STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – DECEMBER 11, 2012)

NV ONE, LLC, NICHOLAS E. CAMBIO, and VINCENT A. CAMBIO	:	
	:	**C.A. No. PB-09-7159**
V.	:	
POTOMAC REALTY CAPITAL, LLC, Alias, CAPITAL MANAGEMENT SYSTEMS, INC.	:	

DECISION

SILVERSTEIN, J. Before this Court is the Motion for Partial Summary Judgment of Plaintiffs NV One, LLC, Nicholas E. Cambio, and Vincent A. Cambio (collectively, "NV One" or "Plaintiffs"), pursuant to Super. R. Civ. P. 56. Plaintiffs seek summary judgment on the issue of damages against Defendant Potomac Realty Capital, LLC, Alias, Capital Management Systems, Inc. (collectively, "PRC" or "Defendants") on Count III of Plaintiffs' Second Amended Verified Complaint ("Complaint"), alleging usury. Additionally, Plaintiffs seek summary judgment on the Defendant's Counterclaims for Breach of Contract.

I

Facts and Travel

The facts relevant to this motion are described in sufficient detail in this Court's previous written decision on the Motion for Partial Summary Judgment on the issue of liability: NV One, LLC, Nicholas E. Cambio, and Vincent A. Cambio v. Potomac Realty Capital, LLC, Alias, Capital Management Systems, Inc., C.A. No. PB-09-7159, slip op. at 1-6 (R.I. Super. Ct., Dec. 16, 2011). In that Decision, this Court granted the Plaintiffs' Motion for Partial Summary Judgment on liability for usury, holding that a loan from PRC to NV One (the "Loan") was

usurious and void. Id. On January 27, 2012, PRC filed a notice of appeal, and on October 1, 2012, the case was certified to the Supreme Court. Nevertheless, the Plaintiffs now seek summary judgment on the issue of damages "to complete the litigation on [the usury] cause of action." (Pls.' Mem. Supp. Mot. Summ. J. 3.) Additionally, the Plaintiffs argue that the Defendant's Breach of Contract claims for breach of the Loan contract now fail as a matter of law because this Court has ruled that the Loan contract is void. The Court heard argument on November 8, 2012.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113. Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no

ambiguity as a matter of law"). Yet, "[s]ummary judgment is an extreme remedy that should be applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

A

Interpretation of G.L. 1956 § 6-26-4(c)

The issue forestalling a full resolution on Count III is the meaning of G.L. 1956 § 6-26-4(c) (the "Penalty Provision"). The Penalty Provision provides:

> "[I]f the borrower shall, either before or after suit, make any payment on the contract, either of principal or interest, or of any part of either, and whether to the lender or to any assignee, indorsee, or transferee of the contract, the borrower shall be entitled to recover from the lender the amount so paid in an action of the case." Id.

The inherent conflict is between the adjacent phrases "any payment on the contract" and "either of principal or interest." See id. NV One argues that it may recover payments made to PRC in connection with the Loan because the Penalty Provision permits recovery for "any payment on the contract." PRC argues that recovery under the Penalty Provision is limited to only "principal or interest."

This issue has not been addressed previously by the Supreme Court. In Nazarian v. Lincoln Finance Corp., the Court considered whether a "trial justice erred in awarding plaintiff the full amount of his payments of both principal and interest" under the Penalty Provision. 77 R.I. 497, 504, 78 A.2d 7, 10 (1951). The Court held that the statutory language was clear and unambiguous: "It expressly authorizes such an action by the borrower to recover not only his payments of usurious interest but also all of the principal and interest that he has paid to the

lender under such an invalid loan agreement." Id. (emphasis original). The question that the Court considers here is different. The question is whether payments that are not principal or interest charged directly to that principal are also recoverable under the Penalty Provision. The Court finds that such payments are recoverable. It does so upon two alternative bases.

1

Broader Basis: Recovery Not Limited to Principal and Interest

When engaged in statutory interpretation, Court first looks to the plain language of the statute. Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."); Mutual Development Corp. v. Ward Fisher & Co., LLP, 47 A.3d 319, 328 (R.I. 2012) ("It is a well-established principle of statutory interpretation that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.") (internal quotations and citations omitted). While a closer case than Nazarian, the plain language of the Penalty Provision permits recovery for more than simply principal and interest. The Penalty Provision allows recovery of "any payment on the contract"; it does not limit recovery to "any payment of principal or interest." See § 6-26-4(c). While the very next clause mentions only principal and interest, the additional clause can be read as an illustrative, non-exhaustive list of the types of payments that could be paid as part of a loan contract. Including such an illustration makes it clear that the borrower is entitled to recover not only the usurious amount paid on the loan, but all payments. See id.; Nazarian, 77 R.I. at 504, 78 A.2d at 10. The clause "either of principal or interest" does not limit the phrase "any payment on the contract." See § 6-26-4(c).

