J-A06028-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

THAO SNYDER, Appellee v. BONG THI NGO AND NO NGUYEN, Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1389 EDA 2012

Appeal from the Judgment entered May 4, 2012,
in the Court of Common Pleas of Lehigh County,
Civil Division, at No.: 2010-C-257

BEFORE: PANELLA, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.: Filed: March 20, 2013

Bong Thi Ngo, ("Ngo" or "Appellant") appeals from the judgment entered May 4, 2012. We affirm.

Between August 11, 2006 and August 11, 2010, Thao Snyder ("Snyder") made a total of nine unsecured loans to Ngo. The first two loans, which the trial court termed "prior loans," were repaid pursuant to the terms of the agreement between Ngo and Snyder. On the remaining seven loans—made between September of 2008 and April of 2009 and totaling $61,000[1]—

[1] The trial court identified the loans and their respective principal, as follows:

a. October 15, 2008: $10,000.00 ("Lawsuit Loan No. 1")
b. September 24, 2008: $10,000.00 ("Lawsuit Loan No. 2")
c. November 3, 2008: $5,000.00 ("Lawsuit Loan No. 3")
d. December 8, 2008: $5,000.00 ("Lawsuit Loan No. 4")
e. May 4, 2009: $6,000.00 ("Lawsuit Loan No. 5")
f. June 4, 2009: $10,000.00 ("Lawsuit Loan No. 6")
g. On or about April 9, 2009: $15,000.00 ("Lawsuit Loan No. 7").

*Retired Senior Judge assigned to the Superior Court.

Ngo made some payments, but ultimately failed to make payments on all seven.[2] The trial court termed these loans "lawsuit loans."

In January of 2010, Snyder, seeking to collect on the "lawsuit loans," filed her complaint, alleging default on the loans, and asserting claims for breach of contract and unjust enrichment.[3] Snyder subsequently filed an amended complaint, re-asserting breach of contract and unjust enrichment, and asserting a claim of fraud. Appellant filed an answer and counterclaim. Appellant's counterclaim asserted that Snyder charged her usurious interest

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Trial Court Opinion, 4/30/12, at 3.

[2] The trial court found that Appellant's payments on the seven loans aggregated as follows:

a. $7,000.00 for Lawsuit Loan No. 1
b. $7,000.00 for Lawsuit Loan No. 2
c. $3,500.00 for Lawsuit Loan No. 3
d. $2,500.00 for Lawsuit Loan No. 4
e. $600.00 for Lawsuit Loan No. 5
f. $0.00 for Lawsuit Loan No. 6
g. $4,000.00 for Lawsuit Loan No. 7.

Trial Court Opinion, 4/30/12, at 4.

[3] Snyder initially filed suit against Appellant Ngo, as well as her husband, Ngoc H. Phan, trading as Heaven on Earth Salon and Day Spa, and against No Nguyen, Appellant's brother, trading as All About Nails. The trial court ultimately determined that the loans at issue were personal in nature. Trial Court Opinion, 4/30/12, at 8. Judgment was entered only against Ngo and only Ngo appealed.

rates on the seven lawsuit loans as well as the two prior loans, and sought recovery and attorneys' fees.

The trial court held a non-jury trial on August 22 and 29, 2011. On November 23, 2011, the court entered its verdict in favor of Snyder, as plaintiff, and against Ngo, as defendant. Both parties filed motions for post-trial relief. On March 30, 2012, the trial court heard argument on the motions. On April 30, 2012, the trial court entered its order, vacating the November 23, 2011 verdict, adjusting the calculation of attorney fees in its earlier order, and denying all other post-trial motions. On May 4, 2012, upon Snyder's praecipe to enter judgment, the trial court entered judgment against Ngo, in the amount of $22,262.50.

On May 14, 2012, Ngo timely filed her notice of appeal with the trial court. On May 29, 2012, the trial court filed an opinion pursuant to Pa.R.A.P. 1925(a), wherein it incorporated the opinion accompanying its order entered April 30, 2012.

