ORIGINAL

No. 2011-1392

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.

MERIT BRIEF OF APPELLANT KEYBANK NATIONAL ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Other Authorities

I. INTRODUCTION

This is one of a series of putative class actions filed by Plaintiff-Appellee JNT Properties, LLC's ("JNT Properties") counsel[1] that seek to impose 15 years of contractual liability on Ohio banks for using the "365/360 method" to compute interest on commercial loans. Virtually identical class actions interpreting the exact same 365/360 contract language have been uniformly rejected by every state appellate and federal court to address the issue. The Eighth District Court of Appeals decision below threatens to make Ohio the only receptive home for these discredited class actions – its fatally flawed analysis conflicts with both Ohio contract law and two centuries of commercial lending practices.

The lending industry uses three separate methods to compute annual interest – the 365/365 method; the 360/360 method; and the 365/360 method. These methods arose because it is impossible to calculate both equal daily and monthly interest charges under the Gregorian calendar (with months ranging from 28 to 31 days). As a result, lenders usually compute interest using a daily interest factor that assumes 30 days per month and 360 days per year. Of the three methods, only the 365/365 method computes a daily interest factor based on a 365-day year. For commercial loans, the 365/360 method is the most common. The 365/360 method results in slightly higher interest.

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

As courts repeatedly recognize, it is necessary to know both the interest rate and the method for computing interest to calculate the dollar amount of interest that accrues on a loan. The method of computing interest (365/365, 360/360 or 365/360) uses the annual interest rate to calculate annual interest. Because each of the three methods for computing interest use the annual rate, they do not (and cannot) create a different rate of interest.

The Promissory Note (the "Note") entered into by Defendant-Appellant KeyBank National Association ("KeyBank") and JNT Properties has separate contract clauses that address the distinct issues of the method of computing interest and the annual interest rate. The Interest Computation Clause on the first page of the Note specifies that interest is computed on a 365/360 basis, and explains that this method uses a daily interest factor based on a 360-day year. There is no mention of 365/365 or 360/360 anywhere in the Note. The Variable Interest Rate Clause on the second page of the Note provides for an initial rate of 8.93% per annum, and resets the interest rate after five years.

JNT Properties' position is that the 365/365 method is required based on the use of the term "per annum" in the Variable Interest Rate Clause. The Eighth District found JNT Properties' position to be one possible interpretation of the Note and declared the Note "ambiguous." The fundamental flaw in that approach is that it manufactures a non-existent conflict between the 365/360 method and the term "per annum" and rests upon the inaccurate conclusion that the 365/360 method "alters" the ordinary meaning of "per annum." JNT Properties and the Eighth District read far too much into "per annum."

Although "per annum" can mean "by the year" and one of the many dictionary definitions of a "year" is a time period of 365 or 366 days, courts (other than the Eighth District) agree that those definitions say nothing whatsoever about which of the three interest computation methods are required by the Note. Rather, the term "per annum" in the context of a promissory note simply (and correctly) identifies the interest rate as an annual interest rate as opposed to other possible interest accrual periods such as monthly or semi-annually.

For JNT Properties to prevail, this Court must conclude that the allegation that KeyBank complied with the Interest Computation Clause is sufficient to state a claim that KeyBank breached the Note. To do so, this Court must render the Interest Computation Clause meaningless and effectively remove it from the Note. Traditional principles of contract interpretation must be thrown out to reach such a conclusion. Although the 365/360 clause is awkward and unquestionably could have been better drafted, imperfect language does not equal ambiguity. To the contrary, any time a contract clause can be given a definite legal meaning when considering the context and interpreting the contract as a whole, the clause is unambiguous and must be enforced. Reading the Note as a whole, the Interest Computation Clause can only mean one thing – annual interest is computed on JNT Properties' loan using the one and only method identified in the Note, the 365/360 method.

Finally, even if this Court rejects KeyBank's position that the 365/360 clause in the Note is unambiguous, KeyBank is still entitled to summary judgment. All of the

extrinsic evidence in this case confirms that the parties intended to use the 365/360 method to compute interest, and the Eighth District erred in refusing to even consider this evidence. The Eighth District's conclusion that the Note must be construed against the drafter regardless of the evidentiary record is contradicted by the well-reasoned opinions of other Ohio appellate courts, which hold that construing a contract against the drafter is a rule of "last resort" and only applies when extrinsic evidence is unavailable. KeyBank respectfully requests that this Court reverse the judgment of the Eighth District Court of Appeals and reinstate the Trial Court's Journal Entry granting summary judgment in its favor.

II. STATEMENT OF THE CASE AND FACTS

A. Statement of Facts

1. The parties.

KeyBank is a Cleveland-based company that provides retail and commercial banking services to individuals and companies throughout the United States. Like many lending institutions, KeyBank commonly uses the 365/360 method for computing annual interest on commercial loans. (Moshier Aff. at ¶4, Supp. 16.) The use of this method results in accrual of a slightly higher dollar amount of interest on an annual basis than the 365/365 or 360/360 methods. (*Id.*, at ¶9, Supp. 17.)

