Opinion No. 369

Building and Loan Associations—Liquidation—Set-offs

HELD: A member of a Building and Loan Association in liquidation may not set-off payments made for shares of stock in the association against his indebtedness to the association for money borrowed.

October 21, 1933.

In order that our position may be better understood, we take the liberty of quoting from your letter to us of the 14th inst., as follows:

"One, Mr. W. J. Hazelton, borrowed $2,000.00 from the Broadwater County Building and Loan Association of Townsend, Montana, and secured the loan with a mortgage on his home. In conformity with the loan plan of the association he was also required to purchased 20 shares of $100.00 par value stock of the Association which stock was retained by the Association as additional collateral or security to the loan. Mr. Hazelton made payments of $10.00 per month and at the time the Association went into voluntary liquidation these payments aggregated approximately $600.00. Mr. Hazelton states that he would not have purchased this stock except in connection with his loan and when he made payments to build up the value of his stock he considered them payments to reduce the amount he had borrowed. The liquidating agent in charge of the Association is now insisting on payment in cash of the loan in the full amount of $2,000.00 and claims that Mr. Hazelton is only entitled to become a general creditor of the Association for the $600.00 which he has paid in. Mr. Hazelton feels that he is entitled to have the $600.00 applied as a payment on the loan so that he can retire the loan at this time by paying approximately $1,400.00. * * * We would like your opinion as to whether or not Mr. Hazelton or other creditors in like situations are entitled to have the stock credits in question applied on their loans."

Section 47, Chapter 57, Laws of 1927, authorizes a building and loan association to go into voluntary liquidation. During the process of liquidation the income and receipts of the association, in excess of the expense and receipts of managing the same, shall be applied to pay off first the indeptedness and then the stock upon which no loans have been made, on a pro rata basis. The board of directors of the association may adopt such rules and make such orders as shall be just and equitable for the division of its assets.

Mr. Hazelton occupies the dual position to the association of borrower and stockholder. Under the law and the scheme of operation he could not be a borrower without becoming a stockholder, but he could be a stockholder without becoming a borrower. In his capacity as borrower he is a debtor, in his capacity as stockholder he is a member of the corporation. What he paid as interest was paid in his character as debtor on his loan. What he paid as stock due was paid in his character as stockholder. The two are separate and distinct and must be so dealt with. Therefore, the payments made on account of the collateral were not payments made on account of the debt it was intended to secure. (Smith v. Bath Loan & Bldg. Asso., 136. Atl. 284, 50 A. L. R. 526; Groover v. Pacific Coast Savings Soc., 127 Pac. 495; In re Joseph, 133 Atl. 696; Bayless v. Baird, 143 N. E. 703; 9 C. J. 979.)

The general rule, both in law and equity, is that demands, to be set off, must be mutual, and that debts accruing in different rights cannot be set off against each other. In view of the dual relation of member and debtor between the association and the borrowing stockholder, as has been pointed out, the equitable doctrine of set-off, as claimed by the borrowing stockholder, is not applicable to the case before us. (Smith v. Bath Loan & Bldg. Asso., supra; Barth v. Pock, 51 Mont. 418; Grover v. Pacific Coast Savings Soc., supra; Royer v. Perkins Loan & Trust Co., 168 Pac. 848; 57 C. J. 444-447.)

Were the rule otherwise, the borrowing shareholder, where the association is in fact insolvent, would enjoy a substantial advantage. As a member he is bound to contribute to the losses and expenses of the common enterprise. If the amount of dues paid

in by him as a member is credited back to him as a debtor, he will receive in full the amount paid upon his stock, while the other members who have not become borrowers may receive only a small part of the amount paid in by them. (Grover v. Pacific Coast Savings Soc., supra; In re National Bldg., Loan & Prov. Ass'n., 107 Atl 453.)

In view of the language of the statute and the overwhelming weight of authority, it is our opinion that Mr. Hazelton is not entitled to have the $600.00 paid on his stock applied on his indebtedness of $2,000.00 to the association.