On appeal, Ngo as Appellant raises three issues for our review:

> A. Given the lower court's conclusion that Snyder had violated the provisions of the Consumer Discount Company Act, particularly in failing to obtain a license from the Pennsylvania Department of Banking to make consumer loans of the type involved here, did the lower court err as a matter of law or abuse its discretion in concluding "the only penalty prescribed under the Act is a criminal penalty, and thus, it is not applicable here"?
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> B. Did the lower court err as a matter of law or abuse its discretion in rejecting Ngo's request to supplement her request for an award of attorneys' fees incurred in connection with this

> litigation, given that the fee amount submitted at the conclusion of the trial could not at that point have been segregated into fees incurred for pursuing Ngo's LIPL-based usury defenses and counterclaims, versus pursuing Defendants' non-LIPL defenses and counterclaims?
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> C. Did the lower court err as a matter of law or abuse its discretion in its calculation of the excessive interest paid by Ngo in connection with the first two loans, by finding the excess interest was $2,400.00 each, when, in fact, it should have been $3,344.04 each, so the recoverable trebled damages should have been $20,064.00 under the LIPL, instead of $16,200.00 as calculated by the [c]ourt?

Appellant's Brief at 8.

Our scope and standard of review are as follows:

> Our scope of review in a non-jury trial is limited to whether findings of fact are supported by competent evidence and whether the trial court committed an error of law. [***Breza v. Don Farr Moving & Storage Co.***, 828 A.2d 1131, 1134 (Pa. Super. 2003)] (citations omitted). "With respect to factual conclusions," this Court "may reverse the trial court if its findings of fact are predicated on an error of law or are unsupported by competent evidence in the record." ***Mastroni–Mucker v. Allstate Ins. Co.***, 976 A.2d 510, 518 (Pa. Super. 2009).

Szymanski v. Dotey, 52 A.3d 289, 292 (Pa. Super. 2012).

In her first issue on appeal, Appellant argues that the loan contracts at issue are wholly voided by illegality. She argues that the trial court found that the Consumer Discount Company Act, 7 P.S. §§ 6201-6219 ("CDCA") applies in the instant case, and notes that the CDCA provides licensing and registration requirements, which she asserts Snyder has not satisfied. Appellant's Brief at 11-14.

Section 6203 of the CDCA, provides in pertinent part:

> [N]o person shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money on credit, in the amount or value of twenty-five thousand dollars ($25,000) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of the interest that the lender would otherwise be permitted by law to charge if not licensed under this act on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments…

7 P.S. § 6203.A.

Section 6218 of the CDCA provides a criminal penalty for a violation of the CDCA, and provides:

> Any person who has not obtained a license from the Secretary of Banking of the Commonwealth of Pennsylvania in accordance with the provisions of this act, and who shall engage in the business of negotiating or making loans or advances of money or credit, in the amount or value of twenty-five thousand dollars ($25,000) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges or other considerations which aggregate in excess of the interest that the lender would otherwise be permitted by law to charge if not licensed under this act on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments, shall be guilty of a misdemeanor, upon conviction thereof shall be sentenced to pay a fine of not less than five hundred dollars ($500) or more than five thousand dollars ($5,000), and/or suffer imprisonment not less than six (6) months nor more than three (3) years, in the discretion of the court.

* * * *

7 P.S. § 6218.

Relevant to our disposition of this issue, section 201 of the Loan Interest and Protection Law, 41 P.S. §§ 101–605 ("LIPL") provides, in pertinent part:

> Except as provided in Article III of this act, the maximum lawful rate of interest for the loan or use of money in an amount of fifty thousand dollars ($50,000) or less in all cases where no express contract shall have been made for a less rate shall be six per cent per annum.

