[Cite as *Gates v. Ohio Sav. Assn.*, 2009-Ohio-6230.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

BARBARA J. GATES, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-G-2881**
- vs -	:	
THE OHIO SAVINGS ASSOCIATION, n.k.a., OHIO SAVINGS BANK,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 06 M 000207.

Judgment: Affirmed.

Edward W. Cochran, 20030 Marchmont Road, Shaker Heights, OH 44122 (For Plaintiffs-Appellants).

Hugh M. Stanley and *Thomas R. Simmons*, Tucker, Ellis & West, L.L.P., 1150 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115-1414 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Appellants, Charles R. and Barbara J. Gates, appeal the judgment of the Geauga County Court of Common Pleas granting summary judgment in favor of appellee, Ohio Savings Bank, n.k.a. AmTrust Bank ("AmTrust"),[1] in connection with a

1. The Gates entered into a mortgage with The Ohio Savings Association, which was later known as Ohio Savings Bank. Thereafter, Ohio Savings Bank changed its name to AmTrust Bank. For purposes of this appeal, we will refer to appellee as AmTrust.

30-year Open-End Roll-Over Mortgage Note ("Note") for a $96,000 loan obtained in 1981. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} This appeal arises out of a mortgage loan transaction Mr. and Mrs. Gates entered into with AmTrust Bank on November 24, 1981. The Gates signed a 30-year Open-End Roll-Over Mortgage Note ("Note") for a $96,000 loan, a refinancing of their prior mortgage loan secured by their home in Novelty, Ohio.

{¶4} This Note provided for an interest rate that adjusts every six months "to a new rate of interest equal to the prevailing rate of interest in effect and utilized by [AmTrust] *** for the same category of loans." Furthermore, the Note provided that the adjustable interest rate cannot fall below a floor rate or go above the greater of two ceiling rates. The floor rate was defined as "the monthly Average Mortgage Contract Rate as published in the Federal Home Loan Bank Board Journal." The ceiling rate was defined as "the greater of (a) 130% of the average auction yield for six months U.S. Treasury bills ["Cap A"] or (b) three percent (3%) over the rate for six month advances from the Federal Home Loan Bank of Cincinnati ["Cap B"] ***."

{¶5} On November 24, 1981, the Gates signed a Rider to the Note providing that the adjustable interest rate "shall be decreased or increased to a new rate of interest equal to one percent (1%) below the rate of interest that would otherwise be prescribed by the Note ***." In the event that Open-End Roll-Over Mortgages were discontinued, the Note provided for the calculation of the six-month adjustable interest rate, stating:

{¶6} "If *** [AmTrust] is not offering to make loans of the same category as this loan, the Contract Interest Rate to be applicable to this Note for the next succeeding six-month period shall be the rate of interest then in effect for that type of loan being offered by [AmTrust] that, in the sole opinion of [AmTrust], has characteristics most similar to this loan."

{¶7} AmTrust discontinued the use of Open-End Roll-Over Mortgage Notes for new mortgage loan transactions in 1982. AmTrust determined that its Adjustable Rate Mortgage ("ARM") loan was the type of loan that had "characteristics most similar" to the Open-End Roll-Over Mortgage. Consequently, AmTrust applied the interest rate for that type of loan to the Gates' loan; the adjustable interest rate for the ARM loans is set at 2.75% over the weekly average yield on U.S. Treasury Securities, adjusted to a constant maturity of one year as made available by the Federal Reserve Board, rounded to the next highest 1/8th of 1%.

{¶8} Since its inception, the Gates have received monthly mortgage statements from AmTrust identifying the current interest rate and other details, such as the allocation of interest and principal and the principal balance. The Gates have also received a notice from AmTrust every six months identifying the new interest rate pursuant to the ARM.

{¶9} In his deposition, Mr. Gates stated that, as early as the first six-month interest rate adjustment in 1982, he believed calculation of the interest rate was inconsistent with the terms of the Note. In 1993, Mr. Gates began calling and writing letters to AmTrust regarding the interest rate calculation. Mr. Gates did not receive a response until October 6, 2005 – a letter signed by Mr. David L. Yahr, a vice president

of AmTrust. In said letter, Mr. Yahr acknowledged AmTrust's lack of response and explained the method of calculating the interest rate.