JNT Properties and the related entity JNT Holdings, LLC were formed to buy an existing Dairy Queen franchise. (Traffis Dep. at 7-8, Supp. 32.) Norm Traffis, his son Jeff Traffis, and his son-in-law Tom Dragmen own JNT Properties. (*Id.* at 5-6, Supp.

32.) Norm Traffis owns 50 percent of the company, holds a bachelor's degree in electrical engineering, and signed the loan documents for the purchase of the Dairy Queen on behalf of JNT Properties. (*Id.* at 5, 10, 74-75, Supp. 32, 33, 42.) Attorney Jim McSherry ("McSherry"), who has extensive experience in commercial lending, represented JNT Properties in its purchase of the Dairy Queen — including JNT Properties' dealings with KeyBank. (*Id.* at 17-20, Supp. 34; McSherry Dep. at 4, 8-11, Supp. 23, 24-25.)

2. The parties discuss interest rates and a financing package.

JNT Properties approached KeyBank in the spring of 2007 to borrow money to purchase a Dairy Queen in Mayfield Heights, Ohio from Whittaker Enterprises, Inc. (Traffis Dep. at 7-8, 21, 30-31, Supp. 32, 35, 36.) Shortly after their first meeting, JNT Properties received a letter from KeyBank "for discussion purposes only" that proposed a financing package including a first mortgage with an interest rate of "[f]ive year cost of funds plus 3.25%," indicating that the "cost of funds [is] currently 5.0%." (*Id.* at 32-33, Supp. 36-37; Def.'s Exh. 3, at JNT 000003, Supp. 50.) A subsequent Commitment Letter defined the variable interest rate on the loan in similar terms, specifying that the rate would be 3.25% above an "Index," which was then 5.11%. (Traffis Dep. at 40-42, Supp. 38-39; Def.'s Exh 26, at 1, Supp. 54.)

3. JNT Properties' counsel reviews the Note.

Approximately two weeks before closing on the loan, JNT Properties' counsel received and reviewed copies of the Note and other loan documents. (McSherry Dep. at 13-14, Supp. 26; Def.'s Exh. 36, Supp. 65.) The closing occurred in the offices of JNT Properties' counsel. (Traffis Dep. at 72-73, Supp. 41-42.) Before the documents were signed by Norm Traffis on behalf of JNT Properties, its counsel confirmed that the documents conformed to what he had previously reviewed and let Norm Traffis know "[i]t's okay to sign." (McSherry Dep. at 13-18, Supp. 26-27; Traffis Dep. at 75-76, Supp. 42.)

Four loans were executed at the closing, including: 1) a KeyBank 20-year variable interest rate loan of $370,350, which is memorialized by the Note at issue in this appeal; 2) a KeyBank "bridge" loan of $296,280; 3) a U.S. Small Business Administration ("SBA") 7A loan through KeyBank of $288,000; and 4) a seller's loan of $74,000. (Traffis Dep. at 8-9, 32, 80-81, 85-87, Supp. 32-33, 36, 43-44, 45; Moshier Aff., Exh. A, Supp. 18-22.)

By the time of the closing, the Index had increased to 5.68% — resulting in the "initial interest rate" of 8.93% (5.68% + 3.25%) on the first page of the Note. (Moshier Aff., ¶8 and Exh. A, p. 1, Supp. 16-17, 18.) During the closing, when Norm Traffis questioned why the rate was "so high," John Moshier of KeyBank explained that, unfortunately, the "index * * * had changed since the last time we had gotten together."

(Traffis Dep. at 77-78, Supp. 43.) No representative of JNT Properties asked any other questions about the loan at the closing. (*Id.*)

At the closing, Norm Traffis chose not to read the clause specifying that interest would be computed on a 365/360 basis before signing the Note. (Traffis Dep. at 77-78, 85, Supp. 43, 45.) There is no allegation in this case that KeyBank made any statements during the lending process that were inaccurate. (Traffis Dep. at 49, Supp. 40.)

4. JNT Properties' counsel confirms the Note is enforceable according to its terms.

On the date of closing, JNT Properties' counsel signed an Opinion of Counsel addressed to KeyBank in which he represented that he had "made such investigations as I deem necessary for the basis of my opinion[s] hereinafter set forth." (McSherry Dep. at 19-20, Supp. 27; Def.'s Exh. 7, Supp. 52-53.) This Opinion of Counsel was a condition precedent to closing on the loans. (McSherry Dep. at 19-20, Supp. 27.) After defining "Loan Documents" as including "the Note," JNT Properties' counsel offered the following opinion concerning the enforceability of the Loan Documents:

> The * * * Loan Documents have been executed and delivered by the Borrower * * * and constitute legal, valid and binding obligations of the Borrower * * * enforceable in accordance with their respective terms.