41 P.S. § 201.

Section 502 of the LIPL provides a civil remedy and penalty for a violation of the LIPL, and states, in pertinent part:

> A person who has paid a rate of interest for the loan or use of money at a rate in excess of that provided for by this act or otherwise by law or has paid charges prohibited or in excess of those allowed by this act or otherwise by law may recover triple the amount of such excess interest or charges in a suit at law against the person who has collected such excess interest or charges . . . .

41 P.S. § 502

Our Supreme Court has summarized the relationship of these statutes in considering a similar case:

> The powers and responsibilities of the variety of lenders present in the marketplace are defined in a sophisticated statutory scheme. We are concerned here only with a nondepository, nonmortgage, consumer lender of amounts less than $25,000. Such lenders are regulated by the Loan Interest and Protection Law (LIPL), 41 P.S. §§ 101–605, and the CDCA, 7 P.S. §§ 6201–6219. Accordingly, our discussion of lenders encompasses only those lenders within the reach of the LIPL and the CDCA. Read together, the LIPL and the CDCA limit the amount of interest lenders may charge on loans under $25,000.

> Specifically, Section 201 of the LIPL generally caps interest rates on loans less than $50,000 at 6% . . . .
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> * * *
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> The CDCA, which was originally enacted in 1937, defines "person" as including "an individual, partnership, association, business corporation, nonprofit corporation, common law trust, joint-stock company or any other group of individuals however organized." 7 P.S. § 6202. Section 3.A of the CDCA, 7 P.S. § 6203.A, bars "persons" from making loans under $25,000 and charging in excess of the lawful interest rate, unless that person is licensed in accord with the act:
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> * * *
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> A person licensed pursuant to the CDCA is authorized to make loans of $25,000 or less under the rates, terms, and conditions contained in the CDCA, which can be up to approximately 24%. 7 P.S. § 6213.E and 6217.1.A.
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> . . . [T]he effect of these two statutes is that if a lender is licensed by the Department in accord with the CDCA, it can charge between 6–24% on loans under $25,000. If it is not licensed, it is bound by the 6% cap imposed by the LIPL.

Cash America Net of Nevada, LLC v. Commonwealth of Pennsylvania, Dep't of Banking, 8 A.3d 282, 285-86 (Pa. 2010).

Appellant notes the settled principle of law that a contract whose performance is criminal, tortious, or otherwise opposed to public policy is illegal and unenforceable. Appellant's Brief at 11 (citing ***Comly v. Hillegass***, 94 Pa. 132 (Pa. 1880)). From this premise, she argues, "Snyder's violations of [the CDCA], particularly its licensing requirement, render void and illegal the loan contracts made between Snyder and Ngo." Appellant's Brief at 11.

On this issue, the trial court rejected Appellant's argument. "The [c]ourt finds that a usurious loan does not render the payer's obligation void, but only voidable as to the interest specified beyond the lawful rate. ***Mulcahy v. Loftus***, 267 A.2d 872 (Pa. 1970)."[4] Trial Court Opinion, 4/30/12, at 4. Additionally, the court explained, "While it appears Snyder did violate the terms of [the CDCA], the only penalty prescribed under the act is a criminal penalty, and thus is not applicable here." ***Id.*** at 7.

Initially we note that the principle of contract law that Appellant relies upon is a policy against judicial enforcement of contracts for an illegal purpose, such as a contract for the sale of illegal drugs. Here, nothing in the CDCA proscribes the making of loans; rather, it proscribes the charging of interest above a fixed amount.

We have long held, "A distinction must be drawn between a contract which is illegal in the sense that the making of the contract violates some statutory prohibition, and a contract which is illegal because it calls for the performance of acts which are in themselves violations of the law." ***Webber v. Borough of Midway***, 211 A.2d 45, 46 (Pa. Super. 1965) (rejecting argument that, if a portion of employment contract is counter to statute, then the employment contract was wholly voided by that illegality, and that the plaintiff was, resultantly, never an employee of the defendant borough).

