

[Cite as *Ely Ents., Inc. v. FirstMerit Bank, N.A.*, 2010-Ohio-80.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93345**

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**ELY ENTERPRISES, INC.**

PLAINTIFF-APPELLANT

vs.

**FIRSTMERIT BANK, N.A.**

DEFENDANT-APPELLEE

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-667641

**BEFORE:** Gallagher, A.J., Cooney, P.J., and Kilbane, J.

**RELEASED:** January 14, 2010

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Ely Enterprises, Inc. (“Ely”), appeals the judgment of the Cuyahoga County Court of Common Pleas that granted the motion to dismiss of appellee, FirstMerit Bank, N.A. (“FirstMerit”). For the reasons stated herein, we reverse the judgment of the trial court and we remand the matter for further proceedings.

{¶ 2} Ely, an Ohio corporation, filed its complaint against FirstMerit on August 12, 2008. Ely alleges that it obtained a loan from FirstMerit in the principal amount of \$373,593.10 on August 15, 2001, and that pursuant to the promissory note, Ely agreed to repay the principal together with interest thereon at the rate of 11.000% per annum. Ely further alleges that FirstMerit breached the promissory note between the parties when it assessed interest based on a calculation known as the “365/360” method, which created an effective interest rate of 11.153% per annum. Ely’s complaint raises claims for breach of contract, seeks class treatment, requests an injunction requiring FirstMerit to cease using the 365/360 method of computing annual interest, and prays for damages, costs, attorney’s fees, and other relief.

{¶ 3} A copy of the promissory note is attached to the complaint. The promissory note sets forth a heading with the principal amount of \$373,593.10 and an interest rate of 11.000%. Under the section “Promise to

Pay,” the note sets forth the same principal amount to be paid with “interest at the rate of 11.000% per annum[.]” Under the section “Payment,” the note states that “[t]he annual interest rate for this Note is computed on a 365/360 basis; that is, by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding.” This section also indicates that the loan was to be paid in 84 monthly payments of \$6,428.30 each, commencing September 15, 2001, with a final payment for all principal and all accrued interest not yet paid due on August 15, 2008.

{¶ 4} FirstMerit filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6), asserting that application of the 365/360 method for calculating interest is permitted by law and unambiguously required by the terms of the promissory note. Ely opposed the dismissal and filed a cross-motion for summary judgment, arguing that the note does not permit FirstMerit to charge interest in excess of the stated per annum rate of 11.000%. The parties proceeded to file supplemental briefs regarding the dismissal.

{¶ 5} The trial court denied Ely’s motion for partial summary judgment and granted FirstMerit’s motion to dismiss. Ely timely appealed the ruling on the motion to dismiss and raises one assignment of error that challenges the trial court’s judgment of dismissal.

{¶ 6} We review an order dismissing a complaint for failure to state a claim for relief de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44. When reviewing a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 280, 2005-Ohio-4985, 834 N.E.2d 791. For a defendant to prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court in granting relief. *Id.*

{¶ 7} In construing a contract, a court is to ascertain the intent of the parties. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 390, 2007-Ohio-5026, 875 N.E.2d 561. Where the contract is clear and unambiguous, then its interpretation is a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172, 628 N.E.2d 1377. A contract is unambiguous as a matter of law if it can be given a definite legal meaning. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 308, 2007-Ohio-4917, 875 N.E.2d 31.

{¶ 8} However, when a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271. Moreover, it is

generally the role of the finder of fact to resolve ambiguity in a contract. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 220, 2003-Ohio-5849, 797 N.E.2d 1256.

{¶ 9} Ely's claims arise from a loan agreement negotiated with FirstMerit, which provides for repayment of the principal plus interest at a rate of 11.000% per annum. The promissory note states that the annual interest rate on the loan was "computed on a 365/360 basis." Ely alleges that this method of calculation was applied to impose a per annum interest that is greater than 11.000%, which Ely claims was a breach of contract.

{¶ 10} FirstMerit claims that the parties agreed to alter the meaning of the term "per annum" by agreeing to the 365/360 calculation method. However, the promissory note contains no special definition of the term "per annum." The note contains a stated interest rate of 11.000% per annum. The term "per annum" is ordinarily defined as "by the year." Black's Law Dictionary (8<sup>th</sup> Ed. 2004). A year consists of 365 days, or 366 in a leap year. The note then sets forth the method for calculating the annual interest rate on a 365/360 basis.

{¶ 11} "The fact that the parties fail to specifically define a term within the contract does not make the term ambiguous. Instead, common, undefined words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or some other meaning

is clearly evidenced from the face or overall contents of the instrument.” (Citations and quotations omitted.) *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 564, 2004-Ohio-7102, 820 N.E.2d 910. In this case, we do not read the 365/360 provision as clearly evidencing an intent of the parties to alter the ordinary meaning of the term “per annum,” or as creating an “annual interest rate” other than the stated rate of 11.000% per annum.

{¶ 12} In *Kitson v. Bank of Edwardsville* (12<sup>th</sup> Cir. Ill. Jan. 24, 2008), Case No. 02-L-0897, the Illinois trial court considered a similar 365/360 computation of annual interest provision on a note with a stated interest rate of 9.250% per annum. The court recognized that the term “per annum” means “by the year.” *Id.* It then held that “the annual interest rate sentence does not compute an annual interest rate [and] \* \* \* does not change the stated interest rate of 9.250% per annum. As a matter of law the plain language of the promissory note \* \* \* does not permit defendant to charge a twelve (12) month interest rate in excess of 9.250%.” *Id.*

{¶ 13} A similar situation is presented herein. The computation of interest provision does not indicate an actual calculated interest rate. The calculation contains the “annual interest rate” as part of the equation, and does not change the stated interest rate on the note. Nevertheless, the calculation allegedly was applied to impose a greater interest rate than the

stated rate of 11.000% per annum. Accepting the material allegations of the complaint as true and making all reasonable inferences in favor of the plaintiff, we find that Ely has set forth a sufficient claim for breach of contract.

{¶ 14} FirstMerit also argues that the parties agreed to a monthly payment term of 84 payments of \$6,428.00 each, and that Ely has not alleged a failure to comply with this provision. FirstMerit states that this provision only can be given effect by applying the calculation method set forth in the note.

{¶ 15} Ely argues that to the extent such a reading of the note gives rise to an internal inconsistency with the stated annual interest term, such an inconsistency should be resolved by the trier of fact. Ely relies upon the case of *Hamilton v. Ohio Savings Bank*, 70 Ohio St.3d 137, 1994-Ohio-526, 637 N.E.2d 887.

{¶ 16} In *Hamilton*, the mortgagors challenged the mortgagee bank's use of a 365/360 method for calculating interest. The mortgagors sought to terminate the bank's alleged practice of overcharging interest and/or misamortizing its loans. The court reviewed certain internal inconsistencies among the documents, but ultimately determined that the record was contradictory as to what was disclosed between the parties. Therefore, the court found there were genuine issues of material fact precluding summary judgment. *Id.* at 140. In a



later appeal, the Ohio Supreme Court held that the action was to proceed as a class action and that the entire class be certified with respect to all claims. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 1998-Ohio-365, 694 N.E.2d 442. Although *Hamilton* dealt with certain disclosure issues not presented herein, the case did contain allegations of overcharging interest through the use of a 365/360 method of calculating interest, and the action was allowed to proceed as a class action. See *id.*

{¶ 17} In this matter, we find that to the extent the calculation and the monthly payment amount are inconsistent with the more specific terms of principal and stated interest rate, the promissory note is ambiguous. Ambiguities in a contract are for the trier of fact to resolve. *Westfield Ins. Co.*, 100 Ohio St.3d at 220. Upon our review, we cannot conclude that it appears from the face of the complaint that the plaintiff can prove no set of facts that would justify a court in granting relief. Therefore, FirstMerit is not entitled to a Civ.R. 12(B)(6) dismissal and the decision of the trial court is reversed. Ely's first assignment of error is sustained.

Judgment reversed; case remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule

27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., CONCURS;  
COLLEEN CONWAY COONEY, P.J., DISSENTS  
(WITH SEPARATE OPINION)

COLLEEN CONWAY COONEY, P.J., DISSENTING:

{¶ 18} I respectfully dissent. I would affirm the trial court judgment because the note clearly sets forth the method for calculating the annual interest rate on a 365/360 basis. Ely agreed to using this method and concedes that it is not itself illegal under Ohio law. I find *Hamilton v. Ohio Savings Bank*, 70 Ohio St.3d 137, 1994-Ohio-526, 637 N.E.2d 887, easily distinguishable. *Hamilton* involved contradictory documents, raising a genuine issue of fact as to what was disclosed to the consumers involved in the mortgage loans at issue.

{¶ 19} The instant case involves a corporation obtaining a loan for more than \$350,000. The only document in issue clearly stated the method for calculating the annual interest. Therefore, I would affirm the trial court's dismissal of the complaint.