

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS KAREL,

Plaintiff/Counter-Defendant-
Appellee,

v

JRCK CORP., RAUL RODRIGUEZ, and
JENNIFER RODRIGUEZ,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED
May 10, 2012

No. 304415
Kent Circuit Court
LC No. 08-001469-CK

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this action to enforce the terms of a promissory note, defendants, JRCK Corp. and Raul and Jennifer Rodriguez, appeal as of right the trial court's order denying, in part, their motion for summary disposition relating to the application of the wrongful-conduct rule. For the reasons stated in this opinion, we affirm.

This case arises from defendants' failure to repay a loan. Plaintiff loaned JRCK \$230,000 pursuant to the terms of a promissory note.¹ The note provided that the interest rate was 17.5 percent. The note further provided that, in the event of a default:

All sums not paid when due shall bear interest between the due date until the payment date at the annual rate of 10 [percent] over the above-specified interest rate of 17.5 [percent] on the principal of this Note (a combined annual interest rate of 27.5 [percent]) . . . or if such rate is usurious, the highest legal rate.

¹ Raul and Jennifer, who formed the corporate entity JRCK, both personally guaranteed repayment of the loan.

JRCK failed to meet its repayment obligation, and plaintiff sued to collect on the note. It is not disputed that plaintiff's complaint sought a criminally usurious amount of interest. Defendants filed a counter-complaint alleging that plaintiff's demanded interest violated the usury statutes.

After a series of procedural motions not at issue in this appeal, plaintiff filed an amended motion for summary disposition on May 26, 2010. Plaintiff's motion was brought pursuant to MCR 2.116(C)(10), and alleged there was no genuine issue of material fact that defendants were required to satisfy the terms of the promissory note. On June 15, 2010, defendants filed a response to plaintiff's motion for summary disposition and their own motion for summary disposition, relying on MCR 2.116(I)(2) and MCR 2.116(C)(8). Defendants argued that the wrongful-conduct rule barred any recovery by plaintiff due to the charging of criminally usurious interest.

On December 3, 2010, a hearing on the parties' competing motions for summary disposition was held. On February 11, 2011, the trial court entered its opinion and order that is the subject of this appeal. The trial court determined that the promissory note was not facially usurious, but that the interest sought by plaintiff was usurious. Therefore, under the wrongful-conduct rule, the trial court barred plaintiff from recovering interest, fees, or costs under the promissory note, but did not bar plaintiff from recovering the principal.

On appeal, defendants argue that the trial court erred in determining that plaintiff was not barred from recovering the principal of the note under the wrongful-conduct rule.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Defendants' motion for summary disposition was brought pursuant to MCR 2.116(I)(2), premised on an argument that MCR 2.116(C)(8) clearly barred plaintiff from recovery based on the wrongful-conduct rule. "Under MCR 2.116(I)(2), summary disposition is properly granted in favor of the nonmoving party if that party, rather than the moving party, is entitled to judgment." *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 433; 773 NW2d 29 (2009).

MCR 2.116(C)(8) allows a trial court to grant summary disposition where the opposing party "has failed to state a claim on which relief can be granted." "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). For purposes of a motion under MCR 2.116(C)(8), "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The promissory note was a part of the pleadings, as it was the written instrument plaintiff's claim was based on and, therefore, "is a part of the pleading for all purposes." MCR 2.113(F)(2).

We also review matters of contract interpretation de novo. *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 245; 760 NW2d 828 (2008).

In *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995), the Court described the wrongful conduct rule as stemming from two "maxims:" (1) "a person cannot

maintain an action, if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party;” and (2) “as between parties in pari delicto, that is equally wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them.” However, “[t]he mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule. To implicate the wrongful-conduct rule, the plaintiff’s conduct must be prohibited or almost entirely prohibited under a penal or criminal statute.” *Id.* at 561.

Further, for the wrongful-conduct rule to bar recovery “a sufficient causal nexus must exist between the plaintiff’s illegal conduct and the plaintiff’s asserted damages.” *Id.* at 564. “An action may be maintained where the illegal or immoral act or transaction to which plaintiff is a party is merely incidentally or collaterally connected with the cause of action, and plaintiff can establish his cause of action without showing or having to rely upon such act or transaction.” *Id.* (quotation omitted).

Defendants argue that the trial court erred in failing to preclude plaintiff from enforcing the promissory note to collect the principal based on the wrongful-conduct rule where plaintiff violated Michigan’s criminal usury statutes; MCL 438.41, which bars interest rates “exceeding 25% at simple interest per annum,” and MCL 438.42, which bars the possession of usurious loan records.

In this case, it is not disputed that plaintiff violated MCL 438.41 by charging a usurious interest rate; however, as the trial court correctly found, the promissory note was not facially usurious. The default interest rate was stated as 27.5 percent, but this was qualified by the statement that “if such rate is usurious, the highest legal rate.” The plain language of the contract provides that if the default rate is usurious, it is reduced to the “highest legal rate.” See *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). “[C]ontracts must be construed so as to give effect to every word or phrase as far as practicable.” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). To find the promissory note to be usurious on its face, we would have to ignore the qualification regarding the interest rate. We “avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Id.* at 468. Consequently, the trial court did not err in determining that the promissory note was not, on its face, usurious, but that the charging and seeking of a usurious interest rate was wrongful conduct. MCL 438.41.

Further, in order for the criminal act of charging an interest rate that is usurious to bar recovery of the principal on the note, there must be a sufficient causal nexus between the charging of the illegal interest rate and the plaintiff’s asserted damages. *Orzel*, 449 Mich at 564. In *Ward v Titan Ins Co*, 287 Mich App 552, 557; 791 NW2d 488 (2010), this Court held that the plaintiff was not barred from recovering work loss injuries resulting from an automobile accident, despite accepting wages “under the table” and failing to report the income on the plaintiff’s taxes because “[t]he wrongful conduct rule does not apply because plaintiff’s alleged failure to file income tax returns would be only incidentally or collaterally connected to his claim for work loss benefits.” *Id.* at 556-557. We conclude that the same reasoning is applicable to this case. While the promissory note is obviously related to plaintiff’s attempt to collect usurious interest, it is only incidentally related because the usurious rate of interest was not authorized by

the terms of the note. Therefore, the trial court did not err in permitting plaintiff to recover the principal.

We note that on appeal, plaintiff presented an issue in his counterstatement of questions regarding his argument that the trial court erred in applying the wrongful-conduct rule to this case because MCL 438.41 and MCL 438.42 are not serious enough crimes to warrant application of the rule. Plaintiff's presentation of this issue constitutes an improper attempt to circumvent the rule requiring the filing of a cross-appeal. "Generally, failure to file a cross appeal precludes an appellee from raising an issue not appealed by the appellant." *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999). Plaintiff cannot neglect to file a proper cross-appeal and then request a decision "more favorable than that rendered below." *Turcheck v Amerifund Fin*, 272 Mich App 341, 351; 725 NW2d 684 (2006).

Nevertheless, we reject plaintiff's argument that violation of the usury statutes does not constitute a serious enough crime to warrant application of the wrongful conduct rule. MCL 438.41 and MCL 438.42 unambiguously criminalize usurious lending and provide significant penalties for such conduct. Therefore, we conclude that the conduct prohibited by these statutes is serious enough to warrant the application of the wrongful conduct rule.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra