TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-22-00451-CV

Chupik Properties and Design, Inc., and Randall Chupik, Appellants

v.

MCCS, Ltd., Appellee

FROM THE 250TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-19-006861, THE HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING

MEMORANDUM OPINION

Chupik Properties and Design, Inc. (CPD) and Randall Chupik appeal from the trial court's final judgment rendered in favor of MCCS, Ltd. In the underlying proceeding, MCCS sued CPD and Chupik (collectively, the Chupik Parties) for breach of a promissory note and guaranty, and the Chupik Parties counterclaimed for usury and, alternatively, breach of fiduciary duty. For the following reasons, we reverse the trial court's judgment and remand for further proceedings.

BACKGROUND

The parties do not dispute that MCCS and CPD executed a Contribution Agreement on June 29, 2017, and a Redemption Agreement and Promissory Note on either January 1 or May 15, 2019.[1] Chupik (the President of CPD) guaranteed the Promissory Note in

[1] The Redemption Agreement and Promissory Note contain typewritten "effective dates" of January 1, 2019, but those dates are crossed out and instead contain handwritten effective

his individual capacity. The relevant provisions of each agreement are recounted infra as necessary to our analysis.

After the Chupik Parties allegedly defaulted on the Promissory Note, MCCS sued CPD for breach of the Promissory Note and Chupik as guarantor. In its original petition, MCCS alleged that it and CPD had formed a joint venture to "finance, market and develop certain townhomes in the Austin market" and that, pursuant to the Redemption Agreement, CPD "agreed to purchase and redeem from MCCS . . . all of MCCS's interest in" the joint venture for $228,750, "which purchase price MCCS agreed to loan to CPD (with interest) pursuant to" the Promissory Note. The maturity date under the Promissory Note was September 30, 2019, but as MCCS alleged, CPD neglected to pay "even one penny of the Note's outstanding principal, or *any* interest accrued thereon."

The Chupik Parties counterclaimed for usury and breach of fiduciary duty and raised affirmative defenses including usury, waiver, laches, estoppel, lack of consideration, fraud, and illegality. The Chupik Parties alleged that, although the previously executed Contribution Agreement does not employ the term "loan" or "interest," it nonetheless constituted a loan requiring CPD (and Chupik as guarantor) to pay 35% interest on a $150,000 loan from MCCS. In their first amended answer and counterclaims, the Chupik Parties specifically denied that the parties were in a joint venture and alleged that (a) each of the agreements that MCCS seeks to enforce is "without consideration," (b) the parties' previously executed Contribution Agreement was usurious, and (c) the Redemption Agreement was an "attempt to collect usurious interest by disguising the original 35% interest rate as merely compensation for MCCS giving up

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dates of May 15, 2019, although that correction is not initialed by either party, and there are no dates near the parties' signature lines. The actual dates of execution and effectiveness, however, are not relevant to this dispute.

its interest" in the alleged "fiction" of a "joint venture." The Chupik Parties sought statutory damages and attorney's fees on their usury counterclaim. *See* Tex. Fin. Code §§ 305.001(a-1) (imposing liability on creditor for usurious interest in connection with commercial transaction of "three times the amount computed by subtracting the amount of interest allowed by law from the total amount contracted for or received"), .005 (imposing liability on creditor charging usurious interest for obligor's attorney's fees). In the alternative, the Chupik Parties alleged that, "if the court finds there was a joint venture," MCCS breached its fiduciary duty by contracting to receive usurious interest and failing to disclose to them that the interest rate was usurious.

MCCS filed a motion for summary judgment, asserting that it was entitled to judgment as a matter of law on its breach-of-promissory-note claim and on Chupik's guaranty. To the motion, MCCS attached the affidavits of its limited partner, Thomas R. Walters, M.D., and of its attorneys. Its exhibits included emails exchanged between the parties and their attorneys and copies of the agreements at issue. The Chupik Parties filed a response to MCCS's motion, to which they attached the affidavit of Chupik and copies of the Contribution Agreement and Redemption Agreement. The Chupik Parties argued that there are genuine issues of material fact on their affirmative defenses and counterclaims that preclude summary judgment.

In a combined order, the trial court ruled on the parties' respective evidentiary objections and granted MCCS's motion for summary judgment, expressly granting MCCS summary judgment on (1) its breach-of-promissory-note claim against CPD, (2) its guaranty claim against Chupik, and (3) the Chupik Parties' counterclaims. The summary judgment merged into a final judgment in which the trial court awarded MCCS damages and attorney's fees. The Chupik Parties timely perfected appeal.

