STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

BRUNOBAILEY, INC.,

Plaintiff,

v. **Case No. 19-175091-CB**
Hon. James M. Alexander

CURIS COMPANIES, INC.,
And MICHAEL CURIS, JR.,

Defendants,

_____/

OPINION AND ORDER RE: (1) PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION; AND (2) DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), (C)(8), AND (C)(10)

This matter is before the Court on cross motions for summary disposition, namely Plaintiff's Motion for Summary Disposition and Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Plaintiff BrunoBailey, Inc., and Defendant Curis Companies, Inc., entered into a Promissory Note on April 11, 2019 whereby Defendant promised to pay Plaintiff the total amount of $1,260,000.00, namely the $1,050,000.00 loan in addition to $210,000.00 as interest on the principal balance, which was due and owing on June 10, 2019. The Promissory Note was then personally guaranteed by Co-Defendant Michael Curis, Jr. See Exhibit B of Plaintiff's Motion.

On May 15, 2019, Defendant Curis Companies, Inc. issued a check in the amount of $1,050,000.00 to Plaintiff, along with a $210,000.00 check as the interest payment. After Plaintiff attempted to negotiate the $1,050,000.00 check, it was returned by Huntington National Bank due to insufficient funds. See Exhibit C of Plaintiff's Motion. When Plaintiff demanded full payment of the debt on June 3, 2019, Defendants responded by seeking an extension to satisfy the Note.

On June 4, 2019, the parties executed an Assignment wherein Defendants assigned to Plaintiff their right, title, claim and interest in all proceeds payable to them in connection with property known as the Plymouth property. See Exhibit F of Plaintiff's Motion. A First Amendment to Promissory Note was also executed to extend the payment deadline of the Promissory Note to the earlier of June 30, 2019 or the date of a sale or transfer of fee title or a lease of the Plymouth property. See Exhibit E of Plaintiff's Motion. On June 5, 2019, Plaintiff made a formal demand that Defendant Curis Companies, Inc. comply with MCL 600.2952 with respect to the dishonored check by paying the total amount of $1,050,000.00 in full. See Exhibit H of Plaintiff's Motion. However, Defendants have failed to pay the Promissory Note or honor the personal guaranty.

Consequently, Plaintiff initiated litigation on July 8, 2019 against Defendants. In its Complaint, Plaintiff is seeking damages based upon the following counts: (1) Breach of the Promissory Note and Guaranty; and, (2) Violation of MCL 600.2952 with respect to the dishonored check issued by Defendant Curis Companies, Inc.

Plaintiff has also filed a summary disposition motion, arguing that the undisputed facts establish each element of Defendants' breach of the parties' Promissory Note under Count One. Plaintiff contends further that it is entitled to summary judgment in relation to Count Two since Defendant Curis Companies, Inc. violated MCL 600.2952 as a matter of law.

In contrast, Defendants have filed their summary disposition motion, in which they argue that the June 4, 2019 Assignment constituted a novation of the Promissory Note to satisfy that payment obligation. Since the Promissory Note was satisfied by the Assignment, Defendants contend that the Insufficient Funds Statute is inapplicable. If the Court would find that the Assignment did not constitute a novation of the Promissory Note, Defendants assert that Plaintiff is still barred from recovery under Michigan's Wrongful Conduct Rule and on account of its failure to mitigate damages.

Both parties seek summary disposition pursuant to MCR 2.116(C)(10) and Defendants seek summary disposition under (C)(7) and (C)(8) as well. "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties…in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 109; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co.,* 451 Mich 358, 362; 547 NW2d 314 (1996).

Defendants are also seeking summary disposition under MCR 2.116(C)(7) on the ground that Plaintiff is barred from recovery because of the full payment or satisfaction of the Promissory Note through the Assignment. "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ

regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Dextrom v Wexford Cty.*, 287 Mich App 406, 428–29; 789 NW2d 211 (2010). (Citations omitted).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden*, *supra* at 120. When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* And, when deciding such a motion, the Court considers only the pleadings. MCR 2.116(G)(5). "A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010). (Citations omitted).

Plaintiff's Count One: Breach of Promissory Note and Guaranty

With respect to its Breach of Promissory Note and Guaranty claim, Plaintiff argues that it can establish every element of the breach of contract claim based upon the undisputed facts. "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co. v Ahrens Const., Inc.*, 495 Mich 161, 178; 848 NW2d 95 (2014).

