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.

REPLY BRIEF OF APPELLANT KEYBANK NATIONAL ASSOCIATION

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I. INTRODUCTION

This appeal is not about whether KeyBank is charging interest at the *rate* specified in the Note (Opp. Br. at 1), but whether KeyBank's *method* for computing annual interest accrual *using that rate* is the required method under the Note. No matter how often JNT Properties attempts to confuse the two issues, the annual interest rate remains a separate issue from the method for computing annual interest. Both courts below acknowledged there are three separate methods for computing accrued interest from an "annual," or "per annum," rate,[1] and there is no dispute that the Note refers to only one such method — the 365/360 method. In short, far from seeking to "rewrite" the Note, KeyBank offers a framework for analyzing breach of contract claims in 365/360 putative class action lawsuits that: gives reasonable meaning to every provision in the contract; interprets the contract as a whole; and enforces the plain and ordinary meaning of *both* the 365/360 language *and* "per annum." This Court should reject JNT Properties' attempt to manufacture a non-existent conflict between "per annum" and the 365/360 method for computing interest, and hold that the Note's reference to the 365/360 method is enforceable and fatal to JNT Properties' breach of contract claim.

II. ARGUMENT

JNT Properties merges KeyBank's three propositions of law into a single argument. To the extent possible, KeyBank will extract those arguments relevant to each

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[1] *See* App. Op. at 1 fn. 1, Merit Appx. 7; 9/25/09 JE at 3-4, Merit Appx. 23.

proposition of law accepted by this Court and address those propositions below in roughly the order in which each are addressed in JNT Properties' Opposing Brief ("Opp. Br.").

A. The Interest Computation Clause Requires Accrual of Interest on a 365/360 Basis.

KeyBank's second proposition of law established that: 1) the critical question in determining whether a contract term is enforceable is whether it has a definite legal meaning (Merit Br. at 20-22); 2) the 365/360 language in the Note (the "Interest Computation Clause"), which both identifies and explains the 365/360 method for computing interest, has such a meaning (*id.* at 22-23); and 3) there is no ambiguity in that language, because there is no alternative, reasonable construction of it (*id.* at 23-25).

JNT Properties does not dispute that the critical question is whether the Interest Computation Clause possesses a definite legal meaning. (Opp. Br. at 9.) Nor does JNT Properties argue for an alternative construction of the Clause. Instead, JNT Properties asks this Court to conclude that this Clause is unenforceable because it is "unintelligible as a matter of both mathematics and logic[.]" (Opp. Br. at 6.)

The fundamental flaw in JNT Properties' position is the assumption that the Interest Computation Clause consists of a mathematical equation for computing an annual interest rate. (Opp. Br. at 5-6.) As a federal appellate court recently recognized, the provision actually contains "two independent clauses," not one mathematical equation — the first clause references the "365/360 basis," and "[t]he second clause specifies

exactly how a '365/360' basis works." *Kreisler & Kreisler LLC v. Natl. City Bank*, 657 F.3d 729, 732 (8th Cir.2011).

In other words, the language following the semicolon in the Interest Computation Clause merely explains the mechanics of a "365/360 basis" interest calculation — *viz.*, "apply[] 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, Merit Supp. 18.) Thus, to calculate annual interest under the Note, the applicable annual interest rate (currently, 8.93%) is divided by 360 days, and then multiplied by the outstanding principal, which is then multiplied by 365 or 366 days (depending on whether the year is a leap year). JNT Properties' owner conceded this calculation results in a dollar amount of interest (Traffis Dep. at 105), and it is completely consistent with other descriptions of the 365/360 method. *See, e.g.,* App. Op. at 1, fn. 1, Merit Appx. 3 (in the 365/360 calculation, "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"), quoting *Republic of France v. Amoco Transport Co.*, 4 F.3d 997 (7th Cir.1993); 9/25/09 JE at 4 (same), Merit Appx. 23.

To be sure, the language before the semicolon does state that "[t]he annual interest rate for this Note is computed on a 365/360 basis." (Opp. Br. at 6.) The reference to a "rate" in that language may be, as some courts have recognized, "clumsy." *LDJ Invests., Inc. v. First Bank*, S.D.Ill. No. 11-695-GPM, 2012 WL 86537, at *3 (Jan. 11, 2012). But

the explanation of calculating annual interest on a 365/360 basis that follows clarifies any confusion caused by the reference to a "rate." Therefore, when read as a whole, the Interest Computation Clause's "grammatical structure and precise explanation of the interest calculation * * * is not uncertain nor indefinite and can be enforced." *Kreisler & Kreisler LLC,* 657 F.3d at 733; *see also* Merit Br. at 23-25 (collecting cases holding that identical 365/360 language is enforceable).

