

No. 11-0910

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEP 21 2011

QUICKEN LOANS, INC.,
Defendant below,
Petitioner,

v.

LOURIE BROWN and MONIQUE BROWN,
Plaintiffs below,
Respondents

(From the Circuit Court of Ohio County, No. 08-C-36)

BRIEF OF AMICUS CURIAE,
JAY D. HIXSON, AND MARTIN P. SHEEHAN,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JOHN BASSETT,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JOHN COTRILL,
TRUSTEE OF THE BANKRUPTCY ESTATE OF CHARLES GROAH,
TRUSTEE OF THE BANKRUPTCY ESTATE OF MARK HEDRICK,
TRUSTEE OF THE BANKRUPTCY ESTATE OF DOROTHY and NORMAN KIDD,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JOSHUA LIVELY,
TRUSTEE OF THE BANKRUPTCY ESTATE OF MELVIN MARQUESS,
TRUSTEE OF THE BANKRUPTCY ESTATE OF WILLIAM MOORE,
TRUSTEE OF THE BANKRUPTCY ESTATE OF CAROL MUNDAY,
TRUSTEE OF THE BANKRUPTCY ESTATE OF DANA and REBECCA OATES,
TRUSTEE OF THE BANKRUPTCY ESTATE OF RANDY RIFFLE,
TRUSTEE OF THE BANKRUPTCY ESTATE OF GREGORY ROCHELLE,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JOSEPH RUSSO,
TRUSTEE OF THE BANKRUPTCY ESTATE OF JACQUELIN SHAVER,
TRUSTEE OF THE BANKRUPTCY ESTATE OF RICHARD SMARR,
TRUSTEE OF THE BANKRUPTCY ESTATE OF BRIAN LEE SUMPTER,
TRUSTEE OF THE BANKRUPTCY ESTATE OF WILLIAM THEISS,
TRUSTEE OF THE BANKRUPTCY ESTATE OF RONNIE THORN, and
TRUSTEE OF THE BANKRUPTCY ESTATE OF HELEN WEEKLEY
IN SUPPORT OF APPELLANT(S) LOURIE BROWN and MONIQUE BROWN

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TABLE OF CONTENTS

Table of Contents

Table of Authorities

Concise Statement Regarding Amicus

Statement Concerning Authorship

Argument

Conclusion

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Barta v. State Compensation Commissioner</u> 128 W.Va. 448, 37 S.E.2d 81 (1946)	5
<u>Carbon Fuel Co v. State Comp. Comm’r</u> 112 W.Va. 203, 164 S.E. 27 (1932)	6
<u>Carrico v. State Compensation Commissioner</u> 127 W.Va. 463, 127 S.E. 2d 463 (1945)	6
<u>Kawaauhau v. Geiger</u> 523 U.S. 57, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998)	7
<u>Matter of Roberts</u> 40 B.R. 629 (Bankr. W.D. Mo.,1984).	4
<u>McVoy v. Amerigas, Inc.</u> 170 W.Va. 526, 295 S.E.2d 16 (1982)	6
<u>Smith v. Jordan (In re: Jordan)</u> 521 F.3d 430 (4 th Cir. 2008)(2-1)(Bailey, C.J., Dist. Ct. N.D. W.Va.)	8
<u>State ex rel. McGraw v. Scott- Runyan Pontiac-Buick, Inc.</u> 194 W.Va. 770, 461 S.E.2d 516 (1995)	6
<u>TXO Production Corp. V. Alliance Resources Corp.</u> 187 W.Va. 457 419 S.E.2d 870 (1992)	5
<u>White v. Wyeth</u> W.Va. (No. 35296 2010)	6
<u>Young v. State Compensation Commissioner</u> 123 W.Va. 299, 14 S.E.2d 774 (1941)	6
Statutes	
11 U.S.C. § 522	4

11 U.S.C. § 523(a)(6)	7
28 U.S.C. § 586 (a)(1)	1
Codes	
W.Va. Code § 31-1-1	6
W.Va. Code § 31-17-1	1
W.Va. Code § 31-17-1(m)	2
W.Va. Code § 31-17-1(o)	2
W.Va. Code § 31-17-8 (m)(3)	4
W.Va. Code § 31-17-8 (m)(8)	4
W.Va. Code § 31-17-17	2, 7
W.Va. Code § 31-17-17(a)	4, 5
W.Va. Code § 31-17-17(d)	7
W.Va. Code § 31-17-18(b)	6
W.Va. Code § 38-10-4	4
W.Va. Code § 46 A-5-101	6, 7
W.Va. Code § 46 A-5-104	7
W.Va. Code § 46 A-5-105	7
W.Va. Code § 46 A-5-106	7
W.Va. Code § 46 A-7-111(1)	7
W.Va. Code § 46 A-7-111(2)	7
Other Publications	
94 C.J.S., <i>Willful</i>	5

