NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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November 28, 2022

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Re: ***Dan Shannon v. Curtis O. Smalls II,***
Case No. CL–2022-7030

Dear Counsel:

In this breach of contract lawsuit involving two promissory notes purportedly backing loans, the general issue is whether they are enforceable. Specifically, is the April 13, 2019, note usurious? If so, does the lender forfeit the loaned principal along with the usurious interest he charged, as a penalty? As to the March 25, 2019, note, is it enforceable?

The Court finds the April 13, 2019, note void for usuriousness. However, the lender may recover the principal he extended to the borrower on that note. To make this finding, the Court reconciles two statutes in facial conflict:

> "Any [usurious contract] is void and no person shall have the right to collect, receive, or retain any principal, interest, fees, or other charges in connection with the contract."

OPINION LETTER

VA. CODE ANN. § 6.2-303(F),

and,

"If the court determines that [a] contract is usurious, judgement shall be rendered only for the principal sum."

VA. CODE ANN. § 6.2-304.

The former statute reads that a usurious lender *cannot* collect his principal; the latter reads that he can *only* recover principal. However, the Court can reconcile the two. For the reasons stated herein the Court holds a usurious lender may recover his principal from a borrower, but not interest or other fees.

Unlike the usurious April 13, 2019, note, the March 25, 2019, note contained a lawful interest rate. However, it is unenforceable for lack of consideration. It is also unenforceable because it is not really a note supporting a contemporaneous loan; it was a gratuitous declaration inaccurately recharacterizing prior gifts as loans.

I. OVERVIEW.

Dan Shannon ("Shannon") and Curtis Smalls II ("Smalls") are former friends who met as inmates in the Fairfax County Detention Center. Neither are in the lending business. Shannon alleges that on or about December 14, 2014, at a time when he was released from jail and Smalls remained incarcerated, Shannon began extending a series of small payments to Smalls. Shannon testified that the payments were always loans; Smalls testified that he thought they were gifts between friends.

Three years later, on December 31, 2017, Shannon and Smalls executed a promissory note declaring the payments Shannon made to Smalls since 2014 were loans, repayable with interest. This note is not before the Court to adjudicate.

On March 25, 2019, Shannon and Smalls executed a second promissory note (the "March 2019 Note") wherein Smalls again promised to repay the money Shannon previously conveyed to him. The March 2019 Note set the interest rate at "the published Visa Card Daily Variable Rate." The parties do not dispute that this rate averaged at 8.75%.[1] The repayment date in the note was April 29, 2020. However, Smalls made no payment on this note. Shannon alleges that the principal amount owed is $4,310.59, plus interest.

[1] Technically, Smalls does not dispute that the 8.75% was what Visa charged Shannon on his own credit card. He argues however, that since this rate is unique to Shannon it renders the March 2019 Note unenforceable due to a missing material term. However, the Court is persuaded the rate was reasonably ascertainable by the parties.

On April 13, 2019, the parties executed a third promissory note (the "April 2019 Note") wherein Shannon agreed to lend Smalls future money. Per the note, Smalls would repay the loan with interest at the "daily published American Express Card Daily Rate." The parties do not dispute that this rate averaged 21.52%.[2] Shannon claims he loaned Smalls $4,332.91 under this note with a June 30, 2019, repayment date. However, Smalls made no payments.

Shannon sued Smalls for breach of contract under Virginia Code § 8.01-27 for each note. Shannon also seeks to recover attorney fees related to these claims.

In response, Smalls denies that he is liable and asserted several affirmative defenses: (1) duress; (2) satisfaction and accord; (3) usury; and (4) public policy.

II. ANALYSIS.

This Court finds the March 2019 Note and the April 2019 Note are for separate purported loans from Shannon to Smalls. The former represented funds Shannon previously extended to Smalls; the latter for funds Shannon planned to extend to Smalls. Therefore, the Court will consider each promissory note separately in determining whether each note is enforceable and whether Shannon may recover for a breach of contract claim under each note.

A. The April 2019 Note is a Usurious Contract; Shannon May Recover Only the Principal Sum Loaned to Smalls.

"Except as otherwise permitted by law, no contract shall be made for the payment of interest on a loan at a rate that exceeds 12 percent per year." VA. CODE ANN. § 6.2-303(A). While there are many exceptions to this general principle in the statute, none apply in this case. The alleged loan in the present case was made between Shannon and Smalls—individuals unlicensed to extend loans. It is undisputed the 21.52% interest rate in the April 2019 Note is usurious.