(Def.'s Exh. 7, at ¶5, Supp. 53.) JNT Properties' counsel admitted that, prior to signing this letter, he read the 365/360 clause in the Note, but asked no questions of KeyBank about it — believing that the manner in which interest would be computed "was kind of what the accountants needed to figure out[.]" (McSherry Dep. at 28-29, Supp. 28-29.)

When a commercial borrower asks about the 365/360 method, KeyBank explains the method to the borrower and the fact that it results in slightly more interest being paid to KeyBank. (Mosier Aff., ¶14, Supp. 17.)

5. The Note.

The Note contains two separate clauses that address the distinct subjects of: 1) the manner in which the variable rate of interest rate is set and, at five-year intervals, changed; and 2) the method for computing the dollar amount of interest due on an annual basis using that rate (the "annual interest"). The Note's variable rate of interest is set according to the terms of the Variable Interest Rate Clause, which specify that the rate will change at five-year intervals:

> **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 at http://www.fhlbsea.com (the "Index"). * * * 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.

(Moshier Aff., ¶8 and Exh. A, pp. 1-2, Supp. 16-17, 18-19.)

On the other hand, an Interest Computation Clause requires the following method for computing annual interest:

> 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.

(Moshier Aff., Exh. A, p. 1, Supp. 18.) JNT Properties' owners did not perceive any issues with this clause prior to retaining new counsel. (Traffis Dep. at 96, Supp. 46.)

B. Statement of the Case.

Represented by new attorneys, JNT Properties brought this putative class action more than 18 months after closing on the loan and filed an amended complaint on February 4, 2009. (*See generally* 1st Am. Compl., Supp. 1-15.) The First Amended Class Action Complaint ("Complaint") alleges that KeyBank's *compliance* with the Interest Computation Clause that JNT Properties' prior counsel opined was "enforceable in accordance with [its] terms" actually breaches the Note. (*Id.*, at ¶¶37-40, Supp. 8-9.) The Complaint asserts a claim for breach of contract seeking damages for alleged interest overcharges computed under the 365/360 method, as well as a claim for a declaratory judgment that KeyBank's use of the 365/360 method "violated" the terms of the Note. (*Id.* at ¶¶31-41, Supp. 7-9.)

KeyBank moved to dismiss the Complaint, emphasizing that the Note expressly required computation of interest on a 365/360 basis and, as a result, the use of that method could not be a breach. The Trial Court's 9/25/09 Journal Entry denied the motion. (9/25/09 JE, Appx. 20-27.) The Trial Court correctly rejected JNT Properties' argument that the Interest Computation Clause conflicted with the initial interest rate of

8.93% per annum, recognizing that the method for computing annual interest is a separate issue. (9/25/09 JE at 3-4, Appx. 22-23.) But the Trial Court perceived two "possible" interpretations of the Interest Computation Clause: 1) that the initial interest rate of 8.93% was intended "to be plugged in as the dividend over the devisor of 360" to determine annual interest under the 365/360 method; or 2) that "another number" was meant to be plugged in to the mathematical formula that would result in a "product of * * * 8.93%." (9/25/09 JE at 6, Appx. 25.) Because the Trial Court concluded that a choice between these "possible" interpretations required consideration of extrinsic evidence, it denied KeyBank's motion to dismiss.

Following discovery on the intentions of the parties to the Note, KeyBank moved for summary judgment and argued that the first interpretation identified in the 9/25/09 Journal Entry was, as a matter of law, the only reasonable interpretation. An affidavit from KeyBank Senior Vice President John Moshier explained that KeyBank's intent "was that the 365/360 method of calculating interest would be applied to the initial interest rate of 8.93% and the principal amount of $370,350.00 and also to subsequent interest rates and principal balances since the interest rate on the loan is adjusted every five years." (Moshier Aff. at ¶7, Supp. 16.) JNT Properties correctly conceded that the Note's Variable Interest Rate Clause foreclosed the second "possible" interpretation identified in the Trial Court's 9/25/09 Journal Entry. (6/14/10 Pl.'s Opp. at 14 ("JNT does not contend that the Formula 'was used to derive the initial interest rate of 8.93%. * * * JNT agrees that the initial interest rate is set forth in the "VARIABLE INTEREST

RATE" section[.]'").) The Trial Court granted KeyBank's motion, revisiting its earlier finding of ambiguity and concluding that "the contract (the Note) is clear that the Defendant intended to use the 365/360 method to calculate interest[.]" (9/8/10 JE, Appx. 19.) As a result, the Trial Court declared that the Note's "reference to the 365/360 method [for computing interest] * * * [will be] retained and enforced." (*Id.*)

JNT Properties filed a timely appeal and the Eighth District Court of Appeals reversed, reasoning that the Interest Computation Clause, read literally, is "unintelligible." (App. Op. at 8-11, Appx. 14-17.) Even though JNT Properties never argued that extrinsic evidence could be ignored based on the principle that contracts should be construed against the drafter,[2] the Eighth District refused to consider all extrinsic evidence on that basis. (*Id.* at 11, Appx. 17.) The Eighth District then declined to enforce the evident intent of the parties to use the 365/360 method to compute annual interest, based on its conclusion that a) the use of such a method would "alter" the meaning of "per annum" or b) "create" a different annual interest rate. (*Id.* at 11-12, Appx. 17-18.) This appeal followed.

