

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

<b>JNT PROPERTIES, LLC</b>	)	<b>CASE NO: CV-09-681873</b>
	)	
<b>Plaintiff</b>	)	<b>JUDGE JOHN P. O'DONNELL</b>
	)	
<b>vs</b>	)	
	)	
<b>KEY BANK NATIONAL ASSOCIATION</b>	)	<b><u>JOURNAL ENTRY</u></b>
	)	
<b>Defendant</b>	)	

***John P. O'Donnell, J.:***

Upon consideration of the defendant's motion to dismiss the first amended class action complaint<sup>1</sup>, the plaintiff's brief in opposition<sup>2</sup>, the defendant's reply brief<sup>3</sup>, the plaintiff's sur-reply brief<sup>4</sup>, and the plaintiff's submission of additional authority<sup>5</sup>, the court finds as follows:

**THE FIRST AMENDED COMPLAINT**

On June 20, 2007, the plaintiff executed a promissory note in favor of the defendant. The note was given in connection with a commercial loan by the bank in the principal amount of \$370,350.00. The note provided for a variable interest rate, with the initial interest rate listed as 8.93%.

The plaintiff claims that the initial interest rate of 8.93% was to be calculated on a *per annum* basis. Because the bank used the 365/360 method of computing interest, the plaintiff alleges that the defendant actually charged 9.05% interest per year instead of the agreed 8.93%.

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<sup>1</sup> Filed March 23, 2009.

<sup>2</sup> Filed March 31, 2009.

<sup>3</sup> Filed April 9, 2009.

<sup>4</sup> Filed May 6, 2009.

<sup>5</sup> Filed July 2, 2009.

The plaintiff asserts that the defendant breached the contract between the two parties by charging more interest than the parties agreed.<sup>6</sup>

The defendant argues that the explicit terms of the note provide for the use of the 365/360 method of calculating interest and that, therefore, the plaintiff cannot, as a matter of law, prove that calculating interest in that way is a breach of the contract.

### **THE PROMISSORY NOTE**

The plaintiff alleges that the interest rate disclosed in the note was 8.93% *per annum*. A reading of the note shows a reference to the rate as *per annum* on the ninth line of a 14-line paragraph that begins on page one and ends on page two of the five-page note. But there is also a more prominent reference to an interest rate of 8.93%, without the modifier *per annum*, set apart in the middle of the top half of page one.

The note provides, in pertinent portions, as follows:

#### **PROMISSORY NOTE (Variable Rate)**

**Initial Interest Rate: 8.93%**

**PROMISE TO PAY.** JNT PROPERTIES, LLC (“Borrower”) promises to pay to KEYBANK NATIONAL ASSOCIATION (“Lender”), or order, in lawful money of the United States of America, the principal amount of Three Hundred Seventy Thousand Three Hundred Fifty and 00/100 Dollars (\$370,350.00), together with interest on the unpaid principal balance from June \_\_\_\_, 2007 until the sooner of July 1, 2027 (the “Maturity Date”) or this Note is paid in full.

**PAYMENT.** Subject to any payment changes resulting from changes in the index, Borrower will pay this loan in accordance with the following payment schedule:

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<sup>6</sup> The first amended complaint also seeks an injunction to prevent “KeyBank from continuing to misuse the 365/360 method” to calculate interest on its loans. (See first amended complaint at ¶34.) Since an injunction would only be appropriate if the defendant is found to have breached the contract by use of the 365/360 method, this portion of the first amended complaint need not be addressed in connection with the motion to dismiss. Similarly, the request for class certification will not be addressed here because it is not implicated by the motion to dismiss.

One interest only payment on July 1, 2007, with interest calculated on the unpaid principal balance at an interest rate of 8.93%; followed by 239 consecutive monthly principal and interest payments in the initial amount of \$3,315.48 each, beginning August 1, 2007, with interest calculated on the unpaid principal balance at an initial interest rate of 8.93%; and 1 final principal and interest payment in the estimated amount of \$3,315.48 on July 1, 2027. . . The interest rate will be adjusted on July 1, 2012, July 1, 2017 and July 1, 2022 to reflect the then current index defined below plus 325 basis points. The monthly payment the Borrower shall pay to the Lender will be adjusted on August 1, 2012, August 1, 2017 and August 1, 2022 to a monthly payment of principal and interest, based on the above-referenced adjusted interest rate, . . .

