STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: December 16, 2011)

NV ONE, LLC, NICHOLAS E. CAMBIO, and VINCENT A. CAMBIO,	:	
vs.	:	**C.A. No. PB 09-7159**
POTOMAC REALTY CAPITAL, LLC, Alias, CAPITAL MANAGEMENT SYSTEMS, INC.	:	

DECISION

SILVERSTEIN, J. Before this Court is Plaintiffs', NV One, LLC, Nicholas E. Cambio, and Vincent A. Cambio (collectively, NV One or Plaintiffs), Motion for Partial Summary Judgment (Motion) pursuant to R.I. Super. R. Civ. P. 56. Plaintiffs seek summary judgment on the issue of liability against Defendants, Potomac Realty Capital, LLC, Alias, Capital Management Systems, Inc. (collectively, PRC or Defendants) on Count III of Plaintiffs' Second Amended Verified Complaint (Complaint). Count III alleges violation of the Rhode Island usury law, codified at G.L. 1956 § 6-26-2. Further, Plaintiffs seek declaratory relief that the mortgage and all liens securing the allegedly usurious loan are unlawful and void, as well as an order removing all liens recorded against the real property.

I

Facts and Travel

On or about July 17, 2007, NV One entered into a loan agreement with PRC, whereby NV One signed a Promissory Note (Note) in an original principal amount of $1,800,000.00 and granted a Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing (Mortgage) with respect to the real property located at 1190 Main Street in West Warwick, Rhode Island (the property). (Compl. ¶ 9.) Plaintiffs Nicholas E. Cambio and Vincent A.

Cambio provided personal guarantees on the loan. (Compl. ¶ 10.) NV One took out the loan to rehabilitate and renovate the former Post Office located on the property in order to convert it into commercial office space. See Compl. ¶ 11.

At the closing on the loan, the parties executed the Note, the Mortgage, a Sources and Uses of Funds sheet, and a Loan Disbursement Authorization (collectively, the loan documents). See Cambio Aff. Exs. B1, C, D1, D2. The loan documents established an "Interest Reserve" initially set at $62,500.00 and a "Renovation Reserve" set at $940,000.00. (Cambio Aff. Exs. B1, C.) The Note provided for monthly interest-only payments on the first day of each calendar month until the maturity date of August 1, 2008, on which date final payment of both unpaid interest and principal was to be made. (Cambio Aff. Ex. B1.) The interest rate was set at the greater of 5.3% or the LIBOR Rate, plus 4.7%. (Cambio Aff. Ex. B1.) The interest rate on Default was set at "the lesser of (a) twenty-four percent (24%) per annum and (b) the maximum rate of interest, if any, which may be collected . . . under applicable law." (Cambio Aff. Ex. B1.) In addition to the stated interest, the loan documents imposed fees, including but not limited to an exit fee of $18,000.00 and an origination fee of $25,000.00. (Cambio Aff. Exs. B1, D1.) The loan documents also note a $15,000.00 previous deposit, raising the total value to $1,815,000.00. (Cambio Aff. Ex. D1.)

Both the Note and the Mortgage contained maximum interest provisions. See Cambio Aff. Exs. B1, C. These provisions attempt to conform the instruments to the local usury laws, and they are commonly known as usury savings clauses. The usury savings clause here, as stated in section 4.4 of the Note, provides, in pertinent part:

> "It is the intention of the Maker and Payee 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 the applicable usury or such other laws (the "**Maximum Amount**").
> . . . .
> 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."

Cambio Aff. Ex. B1 § 4.4 (usury savings clause).

The entire $1.8 million principal balance was not disbursed at the time of the loan and was never fully disbursed to NV One. This was due, at least in part, to the holdbacks for the $940,000.00 Renovation Reserve and the $62,500.00 Interest Reserve. The Interest Reserve was increased to $63,000.00 on September 1, 2007. The loan documents indicate that both reserves were required to be placed in escrow, but no funds were ever actually placed in escrow accounts by PRC. See Cambio Aff. Ex. D1. In fact, PRC did not segregate the funds in any way. (Cambio Aff. ¶ 6.) The Note provided, however, that NV One would not accrue any interest on the reserved funds. Cambio Aff. Ex. B1 § 2.12 ("interest will not accrue in favor of [NV One] on any reserves . . .").