Concise Statement Regarding Amicus

Jay Dee Hixson is a debtor in a pending Chapter 13 bankruptcy case now pending in the United States Bankruptcy Court for the Northern District of West Virginia at Case No.5: 09-bk-00814. He is the plaintiff in an adversary proceeding in the same court at A.P. No. 5:09-ap-00042. The adversary proceeding alleged various causes of action under the West Virginia Residential Mortgage Lender Broker and Servicer Act, W.Va. Code §31-17-1, et seq. To the extent this appeal might impact Mr Hixson's claims under this Act, he has a specific interest in this appeal. Mr Hixson is represented in the Bankruptcy Court by Martin P. Sheehan.

Martin P. Sheehan is a member of the panel of Chapter 7 Trustees maintained by the United States Trustee for Region 4. See, 28 U.S.C. § 586(a)(1). He is the trustee administering several different bankruptcy estates in which he has identified potential causes of action under West Virginia Residential Mortgage Lender Broker and Servicer Act, W.Va. Code §31-17-1, et seq. In this capacity, the capacity in which he files this brief, he has a specific interest in this appeal. Martin P. Sheehan is an attorney, authorized to represent himself as trustee for the various bankruptcy estates.

Statement Concerning Authorship

This brief was written solely by Mr. Sheehan. It was funded by him, and his law firm. He has no expectation for reimbursement, except as may be authorized by the United States Bankruptcy Court for the Northern District of West Virginia from one or more of the matters pending there.

Argument

A. There is a statute that permits cancellation of a loan secured by real estate.

The brief of Appellant filed in the instant appeal repeatedly claims there is no West Virginia statute that authorizes the relief granted by Judge Recht to Lourie and Monique Brown; specifically the cancellation of the Note, and Deed of Trust securing payment of the Note at issue in this case. That claim is inaccurate.

West Virginia Code § 31-17-17. Subparagraph (a) provides:

(a) If any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan may be canceled by a court of competent jurisdiction.

There can be little doubt that a mortgage loan is a secured loan. West Virginia Code § 31-17-1(m) defines a primary mortgage loan as follows:

m) "Primary mortgage loan" means any loan primarily for personal, family or household use **that is secured by a mortgage, deed of trust or other equivalent consensual security interest** on a dwelling as defined in Section 103(v) of the Truth in Lending Act or residential real estate upon which is constructed or intended to be constructed a dwelling.

(Emphasis added.) A secondary loan is similarly defined. See West Virginia Code § 31-17-1(o):

(o) "Subordinate mortgage loan" means any loan primarily for personal, family or household use **that is secured by a mortgage, deed of trust or other equivalent consensual security interest** on a dwelling as defined in Section 103(v) of the Truth in Lending Act or residential real estate upon which is constructed or intended to be constructed a dwelling and is subject to the lien of one or more prior recorded mortgages or deeds of trust.

Thus, as a matter of law, there is a statute which authorizes cancelling a loan secured by real estate. This statute was addressed by Judge Recht (App. 00126). The loan can be cancelled upon a showing of a willful violation.

B. Cancel does not mean rescind.

In an elaborately constructed brief, the appellant argues that "canceled" does not mean

“canceled,” but instead means “rescinded.” The import of this word is that something, which was in effect, is no longer in effect. “Void” is a synonym.

“Rescind” has a distinct meaning. The import of this word is that something which was has been undone and the parties are returned to the status quo ante.

Appellant insists that cancel mean rescind. It does so to claim that when a mortgage loan is cancelled the right to recover the principal, although not interest or fees, remains. This does violence to the use of the word “cancel” elsewhere in the West Virginia Code. For example, Appellant appears to concede that a regulated consumer loan, an unsecured debt, can be cancelled for illegal, fraudulent or unconscionable conduct pursuant to W.Va Code § 46A-5-105 for a willful violation of the West Virginia Consumer Protection Act. Brief for Appellant at 22. The nature of the conduct that justifies cancellation under that statute does not imply half-hearted relief.

