

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: March 2, 2015)

NICHOLAS E. CAMBIO, individually; :
NICHOLAS E. CAMBIO, Trustee of the :
NICHOLAS E. CAMBIO, RONEY A. :
MALAFRONTE and VINCENT A. CAMBIO :
TRUST; CKLP, LLC; 1435 BALD HILL :
ROAD, LLC; COMMERCE PARK :
ASSOCIATES 1, LLC; COMMERCE PARK :
ASSOCIATES 2, LLC; COMMERCE PARK :
ASSOCIATES 6, LLC; COMMERCE PARK :
ASSOCIATES 12, LLC; and COMMERCE :
PARK ASSOCIATES 13, LLC, :
Plaintiffs, :

v. :

C.A. No. KC 09-1703

POTOMAC REALTY CAPITAL, LLC; :
DANIEL M. PALMIER; ANNA COLLINS; :
SALVADOR F. LECCESE; BENTON :
KENDIG, III; POTOMAC LAWSON, LLC; :
CAPITAL MANAGEMENT SYSTEMS, INC.; :
Alias; and FIDELITY NATIONAL TITLE :
INSURANCE COMPANY, Alias, :
Defendants. :

DECISION

SILVERSTEIN, J. Plaintiffs1 bring this Motion for Partial Summary Judgment seeking a declaration pursuant to Counts XIII and XIV of their Amended Complaint that CKLP’s loan from Defendant Potomac Realty Capital, LLC (PRC) was usurious in violation of G.L. 1956 § 6-

1 Plaintiffs are CKLP, LLC (CKLP), holder of 100 percent of the membership interest of Commerce Park Associates 12, LLC (CPA 12), together with Nicholas E. Cambio (N. Cambio), in his individual capacity, and N. Cambio, in his capacity as Trustee of the N. Cambio, Roney A. Malafronte, and Vincent A. Cambio Trust (the N. Cambio Trust) (collectively, Plaintiffs), which is the holder of 100 percent of the membership interests of Plaintiffs 1435 Bald Hill Road, LLC, Commerce Park Associates 1, LLC, Commerce Park Associates 2, LLC, Commerce Park Associates 6, LLC, and Commerce Park Associates 13, LLC.

26-2. Specifically, on Count XIII – Usury: Default Interest Rate, Plaintiffs claim that PRC’s charging of interest at the “Default Rate” (as that term is defined in the loan documents) resulted in interest being charged on the loan above the maximum allowable interest rate set out in the usury statute. Moreover, on Count XIV – Usury: Two Million Dollar Payment, Plaintiffs claim that CKLP’s loan with PRC also became usurious in violation of the statute when PRC collected a \$2,000,000 payment for the release of certain personal guarantors to the loan but elected not to apply that amount to pay down the outstanding principal balance. As to that Count, Plaintiffs argue the \$2,000,000 payment, when amortized over the entire life of the loan, resulted in an effective interest rate substantially in excess of the twenty-one percent maximum. Should the Court find a usurious interest rate charged by PRC to CKLP, Plaintiffs ask the Court to declare the loan void and its respective security interests discharged and voided under § 6-26-4.

I

Facts and Travel

On January 16, 2007, N. Cambio (as sole Manager), Defendant Potomac Lawson, LLC (Potomac Lawson), Defendant Salvador F. Leccese (Leccese), and Defendant Benton Kendig, III (Kendig) executed an Operating Agreement for the purposes of establishing CKLP.² (Am. Compl. App. A). As set forth in the Operating Agreement, CKLP’s stated purpose was to develop a mixed use (residential and commercial) project, which encompassed the development of “Cedar Ridge,” an approximate thirty-acre parcel in West Greenwich, Rhode Island. See Am. Compl. ¶ 26; App. A at 2. Specifically, the parties, in forming CKLP, intended to construct an age-restricted residential condominium development on the subject land. Id. To begin its

² CKLP is a Rhode Island limited liability company with a principal place of business in West Warwick, Rhode Island. (Am. Compl. ¶ 3).

development of the property, CKLP paid \$6,000,000 to purchase 100 percent of the membership in CPA 12, as that entity owned the Cedar Ridge property. See Am. Compl. ¶ 27.