DISCUSSION

In four issues, the Chupik Parties contend that the trial court erred by sustaining MCCS's objections to Chupik's affidavit and by granting summary judgment for MCCS because there are genuine issues of material fact on their affirmative defenses and counterclaims. For ease of analysis, we address the issues out of order and combine our analysis of some issues.

Evidentiary rulings

In their fourth issue, the Chupik Parties contend that the trial court erred in sustaining MCCS's objections to Chupik's affidavit. We review a trial court's ruling concerning the admission of evidence for an abuse of discretion. *See Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015); *Fairfield Fin. Grp., Inc. v. Synnott*, 300 S.W.3d 316, 319 (Tex. App.—Austin 2009, no pet.) (applying same standard to exclusion of summary-judgment evidence). An abuse of discretion occurs when the trial court acts without reference to any guiding rules and principles or acts arbitrarily or unreasonably, *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985), and when the trial court fails to correctly analyze or apply the law, *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (per curiam). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *See Owens–Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998); *Rodriguez v. Citimortgage, Inc.*, No. 03-10-00093-CV, 2011 WL 182122, at *4 (Tex. App.—Austin Jan. 6, 2011, no pet.) (mem. op.). Also, if the trial court abused its discretion in admitting or excluding evidence, reversal is only appropriate if the improper ruling probably caused the rendition of an improper summary judgment. *See* Tex. R. App. P. 44.1(a); *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001).

The Chupik Parties take issue with the trial court's exclusion of the following portions of Chupik's affidavit:

> 4. There was no joint venture between MCCS and CPD. MCCS had no joint venture interest to be redeemed or transferred to CPD. The only agreement between the parties before the Redemption Agreement was the Contribution Agreement. There was no joint venture agreement. There was no agreement for MCCS to share in any losses of a "joint venture" or participate in any profits beyond the repayment of the $150,000 loan and usurious 35% interest.
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> 5. We did not agree that we were partners or joint venturers.
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> . . .
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> 8. No new consideration was given for the $228,750 indebtedness. . . . Further, there was no joint venture and MCCS had no interest in any joint venture to transfer to CPD.
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> . . .
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> 10. MCCS never disclosed to CPD or me that it was (a) contracting to receive a usurious interest in the Contribution Agreement; (b) that it was contracting to receive usurious interest through the Redemption Agreement, Promissory Note, and Guaranty referenced in Plaintiff's most recent petition; (c) that the interest contracted for in the Contribution Agreement was usurious; (d) that the interest that would be contracted for pursuant to the Redemption Agreement, Promissory Note, and Guaranty would be usurious.

The trial court sustained MCCS's objections to the above statements on the ground that they were improper "legal conclusions."

To be competent summary-judgment evidence, an affidavit must contain specific factual bases, admissible in evidence, upon which its conclusions are based. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *see also* Tex. R. Civ. P. 166a(f) ("An affidavit that makes self-serving, conclusory statements without any underlying factual detail cannot support summary judgment."). Affidavits containing unsubstantiated factual or legal conclusions are not competent evidence and are insufficient to raise fact issues because they are not credible or

susceptible to being readily controverted. *Cf. Sprayberry v. Siesta MHC Income Partners, L.P.*, No. 03-08-00649-CV, 2010 WL 1404598, at *4 (Tex. App.—Austin Apr. 8, 2010, no pet.) (mem. op.) (determining that affiant's statements that it "entered into oral contract" with other party and specifying terms of such contract, ways in which other party failed "to honor the terms of his contract," and how affiant was "damaged" and bore "extra costs" as result of such failure were not conclusory).

We conclude that Chupik's statements that (1) the only agreement between the parties preceding the Redemption Agreement was the Contribution Agreement, (2) there was neither a joint-venture agreement nor any agreement for MCCS to share in any losses or participate in any profits, and (3) the parties did not agree to be partners or joint venturers are not legal conclusions or conclusory statements but factual statements. Factual statements are not legal conclusions because "if incorrect, [they] could be readily controverted" by MCCS. *See La China v. Woodlands Operating Co., L.P.*, 417 S.W.3d 516, 520 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Lopez v. Bucholz,* No. 03-15-00034-CV, 2017 WL 1315377, at *3 (Tex. App.—Austin Apr. 7, 2017, no pet.) (mem. op.) (determining that statements that work was performed "at the direct request" of other party, that such party "approved the work," and that "work was performed in accordance with the instruction given by" other party were not conclusory); *Brown v. Hearthwood II Owners Ass'n, Inc.*, 201 S.W.3d 153, 160 & n.10 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (observing that summary-judgment movant could have negated element of breach-of-contract claim requiring contractual relationship between parties by submitting affidavit "to prove a negative," that is, "the absence of a contract"); *US Bank, N.A. v. Prestige Ford Garland Ltd. P'ship,* 170 S.W.3d 272, 277 (Tex. App.—Dallas 2005, no pet.) (considering summary-judgment evidence, including affidavit testifying to

