2013 WL 1292224 (Ala.Civ.App.) (Appellate Brief)
Court of Civil Appeals of Alabama.

Luvena K. MEIGS, Appellant,
v.
Estate of Madge B. MOBLEY, Appellee.

No. 2111143.
February 19, 2013.

On Appeal from the Thirteenth Judicial Circuit of the State of Alabama

Brief and Argument of Appellee

Attorney for Appellee, Jeffry A. Head, 1540 W. I-65 Svc. Rd. S., Ste. D, Mobile, AL 36693, (251) 694-0575, (251) 445-8320.

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***i STATEMENT REGARDING ORAL ARGUMENT**

No oral argument is requested.

***iii STATEMENT OF JURISDICTION**

JURISDICTION IS PROPER AS STATED IN APPELLANT'S BRIEF.

***1 STATEMENT OF THE CASE**

This is an oral contract case.

On May 18, 2010, Appellee filed a complaint against Luvena K. Meigs in the Mobile County Circuit Court. The Complaint contains Four Counts seeking repayment of a loan pursuant to a verbal agreement. (C 12-14) Luvena Meigs filed an Answer to the Complaint and discovery followed. (C 21-23) By agreement of the parties following discovery Count Four was dismissed by Summary Judgment. (C 104-05) On April 4, 2012, the case was tried without a jury. On May 29, 2012, the trial court issued an Order finding for the Plaintiff in the amount of $30,203.00. (C 113) On June 27, 2012, the Defendant filed a Motion for New Trial or to Alter, Amend or Vacate. (C 114) On July 18, 2012, the Defendant filed a Supplemental Motion to Alter, Amend or Vacate. (C 118) On July 25, 2012, the trial court denied the Defendant's Motion for New Trial or to Alter, Amend or Vacate. (C 166)

Notice of appeal was filed and this appeal followed unsuccessful mediation.

*2 STATEMENT OF THE ISSUES

I. WAS THE TRIAL COURT CORRECT IN ITS DETERMINATION THAT THE LOAN WAS MADE TO APPELLANT INDIVIDUALLY, RENDERING HER PERSONALLY LIABLE FOR THE DEBT?

II. WAS THE TRIAL COURT CORRECT IN APPLYING A SIX PERCENT (6%) INTEREST RATE BASED ON THE FACTS IN THIS CASE?

III. WHETHER A SO-CALLED “ACCELERATION CLAUSE” HAS ANY APPLICATION TO THE ORAL AGREEMENT ON WHICH THE JUDGMENT IS BASED?

IV. DID THE TRIAL COURT ERR IN DETERMINING THE AMOUNT OF THE JUDGMENT?

*3 STATEMENT OF THE FACTS

[NOTE: For the sake of clarity, Dale Cobb and Gale Meigs are twin daughters of Madge Mobley. They were 73 years old at the time of trial. Dale Cobb is Personal Representative of the Estate of Madge Mobley opened in North Carolina]

On May 5, 2004 Madge Mobley wire transferred $46,838.00 to Luvena K. Meigs. (C 176) The wire transfer confirmation reflects the transfer to a Regions Bank account in the name of Luvena Meigs in Alabama. (C 176)The source of the money wire transferred to Luvena Meigs was a second equity loan against Madge Mobley's home in the amount of $50,000.00. (R 8-10) The total loan was $50,000.00, which Appellant does not dispute. Testimony of the Personal Representative of the Estate showed that the rest of the money had been given to Luvena Meigs previously by Madge Mobley via a check. (R 17-18) Allure Studio,Inc., Appellant's corporation, was formed on May 7, 2004, two days after the loan was made, which Appellant concedes. (C 60; Appellant's brief pg.9) At the time the loan was made Madge Mobley was 84 years old. (R 12) Dale Cobb and Gale Meigs testified that the loan was made to Luvena Meigs. (R 7; 56, 64)

