o/a 12-6-83 or 7

IN THE SUPREME COURT OF THE STATE OF FLORIDA

S.C. FILE NO: 63,150

EDWARD CERRITO and JOAN R. CERRITO,

Petitioners,

vs.

JACQUELINE R. KOVITCH, LOUIS KOVITCH and ED-JO CORP. OF FLORIDA, INC., a Florida corporation,

Respondents.

______________________________/

FILED

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

This appeal arises out of an action for foreclosure of a mortgage on real property. The Petitioners/Defendants, EDWARD CERRITO and JOAN R. CERRITO (hereinafter the "CERRITOS"), were the mortgagors. The Respondent/Plaintiff, JACQUELINE KOVITCH, was the mortgagee. The Respondent/Counter-defendant, LOUIS KOVITCH, is the husband of JACQUELINE KOVITCH. The mortgaged property was a home owned by the Petitioners. The mortgage secured a note issued by Appellee/Defendant, ED-JO CORP. OF FLORIDA, INC. This note was endorsed by the CERRITOS. When ED-JO CORP. OF FLORIDA, INC. and the CERRITOS defaulted on the subject note, JACQUELINE KOVITCH filed suit to foreclose the mortgage on August 2, 1979, in the Circuit Court In and For Broward County, Florida (R-321). For purposes of identification, the Record on Appeal will be referred to as (R-).

On October 26, 1979, the CERRITOS filed an Answer, Affirmative Defenses, and Counterclaim based on usury (R-331). ED-JO CORP. OF FLORIDA, INC. also filed an Answer, Affirmative Defenses, and Counterclaim (R-337). On November 30, 1979, JACQUELINE KOVITCH filed her Notice for Jury Trial (R-361) and on December 5, 1979, the trial court entered an Order Setting Trial by Jury (R-362). Following the granting of a continuance, the CERRITOS filed a Demand for Jury Trial on March 14, 1980 (R-379). JACQUELINE KOVITCH moved to strike the Demand for Jury Trial on March 21, 1980 (R-381).

The trial court granted JACQUELINE KOVITCH'S Motion to Strike the CERRITOS demand for jury trial by an Order dated April 14, 1980(R-382). On May 12, 1980 the CERRITOS filed an Interlocutory Appeal from the aforementioned Order (Case #80-847, District Court of Appeal, State of Florida, Fourth District). On October 8, 1980, the Fourth District Court of Appeal determined that the April 14, 1980 Order was not one of those non-final orders

from which an interlocutory appeal is authorized, and therefore dismissed the appeal. Thereafter, the CERRITOS petitioned the Supreme Court for review of this Court's October 8, 1980 Order and on March 6, 1981, the Petition for Review was denied (Case #59,929, In the Supreme Court, State of Florida).

Meanwhile, the matter was litigated in the lower court. On May 21, 1980, JACQUELINE KOVITCH, filed her Motion to Strike Claim for Compensatory and Punitive Damages (R-384). On February 13, 1981, JACQUELINE KOVITCH, filed a Notice for Non-Jury Trial (R-390). On February 20, 1981, the lower court entered an Order Setting Non-Jury Trial (R-392). On February 24, 1981, the CERRITOS filed their Motion in Opposition to Notice for Trial (R-394). This motion was never expressly ruled upon by the lower court. On May 1, 1981, the lower court ruled upon the Motion to Strike, etc. dated May 21, 1980 and entered an Order Striking the CERRITOS' Claim for Compensatory and Punitive Damages (R-404). On June 15, 1981, with leave of the lower court, the CERRITOS filed a Third Party Counterclaim against LOUIS KOVITCH (R-405) as well as Amended Affirmative Defenses (R-407). On June 29, 1981, the CERRITOS filed their Demand For Jury Trial on the issues contained in the third-party counterclaim (R-410). On July 6, 1981, LOUIS KOVITCH filed his Answer to Third-Party Counterclaim (R-411). On July 14, 1981 the CERRITOS' demand for jury trial was stricken. (R-558).

On July 22, 1981 the action was tried and on August 3, 1981, the lower court entered a Final Judgment of Foreclosure in favor of JACQUELINE KOVITCH. This judgment also dismissed the CERRITOS' Counterclaim with prejudice. The CERRITOS then filed an appeal with the Fourth District Court of Appeal which was directed to the April 14, 1980 Order Striking the CERRITOS' Demand for a Jury Trial (R-382), the July 14, 1981 Order Striking the CERRITOS' Demand for Jury Trial, and the August 3, 1981 Final Judgment of Foreclosure

(R-762). On December 29, 1982, the Fourth District Court of Appeal rendered an opinion which affirmed the final judgment of the trial court in all respects. The CERRITOS are before this court by reason of constitutional certiorari, (SEE Petitioners' Brief on Jurisdiction), and this Court has accepted jurisdiction.

