No. 11-1392

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 95822

JNT PROPERTIES, LLC,
Plaintiff-Appellee,

v.

KEYBANK, NATIONAL ASSOCIATION,
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION

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I. THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST

The rule of law applied by the court below places at issue the enforceability of the most common method for computing interest on commercial loans — the "365/360 method," which has been recognized by Ohio's lower courts for more than 150 years — and declares "unintelligible" language describing that method that has been used by hundreds of lenders nationwide in tens of thousands of commercial loans involving hundreds of millions of dollars. This case is one of public and great general interest because without this Court's intervention the decision below calls into question the interest charged on thousands of commercial loans by lenders throughout Ohio, discourages commercial lending in Ohio by imposing significant legal risks to the use of the most common method of computing interest, and subjects Ohio banks and financial institutions to the unique burden of defending class action lawsuits uniformly rejected outside of the state.

In this breach-of-contract appeal, the Eighth District created a false "conflict" between contractual terms specifying a "per annum" interest rate and the 365/360 method, required "clear evidence" of an intent to "alter" the meaning of "per annum," and held that an issue of fact remained as to the agreed method for computing interest on Appellee's Note based on its unsupported and insupportable "clear evidence" standard. (App. Op. at 11-12, Appx. 13-14.) That approach has been rejected by every other state appellate court and federal court to address the issue. The upshot is a collection of putative class action lawsuits pending in Cuyahoga County (the only remaining receptive

jurisdiction in the country),[1] which attack the 365/360 method by manufacturing a conflict between two separate provisions of commercial notes that address the distinct subjects of the contractual rate of interest and the manner by which interest on that rate will be computed (i.e., the 365/360, 360/360, or 365/365 method).

The Eighth District's decision results in an unwarranted judicial reexamination of Ohio business transactions negotiated by sophisticated commercial parties represented by counsel, as illustrated by this case. With the aid of experienced lending counsel, Appellee JNT Properties, LLC assembled a sophisticated financial package to purchase a Dairy Queen in Mayfield, Ohio, which included a commercial note issued by Appellant KeyBank National Association that JNT Properties' own lawyer promised KeyBank was "enforceable in accordance with its terms." Nearly two years later, however, JNT Properties filed a putative class action lawsuit against KeyBank and claimed for the first time that the method for computing interest specified in the Note was "unintelligible" and somehow "conflicted" with the Note's "per annum" interest rate.

The false "conflict" urged by JNT Properties and adopted by the Eighth District conflicts with prevailing rules of law across the country. In addition, other errors in the Eighth District's analysis conflict with the Restatement of the Law 2d Contracts, the leading Williston on Contracts treatise, and decisions from multiple other Ohio appellate districts. To address these fundamental flaws, this appeal presents three novel issues of

[1] At least two similar class action lawsuits are currently pending in the Cuyahoga County Court of Common Pleas. See *Ely Ents., Inc. v. FirstMerit Bank, N.A.*, Case No. CV-08-667641; *DK&D Properties Ltd. v. Natl. City Corp.*, Case No. CV-08-680078.

law that have broad application within the lending industry and will provide needed guidance on contract interpretation principles under Ohio law in general:

- This Court should recognize that the use of the term "per annum" in describing an interest rate does not imply a choice of any one of three recognized methods for computing the dollar amount of interest due (Proposition of Law No. 1);
- This Court should confirm that contractual terms cannot be dismissed as "unintelligible" where those terms can be given a definite legal meaning (Proposition of Law No. 2); and
- This Court should resolve a conflict among Ohio's appellate districts and hold that courts should analyze available extrinsic evidence before resorting to the rule of interpretation that a contract is construed against its drafter (Proposition of Law No. 3).

This appeal presents an ideal vehicle to analyze these three legal principles. It arises on a summary judgment record that includes all available evidence concerning the intentions of the parties to the Note. It arises from an opinion by the Eighth District that reversed one of two written opinions issued by the Trial Court under this Court's commercial docket pilot project, so this Court will have the benefit of three written rulings by the courts below — including two by a designated commercial docket judge — when resolving the novel questions presented in this appeal. And it arises in a context where the only dispute between the parties is the legal principles that apply to the undisputed facts surrounding the execution of the Note.

