SBN V FNBC LLC	*	**NO. 2018-CA-1026**
VERSUS	*	
		COURT OF APPEAL
VISTA LOUISIANA, LLC	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2018-00262, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *

Judge Rosemary Ledet
* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins, Judge Paula A. Brown)

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AFFIRMED

MARCH 27, 2019

This is a suit on a promissory note. From the trial court's judgment granting the motion for summary judgment filed by the plaintiff, SBN V FNBC LLC ("SBN"), the defendant, Vista Louisiana, LLC ("Vista"), appeals. Vista also seeks review of the trial court's interlocutory judgment denying its motions for new trial and to compel discovery. The issues before us on this appeal are two-fold: (i) whether the trial court prematurely granted summary judgment without allowing Vista adequate discovery; and (ii) whether the trial court erred in finding that SBN was entitled to summary judgment on its claims against Vista. Because SBN's motion for summary judgment revolves around two legal determinations—construction of a contract (the Business Loan Agreement) (the "Contract") and interpretation of a statute (the Louisiana Loansharking Statute, La. R.S. 14:511) (the "Statute")[1]—we find the trial court did not prematurely rule on SBN's

[1] La. R.S. 14:511 provides as follows:

> A. A person is guilty of loansharking when he knowingly solicits, or receives any money or anything of value, including services, as interest or compensation for a loan, or as forbearance of any right to money or other property, at a rate exceeding forty-five percentum per annum or the equivalent rate for a longer or shorter period. This Section shall not apply to any transaction under Title 6, Title

summary judgment motion. On the merits, we find no legal error in the trial court's rejection of Vista's defenses. For these reasons, we affirm the trial court's judgment granting SBN's summary judgment motion.

FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2015, Vista executed a promissory note payable to the order of First NBC Bank ("FNBC") (the "Note"). The original principal amount of the Note was $1,000,000.00. The Note was payable "in full immediately upon Lender's demand" or, if no demand was made, "no later than February 28, 2016." The Note had a variable interest rate. Contemporaneously with the execution of the Note, Vista executed the Contract with FNBC. Pursuant to the Contract, Vista provided a Letter of Credit (the "LOC"), which was in the same amount as the Note, as security for the Note.

In April 2017, FNBC closed; and the Federal Deposit Insurance Corporation (the "FDIC") was named as FNBC's receiver. At that time, the Note was in default. In October 2017, the FDIC entered into a loan sale agreement with SBN. Pursuant to that agreement, SBN purchased from the FDIC a pool of loans, which included the Note. On the allonge attached to the Note, the FDIC endorsed the Note to the order of SBN.

> 9, or Sections 1751 through 1770 of Title 37 of the Louisiana Revised Statutes of 1950 or under R.S. 9:3500.
>
> B. Whoever commits the crime of loansharking is guilty of a felony and shall be punished by a fine of not more than ten thousand dollars or imprisoned for not less than one year nor more than five years with or without hard labor, or both.
>
> C. For the purposes of this Part, the term "person" shall mean any individual, partnership, corporation, or combination of individuals.

In January 2018, SBN commenced this suit on the Note against Vista. In its petition, SBN averred that it was the holder of the Note and that it had the rights of a holder in due course. In its petition, SBN prayed for a judgment against Vista for the following five items: (i) the unpaid principal balance of the Note—$1,000,000.00; (ii) the accrued unpaid interest due on the Note through January 5, 2018—$75,104.16; (iii) additional default interest of 21% from January 6, 2018, until paid;[2] (iv) late charges—$2,000.00; and (v) attorneys' fees of 25% of the total sum due.

In March 2018, Vista answered the suit asserting the following two defenses: (i) off-set based on FNBC's failure to timely draw down on the LOC (the "LOC Defense"); and (ii) absolute nullity based on the Statute (the "Loansharking Defense").

Shortly after Vista's answer was filed, SBN filed a motion for summary judgment, contending that it was a holder in due course. In support, SBN provided an affidavit of Kelli Wood, SBN's custodian of records. In her affidavit, Ms. Wood identified the Note and the facts surrounding SBN's acquisition of the Note. Attached to her affidavit and identified in it were copies of the Note and the Contract.