absence of contract); *cf. Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion*, 517 S.W.3d 212, *222 n.44 (Tex. App.—Austin 2017, no pet.) (noting that "conclusory" means "[e]xpressing a factual inference without stating the underlying facts on which the inference is based" (citation omitted)). In other words, the parties either made or did not make any agreements besides the three at issue in this lawsuit, including whether any such purported agreement included the sharing of profits and losses and whether the parties agreed or did not agree to be partners or joint venturers. The trial court erred in excluding these statements in paragraphs four, five, and eight.

Furthermore, Chupik's statements that MCCS did not make certain disclosures—regardless of whether the *substance* of such non-disclosures might be legal conclusions—are not in themselves conclusory statements but, rather, "a short rendition of the fact" that MCCS did not make the enumerated communications to him. *See Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (determining that averment that party did not make any representation or have any communication regarding software was not legal conclusion but, rather, "short rendition of the fact that" party had "no communication with [other party] whatsoever"). When a witness attempts to prove the types of negatives here—i.e., that certain communications did not occur or that purported agreements were not reached—the witness is likely at a loss to prove such negatives any way other than to aver that the events or communications did not happen. Statements in the negative do not, categorically, amount to conclusory statements. Moreover, MCCS has the ability to controvert such averments, for instance with contrary averments by its witnesses or by documentary evidence. The trial court therefore erred by excluding the statements in paragraph ten of Chupik's affidavit.

The only statements in the above-cited affidavit portions that constitute legal conclusions are those in which Chupik avers that there was "no joint venture," that MCCS had no joint-venture interest, and that the interest rate was "usurious." *See Hoss v. Alardin*, 338 S.W.3d 635, 644 (Tex. App.—Dallas 2011, no pet.) (observing that whether partnership or joint venture exists is legal question); *Domizio v. Progressive Cnty. Mut. Ins.*, 54 S.W.3d 867, 871 (Tex. App.—Austin 2001, pet. denied) (observing that determination of whether late fees were usurious was legal question). We sustain the trial court's exclusion as to those statements but reverse its rulings as to the remaining statements.[2] As for the portions properly excluded, as explained infra, they are unnecessary to our conclusion that the Chupik Parties' evidence raised genuine issues of material fact. We accordingly sustain the Chupik Parties' fourth issue, in part, with respect to the above-cited statements in Chupik's affidavit except those averring that there was "no joint venture" and that the interest rate was "usurious." We therefore consider the evidence that was improperly excluded in our review of the Chupik Parties' remaining issues, as relevant.

Summary-judgment burdens and standard of review

The Chupik Parties' remaining issues concern the trial court's summary-judgment ruling, which we review de novo. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A party moving for traditional summary judgment on its claim must demonstrate

[2] As for Chupik's statement that "no new consideration was given [by MCCS] for the $228,750 indebtedness," the very next statement in that paragraph of his affidavit—which the trial court did not exclude—is substantively similar: "No new money was loaned to CPD in consideration for the $228,750 promissory note." As we discuss infra, this admitted statement in conjunction with the rest of the evidence, including that which the trial court improperly excluded, is sufficient to raise a genuine issue of material fact on the Chupik Parties' counterclaims and affirmative defenses. We therefore need not address whether this particular statement was properly excluded as a legal conclusion. *See* Tex. R. App. P. 47.1, 47.4.

that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). MCCS, as the movant on its claims, had the burden of establishing that there is no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). If its motion and evidence facially established its right to judgment as a matter of law, the burden shifted to the Chupik Parties to raise a genuine, material fact issue sufficient to defeat summary judgment. *See id.* Because the Chupik Parties sought to defeat summary judgment on MCCS's claims by asserting affirmative defenses, they had the burden to present sufficient evidence to create a fact issue on each element of their affirmative defenses. *Brownlee*, 665 S.W.2d at 112. Additionally, to prove entitlement to summary judgment on the Chupik Parties' counterclaims, MCCS had the burden to conclusively negate at least one element of each counterclaim. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

A fact is material if it affects the ultimate outcome of the lawsuit under the governing law. *Henning v. OneWest Bank FSB*, 405 S.W.3d 950, 957 (Tex. App.—Dallas 2013, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve all doubts in its favor. *M.D. Anderson*, 28 S.W.3d at 23.

