

FRANK F. STARR, Appellant v. HENRY DART, Appellee**NO. 14-07-00673-CV****COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON****July 24, 2008, Judgment Rendered
July 24, 2008, Memorandum Opinion Filed**

SUBSEQUENT HISTORY: Petition for review denied by *Starr v. Dart, 2008 Tex. LEXIS 1076 (Tex., Dec. 5, 2008)*

PRIOR HISTORY:

On Appeal from the 189th District Court, Harris County, Texas. Trial Court Cause No. 2007-04182.

COUNSEL: For APPELLANTS: David A. Palmer, Shayne D. Moses, Brandon Jay Edmundson, Fort Worth, TX.

For APPELLEES: Christopher Paul Hanslik, Katherine Garatoni Maechler, Houston, TX.

JUDGES: Panel consists of Chief Justice Hedges and Justices Fowler and Boyce.

OPINION BY: Wanda McKee Fowler

OPINION**MEMORANDUM OPINION**

Appellant Frank F. Starr appeals from the trial court's judgment on cross-motions for summary judgment in favor of appellee Henry Dart. In a single issue, Starr contends that the trial court erred by denying his summary judgment motion and granting that of Dart, because the settlement agreement Dart sued to enforce imposed usurious interest. Consequently, Starr argues that the settlement agreement is void and Dart owes Starr penalties and attorney's fees under the Texas Finance Code. We affirm.

Factual and Procedural Background

Starr and Dart are parties to a Settlement and Release Agreement (the "Settlement Agreement") under which Dart agreed to dismiss a lawsuit and transfer all of his stock in Edugration, Inc. to Starr in consideration for \$ 424,000.00. This amount was to be paid by Starr as follows: (1) \$ 100,000.00 on August 1, 2005; (2) \$ 162,000.00 on June 1, 2006; and (3) \$ 162,000.00 on

January 1, 2007. Starr also agreed to pay an additional \$ 1,000.00 per day for any late payments.

Starr made the first payment of \$ 100,000.00, and in accordance with the Settlement Agreement, Dart dismissed the lawsuit with prejudice. However, Starr failed to timely make the second payment. Starr and Dart then negotiated an amendment to the Settlement Agreement, entitled "Addendum A." Under Addendum A, Starr agreed to pay Dart \$ 22,000, representing the "liquidated damages" that had accrued between June 1, 2006, and June 23, 2006, as a result of Starr's failure to timely make the second payment. Starr and Dart also agreed that the remaining balance of \$ 324,000.00 would be due on or before October 2, 2006, and Starr again agreed to pay \$ 1,000.00 per day as liquidated damages for each day after October 2, 2006, that the full payment was not made. However, Starr failed to pay the \$ 324,000.00 due October 2, 2006, or any liquidated damages as provided in Appendix A.

Dart sued Starr to enforce the Settlement Agreement and Addendum A, and moved for summary judgment on claims for breach of contract and attorney's fees. Starr responded to Dart's motion and filed a cross-motion for summary judgment, asserting that the \$ 1,000.00 per day liquidated damages provision was an unenforceable penalty and constituted usurious interest under the Texas Finance Code. In the trial court's judgment granting Dart's motion for summary judgment and denying Starr's cross-motion for summary judgment, signed July 24, 2007, the trial court ordered that the liquidated damages provision was an unenforceable penalty, but granted judgment in favor of Dart in the amount of \$ 324,000.00, as well as attorney's fees and pre- and post-judgment interest. This appeal followed.

Analysis of Starr's Issue

Starr contends that the late fees of \$ 1,000.00 per day are not only an unenforceable penalty as the trial court held, but also are interest charges far exceeding what is usurious under Texas law. As a result, Starr argues that the excessive charges both extinguish his debt and obligate Dart to pay him statutory penalties and attorney's fees. When, as here, the parties file cross-motions for summary judgment, one of which was

granted and the other denied, we review the summary judgment evidence presented by both sides, determine all questions presented, and affirm or reverse accordingly. See *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

A. Usury

A usurious transaction is composed of three elements. There must be (1) a loan of money; (2) an absolute obligation to repay the principal; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. See, e.g., *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994); *Domizio v. Progressive County Mut. Ins. Co.*, 54 S.W.3d 867, 872 (Tex. App.--Austin 2001, *pet. denied*); *Wiley-Reiter Corp. v. Groce*, 693 S.W.2d 701, 703 (Tex. App.--Houston [14th Dist.] 1985, *no writ*). "Interest" is defined under the Finance Code as "compensation for the use, forbearance, or detention of money." See TEX. FIN. CODE § 301.002(a)(4). "Usurious interest" is defined as "interest that exceeds the applicable maximum amount allowed by law." *Id.* § 301.002(a)(17). Because usury statutes are penal in nature, they are strictly construed, and if there is any doubt as to legislative intent to punish the activity complained of under usury statutes, the doubt must be construed in favor of the lender. *Domizio*, 54 S.W.3d at 872; *Tygrett v. Univ. Gardens Homeowners' Ass'n*, 687 S.W.2d 481, 484-85 (Tex. App.--Dallas 1985, *writ ref'd n.r.e.*).