Here, there is no dispute that the parties executed a Promissory Note on April 11, 2019 wherein Defendant Curis Companies, Inc. promised to repay $1,050,000.00, in addition to $210,000.00 in interest, to Plaintiff. The plain terms of the Promissory Note provide that

Defendant Curis Companies, Inc. shall remit payment as follows: "[t]otal of ONE MILION [sic] and TWO HUNDRED and SIXTY THOUSAND DOLLARS ($1,260,000.00) shall be due and owing on June 10, 2019." In addition, there is no question that Defendant Michael Curis, Jr. guaranteed that payment. In his Affidavit, Michael Curis, Jr. attests to the fact that he signed the Note as a personal guarantor. See Exhibit 3 of Defendants' Motion. Following the failed payment by Defendant Curis Companies, Inc., a First Amendment to Promissory Note was executed to extend the maturity date of the Note from June 10, 2019 to June 30, 2019.

The First Amendment to Promissory Note summarizes the initial transaction as follows: "Curis Companies, Inc., executed a certain Promissory Note (the "Note") dated April 11, 2019 payable to Lender in the original principal amount of $1,050,000 which was personally guaranteed by Michael A. Curis, Jr." The First Amendment to Promissory Note also added the following provision to the original Note: "Notwithstanding the foregoing, all sums due and owing hereunder shall be immediately due and payable upon the date of a sale or transfer of fee title or a lease of certain property commonly known as Parck Plaza Shopping Center Parcel C, 40855 Ann Arbor Road, Plymouth Michigan ('Plymouth Property')."

Paragraph 5 of the First Amendment to Promissory Note provides further that "[e]xcept as modified herein, the Note remains in full force and effect and is hereby ratified and confirmed by Seller and Purchaser. From and after the date hereof, all references to the Note shall be deemed to refer to the Note as amended by this Amendment. In the event of a conflict between the terms of the Note and the terms of this Amendment, the terms and conditions of this Amendment shall govern and control."

The same day that the First Amendment to Promissory Note was executed, the parties also entered into an Assignment. The Assignment provides as follows:

> FOR GOOD AND VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, and in order to secure Assignee [Plaintiff] for Assignor's [Defendants'] obligations under that certain Promissory Note (the "Note") dated April 11, 2019 payable to Assignee in the original principal amount of $1,050,000 executed by Curis Companies, Inc. and guaranteed by Michael A. Curis, Jr., Assignor hereby assigns and transfers unto Assignee all of its right, title, claim, and interest in and to all proceeds payable to it only in connection with that certain property commonly known as Parck Plaza Shopping Center Parcel C, 40855 Ann Arbor Road, Plymouth Michigan (the "Property").[1]

Paragraph 3 of the Assignment provides further that "[a]ny proceeds collected under this Assignment shall be applied against Assignor's indebtedness under the Note in such order as Assignee shall determine in its sole and absolute discretion."

In consideration of the parties' Promissory Note, First Amendment to Promissory Note, and Assignment, the Court finds that Plaintiff has established the first element of a breach of contract claim, namely the existence of a contract between the parties.

Michigan law is well-established that "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Holmes v Holmes*, *supra* at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

"Contracts must be construed as a whole, giving effect to all provisions. Courts must avoid interpretations that would render any part of a contract surplusage or nugatory and must also, if possible, seek an interpretation that harmonizes potentially conflicting terms." *Village of*

[1] Defendant Michael Curis, Jr. was promised $1,500,000.00 in proceeds, once the Plymouth property closed, in exchange for his assistance with the development project.

Edmore v Crystal Automation Systems Inc., 322 Mich App 244, 263; 911 NW2d 241 (2017). (Citations omitted). "[W]here one writing refers to another, the two writings are to be construed together, including any modifications agreed to by the parties in subsequent writings." *Smith Living Tr. v Erickson Ret. Communities*, 326 Mich App 366, 387; 928 NW2d 227 (2018).