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[2] *See* 11/22/10 Br. of Appellant at 14-16 (arguing only that extrinsic evidence could not be considered based on the perceived "plain and ordinary" meaning of "per annum").

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 Eighth District's conclusion that the 365/360 method either "alters" the meaning of "per annum" or "creates" a different rate rests on the premise that "per annum" addresses the subject of how annual interest is computed. That premise is fatally flawed. First, it strays from the limited "plain and ordinary" meaning of "per annum," which is "by the year" or "annually" and merely distinguishes a yearly accrual period from other periods, such as daily, monthly, biennially, etc. *Black's Law Dictionary* 1171 (8th Ed.2004) (defining "per annum" as "by, for, or in each year; annually"); *Patterson v. McNeeley*, 16 Ohio St. 348, 352 (1865) (use of "per annum" or "annually" signals that interest will accrue "annually" as opposed to "monthly" or "biennially").

Second, it ignores the three separate methods for computing annual interest from an annual rate used in the lending industry. The uneven number of days in a month under the Gregorian calendar makes it impossible to have both equal daily and equal monthly interest charges in a year. *Kreisler & Kreisler, LLC v. Natl. City Bank*, 657 F.3d 729, 732 (8th Cir.2011). As a result, three methods for computing annual interest from an annual interest rate developed:

- The 365/365 method (which computes equal daily charges);
- The 360/360 method (which computes equal monthly charges); and

- The 365/360 method — a "hybrid" that derives a daily interest factor using a 360-day year and applies that factor to the actual number of days the loan is outstanding in a year.

Id.; Thorndike, *Thorndike Encyclopedia of Banking & Financial Tables*, 11-1.2 (4th Ed.2001). It is manifestly unreasonable to presume that, by using "annual" or "per annum," the parties intended to choose among these three methods. *See* 2 Restatement of the Law 2d, Contracts, Section 203, Comment c (1981) ("[I]t is assumed that each term of an agreement has a reasonable rather than an unreasonable meaning."). All of these methods *use* the "per annum" rate to compute annual interest; none "alter" the meaning of "per annum" or "create" a rate different from the "per annum" rate used in the computation.

Third, it erroneously attempts to define "per annum" in isolation in violation of well-established principles of contract interpretation, which teach that "per annum" must be read in context. *See* pp. 14-16 *infra*. Indeed, federal courts and other state appellate courts agree "per annum" must be read in context and, when so read, does not conflict with the 365/360 method for computing annual interest. *See* pp. 16-18 *infra*. Finally, by concluding that "per annum" requires the use of a 365-day calendar year for computing the daily interest factor used to calculate annual interest, the Eighth District wrongly calls into question both the 365/360 method *and* the 360/360 method (each of which uses a daily interest factor based on a 360-day year). *See* pp. 19-20 *infra*.

1. Words must be read in context.

"A promissory note is a contract, and rules of contract interpretation apply to the interpretation of promissory notes." *Cranberry Fin., L.L.C. v. S&V Partnership*, 186 Ohio App.3d 275, 276, 2010-Ohio-464 (6th Dist.). The interpretation of a written contract is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. A cardinal rule of interpretation is that "the words used should be read in context and given their usual and ordinary meaning." *Carroll Weir Funeral Home v. Miller*, 2 Ohio St.2d 189, 192 (1965).

Context is critical because "any word or phrase * * * may be ambiguous" when considered "[i]n isolation." *Dominish v. Nationwide Ins. Co.*, 129 Ohio St.3d 466, 2011-Ohio-4102, at ¶¶7-8; *see also* 2 Restatement of the Law 2d, Contracts, Section 202, Comment d (1981) ("Meaning is inevitably dependent on context."). The relevant context includes other provisions of the contract. *Dominish*, 2011-Ohio-4102, at ¶8. Thus, a contract must be interpreted "as a whole" when determining the meaning of key terms. *Id.*; *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361 (1997) ("a writing * * * will be read as a whole, and the intent of each part will be gathered from a consideration of the whole").

2. "Per annum" is not used to define the method for computing interest.

Even if it were assumed that the "plain and ordinary" meaning of "per annum" could touch upon the subject of how interest is computed (and it cannot), this Court must

construe "per annum" in the context of a Note containing a separate contractual clause addressing the method for computing annual interest. The term "per annum" does not appear in the Interest Computation Clause, which provides the following method for computing the dollar amount of interest due:

> 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.