To finance the purchase of the membership interest in CPA 12, CKLP contemporaneously executed and delivered a promissory note to PRC in the original principal amount of \$5,300,000 (the Note). See N. Cambio Aff. Ex. A, Dec. 16, 2014. This Note represented the loan agreed to by and between CKLP and PRC through a Mezzanine Loan Agreement (the Loan Agreement) dated January 16, 2007. Also, according to the Amended Complaint, on that same day, PRC entered into separate, so-called “Pledge and Security Agreements” with both CKLP and N. Cambio, in his capacity as Trustee, respectively. The Pledge and Security Agreements allegedly represented N. Cambio’s (both as Manager of CKLP and separately in his capacity as Trustee) agreement with PRC to provide the several parcels of real estate owned by the various Plaintiffs as security for the loan.³ See N. Cambio Aff. Ex. A at § 1.9; Am. Compl. ¶¶ 31-32.

Pursuant to section 3 of the Note,

“Upon the occurrence of an Event of Default, then: (i) interest on the outstanding principal balance of this Note shall, commencing on the date of the occurrence of such Event of Default and without notice to Maker, accrue at the Default Rate until full payment of the outstanding principal balance of this Note; and (ii) Payee may exercise all remedies set forth in the Pledge and any other Loan Document, including, without limitation, declaring all or any portion of the unpaid Loan Amount to be immediately due and payable.” (N. Cambio Aff. Ex. A at 7, § 3.2).

As defined in the Note, “Default Rate” means “the lesser of (a) twenty-four percent (24%) per annum and (b) the maximum rate of interest, if any, which may be collected from Maker under

³ Plaintiffs did not provide the Court with copies of the Pledge and Security Agreements. Pursuant to the terms of the Note, the “Pledge” (as that term is used in the Note) was defined to mean each of two Pledge and Security Agreements dated as of the date of the Note. See N. Cambio Aff. Ex. A at ¶ 1.9.

applicable law.” Id. Ex. A at 1, §1.1. The two-year loan evidenced by the Note provided for an interest rate of fifteen percent per annum of which twelve percent was payable through a \$1,000,000 “Interest Reserve” with three percent accruing until maturity. (N. Cambio Aff. ¶ 2). Although the Interest Reserve was required to be placed in escrow, PRC never complied. Id. ¶ 3.

N. Cambio (in his individual capacity), Leccese, and Kendig, jointly and severally, guaranteed the loan with PRC through the execution of an Indemnity and Guaranty Agreement. (PRC’s Resp. to First Set of Req. for Admis., at No. 8) (hereinafter PRC’s Admissions). However, on or about December 31, 2008, during the life of the loan, CKLP members Leccese and Kendig paid \$2,000,000 to PRC in order to be released as guarantors (a payment characterized by PRC as a “Release Fee”). See N. Cambio Aff. ¶¶ 5, 8; PRC’s Admissions, at Nos. 10-15. According to PRC’s Admissions, the release from the loan was achieved through a Release and Guaranty Agreement by and among Leccese, Kendig, and PRC.⁴ (PRC’s Admissions, at No. 10). The actual terms surrounding the \$2,000,000 Release Fee remain unclear.

On December 19, 2008, through electronic correspondence from Daniel M. Palmier (Palmier), a Principal of PRC, to Melissa A. Faria (Faria), Vice President at Universal Properties Group, Inc. (an agent of N. Cambio), Palmier attached a draft of the “Proposed Lawson Deal,” which included the following:

“[Leccese], [Kendig] to pay [PRC] \$2m by 12/31/2008. Potomac to agree to apply all, or substantially all proceeds to Potomac loan (Discuss w/ [N. Cambio]). [PRC] will release personal guarantees and negotiate a subordinate, unsecured, backend promote i.e., “hope certificate” for [Leccese] and [Kendig] to receive capital invested to date (\$2m pay down plus approximately \$212,500

⁴ The Court was also not provided with a copy of the Release and Guaranty Agreement referenced in PRC’s Admissions.

