*, reduced the bankruptcy court's award in its favor by $15,000. Smith cross-appeals the BAP's decision, raising over a dozen claims of error.

We have jurisdiction pursuant to 28 U.S.C. § 158(d), and review the decision of the BAP *de novo*. *Cool Fuel, Inc. v. Bd. of Equalization (In re Cool Fuel, Inc.)*, 210 F.3d 999, 1001 (9th Cir. 2000). For the reasons assigned, we affirm the decision of the BAP in every respect.

Because the parties are familiar with the facts, we recite here only those necessary to explain our decision.

I. BACKGROUND

In 1993, Hirsch borrowed $15,000 from Gold Country.[1] In consideration for the $15,000, Hirsch executed a note ("the S.P.S. note") and deed of trust on a California property. S.P.S., a since-dissolved corporation, was the payee of the note. The deed of trust was also in S.P.S.'s favor and was recorded. Unfortunately, the S.P.S. note cannot now be found.

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[1]Gold Country, a California real estate finance corporation, operates as a middleman matching investors who fund loans to borrowers. The loans are secured by real property. While the payee of the note and deed of trust in these transactions is Gold Country, the beneficial interests are subsequently assigned to the actual investors.

The Texerias later paid off S.P.S. on Hirsch's behalf, and a note by Hirsch in the Texerias' favor was executed for the same amount ("the Texeria note"). Shortly thereafter, United initiated foreclosure proceedings against the California property.

In 1994, Smith, who worked with Hirsch, approached Gold Country in hopes of arranging a loan intended in part to purchase the California property. Smith eventually borrowed $28,000 through Gold Country and she and Hirsch executed a $28,000 note (the "$28,000 note") and deed of trust on the California property. That same day Smith also executed a cross-collateral installment note to Gold Country for $43,000 at 12% interest, and a cross-collateral deed of trust recorded against real property Smith owned in Oregon as additional security. A $43,000 balloon payment on the note was due June 25, 1995, and interest was to be paid in conformity with the terms of the S.P.S. note and the $28,000 note, both secured by the deeds of trust on the California property and cross-secured by the Oregon property. The $43,000 note itself recited the fact that it was executed *only* as additional security for the two prior notes and deeds of trust, and was not itself offered in consideration of an "additional loan." It also stated that upon payment in full of the $28,000 note and the S.P.S. note, the $43,000 note would be cancelled and the deed would be reconveyed.

Smith continued to make interest payments on the $43,000 note through June 1996, but did not make a balloon payment in June 1995. After failed attempts to reach Smith, Gold Country filed a notice of default and election to sell the Oregon property pursuant to the $43,000 note and deed of trust. The notice declared that Gold Country was entitled to "all sums due and owing on the obligation secured by the deed of trust," *to wit* "$43,000 principal plus interest from June 8, 1994 until paid at the rate of 12% per annum on the amount aforesaid."

Smith filed a Chapter 13 petition in the spring of 1997, and her third amended plan was confirmed the following year.

Gold Country filed a $49,174.82 proof of claim in the bankruptcy court, and later a third amended proof of claim, asserting a $61,182.59 secured claim that included attorney's fees and costs. Smith filed objections.

The bankruptcy court issued a letter ruling allowing Gold Country a secured claim in the amount of $43,000, plus $9,796.60 in interest, less $1,000 in statutory damages for Gold Country's violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601. After adding Gold Country's fees and costs into the total award, the court entered its final order, allowing Gold Country's claim in the amount of

$15,000 of the principal amount awarded by the bankruptcy court, nor entitled to any interest or attorney's fees or costs related to the S.P.S. note or the Texeria note. Gold Country contends that even though the $43,000 cross-collateral note incorporated the "wrong" $15,000 note (*i.e.*, the original $15,000 note given to S.P.S. instead of the then-existing Texeria note), Smith intended to assume the "subsequent" Texeria note and must be liable for it. For the reasons given by the BAP, we disagree.

There exists no evidence that Smith assumed liability on the Texeria note. The $15,000 note executed by Hirsch in favor of S.P.S. was paid off by the Texerias, who became beneficiaries of the new note. The S.P.S. and Texeria notes listed different beneficiaries, and appear to have different terms with respect to the interest rate – the S.P.S. note at 12% interest, the Texeria note at 15% interest. Most importantly, the cross-collateral installment note refers only to the S.P.S. note, not the Texeria note. We do not presume that Smith intended to assume responsibility for a note materially different from the one incorporated by the explicit language of the cross-collateral installment note.

B. Smith's Cross-Appeal

We dispose of Smith's claim that the BAP erred in failing to award her actual damages as a result of Gold Country's TILA violation in a published

opinion filed concurrent with this memorandum.

With regard to the remaining issues Smith raises in her appeal, after careful consideration of the record, briefs, and oral argument, we find each of them to be without merit for substantially the reasons stated by the BAP.

III. CONCLUSION

We affirm the decision of the BAP and remand to the bankruptcy court to re-calculate, in light of our holding, Smith's liability to Gold Country and the reasonableness of any attorney's fees.

AFFIRMED.