The loan documents indicate a net funding disbursement of $761,478.54 at the time of closing. (Cambio Aff. Ex. D1.) In January 2008, a disbursement from the Renovation Reserve was made at NV One's request in the amount of $143,877.50. At the maximum, a total of

$1,007,390.52 was disbursed to NV One on the loan by the time of its maturity.[1] See Cambio Aff. Ex. H.

The Note contained provisions through which the parties could extend the term for up to an additional twelve (12) month period. See Cambio Aff. Ex. B1. On or about August 1, 2008, the parties executed an Allonge to extend the maturity date by ten (10) months to June 1, 2009. (Cambio Aff. Ex. B2.) Under the Allonge, the bulk of the loan terms remained the same, but the interest rate was modified. See id. The Allonge provided a two percent increase in interest, bringing the rate to 6.7% plus the greater of the LIBOR Rate or 5.3%. (Cambio Aff. Ex. B2.) NV One paid $18,000.00 to PRC as consideration for the Allonge. (Compl. ¶ 17.) That $18,000 amount, as well as the monthly interest payments on the Allonge, were paid out of the Interest Reserve. By September 2008, NV One had received $995,977.50 of the $1.8 million loan. By November 2008, the Interest Reserve was exhausted.

From August 2008 when the Allonge was executed to February 2009, PRC charged NV One interest at a rate of twelve percent (12%) of the total $1.8 million, despite the fact that at its height, $1,007,390.52 was actually disbursed to NV One. Prior to the Allonge, PRC charged interest at ten percent (10%) of the total $1.8 million, when as little as $761,478.54 was disbursed. Beginning in March 2009, PRC charged NV One the Default rate of twenty-four percent (24%) interest calculated upon the $1.8 million face amount of the Note.[2] PRC also charged fees on top of the interest. (Cambio Aff. ¶ 11, Ex. H.) When the interest charged is applied in the context of the amount actually disbursed, the rate exceeds twenty-one percent

[1] In October 2007, a "loan within a loan" in the amount of $750,000.00 was made to NV One. This additional loan was for purposes other than the renovation of the former Post Office building, and NV One or its related entities repaid the "loan within a loan" within three months. It has no effect on the transaction here.

[2] Notably, this Default rate took effect before the maturity date pursuant to the Allonge: June 1, 2009.

(21%) essentially throughout the loan.[3] PRC never adjusted the amount of interest charged to lower it below twenty-one percent (21%).

On or about October 9, 2009, PRC sent a notice of default and demand for payment to NV One due to NV One's alleged failure to pay off the loan by its maturity date, June 1, 2009. PRC, attempting to exercise its rights under the Mortgage, on or about November 5, 2009 sent a foreclosure notice to NV One. PRC also sent a demand notice to Nicholas E. Cambio and Vincent A. Cambio, demanding payment pursuant to their personal guaranties, on or about November 19, 2009. In response, Plaintiffs filed a Verified Complaint against PRC on December 14, 2009. Plaintiffs claimed fraud, breach of contract, and usury, and they sought injunctive relief preventing foreclosure on the property and collection from the personal guarantors. The Complaint was properly amended on December 22, 2009.

Over a number of days in January 2010, this Court conducted hearings on the injunction and rendered a bench decision (Decision), dated January 20, 2010. This Court's Decision granted a preliminary injunction restraining and enjoining the foreclosure sale. (Dec. Tr. 17, Jan. 20, 2010.) Specifically, this Court determined that loss of the real estate would constitute irreparable harm, and the Plaintiffs set forth a "prima facie case establishing a reasonable likelihood of success . . . ." (Dec. Tr. 12-14.) Addressing the usury savings clause referenced by PRC, this Court declined to apply it at the time and noted the "strong public policy against usurious transactions . . . clearly manifested in the Rhode Island statutes . . . ." (Dec. Tr. 14-16.) (Citations omitted.)

[3] According to Plaintiffs' calculations submitted in support of their Motion, there may have been a period from approximately January to August 2008 during which the interest charged was less than twenty-one percent (21%).

Since the date of the Decision, the parties have conducted some discovery and engaged in settlement negotiations, albeit to no avail. Plaintiffs moved to amend their Complaint a second time in March 2010, and this Court granted that motion April 26, 2010. On August 16, 2011, Plaintiffs filed this Motion on Count III of their Complaint. Count III alleges violations of the Rhode Island usury law, § 6-26-2. Plaintiffs' Motion is limited to the issue of liability on their usury claim.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113. Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Yet, "[s]ummary judgment is an extreme remedy that should be

applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

A.