This interpretation—that recovery for a usurious loan is not limited to principal and interest only—is also supported by Rhode Island's usury policy. "Plainly the policy of the legislature was to provide severe penalties against the lender for his violation of the statute as the best method in its judgment to prevent usurious transactions." Nazarian, 77 R.I. at 505, 78 A.2d at 10; see also In re Swartz, 37 B.R. 776, 779 n.5 (Bankr. D. R.I. 1984). "Our statute is drastic. It plainly is intended to prevent advantage being taken of small borrowers, who often are driven into improvident arrangements by their necessities." Colonial Plan Co. v. Tartaglione, 50 R.I. 342, 147 A. 880, 881 (1929). It is the duty of this Court "to ascertain the intent behind a legislative enactment and to give effect to that intent." State v. Delaurier, 488 A.2d 688, 693 (R.I. 1985). The best way to prevent usurious transactions is to broadly deter lenders from charging usurious interest rates. Thus, the more severe penalty of allowing recovery for any payment on the contract, and not only principal and interest, will better deter usurious transactions. Furthermore, holding that "any payment on the contract" is not limited to principal and interest will also prevent the possibility of lenders profiting from loans in violation of usury law—or avoiding a violation altogether—by charging large fees that are not technically "principal" or "interest." Leaving such a gaping hole in the enforcement of usury law would frustrate the clear legislative intent. See State v. Germane, 971 A.2d 555, 592 (R.I. 2009) ("We will not construe a statute so as to frustrate the clearly expressed intent of the General Assembly.").

2

Narrower Basis: Other Payments as "Interest"

Alternatively, assuming that recovery under the Penalty Provision is limited to only "principal and interest," the word "interest" can be construed to mean more than simply the

interest charged directly to the principal. This construction is supported by the use of "interest" in other parts of the statutory scheme for usury. Section 6-26-2(a) (the "Rate of Interest Provision"), which describes the maximum rate of interest under usury law, provides that "no . . . corporation loaning money . . . shall, directly or indirectly, reserve, charge, or take interest on a loan . . . at a [usurious] rate . . . ." Sec. 6-26-2(a) (emphasis added). The only limitation on the Rate of Interest Provision is § 6-26-2(c) (the "Exceptions Provision"), which lists seven types of charges that "interest shall not be construed to include."[1] Sec. 6-26-2(c). Thus, charges or payments, which while not denominated as "interest" within the loan contract, are dealt with for purposes of the usury statutory scheme as interest (indirect interest) because they do not properly fall within the exception found in the Exceptions Provision. See § 6-26-2(a), (c). Accordingly, "interest" for the purposes of the Penalty Provision may include up-front fees or other charges or payments. See § 6-26-2, -4(c).

Additionally, the Exceptions Provision begins, "For purposes of this section . . . ." Sec. 6-26-2(c). No such limitation appears in the Rate of Interest Provision. See § 6-26-2(a). Therefore, the Rate of Interest Provision applies to the Penalty Provision, but the Exceptions Provision does not apply to Penalty Provision. See § 6-26-2(a), -2(c), -4(c). Under that formulation, "interest" under the Penalty Provision would be defined by the Rate of Interest Provision without the limitations of the Exceptions Provision. See § 6-26-2(a), -2(c), -4(c). Accordingly, any charge or payment that constitutes indirect interest under the Rate of Interest

[1] The most relevant exception from the term "interest" for this case, discussed in Part III.B, is: "Commercial loan commitment or availability fees to assure the availability of a specified amount of credit for a specified period of time or, at the borrower's option, compensating balances in lieu of the fees." Id. § 6-26-2(c)(iv).

Provision would be recoverable even if it fell into a exception in the Exceptions Provision. See § 6-26-2(a), -2(c), -4(c).