B. Starr's Contentions

According to Starr, the late fees in this case constitute interest because they are compensation for the detention of money, which "arises when a debt has become due and the debtor has withheld payment without a new contract giving him the right." See *Tygrett*, 687 S.W.2d at 483. Starr also cites *Pentico v. Mad-Wayler, Inc.*, 964 S.W.2d 708 (Tex. App.--Corpus Christi 1998, *pet. denied*), for the proposition that the late fees are interest because "[l]ate charges fall into the category of a contingent additional charge which [is] treated as interest and added to the interest contracted for if a payment is received after the expiration of the grace period." *Id.* at 715 (stating that late charges assessed for failure to timely make payments under promissory note constituted interest because the statutory definition includes compensation for the obligor's detention of money past the date it is due and payable).

Dart concedes that in some instances the usury statutes may apply to late fees, but argues that the usury statutes do not apply to the Settlement Agreement and Addendum A, because the first essential element of a usurious transaction is missing; namely, there is no loan of money. See, e.g., *Crow v. Home Sav. Ass'n of Dallas*

County, 522 S.W.2d 457, 459-60 (Tex. 1975) ("It is a fundamental principle governing the law of usury that it must be founded on a loan or forbearance of money; if neither of these elements exist, there can be no usury."); *Garcia v. Tex. Cable Partners, L.P.*, 114 S.W.3d 561, 566 (Tex. App.--Corpus Christi 2003, *no pet.*) (holding that late fees charged to cable television subscriber did not constitute usury because a lending transaction was not involved); *Domizio*, 54 S.W.3d at 873 (stating that "for the usury laws to apply, there must be an overcharge by a lender for the use forbearance, or detention of the lender's money"); *Bexar County Ice Cream Co., Inc. v. Swensen's Ice Cream Co.*, 859 S.W.2d 402, 406 (Tex. App.--San Antonio 1993, *writ denied*), *overruled on other grounds*, *Barraza v. Koliba*, 933 S.W.2d 164 (Tex. App.--San Antonio 1996, *writ denied*) (noting that [t]here is a line cases holding that late charges are not usurious interest if their payment is not pursuant to a credit or lending transaction); *Potomac Leasing Co. v. Housing Auth. of the City of El Paso*, 743 S.W.2d 712, 713 (Tex. App.--El Paso 1987, *writ denied*) (holding lease agreement did not involve a lending or credit transaction and therefore the usury laws did not apply); see also *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 440 (Tex. 1993) (holding that constitutional provision proscribing usurious interest did not apply to the rate of prejudgment interest set by a court because its language "governs only lending and credit transactions").

Moreover, in *Wiley-Reiter Corp. v. Groce*, this Court reasoned that the usury statutes did not apply to a settlement agreement because it did not involve a lending transaction or a debtor-creditor relationship. See *Wiley-Reiter Corp.*, 693 S.W.2d at 703. In that case, Groce sued the Wiley-Reiter Corporation and others ("Wiley-Reiter") over his investment in certain gas leases in which Wiley-Reiter held an interest, claiming breach of contract, common law fraud, fraud in connection with a transaction involving stock or real estate, and violation of the *Deceptive Trade Practices Act* and the *Texas Securities Act*. *Id.* at 702. The parties entered into a written settlement agreement in lieu of Groce's obtaining a confession of judgment for punitive damages under the DTPA and other statutory claims. *Id.* The settlement agreement provided that Wiley-Reiter would pay Groce's out-of-pocket damages and attorney's fees on an installment basis. *Id.* Groce also agreed to convey, sell or assign working interests in certain oil and gas leases to Wiley-Reiter, provided all payments were made on time. *Id.* at 703. ¹ The settlement agreement also authorized Groce to confess judgment in his favor in the amount of three times the balance of the remaining payments due under the terms of the agreement if Wiley-Reiter failed to timely pay. *Id.* at 702.

