

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Easyfinancial Services v. Billard 2010 NSSM 4

Date: 20100126
Claim: SCCH 320997
Registry: Halifax

Between:

Easy Financial Services

Claimant

v.

Fathom Billard

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: January 19, 2010 in Halifax, Nova Scotia.

Appearances: Andrew Boutillier, credit manager, for Claimant
Fathom Billard, Defendant, for herself

By the Court:

[1] The working poor are poor in part because their income cannot keep ahead of their expenses—and in part because the fragility of their finances shackles them to debt. Their lives are full of stories of cases where debt has become a form of indentured servitude from which they cannot escape. This case involves one such story.

The Facts

[2] As of June 2009 the defendant Ms Billard was the single mother of two young children. She had been working seven years as a personal care worker at a nursing home. She worked the night shift, from 11 p.m. until 7 a.m., five days a week. She also worked upwards of three additional shifts a weeks, whenever she could get them. These additional shifts would be on the 3 p.m. to 11 p.m. shift, or the evening shift.

[3] The hours Ms Billard worked made it impossible for her to obtain regular daycare. Luckily her mother lived with her. Ms Billard's mother was able to provide full time care for Ms Billard's two young children while she laboured to earning a living for them all.

[4] But Ms Billard found it hard to make ends meet. She took out payday loans. As it was explained to me, payday loans generally run from pay cheque to pay cheque. The borrower borrows against his or her next pay. He or she is expected to repay the loan (with interest and charges) out of the next pay cheque. Sometimes the interest and charges are such that the borrower cannot repay the loan and meet his or her regular living expenses when pay day does arrive. So a new payday loan is taken out, and the cycle repeats. And with each cycle of the payday loan the borrower's ability to pay off the entire loan recedes further and further into the future. It becomes virtually impossible to escape.

[5] The claimant Easyfinancial provides what it says was a way to escape that cycle of revolving debt. It provides short-term loans of up to \$2,000.00. These loans are, it said, designed to give the borrower the opportunity to pay off his or her outstanding payday loans and give the borrower "a longer period to pay off the debt so their pay cheques are not gone"—that is, not eaten up by the need to repay the payday loan principal, interest and charges.

[6] In or about 2008 Ms Billard took out one of these consolidation loans in the amount of \$2,000. She made regular payments, and had the principal reduced to about \$1,300.00. She then needed several hundred dollars for supplies and clothes for her young daughter. So she went to the claimant to refinance her debt.

[7] On June 2, 2009 Ms Billard entered into a new "Personal Loan Agreement" with Easyfinancial Services Inc. The Agreement was expressed to be a "term loan" with an effective date of June 2, 2009. The principal amount of the loan was expressed to be \$2,000.00. The term was 18 months. The amortization period was 18 months. The balance was due on December 25, 2010. The interest rate was 59.9%. (I note in passing that the rate was 0.1% less than the criminal rate of interest proscribed by s.347 of the *Criminal Code* of Canada.)

[8] The Agreement stated that the amount of "new money" was \$2,000.00 and that "the amount of existing loans to be consolidated with this loan" was nil. (This was incorrect, inasmuch on the evidence what was really happening was Ms Billard had refinanced her existing debt of \$1,300.00 to obtain an additional \$700.00, increasing her debt from \$1,300.00 to \$2,000.00.)

[9] The Agreement went on to state that the “cost of borrowing for the whole term of loan” was \$811.31.

[10] The Agreement does not spell out what the monthly or bi-weekly payment of principal and interest would be over the course of the 18 month loan. (I pause here to note that the amortization calculator at <http://www.canadamortgage.com/calculators/amortization.cgi> suggests that the bi-weekly payment for a loan of \$2,000.00 repaid at 59.9% amortized over 18 months would be \$75.00.) It called for 39 bi-weekly payments to retire the loan.

[11] The Agreement goes on to provide that the bi-weekly payment “including” a \$23.33 LPP Premium would be \$95.44. In other words, though it is not so expressed in the Agreement, the payment in respect of principal and interest alone would be \$72.09, which is roughly the amount spelled out in the amortization calculator referenced above.