STATEMENT OF FACTS

On May 11, 1977, Appellant, EDWARD CERRITO, executed Articles of Incorporaton (R-48) for ED-JO CORP. OF FLORIDA, INC. (hereinafter "ED-JO"). Those Articles were filed on June 8, 1977 and a charter was issued on June 10, 1977 (R-817). EDWARD CERRITO, the only incorporator of ED-JO, remained the sole board of director and resident agent. ED-JO never conducted business (R-293) and was involuntarily dissolved on December 5, 1978 (R-283).

A conflict of evidence existed concerning EDWARD CERRITO'S motivation for forming ED-JO. EDWARD CERRITO testified that Frank Scaltrito advised him to form the corporation in early 1977 (R-57). Mr. Scaltrito was the president of Secured Investment Mortgage Co., a mortgage brokerage company (R-86). He testified that ED-JO was formed before he ever met EDWARD or JOAN R. CERRITO (R-87). In any event, at some point, the CERRITOS did contact Frank Scaltrito, and they gave him relevant information concerning their financial status (R-88). Quite briefly, the CERRITOS were in need of money (R-63). EDWARD CERRITO had gone bankrupt in 1975 (R-255). He was once again having a difficult time meeting his financial obligations. The CERRITOS' primary asset was their home (R-89), with a current first mortgage, and a past due second mortgage (on extension) (R-64). In view of their credit history, the CERRITOS were advised that it was unlikely that they would obtain a loan from an institutional lender (R-91). Hence, Mr. Scaltrito recommended private lenders.

After speaking with the CERRITOS, Mr. Scaltrito contacted several potential investors (R-91), including LOUIS KOVITCH, husband of Appellee/Plaintiff (R-95), JACQUELINE KOVITCH. Mr. Scaltrito had acted as mortgage broker for Louis Kovitch on a prior, unrelated investment. This prior association occured in December, 1976 (R-96). When Mr. Scaltrito contacted LOUIS KOVITCH concerning the CERRITOS, Mr. KOVITCH expressed interest in

the investment opportunity. His wife, the Appellee, had just inherited a substantial sum of money (R-166), and they were looking for a profitable investment. Mr. KOVITCH testified that he found the CERRITO investment attractive because the loan would be well secured by the substantial equity the CERRITOS held (R-180). He further testified that the investment was always presented to him as a loan to a corporate borrower with an annual interst rate of 15% (R-181). He also testified that he might not have recommended the investment if it earned only 10% (R-194).

On August 10, 1977, Scaltrito wrote to the CERRITOS, informing them of KOVITCHS' involvement and outlining the steps to be followed in processing their loan (R-821). Shortly thereafter, the CERRITOS executed a Loan Application - Brokerage Agreement (R-98). This document (R-822) describes a $25,000.00 loan, payable in two years, with monthly interest only payments in the amount of $208.33. (Although the agreement states the interest rate as 15%, the amount of $208.33 reflects a 10% interest rate.) The agreement states that "this loan is to pay the debts of the subject corporation". The agreement acknowledges two prior mortgages. The first mortgage was to First Federal of Broward (approx. $34,000.00). The second mortgage was to Jack and Miriam Rubenstein ($15,000.00). A Mortgage Loan Application (R-820) was also signed by the CERRITOS (no reference is made to a corporation). This sets forth the estimated (maximum) costs, payable out of the loan proceeds. Included is an "estimated" attorney's fee of $150.00. Also included is acknowledgment of a $200.00 deposit. It is also noted that a $15.00 charge would be made for a credit report, however, the credit report was never ordered (R-487) (Frank Scaltrito Deposition).

On or about August 12, 1977 Mr. Scaltrito contacted Harry Tempkins, the attorney for JACQUELINE KOVITCH (R-836). Mr. Scaltrito advised Mr. Tempkins that the borrowers were anxious for the funds and that a closing should be

scheduled as soon after the receipt of the title abstract as possible. On August 15, 1977 Mr. Scaltrito sent Mr. Tempkins a previously requested estoppel letter acknowledging the status of the mortgage to the Rubensteins (R-837).

During this period, the KOVITCHS visited the CERRITOS for the purpose of inspecting the property (R-185). At that time, some discussions took place regarding building plans, however, there was a conflict of testimony regarding whether a particular project was identified as the use for which the loan proceeds were being sought (R-71) (R-174).

Also during this period, Mr. Tempkins received an estoppel letter from the attorney representing Jack and Miriam Rubenstein (R-141). This letter was sent to Mr. Tempkins by Mr. Scaltrito (R-141).

On August 24, 1977, the closing on the subject transaction took place in Harry Tempkin's law office. The CERRITOS, Mr. Scaltrito, Jack Rubenstein, Miriam Rubenstein, and Mr. Tempkins attended (R-235). The CERRITOS executed several documents on that day including a Closing Statement, a note, a mortgage, and an affidavit.

The Closing Statement set forth various deductions from the loan proceeds. It was signed by EDWARD CERRITO as President of ED-JO, and additionally it was signed by JOAN R. CERRITO (R-829). The note was signed on its face in similar fashion, however, EDWARD and JOAN R. CERRITO also endorsed the note on its reverse side (R-250). The mortgage was signed by EDWARD CERRITO and JOAN R. CERRITO and incorporated the aforementioned note (R-824). The affidavit was prepared by Mr. Tempkins, signed by the CERRITOS, and provided that the loan was being made to the corporation and that the CERRITOS home was additional security (R-828).

