IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01148 COA

JERRY MILLS AND CHARLIE JOE GREEN

APPELLANTS

v.

GOLDOME CREDIT CORPORATION

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. L. BRELAND HILBURN, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

AL SHIYOU

ATTORNEY FOR APPELLEE:

DAVID K. MCGOWAN

NATURE OF THE CASE: CONTRACTS/SUMMARY JUDGMENT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR DEFENDANT

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

McMILLIN, J., FOR THE COURT:

This case is before the Court upon an appeal by the Plaintiffs from the grant of summary judgment by

the trial court in favor of the Defendant, Goldome Credit Corporation. The claims were originally commenced as separate actions, one by Jerry Mills and one by Charlie Joe Green and his wife, Venessa Green. The cases were consolidated in view of the fact the parties agreed that the issues controlling the outcome of both cases were essentially identical.

The Mills and the Greens had contracted with Low/Ke Inc., an Alabama corporation, to construct single family residential improvements for them, apparently from stock plans or models offered for sale by Low/Ke. Little can be gleaned from the record regarding Low/Ke or its methods of doing business. We are unable to determine from the scant documents making up the record whether the contracts included the underlying parcel of real estate, or whether the buyers had already obtained title to the unimproved real property from another source. The Greens' contract stated that they were purchasing "Construct the Mobile," and the Mills' contract stated they were purchasing "Construct the Jackson." The purchase price in the contracts, both in the twenty to thirty thousand dollar range, was deferred, to be paid over a twenty-year period in monthly installments with interest at the rate of 13.5% per annum. Both contracts granted a conditional right of prepayment to the purchasers, which we quote as follows:

> PREPAYMENT. If this debt is paid in full before the final scheduled payment date, Buyer may make such payment without penalty except that resulting from the application of the Rule of 78's less 20 days and Seller shall refund or credit Buyer with that portion of the Finance Charge which shall be determined under the Rule of 78's less 20 days computed to the nearest scheduled payment date.

Shortly after entering into the contracts, Low/Ke assigned them both to the Appellee, Goldome Credit Corporation (the contracts recite that the assignee is Colonial Financial Service, Inc.; however, counsel for Goldome informs us that these are the same entities, the company having undergone a legal name change.)

Both borrowers prepaid their contracts after a few years (approximately eight years for the Greens and seven years for the Mills). It is undisputed that, by computing the contract payoff figure under the Rule of 78's rather than by the actuarial method, the actuarial yield to Goldome on the Green contract was 15.85% and on the Mills contract was 16.19%.

The Greens and the Mills both allege that the maximum interest rate allowable by law on the contracts was established by section 75-17-1(4), which pertained to "any loan, mortgage, or advance which is secured by a lien on residential real property . . . ." Miss. Code Ann. § 75-17-1(4) (1972), *amended by* Miss. Code Ann. § 75-17-1(4) (Supp. 1982). This section ties the maximum rate to a variable index compiled by the United States Treasury Department. It is undisputed that, at the operative times, the maximum rate chargeable under this section was 13.5%. The Greens and the Mills then rely upon the case of *Denley v. Peoples Bank*, 553 So. 2d 494 (Miss. 1989) to establish unequivocally that the increased yield created by the application of the Rule of 78's constitutes a usurious extraction of finance charges entitling them to relief.

Goldome does not dispute the claim that 13.5% is the maximum yield chargeable under section 75-17-1(4). Neither does it dispute the applicability of the *Denley* decision to the case. Goldome simply claims that the portion of the usury statute covering these transactions was not section 75-17-1(4), but was, in fact, 75-17-1(6), which permitted actuarial yields as high as 24% for "closed end credit

sales of goods, tangible property or services" if such yields were contracted for by "any retail seller." Miss. Code Ann. § 75-17-1(6) (Supp. 1982). Goldome argues that *Denley* does not prohibit a payoff that increases the yield above the contract rate, but, instead, holds that, if an early payoff results in a yield above the contract rate, the increased yield must not violate the statutory maximum. Since the increased yield on both contracts was substantially below that allowable under section 75-17-1(6), Goldome argues, there was no violation of the usury statute.

We agree with Goldome's interpretation of *Denley*. In *Denley*, the contract rate on the note was 16%, even though the statutory maximum chargeable at the time was 18.43%. However, upon prepayment, the application of the Rule of 78's resulted in an actuarial yield to the bank of 23.86%. The Mississippi Supreme Court found the violation of the usury statute to arise out of the yield above the statutory maximum of 18.43% and not the fact that the original contract rate of 16% had been exceeded. *Denley*, 553 So. 2d at 497.