Rhode Island state law provides limits on the maximum rate of interest that may be reserved, charged, or taken on a loan. See § 6-26-2 (setting forth state usury law for maximum rate of interest). Generally, the maximum rate permitted is twenty-one percent (21%) per annum. Id. at (a). There are some exceptions to the general statutory maximum, such as for a loan to a commercial entity where the amount of the loan exceeds $1,000,000.00, repayment is not secured by a mortgage against the principal residence of any borrower, and the commercial entity obtained a pro forma methods analysis performed by a certified public accountant licensed in the state of Rhode Island.[4] Id. at (e). Any loan agreement violating § 6-26-2, as well as the notes and mortgages associated therewith, "shall be usurious and void." § 6-26-4(a). As further evidence of the gravity of the usury laws within this state, any person who willfully and knowingly violates § 6-26-2 is guilty of criminal usury, punishable by up to five (5) years' imprisonment. § 6-26-3.

Rhode Island has a clear and undeniable history of strictly enforcing its usury law and the harsh penalties associated with it. By the Rhode Island Supreme Court's admission, "[o]ur statute is drastic" and "plainly is intended to prevent advantage being taken of small borrowers, who often are driven into improvident arrangements by their necessities." See Colonial Plan Co.

[4] There is no viable argument here that the commercial loan exemption applies. Defendants have failed to come forth with any admissible evidence to suggest that a pro forma analysis was performed as required by the exemption.

v. Tartaglione, 50 R.I. 342, 147 A. 880, 881 (1929) (discussing older version of usury statute); see also In re Swartz, 37 B.R. 776, 779 (Bankr. D.R.I. 1984) (applying Colonial Plan statement to § 6-26-2). Our judiciary has recognized "the clear legislative intent to provide severe penalties against lenders who violate the usury laws" and the "strong public policy against usurious transactions . . . clearly manifested by these provisions." DeFusco v. Giorgio, 440 A.2d 727, 732 (R.I. 1982); see Nazarian v. Lincoln Fin. Corp., 77 R.I. 497, 505, 78 A.2d 7, 10 (1951) ("Plainly the policy of the legislature was to provide severe penalties against the lender for his violation of the statute as the best method in its judgment to prevent usurious transactions"); In re Swartz, 37 B.R. at 779 n.5 (noting "Draconian tenor" of statute). The statute's fundamental purpose to "provide protection for borrowers who, because of economic circumstances, were forced to borrow money at interest rates that the legislature deemed so outrageous as to be contrary to sound public policy." Marley v. Consolidated Mortgage Co., 102 R.I. 200, 207, 229 A.2d 608, 612 (1967); see Reichwein v. Kirshenbaum, 98 R.I. 340, 345, 201 A.2d 918, 921 (1964) ("the legislature clearly evinced an intention to protect a borrower from paying and a lender from extracting a legally excessive rate of interest . . . ."); In re Swartz, 37 B.R. at 779 (declaring "no doubt that the statute . . . is intended to protect borrowers from hidden and pernicious interest charges").

In accordance with the statute, a usurious loan is void. See § 6-26-4; Sheehan v. Richardson, 315 B.R. 226, 234 (Bankr. D. R.I. 2004). Voiding the loan has the effect of allowing the borrower to recover the entire amount of both the principal and interest involved. See Sheehan, 315 B.R. at 240 (permitting borrower to recover entire amount involved even where payments already made on loan); In re Swartz, 37 B.R. at 779 (requiring lender to return any principal and interest paid by borrower); Nazarian, 77 R.I. at 504, 78 A.2d at 10 (entitling

borrower to recovery of "*all* of the principal *and* interest that he has paid to the lender under such an invalid loan agreement" (emphasis in original)); Colonial Plan, 147 A. at 881 ("lender shall have no right to collect either principal or interest").

For a loan to be usurious there must be (1) a contract entered into for the loan, and (2) the reservation, charging, or taking of excessive interest. Sheehan, 315 B.R. at 240. The burden is on the lender to show that the loan is not usurious. See id.; In re Swartz, 37 B.R. at 779 (placing responsibility on lender for strict compliance with usury laws). Even if the borrower assents to a usurious rate, there is no punishment for the borrower, and, in fact, the borrower may recover the payments made. See Sheehan, 315 B.R. at 241. To determine whether an interest rate is usurious, the value for computing the maximum permissible interest is not the amount on the face of the loan, but, rather, the actual amount received by the borrower. See In re Swartz, 37 B.R. at 778 (explaining legality dependent on amount received by borrower) (citations omitted); Burdon v. Unrath, 47 R.I. 227, 230, 132 A. 728, 729 (1926) ("standard for computation of the maximum interest and the test of the transaction is not the stated amount of a loan, but the amount of money actually received by the borrower").