[12] The LPP Premium is referenced at s.16 of the “terms and conditions” of the Agreement. Section 16 provides as follows:

“I, the undersigned [*i.e.* the Borrower], hereby make application to enroll in the Loan Protection Program (LPP) from Easyfinancial Services Inc and life, Accident/Sickness, Critical Illness, and involuntary unemployment insurance from Western Life Assurance Company. I understand that I will receive documentation about LPP from Easyfinancial Services Inc and Western Life and that I should review the documents carefully as there are exclusions and limitations that apply to my insurance coverage and I hereby represent and warrant that I am under 68 years of age at the date of this application to enroll.”

[13] The LPP is described in a Certificate of Insurance (Group Policy EH001001) that was entered into evidence: see Ex. C3. The Certificate states that Western Life Assurance is providing “loan balance” insurance. The insurer agrees to pay the Lender *inter alia* the “Involuntary Unemployment Benefit” described in the certificate. It goes on to say that the reader (that is, presumably, the borrower) does “not have to buy Loan Balance Insurance to obtain a loan.” The insurance is “voluntary.”

[14] The LPP includes an “involuntary unemployment benefit” which, as I read it, offers to pay the lesser of \$1,500.00 or 50% of the initial loan amount: see Easyfinancial services Certificate of Insurance, Ex. C3. “Involuntary unemployment” is defined in the Certificate to mean:

- a. termination of employment without cause; or
- b. layoff; or
- c. termination of employment due to Sickness.

[15] Returning to the Personal Loan Agreement, clause 6 provides that upon any failure to pay “a bi-weekly payment amount” on a due date “the unpaid Principal amount and accrued interest will immediately become due and payable at our option without notice to you.” Since the “bi-weekly payment amount” included both principal and interest on the loan *and* the LPP premium this means, as I read it, that the borrower was not entitled to decide at a later date that insurance on the loan was no longer necessary—he or she was required to pay those premiums until the end of the loan.

[16] This final point is of some significance. As noted above the Agreement does not actually spell out what the bi-weekly payments of principal and interest would be. It refers only to a payment comprised of principal, interest and LPP premium. That amount is said to be \$95.44. If one multiplies \$95.44 by the 39 bi-weekly payments provided for one arrives a total of \$3,722.16.

[17] In other words, what Ms Billard had to pay over the term of the loan was not the \$811.31 set out in the Agreement and its “Statement of Disclosure” but rather \$1,722.16. In other words, she had to pay the principal and then almost twice that amount in interest and insurance premiums.

[18] In any event, as I say above, Ms Billard entered into the Agreement on June 2, 2009. She was initially able to meet her payment schedule. But in November 2009 her mother was forced to return home to New Brunswick. Ms Billard could not find anyone prepared to babysit her children for the times she was working. Nor could she find suitable daycare, which was not surprising given the shifts she worked. She was forced to give up her full time position and drop down to casual part time status, which permitted her to work what regular shifts she could get during the day when daycare or babysitters were available. Her income dropped considerably.

[19] She asked about the LPP insurance. However, she was told that her change in employment status did not amount to “involuntary unemployment” within the meaning of the LPP Benefit plan. EI apparently took the same position. So Ms Billard was abandoned to the

invisible hand of Adam Smith, through no fault of her own, and in spite of her best efforts to support her children by good, honest work.

[20] Ms Billard fell into arrears on her loan. Easyfinancial now comes to court seeking payment of what it says is the outstanding areas of principal and interest of \$2,068.92. I say “principal and interest” because the claimant said that it had “backed out” the LPP premiums from the amount of the claim. It did not however provide a breakdown explaining what was principal and what interest; or how much of the principal had already been paid by Ms Billard; or how the interest was calculated.

[21] In my opinion the claim must fail.

[22] These types of consumer and payday loans are regulated in Nova Scotia by sections 17, 18 and 18A-18U of the *Consumer Protection Act*, RSNS 1989, c.92, as amended. Since the loan in question was for a period greater than 62 days the payday loan provisions of the Act do not apply: s.18A(b). This particular loan is simply a consumer loan governed by s.17.

[23] The Act makes clear that a lender must provide the borrower with “a clear statement in writing showing,” *inter alia*,

- a. the sum actually received in cash by the borrower: s.17(1)(a)(i);
- b. the sum remaining unpaid under a previous extension of credit: s.17(1)(d);
- c. the cost of borrowing in dollars and cents: s.17(1)(g); and
- d. the percentage that the cost of borrowing bears to the sum actually received in cash by the borrower: s.17(1)(h)(i).