The oral agreement by Appellant was that the interest ***4** rate would float based on the interest rate of the second equity loan taken out by Ms. Mobley to fund the loan. (Appellant's brief pg.10)Payments were to be $750 per month until the loan was repaid. (Appellant's brief pg.10)At the time the loan was made Appellant was married to James Meigs, the grandson of Madge Mobley. (Appellant's brief pg. 8-9)James Meigs and Luvena Meigs were divorced February 27, 2009. Testimony reflected that payments of $750.00 per month were made for a period of time, but Appellant was not consistent in her payments (R 63). Appellant stopped paying at all after a payment of $375.00 on July 8, 2009. (R 19) Testimony of Gale Meigs, mother-in-law of Appellant, showed that she faithfully deposited payments made on the loan to her account, used the money to pay the second equity loan at Macon Bank (this loan had been used to fund the loan to Appellant) and credited them against the balance owed by Appellant. (R 57) In 2008, via a refinancing, the second equity loan against Madge Mobley's home was paid off and the evidence showed that the balance on that loan at the time was $36,890.85. (R 16-18) The payoff amount reflected the balance due from Appellant since Appellant's payments were used to defray this loan and the terms of the loan to Appellant mirrored

the second equity loan [Appellant does not dispute the mirroring of the second equity ***5** interest rate]. (Appellant's brief pg. 10) The evidence showed that after the second equity loan was paid off Appellant made payments totaling $9,375.00. (R 19)For the sake of fairness and simplicity, Appellee credited all $9,375.00 to principal on Appellant's debt, reducing the balance to $27,515.85. (R 19-20)This was a critical number benchmarked by Appellee which formed the basis for the judgment amount, exclusive of interest. (C 174-176) The trial court later asked Appellee's attorney to compute interest due from July 8, 2009 [the date Appellant stopped paying] to the date of the judgment. Counsel did so and submitted the letter to the trial court found at C 177. A six percent (6%) interest rate was used at the trial court's request, which Appellee had recommended. (C 175)After suit was filed Appellant had made four additional payments of $250.00, the first of which was made on October 1, 2011 and for which Appellee was given credit. (R 177) In its Motion to Alter, Amend or Vacate Appellant advocated a six percent statutory rate of interest in accordance with §8-8-1, Code of Alabama (1975). (C 116) Appellant later repudiated that position in its Supplemental Motion to Alter, Amend or Vacate. (C 118)

*6 STATEMENT OF THE STANDARD OF REVIEW

Issues I and IV are factual determinations made by the trial court in a bench trial. They are subject to the ore tenus rule. Issues II and III are matters of law and subject to de novo review by this Honorable Court.

*7 SUMMARY OF THE ARGUMENT

This appeal is without merit. The trial court, in a bench trial, determined as matters of fact the identity of the recipient of the loan as well as the balance due on the loan. It heard the evidence and took into account all payments and credits due. Thus, Issues I and IV are subject to ore tenus review and a presumption that they have been decided correctly. The trial court's decision is supported by ample, if not overwhelming, evidence.

Insofar as Issue III and the applicability of the *Patterson v. Greene* case which Appellant relies upon, Appellant has taken no notice of the statutory interest changes made by §8-8-5 et seq., Code of Alabama (1975). The new statutes plainly overrule the *Patterson v. Greene decision. Williams v. E.F. Hutton Mortgage Corporation,* 555 So2d 158 (Ala. 1989) makes this absolutely clear. Finally, the Rosenfeld case cited by Appellant is inapposite to the facts before this Court. This is not an installment sales contract case. *Baxter v. J.T.Jones,* 529 So2d 217 (Ala. 1988) limits the scope of the *Rosenfeld* decision and demonstrates the authority of the trial court where terms of repayment are not stated. There was a failure in the meeting of the minds in this case ***8** and the trial court's decision to award a lump sum judgment for the balance of the loan plus interest is correct. The decision should be affirmed in its entirety.

*9 ARGUMENT

I. WAS THE TRIAL COURT CORRECT IN ITS DETERMINATION THAT THE LOAN WAS MADE TO APPELLANT INDIVIDUALLY, RENDERING HER PERSONALLY LIABLE FOR THE DEBT?

Appellant, Luvena Meigs, argues that the trial court erred in finding her liable rather than her corporation, Allure Studio, Inc. This is a factual determination and subject to the ore *tenus rule* on appeal. Despite Appellant's protestations there is nothing plainly and palpably wrong with the decision reached by the trial court. On the contrary, the evidence was overwhelming that the loan was made to Luvena Meigs individually. The wire transfer confirmation reflects the transfer to a Regions Bank account in the name of Luvena Meigs in Alabama. (C 176)

Both Gale Meigs and Dale Cobb, daughters of Madge Mobley, were unequivocal in their testimony that the loan by their deceased mother was made to Luvena Meigs. (R 7,56,64) At the time of the loan Madge Mobley, now deceased, was 84 years old. There was testimony that she knew nothing about business, corporations or **financial** matters. Common sense dictates that an **elderly** woman borrowing money on her home to make a loan to her daughter-in-law to start a business would make the loan to ***10** the person she knew, Luvena Meigs. At the time the loan was made Allure Studio, Inc. had not been formed. (C

60; Appellant's brief pg.9) To argue that an 84 year old woman would mortgage her home and loan money to a corporation that was not in existence to start a new, unproven business is beyond believability and contrary to the evidence. The cases cited by Appellant are inapposite. There is no course of dealing here and the only party attempting to evade responsibility is the Appellant.