Moreover, each of the propositions of law independently warrants this Court's review. First, guidance on the correct interpretation of the term "per annum" is of vital interest not only to the Ohio lending community, but to businesses that look to Ohio lenders for loans. It is common ground that the phrase "per annum" when literally

translated means "by the year." (App. Op. at 4 n. 2, Appx. 6.) The question presented by this appeal, however, is whether that phrase means something *more* — whether it not only signals to the borrower that the rate is a yearly rate, but also that the lender will use a particular method for computing the amount of interest due. The court below held that it does: Although the Eighth District acknowledged at the outset of its opinion that the 365/360 method *uses* the contractual rate when computing the yield,[2] the court of appeals nevertheless concluded that the 365/360 method "imposes" a "*greater* interest rate" than the current contractual rate of "8.93 percent per annum." (App. Op. at 11, Appx. 13.) In so doing, the Eighth District injected uncertainty into the enforceability of a widely used method for computing interest, which had been approved by Ohio's lower courts for over 150 years. See, e.g., *Lafayette Bank of Cincinnati v. Findlay* (Super. Ct. Cinn. 1844), 1 Ohio Dec. Rep. 49.

The Eighth District's approach erroneously conflates the contractual method for *computing* interest with the annual *rate* of interest. This blending of the contractual rate of interest and the method of computing the yield has been rejected by every other state appellate court and federal court to address the issue. See, e.g., *Bank of Am. v. Shelbourne Dev. Group, Inc.* (N.D. Ill. 2010), 732 F.Supp.2d 809 ("there is no conflict between using the 365/360 method and stating that the applicable interest rates were 'per annum'"); accord *In re Market Ctr. E. Retail Properties, Inc.* (D.N.M. 2010), 433 B.R.

[2] See id. at n. 1, Appx. 3 (explaining that the 365/360 method requires "the bank [to] divide[] *the annual interest rate* by 360 to produce a daily interest factor").

335, 354-55 (no conflict between 365/360 method and 7.74% per annum interest rate); *RBS Citizens Natl. Assn. v. RTG-Oak Lawn, LLC* (Ill.App.Ct. 2011), 943 N.E.2d 198, 206 (references to "per annum" in portion of note specifying the "rate[] to be used during interest computations" do not address how interest will be "calculated or charged"). As these authorities recognize, the 365/360 method does not "impose" a greater rate of interest; it merely uses the contractual interest rate to calculate the yield. E.g., *RBS Citizens Natl. Assn.*, 943 N.E.2d at 206 (references to "per annum" "originate from paragraphs providing *rates to be used during interest computations*") (emphasis added).

Second, both lenders and other contracting parties based in Ohio will benefit from this Court's clarification of the legal effect of errors in expression contained in contractual language. The Note at issue shows an intent to use the 365/360 method; as the Trial Court recognized, "[t]he contract (the note) is clear that [KeyBank] intended to use the 365/360 method to calculate interest," and "there is no evidence that [JNT Properties] either didn't consent to the 365/360 method or intended the use of some other method." (9/8/10 JE, Appx. 15.) The Eighth District's decision did not dispute this point, but rather refused to consider it on the grounds that the Note's reference to the 365/360 method was rendered "unintelligible" due to the inclusion of a stray word — "rate" — before the semicolon in the 365/360 clause. (App. Op. at 11, Appx. 13.)

That refusal is inconsistent with the general approach to contract interpretation mandated by this Court's precedents, which requires an analysis of the "contract as a whole" and enforcement of contractual terms that "can be given a definite legal

meaning." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶11. And it squarely conflicts with both the Restatement and the Williston treatise, which teach that errors in expression are legally irrelevant where "the intention of the parties can be clearly discovered." 11 Williston on Contracts (4 Ed.1999) 25, Section 30:2; see, also, Restatement of the Law 2d, Contracts (1981) 88-89, Section 202, Comment *d* ("particular words or phrases" may be disregarded to fit the verbal context). This Court should accept jurisdiction and clarify that errors in expression do not render contractual language ambiguous where that language can be given a definite legal meaning.

Third, even if the 365/360 clause in JNT Properties' Note were ambiguous, this Court should accept jurisdiction to resolve a conflict among Ohio's appellate courts concerning the scope of the rule that ambiguous contracts are construed against the drafter. Before the Eighth District's decision in this case, every Ohio appellate court to address the issue held that this rule of contract interpretation is "secondary" and does not apply unless primary rules of interpretation and the available extrinsic evidence fail to resolve the ambiguity. E.g., *Reida v. Thermal Seal, Inc.*, 10th Dist. No. 02AP-308, 2002-Ohio-6968, at ¶¶29-32 (improper to construe a contract against its drafter where parol evidence reveals the parties' intent). The Eighth District did not acknowledge this uniform line of authority, and the Eighth District's unwarranted extension of the rule of construction against the drafter unduly constrains the principle that extrinsic evidence may be used to interpret ambiguous contracts.