Contrary to JNT Properties' assertions, failing to give independent meaning to "rate" does not "rewrite" the Note. (Opp. Br. at 1-2.) KeyBank established in its Merit Brief that this Court's precedents, leading treatises and the Restatement of the Law 2d, Contracts require an interpretation that gives reasonable effect to each contractual term — not a literal interpretation. (Merit Br. at 21-22, 24.) For all its rhetoric, JNT Properties cites no authorities holding otherwise. Indeed, other jurisdictions that address "unintelligibility" refuse to hold that a contractual provision is unenforceable based on a literal reading, if a court can give the language a practical and reasonable interpretation. *E.g., United States v. Data Translation, Inc.*, 984 F.2d 1256, 1260 (1st Cir.1992) (contractual provisions that are "unintelligible if read literally" may be given "a *practical* interpretation which makes them intelligible") (emphasis in original). Such a practical and reasonable construction is available here — the only conceivable reason to reference a "365/360 basis," and include a mathematical calculation consistent with that method, is that the parties intended for annual interest to accrue on a 365/360 basis. (Merit Br. at

23-25.) The Note's reference to the 365/360 method should therefore be "retained and enforced." (9/8/10 JE, Merit Appx. 19.)

Finally, KeyBank's reformation counterclaim is consistent with this interpretation. The counterclaim alleges that the "actual intent of the parties to the Note was to calculate interest due and owing under the Note on a 365/360 basis," and that "the Note reflects [this] method of interest calculation and permits KeyBank to charge interest on a 365/360 basis." (Defs.' Ans. & Counterclaim at 9, ¶¶6-7, Opp. Supp. 10.) Thus, the counterclaim applies only "[t]o the extent the language of the Note is interpreted to prevent KeyBank from charging interest" on a 365/360 basis. (*Id.* at ¶¶9, 11, Opp. Supp. 10.) Such a conditional counterclaim in no way undermines KeyBank's position that the intent of the parties as reflected in the Note's language permits KeyBank to charge interest on a 365/360 basis.

B. Such Accrual does not Conflict with a "Per Annum" Rate of Interest.

KeyBank's first proposition of law states: "A description of an interest rate as 'per annum' does not require the use of any particular method for computing interest." (Merit Br. at 12.) Instead of addressing that proposition, JNT Properties manufactures a false conflict between the Interest Computation Clause and a "per annum" interest rate. This "conflict" theory erroneously dismisses centuries of lending practice as irrelevant (Opp. Br. at 14-15); interprets "per annum" in isolation (*id.* at 10); and wrongly asserts, in reliance on inapposite authorities addressing prejudgment interest, that no method for

computing interest is needed to calculate annual interest under a mortgage note (*id.* at 10-11).

In other words, JNT Properties attempts to create a conflict between the Interest Computation Clause and "per annum" by sidestepping the critical question of what "per annum" means in the context of a mortgage note specifying that interest will be computed on a 365/360 basis. Because JNT Properties' arguments do not address the meaning of "per annum" in context, they cannot establish a conflict between the Interest Computation Clause and "per annum" — much less that a general reference to a "per annum" rate would prevail over a specific definition of the method for computing interest. *See* KeyBank Merit Br. at 14 (collecting cases establishing that contract terms are read in context and a contract must be interpreted as a whole). The fatal flaws in each step of JNT Properties' conflict theory include the following:

First, contrary to JNT Properties' assertions, this Court cannot ignore the three separate methods for computing "per annum" interest used for hundreds of years within the lending industry — 365/365, 360/360, and 365/360. (Merit Br. at 12-13.) These methods add necessary context to a consideration of what "per annum" means in a promissory note and are the type of general "real world" knowledge that does not require formal judicial notice.[2] That is why both courts below (and every authority addressing the

[2] *See* Evid.R. 201(A) (explaining that the evidentiary "rule governs only judicial notice of adjudicative facts; i.e., the facts of the case"); McCormick, *Evidence*, Section 332 (4th Ed.1992) (explaining that judges need not follow the constraints of the rules relating to judicial notice when acting upon "legislative facts" because judges "must, in the nature of

meaning of per annum cited in KeyBank's Merit Brief, *see id.* at 16-17) discuss these methods without pausing to consider whether judicial notice is appropriate, and (presumably) why JNT Properties never objected below to either court's analysis of the methods for computing "per annum" interest. (*E.g.*, App. Op. at 1, fn. 1, Merit Appx. 3; 9/25/09 JE at 4 (same), Merit Appx. 23.) In any event, JNT Properties' assertion that the methods are not in the record is wrong — all three appear in the Affidavit of KeyBank Senior Vice President John Moshier. (Moshier Aff. at ¶¶4, 9, Merit Supp. 16-17.)

