To be Argued by:
EDWARD B. FLINK
(Time Requested: 30 Minutes)

APL-2018-00114
Appellate Division–Third Department & Montgomery County Index No. 2010/545

Court of Appeals

of the

State of New York

MARK CENTI,

Plaintiff-Respondent,

– against –

MICHAEL MCGILLIN,

Defendant-Appellant.

BRIEF FOR DFEENDANT-APPELLANT

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QUESTIONS PRESENTED

1. Should plaintiff Centi's claims be dismissed as unenforceable under the doctrine of illegality and as against public policy where the alleged "loan" was made with, and would therefor launder, money that came from Centi's illegal bookmaking business?

It is respectfully submitted that this question should be answered in the affirmative, the Appellate Division and trial court's decisions reversed, the judgment vacated, and the complaint dismissed.

2. Did the Appellate Division err by holding that defendant McGillin waived his right to assert the defense of illegality such that the court cannot consider it where plaintiff Centi could not be surprised by the defense because he admitted during his deposition that the alleged loan was made with illegal gambling proceeds, and where the illegality defense was a major part of discovery and the trial?

It is respectfully submitted that this question should be answered in the affirmative, the Appellate Division and trial court's decisions reversed, the judgment vacated, and the complaint dismissed.

3. Was the evidence legally insufficient to support the Third Department and trial court's rulings that a loan was made as Centi pleaded?

It is respectfully submitted that this question should be answered in the affirmative, the Appellate Division and trial court's decisions reversed, the judgment vacated, and the complaint dismissed.

JURISDICTION STATEMENT

This Court has jurisdiction over this appeal as of right pursuant to CPLR §5601(a), which provides:

> An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, . . . from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal. CPLR §5601(a).

This case originated in the New York Supreme Court, Montgomery County (R. 29-31) resulting in a decision and judgment after a bench trial (R. 6-27) which was appealed to the Appellate Division Third Department (R. 3- 27). The illegality issue was preserved in the trial and post-trial submissions, and was a large part of the trial court's bench trial decision. (R. 11-26). The Third Department order appealed from finally determined the action over the dissent of two justices who would have dismissed Centi's complaint in favor of McGillin on the basis that the alleged loan is unenforceable as against public policy because it constitutes money laundering of admitted illegal gambling proceeds and the trial court's judgment would allow Centi to obtain additional profit from the proceeds of his criminal activity. (R. 299-303).

McGillin is also appealing the Appellate Division's determination that there was "ample evidence" to support the trial court judgment (R. 301). The issue of whether there is legally sufficient evidence for the Appellate Division's decision is

within this Court's jurisdiction (*Heary Bros. Lightning Protection Co., Inc. v Intertek Testing Services, N.A., Inc.*, 4 NY3d 615 [2005]).

PRELIMINARY STATEMENT

It is undisputed that the $210,000 in cash at issue was money which Mark Centi earned from his illegal bookmaking operation, and then hid from the authorities so that it would not be forfeited. Accepting as true Centi's version of the transaction as a loan of plaintiff's ill-gotten gambling profits to be paid back in cash with interest, or defendant's version that he was helping Centi hide from the prosecuting authorities Centi's large cache of gambling profits and return it in amounts plaintiff could spend without detection, the arrangement was money laundering. As such, not only were the funds illegally gained, the purpose of the transaction was illegal. Accordingly, as stated by Justice Egan in the Appellate Division Third Department dissent, "public policy and the fundamental concepts of morality and fair dealing should preclude plaintiff from accessing the court in order that he may obtain additional profit from the proceeds of his criminal activities." R. 303. Justice Egan correctly characterized the loan arrangement as money laundering, on Centi's version of the transaction, as a cash loan of his gambling profits to be repaid in cash in intervals so that Centi could use the money to cover his wants and needs.