(verify)). No yield shall accrue on the aforementioned capital invested.” (Am. Compl. App. B).

Thereafter, on December 30, 2008, N. Cambio (via Faria) sent an e-mail to Anna Collins (Collins), Senior Vice President at PRC, discussing, among other things, the collateral, in which he stated, “not to mention that there will be a \$2,000,000 paid down on the Note.” (Am. Compl. App. C). Within the hour, Collins replied to Faria explaining that “[t]he only thing I am working on this week is the release of guaranty and pay-down from [Leccese] and [Kendig].” (Am. Compl. App. D).

Notwithstanding those series of e-mails, a subsequent e-mail from Collins to Faria, dated January 22, 2009, indicated that “[t]he payment from [Leccese] and [Kendig] was received in consideration for the release of each of their guaranty on the loan. The loan remains at its original balance.” (Am. Compl. App. E; N. Cambio Aff. ¶ 5). Compounding the circumstances associated with the actual terms of the Release Fee, PRC (through its Admissions) admitted that the \$2,000,000 was received in consideration for the release of Leccese and Kendig as guarantors of the loan but denied that it was received as a pay down on the loan. See PRC’s Admissions, at Nos. 12, 15; N. Cambio Aff. ¶ 8. PRC also denied that the \$2,000,000 payment was ever referred to as a pay down on the loan. (PRC’s Admissions, at Nos. 16-17).

Ultimately, CKLP defaulted on the loan on January 1, 2009 (the maturity date under the Note). (N. Cambio Aff. Ex. E). As set forth in correspondence from PRC’s counsel dated February 24, 2009, PRC communicated that “from January 2, 2009 forward, interest has accrued on the Loan at the Default Rate.”⁵ Id. The default rate of interest was charged by PRC on the entire principal amount of \$5,415,000. Id.

⁵ See infra Part III.A for discussion of what percent rate of interest was actually charged by PRC.

This suit was initially commenced in Kent County Superior Court on December 22, 2009. Plaintiffs filed the within Motion on December 17, 2014. In opposing CKLP's Motion, Defendants rely on—and incorporate by reference—the supporting memorandum opposing partial summary judgment submitted by the defendants in a related matter.⁶ See McGowan v. Potomac Realty Capital, LLC, No. PB 09-7314, 2014 WL 7433735 (R.I. Super. Dec. 29, 2014) (Silverstein, J.). A hearing on Plaintiffs' Motion was held on January 15, 2015.

II

Standard of Review

“Summary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.” Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001). In ruling on a motion seeking summary judgment, a trial justice “must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion.” Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981); see also O'Connor v. McKanna, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976) (noting purpose of summary judgment is issue finding, not issue determination). Therefore, the only task of a trial justice in reviewing a motion for summary judgment is whether there is any genuine issue concerning a material fact. See Gliottone v. Ethier, 870 A.2d 1022, 1027 (R.I. 2005) (internal quotation marks omitted) (“[I]f no issues of material fact appear and the moving party is entitled to judgment as a matter of law, the trial justice may enter an order for summary judgment.”).

⁶ The facts of the McGowan case stemmed from a similar lending relationship that existed between PRC and other entities. The Court issued a decision in that matter on December 29, 2014, granting partial summary judgment on various counts seeking a declaration that the loans in that case were usurious in violation of § 6-26-2. See McGowan, 2014 WL 7433735.

III

Discussion

In moving for partial summary judgment as to Counts XIII and XIV of the Amended Complaint, Plaintiffs argue that they are entitled to relief from this Court in the form of a declaration that the effective interest rate charged on the loan well exceeded the statutory limit of twenty-one percent. Plaintiffs traverse two avenues through which they claim the loan with PRC allegedly violated the statute. Under Count XIII, Plaintiffs argue the “Default Rate” of twenty-four percent interest was charged on the loan, rendering it usurious and void. Under Count XIV, Plaintiffs argue that the \$2,000,000 Release Fee—when amortized over the 715 day life of the loan (January 17, 2007 to December 31, 2008)—resulted in interest rates ranging from 42.47 percent to 34.47 percent. See N. Cambio Aff. Ex. H at 2. Each will be discussed in turn.