(Moshier Aff., Exh. A, p. 1, Supp. 18.) This clause plainly requires the use of the 365/360 method for computing interest (*see* Prop. of Law No. 2, *infra*), and forecloses an interpretation of "per annum" that governs the method for computing annual interest. *See Foster Wheeler Enviresponse, Inc.*, 78 Ohio St.3d 353, 363 (adopting an interpretation of the contract at issue that "affords meaning and purpose to all parts of the agreement").

The presence of "per annum" in the Variable Interest Rate Clause merely fulfills its limited, historical purpose by identifying the interest accrual period as an annual one. "Per annum" appears twice in the Variable Interest Rate Clause. (Moshier Aff., Exh. A, pp. 1-2, Supp. 18-19 (stating that the "Index currently is 5.68% per annum," and that "[t]he 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").) Since courts have recognized that "[s]imple interest can be computed

annually, semi-annually, biannually, or even daily, if the terms so dictate,"[3] the presence of "per annum" in this clause merely indicates that interest will accrue on an "annual" basis — as opposed to "a *monthly* or a *biennial* one." *Patterson*, 16 Ohio St. at 352 (emphasis in original). Nothing about this use of "per annum" suggests that the parties intended to use that term to determine the method for computing annual interest rather than the contract clause that directly addresses the subject of computing interest.

3. Other courts agree.

Indeed, every other state appellate court and federal court to address the issue agrees that a "per annum" interest rate does not address which method for computing annual interest applies, let alone conflict with the 365/360 method:

- *Kreisler & Kreisler, LLC v. Natl. City Bank*, 657 F.3d 729, 733 (8th Cir.2011) (construing identical 365/360 clause and holding that "the term 'per annum' is not inconsistent with the 365/360 method for calculating interest");
- *Bank of Am. v. Shelbourne Dev. Group, Inc.*, 732 F.Supp.2d 809 (N.D.Ill.2010) ("[T]here is no conflict between using the 365/360 method and stating that the applicable interest rates were 'per annum[.]'");
- *In re Market Ctr. E. Retail Properties, Inc.*, 433 B.R. 335, 354-55 (D.N.M. 2010) (no conflict between 365/360 method and 7.74% per annum interest rate);
- *Kleiner v. First Natl. Bank of Atlanta*, 581 F.Supp. 955, 962-63 (N.D.Ga.1984) ("[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.");

[3] *Viock v. Stowe-Woodward Co.*, 59 Ohio App. 3d 3, 7 (6th Dist.1989).

- *Hubbard Street Lofts LLC v. Inland Bank*, 2011 IL App (1st) 102640, __ N.E.2d __, ¶20 (construing identical 365/360 clause and holding that "use of the terms 'annual' and 'per annum' cannot reasonably be said to confuse the manner in which interest will be calculated.'");
- *RBS Citizens Natl. Assn. v. RTG-Oak Lawn, LLC*, 943 N.E.2d 198, 206 (Ill.App.2011) (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");
- *Asset Exchange II, LLC v. First Choice Bank*, 953 N.E.2d 446, 454 (Ill.App.2011) (construing identical 365/360 clause and holding that "use of 'per annum' in other sections of the note did not render the computation language found in the 'Payment" section ambiguous");
- *LDJ Invests., Inc. v. First Bank*, S.D.Ill. No. 11-695-GPM (Jan 11, 2012) (construing identical 365/360 clause and holding that "per annum" is consistent with the 365/360, 360/360, and 365/365 methods and does not identify which interest computation method applies).

The Eighth District's opinion below relied on *Ely Ents., Inc. v. FirstMerit Bank, N.A.*, 8th Dist. No. 93345, 2010-Ohio-80, for the conclusion that using the 365/360 method "alters" the "per annum" interest rate. (App. Op. at 11-12, Appx. 17-18.) That reliance was misplaced. The Eighth District panel in *Ely* did not squarely address whether defining a "per annum" interest rate conflicts with the 365/360 method. Rather, a 2-1 majority *assumed* such a conflict existed based on the bank's argument in that case that the 365/360 clause in the note at issue altered the meaning of "per annum." 2010-Ohio-80, at ¶10 ("FirstMerit claims that the parties agreed to alter the meaning of the term 'per annum' by agreeing to the 365/360 calculation method."). As explained above, however, the numerous federal and state appellate authorities that have squarely addressed the issue agree there is no conflict between a "per annum" interest rate and a

clause specifying the 365/360 method for computing annual interest. *Ely*'s unreasoned assumption thus does not (and cannot) undermine the sound analysis supplied by other jurisdictions — which confirms that the 365/360 method neither conflicts with nor "alters" a "per annum" interest rate.