The two-justice Appellate Division dissent correctly applied New York's well-settled rule that the courts will not assist a party suing for the fruits of a crime or to profit from money he acquired illegally. R. 302; *McConnell v Commonwealth*

Pictures Corp., 7 NY2d 465, 470 (1960) (citing *Stone v Freeman*, 298 NY 268, 271 (1948). Here, Centi would have the courts allow him to both launder and earn interest on the illegal bookmaking business profits that he hid from law enforcement and never reported to the IRS.

The trial court and Appellate Division further erred in finding that the arrangement was an on-demand, amortized loan. This finding is contrary to any fair interpretation of the documentary evidence, and, in fact, is refuted by the evidence, which wholly supports McGillin's story and contradicts Centi's allegations and testimony. There is not a single document that was admitted into evidence which supports the plaintiff's claims than the money laundering arrangement was a loan. To the contrary, every document "fits" Mr. McGillin's not-well articulated testimony that, once again, he was helping out a friend.

Even if this was a loan, neither the trial court nor the majority in the Appellate Division recognized that "even though the subject contract may not have been intrinsically illegal, the fact that the money plaintiff loaned to defendant was garnered directly from the fruits of an illegal bookmaking operation, the loan constitutes money laundering." R. 302.

McGillin submits that on careful examination of the documents, each one has some inconsistency or discrepancy, which removes the evidentiary foundation for Centi's claim that the money laundering operation was a loan. This being so,

it is even more fair and appropriate that the Decisions below should be reversed and the complaint dismissed.

STATEMENT OF FACTS

Centi and McGillin were good friends dating back to the 1990's. R. 53, 58, 136 – 38, 144. In the early 2000's, Centi ran a bookmaking operation. R. 189-193. Following an investigation conducted by the New York State Police, Centi was arrested and convicted of promoting gambling in 2004. R. 95-96. As part of his sentence, Centi paid a $100,000 fine. R. 98, 138. McGillin was also convicted upon a plea of guilty to a misdemeanor charge and paid a fine of $50,000. R. 137-138.

At the time of his conviction, Centi still had "around $500,000 in cash" which was in a safe at his sister's house in $100 bills which were in envelopes, $10,000 per envelope. R. 93-94. Centi admitted that "all of this money all came from [Centi's] illegal bookmaking business". R. 95. Centi and McGillin disagree as to whether Centi lent McGillin $170,000 or whether Centi entrusted $210,000 of these funds. They do both agree, however, and it is undisputed, that these funds were all from Centi's illegal bookmaking business. R. 94-95.

Centi was hiding the $500,000 cash from the authorities in order to avoid further forfeiture of his illegal gains. R. 98 – 100, 136. After Centi was arrested for promotion of gambling, he did not want to have any money in his house (instead, keeping a safe at his sister's home). R. 98 – 100, 136. Upon being advised by the trial court of his right to invoke his constitutional 5th Amendment

right against self-incrimination, Centi pled the 5th Amendment when asked whether he had failed to disclose the existence of the cash contained in the safe to the police or prosecutors. R. 98-99. He again invoked the 5th Amendment when asked whether he had failed to disclose his hidden bookmaking proceeds to the IRS (R. 100) and to the New York State taxing authorities (R. 100-101). The trial court held it would take a negative inference from any questions answered by an invocation of the 5th Amendment. R. 100.

Eventually, Centi decided to remove the hidden cash from his sister's home because she was splitting up with her husband. R. 136, 157-158. In an effort to safeguard and conceal the existence of the bookmaking proceeds previously stashed in his sister's home, Centi asked McGillin to hold $210,000 for him and thereafter provide him with $400 per week. R. 136 – 137, 157. McGillin agreed, except that the $400 per week spending money would be given to Centi every four weeks, thus $1,600. R. 136 – 137.

When the $210,000 was first handed to McGillin, McGillin gave Centi $400, such that $209,600 remained in McGillin's hands. R. 137. This explains the running tally on the envelopes, which starts with $209,600. R. 214 – 248. McGillin thereafter held the money at his home and gave Centi $1,600 every four weeks in envelopes starting on January 21, 2005, this being done as a favor for his "good friend". R. 136 – 138, 214 – 248.

