

STATE OF MICHIGAN
COURT OF APPEALS

MARK RAYMOND FAGERMAN,

Plaintiff-Counterdefendant-
Appellee,

v

ANITA LOUISE FAGERMAN,

Defendant-Counterplaintiff-
Appellant.

UNPUBLISHED

March 23, 2006

No. 264558

Wexford Circuit Court

LC No. 04-018520-CH

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant Anita Fagerman appeals the trial court's judgment finding that the agreement between her and her brother, plaintiff Mark Fagerman, constitutes a mortgage that provides for a usurious interest rate, thus barring defendant from recovering any interest thereunder. We affirm in part, reverse in part and remand for a calculation of the amount of interest owing to defendant under the agreement.

In the summer of 2003, defendant lent \$29,300 to plaintiff so that plaintiff could improve his property to make it suitable for residence relative to the placement of a mobile home on the property. The loan also covered the costs to purchase and set up the mobile home. Defendant obtained the funds by way of three separate cash advances from her credit cards in the following amounts and at the following interest rates: (1) \$5,300 at 5.99 percent; (2) \$17,000 at 2.9 percent; and (3) \$7,000 at zero percent until December 2003, then 19.99 percent thereafter. The parties entered into a written agreement which provided: that plaintiff had received \$29,300 from defendant; that "[t]he full \$29,300, along with accumulated interest and penalties for late payments, is to be paid by [plaintiff] as by the credit card agreements involved;" and that "an accumulation of a six time default" in payment by plaintiff "will result in [plaintiff] forfeiting to [defendant] as collateral the title (deed) to his twenty acres" and to the mobile home located thereon. The parties also executed a summary form of the agreement indicating that defendant held an encumbrance on plaintiff's property, which defendant recorded with the Wexford County Register of Deeds.

During the course of 2004, plaintiff fell behind in his payments to defendant by more than six months; as a result, defendant asserted in letters to plaintiff that title in plaintiff's property had vested in her by operation of the agreement. Meanwhile, plaintiff obtained township approval to subdivide his twenty-acre parcel into four lots and placed one or more of the individual lots for sale to raise money to meet his obligations, including to defendant; he received offers thereon, but defendant refused to release her lien on the lot(s) defendant wished to sell. Plaintiff then filed the instant action seeking to quiet title to the property and for declaratory relief relative to the rights and obligations of the parties under the agreement. Defendant filed a counterclaim for the remaining amount owing on the loan, together with interest and attorney fees, or alternatively, asking that the court order the foreclosure sale of plaintiff's property to satisfy the debt remaining owing under the agreement and enter a deficiency judgment as warranted thereafter.

Following cross-motions for summary disposition, the trial court ruled that the agreement constituted a mortgage and further, that because a portion of the funds provided to plaintiff were subject to an interest rate that was to increase to 19.99 percent in December 2003, the entire transaction was tainted with usury and defendant was not entitled to recover any interest under the agreement. Defendant argues that the trial court erred in not blending the individual interest rates to determine a single interest rate for the whole transaction, and further, that the resulting interest rate is not in excess of the legal limit of 11 percent set by MCL 438.31c. We agree.

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). Interpretation of the usury statutes involves a question of law that this Court also reviews *de novo*. See *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

In *Mills v Pesetsky*, 208 Mich App 190; 527 NW2d 545 (1994), *aff'd in part, vacated in part* 453 Mich 975; 556 NW2d 478 (1996), this Court adopted a blending approach to determine whether a land contract was usurious. In that case, the parties had entered into a land contract by which the defendant purchased a home from the plaintiff for \$65,000.¹ As noted by this Court,

The land contract did not provide any terms for the payment of the \$65,000, nor did it state the interest to be paid. According to an addendum, which was incorporated by reference in the land contract, \$45,000 was to be paid in monthly payments of \$482 or more, "including principal and annual interest of 12 % of the unpaid balance." The balance of principal and interest on that amount was due on or before May 1, 1995. The remaining \$20,000, together with interest of eight percent per annum, compounded monthly, was also due on or before May 1, 1995. [*Id.* at 191-192.]

¹ The interest rate in *Mills* was governed by MCL 438.31c(6), which is the same provision implicated here. *Mills, supra* at 193.

The defendant failed to make three payments, and the plaintiff initiated an action for foreclosure. The trial court granted the defendant's motion to stay enforcement of the land contract on the basis that the land contract was usurious. *Id.* at 192. This Court reversed, stating:

The maximum interest rate that could be charged on the \$65,000 land contract was eleven percent per annum, or \$7,150. The parties agreed that defendant would be obligated to pay twelve percent per annum on \$45,000 of the amount due, or \$5,400. They also agreed that the remaining \$20,000 of the debt would be paid at the rate of eight percent per annum, compounded monthly, or an effective annual rate of 8.3 percent. Assuming no part of the \$20,000 was paid by the end of the first year, \$1,659.98 in interest would be owing on that portion of the debt. Interest owed under the two rates equals \$7,059.98 or 10.86 percent of \$65,000. [*Id.* at 193 n 1.]