Second, it is not true that these methods for computing interest "say nothing about to what JNT agreed." (Opp. Br. at 14.) Rather, the existence of three separate methods that *use* the "per annum" interest rate to compute annual interest shows that none *alter* that rate, and that "per annum" cannot be read to require the use of any particular method. (Merit. Br. at 12-13, 16-17 (collecting cases holding that "per annum" does not address the method for computing annual interest).) In other words, the very presence of three methods for calculating "per annum" interest demonstrates there is nothing "ordinary" (Opp. Br. at 7) about the definition of "per annum" urged by JNT Properties.

Third, JNT Properties' conflict theory depends on the false assumption that the ordinary meaning of "per annum" — i.e., "by the year," or "annually" — refers to a "year" of 365 days. (Opp. Br. at 10.) Not only does this assumption make no sense in a lending world where two of the three methods for computing "per annum" interest rely

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things, act either upon knowledge already possessed or upon assumptions, or upon investigation of the pertinent general facts, social, economic, political, or scientific").

on a daily interest factor derived from a 360-day year (Merit Br. at 19), but also JNT Properties cites no authority that supports it. Contrary to JNT Properties' insinuations, KeyBank never conceded the point. While KeyBank acknowledged that a "year" *may* consist of 365 days, it never agreed that "per annum" *must* refer to a 365-day year. (Ans., ¶21, Opp. Supp. 4.) And the only other authority JNT Properties cites is an inapposite case addressing the meaning of "calendar year" in a statute concerning the requirements to appear on a ballot for political office. *See State ex rel. Gareau v. Stillman*, 18 Ohio St.2d 63, 65 (1969) ("calendar year" as used in R.C. 2313.191 "designate[s] a period of time from January 1 through December 31").

Fourth, it is not true that "[k]nowledge of a 'per annum' rate, and the amount of money to which the rate is applied, is all that is necessary to compute the amount of interest owed for that year." (Opp. Br. at 10.) Rather, the authorities cited by JNT Properties establish at most that, in certain contexts where the method for calculating interest is not specified (such as in prejudgment interest calculations), courts have discretion when selecting the appropriate method for computing interest. The Seventh Circuit Court of Appeals opinion cited by both courts below when discussing the methods for computing interest illustrates this point. *See* App. Op. at 1, fn. 1, Merit Appx. 3, quoting *Republic of France v. Amoco Transport Co.*, 4 F.3d 997 (7th Cir.1993); 9/25/09 JE at 4 (same), Merit Appx. 23.

Republic of France addressed a dispute over the correct method for calculating prejudgment interest. The plaintiff argued that such interest should be calculated on a

365/360 basis; the defendant argued that the 360/360 method applied, believing the Seventh Circuit's mandate in a previous appeal that the plaintiff was "entitled to prejudgment interest at the rate of 12.31% *per annum*" required this result. *Id.* at *2 (emphasis in original). Rejecting the position that a "per annum" rate required the use of any particular method for computing interest, the Seventh Circuit explained that a district court's choice of the method for computing interest is "a matter of discretion[.]" *Id.* The Seventh Circuit then held that the district court could have chosen either method without abusing its discretion. *Id.* at *4 ("Each bank, each borrower, and each loan may be different. Amoco may or may not have obtained loans under either interest method, so we cannot say that the use of either method would be patently erroneous[.]").

Indeed, JNT Properties' own authorities demonstrate that, in practice, prejudgment interest calculations actually use one of the three methods. For instance, *Alston v. Northstar La Guardia LLC*, S.D.N.Y. No. 10-Civ.-3611(LAK)(GWG), 2010 WL 3432307 (Sept. 2, 2010), did not calculate prejudgment interest by using only the "per annum" rate and the amount of the principal. Rather, the district court actually applied the 365/365 method to calculate prejudgment interest — it derived "an interest rate of $2.15 per day"[3] by dividing the applicable "per annum" rate by a 365-day year. *Id.* at *4; *compare* 9/25/09 JE at 4, Merit Appx. 23 (explaining that, under the 365/365 method,

[3] That district courts, as well as banks, occasionally refer without objection to a "rate" when calculating the amount of interest due further refutes JNT Properties' assertion that such a "clumsy" reference makes the calculation "unintelligible."

"the bank simply divides the annual interest rate by 365 to get a daily interest factor, applied to each day of the year") (internal quotation omitted). *Accord In re Mtge. Lenders Network USA, Inc.*, 406 B.R. 213, 248, fn. 1 (Bankr.D.Del.2009) (performing a 365/365 calculation to derive a "daily prejudgment rate" of "$560.78 per day" by dividing the "per annum" rate by 365 days).