The issue in dispute in this case is the second element of the breach of contract claim or the alleged breach of the parties' contract(s) by Defendants. The Promissory Note expressly provides direction to the parties in anticipation of a potential breach by Defendants:

> A failure to make any payment of interest; principal or late charge as and when it shall be or become due and payable shall constitute a default under this Promissory Note. In the event of any default under this Promissory Note, the holder hereof may, without notice or demand, declare the entire unpaid principal and all interest accrued on this Promissory Note immediately due and payable.

Based upon the parties' arguments and the attached exhibits, there is no dispute that Defendants failed to pay the $1,050,000.00 debt and the $210,000.00 interest payment as required under the Note. Plaintiff presents the Affidavit of Randall Tarnow and Defendant Curis Companies, Inc.'s dishonored check in the amount of $1,050,000.00 from Huntington National Bank as supporting evidence. See Exhibits C and I of Plaintiff's Motion. The reason given by Huntington National Bank for the return of the check is "NSF" or "not sufficient funds." If the Court's analysis stopped here, Plaintiff would have satisfied the second element of its breach of contract claim.

However, Defendants rely upon certain affirmative defenses to argue that they did not breach the Note because they are no longer obligated to pay the $1,050,000.00 debt. First, Defendants maintain that the June 4, 2019 Assignment constituted a novation of the Promissory Note to satisfy that payment obligation. A novation is defined as "[t]he act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or

replaces an original party with a new party." Black's Law Dictionary (11th ed. 2019). Courts consider the following elements "to measure whether a novation has been established: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) the consent of all parties to the substitution based upon sufficient consideration; (4) the extinction of the old obligation and the creation of a valid new one." *Macklin v Brown*, 111 Mich App 110, 112; 314 NW2d 548 (1981). "All of these elements must be established by the evidence; not necessarily by direct evidence, but by evidence of such facts and circumstances [surrounding the transactions] as logically leads one to the conclusion that a new contract has been made." *Imperial Hotels Corp. v Dore*, 257 F3d 615, 620 (6th Cir 2001).

Defendants contend that the Assignment was a novation because it covered the same subject matter and effectively extinguished the obligation under the Note by replacing it with a potentially greater obligation under the Assignment. That is, the Assignment awarded Plaintiff all right, title, claim and interest in the Plymouth proceeds, which were valued at $1,500,000.00. If the Assignment is not considered a novation in this matter, then Defendants assert that Plaintiff could receive a double recovery from the Note and the Assignment.

Defendants' double recovery argument is unfounded, however, considering the plain language of the Assignment that provides that "[a]ny proceeds collected under this Assignment shall be applied against Assignor's indebtedness under the Note." The Assignment does not state that Plaintiff shall receive the proceeds under the Assignment as well as the debt under the Note. Rather, the Plymouth property proceeds would be utilized to pay the obligation under the Note. What is more, nothing has been paid by Defendants to satisfy the Note at this point in time.

In further support of their novation argument, Defendants rely upon the Court of Appeals' determination in *Nib Foods, Inc. v Mally*, 70 Mich App 553, 560; 246 NW2d 317 (1976) that "if

parties to a prior agreement enter a subsequent contract which completely covers the same subject, but which contains terms inconsistent with those of the prior agreement, and where the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement, leaving the subsequent contract as the sole agreement of the parties."

In response, Plaintiff points out that the Court of Appeals in *Nib* did not in fact apply the above reasoning to that case because the agreement and the lease in that matter were not inconsistent and could be construed together. Similarly, Plaintiff reasons that the parties' Note and the Assignment must be read together and as a result, there is no novation. The Court agrees.

As argued by Plaintiff, the plain contractual language indicates that the Assignment has been executed "to secure Assignee for Assignor's obligations under that certain Promissory Note (the "Note") dated April 11, 2019." Further, Paragraph 3 of the Assignment provides that "[a]ny proceeds collected under this Assignment shall be applied against Assignor's indebtedness under the Note." What is more, Paragraph 5 of the First Amendment to Promissory Note provides that "the Note remains in full force and effect and is hereby ratified and confirmed by Seller and Purchaser."

In consideration of the plain terms of the Assignment and the First Amendment to Promissory Note and construing the two contracts together, the Court finds that the parties did not consent to the satisfaction of Defendants' $1,050,000.00 obligation under the Note through the creation of the Assignment.[2] Clearly, the Assignment is identified as security for Defendants' obligations under the Note. Any proceeds collected under the Assignment are to be applied to Defendants' obligations under the Note. In addition, the First Amendment to Promissory Note expressly states that Defendants' obligations under the Note remain in full force and effect.