Finally, each of these novel issues should be addressed now. This Court's guidance is critical to ongoing class action proceedings in the Cuyahoga County Court of Common Pleas. Without such clarification, KeyBank and other banks sued in that court will be forced to respond to class allegations under an erroneous legal standard that skews inquiries into commonality, typicality and predominance that will inevitably be framed by that ruling. E.g., *Wal-Mart Stores, Inc. v. Dukes* (2011), 131 S. Ct. 2541, 2551-52 (a "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"). Guidance is needed now, before class certification rulings are made in multiple cases based on issues incorrectly framed by an unsupported legal standard.

II. STATEMENT OF THE CASE AND FACTS

Cleveland-based KeyBank provides retail and commercial banking services to individuals and companies throughout the United States. JNT Properties purchased an existing Dairy Queen franchise in Mayfield Heights, Ohio, aided by a complex financing package that included multiple loans. One such loan, memorialized by the Note at issue, is a 20-year variable-interest-rate loan in the amount of $370,350.

The JNT Properties' Note contains separate clauses that specify the variable interest rate and method for computing interest. The variable interest rate of 8.93% is calculated under "an Index which is the Federal Home Loan Bank of Seattle Five (5) Year Intermediate/Long Term Advances Fixed Rate published daily by the Federal Home

Loan Bank of Seattle at http://www.fhlbsea.com (the "Index")." And the Note's Interest Computation Clause specifies that interest is computed on a 365/360 basis:

> 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.

Experienced commercial lending counsel represented JNT Properties in the Dairy Queen purchase, and issued an opinion letter to KeyBank stating that the Note is a "legal, valid and binding obligation[] of the Borrower" that is "enforceable in accordance with [its] respective terms." JNT Properties did not question the manner in which interest would be computed under the Note at any time prior to the filing of this action.

JNT Properties filed this putative class action on January 15, 2009. JNT Properties asserted a claim for breach of contract seeking alleged interest "overcharges" computed under the 365/360 method, as well as a claim for a declaratory judgment that use of that 365/360 method "violated" the Note. The case was transferred to Judge O'Donnell under this Court's commercial docket pilot project.

KeyBank moved to dismiss both claims. The Trial Court's 9/25/09 Journal Entry ("JE") denied the motion. While the Trial Court acknowledged that the 365/360 method is one of three established methods for computing interest, it concluded that the Interest Computation Clause was ambiguous. (See 9/25/09 JE, at 3, 5-6 Appx. 18, 20-21.) According to the Trial Court, there were two "possible" interpretations: either 1) the initial interest rate of 8.93% was intended "to be plugged in as the dividend over the

devisor of 360" to determine a daily interest factor from which interest could be calculated using the 365/360 method; or 2) "another number" was meant to be plugged in as the dividend that would result in a "product of * * * 8.93%." (Id. at 6, Appx. 21.)

Following limited discovery focused on the intent of the parties, KeyBank moved for summary judgment — asserting that the first possible interpretation identified in the 9/25/09 JE was, as a matter of law, the only reasonable interpretation of the Note. JNT Properties' Opposition correctly conceded that the second possible interpretation was foreclosed by the Variable Interest Rate Clause:

> * * * JNT does not contend that the Formula "was used to derive the initial interest rate of 8.93%." Indeed, as a mathematical matter, the Formula does not produce a "rate" of interest at all, but rather a dollar amount (e.g., 8.93% ÷ 360 x $370,350.00 x 365 = $33,531.59).

The Trial Court granted KeyBank's motion for summary judgment, declaring that the Note's "reference to the 365/360 method [for computing interest] * * * [will be] retained and enforced." (9/8/10 JE, Appx. 15.) The Eighth District reversed the Trial Court's judgment, and KeyBank timely filed this appeal.

III. ARGUMENT

Proposition of Law No. 1

> **A description of an interest rate as "per annum" does not require the use of any particular method for computing interest.**

The uneven number of days in each month under the Gregorian calendar makes it impossible to have both equal daily interest charges and equal monthly interest charges throughout the year and, as a result, banks have developed three separate methods for

computing yearly interest: the 365/365 method (which provides equal daily interest charges); the 360/60 method (which provides equal monthly interest charges); and the 365/360 method — a "hybrid" method that derives a daily interest factor using a 360-day year and then applies that factor to each of the 365 or 366 days in the year. (App. Op. at 1, n. 1, Appx. 3; 9/25/09 JE at 3-4, Appx. 18-19.) The 365/360 "method of interest calculation has been widely used in the banking industry for the past two centuries," *Voider v. First Natl. Bank of Commerce* (E.D. La. 1981), 514 F.Supp. 585, 591.