The *Mills* panel thus concluded that the total interest on the \$65,000 amount of the land contract did not exceed the 11 percent per annum maximum rate allowed by MCL 438.31c(6). *Id.* at 193. Our Supreme Court affirmed this Court's "decision to use the blending approach to determine whether the land contract was usurious[.]" *Mills, supra*, 453 Mich at 975.²

Applying *Mills* to the instant case, the interest rate provided for by the parties' agreement did not exceed the legal limit of 11 percent set forth in MCL 438.31c(6). It is undisputed that the interest rate on a \$5,300 portion of the funds provided to plaintiff was fixed at 5.99 percent and that the interest rate on a \$17,000 portion of the funds provided to plaintiff was fixed at 2.9 percent. Therefore, even if the remaining \$7,000 in its entirety incurred interest at a rate of 19.99 percent,³ employing the approach adopted in *Mills* results in a calculation that the interest owed under the three rates would equal \$2,209.77,⁴ or 7.5 percent of \$29,300. While we are fairly

² The Supreme Court further ruled that this Court "erred in holding that the land contract was not usurious because that determination should have been made by the trial court given the lack of evidence on that issue before" this Court. *Mills, supra*, 453 Mich at 975. Therefore, the Supreme Court vacated this Court's judgment in that regard and remanded the case "to the trial court to determine whether the land contract was usurious using the blending approach." *Id.*

³ Documentary evidence submitted by defendant below suggested that defendant transferred the balance of this portion of the funds provided to plaintiff to another credit card, at a fixed rate of 6.99 percent, thus avoiding the imposition of the potentially usurious rate. If this is true, plaintiff was not charged a usurious interest rate; however, because the agreement at its inception contemplated a rate of 19.99 percent beginning in December 2003, and because the record is not entirely clear and definitive regarding the credit card transfer, we shall proceed with our usury analysis. The matter will be material to a determination of the amount of interest plaintiff owes defendant under the agreement on remand.

⁴ The math is as follows: 5.99 percent of \$5,300 is \$317.47; 2.9 percent of \$17,000 is \$493; and
(continued...)

confident of our math and believe that using the blending approach will produce an interest rate that falls significantly short of 11 percent, we shall permit the trial court to make the necessary calculations on remand following input from the parties in order to avoid the pitfalls encountered by the *Mills* panel as evidenced by the Supreme Court's order in that case remanding the matter for the trial court to engage in the calculations. Nonetheless, the trial court erred in determining that the instant transaction was usurious under the court's approach and analysis. Therefore, we reverse the trial court's judgment on this issue and remand to the trial court for a determination of the "blended" or combined interest rate⁵ and the total amount of interest owed by plaintiff under the agreement.

Defendant also asserts that the trial court erred in determining that the agreement constituted a mortgage as opposed to a type of indemnification agreement that when defaulted on resulted in a sale of the property to defendant. We disagree. By definition, a "mortgage" is "an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt." Black's Law Dictionary (5th ed). In *State Bar Grievance Administrator v Van Duzer*, 390 Mich 571, 577; 213 NW2d 167 (1973), our Supreme Court stated that "[a] conveyance of an interest in real estate to secure the performance of an obligation is a mortgage." By its plain language, the parties' agreement gave defendant an interest in plaintiff's land to secure the performance of plaintiff's duty to repay defendant according to the terms of their agreement.⁶ By definition, then, the agreement clearly constitutes a mortgage. As such, it is subject to MCL 600.3140, which provides plaintiff with a right of redemption for a six-month period following the sheriff's sale. Further, MCL 438.31c(2) expressly applies to a "note, bond or other evidence of indebtedness . . . the bona fide primary security for which is a first lien against real property." There can be no dispute that the agreement here fits this definition.

Defendant also argues that her attorney's neglect relative to discovery and the parties' true intent concerning the nature of agreement destroyed her contractual rights and, therefore, she was entitled to relief from judgment pursuant to MCR 2.612(C)(1)(f). This speculative argument does not reference extraordinary circumstances mandating the setting aside of the judgment in order to achieve justice; therefore, relief under MCR 2.612(C)(1)(f) is not appropriate, especially considering our finding above that the agreement clearly constituted a mortgage. See *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999).⁷

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19.99 percent of \$7,000 is \$1399.30.

⁵ Of course, if plaintiff concedes on remand that the blended or combined interest rate is below the usury rate, further inquiry by the court will be unnecessary.

⁶ We again note, as indicated above, that the parties executed a summary form of the agreement that reflected that defendant held an encumbrance on plaintiff's property that was recorded with the register of deeds. This lends further support that a mortgage existed.

⁷ Plaintiff raised a jurisdictional issue in a motion to dismiss that was denied by this Court, and the issue is also raised in plaintiff's appellate brief. The issue has been addressed and decided,
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Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Helene N. White

/s/ Patrick M. Meter

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and, regardless, the argument lacks merit because defendant was indeed an aggrieved party under MCR 7.203.