The Chupik Parties do not take issue with whether MCCS met its initial burden on its promissory-note and guaranty claims to establish its right to summary judgment and thus whether the burden shifted to them to proffer evidence raising a genuine issue of material fact on

a defense thereto. *See* Tex. R. Civ. P. 166a(c); *M.D. Anderson*, 28 S.W.3d at 23; *see also Smiley Dental-Bear Creek, PLLC v. SMS Fin. LA, LLC*, No. 01-18-00983-CV, 2020 WL 4758472, at *4 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, no pet.) (mem. op.) (outlining elements of suit to collect on promissory note); *Lopez v. Rocky Creek Partners, LLC*, 623 S.W.3d 510, 515 (Tex. App.—San Antonio 2021, no pet.) (noting that party may satisfy these proof requirements by submitting photocopy of promissory note attached to affidavit in which affiant swears to facts supporting elements). Rather, the Chupik Parties contend that (a) they presented evidence creating a genuine issue of material fact on each element of their affirmative defenses of usury, illegality, lack of consideration, and breach of fiduciary duty that precluded summary judgment for MCCS on its promissory-note and guaranty claims; and (b) MCCS did not establish its right to judgment as a matter of law on the Chupik Parties' counterclaims of usury and breach of fiduciary duty. We first address the issue of usury.

Usury

Both the usury affirmative defense and counterclaim rest on the Chupik Parties' allegation that the first agreement between the parties—the Contribution Agreement—was usurious. We therefore first consider whether the Contribution Agreement was usurious on its face, and, if not, whether there was a genuine issue of material fact on whether it was usurious. *See Catalina v. Blasdel*, 881 S.W.2d 295, 296 (Tex. 1994) ("Usury, where not apparent from the face of the instrument, is a question of fact."). The essential elements of a usurious transaction are (1) a loan of money, (2) an absolute obligation to repay the principal, and (3) the exaction of a greater compensation than allowed by law for the use of the money (i.e., interest) by the borrower. *See First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994);

Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); *Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.*, 176 S.W.3d 307, 322–23 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), *abrogated on other grounds by Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 113–14 (Tex. 2018); *see also Catalina*, 881 S.W.2d at 297 (noting that if agreement does not contain absolute obligation to repay principal, it is not usurious as matter of law). If a transaction is missing any of the above three elements, it cannot be usurious. *See Holley*, 629 S.W.2d at 696–97. Thus, if the Contribution Agreement did not constitute a loan, did not create an absolute obligation to repay, or did not charge usurious interest, the Chupik Parties' usury defense and counterclaim fail as a matter of law. *See Anglo-Dutch Petrol. Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 96 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

"A factor that courts consider when determining usury is whether repayment was based on a contingency." *Catalina*, 881 S.W.2d at 297. This factor is important because it helps a court in determining whether a transaction was a loan or a business investment. *Id.*; *see also Bray v. McNeely*, 682 S.W.2d 615, 619 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Beavers v. Taylor*, 434 S.W.2d 230, 231–32 (Tex. App.—Waco 1968, writ ref'd n.r.e.). A loan is "an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor has an obligation to pay the creditor." Tex. Fin. Code § 301.002(a)(10). "Interest" means "compensation for the use, forbearance, or detention of money." *Id.* § 301.002(a)(4). "Usurious interest" means "interest that exceeds the applicable maximum amount allowed by law." *Id.* § 301.002(a)(17). If there is no "loan," then any disputed amount charged cannot be characterized as interest, and without interest, there cannot be usury. *See First USA Mgmt., Inc. v. Esmond*, 960 S.W.2d 625, 628 (Tex. 1997).

"Usury statutes are penal in nature and should be strictly construed." *Tony's Tortilla Factory*, 877 S.W.2d at 287; *Oyster Creek Fin. Corp.*, 176 S.W.3d at 323. "When construing a contract under a usury claim, courts presume the parties intended a nonusurious contract." *Financial Sec. Servs., Inc. v. Phase I Elecs. of W. Tex., Inc.*, 998 S.W.2d 674, 677 (Tex. App.—Amarillo 1999, pet. denied). However, a court "may look past the label" of a specified "fee" in a contract to determine whether it is a mere service charge or, instead, is interest, and if there is a disputed fact question about the purpose of the fee, a jury may determine if the fee is "merely a device to conceal usury." *See Tony's Tortilla Factory*, 877 S.W.2d at 287. Additionally, a party may offer extrinsic evidence to prove that a contract is usurious. *See Strasburger Enters., Inc. v. TDGT Ltd. P'ship*, 110 S.W.3d 566, 574 (Tex. App.—Austin 2003, no pet.); *Hoxie Implement Co. v. Baker*, 65 S.W.3d 140, 146 (Tex. App.—Amarillo 2001, pet. denied); *see also Bray*, 682 S.W.2d at 617 (stating that "to determine whether this transaction should be classified as a loan or a sale, we must look to the intention of the parties as revealed by the contract and the surrounding circumstances").