The lender's intent is irrelevant and immaterial to a determination of usury under Rhode Island law. See In re Swartz, 37 B.R. at 778-79 (refusing to recognize good faith of lender as defense and stating "lender's intention to comply with the law is irrelevant under Rhode Island usury statute"); Colonial Plan, 147 A. at 881 (ruling lender's intent to violate usury law immaterial). The rule in many jurisdictions that there must be unlawful intent to render a transaction usurious is not universal and does not apply in Rhode Island. Burdon, 132 A. at 730 (discussing general rule of intent and declining to apply it under R.I. law). In this state, a lender presently has no defense even for an innocent mistake, a minor violation, or a rate otherwise set

in good faith. See In re Swartz, 37 B.R. at 778-79 (holding $4.00 fee over the maximum interest rate renders loan usurious and void regardless of lender's intent to comply with usury law).

Courts have reasoned that allowing lenders to argue mistake or lack of intent would provide a convenient excuse for charging usurious rates and would invite the very abuse the usury laws are designed to prevent. See id. (reasoning to allow lender to plead innocent mistake after discovery of violation would invite abuse); Burdon, 132 A. at 730 (holding mistake of law no excuse and arguing to hold otherwise would "furnish to avaricious lenders a convenient excuse for an evasion of the law"). Permitting consideration of intent "would open the door to the very abuses and opportunities to take advantage of small borrowers which the statute is designed to prevent." Colonial Plan, 147 A. at 881. Thus, arguing intent or good faith error "ignores the clear language of the statute." In re Swartz, 37 B.R. at 778.

Simply considering the facts in this case as outlined above, and putting aside for the moment the issue of the usury savings clause, it is clear that the loan in question is usurious. For separate periods of the loan, PRC charged interest rates of ten percent (10%), twelve percent (12%), and twenty-four percent (24%) of $1.8 million, while only distributing up to $1,007,390.52 to NV One. There can be no doubt that these interest amounts charged exceeded twenty-one percent (21%) of the disbursed loan. Because the elements of usury require only a loan and some reservation, charging, or taking of excessive interest, it is of no assistance to PRC that the interest rate may not have been usurious throughout the entire loan period. See Sheehan, 315 B.R. at 240 (requiring only loan agreement and reservation, charging, or taking of excessive interest). It is clear on the record of undisputed facts that the rate was undoubtedly usurious, at least for some period. That exact period or the exact amount above the twenty-one percent (21%) limit is not necessary for this Court to determine on this Motion. Reserving, for the

moment, consideration of the usury savings clause, it is evident that the loan here violates § 6-26-2.

B.

This Court is unaware of any controlling Rhode Island case law regarding the use and effect of a usury savings clause. Given the lack of precedent, this Court will consider the effectiveness of a usury savings clause in light of the public policy, legislative intent, and plain meaning of the Rhode Island usury law. Because usury statutes vary from state to state, our Supreme Court has declined in the past to rely on the law of other states. See Burdon, 132 A. at 730 (noting "statutes of usury are many and varied"); see also In re Swartz, 37 B.R. at 778 (finding other states' statutes of no assistance). Nevertheless, this Court finds it helpful to consider the law of other jurisdictions in articulating our own.

Texas has perhaps the most extensive usury laws and application of savings clauses. Usury law in Texas differs greatly from Rhode Island, however. Texas' usury regulations, consisting of a number of chapters of statutes, are far longer and more complex than Rhode Island's succinct, few statutes. See Tex. Fin. Code Ann. § 301.001 (2005) et seq. Furthermore, usury in Texas is a matter of intention. See In re Perry, 425 B.R. 323, 376 (Bankr. S.D. Tex. 2010) (citing Kennon v. McGraw, 281 S.W.3d 648, 652 (Tex. App. 2009)). There, savings clauses are given effect if possible and enforced in appropriate circumstances. See id. (citations omitted); Armstrong v. Steppes Apartments, Ltd., 57 S.W.3d 37, 46 (Tex. App. 2001) (providing Texas acknowledges validity of usury savings clauses and enforces them when appropriate). Despite the favor provided by Texas courts to savings clauses, mere presence of one alone will not save loans that are usurious on their face. Armstrong, 57 S.W.3d at 46 ("mere presence of a usury savings clause, however, will not rescue a transaction that is necessarily usurious by its