However, Shannon argues that Smalls is estopped from asserting the usury defense because Smalls proposed the usurious rate. Alternatively, if Smalls is not estopped, Shannon argues the law permits him to recover the principal he says he loaned Smalls plus 12% interest on the usurious contract—he claims he simply may not collect interest above 12%. Smalls responds that Virginia Code § 6.2-303(F) bars Shannon from collecting anything from him—principal, interest, or fees.

1. Smalls is not Estopped from Asserting the Affirmative Defense of Usury.

Virginia Code § 6.2-303(F) states that, absent a statutory exception, usurious contracts are void. However, borrowers may be estopped from pleading usury as a defense. These circumstances include those where "the borrower by his conduct or representations induces the

[2] *Accord* n.1, *supra.*

lender to enter into a usurious agreement that he would not otherwise have made." *Heubusch v. Boone*, 213 Va. 414, 421 (1972).

Shannon argues that Smalls proposed the usurious interest rate, fraudulently inducing Shannon to make the loan. He claims Smalls cannot profit from his own wrongdoing. *Id; see also Berry v. Martens*, 58 Va. Cir. 315, *2 (2002). However, Shannon failed to persuasively prove to the Court that Smalls proposed the usurious rate. It finds Shannon not credible on this point for the same reasons as set forth in II(B), *infra*.

Therefore, Smalls is not estopped from asserting the affirmative defense of usury against the April 2019 Note.

2. The April 2019 Note is a Void Contract; However, Shannon Can Recover the Principal Loaned to Smalls.

The Court finds that the April 2019 Note violates Virginia Code § 6.2-303(A) and is void. The effective interest rate stated in the promissory note is 21.52%, far above the 12% rate permitted by law. As discussed above, in II(A)(1), *supra*, Smalls has not been estopped from asserting this affirmative defense. As a result, the Court must now determine what, if anything, Shannon can recover from Smalls.

"Any [usurious contract] is void and no person shall have the right to collect, receive, or retain any principal, interest, fees, or other charges in connection with the contract." VA. CODE ANN. § 6.2-303(F). Smalls argues that this provision of the Code bars a usurious lender from recovering any amount he loaned a borrower—principal, interest, or fees.

Shannon highlights a facial inconsistency to this seemingly absolute forfeiture rule. A related statute reads: "If the court determines that the contract is usurious, judgment shall be rendered only for the principal sum." VA. CODE ANN. § 6.2-304. Yet another statute reads: "If interest in excess of [12%] is paid upon any loan, the person paying may recover . . . 1. The total amount of the interest paid to such person in excess of that permitted." VA. CODE ANN. § 6.2-305. Shannon argues that these two statutes expressly permit him to recover from Smalls the loan principal, plus 12% interest.

Smalls replies that Virginia Code § 6.2-303(F), enacted in 2020 and effective on January 1, 2021, effectively repealed the older §§ 304 and 305(A). The Court disagrees. When statues are in apparent conflict with one another the Court is bound "if reasonably possible, to give them such a construction as [would] give force and effect to each." *Country Vintner, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 413 (2006) (quoting *Sexton v. Cornett*, 271 Va. 251, 257 (2006)). "[A] later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot . . . be reconciled." *Id.* (quoting *Boulevard Bridge Corp. v. City of Richmond*, 203 Va. 212, 218 (1962)).

The Court holds Virginia Code §§ 6.2-303(F), 6.2-304, and 6.2-305(A) to be in equipoise. To understand them one need only consider the predictable situations involving usurious contracts that the General Assembly sought to govern. The first statute is an absolute statement that a usurious contract is void. VA. CODE ANN. § 6.2-303(F). This represents the general policy statement that no person may extend a usurious loan nor take such a loan—they are void contracts. Importantly, this statute is mutually applicable. It says that a lender may not *collect* principal, interest, fees, or other charges. It also says that a borrow may not *retain* principal. However, the General Assembly clearly recognized that there would be situations, such as the present one, where parties would enter such a void contract and that money would change hands. It did not want to unjustly enrich borrowers or unduly burden lenders. With a void contract a lender could not sue for breach of contract to recover the loan principal stripped of interest and a borrower could not sue to recover usurious interest he paid. After all, one cannot sue for breach of a void contract. So, the General Assembly enacted Virginia Code § 6.2-304 for lenders and § 305(A) for borrowers. Consequently, if a lender actually paid loan money to a borrower on the statutorily void usurious contract, the law permits him to recover his principal on quasi-equitable grounds. VA. CODE ANN. § 6.2-304. Conversely, if a borrower actually paid unlawful interest on the void usurious contract, the law permits him to recover double the interest he has paid over 12% on the same quasi-equitable grounds. VA. CODE ANN. § 6.2-305(A).

