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B-130955, May 2, 1957

Number: B-130955

Date: 1957-05-02

B-130955, MAY 2, 1957

TO MR. LESTER H. THOMPSON, AUTHORIZED CERTIFYING OFFICER, FEDERAL HOUSING ADMINISTRATION:

ON MARCH 4, 1957, YOUR REFERENCE, MC:JRB, YOU REQUESTED A DECISION WHETHER YOU ARE AUTHORIZED TO CERTIFY FOR PAYMENT A VOUCHER SUBMITTED THEREWITH IN FAVOR OF THE NASSAU TRUST COMPANY, GLEN COVE, NEW YORK, FOR $158.66. THE VOUCHER COVERS A CLAIM FOR REIMBURSEMENT OF A LOSS SUSTAINED BY THE BANK ON ACCOUNT OF DEFAULT IN A PAYMENT OF A NOTE SIGNED BY EDWARD AND GERALDINE BOARER WHICH THE INSURED INSTITUTION PURCHASED FROM THE PAEGE PRODUCTS, AND REPORTED FOR INSURANCE UNDER ITS (THE BANK-S) CONTRACT WITH THE FEDERAL HOUSING ADMINISTRATION UNDER TITLE I OF THE NATIONAL HOUSING ACT, AS AMENDED, 12 U.S.C. 1702 1706D.

THE RECORD DISCLOSES THAT THE NOTE INVOLVED WAS ORIGINALLY FOR THREE HUNDRED SEVENTY-FIVE DOLLARS BUT THAT A LINE HAS BEEN DRAWN THROUGH THE WORDS "THREE" AND "SEVENTY-FIVE" AND WORDS ,FOUR" AND "THIRTY-ONE" AND WRITTEN ABOVE. ALSO, IT IS NOTED THAT "18/100" IS WRITTEN ABOVE ,00/100," THE LATTER SYMBOL NOT BEING DELETED HOWEVER. WE ARE ADVISED THAT THE INSURED BANK, IN LETTER DATED JANUARY 18, 1957, ADMITTED THAT THESE CHANGES WERE MADE BY ONE OF ITS OFFICERS. YOU STATE THAT IT APPEARS THAT THE MAKERS WERE NOT CONSULTED AS TO THE ALTERATION. THE BANK CONTENDS THAT IT WAS MERELY CORRECTING AN ERROR AND THAT THE MAKERS OF THE NOTE KNEW THAT THE AMOUNT TO BE PAID WAS $431.18. YOU SAY THAT THIS VIEW IS SUPPORTED BY THE FACT THAT THE AMOUNT OF THE NOTE WRITTEN IN FIGURES IN THE MARGIN IS $431.18 AND THAT THE PAYMENTS SET OUT IN FIGURES IN THE BODY OF THE NOTE TOTAL $431.18.

YOUR LETTER CONTINUES IN PART:

"THE VIEW HAS BEEN EXPRESSED THAT THE WORDS "FOUR" AND "THIRTY-ONE" MAY BE INTERPRETED AS NOTATIONS AND NOT AS ALTERATIONS OF THE NOTE. IT IS POINTED OUT THAT THE ORIGINAL WORDS "THREE" AND "SEVENTY-FIVE" ARE STILL CLEARLY LEGIBLE. THERE IS NO ATTEMPT TO CONCEAL WHAT HAS BEEN DONE. THIS BASIS IT IS THOUGHT THAT THE CLAIM MIGHT BE PAID ON THE BASIS OF THE ORIGINAL AMOUNT OF $375.00.