The Contribution Agreement was executed by CPD and Thomas Walters, on behalf of MCCS.[3] It recites that CPD "is developing and marketing 55 townhomes in the Walsh 360 Condominium Site (the "Project")" and, in connection with the Project's expenses, "has requested that [MCCS] provide a contribution in the amount of $150,000 (the "Contribution")." Relevant to this dispute, the Contribution Agreement further provides,

> 1. Contribution. On the Effective Date or such other time as the parties shall mutually agree, [MCCS] shall pay the Contribution to [CPD] by check or wire transfer to a bank account designated by [CPD].

[3] According to MCCS's brief, Walters is a limited partner of MCCS; a member of MCCS's general partner, Aerial Ventures, LLC; and MCCS's "principal."

2. Contribution Fee: Repayment.

> a. [CPD] shall make distributions of net cash flow received from the Project, at such times and in such amounts as determined by [CPD] in its sole discretion, in the following order: (a) first, 50% to [MCCS] and 50% to [CPD] until such time as [MCCS] has received the Contribution Fee, and Contribution (b) thereafter 100% to [CPD]. As used in this Agreement, the "Contribution Fee" shall be equal to $52,500 annually, accruing at 35% APR applied to the unpaid balance of Contribution.
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> b. The Contribution shall be repaid by [CPD] to [MCCS] at such time as determined by [CPD] in its sole discretion, but in no event later than Dec. 31, 2018 (the "Termination Date"). Any accrued but unpaid Contribution Fees shall also be payable on the Termination Date. For the avoidance of doubt, all distributions made by [CPD] to [MCCS] shall be applied first to any accrued but unpaid Contribution Fees and thereafter to repayment of the Contribution.

Under the plain and unambiguous terms of the Contribution Agreement, MCCS promised to pay (and undisputedly did pay) CPD $150,000. Besides the Contribution of $150,000, the Contribution Agreement references a Contribution Fee of $52,500 annually, accruing at 35% APR to the unpaid balance of the Contribution. Paragraph 2.a makes any distributions of "net cash flow" from the Project at the sole discretion of CPD and provides that, to the extent any distributions are made to MCCS, they need only be provided until the Contribution and Contribution Fee are repaid. MCCS relies on this provision to support its argument that the Contribution Agreement does not evidence a loan because there was no absolute obligation to repay its "investment" of $150,000 because distributions were entirely within CPD's discretion. However, we cannot read Paragraph 2.a in isolation but must give effect to and harmonize it with Paragraph 2.b. *See Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, (Tex. 2019). Paragraph 2.b identifies a termination date of

December 31, 2018, and provides that *both* the Contribution and "[a]ny accrued but unpaid Contribution Fees" "shall be repaid" by CPD "in no event later than" the termination date.

Although the word "loan" is not used in the document, there can be no question in light of Paragraph 2.b that the transaction was a loan because CPD had an absolute obligation to repay the original $150,000 received from MCCS plus a fee (i.e., compensation or interest) for the use of the money. *See* Tex. Fin. Code § 301.002(a)(4) (defining interest), (10) (defining loan); *Johns v. Jaeb*, 518 S.W.2d 857, 859 (Tex. App.—Dallas 1974, no writ) (finding, as matter of law, that transaction was loan rather than contribution to limited partnership because there was absolute obligation to pay funds originally advanced to limited partnership and lender did not expose his "investment to the hazards of the business"). Although it was within CPD's sole discretion whether to repay any of the Contribution or accrued Contribution Fee *before* the termination date, it had no discretion at all to repay the Contribution and Contribution Fee *after* the termination date. Given our determination as a matter of law that the Contribution Agreement evidenced a loan from MCCS to CPD, and that the Contribution Fee was interest, we must next determine whether the loan was usurious. *See Gonzales Cnty. Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906 (Tex. 1976) ("Courts must examine the form of the transaction and its substance in determining the existence or non-existence of usury."); *First USA Mgmt.*, 960 S.W.2d at 627 ("Whether an amount of money being charged constitutes interest depends not on what the parties call it but on the transaction's substance.").