Opposing the motion, Vista acknowledged the validity of the Note and the Contract; however, it disputed SBN's status as a holder in due course. On the merits, Vista asserted the same two defenses it asserted in its answer—the LOC Defense and the Loansharking Defense.

[2] On January 5, 2018, SBN exercised its option, pursuant to the "Interest after Default" provision of the Note, to increase the interest rate to 21%. This provision of the Note tracks the language of La. R.S.9:3509(B)(1).

In support, Vista attached to its opposition affidavits from the following three people: (i) Lawrence Starkman, Vista's manager; (ii) John Seago, Vista's attorney; and (iii) Rene Meaux, a certified public accountant retained by Vista. Mr. Starkman attested that Vista had "filed Interrogatories, Requests for Production of Documents and Admissions of Fact which requested SBN to provide the exact amount SBN paid for the Vista loan" (the "Discovery Requests"). Mr. Seago attested that he prepared the Discovery Requests. Attached to and identified in Mr. Seago's affidavit was a copy of the Discovery Requests. Mr. Meaux attested that he performed calculations based on the average price paid in each pool for each loan and that he concluded the rate of return sought by SBN exceeded 45% per annum.[3] Attached to Mr. Meaux's affidavit were copies of his report and a summary of his calculations.

On May 11, 2018, the summary judgment hearing was held. At the hearing, SBN conceded, contrary to the allegation in its petition, that it was not a holder in due course; and Vista requested a continuance to conduct discovery. Vista stressed that, on April 17, 2018, it filed the Discovery Requests; that SBN had not yet answered them; and that SBN's responses were not due until May 17, 2018, six days after the hearing. At the hearing, the trial court orally granted SBN's motion for summary judgment and, by implication, denied Vista's request for a continuance. Although the trial court granted SBN's summary judgment motion at the hearing, two weeks later (on May 25, 2018), Vista filed a motion to compel, seeking a response to the Discovery Requests.

[3] According to his calculations, Mr. Meaux determined that SBN paid an average amount of either twenty-three cents or thirty-six cents per dollar for the Note, depending on which of two possible loan pools the Note was included. These average amounts were used by Mr. Meaux to calculate the "other compensation" SBN received on the Note; he explained that "the average price per loan paid by SBN was then compared to the amount SBN is now claiming Vista owed under the [Note] . . . to determine the rate of return on their investments."

On June 1, 2018,[4] the trial court rendered a written judgment granting SBN's summary judgment; the judgment was in favor of SBN and against Vista for the amounts prayed for in the petition with the one exception.[5] Five days later (on June 6, 2018), Vista filed a motion for new trial, asserting the same two defenses that it raised in its answer and its opposition to the motion for summary judgment. The trial court denied both the motion to compel and motion for new trial. Vista appealed.

DISCUSSION

"Summary judgments are reviewed *de novo* on appeal, with the reviewing court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law." *Smith v. Robinson*, 18-0728, p. 5 (La. 12/5/18), ___ So.3d ___, ___, 2018 WL 6382118, *3 (citing La. C.C.P. art. 966; *Louisiana Safety Ass'n of Timbermen Self-Insurers Fund v. Louisiana Ins. Guar. Ass'n*, 09-0023, p. 5 (La. 6/26/09), 17 So.3d 350, 353). Likewise, "when a matter involves the interpretation of a statute, it is a question of law, and a *de novo* standard of review is applied." *New Orleans Fire Fighters Pension & Relief Fund v. City of New Orleans*, 17-0320, p. 5 (La. App. 4 Cir. 3/21/18), 242 So.3d 682, 688 (citing *Red Stick Studio Dev., L.L.C. v. State ex rel. Dep't. of Econ. Dev.*, 10-0193, p. 9 (La. 1/19/11), 56 So.3d 181, 187).

[4] In its reasons for judgment, the trial court explained that "[t]he written judgment was submitted after the fact and not signed by the Court until June 1, 2018."

[5] The exception was that the request for attorneys' fees. Although SBN requested 25% of the total sum, the trial court awarded attorneys' fees of $10,000.00.