[24] The borrower is “not liable to pay a lender as a cost of borrowing any sum or at a rate that exceeds the sum or rate disclosed in a statement given pursuant to section 17:” s.18(1).

[25] In my opinion the loan in this case breached these requirements in the following ways:

- a. it did not specify the sum actually received (approximately \$700.00) by Ms Billard;

- b. it did not specify the sum that had remained unpaid under the earlier loan;
- c. it did not reveal the actual cost of borrowing; and
- d. it did not display the actual cost of borrowing as a percentage.

[26] With respect to the last two points, it is true that the “Statement of Disclosure” states that the cost of borrowing is \$811.31 and that the interest rate is shown as 59.9%. However, in my opinion these two statements were misleading because they ignore the cost of the LPP Premium. If the premium is included in the cost of the loan then as discussed above the actual cost is closer to \$1,700.00—and hence the interest rate on the loan would be much higher than the 59.9% displayed on the statement.

[27] It might be argued that the LPP Premiums were “voluntary” and hence did not represent a “cost” of the loan. The premiums were for something different. They were to purchase insurance, and did not represent an actual cost of the loan. I acknowledge in this regard that the Certificate of Insurance (Group Policy EH001001) does state that the reader (that is, presumably, the borrower) does “not have to buy Loan Balance Insurance to obtain a loan.” The insurance is “voluntary.” However, to conclude that these words mean that the premium was *in fact* voluntary is to elevate form over substance. In this regard I make two points.

[28] First, the certificate is a certificate in respect of a group policy. The parties to a group policy are the lender and the insurer. The borrower is not a party. Hence the insurer’s statement that the insurance is “voluntary” says nothing about and cannot determine the terms and conditions of the loan agreement between the lender and the borrower. In other words, if the lender requires all of its borrowers to take such insurance it can hardly be said to be voluntary from the standpoint of the borrower.

[29] Second, and in any event, it is odd to find such wording in what purports to be an insurance contract. No insurance contract I have ever seen includes a clause stating that it is “voluntary.” Indeed, there is no need for such wording, because it is a fundamental principal of contract law that parties enter into an agreement—a contract—voluntarily.

[30] Why then would an insurer include such wording in an insurance contract? One explanation may be that the wording exists not for the ostensible reader (*i.e.* the borrower who enters into the contract) but rather for regulators concerned about the cost of consumer loans. In

other words, it exists to conceal a different situation, one in which the premium is in fact mandatory rather than voluntary.

[31] In my opinion the Personal Loan Agreement does in fact require LPP “insurance” as a term and condition of the loan itself. It is mandatory, not voluntary. Nowhere in the Agreement does it say that the LPP premium is “voluntary” or “an option.” Indeed, as discussed above at para. [15], the LPP premium is expressly made part of the “bi-weekly payment” that must be paid on pain of being in default on the loan itself. There is nothing on the Personal Loan Agreement that says the borrower can opt out of the LPP premium. All of this leads me to the conclusion that the LPP premium is in fact and in law part of the contractual loan agreement—it is in effect part of the cost of the loan which must, along with principal and interest, be paid.

[32] Since the claimant was in breach of its obligations under s.17 of the *Consumer Protection Act* it is not in my view entitled to enforce its claim for interest on the loan. I note too that since the LPP premium is part of the cost of the loan then the effective rate of interest is much greater than 60% and, to that degree at least, offends the provisions of s.347 of the *Criminal Code* and would, to that degree at least, be unenforceable.

[33] The fact that the claimant has failed to establish its claim for interest on the loan as required by s.17 of the *Consumer Protection Act* does not in and of itself mean that the borrower is relieved of the duty to repay at least the principal: see s.18(2)(a). But in this case the claimant failed to introduce evidence showing what the actual principal was. The evidence was clear that the claimant had made payments up to at least November 2009 (if not later). Yet these payments included more than the interest and costs the claimant was entitled to charge (as discussed above). These extra amounts the claimant was not entitled to charge would in normal course be credited to principal (which would have the added effect of reducing interest). But in the absence of the necessary evidence from the claimant I cannot determine what part of the principal properly remains unpaid. The onus is on the lender (here the claimant) to prove what that principal amount was. It has failed to do so. The claim must accordingly be dismissed.

Dated at Halifax, this 26th day of January, 2010

Original: Court File)
Copy: Claimant)
Copy: Defendants)

W. Augustus Richardson, QC
ADJUDICATOR