Appellant makes much of the testimony of her accountant, Mr. Zick. Mr. Zick had no personal knowledge of her intentions in making the loan. (R 151) The mere fact that Appellant caused her corporation to make payments that she owed and that her accountant treated the debt as a corporate debt are not in anywise evidentiary on the subject of to whom Madge Mobley made the loan. The accountant did as Appellant instructed him which proves nothing as it relates to the recipient of the loan.

The case was tried to a judge alone. The judge heard the evidence and found that the loan was made to an individual, Luvena Meigs. There is nothing in the record to warrant a reversal of the trial court's decision. On the contrary, there is overwhelming evidence to sustain the judge's decision and ***11** this issue is due to be affirmed on appeal.

II. WAS THE TRIAL COURT CORRECT IN APPLYING A SIX PERCENT (6%) INTEREST RATE BASED ON THE FACTS IN THIS CASE?

Appellant totally ignores current Alabama law in raising the issue of usurious interest under §8-8-1, Code of Alabama (1975). Had Appellant read the case on which she relies, *Patterson v. Green,* 474 So2d 725 (Ala. Civ. App. 1985), she would have seen the futility in making the argument raised as issue Number II. That case involved a loan made in 1973 and the Court stated: "There is no dispute that the contract between the plaintiff and the defendants was entirely oral. Thus, in accordance with § 8-8-1, Ala.Code (1975), the maximum rate of interest permitted by law *in this instance* is six percent per year. [1] (emphasis added) Footnote [1] states:" We note that, under current Alabama law, the parties might not be bound by the six percent interest limitation set forth in § 8-8-1. See § 8-8-5, Ala.Code (1975)". *Patterson v. Green,* 474 So2d at 726 fn 1. The law changed in 1980 and Appellant has taken no notice of the change. In *Williams v. E.F. Button Mortgage Corporation,* 555 So2d 158, 160-161 (Ala. 1989) the Supreme Court of Alabama took note of this change stating:
Alabama Code 1975, § 8-8-5(a), allows persons to ***12** agree to pay such a rate of interest as they may determine, provided that the original principal balance of the loan is not less than $2,000, and "provided further that all laws relating to unconscionability in consumer transactions including but not limited to the provisions of chapter 19 of Title 5, known as the Mini-Code, shall apply to transactions covered by this section." The quoted language clearly retains the application of unconscionability laws to loans of $2000 or more, even though § 8-8-5 exempts such loans from the application of "any law of this state otherwise prescribing or limiting [the] rate or rates of interest" paid on such loans. Thus, the trial court's holding that "the usury statute has no applicability to the instant loans" is correct only to the extent that no interest rate limitation is imposed by "any law of this state" on the plaintiffs' loans; to the extent that § 8-8-5 specifies that any interest rate may be charged on loans above $2000.

The loan in this case was made in 2004. The loan was for $50,000.00. The parties were free to choose and agree upon the interest rate, which they initially did. The rate was to be a floating rate (prime plus 1%) mirroring the home equity loan used to fund the loan to Appellant. (Appellant's brief pg. 10) Appellant made payments for a period of time as she had agreed. Ultimately the second mortgage loan taken out by Madge Mobley was refinanced at a 7.5% rate. (R 15) Due to conflicting evidence and convoluted facts the trial court ultimately applied the Alabama statutory rate of interest of six percent (69%) in accordance with §8-8-1, Code of Alabama (1975). In its motion to reconsider Appellant actually asked the trial court to apply a 6% interest rate. (C 116) ***13** Appellant's argument regarding the interest rate and usury is spurious and without merit. Current statutory law, §8-8-5 et seq., Code of Alabama (1975) and Supreme Court authority mandate affirmation on the second issue raised by Appellant. [Note: The loan was originated in North Carolina by a North Carolina resident. Appellant does not challenge this. As there has been no evidence on conflict of laws and what law would be controlling in this case it would be inappropriate for this Honorable Court to substitute its opinion for that of the trial court on this issue.]