{¶10} Although Mr. Gates sought the advice of an attorney in 1993 and 1995 to explore potential claims against AmTrust, a complaint was not filed until February 24, 2006. Upon motion of AmTrust, the matter was removed to the United States District Court, Northern District of Ohio, Eastern Division. The District Court granted summary judgment in favor of AmTrust on the Gates' claim that AmTrust had violated the Truth In Lending Act. The remaining claims were remanded to the trial court.

{¶11} The Gates filed a second amended complaint, asserting the following claims: (1) breach of contract, (2) fraud, (3) breach of fiduciary duty, (4) a claim that AmTrust failed to abide by federal banking regulations, and (5) an accounting. AmTrust moved for summary judgment, which the trial court granted. The only issue on appeal is the trial court's entry of summary judgment with respect to the Gates' breach of contract claim. On appeal, the Gates assign the following errors for our review:

{¶12} "[1.] The trial court erred in enforcing Cap B even though the index in Cap B was unavailable to the general public and Ohio Savings Bank.

{¶13} "[2.] The trial court erred in enforcing Cap B even though the language describing Cap B was subject to totally opposite interpretations.

{¶14} "[3.] The trial court erred in enforcing Cap B even though the bank's calculation of periodic interest breached its obligation of good faith and fair dealing."

{¶15} **Standard of Review**

{¶16} This court reviews de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, at ¶13,

citing *Cole v. Am. Industries & Resources Corp*. (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id. citing *Parenti v. Goodyear Tire & Rubber Co*. (1990), 66 Ohio App.3d 826, 829.

{¶17} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been

firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40.

{¶18} The Supreme Court of Ohio has held that "the construction of a written contract is a question of law, which [is reviewed] de novo." *In re All Kelly & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, at ¶28. (Citations omitted.)

{¶19} **Ambiguity in a Contract**

{¶20} For ease of discussion, we initially address the Gates' second assignment of error. The Gates argue the trial court erred in finding that the provision defining the ceiling rate as defined in the Note, entered into in November 1981, was unambiguous. As a result, they argue the trial court erred in dismissing their claim for breach of contract.

{¶21} As previously stated, this court recognizes that the interpretation of a contract is a purely legal question and, thus, we shall conduct a de novo review of the trial court's interpretation of the contract at issue, affording no deference to the trial court's interpretation.

{¶22} Addressing ambiguity in a written document, the Supreme Court of Ohio has noted:

{¶23} "In recent years, Ohio courts have devoted many pages to discussions of whether contracts, ballot initiatives, statutes, or even constitutional provisions are ambiguous. See, e.g., *State v. Haven*, 9th Dist. No. 02CA0069, 2004-Ohio-2512 ***; *Ponser v. St. Paul Fire & Marine Ins. Co.*, 5th Dist. No. 2002CA00072, 2003-Ohio-4377, ***; *State ex rel. Grammas v. Batavia Twp. Bd. of Trustees* (Apr. 22, 1996), 12th Dist. No. CA95-10-069, 1996 WL 189034 ***. However, no clear standard has evolved to

determine the level of lucidity necessary for a writing to be unambiguous. Some courts have reasoned that when multiple readings are possible, the provision is ambiguous. See *Integrity Tech. Servs. v. Holland Mgmt.*, 9th Dist. No. 02CA0009-M, 2002-Ohio-5258, ***, at ¶18; *Baker v. Economy Fire & Cas. Co.* (Nov. 18, 1985), 12th Dist. No. CA85-05-048, 1985 Ohio App. LEXIS 9322 ***; *Roy v. State Farm Mut. Auto. Ins. Co.* (1982), 8 Ohio App.3d 368, 370 ***. The problem with this approach is that it results in courts' reading ambiguities into provisions, which creates confusion and uncertainty. When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning. *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, ***, at ¶11. Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, at ¶11. (Parallel citations omitted.)