A

Default Interest Rate

It is apparent to the Court that its prior December 29, 2014 Decision is largely dispositive of the issues relative to Count XIII and, therefore, the Court will apply much of that same analysis here. In Count XIII, Plaintiffs allege that upon PRC’s claiming an Event of Default under the Note, the twenty-four percent default rate of interest charged rendered the loan usurious. In response to the above arguments advanced by Plaintiffs, PRC relies on the same arguments that this Court has rejected in McGowan; to wit, equitable principles of unjust enrichment demand a finding in favor of Defendants because not only will PRC remain without repayment of the total outstanding balance of the note, but any security interest as collateral for the loan will be voided pursuant to § 6-26-4(a). See McGowan, 2014 WL 7433735, at *5.

Pursuant to the provisions of §§ 6-26-2 and 6-26-4, the maximum allowable interest to be charged on a loan is twenty-one percent; any violation thereof will result in the loan and accompanying security interest being declared usurious and void, and the borrower will be entitled to recoup all amounts paid on the loan. See §§ 6-26-2, 6-26-4; see also NV One, LLC v. Potomac Realty Capital, LLC, 84 A.3d 800, 805-06 (R.I. 2014) (reviewing Rhode Island usury statute). The Rhode Island Supreme Court’s recent guidance on usurious loans leads this Court to the conclusion that the interest rate charged in this case was facially usurious when PRC declared an Event of Default on the Note. See NV One, 84 A.3d at 806 (finding twenty-four percent interest rate charged as default rate of interest was facially usurious irrespective of loan amount).

First, after the Event of Default occurred on January 1, 2009, PRC, through its counsel, stated that interest was being charged at the Default Rate. See N. Cambio Aff. Ex. E. As stated above, the “Default Rate,” as defined in the Note, was either twenty-four percent or “the maximum rate of interest, if any, which may be collected from Maker under applicable law.” See id. Ex. A. The Note also contained a maximum interest provision. The Court need not look further than our Supreme Court’s opinion in NV One to find that the usury savings clause contained in the Note here is unenforceable as a matter of public policy. See NV One, 84 A.3d at 810 (“[U]sury savings clauses are unenforceable as against the well-established public policy of preventing usurious transactions.”). As in Section 4.4 of the note in NV One (a case in which PRC also was the lender), Section 4.4 of the instant Note contains a usury savings clause, so-called, which reads, in pertinent part:

“A. It is the intention of Maker [CKLP] and Payee [PRC] to conform strictly to the usury and similar laws relating to interest from time to time in force, and all agreements between Maker and Payee, whether now existing or hereafter arising and whether oral

or written, are hereby expressly limited so that in no contingency or event whatsoever, whether by acceleration of maturity hereof or otherwise, shall the amount paid or agreed to be paid in the aggregate to Payee as interest hereunder or under the other Loan Documents or in any other security agreement given to secure the Loan Amount, or in any other document evidencing, securing or pertaining to the Loan Amount, exceed the maximum amount permissible under applicable usury or such other laws (the 'Maximum Amount'). . . .

“B. If under any circumstances Payee shall ever receive an amount that would exceed the Maximum Amount, such amount shall be deemed a payment in reduction of the Loan owing hereunder and any other obligation of Maker in favor of Payee . . . or if such excessive interest exceeds the unpaid balance of the Loan and any other obligation of Maker in favor of Payee, the excess shall be deemed to have been a payment made by mistake and shall be refunded to Maker.” N. Cambio Aff. Ex. A at § 4.4; Compare id. with NV One, 84 A.3d at 806.

Moreover, while the letters from PRC’s counsel to CKLP do not expressly state that the twenty-four percent interest rate was charged, N. Cambio states in his affidavit that the default rate charged by PRC was indeed twenty-four percent. See N. Cambio Aff. ¶¶ 6-7. PRC, however, has failed to produce any evidence rebutting this fact or even to suggest that some rate, other than twenty-four percent, was charged by PRC. Accordingly, the Court must conclude that not only can PRC not rely on the language of the usury savings clause to avoid liability under the usury statute, but that PRC, in fact, charged a facially usurious rate of interest on the outstanding \$5,415,000 principal.