The historical reasoning and usage of the usury defense in Virginia supports the Court's interpretation of Virginia Code § 6.2-303(F) as not implicitly repealing § 6.2-304. "The rule that where a contract for an illegal consideration has been voluntarily performed, a party who had paid money under it cannot recover it back, has no applicability to usurious transactions." *Richeson v. Wood*, 158 Va. 269, 288 (1932). "[W]hether the suit be prosecuted at law or in equity, if usury be established, the lender can only recover the principal sum loaned or forborne." *Munford v. McVeigh's Adm'r*, 92 Va. 446, 466 (1896). "The judgment is for a debt which is neither tainted with usury nor founded upon an illegal consideration." *King v. Buck*, 71 Va. 828, 831 (1878). Thus, historically, a borrower to a usurious contract could recover the usurious interest he paid; a lender to that same contract could recover unreimbursed principal.

In the present case, Shannon's and Smalls' attempt to enter their usurious contract failed—it was immediately void. There was, therefore, no contract between the parties. Neither party had the right to convey interest, the principal, or any other fees under the attempted contract to the other party, since there was no legal duty between them. Shannon had no legal duty to convey the principal sum to Smalls. Smalls had no legal duty to make interest payments to Shannon. As a result, neither had the right to retain, collect, or receive any payments from the other. Any general breach of contract claim for Smalls failing to make payments fails, since Smalls had no duty to do so, and Shannon had no right to collect, receive, or retain those payments.

However, in the present case money changed hands pursuant to this void contract. Under Virginia Code § 6.2-304, Shannon can sue Smalls to recover the unreimbursed principal he paid

Smalls under the void April 2019 Note.[3] Shannon had no duty to extend the loan proceeds to Smalls under the void contract, but he did so. Smalls cannot just keep the money. Under § 6.2-304, the Court can restore Shannon to his position before the void contract occurred. Had Smalls made any payments to Shannon, he could have availed himself of § 6.2-305(A) to recover the excessive interest he paid—doubled as a penalty.

There is no statutory provision that permits Shannon to collect the interest rate of up to 12% that he should have charged Smalls.[4] So, the Court may not rewrite the contract to reduce the interest rate from 21.52% down to 12%. When a lender loans money at a usurious rate he takes two risks: (1) he loses the right to collect the maximum lawful interest rate, and (2) he is liable to the borrower for twice the usurious interest if the borrower pays any of the usurious interest.

The Court finds Shannon conveyed a principal sum of $4,332.91 to Smalls under the void April 2019 Note. Smalls paid nothing on this loan—neither principal nor interest. Shannon may recover this principal from Smalls and judgment will issue against Smalls. However, Shannon may not recover the 12% interest he could have lawfully charged from Smalls. (Shannon is lucky Smalls did not pay the usurious interest. He, at least, avoids having to repay Smalls double the usurious interest).

B. The March 2019 Note is Unenforceable.

Unlike the usurious April 2019 Note, the March 2019 Note sets forth a lawful interest rate. Unfortunately for Shannon, the Note is unenforceable because (1) it lacked consideration and, alternatively, (2) it improperly and inaccurately recast a series of gifts from Shannon to Smalls as loans.

"'[T]he elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation.'" *Navar, Inc., v. Fed. Bus. Council*, 291 Va. 338, 344 (2016) (quoting *Ulloa v. QSP, Inc.*, 271 Va. 72, 79 (2006)).

A valid contract must be "'a complete agreement which requires acceptance of an offer, as well as valuable consideration.'" *Dean v. Morris*, 287 Va. 531, 536 (2014) (quoting *Montagna v. Holiday Inns, Inc.*, 221 Va. 336, 346 (1980)). However, "[t]he general rule is that a new promise, without other consideration than the performance of an existing contract in accordance with its terms, is a naked promise without legal consideration therefor and unenforceable." *Seward v. New York Life Ins. Co.*, 154 Va. 154, 168 (1930); *see also Faison v. Hughson*, 80 Va. Cir. 96 (2010).

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[3] Shannon argues in a post-trial memorandum that Virginia Code § 6.2-303(F) is inapplicable to the present case because it is a new statute that was not in effect when the parties contracted. Since the Court finds that § 6.2-304 governs, and Shannon may recover the principal he extended to Smalls, the effective date of § 6.2-303(F) is moot.
[4] Virginia Code § 6.3-305 is a protection for a borrower, not a lender. It expressly applies to the "person paying," not the person lending. Shannon may not use this statute to reduce the interest he charged from the usurious rate down to the lawful rate.