Restoring the parties to the status quo ante, as appellant appears to suggest, would logically require elimination of the consumer payment obligation. Appellant claims however a cancelled loan would still permit the recovery of the principal. Will lenders seek a judgment in their favor for the principal of a cancelled unsecured loan? Will the legal rate of interest apply to such a judgment? What then was cancelled? Posing such questions establishes the absurd position being advocated. “Cancel” is clearly not the equivalent of rescind in the unsecured loan context.

Why, then, would cancel mean rescind in the secured loan context? There is no good reason. It is true that cancellation is a serious remedy. But the statute addresses a serious problem.

One would have to been living under a rock not to have noticed that the wide ranging scale of inappropriate lending practices have impacted the national economy. This is not a situation where lax enforcement of measures designed to insure fair lending should be encouraged. If bad loans are cancelled, the citizens of West Virginia shall have their property freed from the claims of charlatans masquerading as honest businessmen, and be able to reclaim their equity¹ for productive purposes.

C. Cancellation of the Deed of Trust

The West Virginia Residential Mortgage Lender Broker and Servicer Act, W.Va. Code § 31-17-17(a), quoted above, does describe cancellation of a loan, without making a specific reference to a Deed of Trust. One might question whether a Deed of Trust can be cancelled, if the loan is cancelled. Complex statutory analysis is not necessary.

The Deed of Trust at issue provides as follows:

This Security Instrument secures Lender: (i) the repayment of the Loan, and all renewals, extensions, and modifications of the Note; and (ii) the performance of the Borrower's covenants under this Security Instrument and the Note.

(Deed of Trust starts at Appendix at 001482). If the loan is cancelled, the Deed of Trust, by its own terms secures a non-existent obligation. It needed to be declared void to remove a cloud on

¹ Appellant argues that inadequate collateral value works to the disadvantage of a lender who cannot recover from foreclosing on the collateral all that is owed. But borrowers are disadvantaged too. They lose their assets.

They lose the benefit of a real "fresh start" in bankruptcy. While debtors can, and do, have the right to exempt property in a bankruptcy proceeding (11 U.S.C. § 522 and W.Va. Code § 38-10-4), the exemption only protects the equity. See generally, Matter of Roberts, 40 B.R. 629 (Bankr. W.D. Mo., 1984).

When unscrupulous lenders lend in excess of fair market value, and lend to cause borrowers to lose their homes, in violation of the expressed public policy of West Virginia, W.Va. Code § 31-17-8(m)(3) and (8), debtors are cheated of the opportunity to use bankruptcy proceedings to recover.

the title. TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457 419 S.E.2d 870 (1992). Judge Recht knew that and acted appropriately.

D. Willfulness

The remedy for violations of the West Virginia Residential Mortgage Broker, Lender and Servicer Act are contained in W.Va. Code § 31-17-17. Subparagraph (a) provides:

(a) If any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan may be canceled by a court of competent jurisdiction.

Appellees claimed that the mortgage loan made to them was made in wilful violation of the terms of this statute.

What is a willful violation? Willful was described in 94 C.J.S., *Willful* as having a certain fluidity. It was described as meaning the person “knows what he is doing, and intends what he is doing.” The term is said to imply a conscious act. It has been said a “willful” act is one done “knowingly, permissively, voluntarily, deliberately, persistently, perversely, obstinately or stubbornly.” Willful acts are acts that are not done accidentally, carelessly, thoughtlessly, heedlessly or inadvertently. Willful acts are within the control of the person acting. Doing an act willfully does not imply the act was done with a corrupt motive or an evil intent.

Workers’ Compensation Law has provided significant insight into the statutory meaning of willfulness in West Virginia. In a number of cases, there has been a challenge to workers being compensated for “willful misconduct” or “willful disobedience to an employer’s rule.” For example, in Barta v. State Compensation Commissioner, 128 W.Va. 448, 37 S.E.2d 81 (1946) the Court held that an employee was on notice of the contents of a statute if the statute had been delivered to him. Thereafter, intentional acts, in violation of the statute, would constitute “willful

misconduct.” This was the rule used to deny compensation in Carbon Fuel Co v. State Comp. Comm'r, 112 W.Va. 203, 164 S.E. 27 (1932) (riding a mine car designed to transport coal only in violation of statute).