The summary judgment procedure is favored. La. C.C.P. art. 966(A)(2).[6] The standard for obtaining a summary judgment is set forth in La. C.C.P. art. 966(A)(3), which provides that "[a]fter an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." Whether a fact is material is a determination that must be made based on the applicable substantive law. *Roadrunner Transp. Sys. v. Brown*, 17-0040, p. 7 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1270 (citing *Smith v. Our Lady of the Lake Hosp., Inc*., 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751).

Typically, suits on promissory notes are appropriate for summary judgment when the debtor establishes no defense against enforcement. *American Bank v. Saxema*, 553 So.2d 836, 845 (La. 1989); *Premier Bank v. Percomex, Inc*., 615 So.2d 41, 43 (La. App. 3d Cir. 1993); *see also Fed. Deposit Ins. Corp. v. Cardinal Oil Well Servicing Co., Inc*., 837 F.2d 1369, 1371 (5th Cir.1988) (observing that "[t]ypically, suits on promissory notes provide fit grist for the summary judgment mill").

In a suit on a promissory note, the plaintiff-lender's burden of proof is straightforward; "the [plaintiff-lender's] production of the note sued upon makes his case." *Merchants Trust & Sav. Bank v. Don's Int'l, Inc*., 538 So.2d 1060, 1061 (La. App. 4th Cir. 1989); *Pannagl v. Kelly*, 13-823, p. 6 (La. App. 5 Cir. 5/14/14), 142 So.3d 70, 74 (observing that "[o]nce the plaintiff, the holder of a promissory note, proves the maker's signature, or the maker admits it, the holder has made out

[6] La. C.C.P. art. 966(A)(2) provides that "[t]he summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action" and that "[t]he procedure is favored and shall be construed to accomplish these ends."

his case by mere production of the note and is entitled to recover in the absence of any further evidence"). In order to defeat summary judgment, the defendant-borrower must assert a valid defense to liability on the promissory note, not separate and distinct claims that are unrelated to the question of liability. *Saxena*, 553 So.2d at 844.

Here, Vista does not dispute the validity of the Note produced by SBN. Rather, as noted elsewhere in this opinion, Vista asserts two defenses to the Note. Villa also asserts the procedural argument that summary judgment was prematurely granted and that its request to continue and to compel discovery should have been granted. Addressing the issues Vista raises on appeal, we divide our analysis into three parts—prematurity, the LOC Defense, and the Loansharking Defense.

Prematurity

A motion to continue is the proper method to challenge a motion for summary judgment on the basis of prematurity due to inadequate discovery.[7] "When discovery is alleged to be incomplete, a trial court has the discretion either to hear the summary judgment motion or to grant a continuance to allow further discovery." *Roadrunner*, 17-0040, p. 11, 219 So.3d at 1272 (citing *Simoneaux v. E.I. du Pont de Nemours and Co*., 483 So.2d 908, 912 (La. 1986); *Eason v. Finch*, 32,157, p. 7 (La. App. 2 Cir. 8/18/99), 738 So.2d 1205, 1210). The trial court denied Villa's request to continue. We review the trial court's decision under an abuse of discretion standard. *Id.*

[7] La. C.C.P. art. 966(C)(2) provides that "[f]or good cause shown, the court may order a continuance of the hearing."

"Construing Article 966, this court has held that '[a]lthough the language of article 966 does not grant a party the absolute right to delay a decision on a motion for summary judgment until all discovery is complete, the law does require that the parties be given a fair opportunity to present their case.'" *Roadrunner*, 17-0040, p. 11, 219 So.3d at 1273 (quoting *Leake & Andersson, LLP v. SIA Ins. Co.* (*Risk Retention Grp.*), 03-1600, pp. 3-4 (La. App. 4 Cir. 3/3/04), 868 So.2d 967, 969). This court, as Vista points out, has crafted a multi-factor test for determining whether adequate time for discovery was allowed before granting summary judgment.[8]

Nonetheless, the Louisiana Supreme Court has instructed that "[u]nless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact." *Simoneaux v. E.I. du Pont de Nemours & Co*., 483 So.2d 908, 913 (La. 1986). Consistent with that principle, the jurisprudence has recognized that, despite pending discovery requests, summary judgment is not premature when the issue presented is purely a legal one and additional discovery will not change the result.[9] In that context, there

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[8] The multi-factor test this court has crafted is as follows:

- whether the party was ready to go to trial;
- whether the party indicated what additional discovery was needed;
- whether the party took any steps to conduct additional discovery during the period between the filing of the motion and the hearing on it; and
- whether the discovery issue was raised in the trial court before the entry of the summary judgment.