B

Application of G.L. 1956 § 6-26-4(c)

It is undisputed that any payments of direct interest and principal are within the recoverable payments under the Penalty Provision. NV One paid $184,433.75 in interest to PRC toward the Loan. See Dauphinais Aff. ¶ 3.[2] Therefore, the Court grants summary judgment to NV One, as to the $184,433.75 in interest payments. Two other types of payments, however, were made by NV One to PRC: (1) a $15,000 Deposit and (2) a $700,000 "loan within a loan." Based on the statutory interpretation above, the Court now considers each of these payments.

1

$15,000 Deposit

In connection with the usurious loan, NV One paid $15,000 to PRC. (Dauphinais Aff. ¶ 3; Collins Aff. ¶ 3.)[3] The parties disagree over the appellation of this payment. In affidavits attached in its motion, NV One refers to this payment as a "Good Faith Deposit," while PRC refers to it as a "Loan Commitment Fee." Compare Dauphinais Aff. ¶ 3 with Collins Aff. ¶ 3. PRC also claims that this payment is "customarily collected by PRC from its borrowers at the time of the making of the loan." (Collins Aff. ¶ 4.) Most notably, however, two documents in

[2] Linda Dauphinais is the Director of Accounting for all companies in the Universal Properties Group, including NV One. (Dauphinais Aff. ¶ 1.) Dauphinais provided a list of payments made by NV One toward the Loan with PRC. See id. ¶ 3. The Court calculates the $184,443.75 figure by subtracting the contested $15,000 Deposit payment and three payments toward the $750,000 "loan within a loan" from Dauphinais' total of $949,443.75. See id.

[3] Anna M. Collins is the Senior Vice President of Operations for PRC. (Collins Aff. ¶ 1.)

the record[4]—"Sources and Uses of Funds" and a "Loan Disbursement Authorization"—describe the $15,000 payment as "Previously Deposited Funds" and a "Deposit," respectively. (Nicholas Cambio Aff., Ex. A-1, A-2.) The Court will refer to this payment as a "Deposit," although that name is not dispositve.

a

Broader Basis Analysis

PRC has not pointed to any evidence that the $15,000 Deposit was not paid on the Loan contract; the company has only argued that the Penalty Provision does not allow recovery of this type of payment. (Collins Aff. ¶ 3; Defs.' Mem. Opp. Summ. J. 7.) Under this Court's broader interpretation, the definition of "interest" is irrelevant because this Court found that "any payment on the contract" is recoverable. See supra Part III.A.1. Therefore, NV One is entitled to recover the $15,000 Deposit under the broader interpretation of the Penalty Provision. See § 6-26-4(c).

b

Narrower Basis Analysis

Under the Court's narrower interpretation of the Penalty Provision, NV One is still entitled to recover the $15,000 Deposit. PRC contends that the $15,000 payment is not "interest" because the Exceptions Provision states that "interest shall not be construed to include . . . [c]ommercial loan commitment or availability fees to assure the availability of a specified amount of credit for a specified period of time or, at the borrower's option, compensating balances in lieu of the fees." Sec. 6-26-2(c)(iv). To support the argument that the $15,000

[4] These documents appear in the Affidavits of Nicholas Cambio as Exhibits A-1 and A-2 in this motion and as Exhibits D-1 and D-2 in the August 2011 Motion for Partial Summary Judgment. See Cambio Aff., Oct. 15, 2012, ¶ 3; Cambio Aff., Aug. 16, 2011, ¶ 6.

Deposit falls into that category, PRC points to the Collins Affidavit. The Collins Affidavit plainly states first, "In connection with the Loan, NV paid the amount of $15,000.00 to PRC as a loan commitment fee (the 'Loan Commitment Fee')." (Collins Aff. ¶ 3.) The affidavit goes on to say, "The Loan Commitment Fee collected from NV is of the sort customarily collected by PRC from its borrowers at the time of the making of the Loan." Id. ¶ 4.

On summary judgment, the Court's role is "is simply to identify disputed material fact issues, and not to resolve them." Hendrick v. Hendrick, 755 A.2d 784, 792 (R.I. 2000). Even though PRC has presented evidence that the $15,000 should be called a "Loan Commitment Fee," a phrasing which conveniently matches the phrasing of the Exceptions Provision, there is still no disputed issue of material fact because merely adding the statutory name to a payment does not bring it within the purview of the Exceptions Provision. See 6-26-2(c)(iv). Specifically, the Exceptions Provision contemplates "[c]ommercial loan commitment or availability fees to assure the availability of a specified amount of credit for a specified period of time or, at the borrower's option, compensating balances in lieu of the fees." Id. (emphasis added). While the Collins Affidavit states that PRC customarily collects such a fee from its customers, there is no evidence regarding its purpose as required by the Exceptions Provision. Compare id. with Collins Aff. ¶¶ 3-4. Therefore, the $15,000 Deposit does not fall within the Exceptions Provision. See 6-26-2(c)(iv). Even if the $15,000 Deposit did fall within the Exceptions Provision, the exceptions do not apply to the Penalty Provision because the application of Exceptions Provision is limited to § 6-26-2 only. See 6-26-2(c); see also supra Part III.A.2.