On the same date (at the closing) two satisfactions of mortgage were executed by Jack and Miriam Rubenstein. These satisfactions were prepared and

notarized by Mr. Tempkins. The first released a mortgage of $10,000.00 dating back to January 19, 1972 and is not relevant to the subject transaction (R-839). The second released the Rubenstein mortgage of $15,000.00 which was in effect at the time of the closing (R-838).

At the closing, the CERRITOS received a check payable to them personally for $15,157.80 ($15,000.00 plus accrued interest to date of closing as per the estoppel information supplied by Mr. Scaltrito) and a check payable to them personally for $7,376.20 (R-232), both written out of Harry Tempkins' Trust Account. Remaining amounts were paid to Scaltrito ($1,938.50) (R-150) and Tempkins as commissions, fees, or costs (R-232). The CERRITOS immediately endorsed the check for $15,157.80 over to the Rubensteins and the Rubensteins then gave Mr. Tempkins the above referenced satisfactions (R-267). The CERRITOS retained the check for $7,376.20 (R-267). They received no credit for the $200.00 deposit referred to in the Mortgage Loan Application and Mr. Scaltrito's letter of August 10, 1979 (R-821). They paid an attorney's fee well in excess of the $150.00 fee referred to in that same Mortgage Loan Application. In fact, the fee charged on the application excluded the amount actually charged.

Following the closing, payments were made throughout the term of the note. Payments were made by cash or money order (R-268). The notations "second mortgage interest payment" and "purchased by Mr. & Mrs. Ed Cerrito" were usually included in the money orders and receipts (R-854). It is the KOVITCHS' position that these notations were made by the CERRITOS (R-198). When the final interest payment and balance came due on July 23, 1979, the CERRITOS went into default (R-177). The CERRITOS requested an extension, however, the KOVITCHS declined to extend the loan (R-177).

ARGUMENT

INTRODUCTION

The CERRITOS pose four independent grounds for reversal. First, that the lower court erred in striking the CERRITOS' demand for a jury trial. Second, that foreclosure of a mortgage is an equitable remedy which should have been denied on equitable grounds, including, usury in the underlying promissory note. Third, that the CERRITOS were entitled to a credit for all interest paid in excess of the statutory maximum. With respect to the latter two arguments, Section 687.03 Fla. Stat. (1977) read in pertinent part:

> "It shall be usury and unlawful for any person or for any agent, office or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than 10 percent per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of 10 percent. Such transactions with a corporations shall, whereby the corporation pays interest, be usury and unlawful if for a rate of interest greater than 15 percent per annum . . .".

Lastly, it is the CERRITOS' position that this action was prematurely tried.

I. THE LOWER COURT ERRED IN STRIKING THE CERRITOS' DEMAND FOR JURY TRIAL ON ISSUES CONTAINED IN THE CERRITOS' AFFIRMATIVE DEFENSES AND COUNTERCLAIM OF USURY.

In striking the CERRITOS' Demand for Jury Trial on issues contained in their affirmative defenses and counterclaim of usury, the court overlooked an established principle of both the state and federal Jurisprudence.

The leading Florida case is Smith v. Barnett Bank of Murray Hill, 350 So. 2d 358 (1st DCA, 1977) wherein the situation was identical to the one found in the instant case. The First Dictrict Court of Appeal decided that a jury trial was appropriate using the following two-part analysis:

1. Article I, Section 22, Florida Constitution provides for a jury trial for cases in which a jury trial was traditionallyh affored at common law.

2. Although the right of action afforded by Fla. Stat. 687.04, per se, did not exist at common law, an action or recovery of money as damages was among those types of action in which the common law permitted trial by jury.

Smith v. Barnett Bank, supra, at P. 351.

A close reading of the opinion of the Fourth District Court of Appeal in the instant case indicates that the District Court had no quarrel with the first prong of the Smith analysis. Clearly, the disagreement arises in defining how similar a statutory cause of action needs to be to its common law counterpart before it can be said that it is a "cause of action which was recognized by the common law." Under the analysis set forth by the First District Court of Appeal in the Smith case, any cause of action wherein a Plaintiff claims money damages is sufficiently similar to a common law action so as to afford the parties a jury trial. The Fourth District Court of Appeal would impose a much stricter test and would require that the statutory cause of action be not simply for money damages, but rather for compensatory money damages. The Fourth District Court of Appeal thus reasons that because Fla. Stat. 687.04 limits a Plaintiff's

damages to double the interest paid (plus attorney's fees) as opposed to full compensatory damages, no right to a jury trial has been preserved.

Such reasoning opens the door for substantial reduction in the scope of trial by jury. In this regard, the Court in Smith pointed out as follows:

> It is insignificant to the determination of . . . (the) . . . right to trial by jury that the right of action they assert is created by statute rather than by common law. If the rule was otherwise, claims for money damages based on modern legislation would be subject to denial of a jury trial, and the right to jury trial would shrink as time and legislation change the citizen's rights of redress and access to the Courts.
>
> Smith v. Barnett Bank, supra at P. 351.