Equally flawed is the Eighth District's conclusion in this case and in *Ely* that use of the 365/360 method somehow "creates" a different interest rate than the "per annum" rate specified in the Notice. (App. Op. at 12, Appx. 18, citing *Ely*, 2010-Ohio-80, at ¶11.) The court below acknowledged that the 365/360 method *uses* the annual interest rate stated in the Note to calculate annual interest. (*Id.* at 1, fn.1, Appx. 7 ("[Under the 365/360 method,] the bank first divides the *annual interest rate* by 360 to produce a daily interest factor."), citing *Republic of France v. Amoco Transport Co.*, 4 F.3d 997 (7th Cir. 1993). Because the 365/360 method *uses* the "per annum" rate, it does not (and cannot) "create" a different rate of interest.[4]

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[4] Some courts take the position that, while the 365/360 method does not alter the nominal "per annum" rate stated in the note, the slight increase in annual interest charges produced by that method may be expressed as a fractional (1/72) increase in the "effective" interest rate. *E.g., Kreisler & Kreisler*, 657 F.3d at 732; *Asset Exchange II, LLC*, 953 N.E.2d at 451. Importantly, the ability to mathematically express the difference in accrued annual interest through a fractional change in an "effective" interest rate does not give rise to a conflict between the nominal "per annum" rate stated in a promissory note and the 365/360 method. *Kreisler & Kreisler*, 657 F.3d at 732; *Asset Exchange II, LLC*, 953 N.E.2d at 454. Moreover, it inappropriately loads the dice to assume that any such difference is best expressed as an *increase* in the "effective" interest rate. Because the 365/360 method is prevalent in commercial lending, *see* p. 19, *infra*, it would be more consistent with lending practices to characterize annual interest computed under the 365/365 method as a *reduction* in the "effective" interest rate. *See Lake's Monthly Installment & Interest Tables*, 643 (4th Ed.1970) ("To change Ordinary [interest

4. The ruling below wrongly calls into question two commonly used methods for computing interest.

Finally, the inherent flaws in the Eighth District's analysis wrongly call into question two commonly used methods for computing interest. To conclude that the 365/360 method "alters" the "per annum" interest rate, the Eighth District surmised that "per annum" requires the use of a daily interest factor based on a 365-day year. App. Op. at 11-12, Appx. 17-18, citing *Ely*, 2010-Ohio-80, at ¶11; *Ely*, *supra*, at ¶10 (stating that a "year consists of 365 days, or 366 in a leap year"). Yet only one of the three methods for computing annual interest — the 365/365 method — uses a daily interest factor based on the 365-day year. The upshot is a default rule within the lending industry that interest "is usually computed on the basis of * * * 360 days one year." *Lake's Monthly Installment & Interest Tables*, 643 (4th Ed.1970). By concluding that a different year is intended any time an interest rate is described as "per annum" (the accrual period for all long-term loans), the Eighth District's decision upsets settled lending practices — calling into question both the 365/360 and 360/360 methods for computing annual interest.

This disruption is particularly acute in the commercial context, since the 365/360 method is the most common method in commercial lending. *Kreisler & Kreisler*, 657 F.3d at 732; Moshier Aff. at ¶4, Supp. 16 ("The 365/360 method of calculating interest is very common in commercial loans both at KeyBank and in the banking industry."). As at

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computed under the 365/360 method] to Exact Interest [computed under the 365/365], divide Ordinary Interest by 73 and subtract the quotient from the Ordinary Interest and the balance will be the Exact Interest.")

least one commentator has recognized, the prevalence of the 365/360 method in commercial loans supports an inference that this method is intended by the parties even in the absence of a contractual clause mandating its use.[5] At a minimum, however, established lending practices refute the Eighth District's unwarranted conclusion that "per annum" requires the use of a 365-day year for purposes of deriving a daily interest factor to use in calculating annual interest.

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. (2 Restatement of the Law 2d, Contracts, Section 202, Comment d (1981), followed.)

The Eighth District further erred in failing to enforce the evident intent of the parties, as expressed in the Interest Computation Clause, to compute annual interest on a 365/360 basis. By eschewing an inquiry into the intent of the parties for a literal reading of that Clause, the court below violated the fundamental tenet of contract interpretation that contractual language possessing a definite legal meaning is enforceable — even if that meaning can be expressed in a more direct fashion. Because the Interest Computation Clause, however imperfectly worded, plainly refers to a single method for computing annual interest, it possesses a definite legal meaning and is unambiguous.

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[5] Bronstein, *Legal Aspects of the Use of "Ordinary Simple Interest,"* 40 U. Chi. L. Rev. 141, 153 (1972) ("When use of the 365/360 method is widespread, commercial borrowers should, absent agreement to the contrary, be held to have intended its application despite lack of actual knowledge.").

This Court should reinstate the Trial Court's judgment that the 365/360 method must be "retained and enforced." (9/8/10 JE, Appx. 19.)

1. Terms that possess a definite meaning are unambiguous.

The overarching 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.*, 38 Ohio St.2d 244 (1974), at paragraph one of the syllabus. Because the intent of the parties is paramount, all contract interpretation rules are applied with a view towards determining and enforcing the parties' intent. "The rules for the construction of contracts are all subordinate to the cardinal principle that the intention of the parties, to be gathered from the whole instrument, must prevail unless it is inconsistent with some established principle of law." 11 Williston on Contracts, 23-25, Section 30:2 (4th Ed.1999).