Bass Partnership v. Fortmayer, 04-1438, p. 10 (La. App. 4 Cir. 3/9/05), 899 So.2d 68, 75 (citing *Greenhouse v. C.F. Kenner Associates Ltd. Partnership*, 98-0496, p. 3 (La. App. 4 Cir. 11/10/98), 723 So.2d 1004, 1006); *Roadrunner*, 17-0040, pp. 11-12, 219 So.3d at 1273; *St. Pierre Ass'n v. Smith*, 17-0228, pp. 11-12 (La. App. 4 Cir. 12/6/17), 234 So.3d 170, 178.

[9] *See Whitney Bank v. Garden Gate New Orleans, L.L.*C., 17-362, pp. 6-7 (La. App. 5 Cir. 12/27/17), 236 So.3d 774, 781 (observing, in a suit on a promissory note, that "defendants have

are no genuine issues of material fact; and additional discovery would be fruitless. *See Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004) (citing *Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir.1988)) (observing that "summary judgment in the face of requests for additional discovery is appropriate only where such discovery would be 'fruitless' with respect to the proof of a viable claim").[10] When additional discovery would be "fruitless," the multi-factor test for determining whether adequate time discovery was allowed is inapposite. Such is the case here.

To determine whether additional discovery would be fruitless, a court must "look to the legal theories that might sustain the [non-movant's] claims." *Klingele*, 849 F.2d 409, 412 (9th Cir.1988); *see Smith*, 93-2512, p. 27, 639 So.2d at 751 (observing that materiality of a fact is determined based on applicable substance law). Here, Vista asserts two defenses in opposing SBN's motion for summary judgment—the LOC Defense and the Loansharking Defense. As noted at the outset, both defenses present purely legal issues, which can be resolved by applying rules of contractual interpretation and statutory construction. Therefore, this is a case in which additional discovery would be fruitless.

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not shown there are any genuine issues of material fact for which discovery is necessary, and thus, defendants have not shown that a probable injustice has occurred" in denying motion to continue); *River Bend Capital, LLC v. Lloyd's of London*, 10-1317, p. 5 (La. App. 4 Cir. 4/13/11), 63 So.3d 1092, 1096 (observing that "[f]urther discovery to verify what Lloyd's meant by 'full and final settlement' is unnecessary where the language is clear and unambiguous as here"); *Hamilton v. Willis*, 09-0370, p. 3 (La. App. 4 Cir. 11/4/09), 24 So.3d 946, 948 (observing that "[a]dditional discovery cannot change the motorsports exclusion, which we find to be clear and unambiguous and not leading to absurd consequences"); *Orleans Par. Sch. Bd. v. Lexington Ins. Co.*, 12-1686, p. 30 (La. App. 4 Cir. 6/5/13), 118 So.3d 1203, 1223 (observing that "[w]hen the words of an insurance contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent (La. C.C. art. 2046); and additional discovery cannot change the result").

[10] As a commentator has observed, "[t]he general Louisiana summary judgment procedure is taken from the federal procedure, and the jurisprudence under the federal procedure may be considered in applying the Louisiana procedure." 1 Frank L. Maraist, LA. CIV. L. TREATISE, CIVIL PROCEDURE § 6:8 (2d ed. 2018).

Reaching this result, the trial court, in its reasons for judgment, observed that "[n]o amount of additional discovery on Vista's asserted defenses would create a genuine issue as to which reasonable persons could disagree." We agree. Vista's reliance on the multi-factor test is misplaced. The trial court did not abuse its discretion in denying the request to continue and the motion to compel discovery.

The LOC Defense

Vista's first defense on the merits is that it is entitled to a set-off, based on FNBC's failure to exercise its rights under the LOC before it expired, which LOC would have paid the Note in full. FNBC's failure to exercise its rights under the LOC, Vista contended, was both a breach of the Contract and negligence.[11] SBN counters that the parties agreed in the Contract that FNBC had no duty to draw down the LOC. Given that FNBC had no duty to do so, SBN contends that there could be no breach of duty.