When money is advanced in exchange for an obligation to repay the advance plus an additional amount, the added amount constitutes interest and may not exceed the statutory maximum. *Dunnam v. Burns*, 901 S.W.2d 628, 631 (Tex. App.—El Paso 1995, no writ) (determining that agreement's requirement that party had absolute obligation to pay $5,000 in

addition to principal rendered additional amount "interest"). This principle of law holds true regardless of who drafted the agreement. *See id.* at 631–32 ("The drafter of the usurious promissory note is simply irrelevant."). "A document that contains an absolute obligation to repay a loan together with interest in excess of the amount permitted by statute is usurious on its face." *Id.* at 631. The maximum amount of allowable interest is 18% or 24%, depending on the circumstances and as computed and published by the Texas Consumer Credit Commissioner. *See* Tex. Fin. Code §§ 303.009 (providing maximum and minimum interest ceilings), .011 (requiring Texas Consumer Credit Commissioner to regularly compute and publish in Texas Register applicable rate ceilings), 306.002(a) ("A creditor may contract for, charge, and receive from an obligor on a commercial loan a rate or amount of interest that does not exceed the applicable ceilings computed in accordance with Chapter 303."); *see also id.* § 306.001(5) (defining commercial loan as "a loan that is made primarily for business, commercial, investment, agricultural, or similar purposes" but not including "a loan made primarily for personal, family, or household use"). The Contribution Agreement, requiring CPD to repay the $150,000 loan with 35% interest, was thus usurious on its face, and MCCS was not entitled to summary judgment on the Chupik Parties' counterclaim of usury based on the first ground it asserted in its motion: that the Contribution Agreement was not usurious as a matter of law.

The second ground that MCCS raised in its summary-judgment motion regarding the usury counterclaim was that the Chupik Parties "released" and therefore waived any such claims through the following provision in the subsequent Redemption Agreement:

> CPD, on behalf of itself, the Joint Venture, and its current and former stockholders, officers, directors, employees, agents, affiliates, assigns, successors, heirs, executors, and administrators, if any (the "Releasing Parties"), hereby waives, discharges, and forever releases MCCS and its employees, officers,

> general partners, partners, agents, representatives, attorneys and their successors and assigns (the "Released Parties"), from and of any and all claims, causes of action, allegations or assertions that the Releasing Parties have or may have had at any time up through and including the date hereof, against any or all of the Released Parties, regardless of whether any such claims, causes of action, allegations or assertions are known to the Releasing Parties or whether any such claims, causes of action, allegations or assertions arose as a result of the MCCS's actions or omissions in connection with the joint Venture, **INCLUDING ANY CLAIMS, CAUSES OF ACTION, ALLEGATIONS OR ASSERTIONS RESULTING FROM MCCS'S OWN NEGLIGENCE.**

In its motion, MCCS argued that CPD "breached" this release and could not bring its usury counterclaim because by virtue of the Redemption Agreement's release MCCS had "already been release[d] from all potential liability." It cited caselaw holding that an accrued cause of action for usury may be released if the release is supported by new consideration. *See Biggs v. ABCO Props., Inc.*, No. 13-03-00398-CV, 2006 WL 414919, at *2 (Tex. App.—Corpus Christi–Edinburg Feb. 23, 2006, pet. denied) (mem. op.); *Lesbrookton, Inc. v. Jackson*, 796 S.W.2d 276, 278 (Tex. App.—Amarillo 1990, writ denied). MCCS further argued that, before execution of the Redemption Agreement, it had been "threatening litigation" against CPD to collect on its "investment," and CPD's release of claims and "redemption" of MCCS's "interest in the joint venture" constituted "new consideration" for MCCS's decision to forgo litigation. Based on the plain language of the Redemption Agreement and the summary-judgment evidence, we disagree.

Firstly, unlike here, the cases MCCS cited involved *mutual* releases whereby the parties agreed to release each other from liability for any and all potential claims, *see Lesbrookton*, 796 S.W.2d at 278, or an agreement by one party to dismiss already pending litigation in exchange for the other party's agreement to waive any claims for usury, *see Biggs*, 2006 WL 414919, at *2. Here, the release in the Redemption Agreement is unilateral—CPD is the only party that agrees to release any claims. Furthermore, the Redemption Agreement

neither references any pending litigation nor contains any promise on the part of MCCS to forgo bringing a lawsuit against the Chupik Parties.