III. WHETHER A SO-CALLED "ACCELERATION CLAUSE" HAS ANY APPLICATION TO THE ORAL AGREEMENT ON WHICH THE JUDGMENT IS BASED?

Appellant's next argument is that the trial court erred in finding a lump sum plus interest due and entering a judgment for this amount. Appellant relies on *Rosenfeld v. City Paper Co.*, 527 So2d 704 (Ala. Civ. App. 1988). Appellant's reliance on this case is misguided at best. The case involved a written promissory note that specifically provided: "In the event that the relationship between [Rosenfeld/payor] and [CPC/payee] terminates, regardless of the reason for such termination, the outstanding balance ***14** then due on the obligation expressed herein shall be due and payable, without interest, in five (5) equal annual installments, beginning one year from the date of termination of the relationship between the parties." The unambiguous language of the written promise to pay required the Court of Civil Appeals to find that acceleration of payments not yet due was not appropriate. Indeed, the business relationship involved an installment sales contract and both parties agreed in writing that if the relationship ended payment would be interest free and in five (5) equal annual installments beginning a full year after termination. To hold otherwise would have amounted to totally ignoring the written agreement made by two contracting businesses. The Alabama Supreme Court mentioned the field of operation of the *Rosenfeld* decision in *Baxter v. J.T.Jones*,529 So2d 217,227 (Ala. 1988) stating in footnote 10: "[10] For the rule with respect to **installment sales contracts** in the absence of an acceleration clause, see *Rosenfeld v. City Paper Co.*, 527 So.2d 704 (Ala.1988) (emphasis added). The case before the *Baxter* Court involved two separate interrelated contracts. The Appellant in that case had argued that the time for payment determined by the trial court on the second contract was too short, placing them in a disadvantageous ***15** and unfair position. The Court ultimately ruled: "Because the series of agreements did not set forth any specific requirements for the repayment of the loan, the trial court could set a reasonable time limit. We do not believe the trial judge **abused** his discretion in setting a 60-day limit for the repayment of the loan." 529 So2d at 227.

Appellant asks this Court to add a "no acceleration clause" to the oral agreement to repay this loan. Appellant refused to make payments in accordance with her original agreement to repay $750 per month. Appellant made no payments whatsoever from July 8, 2009 until October 1, 2011. Appellant contends that she does not owe this debt and that her corporation is the debtor. Despite this, Appellant argues that there was a meeting of the minds to reduce the original promise to pay $750 per month to $500 per month. If there was no meeting of the minds on who actually received the loan and who owes the debt, or on the applicable interest rate, there cannot be a meeting of the minds to a series of payments to be made over time (which Appellant claims has changed by course of dealing). She cannot take conflicting positions on crucial facts- accepting those facts benefitting her and denying those facts harmful to her. The trial court understood this and rendered a judgment ***16** for a lump sum. It would be improper to add a "no acceleration clause" into this convoluted set of facts. The lump sum judgment entered was correct and is due to be affirmed.

IV. DID THE TRIAL COURT ERR IN DETERMINING THE AMOUNT OF THE JUDGMENT?

Appellant's last argument is that the trial court failed to give her credit for payments she had made. Appellant mischaracterizes this determination as one of law and not fact in its brief. (Appellant's brief, pg. 14) The determination of payments made, credit given and the amount due is nothing if not a factual determination. To suggest otherwise is folly. There was conflicting evidence over certain payments, with testimony from both sides. The judge who heard all the evidence ruled that after credit for all payments made the amount due including interest equaled $31,203.00. As a factual determination the finding by the trial court is presumed correct under the ore tenus rule. With conflicting testimony in a convoluted case there is no plain and palpable error. The judgment is due to be affirmed as is.

***17 CONCLUSION**

Appellant asks this Honorable Court to substitute its judgment in place of the trial court in determining facts. The trial court heard the evidence and there is nothing indicating its decision is plainly, palpably wrong. Appellant totally ignores Alabama law on interest rates lawfully chargeable where the loan is more than $2,000.00 and cites a case that has long been overruled

by statute. Appellant then mischaracterizes the case as an installment sales case and asks this Honorable Court to write in a "no acceleration clause" where no such clause exists. Appellant contumaciously refuses to accept responsibility for her debt and has frivolously appealed this case. The judgment is due to be affirmed and Appellant should be assessed damages for her wrongful appeal.

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