Importantly, neither the Fourth District Court of Appeal nor the Respondent's have cited a case which requires a litigant in a statutory cause of action to show that the monetary damages he claims are compensatory in nature, in order to be afforded a trial by jury.

On the contrary, there are a long line of Federal cases which specifically support the notion that in a statutory cause of action for money damages (whether compensatory or not) the right to trial by jury is present. These case provide valuable insights ino the development of the right by trial under modern jurisprudence. The starting point, of course, is the Seventh Amendment, Constitution of the United States. It provides, in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of common law."

In defining the term "in suits at common law", the Federal Courts have faced the very same issue before this Court. A landmark case is Ross v. Bernhard, 396 U.S. 531 (S.C. 1970) wherein the Supreme Court applied a three-part test, to-wit; 1) whether the issue at bar was "legal" (hence triable by jury) rather than equitable under pre-merger custom, 2) whether the remedy sought

is legal, not equitable, and 3) whether the remedy is triable to a jury given their practical abilities.

With regard to the first criteria, at least two circuit courts have held that an action to recover taxes was one recognized at common law because it is an action on a debt, a legal cause of action for which a jury trial was appropriate. Damsky v. Zavatt, 289 F. 2d 46 (2nd Cir., 1961); Farmers-Peoples Bank v. U.S., 477 F. 2d 752 (6th Cir., 1973). Simply because a tax arises out of statute and that statue sets forth how the tax is t be determined does not foreclose the possibility of trial by jury. On the basis of this analysis it would appear that the applicable portion of F.S.A. 687.04 would meet the requirement that legal rights are being enforced.

With regard to the second requirement, it would appear that where the statute provides for the recoverey of a money judgment, in personam, there is little problem in classifying the remedy as legal. See Farmers-People Bank v. U.S., supra, at P. 757.

With regard to the third requirement, clearly the application of F.S. 687.04 is not beyond the comprehension of a lay jury. This is especially so in view of the fact that the question of usury involves a determination of intent. Dixon v. Sharp, 276 So. 2d 817 (S.C., 1973); Atwood v. Fisher, 330 So. 2d 62 (3rd DCA, 1976).

Beyond the application of the three-part Ross test, various Federal courts have pointed to other considerations which when applied to the instant situation tend to show that a jury trial is appropriate in action under F.S. 687.04. In Pernell v. Southall Realty, 416 U.S. 363 (S.C., 1974) the Supreme Court held that a jury trial was appropriate in action under a District of Columbia eviction statute. In applying the Ross test, the Court pointed out that the landlord had failed to provide any support for the notion that the eviction statute remotely

resembled an equitable cause of action. By analogy, neither the KOVITCHES nor the Fourth District Court of Appeal has cited any equitable action which resembled F.S.A. 687.04.

The Court in Pernell also went on to point out that notwithstanding the landlord's understandable desire to handle evictions in a summary manner, such a goal was not inconsistent with trial by jury. Pernell v. Southall, supra, at P. 1734. Clearly, procedures could be adapted to afford a litigant a speedy jury trial. That such procedures do, or do not exist, is not in and of itself, a sufficient justification to withhold trial by jury.

Relatedly, the Court in Pernell noted that the District of Columbia's eviction statute provided that an eviction suit should be brought "as an ordinary civil action". Pernell v. Southall, supra, at P. 383. From this language the Court could not find a legislative attempt to preclude a jury trial. By analogy, F.S.A. 687.04 specifically provides that an action under may be brought "in any court of competent jurisdicton". Surely, had the Florida Legislature contemplated only non-jurfy actions, the language used would have been more explicit to this effect.

Still other Federal Courts have held that in civil actions to recover statutory penalties, a jury trial may be appropriate, even though the statute is silent as to a jury trial. Atchison, Topeka & Santa Fe Railway v. U.S., 178 F. 12 (8th Cir., 1910); Connolly v. U.S., 149 F. 2d 666 (9th Cir., 1945). Thus, the fact the F.S. 687.04 does not specifically indicate a jury trial is appropriate by no means determinative. On the contrary, the lesson of the Federal cases appear to be that all doubts as to the right to trial by jury should be resolved in favor of permitting trial by jury. See also NSC Inter. Corp. v. Ryan, 531 F. Supp 362 (N.D. Ill., 1981) ("the statutory cause of action provides no indication that relief

sought is equitable, which is yet another factor indicating that the Seventh Amendment applies to the Statutes".)

Significantly, the "lessons" of the Federal Courts are found in the case of Hollywood, Inc. v. City of Hollywood, 32! So. 2d 65, 71 (S.C., 1975) wherein this Court held that:

> " . . . Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial for that right is fundamentally guaranteed by the U.S. and Florida Constitution . . .".