Because at least three separate methods for computing interest are used within the lending industry, it is unreasonable to infer from the description of an interest rate as "yearly," "annual," or "per annum" that the parties intended to use any one of those methods. See Restatement of the Law 2d, Contracts (1981) 94, Section 203, Comment *c* (explaining that, "[i]n the absence of contrary indication, it is assumed that each term of an agreement has a reasonable rather than an unreasonable meaning"). Rather, consistent with the prevailing rule of law across the country, the term "per annum" is best understood as indicating only an intention to pay at an annual interest rate without regard to the method by which that annual interest will be calculated:

> [A] promise to pay interest 'per annum' is simply a promise to pay at an annual interest rate. This does not obligate the lender to use any particular method of interest computation.

Kleiner v. First Natl. Bank of Atlanta (N.D. Ga. 1984), 581 F.Supp. 955, 962-63. Accord *Bank of Am.*, 732 F.Supp.2d 809 ("there is no conflict between using the 365/360 method and stating that the applicable interest rates were 'per annum'").

Therefore, regardless of whether the interest rate specified in a note is identified as a "yearly," "annual," or "per annum" rate, it is necessary to consult other provisions of the promissory note to determine the method the parties intended to use to compute the dollar amount of interest due. In this case, the Note's Interest Computation Clause specifies one, and only one, method for computing interest: the 365/360 method. The Note's reference to that method should, as the Trial Court recognized, be "retained and enforced." (See 9/8/10 JE, Appx. 15.)

Proposition of Law No. 2

> **Errors in expression do not render contractual language ambiguous or unenforceable where that language can be given a definite legal meaning. (Restatement of the Law 2d, Contracts (1981) 88-89, Section 202, Comment *d*, followed.)**

This Court's precedents teach that the goal of contract interpretation is "to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, at paragraph one of the syllabus. In determining the parties' intent, "a writing * * * will be read as a whole, and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361. "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Galatis*, 2003-Ohio-5849, at ¶11.

Consistent with these principles, the Restatement instructs that courts engaged in contract interpretation may disregard particular words in a contractual clause to fit the meaning of the contract as suggested by the context in which those words appear:

> *Interpretation of the whole.* Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. * * * Where the whole can be read to give significance to each part, that reading is preferred; if such a reading would be unreasonable, a choice must be made. See § 203. *To fit the immediate verbal context or the more remote total context particular words or punctuation may be disregarded or supplied; clerical or grammatical errors may be corrected; singular may be treated as plural or plural as singular.*

Restatement of the Law 2d, Contracts (1981) 88-89, Section 202, Comment *d* (emphasis added); see, also, 11 Williston on Contracts (4 Ed.1999) 25, Section 30:2 ("Whatever may be the inaccuracy of expression or the inaptness of the words used in an instrument from a legal perspective, if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly.").

In this case, application of these principles compels the conclusion that the Note's Interest Computation Clause is unambiguous and requires interest computation on a 365/360 basis. The context of the Note includes separate clauses that address the distinct subjects of calculating the variable interest rate and computing interest payments using that rate. Because the Note contains a clause that expressly identifies the manner by which the initial interest rate was set and through which it will be altered, it is unreasonable, as JNT Properties recognized below, to construe the Note's Interest Computation Clause as specifying the manner by which the interest rate is set.

Rather, as other courts considering identical 365/360 language have held, the only reasonable interpretation of the Note's Interest Computation Clause is that it embodies the parties' intent to compute interest *using* the specified 8.93% rate of interest *and* the

365/360 method for computing interest. See *Kreisler & Kreisler, LLC v. Natl. City Bank* (Mar. 3, 2011), E.D. Mo. No. 4:10-cv-956 CDP, 2011 WL 846191, at *3 (holding "that the language is neither ambiguous nor unintelligible"); *Asset Exchange II, LLC v. First Choice Bank* (Ill.App.Ct. July 12, 2011), No. 1-10-3718, 2011 WL 2714225 (identical 365/360 language is unambiguous). That interpretation is consistent with the manifest purpose of the first portion of the Interest Computation Clause, which signals the parties' intent to "compute[] [interest] on a 365/360 basis." And it also properly gives effect to the mathematical formula following the semicolon, which describes the calculation used in the 365/360 method: "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." Compare App. Op. at 1, n. 1, Appx. 3 (describing the 365/360 method as a method where "the bank first divides the annual interest rate by 360 to produce a daily interest factor" and then "applies that factor to each of the 365 or 366 days in the year").