explicit terms"); Coastal Cement Sand, Inc. v. First Interstate Credit Alliance, Inc., 956 S.W.2d 562, 572 (Tex. App. 1997) (explaining savings clause ineffective if directly contradicts explicit terms of contract). A lender cannot simply escape usury liability by disclaiming an intention to do that which they clearly did. In re Perry, 425 B.R. at 376 (citing Kennon, 281 S.W.3d at 652); Armstrong, 57 S.W.3d at 47 ("lender cannot avoid the consequences of contracting for a usurious interest rate simply by including a savings clause in the contract"). Further, a savings clause will not save a loan when the lender continues to charge usurious amounts after notice and fails to effectuate the savings clause. See Armstrong, 57 S.W.3d at 47 (disallowing lender who never attempted to effectuate savings clause from now seeking its protection); see also In re Perry, 425 B.R. at 376 (stating law that savings clause will not save transaction usurious on its face or where no evidence lender attempted to effectuate clause). Although Texas favors savings clauses in light of its complex usury law, it still refuses to give them effect where it would allow the lender to "escape penalty by mere reference to a savings clause." In re Perry, 425 B.R. at 376 (citations omitted).

Florida has a similarly well-developed area of law regarding usury and the implementation of savings clauses in loan instruments. Like Rhode Island, the purpose of Florida's usury law is "to protect borrowers from paying unfair and excessive interest to overreaching creditors." Jersey Palm-Gross, Inc. v. Paper, 658 So.2d 531, 534 (1995). However, unlike Rhode Island, usury in Florida is largely a matter of intent. Id. Florida seeks to balance its legislative policy of protecting borrowers with its interest in facilitating complex commercial loan transactions. See id. at 534-35. Like Texas, Florida considers the savings clause as a factor in the determination of intent, but "a savings clause cannot, by itself, absolutely insulate a lender from a finding of usury." Id. at 535. Florida finds savings clauses to be proper

"[w]here the actual interest charged is close to the legal rate, or where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency . . . ." Id. (providing oft-cited framework for proper application of savings clause).

Other states have adopted similar approaches to Texas and Florida and do not effectuate savings clauses when the note is usurious on its face or when the lender accepted usurious payments. See Dominguez v. Miller, 995 F.2d 883, 886 (9th Cir. 1993) (holding savings clause no defense in California when loan is usurious on its face); Golden v. Lyons, 193 A.2d 487, 490 (Conn. 1963) (holding note usurious in Connecticut despite savings clause where lender accepted excessive interest payments and terms of the note appear usurious). In states where intent is an element of the violation, actions that are "per se usurious . . . cannot be condoned by any declaration of lack of intent to violate the law." Golden, 193 A.2d at 490. California, like Texas and Florida, considers a savings clause when intent is questionable, but does not when excessive interest payments are accepted by the lender and the rate is usurious on its face. See Gibbo v. Berger, 19 Cal. Rptr. 3d 829, 834 (Cal. Ct. App. 2004) (ruling savings clause does not apply where payments accepted and rate usurious on face).

These states distinguish between loans that are usurious on their face and loans that become usurious upon the occurrence of some future event or due to a variable interest rate. This Court, however, is unaware of any difference under Rhode Island law between these two types of usurious loans. As discussed above, in Rhode Island it need only be shown that a loan agreement was made and the lender demanded or received payments above the maximum interest rate. See Sheehan, 315 B.R. at 240. Rhode Island borders on strict liability for usury violations, and intent is not an issue as it is in other states. See In re Swartz, 37 B.R. at 779

(holding lender responsible for strict compliance with usury law). Accordingly, whether the note is usurious on its face or later becomes usurious is irrelevant.