{¶24} Therefore, the first question this court must decide, under the rules of contract construction, is whether the contract is ambiguous. If the contract is unambiguous, we decline to partake in the exercise of contractual interpretation and, thus, apply the contract as written.

{¶25} In the instant case, the Note contained a definition of the ceiling rate, or a cap on the adjustable interest rate. The ceiling rate was defined as: "the greater of (a) 130% of the average auction yield for six months U.S. Treasury bills ["Cap A"] or (b) *three percent (3%) over the rate* for six month advances from the Federal Home Loan Bank of Cincinnati ["Cap B"] ***." (Emphasis added.)

{¶26} The Gates argue that Cap B is ambiguous. Specifically, they allege that "three percent (3%) over the rate" means 103% of the Federal Home Land Bank of Cincinnati rate. We do not agree.

{¶27} It is well-settled that this court must examine the contract as a whole. When the Note in this case is viewed as a whole, it becomes apparent there is no ambiguity. Interpreting Cap B as 103% would render an internally inconsistent interpretation, as Cap A specifically refers to "*130%* of the average auction yield for six months U.S. Treasury bills." (Emphasis added.) If the drafters intended "three percent (3%) over the rate" to mean 103%, they would have used the actual figure, i.e. 103%, to remain consistent with the numerical phraseology employed in Cap A.

{¶28} Further, the definition of the ceiling rate specifically applies to the "greater" of two options. The Gates' interpretation would render meaningless portions of the Note. For example, if we were to accept the Gates' argument, Cap B would be superfluous, since Cap A would always be greater than Cap B. The Supreme Court of Ohio has held that, when interpreting a contract**,** a court is to presume that words are used for a specific purpose, and a court should avoid interpretations that render portions meaningless or unnecessary. *Farmers Natl. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, paragraph six of the syllabus.

{¶29} We further presume that the intent of the parties is reflected in the language used in the Note. Although Mr. Gates maintains an ambiguity exists with regard to Cap B of the Note, executed in 1981, he testified that the "analysis of the three percent" was not formulated until *after* the instant lawsuit was filed. Moreover, the Gates do not take issue with the Rider to the Note which provides that they will receive

an interest rate "equal to one percent (1%) below the rate of interest that would otherwise be prescribed by the Note." Remaining arithmetically consistent with the Gates' argument under this assignment of error, the phraseology "equal to one percent (1%) below the rate of interest" in the Rider would equal 99% of the interest rate required by the Note. In his deposition, however, Mr. Gates testified that "one percent (1%) below the rate of interest" is to be calculated by subtracting one full percent from the rate of interest.

{¶30} Additionally, with regard to the definition of the ceiling rate contained in the Note, the Gates' expert, Mr. Frank D'Amico, testified to the following:

{¶31} "Q: 'Or' which means there's two ceilings, either one. 'Or three percent over the rate for the six-month advances for the Federal Home Loan Bank of Cincinnati.' Do you see that?

{¶32} "***

{¶33} "Q: Did you know what the six-month advances for the Federal Home Loan Bank of Cincinnati were?

{¶34} "A: No, I didn't.

{¶35} "Q: Let's assume that it was eight percent. Okay?

{¶36} "A: Okay.

{¶37} "Q: What is the percentage, the three percent over eight percent? How many percent would that be?

{¶38} "A: Three percent over the six-month rate would be 11 percent, I would assume."

{¶39} When the Note at issue here is viewed as a whole, it becomes clear that the definition of the ceiling rate, in Cap B, is clear and unambiguous. Based on the foregoing, the Gates' second assignment of error is without merit.

{¶40} **Unconscionability**

{¶41} Under the first assignment of error, the Gates argue that Cap B is "unconscionable because the index therein was frequently not available to the general public or to [AmTrust]."

{¶42} "An unconscionable contract clause is one in which there is an absence of meaningful choice for the contracting parties, coupled with draconian contract terms unreasonably favorable to the other party." *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶30. An arbitration provision can be rendered invalid where a party demonstrates the provision is both procedurally and substantively unconscionable. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 Ohio App.3d 27, 2004-Ohio-5953, at ¶13.