[2] While Michael Curis, Jr. attests in his second Affidavit, attached as Exhibit 1 to Defendants' Response, that it was the parties' intent that entering into the Assignment would constitute full payment/satisfaction of the amount due under the Note, the plain and unambiguous language in the contracts demonstrate otherwise.

Furthermore, Plaintiff argues that the Assignment of the proceeds of a worthless claim lacks sufficient consideration to constitute a novation. Plaintiff attaches as Exhibit I the Affidavit of Randall Tarnow, Plaintiff's president, who attests that "BrunoBailey has not received the proceeds of the Plymouth Claim from Curis Companies, Curis, Jr., or anyone else."

In the Joint Case Management Plan, attached as Exhibit A to Plaintiff's Motion, Defendants represent on page 4 that "Mr. Curis had a claim to a commission or referral fee from another developer in connection with the HFHS development at the Plymouth Property (until he assigned it to Plaintiff)." As such, Plaintiff characterizes this $1,500,000.00 amount as a commission or a referral fee for Defendant Michael Curis, Jr. Yet, a commission or referral fee may only be earned by a licensed real estate broker under MCL 339.2501 *et seq*., and Plaintiff contends that neither Defendant is a licensed real estate broker to lawfully collect a commission or referral fee. See Exhibit K of Plaintiff's Motion. Conversely, Defendants argue that Michael Curis, Jr. was entitled to the proceeds as the real estate developer, not as a real estate broker. See Exhibit 1 of Defendants' Reply. Irrespective of the designation of the $1,500,000.00 amount, there is no debate that Plaintiff never received any monetary benefit under the Assignment.

According to Plaintiff, Defendants also assert that the Assignment constitutes an accord and satisfaction to extinguish the debt. "Accord and satisfaction is an affirmative defense… An 'accord' is an agreement between parties to give and accept, in settlement of a claim or previous agreement, something other than that which is claimed to be due, and 'satisfaction' is the performance or execution of the new agreement." *Nationwide Mut. Ins. Co. v Quality Builders, Inc.*, 192 Mich App 643, 646–47; 482 NW2d 474 (1992). To establish this defense, a defendant is required to show "(1) its good faith dispute of (2) an unliquidated claim of plaintiff, (3) its tender of money in satisfaction of the claim, and (4) plaintiff's acceptance of the tender." As

argued by Plaintiff, this defense fails because the debt in this matter is a liquidated claim. "A claim is liquidated when it is capable of ready determination of how much is due." *In re Dow Corning Corp.*, 215 BR 346, 355 (Bankr ED Mich 1997). There is no question that the debt due and owing under the Note is $1,050,000.00.

Next, Defendants present their second argument that Plaintiff is barred from recovery under Michigan's Wrongful Conduct Rule. "When a plaintiff's action is based, in whole or in part, on his own illegal conduct, a fundamental common-law maxim generally applies to bar the plaintiff's claim…When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common-law maxim, known as the 'doctrine of in pari delicto' generally applies to also bar the plaintiff's claim…We shall refer to these maxims collectively as the 'wrongful-conduct rule.'" *Orzel by Orzel v Scott Drug Co.*, 449 Mich 550, 557; 537 NW2d 208 (1995). (Citations omitted).

What Defendants allege as Plaintiff's wrongful conduct is its purported violation of Michigan's criminal usury statute, MCL 438.41. Specifically, Plaintiff charged Defendants $210,000.00 as interest on the loan, which Defendants maintain is an interest rate of 120% (annualized). Defendants rely on MCL 438.61 to argue that corporations and other business entities may agree in writing to any amount of interest if the rate does not exceed 25% as set forth in the criminal usury statute. Pursuant to MCL 438.41, "[a] person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both."

Defendants also rely on the case of *Hedrick v Miller* (WD Michigan Bankruptcy Court Adversary Case No. 08-80218 4/25/2018), in which the United States Bankruptcy Court applied the Wrongful Conduct Rule to an interest rate violation of the criminal usury statute. According to Defendants, the *Hedrick* Court determined that Michigan's Wrongful Conduct Rule deprived the plaintiff in that matter from any right to payment and it subsequently discharged that defendant's debt.