The $15,000 Deposit does, however, constitute indirect interest charged on the Loan. While not mentioned in the Loan document, PRC admits that this payment was made "[i]n

connection with the Loan." (Collins Aff. ¶ 3.) The Deposit was not part of the principal or any repayment; it was a cost associated with the acquisition of the Loan funds. Therefore, under the Court's narrower interpretation, the $15,000 Deposit may constitute recoverable "interest" under the Penalty Provision. Accordingly, the Court grants summary judgment to NV One, as to the $15,000 Deposit.

2

$750,000 "Loan within a Loan"

Additionally, NV One claims that a $750,000 disbursement by PRC and repayment by NV One in October 2007—described by NV One as a "loan within a loan"—should also be included in the damages calculation. Three payments in December 2007 totaling $750,000 were made by NV One to PRC. (Dauphinais Aff. ¶ 3.) NV One's Director of Accounting lists these payments as "Repayment of $750,000 from Renovation Reserve." Id. In NV One's August 2011 Motion for Summary Judgment, however, NV One describes the $750,000 payment as "an anomaly." (Pl.'s Aug. 2011 Mem. Supp. Mot. Summ. J. 8.) Further, without supporting citation, NV One went on:

> "It was used for purposes other than renovation of the Post Office. With PRC's knowledge and consent and through its own disbursement, this sum was provided to the Plaintiff and repaid by NV (and/or related entities) to PRC within three months. This 'loan within a loan' . . . reflects the relationship that prevailed between the parties at that juncture with respect to the Loan." Id.

In its previous decision, this Court noted that "[t]his additional loan was for purposes other than the renovation of the former Post Office building, and NV One or its related entities repaid the 'loan within a loan' within three months. It has no effect on the transaction here." NV One, C.A. No. PB-09-7159, slip op. at 4, n.1. Thus, it is unclear whether the parties contemplated that the payments were to be part of the original Loan, or a separate transaction.

Therefore, whether the $750,000 "loan within a loan" is a payment "on the contract" or a separate transaction remains a genuine issue of material fact.[5] See § 6-26-4(c); see Super. R. Civ. P. 56. Thus, the Court denies summary judgment as to the $750,000 "loan within a loan."

C

Defendant's Counterclaims

PRC filed a three-count Counterclaim, alleging Breach of Contract against: (1) NV One for the Loan "Note and the Security Instrument" (Count I); (2) Nicholas Cambio for "the Guaranty" of the Loan (Count II); and Vincent Cambio also for "the Guaranty" of the Loan (Count III). (Countercl. ¶¶ 21-39.) In its previous Decision on the Motion for Partial Summary Judgment, this Court held that Loan was "usurious and void." NV One, C.A. No. PB-09-7159, slip op. at 19. Because the Loan is now void, PRC lacks an enforceable contract. Accordingly, there is no contract to be breached and no guaranties to be enforced. Therefore, the Court grants summary judgment to the Plaintiffs on the Defendant's Counterclaims.

IV

Conclusion

The Court finds that the Penalty Provision does not limit recovery for usury to only principal and interest charged directly on that principal. The Penalty Provision may be construed to allow the borrower of a usurious loan to recover "all payments on the contract;" the borrower is not limited to recovery of principal and interest payments. Alternatively, assuming that recovery under the Penalty Provision is limited to only "principal and interest," the Court finds that "interest" under the Penalty Provision may be construed to include indirect interest, which may be comprised of other charges related to the loan.

[5] Because the Court finds that there is a disputed issue of material fact, the Court does not need to analyze the "loan within a loan" under the interpretations of the statute as described supra.

Therefore, the Court grants summary judgment to NV One on damages, as to the $184,433.75 in interest payments and the $15,000 Deposit. However, as to the $750,000 "loan within a loan," the Court denies summary judgment because whether that transfer is a payment "on the contract" or a separate transaction remains a genuine issue of material fact. Finally, the Court grants summary judgment to the Plaintiffs on the Defendant's Counterclaims. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.