In Young v. State Compensation Commissioner, 123 W.Va. 299, 14 S.E.2d 774 (1941) the Court held an experienced miner had actual knowledge and observed “while wilful misconduct growing out of a disobedience to law or rules must rest on knowledge thereof, men cannot close their eyes to their surroundings and say that they do not have knowledge of things which are, figuratively speaking, in plain view.” Id. at ___, 14 S.E.2d at 776. In Carrico v. State Compensation Commissioner, 127 W.Va.463, 127 S.E.2d 463 (1945) the Court denied compensation to an employee who failed to wear goggles and subsequently suffered an eye injury. There the Court held that knowing the employee knew there was a rule for his benefit, and that the employee acknowledged he chose not to comply. Such was held to be wilful misconduct.

Additional insight into the meaning of the word “willful” can be found in the West Virginia Consumer Protection Act, W.Va. Code § 46A-1-101, *et seq.* That statute is designed to protect consumers and foster sound and fair business practices. White v. Wyeth, W.Va. (No. 35296 2010) and McVoy v. Amerigas, Inc., 170 W.Va. 526, 295 S.E.2d 16 (1982) and State ex rel. McGraw v. Scott-Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). The West Virginia Residential Mortgage Broker, Lender and Servicer Act, 31-1-1, *et seq.*, should be recognized as having a similar purpose. It too provides specific kinds of consumer protections and fosters sound business practices. It is designed to work in harmony with the West Virginia Consumer Protection Act. See, W.Va. Code § 31-17-18(b).

The West Virginia Consumer Protection Act, authorizes certain penalties, between \$100 and \$1,000, to be imposed for “violations” of the statute. See W.Va. Code § 46A-5-101(a). Attorney’s fees and inflationary adjustments are warranted for mere violations. See, W.Va. Code § 46A-5-104, and § 46A-5-106. Where a violation is “willful” the underlying debt may be cancelled. W.Va. Code § 46A-5-105. This compares favorable with the relief sought by plaintiff here under W.Va. Code § 31-17-17.

Under the West Virginia Consumer Protection Act, the Attorney General has the right to bring suit where violations are “repeated and willful.” W.Va. Code § 46A-7-111(2). The defense of inadvertence in W.Va. Code §31-17-17(d) is similar to the inadvertence defense in W.Va. Code § 46A-7-111(1). Both of these require the business entity to have come forward promptly to notify a consumer of the inadvertent non-compliance, and to remedy the non-compliance. Failure to so act, eliminates this defense.

The distinction between inadvertence and willfulness may not seem substantial. But the difference between a course of fair dealing and overreaching exploitive behavior can sometimes be one of degree. It is for this reason, that the defense of inadvertence, under both statutes, requires a pro-active component. The violation of clear rules by a licensee must be discouraged if fair dealing is to become the standard of the market. In such a light, conscious choice to disregard statutory commands must be considered willful.

The statute here does not require that proof of willfulness involve a desire to bring about a specific consequence.² This is so because the statute requires proof of a “willful violation” of

² In Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998), the United States Supreme Court considered what was a “willful injury” under 11 U.S.C. § 523(a)(6). There the Court held that the act causing the injury must have been a conscious one, and that the

the provisions of the relevant statute and not some “willful” consequence.³

Conclusion

These *amici* ask that the West Virginia Residential Mortgage Lender Broker and Servicer Act be fairly read and used to affirm the rulings of Judge Recht in substantial degree.

RESPECTFULLY SUBMITTED


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resulting injury must have been intended. The distinction is not dependent on a different construction of “willful” than the plaintiff advocates, herein, but is, instead, dependent on the difference in the word modified by willful.

³ Much of this same discussion of willfulness permeates the decision of the United States Court of Appeals for the Fourth Circuit in Smith v. Jordan (In re: Jordan), 521 F.3d 430 (4th Cir. 2008)(2-1)(Bailey, C.J., Dist. Ct. N.D. W.Va.). There the Court concludes that a discharge could be denied for “refusal to obey a Court order” only by a showing of willfulness. Willfulness would be established by proof of knowledge of the existence of the Court order, and a conscious choice to disobey it. Proof of a conscious choice was found lacking because of a lack of precision in the order.

CERTIFICATE OF SERVICE

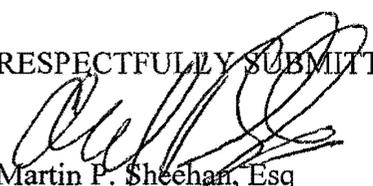
I hereby certify that on this 20th day of October, 2011, I caused this Brief of Amicus Curiae to be served on the following persons by mailing a true and correct copy via United States Postage Mail.

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