Moreover, even aside from the clear holding of the Smith v. Barnett Bank case and the Federal case law, in the subject acton it was JACQUELINE KOVITCH who initially requested a jury trial (R-361). A demand for jury trial may not be withdrawn without consent of the parties. Rule 1.430 (D) Florida Rules of Civil Procedure. The CERRITOS never consented to such a withdrawal. In fact, the record reveals that the Appellants filed demands for a jury trial not only as to the original counterclaim, but also as to the third-party counterclaim.

When all these considerations are weighed it becomes evident that the analysis espoused by the Fourth District Court of Appeal is unnecessarily and dangerously narrow. Quite simply, there is no practical or historical reason for denying a litigant a jury trial in an action under F.S. 687.04.

II. THE LOWER COURT ERRED IN ENTERING A FINAL JUDGMENT OF FORECLOSURE IN LIGHT OF THE USURIOUS NATURE OF THE TRANSACTION AND THE CONDUCT OF JACQUELINE KOVITCH BEFORE AND DURING LITIGATION.

A. The promissory note which was the underlying obligation referred to and incorporated in the mortgage was usurious on its face.

A corporate officer's signature on a note, without identifying or limiting designation of any kind is an endorsement, imposing upon that individual personal liability as a matter of law. New York Financial, Inc. v. J. W. Holding Co., 396 So. 2d 802 (3rd DCA 1981). Further, F.S.A. 673.3-402, specifically provides that "Unless the instrument clearly indicates that a signature is made in some other capacity, it is an indorsement." There seems little doubt that ED-JO and the CERRITOS were each primarily liable for the full amount of the promissory note.

Applying this to the statutory language of Section 687.03 (set forth in the Introduction) and a prima facie case of usury results. First, the note bears interest at greater than 10%. Second, the note is not an "obligation of a corporation." Strict construction of the statutory language of 687.03 exempts only an "obligation of a corporation" from the 10% interest.

The note is more aptly described as an obligation of the corporation and two individuals (the CERRITOS). Surely, as to the CERRITOS it was not simply an "obligation of a corporation". JACQUELINE KOVITCH as holder of the note had the option (aside from the usury problem) of proceeding against either ED-JO or the CERRITOS, for the full amount of the note, as well as any accrued interest. Equally clear, however, is the obvious existence of usury in the note which stated the interest as 15%. It is the CERRITOS' initial contention that the underlying obligation was usurious on its face without any reference to extrinsic evidence. See, New York Financial, Inc. v. J. W. Holding Co., Inc., supra.

B. The subject loan was usurious in that ED-JO was a mere corporate veil and interest in excess of 10% was charged the real borrowers, the CERRITOS.

A corporate shell may not be used to evade the usury laws. Gilbert v. Doris R. Corp., 111 So. 2d 682 (3rd DCA 1959). Whether for purposes of usury such a "shell" exists is a question of fact to be determined by many factors including the holding of directors or stockholders' meetings, the opening of corporate bank accounts, business activity before and after the loan, etc. Securities Inv. Co. of St. Louis v. Indian Water Development Corp., 501 F. 2d 662 (5th Cir. 1974). In this regard, ED-JO never had a directors' or stockholders' meeting, never opened a bank account, never conducted any business activity and never owned any assets (R-285).

Moreoever, although it has been held that sole ownership of stock alone may not justify finding stockholders primarily liable on corporate obligations, and the underlying loan usurious, Holland v. Gross, 89 So. 2d 255 (1956), where a loan is really for the ultimate use and benefit of those stockholders, the interest rate so charged may not exceed the statutory limit placed on loans to individuals. Gilbert v. Doris R. Corp., supra. In this regard it must be pointed out that approximately $15,000.00 of the $25,000.00 loan was used to pay off a mortgage on the CERRITOS personal residence (R-267), that the remaining proceeds were paid directly to EDWARD CERRITO (R-267), that those proceeds were used to pay personal living expenses (R-292), and that the CERRITOS not ED-JO made the monthly payments on the note (R-271).

In the lower court JACQUELINE KOVITCH elicited testimony to the effect that ED-JO was formed on the initiative of the CERRITOS alone long before the subject loan was contemplated (R-87). It is respectfully submitted that the timing of the incorporation is not dispositive of the real issue of whether the CERRITOS were the real parties acting behind a corporate facade. A corporate shell used to evade the usury laws is no less objectionable than one

formed to evade those laws. In both instances, a necessitous individual borrower is charged interest in excess of the maximum allowed by statute.

C. The subject loan was usurious in that the interest rate charged ED-JO was in excess of 15%.

Corporations, like individuals, are afforded protection from interest rates in excess of the statutory maximum. At the time of the subject loan, interest in excess of 15% was usurious as to a corporate borrower. Section 687.03 Fla. Stat. (1979).

For purposes of determining a usurious rate of interest only those actual and reasonable expenses directly attributable to the loan are properly excluded from characterization as interest. Abramowitz v. Barnett Bank, 394 So. 2d 1033 (5th DCA 1981). Brannen v. Southeast Beach State Bank, 365 So. 2d 422 (1st DCA 1978). Any other charges must be considered interest to be spread out over the term of this loan thereby increasing the effective interest rate. For example, documentary stamp taxes do not constitute added interest, Brannen v. Southeast Beach State Bank, supra, while expenses arising out of lenders general overhead, including commission paid to the lender's mortgage broker are considered interest, Williamson v. Clark, 120 So. 2d 637 (2nd DCA 1960).