In opposition, Plaintiff notes that the *Hedrick* case is an unpublished decision that has no precedential value. Moreover, Plaintiff relies upon MCL 450.1275, which provides that "[a] domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited."

While MCL 438.61 and MCL 450.1275 appear to be in conflict, the Court of Appeals has distinguished between the two in the case of *Kleanthous v First of Chelsea Corp.*, 201 Mich App 440, 441–42; 507 NW2d 2 (1993). In that case, the Court of Appeals reasoned that "M.C.L. § 450.1275; M.S.A. § 21.200(275) provides that a corporation may agree in writing to pay a rate of interest in excess of the legal rate and that the defense of usury is prohibited. M.C.L. § 438.61; M.S.A. § 19.15(71), effective March 31, 1983, made it lawful to charge business entities, including corporations, interest at rates not exceeding fifteen percent a year. These statutes are not in conflict. One sets the legal interest rate at fifteen percent for a wide class of business entities. The other states that a particular class of business entities, corporations, can agree to pay interest at rates higher than the legal rate and they will be barred from raising usury as a defense. Changing the legal interest rate applicable to business entities from seven percent to fifteen percent did nothing to diminish the authority corporations have to agree to pay interest in excess

of the legal limit, and did nothing to diminish the prohibition on corporations from raising the defense of usury if they have agreed to pay interest in excess of the legal limit."

Since Defendant Curis Companies, Inc. is a Michigan corporation and it expressly agreed to pay interest in the amount of $210,000.00 in the parties' Promissory Note, Defendant Curis Companies, Inc. is prohibited from raising the defense of usury.

Plaintiff argues further that Defendant Michael Curis, Jr., as the guarantor, cannot separately invoke the defense of usury. In a case concerning an individual guarantor who raised the defense of usury, namely *Pardee v Fetter*, 345 Mich 548, 552; 77 NW2d 124 (1956), the Michigan Supreme Court deferred to New York case law to find that a surety cannot invoke the defense of usury when the corporation was unable to invoke that defense. "The general rule is that the liability of the surety is no greater and no less than that of the principal, and where the defense of usury could not be invoked by the corporation it cannot be invoked by the surety." *Id.*

In contrast, Defendants argue that the First Amendment to Promissory Note made Defendant Michael Curis, Jr. a primary obligor. The first paragraph of the First Amendment to Promissory Note provides: "THIS FIRST AMENDMENT TO PROMISSORY NOTE (this "Amendment") is dated as of June 4, 2019 by and between CURIS COMPANIES, INC., a Michigan corporation and MICHAEL A. CURIS (collectively, "Borrower") and BRUNOBAILEY, INC., a Michigan Corporation ("Lender").

Even though the above language identifies Michael Curis, Jr. as a Borrower under this amendment, the role of Michael Curis, Jr. as the personal guarantor of the Promissory Note has not been changed. Notably, the First Amendment to Promissory Note reaffirms that Defendant Michael Curis, Jr. personally guaranteed the April 11, 2019 Promissory Note. The Assignment also reiterates that Michael Curis, Jr. personally guaranteed the April 11, 2019 Promissory Note.

Additionally, the Promissory Note remains in full force and effect and is only superseded by the First Amendment to Promissory Note if the terms conflict with one another. The First Amendment to Promissory Note simply extended the maturity date of the original Note and added terms regarding the Plymouth property. The First Amendment to Promissory Note never altered Michael Curis Jr.'s role as the personal guarantor of the April 11, 2019 Promissory Note. Since Defendant Michael Curis, Jr. is the personal guarantor of the Note, he cannot separately invoke the defense of usury. As such, the Court finds that both Defendants are prohibited from raising the defense of usury under MCL 450.1275.

Plaintiffs also point out that the Promissory Note contains a savings clause, which provides in pertinent part as follows:

> Any provision conflicting with any statute or rule of law of the State of Michigan, including any statute or rule of law relating to the maximum rate of interest that can be paid by undersigned, or otherwise unenforceable for any reason, shall be deemed severable from the balance of this Promissory Note and shall be enforced to the maximum extent permitted by law and shall not invalidate any other provision contained in this Promissory Note.