"ON THE OTHER HAND, IT IS CLEAR THAT THE AMOUNT INTENDED WAS $431.18. APPARENTLY THE MAKERS WERE AWARE OF THIS. THE WRITING OF "THREE HUNDRED SEVENTY-FIVE DOLLARS" WAS A CLERICAL ERROR WHICH THE HOLDERS WOULD LEGALLY BE ENTITLED TO HAVE CORRECTED. IT WOULD SEEM UNFAIR TO PENALIZE THE INSURED FOR THIS CLERICAL ERROR. THE COMMISSIONER HAS WAIVED THE VIOLATION OF SECTION 201.2/A) OF THE TITLE I REGULATIONS REQUIRING THAT A NOTE BE REGULAR ON ITS FACE. I AM URGED TO CERTIFY THE CLAIM FOR PAYMENT ON THE BASIS OF A NOTE FOR $431.18.'

YOU ASK IF YOU ARE AUTHORIZED TO CERTIFY THIS CLAIM FOR PAYMENT, WHETHER CERTIFICATION SHOULD BE ON THE BASIS OF A NOTE FOR $375 OR $431.18.

THE APPLICABLE LAW OF NEW YORK (NEGOTIABLE INSTRUMENTS LAW, SECTION 205, CONSOLIDATED LAWS SERVICE, NEW YORK) PROVIDES:

"WHERE A NEGOTIABLE INSTRUMENT IS MATERIALLY ALTERED WITHOUT THE ASSENT OF ALL PARTIES LIABLE THEREON, IT IS AVOIDED, EXCEPT AS AGAINST A PARTY WHO HAS HIMSELF MADE, AUTHORIZED OR ASSENTED TO THE ALTERATION AND SUBSEQUENT INDORSERS. BUT WHEN AN INSTRUMENT HAS BEEN MATERIALLY ALTERED AND IS IN THE HANDS OF A HOLDER IN DUE COURSE, NOT A PARTY TO THE ALTERATION, HE MAY ENFORCE PAYMENT THEREOF ACCORDING TO ITS ORIGINAL TENOR.'

INCREASING THE AMOUNT OF A NOTE IS CONSIDERED A MATERIAL ALTERATION AND WILL VITIATE THE NOTE UNLESS SUCH INCREASE IS AUTHORIZED BY ALL THE PARTIES THERETO. HOWEVER, THE COURTS OF NEW YORK HAVE HELD THAT WHERE AN ALTERATION, EVEN THOUGH SEEMINGLY MATERIAL, IS DONE INNOCENTLY, OR TO CORRECT A MISTAKE IN DRAWING THE NOTE, OR TO MAKE IT EXPRESS THE REAL BARGAIN OF THE PARTIES, IT WILL NOT VITIATE THE NOTE. IN THIS CONNECTION YOUR ATTENTION IS CALLED TO THE CASE OF LEVY ET L., V. ARENS, 142 N.Y.S. 312, WHEREIN IT WAS HELD--- QUOTING FROM THE SYLLABUS:

"ADDITION OF THE WORDS "WITH INTEREST" TO A NOTE IS A MATERIAL ALTERATION, WHICH WILL VITIATE THE NOTE IF MADE WITH A FRAUDULENT INTENT, BUT NOT SO WHERE IT IS DONE INNOCENTLY, OR TO CORRECT A MISTAKE IN DRAWING THE NOTE, SO AS TO MAKE IT EXPRESS THE REAL CONTRACT OF THE PARTIES.'

IN THE CITED CASE THE COURT QUOTED WITH APPROVAL THE FOLLOWING LANGUAGE FROM BOOTH V. POWERS, 56 N.Y. 22:

"* * * SOMETIMES AN ALTERATION IN A NOTE SEEMINGLY MATERIAL, AND SUCH AS MAY PRIMA FACIE RENDER IT VOID, IS INNOCENT, AND DOES NOT VITIATE THE INSTRUMENT. SO IT IS WHEN IT IS DONE TO CORRECT A MISTAKE IN PENNING THE NOTE, OR TO MAKE IT EXPRESS THE REAL BARGAIN OF THE PARTIES, OR TO GIVE THE PROPER LEGAL FORM TO THE INSTRUMENT. IN SUCH CASE THE PAYEE HAS THE RIGHT TO ENFORCE IT.'