With regard to broker's commission, Mr. Scaltrito had a prior dealing with Mr. and Mrs. KOVITCH approximately seven months before the subject transaction (R-96); he contacted them before the CERRITOS signed the broker agreement and mortgage application (R-97); and a letter of August 10, 1977, specifically refers to JACQUELINE KOVITCH as "our" investor (R-821) and Mr. Tempkins as "our" attorney. Additionally, in the Affidavit of Frank Scaltrito, filed November 13, 1979 (R-344), Mr. Scaltrito states that in agreeing to the loan JACQUELINE KOVITCH relied on his estimation of the value of the security, as well as his assessment of the viability of ED-JO CORP.

Lastly, in the Affidavit of LOUIS KOVITCH, filed November 13, 1979, he states that he met with Mr. Scaltrito as early as July 24, 1977. It is the CERRITOS' position that Mr. Scaltrito was JACQUELINE KOVITCH'S broker. His commission should properly be included as interest. Mr. Scaltrito was the agent for the KOVITCHS.

Similarly, the $100.00 charge for the title policy was not an actual and reasonable expense directly attributable to the loan. The title policy was merely an added protection requested by the lender and not necessitated by the loan. Further, since the policy only cost approximately $40.00 (R-233), the extra charge of $60.00 was not an actual expense of the loan. If anything it merely represented Mr. Tempkin's "mark-up" on the policy. Thus it was duplicative of the fees already charged by Mr. Tempkins ($250.00), and therefore unreasonable (R-232).

With respect to attorney's fees the Supreme Court has held that where a unity of interest exists between a lender and his attorney, any "attorney fees" passed on to the borrower are properly classified as interest. Stoutmaire v. North Florida Loan Association, 11 So. 2d 570 (1943). In that case, the court found that an attorney at law acting as attorney in fact on behalf of a lender became the lender. Thus, any attorney's fee charged the borrower was really disguised interest. In the subject transaction, the record reveals that on August 24, 1977 Mr. Tempkins received a $25,000.00 check from JACQUELINE R. KOVITCH dated August 22, 1977 payable to his trust account (R-209). At the closing (also on August 24, 1977) he wrote checks totalling $24,654.00, from his trust account. He retained $346.00, representing his fee ($250.00), the charge for the title policy ($100.00), less a credit for recording overcharge ($4.00) (R-231-232). Since obviously the KOVITCH check did not clear by August 24, 1977,

Mr. Tempkins, in effect, financed the loan, and at the time of closing he was the lender. Any attorney's fee he charged was therefore, "disguised interest".

The effect of the various "disguised interest" charges can be represented as follows:

1.	Amount Borrowed	$25,000.00
	Brokers Commission	1,938.50
	Amount Realized	$23,061.50
2.	Amount Borrowed	$25,000.00
	Title Policy (Actual Cost $40.00)	60.00
	Amount Realized	$24,940.00
3.	Amount Borrowed	$25,000.00
	Attorney's Fees	250.00
	Amount Realized	$24,750.00

Under each of these situations, the actual interest rate would be usurious, as follows:

Amount Received by CERRITOS	$23,061.50	$24,940.00	$24,750.00
Monthly Interest Payment	312.50	312.50	312.50
Annual Interest Payment	3,750.00	3,750.00	3,750.00
Annual Interest Rate	16.26%	15.06%	15.15%

D. The parties possessed the requisite intent to charge usurious interest.

Any party who participates in a transaction knowing that the interest being charged is in excess of the statutory maximum possesses intent to violate the usury statutes. Abramowitz v. Barnett Bank of West Orlando, 394 So. 2d (5th DCA 1981). Lee v. Newman, 143 So. 2d 222 (3rd DCA 1962). The party does not have to consciously decide to charge a higher rate than the maximum allowable, but merely has to consciously charge an amount which, in fact, is more than the amount allowable. This intent was established by testimony that Mr. KOVITCH was aware that the interest being charged was 15% (R-181), by the preparation of the closing statement by an experienced mortgage broker (R-107) and by the participation of Mr. Tempkins.

With respect to Mr. Tempkins role in the transaction, it has been held that an attorney who prepares a usurious agreement is deemed to possess intent to charge usurious interest. Atwood v. Fisher, supra. Mr. Tempkins represented JACQUELINE KOVITCH throughout the transaction. He testified that he examined the abstract, prepared the mortgage satisfactions, contacted the Rubensteins (R-225), and attended the closing (R-235). At the same time, however, he also admitted that he had the CERRITOS sign an affidavit which he prepared (R-230). That affidavit stated that the money being borrowed was to be used solely for corporate purposes (R-828). This was clearly not the case. Approximately $15,000.00 of the loan was used to pay off a personal obligation of the CERRITOS, namely, the Rubensteins' mortgage (R-235). Further, it was Mr. Tempkins who disbursed the checks at closing (R-235). He was well aware of the various loan "charges" being assessed against the CERRITOS (attorney's fees, recording, broker's commissions, etc.). It is submitted that as an attorney, Mr. Tempkins, knew of, should have known the transaction was usurious.