Rejecting the LOC Defense, the trial court, in its written reasons for judgment, reasoned that "[a]s the [Contract], signed by Vista, did not require FNBC to seek set-off from the [LOC], Vista cannot now raise the failure to do so as a defense." We reach the same result for the following two reasons.

First, the unambiguous language of the Contract supports the trial court's finding that FNBC was not required to seek a set-off from the LOC. The Contract provides as follows:

> Lender shall have the additional right, again at its sole option, to file an appropriate collection action against Borrower and/or against any guarantor or guarantors of Borrower's Loan and Note, and/or to proceed or exercise any rights against any Collateral[12] then

[11] The parties do not dispute that Vista placed the LOC with FNBC as security for the loan and that FNBC failed to exercise its rights under the LOC.

[12] The Contract defines "Collateral" as the LOC.

> securing repayment of Borrower's Loan and Note. Borrower and each guarantor further agree that Lender's remedies shall be cumulative in nature and nothing under this Agreement or otherwise, shall be construed as to limit or restrict the options and remedies available to Lender following any event of default under this Agreement or otherwise.
>
> Except as may be prohibited by applicable law, all of Lender's rights and remedies shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Borrower or of any Grantor shall not affect Lender's right to declare a default and to exercise its rights and remedies.

Under the unambiguous terms of the Contract, the lender, FNBC, had the option to proceed against the collateral, the LOC, but was not required to do so.

Second, a contract to provide security for an outstanding obligation is an accessory contract.[13] Here, the LOC is the accessory obligation; the principal obligation is the Note. As SBN points out, "[w]hile a surety, under some conditions may, by requesting discussion of the property of the principal, require a creditor to pursue the principal before pursuing the surety, La. C.C.P. art. 5152, there has never been a requirement that the creditor pursue his collateral before pursuing the debtor, or that he could only pursue the debtor if he had pursued the collateral."[14] To the contrary, "when a debtor defaults on the payment of the principal obligation, the creditor avails himself of his security device, if he has one, but there is no rule of law which prohibits the creditor from proceeding on the

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[13] *See* La. C.C. art. 1913 (providing that "[a] contract is accessory when it is made to provide security for the performance of an obligation" and that "[w]hen the secured obligation arises from a contract, either between the same or other parties, that contract is the principal contract"); *see also* La. C.C. art. 3136 (providing that "[s]ecurity is an accessory right established by legislation or contract over property, or an obligation undertaken by a person other than the principal obligor, to secure performance of an obligation. It is accessory to the obligation it secures and is transferred with the obligation without a special provision to that effect").

[14] La. C.C.P. art. 5152 provides that "[w]hen a surety is sued by the creditor on the suretyship obligation, and the right of discussion has been created by contract between the surety and the creditor, the surety may plead discussion to compel the creditor to obtain and execute a judgment against the principal before executing a judgment against the surety."

principal debt." *D'Amico v. Canizaro*, 256 La. 801, 808, 239 So.2d 339, 341 (1970) (internal footnote omitted).[15]

In sum, under both the governing legal principles regarding accessory obligations and the unambiguous provision of the Contract, FNBC's failure to timely call the LOC can have no impact on the principal obligation Villa owes on the Note. For these reasons, we find, agreeing with the trial court, that Vista's LOC Defense is unpersuasive.

The Loansharking Defense

Vista's second defense is that the rate of return or "compensation" that SBN realized on the Note violated the maximum compensation allowed under the Statute—45% per annum—and thus amounts to criminal usury—loansharking. Vista contends, as the trial court noted, that "because SBN was able to acquire the [N]ote for pennies on the dollar, it received an 'unconscionable' amount of 'compensation' considering the standard interest combined with the bonus resulting from its acquisition of the [N]ote at a discount." Vista contends that when SBN purchased the Note, it became the new lender for this loan. According to Vista, "[t]he difference between what [SBN] paid for Vista's loan and what it is requiring Vista to pay back is 'other compensation' referred to in the Statute." Vista contends that given SBN's actions violate the Statute, SBN's attempt to

