UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7494
Summary Calendar

G & G TANK RENTAL SALES, INC.
and DAVID GARCIA,

Plaintiffs-Appellants,

VERSUS

A. I. CREDIT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(C-92-CV-195)

(March 8, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM[*]:

Plaintiff-Appellants G & G Tank Rental & Sales, Inc. and David Garcia (collectively, "G & G Tank"[1]) appeal the district court's

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]Appellants have completely failed to explain how David Garcia has a basis in law or fact to challenge a purportedly usurious

dismissal of their usury claim pursuant to Rule 12(b)(6)[2] for failure to state a claim upon which relief can be granted. Concluding that no relief could be granted under any set of facts consistent with the complaint of G & G Tank, we affirm.

I

FACTS AND PROCEEDINGS

As this case was dismissed pursuant to Rule 12(b)(6), on appeal we accept as fact the allegations contained in the complaint of G & G Tank and the statements included in all documents incorporated therein.[3]

Defendant-Appellee A. I. Credit Corp. ("A. I. Credit") and G & G Tank executed two agreements to finance insurance premiums (collectively, "Agreements"), which agreements contained virtually identical provisions . Under the terms of the Agreements, A. I. Credit lent funds to G & G Tank so that the latter could purchase insurance. In the agreement entered into in February, 1992 (the "February Agreement"), A. I. Credit lent $347,239.15 to G & G Tank; in the agreement entered into in March, 1992 (the "March Agreement"), A. I. Credit lent G & G Tank $711,470.00 . The total amount lent pursuant to those Agreements was thus $1,058,709.15.

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demand asserted against a corporation, G & G Tank Rental & Sales, Inc., of which he was president. As resolution of this issue is unnecessary to this appeal, we do not address it further. For purposes of simplicity, however, we hereafter refer to G & G Tank Rental & Sales, Inc. and David Garcia collectively as "G & G Tank."

[2]FED. R. CIV. P. 12(b)(6).

[3]E.g., Caine v. Hardy, 943 F.2d 1406, 1411 n.5 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 1474 (1992).

G & G Tank did not make the monthly finance payments as required by the Agreements. This failure to pay constituted a default that subjected the entire amounts due under the Agreements to immediate collection. Under the terms of the Agreements and the Texas Insurance Code, those defaults allowed A. I. Credit to send G & G Tank notices of intent to cancel the insurance policies financed by those Agreements. A. I. Credit sent such notices in April 1992. These notices also provided G & G Tank with the statutorily required ten-day period in which to cure its defaults.[4]

As G & G Tank was terminating its business and consequently no longer required insurance coverage, it made no attempt to cure its defaults. Eventually, A. I. Credit cancelled the insurance policies financed by the Agreements.[5]

A. I. Credit did not send a notice of intent to accelerate the amounts due under the Agreements. Instead, in May 1992, A. I. Credit sent a letter to G & G Tank demanding payment of $998,109.50 as the balance then due under the Agreements. As G & G Tank concedes in its complaint, the amount thus demanded appears to constitute the total amount due for both the February Agreement and the March Agreement.[6]

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[4]See TEX. INS. CODE ANN. art. 24.17(c) (Vernon 1981).

[5]The Agreements provided that A. I. Credit had a security interest in unearned insurance premiums, and that any unearned premiums recovered by A. I. Credit from early cancellations would be credited to the amount owed by G & G Tank. The agreed order between G & G Tank and A. I. Credit appears to credit G & C Tank with the unearned premiums recovered.

[6]Neither party has attempted to explain why the amount demanded, $998,109.50, was less than the amount lent,

In response to the demand letter, G & G Tank filed the instant suit in state court claiming that 1) the demand letter constituted an unfair debt collection practice, and 2) the amount claimed in that letter was usurious. A. I. Credit removed the suit to federal district court, where it was referred to a magistrate judge.