[4] In her reply brief, Appellant notes that ***Mulcahy*** did not implicate the CDCA, and, as such, is inapposite. Appellant's Reply Brief at 1-2.

As a result, we need not accept, *a priori*, that a single illegal term necessarily renders the whole agreement void.

Additionally, as our Supreme Court noted, the CDCA and the LIPL operate in tandem to regulate the making of certain types loans, and setting a maximum interest rate, depending on the lender's licensing status. ***See Cash America Net of Nevada, LLC***, 8 A.3d at 285-86. Our legislature prescribes, "Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things. . . . Statutes in pari materia shall be construed together, if possible, as one statute." 1 Pa.C.S.A. § 1932.

Taken together, we understand the CDCA and LIPL to offer alternative enforcement schemes, based on the nature of the party prosecuting the action. Where the Department of Banking seeks to enforce our statutory maximum interest rate for unlicensed lenders, the consequence is a criminal one. ***See*** 7 P.S. § 6218. Where, however, a civil litigant seeks to enforce our maximum interest rate, her remedy is equitable. ***See*** 41 P.S. § 504 ("Any person affected by a violation of the act shall have the substantive right to bring an action on behalf of himself individually for damages by reason of such conduct or violation, together with costs including reasonable attorney's fees and such other relief to which such person may be entitled under law.").

Reading the CDCA and LIPL *in pari materia*, we find it plainly apparent that the legislature did not proscribe the making of loans without a license, thereby creating an illegal purpose in any loan made without a license. Rather, the legislature proscribed the charging of excessive interest. Thus, the contract at issue was not for an illegal purpose, but instead, contained an illegal term. As the LIPL provides, such contracts are merely voidable for the usurious interest. ***See*** 41 P.S. § 502. Accordingly, we find no abuse of discretion in the trial court's determination on this issue.

In her second issue, Appellant argues that the trial court erred in refusing to accept an affidavit, itemizing the attorney's fees she sought to recover pursuant to the LIPL. She argues, "[I]t was legal error and/or an abuse of discretion for the lower court to preclude [Appellant] from recovering all of the statutorily required fees and costs associated with her successful LIPL defenses and counterclaims." Appellant's Brief at 15.

Section 503(a) of the LIPL provides:

> If a borrower or debtor, including but not limited to a residential mortgage debtor, prevails in an action arising under this act, he shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred on his behalf in connection with the prosecution of such action, together with a reasonable amount for attorney's fee.

41 P.S. § 503(a).

This Court has held:

> Under 41 P.S. § 503, in determining the amount of the fee, the court may consider: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill

> requisite properly to conduct the case; (2) The customary charges of the members of the bar for similar services; (3) The amount involved in the controversy and the benefits resulting to the client or clients from the services; and (4) The contingency or certainty of the compensation.

Croft v. P & W Foreign Car Service, Inc., 557 A.2d 18, 20 (Pa. Super. 1989).

Appellant initially sought attorney's fees totaling $14,502.32. Trial Court Opinion, 4/30/12, at 6. The trial court found, and Appellant admitted, however, that that amount reflected both the prosecution of Appellant's counterclaim, which sought to prosecute the violation of the LIPL, as well as her defense of Snyder's complaint. ***Id.*** Section 503(a) of the LIPL, however, permits only the recovery of reasonable fees incurred in connection with the prosecution.

The trial court held, "that costs and expenses reasonably incurred, plus attorneys fee, should equal the sum of half the time spent in court, plus an hour of preparation for each hour of that time, multiplied by a reasonable hourly attorneys fee of $200. This calculation, (3+.6+3+.6) ($200.00), results in a sum of $1,440.00." ***Id.*** at 6.