Second, there is no evidence in the record to show that PRC, at any time, adjusted the rate of interest to fall below the maximum allowable rate.⁷ See NV One, 84 A.3d at 806 (“[I]t is

⁷ It is a general rule of usury that the maximum allowable interest is calculated based on the amount actually disbursed and received by the borrower; the face amount of the loan is irrelevant. See Indus. Nat’l Bank of R.I. v. Stuard, 113 R.I. 124, 125, 318 A.2d 452, 453 (1974); accord NV One, 84 A.3d at 805. According to PRC’s Loan Statements, attached as Exhibit C to N. Cambio’s Affidavit, beginning in February 2007, PRC charged twelve percent interest on the

apparent to this Court that not only did PRC charge a usurious interest rate, but it made no attempt to lower the interest charges to conform to the maximum permissible interest rate.”). In reviewing our usury statute, the Court in NV One explained, “[f]or protection of the borrower, it is incumbent upon the lender to ensure full compliance with the provisions for maximum rate of interest, and, apart from the explicit exception in § 6–26–2(e), anything short of full compliance renders the transaction usurious and void.” Id. at 809. The Court also remarked on “the historically strict enforcement of the statute” in Rhode Island, noting the Legislature’s intent for “an inflexible, hardline approach to usury that is tantamount to strict liability.” Id. at 807-08; accord LaBonte v. New England Dev. R.I., 93 A.3d 537, 544-45 (R.I. 2014). Even though the Court reviews all evidence in the light most favorable to PRC, in view of the paucity of PRC’s response to Plaintiffs’ Motion, the Court is unable to find any genuine issues of material fact to preclude the entry of summary judgment for Plaintiffs on this Count. See Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1169 (R.I. 2014) (internal quotation marks omitted) (“Although summary judgment is recognized as an extreme remedy, . . . to avoid summary judgment the burden is on the nonmoving party to produce competent evidence that prove[s] the existence of a disputed issue of material fact[.]”). Simply put, there is nothing in the record

face amount of the loan of \$5,300,000. See N. Cambio Aff. Ex. C-1 (Loan Statement for February 2007). Through at least June 2008, the three percent to accrue was never charged on the loan. However, due to the Interest Reserve of \$1,000,000, only \$4,300,000 was actually disbursed to CKLP. The interest charge for the month of February 2007 (with the full amount of the Interest Reserve still held by PRC) amounted to \$49,466.67. See id. That \$49,466.67 averages out to \$1,766.67 per day in interest charges and a yearly interest charge of approximately \$636,000 (based on a 360-day calendar year). Based on the Court’s calculations, in order to charge \$636,000 in yearly interest on \$4,300,000 (the amount actually disbursed for the month of February), PRC had to charge interest at a rate of approximately 14.8 percent. This amount is well below the twenty-one percent maximum allowed by statute. Therefore, it appears to the Court that PRC did not violate our usury laws until it charged CKLP interest at the Default Rate. The Court was not provided with loan statements subsequent to June 2008.

before the Court here that could justify a different conclusion from that of our Supreme Court and this Court's prior decisions.

This Court accordingly declares that PRC improperly charged interest at a rate above the maximum allowable rate of twenty-one percent, in violation of § 6-26-2. Without considering for the moment any potential impact the \$2,000,000 Release Fee may have on the Note's ultimate, effective interest rates, the default rate of twenty-four percent was nevertheless charged as of January 1, 2009 on the outstanding principal balance of the loan of \$5,415,000. Thus, the Note is declared usurious and void on its face, pursuant to § 6-26-4(a). As a result, the Court grants Plaintiffs' Motion for Summary Judgment as to Count XIII of the Amended Complaint. Under the requirements of § 6-26-4, all security interests serving as collateral for the Note are voided and discharged, and all "borrowers" are entitled to their respective amounts paid on the loan, if any. The summary judgment on this Count is only partial in accord with Plaintiffs' demand, as the Court will not here deal with Plaintiffs' claim for damages.