IN THE INSTANT CASE THE BANK SAYS THAT IN HAVING THE NOTE FILLED OUT AND SUBSEQUENTLY SIGNED BY THE CUSTOMER, THE SALESMAN (APPARENTLY FOR THE CONTRACTOR) INADVERTENTLY FILLED OUT THE NOTE FOR THE AMOUNT OF THE PROCEEDS RATHER THAN THE AMOUNT WHICH WAS NECESSARY FOR THE CUSTOMER TO BORROW IN ORDER TO NET $375. THIS IS BORNE OUT BY THE RECORD WHICH DISCLOSES THAT THE COST OF THE WORK TO BE PERFORMED WAS $375 AND THAT THIS AMOUNT WAS TO BE FINANCED BY AN F.H.A. HOME IMPROVEMENT LOAN. THE RECORD ALSO DISCLOSES THAT THE BORROWERS APPLIED TO THE BANK FOR A LOAN IN THE NET AMOUNT OF $375. PRESUMABLY THE BORROWERS WERE AWARE THAT THEY WOULD HAVE TO PAY INTEREST ON THE LOAN. ALSO, AS INDICATED ABOVE, THE AMOUNT OF THE NOTE WRITTEN IN FIGURES IN THE MARGIN (PRESUMABLY PRIOR TO THE SIGNING OF THE NOTE BY THE BORROWERS) IS $431.18, AND THE PAYMENTS SET OUT IN FIGURES IN THE BODY OF THE NOTE TOTAL $431.18. THAT IS TO SAY THE BORROWERS AGREED IN THE BODY OF THE NOTE TO MAKE 35 MONTHLY PAYMENTS OF $11.99 AND ONE FINAL PAYMENT OF $11.53, THE TOTAL OF WHICH IS $431.18. MOREOVER, THE FILE SHOWS THE BORROWER MADE APPROXIMATELY 20 MONTHLY PAYMENTS IN THE AGREED-TO MONTHLY INSTALLMENTS OF $11.99, BEFORE DEFAULTING ON THE NOTE. IT IS OBVIOUS, THEREFORE, THAT THE BODY OF THE NOTE CONTAINED AN ERROR AND WAS AMBIGUOUS.

WHILE GENERALLY THE RULE IS THAT THE AMOUNT OF THE NOTE IN WRITING CONTROLS, AS

DISTINGUISHED FROM THE AMOUNT IN FIGURES, IT DOES NOT APPEAR THAT SUCH RULE WOULD BE FOR APPLICATION WHERE THE EVIDENCE OF RECORD INDICATES THE AMOUNT IN WRITING WAS INCORRECT. FROM THE FOREGOING, IT APPEARS, AS THE BANK CONTENDS, THAT IN ALTERING THE NOTE THE BANK WAS MERELY ATTEMPTING TO CORRECT A MISTAKE SO AS TO MAKE THE NOTE EXPRESS THE REAL CONTRACT OF THE PARTIES AND THAT NO FRAUD WAS INTENDED. HENCE, THIS CASE WOULD APPEAR TO BE GOVERNED BY LEVY ET AL. V. ARONS AND BOOTH V. POWERS, SUPRA.

IN VIEW OF WHAT HAS BEEN STATED ABOVE, SINCE THE FEDERAL HOUSING COMMISSIONER HAS WAIVED THE VIOLATION OF SECTION 201.2/A) OF THE TITLE I REGULATIONS (24 C.F.R. 201.2 (A) (PURSUANT TO THE AUTHORITY VESTED IN HIM BY 12 U.S.C. 1703/C), AND CONSIDERING THAT THE BANK HAS AGREED TO REPURCHASE THE ACCOUNT IF THE BORROWERS CONTEST COLLECTION ON THE BASIS OF MATERIAL ALTERATION, THE VOUCHER MAY BE CERTIFIED FOR PAYMENT IN THE FULL AMOUNT OF $156.70, BASED UPON THE NOTE BEING ONE FOR $431.18, IF OTHERWISE CORRECT.