The issue now before us, therefore, is easily stated, though perhaps not so easily resolved. Are the transactions now before us "closed end credit sales of goods, tangible property or services" that were contracted for by a "retail seller" such that the higher yields permitted by subsection (6) apply? *See* Miss. Code Ann. § 75-17-1(6) (Supp. 1982). If the answer is in the affirmative, then it seems clear that Goldome should prevail on this appeal. Otherwise, it seems apparent that section 75-17-1(4) would apply to this transaction involving "a lien on residential property" and a different result would be compelled by *Denley*.

First, we will dispose of the easy issues. This contract is clearly a "closed end credit sale," as opposed to an open-ended arrangement that contemplates a series of transactions, such as an open account maintained at a retail establishment or the ubiquitous credit-card. It is also clearly *not* a contract for the sale of goods, which term traditionally describes items of personalty.

This leaves us with the more difficult question of whether a contractor whose primary business endeavor is the construction of permanent improvements to real property such as residential dwellings can be classed as a "retail seller . . . of . . . tangible property" within the meaning of this statute. Goldome assumes that the form of the contract alone decides the issue, and that its characterization as an "Installment Sales Contract" is conclusive on the question. With that we cannot agree. The statute not only limits the nature of the transaction, which the form of the contract addresses, it also reserves the right to charge this higher interest rate to a limited class of parties meeting a two-fold test.

The contracting party must, first of all, be a "retail seller." Also, the contract must be for the sale of "goods, tangible property or services." Miss. Code Ann. § 75-17-1(6) (Supp. 1982). There appears to be a significant question as to whether a contractor whose principal business endeavor is to construct single family residential properties under contract with the prospective occupant could be classed as a "retail seller." This Court is aware that there are certain businesses that offer stock predesigned packages to be constructed on the customer's existing lot, and that such a business may have some of the attributes of a retail seller. There are also builders who purchase residential lots and construct homes thereon, speculating upon their ultimate ability to sell the house and lot to some then unknown prospective customer. Whether either or both of these methods of doing business would permit the seller to contract for an interest rate higher than that permitted under section 75-17-1(4)

on the basis of being a retail seller of tangible property appears doubtful to this Court. Although a parcel of real property or permanent improvements to that property in the form of a residence are without question "tangible," it is difficult to classify the vendor of such an asset as a "retail seller." Such a phrase, by its customary usage and understanding, more properly denotes one in the business of selling personal property. *Black's Law Dictionary* defines various terms relating to retail transactions by contrasting them to wholesale transactions. Thus, in defining the verb "retail," the dictionary concludes with the observation that "[i]n general, wholesalers sell to retailers who in turn sell to consumers," and in defining the word as a noun, calls it "[a] sale for final consumption in contrast to a sale for further sale or processing (*i.e.*, wholesale)." *Black's Law Dictionary* 912 (6th ed. 1990). A "retail sale" is defined as "[a] sale in small quantities or direct to consumer , as distinguished from sale at "wholesale" in large quantity to one who intends to resell." *Id.* It seems evident that such concepts as "retail" and "wholesale" have little or no application to transactions involving real estate or permanent improvements thereto.

Section 1-3-65 of the Mississippi Code of 1972 charges that "[a]ll words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning." Miss. Code Ann. § 1-3-65 (1972). We conclude that the common and ordinary meaning of the phrase "retail seller" cannot be expanded to include one engaged in the business of constructing residential properties under contract with the prospective owner, so as to permit the application of the substantially higher finance charges contemplated under section 75-17-1(6) as it existed at the time of contracting in this case.

Our conclusion is bolstered by a wider review of the statutory scheme in effect at the time to govern maximum yields on finance charges. From certain general limitations relating to essentially all forms of contractual credit extension in subsections (1) and (2) of section 75-17-1, the statute went on to carve out transactions of various kinds that could legally command a higher yield. Thus, subsection (3) permitted a higher yield for credit extended to certain organizations such as partnerships, corporations, and similar enterprises. Subsection (4) concerned itself explicitly with the maximum yield on obligations secured by residential real property. Subsection (5) permitted a particular yield to credit card charges and similar arrangements, commonly known as revolving charge or open-end credit arrangements. Subsection (6) followed immediately by permitting a different yield for certain closed end credit sales accomplished by a "retail seller." Subsection (7) dealt with those maximum yields chargeable by licensees under the Small Loan Regulatory Law. Finally, subsection (8) set certain maximum yields chargeable by "any lender or by any retail seller in connection with sales of factory manufactured moveable homes." Miss. Code Ann. § 75-17-1(8) (Supp. 1982).