One consequence of this principle is that, "[a]s a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶11. As the leading Williston treatise explains, "[w]hatever 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." 11 Williston on Contracts, 25, Section 30:2 (4th Ed.1999). Thus, the Restatement teaches that courts engaged in contract interpretation may subordinate rules of grammar and

disregard misplaced words to enforce the intentions of the parties as revealed by the context in which the contractual clause appears. 2 Restatement of the Law 2d, Contracts, 88-89, Section 202, Comment d (1981) ("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.").

This Court endorsed an identical interpretive approach in *Dominish v. Nationwide Ins. Co.*, 129 Ohio St.3d 466, 2011-Ohio-4102. In *Dominish*, this Court examined contractual language that "could have been written more clearly" and enforced the evident intent of the parties as expressed in "language clear enough to be plainly understood." *Id.*, 2011-Ohio-4102, at ¶8. In light of these principles, this Court's task is "to objectively and thoroughly examine the writing to attempt to ascertain its meaning." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, at ¶11.

2. The Interest Computation Clause has a definite meaning.

The Interest Computation Clause specifies the following method for computing the dollar amount of interest due:

> 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.

(Moshier Aff., Exh. A, p. 1, Supp. 18.) As the federal Eighth Circuit Court of Appeals correctly recognized when construing identical language, this sentence "is comprised of two independent clauses." *Kreisler & Kreisler*, 657 F.3d at 732. "The first states that 'the annual interest rate for the Note is computed on a 365/360 basis." *Id.* "The second clause specifies exactly how a '365/360 basis' works: by calculating a daily rate using the annual rate divided by a 360 day year and then multiplying the daily rate by the number of days the balance was outstanding and by the balance itself." *Id.* And while "the payment provision may have been clearer had it stated that the 'annual interest,' rather than the 'interest rate,' is calculated on a 365/360 basis," its "grammatical structure and precise explanation of the interest calculation * * * is not uncertain nor indefinite and can be enforced." *Id.*; *accord Asset Exchange II, LLC*, 953 N.E.2d 446 (identical 365/360 language is unambiguous and enforceable); *Hubbard Street Lofts LLC*, 2011 IL App (1st) 102640, __ N.E.2d __, ¶¶20-21 (same).

The fact that no court or party has offered an alternative, reasonable construction of the Interest Computation Clause during this litigation underscores the absence of any ambiguity in that provision. While the Trial Court denied KeyBank's motion to dismiss based on a "possible" interpretation of that Clause as explaining the source of the initial interest rate of 8.93% (9/25/09 JE at 6, Appx. 25), such an interpretation is inconsistent with the Variable Interest Rate Clause — which directly addresses the mechanism for setting the 8.93% initial rate. Accordingly, the Trial Court's Journal Entry granting summary judgment correctly revisited its finding of ambiguity and held that "the contract

(the Note) is *clear that the Defendant intended to use the 365/360 method to calculate interest*[.]" (9/8/10 JE, Appx. 19 (emphasis added).)

On appeal, the Eighth District did not offer a different construction of the Interest Computation Clause. Rather, the panel simply refused to enforce the Interest Computation Clause based on its conclusion that, read literally, the clause is "unintelligible." (App. Op. at 11, Appx. 17.) Such a literal reading strays from settled principles of contract interpretation. "There is no surer way to misread any document than to read it literally[.]" *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring). This Court's precedents therefore require only that the relevant contractual language "can be given a definite legal meaning." *Galatis*, 2003-Ohio-5849, at ¶11; *Porterfield*, 2005-Ohio-3095, at ¶11. There is no requirement that this legal meaning be perfectly expressed, *Dominish*, 2011-Ohio-4102, at ¶8, and courts must "give reasonable effect to every provision in the agreement." *Stone v. Nat'l City Bank*, 106 Ohio App.3d 212, 221 (1995); *see also* 2 Restatement of the Law 2d, Contracts, 93, Section 203(a) (1981) (explaining that "an interpretation which gives reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect").

In the end, the Interest Computation Clause refers to one, and only one, of the recognized methods for computing annual interest (the 365/360 method) and includes a mathematical formula consistent with that method. *Kreisler & Kreisler*, 657 F.3d at 732; *LDJ Invests., Inc. v. First Bank*, S.D.Ill. No. 11-695-GPM (Jan. 11, 2012) (identical

365/360 language is unambiguous and enforceable even though it is "clumsy" or "poorly constructed"). Because the Interest Computation Clause references and describes a single method for computing annual interest, it possesses a definite legal meaning and is unambiguous and enforceable.