The **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. . .

VARIABLE INTEREST RATE. The interest rate on this Note is subject to change on July 1, 2012, July 1, 2017 and July 1, 2022 based on changes in an Index which is the Federal Home Loan Bank of Seattle Five (5) Year Intermediate/Long Term Advances Fixed Rate . . . The Index currently is 5.68% per annum. The initial interest rate to be applied to the unpaid principal balance of this Note will be at a rate of 325 basis points (3.25%) over the Index, resulting in an initial rate of 8.93% per annum. . .  
**(Emphasis added.)**

Because this is a commercial loan, the provisions of the Truth in Lending Act do not apply and Key Bank was not required to disclose to the plaintiff the total of all interest charges for the life of the loan.<sup>7</sup>

### **THE 365/360 METHOD**

Because of the uneven number of days in a normal year, and because not all months have the same number of days, various methods of calculating yearly interest have been developed. The United States Court of Appeals, Seventh Circuit, in its decision in the case of *Republic of France v. Amoco Transport Co.* (1993), 4 F. 3d 997, cogently summarized the various interest

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<sup>7</sup> See, generally, 15 U.S.C. Section 1601, *et seq.*

computation methods, including the 365/360 method, and that portion of the opinion is worth reproducing here:

Some background on the competing methods. Because the Gregorian calendar makes it impossible to have both equal daily interest charges and equal monthly interest charges throughout the year, banks have developed three methods of computing interest. These are the 365/365 method (exact day interest), the 360/360 method (ordinary interest) and the 365/360 method (bank interest). (*Citations omitted*). Under the 365/365 method each day has the same interest charge; the bank simply divides the annual interest rate by 365 to get a daily interest factor, applied to each day of the year. Under the 360/360 method each month carries the same interest charge; every completed month is assumed to have thirty days, and accumulates one-twelfth of the annual interest. Interest for incomplete months is calculated by dividing the number of days by 360. At the end of a year both of these methods produce the same interest because in each case the calculation will be Principal x Rate x 1. (*Citation omitted*).

The 365/360 method is a hybrid. Here the bank first divides the annual interest rate by 360 to produce a daily interest factor. It then applies that factor to each of the 365 or 366 days in the year, even though the borrower has paid the nominal “annual” interest due after 360 days. Thus this method generates five or six extra days of interest for the bank each year, increasing the effective interest rate for the calendar year by 1/72. (*Citation omitted*.)

Although the plaintiff maligns the 365/360 method as being “interest-maximizing” and having “absolutely no conceptual justification,”<sup>8</sup> the plaintiff has not brought to this court’s attention any statutory, regulatory or other legal prohibition against the use of the 365/360 method in a commercial loan transaction.

### **ANALYSIS**

Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained-for legal benefit and/or detriment), a manifestation of mutual assent, and legality of object and of consideration.<sup>9</sup>

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<sup>8</sup> Plaintiff’s brief in opposition to motion to dismiss, page 4.

<sup>9</sup> *Nye v. Kutash*, 2009-Ohio-847, Cuyahoga App. No. 91734, ¶10.

A meeting of the minds as to the essential terms of a contract is a requirement to enforcing the contract.<sup>10</sup> The role of courts in examining contracts is to ascertain the intent of the parties. Courts presume that the intent of the parties to the contract resides in the language they choose to employ in the agreement.<sup>11</sup> Courts presume that the language of a contract between competent parties accurately reflects their intentions.<sup>12</sup> In determining the parties' intent, a court must read the contract as a whole and give effect, if possible, to every part of the contract.<sup>13</sup>

Sometimes contracts are written in a way that prevents a court from determining the intent of the contracting parties without reference to other evidence of intent. Where, because of ambiguous language or the use of argot specific to an occupation or industry, intent cannot be determined from the four corners of the contract, the court may use parol evidence to find the parties' intent.<sup>14</sup>

The essence of the plaintiff's claim is that the parties intended that interest on the loan amount would be charged at 8.93% per calendar year and that the bank breached this agreement by charging 9.05%. The essence of the defendant's claim is that the parties intended that interest would be computed on a 365/360 basis and that the "initial interest rate" of 8.93% was to be used only as a starting point to calculate a daily interest factor – by dividing 8.93 by 360 – which would then be multiplied by the number of days in the year that the principal is outstanding (364 in leap years, 365 in all other years) to calculate a yearly interest rate.