Shannon alleges he extended loans to Smalls in December 2014, and continued until December 2017, with the March 2019 Note memorializing the past payments. Thus, even according to Shannon, the March 2019 Note merely recounted alleged prior agreements. There was no new consideration to support it—Shannon already made the loans to Smalls (assuming they were loans). As a result, the Court finds the March 2019 Note unsupported by consideration, and thus unenforceable. Smalls cannot be liable for a breach of such agreement under Virginia Code § 8.01-27, since there was no enforceable agreement to breach.

The Court is aware Smalls did not raise lack of consideration as a defense in his pleadings, as argued by Shannon during closing arguments. However, consideration is a basic element of breach of contract, and the Court finds as fact that Shannon failed to persuasively prove this element. Any rights and obligations on the pre-March 2019 money Shannon extended to Smalls accrued prior to the March 2019 Note.

Even if the loan contract had been supported by consideration, the Court finds as fact that the money Shannon gave to Smalls was a series of gifts and not loans. On this point, simply stated, the Court did not find Shannon credible. First, both he and Smalls were convicted of either a felony or a crime involving moral turpitude, which a court may always consider in assessing credibility. While this factor of credibility cut both ways for the parties, Shannon had the burden of proof to prove the money he extended to Smalls was a loan. Second, the circumstances of the pre-March 2019 money seemed more consistent with gifts among friends, as Smalls testified, than loans, as Shannon testified. The two befriended each other in jail and Shannon gave Smalls a series of small sums of cash under sympathetic circumstances. Third, Shannon insisted that Smalls execute the note after Shannon was released from jail and while Smalls was still an inmate. Incarcerated persons are deemed to be disabled when it comes to making legal decisions. *See, e.g.,* VA. CODE ANN. § 8.01-9. They certainly lack the bargaining power of one with liberty. Thus, anyone attempting to contract with an inmate must govern themselves accordingly.

In making the finding that the money Shannon gave to Smalls was a gift, the Court considered the March 2019 Note for the purpose of supporting Shannon's testimony that both he and Smalls always considered his payments to Smalls to be repayable loans. However, even with this document, the Court still did not believe the money Shannon gave to Smalls was a loan.

Since the Court finds the money Shannon extended to Smalls to be gifts and the March 2019 Note to be unsupported by consideration, the Court finds for Smalls on this count of the Complaint and will dismiss that claim.

C. Shannon Cannot Recover Attorney Fees.

Shannon also seeks to recover reasonable attorney fees in connection with his claims of breach of the two promissory notes.

"Under the so-called 'American rule,' a prevailing party generally cannot recover attorney fees from the losing party. This rule, however, does not prevent parties to a contract from adopting provisions that shift the responsibility of attorney fees to the losing party in disputes involving the contract." *Dewberry & Davis, Inc., v. C3N, Inc.*, 284 Va. 485, 495 (2012).

The March 2019 Note states that Smalls would "pay all attorney fees, costs and expenses to collect such outstanding loans, accruing interest and any court sanctioned fees and penalties" if he breached the note. Similarly, the April 2019 Note states that "[a]ll terms and conditions for failure to pay on time or at all for the above loans are the same as stated in the [March 2019 Note]."

Since the Court finds the March 2019 Note unenforceable, Shannon is not the prevailing party under that claim, and as a result cannot recover attorney fees for that claim. Similarly, since the Court finds the April 2019 Note is a void contract, the attorney fees provision therein is unenforceable. The Court will deny Shannon's request for attorney fees.

III. CONCLUSION.

The Court finds the April 2019 Note usurious and the March 2019 Note unenforceable. The Court will award Shannon the return of his principal on the former note in the amount of $4,332.91. It will deny Shannon's claim on the latter note. The Court will deny Shannon's request for attorney fees.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DAN SHANNON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL–2022–7030
	)	
CURTIS O. SMALLS, II,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER came before the Court November 2, 2022, for a bench trial. And, for the reasons set forth in the Court's November 28, 2022, Opinion Letter, incorporated herein by reference, it is

ADJUDGED, on Count I of the Complaint, JUDGMENT IS FOR DEFENDANT;

ADJUDGED, on Count II of the Complaint, JUDGMENT IS FOR PLAINTIFF; and

ORDERED Defendant Curtis O. Smalls, II pay Plaintiff Dan Shannon $4,332.91, plus interest at the rate of 6% from today until paid. Each party shall pay his own attorney fees.

THIS CAUSE IS ENDED.

[redacted]
Judge David A. Oblon

NOV 28 2022

Entered

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.