The magistrate judge dismissed G & G Tank's usury claim under Rule 12(b)(6). The magistrate judge first observed that the complaint admitted that 1) A.I. Credit had lent G & G Tank $1,058,709.15 to pay insurance premiums, and 2) G & G Tank had made no payments on those loans. The magistrate judge next observed that the complaint alleged that A. I. Credit had requested only $998,109.50 in its demand letter. Thus, the magistrate judge reasoned, such a demand could never constitute usury under the facts alleged in the complaint because the total sum claimed was less than the amount of principal lent. Accordingly, the usury claim was dismissed under Rule 12(b)(6).

G & G Tank and A. I. Credit eventually entered an agreed order granting A. I. Credit summary judgment on the unfair debt collection claim. This order also granted summary judgment in favor of A. I. Credit on its counterclaim seeking recovery on the Agreements. Finally, this order provided that G & G Tank reserved the right to appeal the dismissal of the usury claim. G & G Tank timely appealed.

II

DISCUSSION

$1,058,709.15.

A. The Merits: Principal is Not Interest

A complaint should not be dismissed under Rule 12(b)(6) unless "it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations [in the complaint]."[7] We review such dismissal de novo.[8]

G & G Tank only appeals the dismissal of its usury claim, which is predicated on the demand letter sent by A. I. Credit. Despite that fact that the amount demanded in that letter was less than the principal amount lent pursuant to the Agreements, G & G Tank continues to insist that such amount was usurious. G & G Tank contends that an insurance finance agreement cannot be automatically accelerated absent notice of intent to accelerate; that the demand letter reflected an amount due that included accelerated payments; that the demand letter thus improperly claimed principal before its was due; and that such a premature claim for principal constitutes a claim for interest that is usurious under Texas law. We conclude that this argument and the "logic" it proffers is obviously and fatally flawed.

Under the relevant Texas statute, "usury" is defined as "interest in excess of the amount allowed by law"[9] and "interest" is defined in pertinent part as "the compensation allowed by law

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[7]E.g., Barrientos v. Reliance Standard Life Ins. Co., 911 F.2d 1115, 1116 (5th Cir. 1990), cert. denied, 498 U.S. 1072 (1991).

[8]Id.

[9]TEX. REV. CIV. STAT. ANN. art. 5069-1.01(d) (Vernon 1987).

for the use or forbearance or detention of money."[10] The Texas Supreme Court has further defined interest and principal as correlative terms that "imply" one another.[11]

Even assuming arguendo that the principal was improperly accelerated here owing to lack of proper notice, G & G Tank still failed to allege any cognizable claim of usurious interest.[12] Simply put, principal is not interest. A claim for the return of principalSQeven if made prematurelySQdoes not somehow transform that principal into interest, as it is not a claim for "the use or forbearance or detention of money."[13] Such a claim of "interest" presupposes the existence of an amount separate and apart from the claim for principal, for "[i]nterest and principal are synergistic words which imply one another, and by necessity, principal must be that amount which is used, forborne, or detained, and upon which

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[10]TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1987).

[11]Steves Sash & Door Co. v. Ceco Corp., 751 S.W.2d 473, 475 (Tex. 1988).

[12]The parties expend substantial effort arguing over whether the acceleration clauses at issue in the Agreements were "automatic," and whether a company that finances insurance premiums must provide in its agreements an explicit waiver of the notice of intent to accelerate. Cf. Shumway v. Horizon Credit Corp., 801 S.W. 2d 890, 893-95 (Tex. 1991) (holding that an agreement generally must provide a clear, specific, and separate waiver of the notice of intent to accelerate). As these issues are unnecessary to the disposition of this appeal, we express no opinion regarding their resolution.