Proposition of Law No. 3

> **Where extrinsic evidence clarifies the intent of the parties to a commercial contract, a court cannot resort to the secondary rule of interpretation that ambiguities are interpreted against the drafter.**

Should this Court conclude that the Note's Interest Computation Clause is unambiguous and requires the use of the 365/360 method for computing interest, it need not address this Proposition of Law. Not all rules of contract interpretation, however, are created equal. While primary rules of interpretation (including the rule that a contract is

read as a whole) always apply, secondary rules — including the rule that a contract is interpreted against its drafter — apply "only after primary rules have been applied and the contract's meaning remains uncertain or ambiguous." *Malcuit v. Equity Oil & Gas Funds, Inc.* (1992), 81 Ohio App.3d 236, 240; see, also, 11 Williston on Contracts (4 Ed.1999) 390-91, Section 32:1 (explaining that secondary rules apply only where the contract remains ambiguous after the application of the primary rules to the contract).

Extrinsic evidence addressing the intent of the parties and the circumstances surrounding the execution of a contract is on a par with primary rules of contract interpretation. Therefore, "[w]hen interpreting ambiguous contracts, courts must make a legitimate attempt, after hearing the relevant parol evidence, to determine the intent of the contracting parties." *Cline v. Rose* (1994), 96 Ohio App.3d 611, 615. A contract may be construed against the drafter only if that attempt is unsuccessful. Id.; *Reida v. Thermal Seal, Inc.*, 10th Dist. No. 02AP-308, 2002-Ohio-6968, at ¶¶29-32 (improper to construe a contract against its drafter where parol evidence reveals the parties' intent).

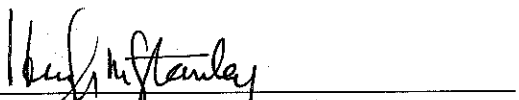
In this case, the Eighth District wrongly refused to analyze extrinsic evidence showing: 1) how the 8.93% initial interest rate was set; and 2) that KeyBank intended to apply the 365/360 method to the initial interest rate of 8.93% to calculate the interest payment, stating that "an ambiguity in the writing will be interpreted strictly against the drafter." (App. Op. at 10-11, Appx. 12-13.) The Eighth District's decision did not cite *Malcuit* and the uniform line of appellate precedent that followed it, and provided no justification for departing from this otherwise settled rule. By failing to heed this line of

precedent, the Eighth District erroneously reduced the scope of the principle that extrinsic evidence may be used to interpret ambiguous contracts.

IV. CONCLUSION

For all the above reasons, KeyBank respectfully requests that this Court accept jurisdiction and reverse the judgment of the court of appeals. Without this Court's intervention, the decision below will call into question the interest charged on thousands of Ohio commercial loans, discourage commercial lending in this state by imposing significant legal risks to the use of the most common method of computing interest, and require Ohio banks and financial institutions to defend class action lawsuits uniformly rejected outside of the state.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction** has been served this 12th day of August, 2011, by U.S. Mail, postage prepaid, upon the following:

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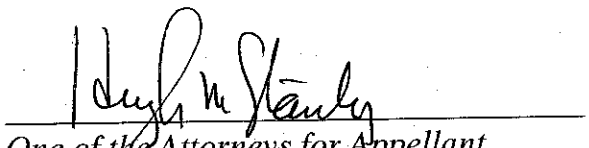

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95822

JNT PROPERTIES, LLC

PLAINTIFF-APPELLEE

vs.

KEYBANK, NATIONAL ASSOCIATION

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-681873

BEFORE: Kilbane, A.J., Stewart, J., and Boyle, J.

RELEASED AND JOURNALIZED: June 30, 2011

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MARY EILEEN KILBANE, A.J.:

Plaintiff-appellant, JNT Properties, LLC (JNT), appeals the trial court's decision granting summary judgment in favor of defendant-appellee, KeyBank National Association (KeyBank). Finding merit to the appeal, we reverse and remand.