JACQUELINE KOVITCH'S lack of personal knowledge is irrevelant. Florida Statute 687.03 (1979) specifically provided that ". . . It should be usury and unlawful for any person, or for any agent, officer, or other representative (emphasis added) of any person, to reserve, charge or take for any loan . . . interest greater than 10 percent per annum . . .". Lenders obviously cannot evade the usury laws simply by closing their eyes as to all that is going on around them. Mr. Scaltrito and Mr. Tempkins both knew why the transaction was structured so as to include ED-JO CORPORATION as a borrower.

Likewise, the CERRITOS' knowledge or lack of knowledge of the usurious nature of the transaction is similarily irrevelant. The usury statutes are operative regardless of whether the scheme is suggested by the lender or the borrower. Lee Construction v. Newman, 143 So. 2d 222 (3rd DCA 1962).

Shorr v. Skafte, 90 So. 2d 604 (S.C. 1956). One of the primary and traditional purposes of any usury laws is to protect the necessitous borrower from himself.

E. Foreclosure of a mortgage is an equitable action subject to the defense of usury, as well as any other equitable defense.

A court of equity may deny enforcement of a mortgage where the underlying obligation is found to be usurious. Indianapolis Morris Plan Corp. v. Portela, 364 So. 2d 840 (3rd DCA 1978). Wasman v. Rubinson, 341 So. 2d 802 (3rd DCA 1977). Adequate legal remedies are available to a foreclosing lender/mortgagee. JACQUELINE KOVITCH could have sought money damages based upon the note. The dispute has always been limited to the amount of interest charged pursuant to that note. It is submitted that there was an available legal remedy much less drastic than foreclosure.

Even in the absence of usury, any mortgagee who comes before the Court with unclean hands may be denied foreclosure. Cross v. Federal National Mortgage Association, 359 So. 2d 464 (4th DCA 1978). Pelle v. Glantz, 349 So. 2d 732 (3rd DCA 1977). In the lower court, JACQUELINE KOVITCH filed an affidavit (R-344) (drafted by Mr. Tempkins) which was signed by Mr. Scaltrito. This affidavit was totally favorable to JACQUELINE KOVITCH'S position, however, at deposition and at trial, it was shown this affidavit was utterly false with respect to paragraph seven (7) (R-159). At closing all checks were not made payable to the corporation. Any statement to the contrary, if not intended to mislead the lower court, at the very least demonstrated that neither the affiant nor JACQUELINE KOVITCH nor Mr. Tempkins made any effort to ascertain the truth of the matters asserted in the affidavit. See, Wasman v. Rubinson, supra. Appellants suggest that it was improper for the lower court to ignore and thereby implicitly sanction JACQUELINE KOVITCH'S bad faith.

Although the CERRITOS do not contend that foreclosure of homestead property is in itself objectionable, see e.g., Hicks v. Mid-Florida

Production Credit Association, 374 So. 2d 566 (1st DCA 1979), surely when homestead propery is involved certain equities favor the homeowner. Under the instant circumstances, it is the CERRITOS' contention that denial of foreclosure would have been the result most consistent with the purpose of Article 10, Section 4, namely, the protection of homestead property from forced sale for debts of the owner.

III. THE LOWER COURT ERRED BY DISMISSING THE CERRITOS' COUNTERCLAIM WITH PREJUDICE.

The CERRITOS are entitled to recovery for double the amount of interest paid under the subject loan, or alternatively, a credit for interest paid in excess credit for interest in excess of the statutory maximum (10%).

Any lender who knowingly receives usurious interest shall forfeit double the amount of interest so received to the borrower who has paid that interest. F.S. 687.04 (1979). The Florida Statute distinguishes between merely charging usurious interest (in which case the penalty is forfeiture of interest) and receiving usurious interest (in which case the penalty is recovery of double the interest paid). In the subject case it was established that EDWARD CERRITO and JOAN R. CERRITO made 22 monthly interest-only payments pursuant to the loan agreement (R-273). Upon a finding of usury, they were entitled to a return of double the amount so paid.

F.S. 687.11 (1979), applicable at the time of the transaction, specifically provided that:

> (1) No individual secondarily liable as endorser, guarantor, surety, or otherwise on any corporate obligation shall be required, in any proceeding for collection of interest in the courts of this state, to pay any interest in excess of 10 percent per annum, and any interest claimed therein against such individual in excess of 10 percent per annum shall be forfeited.

Thus, even assuming the transaction was not usurious at inception, ED-JO CORP. made none of the interest payments under the 'corporate' note. In fact, ED-JO CORP. never did any business, never had any assets, and as of December, 1978, was not in existence (R-283). Clearly, all receipts and money orders show that it was the CERRITOS who made the interest payments (R-854). Furthermore, when payments were late it was the CERRITOS who were called (at their home) (R-213). No late notice was ever transmitted to any officer of ED-JO, either before or after its dissolution.