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.**

The limited function of "per annum," the historical use of three separate methods for computing interest and the Note's express reference to only one of those methods are sufficient to warrant reinstatement of the summary judgment in KeyBank's favor on the grounds that the Note is unambiguous and requires the use of the 365/360 method for computing interest. Should this Court conclude that the Note is ambiguous, however, it should also address this Proposition of Law and hold that the Eighth District erred in refusing to consider available extrinsic evidence on the theory that contractual ambiguities are construed against the drafter. The extrinsic evidence in the record with respect to this particular loan shows, as a matter of law, that the parties intended to apply the 365/360 method for computing interest.

The rule of construction against the drafter "is generally said to be a rule of last resort and is applied only where other secondary rules of interpretation have failed to elucidate the contract's meaning." 11 Williston on Contracts 480, Section 32:12 (4th

Ed.1999); *accord Malcuit v. Equity Oil & Gas Funds, Inc.*, 81 Ohio App.3d 236, 240 (9th Dist.1992) (rule of construction against the drafter applies "only after primary rules have been applied and the contract's meaning remains uncertain or ambiguous"). It is "merely a tie-breaker" and does not foreclose the ability of either party "to introduce evidence to disambiguate" the contract. *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 366 (7th Cir.1990).

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*, 96 Ohio App.3d 611, 615 (3d Dist.1994). Admissible extrinsic evidence includes (among other things) the surrounding circumstances when the contract was executed. *United States Fid. & Guarantee Co. v. St. Elizabeth Med. Ctr.*, 129 Ohio App.3d 45, 56 (2d. Dist.1998), citing *Blosser v. Carter*, 67 Ohio App.3d 215, 219 (4th Dist.1990). And a contract is construed against the drafter only if the admissible extrinsic evidence fails to reveal the parties' intent. *Cline*, 96 Ohio App.3d at 615; *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, while the Eighth District referred to "an ambiguity" in the Note, it did not identify what in the Note was ambiguous. (App. Op. at 11-12, Appx. 17-18.) The only other potential meaning of the Interest Computation Clause identified at any point in this litigation is the "possible" interpretation alluded to by the Trial Court that "another

number" was meant to be plugged in to Interest Computation Clause, which would result in a "product of * * * 8.93%." (9/25/09 JE at 6, Appx. 25.)

Even if the plain language of the Note did not bar this interpretation (and it does), the available extrinsic evidence would refute it:

- Correspondence established that the initial interest rate was set by adding 3.25% to the Index — not by using the Interest Computation Clause. (Def.'s Exh. 3, at JNT 000003, Supp. 50; Def.'s Exh 26, at 1, Supp. 54.)

- The parties' discussions at the loan closing confirmed that the 8.93% initial interest rate was not set through the formula specified in the Interest Computation Clause. (Traffis Dep. at 77-78, Supp. 43 (KeyBank responded to JNT Properties' inquiry as to why the rate of 8.93% was "so high" by stating that the "index * * * had changed since the last time we had gotten together.")

- KeyBank's intent in including the Interest Computation Clause was to apply the 365/360 method to the initial interest rate of 8.93% and principal amount of $370,350.00, and also to subsequent interest rates and principal balances since the interest rate is adjusted every five years. (Moshier Aff., ¶7, Supp. 16.)

- Norm Traffis chose not to read the Interest Computation Clause before signing the Note, relying on the representation of JNT Properties' counsel that "it was okay to sign." (Traffis Dep. at 76-78, 85, Supp. 42-43, 45.)

- Although JNT Properties' litigation counsel contends the Interest Computation Clause is unenforceable and should be given no meaning, its prior lending counsel conducted all investigations that he deemed necessary and opined that the Note was "enforceable in accordance with [its] terms." (Def.'s Exh. 7, at ¶5, Supp. 53.)

- If Norm Traffis, Jeff Traffis, Tom Dragmen, or JNT Properties' counsel had asked about the Interest Computation Clause, KeyBank would have "explain[ed] the 365/360 method of computing interest" — including the fact that "it results in slightly more interest being paid to KeyBank[.]" (Mosier Aff., ¶¶12-15, Supp. 17.)

In short, even if the Interest Computation Clause is ambiguous, the extrinsic evidence in this case is only consistent with an interpretation that requires the use of the 365/360 method when computing annual interest. As a result, the use of 365/360 method is not a breach of contract.

CONCLUSION

For all the above reasons, KeyBank respectfully requests that this Court reverse the judgment of the court of appeals and reinstate the Trial Court's order granting summary judgment in favor of KeyBank.

Respectfully submitted,

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I hereby certify that a copy of the foregoing **Merit Brief of Appellant KeyBank National Association** has been served this 19th day of January, 2012, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX

ORIGINAL

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.

NOTICE OF APPEAL OF APPELLANT KEYBANK NATIONAL ASSOCIATION

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NOTICE OF APPEAL OF APPELLANT KEYBANK NATIONAL ASSOCIATION

Appellant KeyBank National Association hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Court of Appeals Case No. 95822 on June 30, 2011.

This case is one of public or great general interest.

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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.

---

[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

[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