B

The \$2,000,000 Release Fee

Plaintiffs also request a declaration from this Court with respect to Count XIV that the \$2,000,000 Release Fee received by PRC effectively rendered the loan usurious and void when it is included in the computations of interest. Plaintiffs support their argument with worksheets attached as Exhibit H to the affidavit of N. Cambio that demonstrate the interest rates on the loan with PRC—treating the Release Fee as interest—resulted in monthly interest rates ranging from 42.48 percent in January 2007 to 34.47 percent in December 2008 (the last month before PRC

declared the loan in default).⁸ See N. Cambio Aff. Ex. H at 2. Ultimately, by calculating the effective interest rate to include the Release Fee, Plaintiffs maintain PRC was in violation of § 6-26-2. Based on Plaintiffs' arguments, the issue presently before the Court is whether the \$2,000,000 Release Fee should be considered "interest" so as to invoke § 6-26-2.⁹ In other words, the crux of the issue centers on whether payment by certain personal guarantors on \$2,000,000 under the circumstances here can be considered an "interest" payment.

Before reaching the issue of whether the Release Fee should be considered in computing the effective interest rate charged by PRC (pursuant to the provisions of § 6-26-2(c)(1)), the Court first must be able to conclude what exactly was the purpose of the \$2,000,000 payment. As explained above, the Court was not provided with the Release and Guaranty Agreement in which Leccese and Kendig were apparently released as guarantors of the loan. See supra footnote 4. While Plaintiffs assume PRC's failure to apply that payment to reduce the loan balance warranted its characterization as a fee, cost, charge or penalty, such a conclusion is not warranted. It is entirely unclear to the Court, based on the record in this case, whether or not the Release Fee was even intended to be applied to the loan balance. Without the specific language of the relevant agreement or other and further evidence as to the intent of the parties, the actual purpose of the \$2,000,000 payment remains shrouded in doubt.

⁸ PRC fails to provide any evidence rebutting the calculations provided to the Court in the worksheets. According to Plaintiffs, the variance in the interest rates from 42.48 percent to 34.47 percent was due to the payment of the \$1,000,000 Interest Reserve against the principal balance of the loan. In other words, as more funds from the Interest Reserve were paid towards the loan balance, the less the effective interest rate charged by PRC due to the fact that the loan balance increased with cash payments, advances, or credits of interest from the (unfunded) interest reserve. Once the Interest Reserve was exhausted, Plaintiffs argue the interest rate stabilized at 34.47 percent, a rate still well above the maximum rate of interest permitted.

⁹ In relevant part, § 6-26-2(a) reads: "[N]o . . . corporation loaning money to or negotiating the loan of money for another . . . shall, directly or indirectly, reserve, *charge*, or take interest on a loan, whether before or after maturity, at a rate that shall exceed the greater of twenty-one percent (21%) per annum . . ." Sec. 6-26-2(a) (emphasis added).

What is clear from the e-mails exchanged by Faria and Collins is that the \$2,000,000 payment from Leccese and Kendig (each proffering \$1,000,000) would release them as personal guarantors to CKLP's loan from PRC. Yet, as noted above, several other e-mails generate questions on whether an agreement between the parties existed for PRC to apply that sum to the loan principal. According to the e-mail from Palmier attaching the Proposed Lawson Deal dated December 19, 2008, supra at 4, PRC originally contemplated applying all or substantially all of the \$2,000,000 proceeds to the outstanding loan balance. Moreover, as of December 30, 2008, a day before Leccese and Kendig were believed to have made the actual payment, Collins referenced that she was working on their release as guarantors and the "pay down" on the Note. However, in a subsequent e-mail on January 22, 2009, Collins made clear to Faria that the loan was remaining at its principal balance and that the payment was received only in consideration for their release as guarantors.