{¶43} In *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, the Second Appellate District explained substantive unconscionability in the following manner:

{¶44} "Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the

following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." (Citations omitted.)

{¶45} *Collins* also outlined the standard for reviewing a question of procedural unconscionability:

{¶46} "Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, *e.g*., 'age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.'" (Citations omitted.) Id. at 834.

{¶47} As noted, unconscionability is, in effect, a conjunctive test. Therefore, in order to find a contract or a clause in the contract to be unconscionable, one must allege and prove both substantive and procedural unconscionability. The Gates' theory that Cap B of the Note was substantively and procedurally unenforceable was first raised in their memorandum in opposition to AmTrust's motion for summary judgment. The Gates failed to assert this legal theory of unconscionability in their original or amended complaint. *Alden v. Kovar*, 11th Dist. Nos. 2007-T-0114 and 2007-T-0115, 2008-Ohio-4302, at ¶64-73. Thus, it was not before the trial court. In the interest of justice, however, we will address the Gates' first assignment of error.

{¶48} In their brief, the Gates failed to identify evidence in the record that would demonstrate there is a genuine issue of material fact. Their argument is devoid of any evidence that would demonstrate Cap B satisfies both prongs of the test for

unconscionability. To support their claim, they rely solely upon the trial court's alleged misinterpretation of *Preston v. First Bank of Marietta* (1983), 16 Ohio App.3d 4. The plaintiffs in *Preston* signed two mortgages – a note for 8% interest and a note for 9% interest. Id. at 5. Both notes included a paragraph allowing the bank to "'decrease said interest rate and *** increase the rate upon giving not less than 30 days' written notice ***.'" Id. The plaintiffs were given disclosure statements but neither statement mentioned the raising of interest rates. Id. The *Preston* Court stated "[t]he variable rate clauses in the mortgages in this case are not sufficiently definite and certain." Id. at 6. Further, the court noted that the trial court's decision in finding the contracts to be unconscionable was a "misnomer." Id. at 7. However, "[t]he contracts, if they were enforced, would be unconscionable for clearly there is no mutuality." Id.

{¶49} First, the terms of the Note at issue do not meet the test for substantive unconscionability. Unlike the contracts in *Preston*, supra, the Note at issue did not provide AmTrust unfettered discretion in increasing or decreasing the rate of interest. While the interest rate could fluctuate, its calculation was specifically defined within the Note. Also, the Note set forth definable parameters, clearly establishing the ceiling rates upon which the index could not rise above.

{¶50} Moreover, a review of the record reveals that the Gates cannot point to any evidence of procedural unconscionability. Mr. Gates received a bachelor of arts degree in business education and later took courses in engineering. Mr. Gates esteemed himself as a "successful real estate developer" and has owned, operated, and sold businesses in the past and had past business dealings with at least four different financial institutions.

{¶51} Therefore, we hold that, based on the evidence presented in this case, even if the Gates had set forth a claim for relief based upon unconscionability of Cap B, they failed to set forth any facts showing there is a genuine issue for trial on such claim. The first assignment of error is without merit.

{¶52} **Implied Covenant of Good Faith and Fair Dealing**

{¶53} In the third assignment of error, the Gates argue the trial court erred in enforcing Cap B, since AmTrust's calculation of periodic interest breached its obligation of good faith and fair dealing. We do not agree.

{¶54} In *Westwinds Dev. Corp. v. Outcalt*, 11th Dist. No. 2008-G-2863, 2009-Ohio-2948, at ¶89, this court recognized that the covenant of good faith is part of a contract claim and, thus, it cannot stand alone as a separate cause of action. (Citation omitted.)

{¶55} As we have previously found that the trial court did not err in dismissing the Gates' breach of contract claim, the Gates cannot maintain a separate claim for breach of implied covenant of good faith and fair dealing. As such, the Gates' third assignment of error is not well-taken.

{¶56} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.