Some other states have declared usury savings clauses to be void as contrary to public policy. See, e.g., Kissell Co. v. Gressley, 591 F.2d 47, 53 (9th Cir. 1979) (noting enforcing savings clause contrary to Arizona policy principles); Swindell v. Fed. Nat'l Mortgage Ass'n, 409 S.E.2d 892, 896 (N.C. 1991) (reasoning usury savings clause contravenes North Carolina's statutory policy); Simsbury Fund, Inc. v. New St. Louis Assocs., 611 N.Y.S.2d 557, 558 (N.Y. App. Div. 1994) (holding savings clause does not make loan non-usurious in New York). New York, like Rhode Island, declares usurious notes void as a matter of law, and the borrower is relieved of obligations on both principal and interest. See DeStaso v. Bottiglieri, No. 4480/06, 2009 WL 3298090, at *3 (N.Y. Sup. Ct. Aug. 31, 2009). When a lender subject to New York law held a portion of a loan in escrow out of the reach of the borrower but charged the borrower interest on that portion, the court determined that note to be usurious even though it contained a savings clause. See Simsbury Fund, 611 N.Y.S.2d at 558.

In declining to honor savings clauses in North Carolina, that state's Supreme Court relied on the public policy behind its usury laws.[5] See Swindell, 409 S.E.2d at 896. Explicitly holding that a usury savings clause cannot shield a lender from liability, the court considered the importance of "protecting the borrower against the oppression of the lender." Id. (citations omitted). The court explained that the statute places the burden on the lender to comply because it is the lender's business to lend money and the lender is in a better position than the borrower to

[5] Unlike Rhode Island, North Carolina requires corrupt intent to charge usurious interest, but that can be established simply by showing a usurious rate was actually imposed. See id. at 895-96. The penalty for usury in North Carolina is only forfeiture of interest, not principal. See id.

know and comply with the usury law. Id. Stated further:

> "A 'usury savings clause,' if valid, would shift the onus back onto the borrower, contravening statutory policy and depriving the borrower of the benefit of the statute's protections and penalties.
> . . . .
> A lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower."

Id. Finding it the intent of the North Carolina General Assembly to enforce the penalty provisions of their usury law, the court refused to apply the savings clause. Id. at 896-97.

As mentioned, Rhode Island has not considered the application of usury savings clauses; however, Rhode Island courts have examined the effect of waivers and releases of usury claims. This state allows waiver of a usury claim only when "it is freely and knowingly made after reasoned reflection for the legitimate purpose of avoiding or settling litigation." DeFusco, 440 A.2d at 732. Our Supreme Court applied this "narrow" rule so it would only apply when "a debtor's release of a usury claim is not merely a subterfuge to evade the usury statutes." Id. Because of the strong public policy against usurious transactions, releases may well be invalid as contravening that public policy if, for instance, they are executed contemporaneously with the signing of the note or in exchange for additional loans. See id. (stating "[t]he coercive nature of such situations, in light of the pressing financial needs of the borrower, has persuaded many courts to hold such releases invalid as contravening state usury statutes"). To ease the requirements for a valid release of a usury claim "would amount to a distortion of the plain language of the statute and a denial of the relief expressly therein provided as the established state policy." Nazarian, 77 R.I. at 505, 78 A.2d at 11 (ruling usury release not effective when not supported by valid consideration based on plain public policy to prevent usurious transactions).

Acknowledging Rhode Island's emphatic intent to discourage usurious transactions, this Court finds that under the undisputed facts presented here, enforcement of the usury savings clause would thwart public policy. Enforcing the provision would permit the lender, PRC, to take advantage of the borrower, NV One, by exacting excessive interest and simply modifying the rate if questioned by the borrower. See Marley, 102 R.I. at 207, 229 A.2d at 612 (discussing statutory intent to protect borrowers); Colonial Plan, 147 A. at 881 (discussing intent to prevent advantage being taken of borrowers); see also Swindell, 409 S.E.2d at 896 ("lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's rescission when discovered and challenged by the borrower"). Providing this opportunity to lenders would allow them to engage in the very abuse the statute is intended to prevent. See In re Swartz, 37 B.R. at 778-79 (concerning inviting abuse by allowing lender to plead mistake after discovery of violation); Colonial Plan, 147 A. at 881 (concerning opening the door to the abuses the statute is designed to prevent by considering lenders' intent). Further, it would allow the lender to escape the severe penalties intended by the General Assembly for usury violations. See DeFusco, 440 A.2d at 732 (recognizing "clear legislative intent to provide severe penalties"); Nazarian, 77 R.I. at 505, 78 A.2d at 10 (explaining policy to enforce severe penalties against lender to prevent usurious transactions). Lending effect to a usury savings clause would contradict this state's articulated public policy in favor of the borrower and against usurious transactions.