In January 2009, JNT filed a class action against KeyBank. In its first amended class action complaint, JNT alleges that it obtained a loan from KeyBank in the principal amount of $375,350, and pursuant to the promissory note ("Note"), JNT agreed to repay the principal together with interest at the rate of 8.93 percent per annum. JNT alleges that KeyBank has breached the promissory note between JNT and other class members when KeyBank assessed interest based on a calculation known as the "365/360 method."[1]

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[1]In *Republic of France v. Amoco Transport Co.* (C.A.7, 1993), 4 F.3d 997, the Seventh Circuit Court of Appeals summarized the 360/365 method as follows:

> **"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). * * * [Under the 365/360 method,] 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." (Citations omitted.)**

The Note provides in pertinent part:

"PROMISSORY NOTE
(Variable Rate)

Principal Amount: $370,350.00 Initial Interest Rate: 8.93%

PAYMENT. * * *[JNT] will pay this loan in accordance with the following payment schedule:

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 consecutive monthly principal and interest payments in the initial amount $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. * * * The interest rate will be adjusted on July 1, 2012, July 1, 2017 and July 1, 2022 to reflect the current Index defined below plus 325 basis points. The monthly payment [JNT] shall pay to [KeyBank] will be adjusted on July 1, 2012, July 1, 2017 and July 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 published daily by the Federal Home Loan Bank of Seattle[.] * * * The Index is currently at 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."

JNT further alleges that KeyBank's improper use of the 365/360 method created an interest rate of 9.05 percent per annum, rather than the 8.93 percent per annum listed on the Note. JNT's complaint raises a claim for breach of contract, seeks class treatment, requests declaratory and injunctive relief requiring KeyBank to cease using the 365/360 method of computing annual interest, and prays for damages, costs, attorney's fees, and other relief.

In response to JNT's complaint, KeyBank filed a motion to dismiss, which JNT opposed. The trial court denied KeyBank's motion and KeyBank appealed to this court. This court dismissed the appeal for lack of a final appealable order in December 2009. See *JNT Properties, LLC v. Key Bank Natl. Assoc.*, Cuyahoga App. No. 94045.

On remand, KeyBank answered JNT's complaint and asserted a counterclaim for reformation. Following discovery focused on the intentions of the parties to the Note, KeyBank moved for summary judgment. KeyBank argued the only reasonable interpretation of the interest calculation provision is that the interest payments would be calculated from the annual interest rate (8.93%) disclosed in the Note using the 365/360 method. JNT opposed, arguing that because the "initial rate of 8.93% per annum" is unambiguous, KeyBank

cannot use the unintelligible 365/360 formula in the Note to charge JNT more than 8.93 percent interest per year.[2]

In September 2010, the trial court granted KeyBank's motion for summary judgment, finding that:

> **"[T]he contract [Note] is clear that [KeyBank] intended to use the 365/360 method to calculate interest. There is no evidence that [JNT] either didn't consent to the 365/360 method or intended the use of some other method.**
>
> **The fact that the words used to describe the formula for calculating the interest rate ('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') do not correctly describe the 365/360 calculation does not change the parties' agreement that 'the annual interest rate for this note is computed on a 365/360 basis.'**
>
> **As JNT notes at Page 6 of its opposition brief, 'when a single portion of a lengthy contract is unintelligible, but yet severable from the remainder, a court may strike that portion itself without affecting the enforceability of the remainder.' In this case the unintelligible verbal formula may be ignored, but the reference to the 365/360 method [for computing interest] – accepted shorthand for a commonly used formula – [will be] retained and enforced."**

It is from this order that JNT appeals, raising one assignment of error, in which it argues that the trial court erred when it granted summary judgment in favor of KeyBank.

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[2]Both parties agree that the term "per annum" means "per year."

Standard of Review

Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

> **"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."**

Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197.

Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

The Contract

"A contract is generally defined as a promise, or a set of promises, actionable upon breach. 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.' *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶16.

When confronted with issues of contractual interpretation, the role of the court is to give effect to the intent of the parties to the agreement. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶11. As the Ohio Supreme Court in *Westfield* stated:

> **"We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of**

> **the policy. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.**
>
> **On the other hand, where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. A court, however, is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties.**
>
> **It is generally the role of the finder of fact to resolve ambiguity. However, where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party."[3] (Citations omitted.) Id. at ¶11-13.**

In the instant case, JNT argues the parties intended that the interest on the loan would be 8.9 percent per year and KeyBank breached this agreement by using the 365/360 method and charging 9.05 percent interest per year instead. JNT relies primarily on *Ely Ents., Inc. v. FirstMerit Bank, N.A.*, Cuyahoga App. No. 93345, 2010-Ohio-80, appeal not allowed, 125 Ohio St.3d 1415, 2010-Ohio-1893, 925 N.E.2d 1003, to support its position that the plain language of the Note requires KeyBank to charge interest at an initial rate of 8.93 percent per year.