[13]TEX. REV. CIV. STAT. ANN. art. 5069-1.01(a) (Vernon 1987); see also Delta Enterprises v. Gage, 555 S.W.2d 555, 558-59 (Tex. Civ. App.--Fort Worth 1977, writ ref'd n.r.e.) (holding that amounts paid pursuant to an option contract could not be interest as a matter of law, for such amounts were not paid for the use, forbearance, or detention of money).

the interest is charged."[14]

The cases cited by G & G Tank are not to the contrary. In one of the few cases cited that is remotely on point, Dryden v. City National Bank,[15] a Texas appellate court held that a demand for unearned interest accompanied by a failure to give credit for amounts paid constituted a charging of interest in violation of the Texas usury statutes.[16] Of course, unearned interest is not principal. Likewise, a demand for an amount that has already been paid is not a demand for repayment of principal: Given that by definition such an amount has been paid, it can no longer logically make up part of the principal balance. But neither of these precepts has any application to the instant case: G & G Tank alleged in its complaint that the principal due was $1,058,709.15, that it had not made payments to reduce this sum, and that A. I. Credit sought $998,109.50 in its demand letter. Consequently,

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[14]Steves Sash & Door, 751 S.W.2d at 475.

[15]666 S.W.2d 213, 221 (Tex. Civ App.--San Antonio 1984, writ ref'd n.r.e.).

[16]G & G Tank also cites several other cases that contain the "unearned interest" and "failure to credit" precepts of Dryden. The other cases cited by G & G Tank in support of its claim are even more inapposite. For example, G & G Tank cites Seitz v. Lamar Sav. Ass'n, 618 S.W.2d 142 (Tex. Civ. App.--Austin 1981, no writ), which held that a bank's charges, which were admittedly usurious, were not protected by the bona-fide-error defense. G & G Tank also cites Najarro v. Sasi Int'l Ltd., 904 F.2d 1002 (5th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), which addressed whether a particular transaction must be characterized as a loan for purposes of the Texas usury statutes. FinallySQin a tour de force of ineptitudesSQG & G Tank cites a case, Delta Enterprises, containing a holding squarely adverse to it, i.e., that unless payments are for the use, forbearance, or detention of money, they cannot be for interestSQhence they cannot be usuriousSQas a matter of law. Delta Enterprises, 555 S.W.2d at 559.

there could be and there were no allegations in G & G Tank's complaint that the amount demanded by A. I. Credit included unearned interest, or that the amount thus demanded somehow failed to account for payments previously made.

B. Sanctions and Frivolous Appeals

A.I. Credit has requested sanctions against G & G Tank for prosecuting this appeal. Under Federal Rule of Appellate Procedure 38 we have discretion to sanction an appellant when an appeal is determined to be frivolous,[17] which we have defined as "an appeal in which 'the result is obvious or the arguments of error are wholly without merit.'"[18]

Although we decline A. I. Credit's invitation to sanction,[19] we caution counsel for G & G Tank henceforth to observe more closely the line between zealous advocacy and abusive prosecution of meritless appeal. Unmeritorious appeals, such as the one at issue here, may easily be perceived as nothing more than harassment, wasting the time and resources of both the courts and the opposing party. Counsel's prosecution of future appeals such as this is likely to be perceived as such harassment, thereby

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[17]FED. R. APP. P. 38.

[18]E.g., Montgomery v. United States, 933 F.2d 348, 350 (5th Cir. 1991) (quoting Coghlan v. Starkey, 852 F.2d 806, 811 (5th Cir. 1988)).

[19]We observe that A. I. Credit's request for sanctions here is highly suspect, given that A. I. Credit earlier agreed to an order in which G & G Tank would be entitled to a $15,000 credit if it prosecuted this appeal. This credit is to be applied against attorney's fees previously awarded A. I. Credit in the judgment entered pursuant to that agreed order.

subjecting both counsel and his client to sanctions.

III

CONCLUSION

G & G Tank failed to make installment finance payments for two insurance premium loans that it had contractually committed to pay. When this default led the finance company to demand repayment of principal, G & G Tank launched a preemptive strike in the form of a suit claiming usury under Texas law. We conclude that as a matter of Texas law a claim for return of principal may not constitute a claim for interestsQwithout which there can be no viable claim of usury. Consequently, the judgment of the district court dismissing G & G Tank's complaint for failure to state a claim is

AFFIRMED.