In response, Defendants rely on the case of *Olsen v Porter*, 213 Mich App 25; 539 NW2d 523 (1995), to argue that trial courts may not reform usurious contracts based upon clear and obvious policy considerations. Yet, the *Olsen* case did not involve a savings clause in the parties' land contract and therefore, is inapplicable to the case herein.

In the case of *In re Skymark Properties II, LLC*, 597 BR 363, 390 (Bankr ED Mich 2019), cited by Plaintiff, the United States Bankruptcy Court held that the lender in that matter was not in violation of the usury statute because the Promissory Note contained a savings clause to ensure that the interest would not exceed the maximum rate allowed by Michigan's usury statute. In *Skymark*, the savings clause was upheld by the Bankruptcy Court to prevent the defense of usury. Plaintiff even notes that this Court cited to the Bankruptcy Court's ruling in the matter of

Southfield Metro Center Holdings, LLC v Skymark Properties II, LLC, Case No. 2019-170827-CB, in its May 1, 2019 Order. Defendants suggests that this Court hold its opinion in this matter in abeyance if the Court believes that the pending Court of Appeals' decision in the *Southfield Metro* case would be dispositive or instructive here. However, the Court has previously determined that Defendants are prohibited by statute from raising the defense of usury. Had that determination not been made, the Court finds that the execution of the parties' savings clause would also prevent the defense of usury by either Defendant in this matter.

Finally, and as its third defense, Defendants argues in their motion that Plaintiff is barred from recovery on account of its failure to mitigate damages. According to Defendants, Plaintiff (via its President, Randall Tarnow) could have refused to sign off on the closing of the development until the Plymouth proceeds were paid. Because Randall Tarnow refused to sign off on the closing of the Plymouth development, Defendants argue that Plaintiff squandered the opportunity to receive $1,500,000.00.

In response, Plaintiff contends that it was not required to proceed on the collateral before seeking payment of the loan from Defendants. See generally, *Comerica Bank v Cohen*, 291 Mich App 40, 49; 805 NW2d 544 (2010). Additionally, Plaintiff points out that Randall Tarnow's employer, Newmark Knight Frank, was the real estate broker for Henry Ford Health System in relation to the Plymouth transaction. In his Affidavit, Randall Tarnow attests that he worked on the Plymouth transaction as an employee of Newmark Knight Frank. "BrunoBailey had no authority or ability to control or prevent the closing of any transaction related to the Plymouth Property. It had no role in such transaction. Newmark Knight Frank could not prevent the closing of the Plymouth Property transaction to assist Curis Companies or Curis, Jr. In fact, any

such action would have violated Newmark Knight Frank's duties owed to the parties to that transaction." See Paragraphs 17 – 20 of the Tarnow Affidavit; Exhibit B to Plaintiff's Response.

The Court observes that Defendants do not present opposing factual evidence that would create a question of fact with respect to the alleged failure on Plaintiff's part to mitigate damages. Defendants also concede this fact and accordingly, have withdrawn their "failure to mitigate damages" argument from their request for summary disposition.

In consideration of the Court's afore-mentioned findings in favor of Plaintiff, and based upon the evidence presented, the Court further finds that Plaintiff has satisfied the third element of its breach of contract claim with respect to damages as a result of Defendants' breaches of the Promissory Note and personal guaranty.

In consideration of the parties' cross motions for summary disposition as well as the affidavits, pleadings, and other evidence submitted by the parties, the Court finds that the evidence fails to establish a genuine issue regarding any material fact in relation to Count One of Plaintiff's Complaint. Accordingly, the Court finds that Plaintiff is entitled to summary disposition on Count One of its Complaint.

Plaintiff's Count Two: Violation of MCL 600.2952

Pursuant to Count Two of the Complaint, Plaintiff alleges that Defendant Curis Companies, Inc. violated MCL 600.2952 when its check for $1,050,000.00 was returned to Plaintiff for insufficient funds.

MCL 600.2952(1) provides that "a person who makes, draws, utters, or delivers a check, draft, or order for payment of money upon a bank or other depository, person, firm, or corporation that refuses to honor the check, draft, or order for lack of funds or credit to pay or because the maker has no account with the drawee is liable for the amount of the dishonored check, draft, or

order, plus a processing fee, civil damages, and costs, as provided in this section." Section (2) of the statue sets forth the requirements of the written demand for payment of the check. MCL 600.2952(4) then provides the penalty for the responsible party in a civil action. That is, the maker of the dishonored check is liable to the payee for payment of all of the following:

> (a) The full amount of the check, draft, or order.
> (b) Civil damages of 2 times the amount of the dishonored check, draft, or order or $100.00, whichever is greater.
> (c) Costs of $250.00.