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[3]"A contract is ambiguous if its terms cannot be clearly determined from a reading of the entire contract or if its terms are susceptible to more than one reasonable interpretation." *Militiev v. McGee*, Cuyahoga App. No. 94779, 2010-Ohio-6481, ¶30, citing *United States Fidelity & Guar. Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio App.3d 45, 716 N.E.2d 1201.

In *Ely*, a commercial borrower (Ely) brought a breach of contract class action against FirstMerit, alleging that "FirstMerit breached the promissory note between the parties when it assessed interest based on a calculation known as the '365/360' method, which created an effective interest rate of 11.153% per annum." Id. at ¶2. FirstMerit filed a motion to dismiss, which the trial court granted.

Ely appealed, arguing the 365/360 interest rate computation method used by FirstMerit imposed a per annum that was greater than the 11.000% provided in the promissory note. FirstMerit argued the parties agreed to alter the meaning of the term "per annum" by agreeing to the 365/360 calculation method. This court found that the "term 'per annum' is ordinarily defined as 'by the year'" and "[t]he computation of interest provision [in the promissory note] did not indicate an actual calculated interest rate. The calculation [used by FirstMerit contained] the 'annual interest rate' as part of the equation, and [did] not change the stated interest rate on the note. * * * [T]he calculation allegedly was applied to impose a greater interest rate than the stated rate of 11.000% per annum." Id. at ¶10 and 13. Therefore, we concluded that FirstMerit was not entitled to a Civ.R. 12(B)(6) dismissal because "to the extent the calculation and the monthly payment amount [were] inconsistent with the

more specific terms of principal and stated interest rate, the promissory note is ambiguous." Id. at ¶17.

In reaching our decision, this court relied in part on *Hamilton v. Ohio Sav. Bank*, 70 Ohio St.3d 137, 1994-Ohio-526, 637 N.E.2d 887. In *Hamilton*, mortgagors challenged the mortgagee bank's use of a 365/360 method for calculating interest. The mortgagors sought to terminate the bank's alleged practice of overcharging interest. The Ohio Supreme Court reviewed inconsistencies among the documents and determined that the record was contradictory as to what was disclosed between the parties. The court concluded there were genuine issues of material fact precluding summary judgment. Id. at 140.[4] We noted that "[a]lthough *Hamilton* dealt with certain disclosure issues not presented herein, the case did contain allegations of overcharging interest through the use of a 365/360 method of calculating interest, and the action was allowed to proceed as a class action." *Ely* at ¶16.

The matter before us presents a situation similar to *Ely* and *Hamilton*. Here, the interest computation provision used by KeyBank does not indicate an actual stated interest rate. Rather, the formula provides that "[t]he annual interest rate * * * is computed * * * by applying the ratio of the annual interest

[4]In a later appeal, the Ohio Supreme Court held that the action was to proceed as a class action and that the entire class be certified with respect to all claims. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 1998-Ohio-365, 694 N.E.2d 442.

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."

KeyBank argues the "initial interest rate" of 8.93 percent was to be used 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 (366 days in leap years and 365 days in all other years). KeyBank further argues the parties intended that the yearly interest rate would be computed on a 365/360 basis. To support its argument, KeyBank relies on correspondence that indicated the initial interest rate was set by adding 3.25 percent to the Federal Home Loan Bank of Seattle Five Year Intermediate/Long Term Advances Fixed Rate and an affidavit of a senior vice president who asserted that KeyBank's intent was that the 365/360 method would be applied to the initial rate 8.93 percent to calculate interest, which would "result[ ] in a slightly higher yield to KeyBank" than if another method was used.[5]

[5]KeyBank provided this court with *Kreisler & Kreisler, LLC v. Natl. City Bank* (E.D. Mo. 2011), Case No. 4:10CV956 CDP and *RBS Citizens, Natl. Assn. v. RTG-Oak Lawn, LLC* (C.A.1, 2011), 407 Ill.App.3d 183, 943 N.E.2d 198, as supplemental authority to support its position. We find these cases easily distinguishable. Both cases are based on Illinois law and the interest provision at issue in *RBS* is different than the instant case.

However, "where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party." *Westfield* at ¶13. In its decision denying KeyBank's motion to dismiss, the trial court described the formula as unintelligible, stating "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?" We agree.

Here, the calculation used by KeyBank in the instant case imposes a greater interest rate than the stated interest rate of 8.93 percent per annum. When the trial court granted summary judgment in favor of KeyBank, it severed the "unintelligible verbal formula," but retained KeyBank's reference to the 365/360 method. The court rewrote the calculation to state that "[t]he annual interest rate for this Note is computed on a 365/360 basis[.]" The court further stated that this method is "accepted shorthand for a commonly used formula," but never defined the formula.