1 The compromise also included Groce's agreement to non-suit one of the individual defendants at the time and, if all parties performed their obligations under the terms of the agreement, to execute a take-nothing judgment against individual and corporate defendants. *Wiley-Reiter Corp.*, 693 S.W.2d at 703. In the event all obligations were performed, Groce agreed to waive any cause of action he might have under the Texas Securities Act or any other cause of action which might arise from his continued ownership interest in the leases and wells. *Id.*

When Wiley-Reiter missed two payments, Groce sought and was granted judgment in the amount of \$ 97,920.00, which represented three times the remaining balance due. *Id.* Wiley-Reiter appealed, claiming that the amount of the judgment included interest of \$ 72,420.00--the equivalent of 284%--and so clearly violated the usury statutes as a matter of law. *Id.* Groce responded that the settlement agreement did not violate the usury statutes and that Wiley-Reiter failed to preserve the issue for appeal. *Id.* at 702-03. Turning to the first issue concerning whether the settlement agreement was usurious, the court determined that the usury laws did not apply. As the court explained, "Appellants did not borrow any money from appellee, nor did Appellee charge appellant[s] for the use or detention of appellee's money. Thus, the fundamental principle of the usury laws did not exist." *Id.* at 703. Further, the court noted that the requisite credit relationship which might have entitled Wiley-Reiter to invoke the protection of the usury laws did not exist, as the settlement agreement "was not in any way based on a *lending* transaction." *Id.* Thus, the court concluded, the settlement agreement "did not involve a debtor-creditor relationship" as contemplated by the usury statutes. *Id.* The court next considered whether Wiley-Reiter had failed to preserve the issue for appeal, and found that it had failed to do so because it did not properly raise the issue below. *Id.* at 704.

Starr attempts to distinguish *Wiley-Reiter* by arguing that the holding was limited to the facts of the case, it was dicta because the issue was waived, and the terms did not involve a transfer of an interest in property. Starr also argues that the basis for the usury claim, a provision that called for the payment of three times the balance of the payments due, could not have been usurious interest because the amounts claimed to be usurious "were included within the principal amount of the judgment" and were meant to equate to the punitive or statutory damages the plaintiff sought. In contrast, Starr contends the payment and "late fee" provisions of the settlement agreement in this case amount to a promissory note from Starr to Dart, and there is no good policy reason to treat

such a settlement agreement differently than any other contract.

However, although we have carefully considered Starr's arguments, we find *Wiley-Reiter's* analysis of the issue instructive and applicable to this case. We agree with the *Wiley-Reiter* court's reasoning that a settlement agreement such as this one, freely entered into by parties to litigation to compromise and settle their dispute, does not involve a lending or credit transaction and is not the type of agreement the usury laws were intended to govern. Further, Starr has not cited to us any case that holds, contrary to *Wiley-Reiter*, that such a settlement agreement may be subject to the usury laws.² Therefore, based on *Wiley-Reiter* and our review of the case law and the Finance Code, we reject Starr's contention that the Settlement Agreement and Appendix A were usurious. We overrule Starr's issue.

2 Starr cites several cases he contends have extended the reach of the usury laws since *Wiley-Reiter*, but these cases are distinguishable because they involve either promissory notes or commercial or consumer contracts for goods or services, and none apply the usury statutes to a settlement agreement. *See Hoxie Implement Co., Inc. v. Baker*, 65 S.W.3d 140, 154-55 (Tex. App.--Amarillo 2001, *pet. denied*) (on reh'g) (holding that, because a jury found buyer did not breach allegedly usurious agreement to purchase farm machinery from seller, no creditor/debtor relationship existed upon which to conclude that seller committed usury); *Pentico*, 964 S.W.2d at 715-16 (holding that erroneously-prepared amortization schedule accompanying demand letter seeking late charges for failure to timely make payments on promissory note constituted interest); *Hardwick v. Austin Gallery of Oriental Rugs, Inc.*, 779 S.W.2d 438, 443 (Tex. App.--Austin 1989, *writ denied*) (holding that late charge demanded by holder of promissory note for late payments constituted interest); *Commerce, Crowds & Canton, Ltd. v. DKS Constr., Inc.*, 776 S.W.2d 615, 617-18 (Tex. App.--Dallas 1989, *no writ*) (holding that interest charged in construction contracts was usurious without addressing whether the contracts constituted loans or lending transactions); *Butler v. Holt Mach. Co.*, 741 S.W.2d 169, 173-74 (Tex. App.--San Antonio 1987, *writ denied*) (holding late charges paid under extension of credit to refinance outstanding balances on three contracts to purchase tractors and an open account constituted interest).

Conclusion

Having concluded that the Settlement Agreement and Addendum A were not lending or credit transactions subject to the usury laws, we overrule Starr's issue and affirm the trial court's judgment.

/s/ Wanda McKee Fowler

Justice

Judgment rendered and Memorandum Opinion filed
July 24, 2008.