Secondly, as CPD argued in its response to MCCS's motion, the release could not operate to bar CPD's usury counterclaim unless it was supported by new consideration. *See Finn v. Alexander*, 163 S.W.2d 714, 716–17 (Tex. [Comm'n Op.] 1942) (acknowledging that although accrued cause of action for usury may be released by debtor, such release must be "made in good faith and the instruments evidencing same must not be executed to cloak the real transaction" and must be supported by "sufficient consideration"); *Skeen v. Slavik*, 555 S.W.2d 516, 519–20 (Tex. App.—Dallas 1977, writ ref'd n.r.e.) (concluding that unilateral release in new agreement between parties, whereby debtor agreed to release usury claims against lender, was not effective when debtor received no new loan or other consideration in exchange for debtor's release and signing of new promissory note). The provisions in the Redemption Agreement relevant to whether MCCS gave consideration in exchange for CPD's release and execution of a new promissory note are the following:

- The Parties participate in a joint venture responsible for the financing, marketing and development of certain townhomes in the Austin market (the "Joint Venture");
- MCCS has an interest in the Joint Venture which each of the Parties desire for CPD to redeem on behalf of the Joint Venture in accordance with the terms and conditions set forth herein (the "Redeemed Interest");
- For and in consideration of the above premises, the mutual covenants set forth herein and other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Parties agree as follows . . . .

The Redemption Agreement then recites that the Redeemed Interest is "hereby" purchased and redeemed by CPD for $228,750, payable by delivery of the Promissory Note on the closing

date and, as already reproduced above, that CPD additionally "hereby waives . . . and forever releases MCCS."

Although the Redemption Agreement recites the parties' acknowledgement of the "adequacy and receipt of" "other good and valuable consideration" in addition to CPD's "purchase" of MCCS's purported joint-venture interest, such recitations are directly contradicted by statements in Chupik's affidavit. He averred that MCCS made no additional loans to CPD beyond the original $150,000 and that the parties never agreed MCCS would share in the losses of the project or receive any profits beyond the repayment of the $150,000, plus interest. *Cf. Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184, 186 (Tex. 1981) (listing elements of joint venture, including that parties have agreement to share in profits and losses); *Lakeway Co. v. Leon Howard, Inc.*, 578 S.W.2d 163, 166 (Tex. App.—Tyler 1979, writ ref'd n.r.e.) (acknowledging "general rule that the recital of a written instrument is not conclusive, and it is competent to inquire into the consideration and show by parol evidence the nature of the real consideration"). He further averred that the only agreement between the parties that predated the Redemption Agreement was the Contribution Agreement, which we have already determined specified the terms of a usurious loan rather than the purchase by MCCS of an investment interest in the project. Furthermore, the express terms of the Redemption Agreement contain no return promises or covenants by MCCS. Finally, the amount that the Chupik Parties agreed to pay—through their execution of the Promissory Note and Guaranty—for the purported joint-venture interest equals the exact amount that would have been due and owing on the unpaid principal and accrued interest under the usurious Redemption Agreement.[4]

[4] A year and a half had elapsed between the date the Contribution Agreement was executed and the date the Redemption Agreement was executed. APR interest of 35% of

We conclude that there is a genuine issue of material fact as to whether the Redemption Agreement was supported by new consideration and whether, therefore, the purported release executed by CPD is effective to bar the Chupik Parties' usury counterclaim. Accordingly, the trial court erred in granting MCCS summary judgment on the Chupik Parties' usury counterclaim.

For similar reasons, we also conclude that the Chupik Parties presented evidence creating a genuine issue of material fact on each element of their affirmative defenses of usury, illegality, and lack of consideration sufficient to defeat summary judgment for MCCS on its promissory-note and guaranty claims. In the context of the allegations here, all three defenses initially rest on the existence of a usurious contract, and we have already determined that the Contribution Agreement was usurious as a matter of law. *See Tri-County Farmer's Co-op v. Bendele*, 641 S.W.2d 208, 209 n.2 (Tex. 1982) (per curiam) ("A usurious contract is, of course, void as a matter of law."); *Houston Sash & Door Co. v. Heaner*, 577 S.W.2d 217, 222 (Tex. 1979) (noting that guaranty may not be enforced if underlying obligation is void for illegality). Furthermore, all three defenses next hinge on a determination that the subsequent agreements—the Redemption Agreement and Promissory Note—were a mere device to conceal the unlawful usury. *See Finn*, 163 S.W.2d at 716–17 (affirming trial court's finding of usury where evidence demonstrated series of transactions between finance company and debtor, "all of which were tainted with usury," and thus "the device used to cloak the usurious transactions was no protection to the" finance company). As to that determination, we have already concluded that the evidence in the form of Chupik's affidavit, plus the text of the Redemption Agreement itself