"Summary judgment may not be granted when reasonable minds could come to differing conclusions." *Hamilton* at 140. Thus, just as in *Ely*, we find that the 365/360 formula used to calculate interest in the instant case cannot be read "as clearly evidencing an intent of the parties to alter the ordinary

meaning of the term 'per annum,' or as creating an 'annual interest rate' other than the stated rate" of 8.93 percent. Id. at ¶11.

Since we cannot conclude that there is no genuine issue of material fact, the trial court's decision granting summary judgment in favor of KeyBank is reversed.

The sole assignment of error is sustained.

Accordingly, judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

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

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY

64918908

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JNT PROPERTIES LLC
Plaintiff

KEY BANK N.A.
Defendant

Case No: CV-09-681873

Judge: JOHN P O'DONNELL

JOURNAL ENTRY

DEFENDANT KEY BANK NATIONAL ASSOCIATION'S MOTION FOR A ONE-WEEK EXTENSION OF TIME TO FILE REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (THOMAS R. SIMMONS 0062422, FILED 06/18/2010) IS GRANTED.

DEFENDANT KEY BANK NATIONAL ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT (HUGH M. STANLEY 0013065, FILED 05/14/2010) IS GRANTED.

THE CONTRACT (THE NOTE) IS CLEAR THAT THE DEFENDANT INTENDED TO USE THE 365/360 METHOD TO CALCULATE INTEREST. THERE IS NO EVIDENCE THAT THE PLAINTIFF EITHER DIDN'T CONSENT TO THE 365/360 METHOD OR INTENDED THE USE OF SOME OTHER METHOD.

THE FACT THAT THE WORDS USED TO DESCRIBE THE FORMULA FOR CALCULATING THE INTEREST RATE ("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") DO NOT CORRECTLY DESCRIBE THE 365/360 CALCULATION DOES NOT CHANGE THE PARTIES' AGREEMENT THAT "THE ANNUAL INTEREST RATE FOR THIS NOTE IS COMPUTED ON A 365/360 BASIS."

AS THE PLAINTIFF NOTES AT PAGE 6 OF ITS OPPOSITION BRIEF, "WHEN A SINGLE PORTION OF A LENGTHY CONTRACT IS UNINTELLIGIBLE, BUT YET SEVERABLE FROM THE REMAINDER, A COURT MAY STRIKE THAT PORTION ITSELF WITHOUT AFFECTING THE ENFORCEABILITY OF THE REMAINDER." IN THIS CASE THE UNINTELLIGIBLE VERBAL FORMULA MAY BE IGNORED, BUT THE REFERENCE TO THE 365/360 METHOD - ACCEPTED SHORTHAND FOR A COMMONLY USED FORMULA - RETAINED AND ENFORCED.
COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature 09/08/2010

09/08/2010

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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

John P. O'Donnell, J.:

Upon consideration of the defendant's motion to dismiss the first amended class action complaint[1], the plaintiff's brief in opposition[2], the defendant's reply brief[3], the plaintiff's sur-reply brief[4], and the plaintiff's submission of additional authority[5], 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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[1] Filed March 23, 2009.
[2] Filed March 31, 2009.
[3] Filed April 9, 2009.
[4] Filed May 6, 2009.
[5] 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.[6]

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:

[6] 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.[7]

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

[7] 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,"[8] 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.[9]

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[8] Plaintiff's brief in opposition to motion to dismiss, page 4.
[9] *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.[10] 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.[11] Courts presume that the language of a contract between competent parties accurately reflects their intentions.[12] 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.[13]

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.[14]

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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[10] *Kostelnik v. Helper* (2002), 96 Ohio St.3d 1, at 3-4.
[11] *Shifrin v. Forest City Ent.* (1992), 64 Ohio St.3d 635, 638.
[12] *Ohio Univ. Bd. of Trustees v. Smith* (1999), 132 Ohio App.3d 211, 218.
[13] *Babyak v. D.S.Langale One, Inc.*, 2009-Ohio-4212, 10th District App. No. 08AP-996, ¶28.
[14] 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. [15] 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[16] 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,[17] cannot be granted.

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[15] Leaving aside, for now at least, the question of whether a ratio and a fraction are the same thing.
[16] Approximately 8.81%, since 360/365 x 8.93 = 8.81 (rounded off).
[17] 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 25TH day of September 2009, to the following:

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Judge John P. O'Donnell