Finally, far from supporting JNT Properties, this Court's opinion in *Hamilton v. Ohio Savings*, 70 Ohio St.3d 137 (1994), simply underscores KeyBank's point that it is necessary to know both the rate and the method to calculate annual interest accrual on a loan. *Hamilton* did not turn on an alleged conflict between a "per annum" rate and a 365/360 interest calculation. Rather, *Hamilton* involved home mortgage loans with conflicting "Regulation Z" consumer disclosure notices (12 C.F.R. §226.1). One disclosure referred to the 365/360 method; the other referred to the 360/360 method. *Id.* at 138. Based on that conflict, this Court reversed summary judgment in favor of the bank on all "common law claims" (including breach of contract) — holding that "[w]hether the method of interest calculation * * * [was] disclosed is a question of fact" precluding summary judgment. *Id.* at 140. *Hamilton* is thus entirely consistent with a lending world that includes multiple methods for calculating annual interest accrual, and holds only that conflicting descriptions of the method required under a particular note will create an issue of fact. No such conflict exists here.

C. In any Event, the Note Cannot be Construed Against the Drafter Without Analysis of Extrinsic Evidence.

As explained above, JNT Properties does not defend the Eighth District's conclusion that the Note is ambiguous by proffering an alternative construction of the Clause. Since JNT Properties has not pointed to any reasonable alternative construction of the Interest Computation Clause (and there is none), this Court should hold that the Note is unambiguous and requires calculation of annual interest on a 365/360 basis. If this Court were to conclude that the Note is ambiguous, however, then it should adopt KeyBank's third proposition of law and hold that a court cannot resort to the rule of construction against a drafter where extrinsic evidence clarifies the intent of the parties.

KeyBank's Merit Brief demonstrated that: a) Ohio appellate authorities that have analyzed the issue and the Williston treatise agree that a contract may be construed against the drafter only when the available extrinsic evidence fails to reveal the parties' intent; and b) the only "possible" alternative interpretation of the Interest Computation Clause identified by any court in this case is refuted by the extrinsic evidence. (Merit Br., at 25-26.) JNT Properties responds in a conclusory footnote by arguing that courts may construe the contract against the drafter without resorting to extrinsic evidence in "certain circumstances," and that it is unnecessary to determine whether the extrinsic evidence rebuts the "possible" alternative interpretation identified below because summary judgment is always inappropriate when a contract is ambiguous. (Opp. Br. at 8, fn. 6.) Both arguments are meritless, as JNT Properties' own authorities demonstrate.

The sole authority JNT Properties cites for the proposition that courts may construe ambiguous contract language against the drafter in "certain circumstances" without resorting to extrinsic evidence is *Van Horn v. Nationwide Property & Cas. Ins. Co.*, N.D. Ohio No. 1:08-cv-605, 2009 WL 1255115 (May 4, 2009). Yet the statement to that effect in *Van Horn* contains no analysis and is pure *dicta* unnecessary to the court's resolution of the breach of contract claim, since the district court ultimately concluded that both the plain language of the agreement and the extrinsic evidence pointed in the same direction. *See id.* at *9 (holding that "[b]oth the four corners of the settlement agreements and the extrinsic evidence show that the parties did not intend the settlement agreements to cover rental-car benefits."). As such, it is far too thin a reed on which to rest a rule of law that conflicts with the holdings of every Ohio appellate court to analyze the issue and the teaching of the Williston treatise. Moreover, even if the district court were correct in asserting that extrinsic evidence may be ignored in "certain circumstances," the only "circumstances" identified in *Van Horn* were ambiguities in: 1) indemnity contracts; or 2) contracts of insurance. *Id.* at *5-6. Neither "circumstance" is present here. Therefore, even if *Van Horn*'s dictum were an accurate statement of the law, it would not apply to JNT Properties' Note.

Indeed, the only relevance of *Van Horn* to this appeal is that it concisely and correctly rejects JNT Properties' *other* conclusory argument — that summary judgment is inappropriate whenever a contract is ambiguous. As *Van Horn* correctly notes, while an ambiguous provision creates an issue of fact concerning the parties' intent, that issue,

"like any other factual issue, can be resolved at the summary judgment stage when there are no genuine issues of material fact[.]" *Id.* at *7, citing *Parrett v. Am. Ship Bldg. Co.*, 990 F.2d 854, 858 (6th Cir.1993). Here, the extrinsic evidence refutes the only other "possible" interpretation identified by the Trial Court — that the Interest Computation Clause might derive the 8.93% initial rate of interest. (Merit. Br. at 26-28.) Thus, there is no genuine issue of material fact and KeyBank would be entitled to summary judgment even if the Note were ambiguous.

III. CONCLUSION

For all of the above reasons, this Court should 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 **Reply Brief of Appellant KeyBank National Association** has been served this 30th day of March, 2012, by U.S. Mail, postage prepaid, upon the following:

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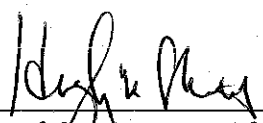

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