In opposition to this Motion for Partial Summary Judgment, the Defendants argue that their intent to comply with the usury requirements is a disputed, material fact not to be resolved on summary judgment. Were intent an issue under the statute, that argument may hold water; however, it is well-settled in Rhode Island that intent is irrelevant and immaterial to a violation

of the usury laws. See In re Swartz, 37 B.R. at 778-79 (ruling lender's intent to comply with usury laws irrelevant); Colonial Plan, 147 A. at 881 (ruling lender's intent immaterial in determination). Dispute of an immaterial fact is insufficient to preclude a ruling on summary judgment. See Smiler, 911 A.2d at 1038 (allowing summary judgment where no genuine dispute of material fact). Accordingly, there is no genuine dispute of material fact here and judgment may enter on the matter of law.[6]

Likewise, because intent is not an issue in Rhode Island, savings clauses are not useful here as they are in Texas and Florida, where they may be used to shed light on a lender's intent—a necessary element of usury in those states. Compare In re Perry, 425 B.R. at 376 (considering lender's intent under Texas law), and Jersey Palm-Gross, 658 So.2d at 534-35 (discussing intent of lender under Florida law), with Burdon, 132 A. at 730 (declining to consider lenders' intent under Rhode Island law). Those states give effect to the savings clause when the lenders' intent is not clear. See Jersey Palm-Gross, 658 So.2d at 535 (weighing savings clause as factor in determining intent). A savings clause serves no similar purpose under Rhode Island's statute. See In re Swartz, 37 B.R. at 778-79 (requiring strict compliance with usury law and not considering intent). Where the intent of the lender is not controlling, the lender's intent as set forth in a savings clause is of no consequence.

As opposed to considering intent, Rhode Island's judiciary has limited lenders' ability to avoid usury claims. See DeFusco, 440 A.2d at 732 (permiting waiver of usury claim in only limited circumstances). It is imperative that we not permit coercive situations to enable lenders to evade statutory responsibilities. See id. (limiting release and waiver of usury because of

[6] Defendants also argue that limited discovery has been completed with regard to its intent to comply with usury laws. Because intent to comply has no effect on the finding of usury in Rhode Island, any discovery deficiencies are irrelevant. Additionally, Defendants acknowledge that they agreed to limited discovery. See Defs.' Mem. of Law in Opp'n 4.

coercive lending situations and public policy). Allowing a lender such as PRC to exact oppressive rates of interest from a borrower who needs the funds by simply including a savings clause in the boilerplate language of a loan agreement would similarly distort the intent behind the usury laws. See Nazarian, 77 R.I. at 505, 78 A.2d at 11 (refusing release of usury claim when not supported by valid consideration as contrary to public policy).

Here, a significant portion of the loan was never even distributed to NV One. Rather than holding the reserves in escrow as PRC indicated it would in the loan documents, PRC kept the funds in its own books where it could use them for other purposes. When the entire face amount of the loan is not disbursed, the maximum permissible interest is calculated based on the funds actually disbursed. See Burdon, 47 R.I. at 230, 132 A. at 729. Here, the disbursed amount is closer to $1 million than $1.8 million. This creates the usurious rate because PRC charged interest on funds it still held itself. See In re Swartz, 37 B.R. at 778 (calculating permissible interest rate based on amount received by borrower); see also Simsbury Fund, 611 N.Y.S.2d at 558 (holding note containing savings clause usurious where lender held portion of loan in escrow out of reach of borrower but charged interest on entire amount). Because the reserves were not even held in escrow by PRC, a fortiori, the interest rate was usurious. See Simsbury Fund, 611 N.Y.S.2d at 558. Further, the Note denied NV One any interest earned on the reserve funds held by PRC. Certainly, PRC cannot be permitted to charge interest on funds that are not only out of the reach of NV One, but also in use by PRC.

Additionally, PRC never attempted to effectuate its savings clause; instead, it continued to charge usurious rates and receive usurious payments. PRC cannot claim the protection of its own clause to which it did not adhere. To allow this lender to do so would directly contradict the Draconian approach applied by this state in order to protect borrowers from usurious lending

practices. See In re Swartz, 37 B.R. at 779 n.5 (noting Draconian approach to enforce usury law).

IV

Conclusion

After due consideration, this Court grants Plaintiffs' Motion for Partial Summary Judgment on liability for usury. This Court deems the loan is usurious and void. Accordingly, this Court finds the Mortgage and all other liens included in the loan documents void. Further, this Court orders all liens on the property removed from the land records.

Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.