[15] *See also Hancock v. Bridges*, 547 So.2d 1103, 1106 (La. App. 1st Cir. 1989) (citation omitted) (observing that the creditor "can proceed on the principal debt rather than on the security device"); *Whitney Nat. Bank v. Jeffers*, 573 So.2d 1262, 1266 (La. App. 4th Cir. 1991) (observing that "[t]he pledgee has the legal right to proceed on the pledge or to wait until the maturity of the principal obligation and sue on it, disregarding the pledged property").

obtain a money judgment on the Note was void as against public policy and that the Note was an absolute nullity.[16]

SBN's counters that the Note is exempt from the Statute. According to the Note itself, "[t]o the extent not preempted by federal law, this business or commercial loan is being made under the terms and provisions of La. R.S. 9:3509, *et seq*." It notes that this loan was made pursuant to the statutory authority granted in both Title 6 and Title 9 of the Revised Statutes. SBN further notes that the Statute was enacted in 1995, yet no court has seen fit to strike down a commercial loan contract on the grounds that the interest rate was unconscionable under the Statute. SBN also argues when a third party purchases a note, and then enforces it according to its terms, the maker of the note is not being forced to do anything more than he contracted to do—pay the principal amount of the note, representing the money he was loaned, plus interest.

Agreeing with SBN, the trial court, in its written reasons for judgment, observed that Vista's interpretation of the Statute "would effectively outlaw the common practice of purchasing notes at a discount"[17] and that "purchasing a note

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[16] *See* La. C.C. art. 7 (providing that a person may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any derogation of such law is an absolute nullity); La. C.C. art. 2030 (providing that "[a] contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral").

[17] This common practice is termed commercial discounting, which is defined as "the recognized financial practice of buying an existing indebtedness for a price less than its face value. Such a transaction is essentially a sale and has never been considered within the letter or spirit of the usury law." Note, Usury—Prepayment of Promissory Notes—Rates of Unearned Interest, 40 Tul. L.Rev. 452, 456, n. 27 (1966); *see Lafayette Royale Apartments, Inc. v. Meadowbrook Nat. Bank*, 397 F.2d 378, 381 (5th Cir.1968) (observing that "[t]he evidence is clear and uncontradicted that the instant transaction involved the sale and purchase of a mortgage note rather than a direct loan between Meadow Brook and Lafayette Royale" and holding that "the transaction was not usurious under Louisiana law"); *see also Matter of Executive Office Centers, Inc.*, 96 B.R. 642, 648-49 (Bankr. E.D. La.1988) (citing *Budget Plan of Baton Rouge, Inc. v. Talbert*, 276 So.2d 297 (La.1973); *Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, 77 F.2d 152 (5th Cir.1935)) (observing that "[c]ommercial loan discounting facilitates commerce by providing a means of raising capital through the sale of debt instruments at a discount" and that

at a discount, no matter how large the windfall that might accrue on successful collection, is not loansharking as contemplated by La. R.S. 14:511." The trial court also noted that "Vista does not appear to cite nor could this Court find any case that supports such an interpretation." The trial court thus determined that the Statute was not violated by Vista purchasing the Note from the FDIC at a discount and enforcing the Note according to its terms. We agree.

In construing the Statute, we first note the well-settled principle that "criminal statutes are to be strictly construed." *State v. Vogel*, 18-0174, p. 12 (La. App. 1 Cir. 9/24/18), 261 So.3d 801, 809. We further note that the term loansharking is defined as "[t]he practice of lending money at excessive and esp. usurious rates, and often using threats or extortion to enforce repayment." BLACK'S LAW DICTIONARY (10th ed. 2014).

Because there are no cases construing or citing the Statute and because loansharking is criminal usury, we look for guidance to jurisprudence construing the Louisiana civil usury law. The jurisprudence has observed that the usury laws of this state have historically exempted commercial discounting. *Lafayette Royale Apartments*, 397 F.2d at 381 (observing that "[c]ommercial discounting . . . is permissible under Louisiana law"). Given the usury law jurisprudence and strictly construing the Statute, we conclude that the commercial practice of buying a note at a discount, here from the FDIC, is not the type of act the Louisiana Legislature was seeking to prevent in enacting the Statute.

"[t]he Louisiana legislature, as early as 1856, recognized the desirability of this commercial practice by excepting loan discounting from certain areas of pervasive legal, economic and social import, such as usury").