Unfortunately for the defendant, a plain reading of the contract does not unambiguously reflect this intention because it contains an unintelligible formula for the calculation of a yearly

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<sup>10</sup> *Kostelnik v. Helper* (2002), 96 Ohio St.3d 1, at 3-4.

<sup>11</sup> *Shifrin v. Forest City Ent.* (1992), 64 Ohio St.3d 635, 638.

<sup>12</sup> *Ohio Univ. Bd. of Trustees v. Smith* (1999), 132 Ohio App.3d 211, 218.

<sup>13</sup> *Babyak v. D.S.Langale One, Inc.*, 2009-Ohio-4212, 10th District App. No. 08AP-996, ¶28.

<sup>14</sup> See, e.g., *City Life Dev., Inc. v. Praxus Group, Inc.*, 2007-Ohio-2114, Cuyahoga App. No. 88221, ¶32: Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions.

interest rate. The contract provides that “*the annual interest rate* for this note is computed . . . by applying the ratio of *the annual interest rate* over a year of 360 days” and then multiplying that fraction by the number of days in a year.<sup>15</sup> The purpose of the computation is to arrive, after dividing and multiplying, at a product that is the “annual interest rate.” But how can a calculation that is supposed to result in an “annual interest rate” start with the “annual interest rate” if it isn’t both divided and multiplied by the same number?

The parties may have intended that the “*annual interest rate*” would be calculated by first dividing the “*initial interest rate*” by 360, but the contract doesn’t distinguish the “initial” rate from the “annual” rate, and the court, especially in the context of a motion to dismiss, cannot infer that intention.

It seems two possibilities exist: that the interest rate of 8.93% was meant to be plugged in as the dividend over the divisor of 360 to get the quotient (the daily interest factor), which is then multiplied by 365, the product of which will be the *per annum* interest rate; or that another number<sup>16</sup> would be divided by 360 and that quotient then multiplied by 365, the product of which would be 8.93%. The defendant calculated interest with 8.93% as the initial divisor in a 365/360 method computation but the plaintiff claims that 8.93% was intended to be the product of the interest computation. Either way, the court cannot determine the intent of the parties – or whether a mistake justifying reformation was made – without reference to extrinsic evidence of intent and a motion to dismiss, which may only be granted if, after examining the allegations of the complaint in a light most favorable to the non-movant, it appears beyond doubt that the movant can prove no set of facts entitling it to relief,<sup>17</sup> cannot be granted.

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<sup>15</sup> Leaving aside, for now at least, the question of whether a ratio and a fraction are the same thing.

<sup>16</sup> Approximately 8.81%, since  $360/365 \times 8.93 = 8.81$  (rounded off).

<sup>17</sup> A truism by this point, but see, e.g., *Fuller v. Cuyahoga Metro.Hous. Auth.*, 2009-Ohio-4716, Cuyahoga App. No. 92270, ¶2.

Hence, the defendant's motion to dismiss, filed March 23, 2009, is denied. The court is aware that another judge of this same court reached a different conclusion on identical issues in *Ely Enterprises, Inc. v. FirstMerit Bank, N.A.*, CV 08 667641, and that the plaintiff's appeal of that decision is pending before the Cuyahoga County Court of Appeals as case number 93345. The court therefore, pursuant to Rule 54(B) of the Ohio Rules of Civil Procedure, determines that there is no just cause for delay.

**IT IS SO ORDERED:**

Date: \_\_\_\_\_

\_\_\_\_\_  
Judge John P. O'Donnell

**SERVICE**

A copy of this Journal Entry was sent by regular U.S. mail, this \_\_\_\_\_ day of September 2009, to the following:

Steven M. Weiss, Esq.  
Law Offices of Steven M. Weiss  
55 Public Square, Suite 1009  
Cleveland, OH 44113  
*Attorney for Plaintiff*

Mark R. Koberna, Esq.  
Rick D. Sonkin, Esq.  
Sonkin & Koberna Co., LPA  
3401 Enterprise Parkway, Suite 400  
Cleveland, OH 44122  
*Attorneys for Plaintiff*

Hugh M. Stanley, Esq.  
Thomas R. Simmons, Esq.  
Benjamin C. Sasse, Esq.  
Tucker Ellis & West LLP  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115-1414  
*Attorneys for Defendant*

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Judge John P. O'Donnell