Here, we discern no abuse of discretion. While a trial court may be informed by an affidavit that provides full accounting of the fees actually incurred, such an accounting is not necessary to decide the questions of what fees are reasonable. ***See Croft***, 557 A.2d at 20. As noted above, our standard of review asks whether the trial court abused its discretion in

calculating a reasonable fee. ***See Szymanski***, 52 A.3d at 292. The trial court made its determination by calculating the product of reasonable hours multiplied by a reasonable hourly rate.

Appellant challenges neither the trial court's finding of a reasonable number of hours, nor its finding of a reasonable hourly rate. She merely seeks to introduce an accounting of her costs and expenses actually incurred. As the accounting of fees incurred is not necessary for the determination of costs and expenses reasonably incurred, and as we find that the trial court made a reasoned independent calculation, we find no merit in Appellant's second issue on appeal. ***See id.***; ***Croft***, 557 A.2d at 20.

In her final issue, Appellant argues that the trial court erred in its calculation of the recoverable usurious interest charged on the two prior loans, which were the basis of Appellant's counterclaim. Appellant's Brief at 17.

Section 201 of the LIPL provides, in pertinent part:

> Except as provided in Article III of this act, the maximum lawful rate of interest for the loan or use of money in an amount of fifty thousand dollars ($50,000) or less in all cases where no express contract shall have been made for a less rate shall be six per cent per annum.

41 P.S. § 201.

Section 502 of the LIPL provides, in pertinent part:

> A person who has paid a rate of interest for the loan or use of money at a rate in excess of that provided for by this act or otherwise by law or has paid charges prohibited or in excess of those allowed by this act or otherwise by law may recover triple

> the amount of such excess interest or charges in a suit at law against the person who has collected such excess interest or charges . . . .

41 P.S. § 502.

The trial court found that Snyder made two "prior loans" to Appellant, each bearing a principal of $20,000. Trial Court Opinion, 4/30/12, at 5. The court also found that, over a period of one year, Appellant made monthly payments of $2,000 on each of those loans, for a total of $24,000 on each, fully satisfying the agreements between the parties. ***Id.*** Appellant thus paid $4,000 in interest on each of the two loans. The trial court found that the interest rate on these loans exceeded the maximum lawful rate of six percent. ***See*** 41 P.S. § 201. The court calculated that Appellant paid $2,800 in usurious interest on each of the two loans, for a total of $5,600, and held that Appellant was entitled to treble damages, totaling $16,800. ***See*** 41 P.S. § 502.

Appellant does not challenge the law applied by the trial court, but rather the trial court's calculation of usurious interest paid. Appellant's Brief at 17-18. The trial court found that $2,800 of the $4,000 in interest paid on each loan was usurious. Incumbent in this finding is that $1,200 of the interest paid on each loan was within the maximum legal rate of six percent. Appellant, however, argues that she paid $3,344 in usurious interest of the $4,000 in interest actually paid on each loan, and thus, only $656 of the interest paid on each loan was within the maximum legal rate of six percent.

While neither the trial court's opinion nor Appellant's brief offers a formula for their calculation, we understand the trial court to have calculated the amount of non-usurious interest through the use of a "simple interest" calculation, *i.e.* the product of Principal multiplied by Rate multiplied by Time. Here, $20,000 * 6% * one year = $1,200. We understand Appellant to offer a different accounting of interest, based on a re-calculation of the principal at each monthly payment interval.

Appellant, however, provides no citation to law mandating the application of her formula, or prohibiting the trial court's application of the simple interest calculation. As a result, we need not address Appellant's final issue on appeal. ***See*** Pa.R.A.P. 2119(a), (b); ***Chapman-Rolle v. Rolle***, 893 A.2d 770, 774 (Pa. Super. 2006) ("It is well settled that a failure to argue and to cite any authority supporting any argument constitutes a waiver of issues on appeal") (quoting ***Jones v. Jones***, 878 A.2d 86, 90 (Pa. Super. 2005)).

Accordingly, for the reasons stated above, we affirm.

Judgment affirmed.