We consider this rather comprehensive regulatory scheme as indicating an intention on the part of the legislature that the nature of the transaction resulting in the extension of credit should control the maximum yield chargeable. In that interpretation, credit extended in a transaction dealing solely with the construction of single-family residential property to be secured principally, if not exclusively, by a deed of trust on that property would be limited by the provisions of subsection (4). We conclude that subsection (6) was intended to control an entirely different class of credit transactions that were envisioned as being either unsecured or secured by security interests in various forms of personal property normally the subject of more traditionally understood retail transactions. The attendant increased risk to the entity extending the credit under subsection (6) would reasonably explain the concurrent ability to charge a substantially higher interest rate than that allowed to one obtaining the

more solid security of a real estate deed of trust.

That the mutually exclusive role we have assigned to each subsection of the statute is the correct interpretation is further bolstered by the observation that, were we to accept the reasoning urged by Goldome, we would be forced to conclude that there was a hopeless conflict between the provisions of subsection (6) and subsection (8) dealing with a retail seller of "factory manufactured moveable homes" since such a manufactured home would also unquestionably be "tangible property" under subsection (6). It would also sanction the anomalous situation of permitting one selling site-constructed homes to charge interest substantially in excess of that allowed to sellers of factory-manufactured moveable homes when the clear intent of the legislature was to permit exactly the opposite.

Finally, we find further support for our interpretation of the statute by virtue of the fact that the legislature itself recognized the mutually exclusive nature of the different limits on the various forms of credit governed by the statute when, in subsection (9), it added the following language: "A licensee under the Small Loan Regulatory Law . . . may contract for and receive finance charges as authorized by subsection (7) hereof, *regardless of the purpose for which the loan or other extension of credit is made."* Miss. Code Ann. § 75-17-1(9) (Supp. 1982) (emphasis supplied). This language appears to have no useful purpose whatsoever except to exempt Small Loan Regulatory Law licensees from the restrictions of subsections (4), (5), (6), and (8) that would otherwise be deemed to restrict the yield permitted under subsection (7) when the purpose of the credit extension could be fairly said to fit within these other provisions and be limited accordingly.

Having determined that the maximum interest rate chargeable on these transactions is that set out in section 75-17-1(4), and being bound by the decision in *Denley* that a yield recomputed on the occasion of a voluntary prepayment may not exceed the statutory maximum, which in this case was 13.5%, we are forced to conclude that the application of the Rule of 78's in these cases, as it did in *Denley*, has run afoul of the usury statute. This leaves us no choice but to reverse the judgment of the trial court.

Goldome’s counsel points out that the legislature has, since the dates these contracts were made, substantially altered the law of usury in this State, including an amendment that effectively destroys the *Denley* decision. While these observations are, in fact, true, they do nothing to alter the fact that any legislative changes in the usury laws are prospective in effect only. This Court, acting as an intermediate appellate court, is obligated to apply the statutes as they were in effect at the time of contracting and as those statutes have been interpreted by the Mississippi Supreme Court. It is not within our prerogative to reassess the rationale upon which *Denley* was decided to see if, upon further reflection, a different result might commend itself. In view of the apparent vehemence with which that decision was attacked and the lengths the supreme court went to to defend its decision on rehearing, we can only speculate that the winds of change would have to blow with substantial force to disturb the *Denley* decision. Until that occurs, we find that the decision controls the outcome of this case in favor of the debtors on the limited issue presented to us for decision.

We note that the Plaintiffs in these consolidated cases are seeking claims for relief that substantially exceed the penalties prescribed under the usury statute itself. Our decision is restricted to the very limited issue presented to us for decision and should not be interpreted, by implication or otherwise,

to suggest the extent of the relief available to the Plaintiffs for this violation of the usury statute. That is a separate question not presented to this Court and not decided by us.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE TERMS OF THIS OPINION. COSTS OF THE APPEAL ARE ASSESSED TO THE APPELLEE.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.