Since all payments were made by the CERRITOS, they were entitled to a credit for the excess interest (15% - 10% = 5%, or 1/3 of all interest) collected by the lender. No credit reflecting the forfeiture of interest mandated by F.S. 687.11 (1979) was taken into account in the Final Judgment of Foreclosure (R-762).

The judgment was therefore erroneous.

IV. THE LOWER COURT ERRED IN SETTING THE CASE FOR TRIAL BEFORE THE ENTIRE ACTION WAS AT ISSUE.

This action was prematurely noticed for trial, prematurely set for trial, and prematurely tried.

A party may notice an action for trial only after the pleadings have been closed and all motions directed to the last pleadings are disposed of. Rule 1.440 (a) Florida Rules of Civil Procedure. The record clearly indicates that at the time JACQUELINE KOVITCH filed her Notice for Trial (R-390), there was a pending Motion to Strike Claim for Compensatory and Punitive Damages (R-384). Said motion was not ruled upon until some two months (R-404) after the Order Setting Non-Jury Trial (R-392). It is the CERRITOS' position that the trial court was without authority to set the matter for trial as long as a pending motion was before the court.

Rule 1.440 outlines the steps for bringing a matter to trial. Subsection (a) defines the "at issue" pre-requisite. Subsection (b) specifically provides "thereafter (emphasis added) any party may file and serve notice that the action is at issue (emphasis added) and ready to be set for trial . . .". Subsection (c) provides that "if the Court finds the action ready to be set for trial, it shall enter an order fixing a date for trial . . . . By giving the same notice (emphasis added), the court may set an action for trial on its own motion." Hence, the rule allows either the Court or a party to "notice" a matter for trial. However, in both instances an essential pre-requisite to the notice (and therefore the order setting the action for trial) is that the case be "at issue". Any other interpretation would be inconsistent with the explicit language of the rule.

Moreover, this initial departure from Rule 1.440 was followed by a second violation of the aforesaid rule. At the time that JACQUELINE KOVITCH'S Motion to Strike Claim for Compensatory and Punitive Damages was disposed

(R-404), the CERRITOS were granted leave to amend their counterclaim. Thereafter, LOUIS KOVITCH was added as a counterdefendant (R-405). Clearly, this injected new issues in the case. As Professor Trawick has pointed out, if an action involves a counterclaim, crossclaim, or third-party practice, the action is not at issue until all pleadings have been settled for all parts of the action. Trawick, Fla. Prac. and Proc. Section 22-2 (1981). The record reveals that the CERRITOS received the answer to their counterclaim against LOUIS KOVITCH approximately 16 days before trial (R-411). Thus, the entire action (which now included LOUIS KOVITCH) did not become "at issue" until the CERRITOS responded to the answer filed by LOUIS KOVITCH (R-552).

In this regard, Rule 1.440 (c) specifically provides that "trial shall be set not less than thirty days from the service of notice . . .". When read in light of all subsections, the Rule, in effect, prohibits trial sooner than 30 days from the date the action becomes "at issue". Thus even if one overlooks the initial departure from Rule 1.440(a) and (b), there remains the subsequent prejudice occasioned by the trial of this cause within the 30 day period. The CERRITOS submit that the action in the lower court was prematurely set for trial, and more importantly, prematurely tried.

CONCLUSION

The lower court committed two reversible procedural errors. First, by denying the CERRITOS a trial by jury, the lower court withheld a right guaranteed to all citizens. Second, in trying this action prematurely, the lower court frustrated the CERRITOS' ability to adequately prepare their case.

Substantively, the record presents a transaction which is precisely the type the usury law envision. The CERRITOS were anxious and necessitous borrowers who would have signed anything to obtain money, no matter how onerous the terms. Unrepresented by counsel with a poor credit history, they were completely susceptible to any arrangements offered by the lender and the lender's agents. Under these circumstances the subject loan was anything but an arms-length transaction. The CERRITOS were told that the loan could not be made without use of the corporation. In effect, they were really being told that the loan would not be made at 10 percent per annum but it would be made at 15%. It is with this set of facts that JACQUELINE KOVITCH came before the lower court requesting foreclosure on the CERRITOS' home. It is submitted that JACQUELINE KOVITCH, failed to show sufficient equities to support foreclosure, and that undisputed evidence was presented to support an award of damages based upon the counterclaim.

For the reasons set forth herein it is respectfully requested that:

A. The Final Judgment of the lower court be reversed, and;

B. The case be remanded for a new trial (by jury) or alternatively, remanded with directions to enter judgment in favor of the CERRITOS on the Complaint, and;

C. The case be remanded with directions to reinstate the Counterclaim, or alternatively, remanded with directions to enter judgment in favor of the CERRITOS on the Counterclaim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellants was furnished by U.S. Mail this 22nd day of August, 1983 to Richard Wasserman, Esq., 420 Lincoln Road, #~~258~~ 324, Miami Beach, FL 33139.

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