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$150,000 for that duration equals $78,750. That amount plus the principal of $150,000 equals $228,750.

and the amount of the Promissory Note, create a genuine issue of material fact as to whether the Redemption Agreement was supported by new consideration. Because of this fact issue, summary judgment for MCCS on its claims was improper. *Sturm v. Muens*, 224 S.W.3d 758, 761 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Any dispute in the evidence as to whether a charge in addition to stated interest is actually for separate consideration, rather than a device to conceal usury, raises a fact issue."); *Skeen*, 555 S.W.2d at 521 (rejecting lender's argument that usury in prior transaction between parties had no bearing on subsequent purportedly non-usurious transaction where it was "apparent" that usurious charges were carried forward in debtor's new obligation for which there was no advancement of additional funds, notwithstanding release and settlement agreement); *Cotton v. Thompson*, 159 S.W. 455, 461 (Tex. App.—Galveston 1913, no writ) (holding that because no consideration was paid plaintiff for his execution of "release" of usury claim, "the usury in former transactions was not purged" thereby).

Because the Chupik Parties presented evidence that raised a fact issue on each element of their affirmative defenses of usury, illegality, and lack of consideration, the summary judgment cannot be affirmed on MCCS's promissory-note and guaranty claims. *See Sturm*, 224 S.W.3d at 764. Furthermore, MCCS did not conclusively disprove any element of the Chupik Parties' usury counterclaim. Accordingly, we sustain the Chupik Parties' first issue (relating to their usury counterclaim) and the portion of their third issue relating to their affirmative defenses of usury, illegality, and lack of consideration.

Breach of fiduciary duty

The Chupik Parties pleaded that MCCS breached its fiduciary duty to them, as an alternative counterclaim to usury and in the event that the court found that the parties had entered into a joint venture. They additionally raised breach of fiduciary duty as an affirmative defense. In their second and third issues, the Chupik Parties contend that the trial court erred in granting MCCS summary judgment on this counterclaim and affirmative defense. The Chupik Parties allege that MCCS breached its fiduciary duty by contracting to receive usurious interest and failing to disclose the usurious nature of the agreements between the parties.

A joint venture has four elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. *Ayco Dev. Corp.*, 616 S.W.2d at 186. Parties in a joint venture owe each other a fiduciary duty. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 550 (Tex. 1998). The elements of a claim for breach of fiduciary duty are (1) the existence of the fiduciary relationship and (2) a breach of a fiduciary duty by the defendant (3) that causes (4) damages to the plaintiff. *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App.—Austin 2009, no pet.).

In its summary-judgment motion, MCCS argued that it was entitled to summary judgment on the Chupik Parties' breach-of-fiduciary-duty counterclaim on the basis of the same two grounds it raised to defeat the usury counterclaim: (1) either the Contribution Agreement was not usurious as a matter of law, or there is no genuine issue of material fact about whether it was; and (2) even if the Contribution Agreement was usurious, CPD agreed to "release" MCCS from any and all claims and causes of action that they might have possessed against it, necessarily including claims for breach of fiduciary duty. We have already determined that the

Contribution Agreement was usurious as a matter of law, and thus MCCS was not entitled to summary judgment on the basis of the first asserted ground.

As for the second ground, we have already determined that there is a genuine issue of material fact concerning whether CPD's release of claims in the Redemption Agreement is effective due to the existence of a fact issue about whether the agreement is supported by consideration. We therefore conclude that MCCS was not entitled to summary judgment on the Chupik Parties' breach-of-fiduciary-duty counterclaim on the basis of the second asserted ground, and we hold that the trial court erred in granting MCCS summary judgment on this counterclaim. We need not address the portion of the Chupik Parties' third issue in which they contend that they raised a genuine issue of material fact on each element of their breach-of-fiduciary-duty affirmative defense because we have already determined that the trial court erred in granting MCCS summary judgment on its affirmative claims, which claims we remand to the trial court for further proceedings. *See* Tex. R. App. P. 47.1, 47.4.

CONCLUSION

We reverse the trial court's final judgment and remand this cause for further proceedings.

Thomas J. Baker, Justice

Before Justices Baker, Kelly, and Theofanis

Reversed and Remanded

Filed: April 24, 2024