When a note is purchased at a discount, and then enforced according to its terms, the maker of the note is being called upon to do nothing other than what the maker contracted to do. For this reason, the general rule is that "the sale or purchase of negotiable or assignable commercial paper or another chose in action or evidence of indebtedness transferable in trade and business transactions, for valuable or legal consideration after its first negotiation, is not usurious even though the price or other consideration determined upon is less than the nominal or face value of the instrument purchased." 44B Am.Jur.2d *Interest and Usury* § 95 (citing *First All. Bank v. Westover, Inc*., 222 Ga.App. 524, 524–25, 474 S.E.2d 717, 718 (1996)).

Westover is illustrative. There, the court framed the issue before it as "whether a discount received by one of two joint lenders at the time it bought the interest of the other lender shall be included in calculating interest for the purpose of evaluating a usury claim pursuant to OCGA § 7–4–18." *Westover*, 222 Ga.App. at 524-25, 474 S.E.2d at 718.[18] Addressing that issue, the court observed that "[t]he gist of the [borrowers'] complaint is not that [the lender] obtained the Primary Loan at a discount—but rather that [the lender] improperly prevented the [borrowers] from sharing in the benefits derived from that discount." *Westover*, 222 Ga.App. at 527, 474 S.E.2d at 720 (1996). The court further observed that when the lender purchased the Primary Loan, its principal value was $1.48 million and that the borrowers enjoyed full use of that $1.48 million. The court thus found the borrowers' usury argument unpersuasive, reasoning that "it is not usurious for a

[18] In *Westover*, the court noted OCGA § 7–4–18(a) provides that "[a]ny person, company, or corporation who shall reserve, charge, or take for any loan or advance of money ... any rate of interest greater than 5 percent per month, either directly or indirectly, by way of commission for advances, discount, exchange, or the purchase of salary or wages; by notarial or other fees; or by any contract, contrivance, or device whatsoever shall be guilty of a misdemeanor." 222 Ga.App. at 526, 474 S.E.2d at 719.

borrower to pay interest on the full amount that it borrowed." *Id.* (citing *Williams v. Powell*, 214 Ga.App. 216, 218, 447 S.E.2d 45 (1994) (in conducting a usury analysis, "[i]nterest is calculated on the amounts of which the borrower had use")).[19]

Here, Vista makes a similar argument. It implicitly contends that it is not being allowed to share in the built-in profit that SBN will receive on the Note, which it purchased at a discount. The built-in profit—the difference between the amount a purchaser pays for a note and the face amount of the note—is what Vista seeks to label "other compensation" under the Statute. There is a difference, however, between additional charges that are added to the principal amount of a note—discounted interest and other charges—and the amount a purchaser pays for a note, with the option of enforcing the note according to its terms—the well-established practice of commercial discounting. This is a commercial discounting case. SBN purchased the Note from the FDIC at a discount and is seeking to enforce the Note according to its terms. Repeating the trial court's remark, "purchasing a note at a discount, no matter how large the windfall that might accrue on successful collection, is not loansharking." For this reason, the amount that SBN paid the FDIC for the Note simply is not relevant to the criminal usury analysis. The Loansharking Defense is not persuasive.[20]

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[19] *See also Schmitt v. Matthews*, 12 Wash.App. 654, 663, 531 P.2d 309, 314 (1975) (quoting *Palmer v. Stevens-Norton, Inc.*, 75 Wash.2d 155, 158, 449 P.2d 689, 691 (1969), which observed that "[w]hether a note is usurious depends entirely on what a borrower is required to pay for the use of the borrowed money and does not depend on what return a bona fide purchaser for value seeks to realize on his investment").

[20] Vista seeks appellate review of not only the final judgment granting SBN's motion for summary judgment, but also the interlocutory ruling denying its motion for new trial. "[An] abuse of discretion standard applies regardless which ground—peremptory or discretionary—the new trial motion is based upon." *Autin v. Voronkova*, 15-0407, p. 4 (La. App. 4 Cir. 10/21/15), 177 So.3d 1067, 1070 (citations omitted). For the same reasons expressed in analyzing the

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED

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motion for summary judgment, we find no abuse of discretion in denying the motion for new trial.