To prove this claim, Plaintiff has submitted as Exhibit C to its Motion the dishonored check that was returned from Huntington National Bank due to insufficient funds. Plaintiff next offers its June 5, 2019 written demand letter for payment as Exhibit H to its Motion. The Court finds that the written demand letter fully complies with the requirements set forth in MCL 600.2952(2). While Defendants provide defenses in support of their refusal to pay the $1,050,000.00 loan amount, Defendant Curis Companies, Inc. does not dispute the fact that the check was dishonored or that Defendants received the written demand letter in response.

Instead, Defendants maintain that the Assignment paid the underlying debt of the Promissory Note in full. Defendants also contend that Plaintiff's violation of the criminal usury statute triggered the Wrongful Conduct Rule, which negates any liability of Defendants in relation to the $1,050,000.00 debt. Finally, Defendants assert that the obligation to pay the $1,050,000.00 was not yet ripe when Defendant Curis Companies, Inc. issued the check on May 15, 2019. As such, Defendant Curis Companies, Inc. argues that it cannot be held liable under MCL 600.2952.

Throughout this Opinion and Order, the Court has found in favor of Plaintiff with regard to Defendants' defenses concerning the criminal usury statute and the Wrongful Conduct Rule. Consequently, Defendant Curis Companies, Inc.'s above defenses against liability for the dishonored check fail once more. With that said, however, the Court is mindful of Defendants'

assertion that Plaintiff agreed not to cash the subject checks until the Plymouth development closed. Defendants present the Affidavit of Michael A. Curis, Jr., who attests to the following:

> 15. On May 15, 2019, well before the Original Maturity Date, Tarnow asked me to give him two checks, one for $1,000,050.00 [sic] ("the Principal Check") and the other for $210,000.00 ("the Interest Check) and agreed to hold them until the Plymouth Development closed and the Plymouth Proceeds were paid.
>
> 16. CCI issued the two checks to Brunobailey as requested, but Tarnow did not hold them. He immediately presented the Principal Check which, of course, was returned for insufficient funds. ("The NSF Check").

In opposition, Plaintiff argues that Defendant Curis Companies, Inc. never told Plaintiff to hold the check before it was negotiated. In his Affidavit, Randall Tarnow attests that "[n]either Curis Companies nor Curis Jr. ever told BrunoBailey to hold the check in escrow or in trust before BrunoBailey attempted, unsuccessfully, to negotiate the check." Plaintiff asserts further that it would make no sense for Defendant to tender an unconditional check and then direct Plaintiff to hold it in trust. Plaintiff also points out that the check was never honored by Defendant Curis Companies, Inc.

As stated previously, there is no dispute that Defendant Curis Companies, Inc.'s $1,050,000.00 check was returned for insufficient funds and in compliance with MCL 600.2952, Plaintiff issued a written demand letter for full payment of that obligation. There is also no dispute that the $1,050,000.00 obligation, and the $210,000.00 interest payment, have not been satisfied by Defendants and are currently due and owing. What concerns the Court here are the attestations made by Defendant Michael Curis, Jr. in his Affidavit that Plaintiff agreed to hold the checks for $1,050,000.00 and $210,000.00 until the Plymouth development closed and its proceeds were paid. Certainly, there is no indication on the face of the actual check that there is any condition that must be met prior to its negotiation. Yet, if what Michael Curis, Jr. avows, under oath, is true and if Plaintiff had not cashed the check, the severe remedies under MCL

600.2952 would not have been triggered. Thus, the Court finds that there is a genuine issue of material fact with respect to Plaintiff's claims under Count Two of the Complaint to warrant denial of both parties' summary disposition motions in this regard.

Therefore, Plaintiff's Motion for Summary Disposition is GRANTED as to Count One of the Complaint and DENIED as to Count Two of the Complaint.

Furthermore, Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10) is DENIED in its entirety.

IT IS SO ORDERED.

September 28, 2020
Date

/s/ James M. Alexander
Hon. James M. Alexander
Circuit Court Judge