Based on this confusion regarding any pay down on the loan, a fact issue is created. As our Supreme Court made clear, "when the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage." DeMaio v. Ciccone, 59 A.3d 125, 132 (R.I. 2013) (quoting Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995)). Furthermore, on a motion seeking summary judgment, it is the duty of a trial justice to find the issues, not to resolve them. Ciambrone v. Coia & Lepore, Ltd., 819 A.2d 207, 210 (R.I. 2003). With these standards in mind, the Court finds that a genuine issue of material fact exists as to whether an agreement existed to apply the Release Fee to the loan balance. Accordingly, the Court is prohibited from resolving these issues and must deny summary judgment as to Count XIV.

Even if the Court could determine that the \$2,000,000 sum was to decrease CKLP's loan balance, it is further unclear whether the payment was made by CKLP as the "borrower" on the loan. In order for this Court to find a violation of § 6-26-2, CKLP, as the "borrower,"¹⁰ has to be *charged* the \$2,000,000 payment that would allegedly render the interest rate usurious. See § 6-26-2. As the \$2,000,000 Release Fee payment was made by Leccese and Kendig, and not CKLP, it cannot be conclusively said that CKLP was, in fact, charged by PRC.¹¹ Essentially, the \$2,000,000 payment by the guarantors may have been for separate consideration for their release as guarantors. Whether this payment was, in fact, supposed to reduce principal, be applied to "interest," or simply release the payors as guarantors, is a fact question that the Court is simply unable to resolve based on the evidence now before it. Plainly, there are too many material fact issues raised in this case to resolve this Count on summary judgment.¹² See Glottone, 870 A.2d at 1027.

¹⁰ As one California court explained, "the defense of usury is personal to the borrower and one who is not a party to the usurious contract may not attack it." Domarad v. Fisher & Burke, Inc., 76 Cal. Rptr. 529, 540 (Ct. App. 1969); see also Fed. Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691, 700 (5th Cir. 1991) ("Under Texas law a guarantor cannot assert any claim of usury in the underlying obligation. Usury is a personal defense and may not be asserted by a guarantor unless the contract with the guarantor also contains the usurious provision."). Here, the defense of usury is being asserted by CKLP and not by Leccese and Kendig personally.

¹¹ Further confusing the details surrounding the terms of the Release Fee is the reference to a "hope certificate" as originally set forth in the "Proposed Lawson Deal." While it appears from a reading of the papers that Leccese and Kendig would receive a later payment of their capital invested to allegedly pay down the loan, it is entirely unclear what the final terms of the agreement contemplated. As a result, the Court is unable to find that the guarantors made the payment, in any form, on behalf of CKLP.

¹² The Court pauses to note the practical ramifications of its holding. Albeit, while usury was not found, as a matter of law, with respect to the effect of the \$2,000,000 Release Fee, the Court has nonetheless found usury when PRC charged the Default Rate of interest on the Note at twenty-four percent. This finding, which results in the triggering of the provisions of § 6-26-4, already renders the contracts—and accompanying security interests—void and discharged. While the Court cannot grant summary judgment as to Count XIV today, the effect of this Court's Decision, relative to the granting of partial summary judgment on Count XIII, results in a declaration that PRC indeed violated our usury statute.

IV

Conclusion

Predicated upon the foregoing, the Court grants partial summary judgment in favor of all Plaintiffs on Count XIII of the Amended Complaint and declares that the interest charged at the “Default Rate” was usurious and void. However, the Court denies Plaintiffs’ Motion for Partial Summary Judgment as to Count XIV seeking a declaration that the \$2,000,000 Release Fee rendered the loan usurious and void. Effectively, the Court finds that PRC violated § 6-26-2 in charging interest at a rate above the maximum allowable twenty-one percent. Accordingly, pursuant to § 6-26-4, this Court declares all security interests, which serve as collateral for the Note, to be voided and discharged.

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record. Counsel shall schedule a chambers conference with respect to further proceedings as to this matter.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Cambio v. Potomac Realty Capital, LLC, et al.**

CASE NO: **KC 09-1703**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **March 2, 2015**

JUSTICE/MAGISTRATE: **Silverstein, J.**

ATTORNEYS:

For Plaintiff: **Richard G. Riendeau, Esq.**

For Defendant: **William J. Delaney, Esq.**
Kate Moran Carter, Esq.