Centi's claim that he used his hidden cash from his illegal bookmaking business to loan McGillin $170,000 is inconsistent with this documentary evidence, as it was inconsistent with the other documents that were admitted into evidence, as will be discussed in greater detail herein.

When first given the money by Centi, McGillin took a lot of envelopes and pre-wrote out the amounts to be given to Centi every four weeks. R. 66-70;156. The payments were not monthly, but every four weeks. R 136-137. Not all of the envelopes McGillin wrote out were presented by the plaintiff at trial, only the first 33 and the 35th envelopes which contained the $1600 every four weeks "payments." R. 156. [1] Each envelope bore a calculation showing the amount of cash still in McGillin's possession at the time of the transfer, the $1600 amount being transferred and the remainder of Centi's cash still being held by McGillin following each $1,600 payment. R. 67, 214 – 248. The running tallies were written by McGillin all at one time, for all of the $210,000 cash that McGillin held for his friend. R. 156.

Centi recorded the dates of the payments and numbered many but not all of the envelopes. R. 67-72. The first envelope bears a date of January 21, 2005. R. 215. The 35th envelope bears a date of August 31, 2007. R. 248.

[1] It appears that the trial court and attorneys at trial did not realize that the 34th envelope was actually not a part of trial exhibit 3, R. 214-248. Since it is clear that there were 35 $1600 "payments" made every four weeks in envelopes that McGillin had written out and that the parties intended all 35 envelopes to be admitted into evidence, we will refer to the 35 envelopes even though there are only 34 which were admitted and are a part of the Record.

It was in December, 2005, almost 12 months after the alleged loan, that McGillin won, in a radio station raffle, the calculator that was able to perform the amortization calculations that Centi claims McGillin used to calculate the loan payment amount. R. 139 – 140; R. 212, trial exhibit 2.

Frequently thereafter, on numerous occasions, Centi would ask his friend McGillin to use the new calculator to calculate various loan or investment terms. R. 139. McGillin used his calculator to calculate the information Centi wanted many, many times, "hundreds of times". R. 139 – 140; 161, 164, 166. McGillin was asked by Centi to determine various things such as amortized monthly payments or dividends or terms or rates, based on variables and questions provided by Centi. R. 160-164, 177-179. The requests sometimes involved figuring out the principal amount, rate and payments to realize a certain dollar profit over a certain amount of time. *Id*. At times McGillin had to try to find the information sought by Centi by simply running many different formulas or variables until he found the answer or something close. R. 177-179.

This was not a big deal for McGillin who could punch in the numbers for his friend during quiet periods during McGillin's work at his shoe store. R. 174-175; 183. McGillin presumed his friend Centi wanted this information to determine the potential terms of various loans and/or investments he was considering. R. 139-140, 161, 163 – 164, 183, 196. McGillin used his calculator to make

hundreds of such calculations for his friend over time. R.139-140; 163-64. There were many more of these pieces of paper containing calculations which Centi did not bring to Court or introduce. R. 183.

The last spending money increment of $1,600 made to Centi by McGillin by envelope was on or about August 31, 2007. R. 248. Shortly after having made the 35th payment, McGillin learned of Centi's interference with McGillin's contract to purchase a liquor store (by Centi investing in the business himself, thereby cutting McGillin out of the deal which had already been reduced to a signed contract). R. 140-143, 188.

As a result of this discovery, and at some point in September of 2007, McGillin immediately arranged to meet Centi at his home at which point he returned the remaining $153,600 to Centi and told him that he no longer wanted to do business with him. R. 143-145; 188-189. McGillin wanted nothing more to do with Centi who he thought was his friend. R. 188.

McGillin commenced an action against Centi in January of 2008 for tortious interference with contract and also sued the liquor store owner for breach of contract. R. 35, 145. Notably, Centi did not allege that there was any loan by way of counterclaim or set-off in McGillin's 2008 action for tortious interference with contract. R. 91 – 92.

After filing suit against Centi and the owner of the liquor store, McGillin and Centi had essentially no contact. The first whisper of there being a loan and the $1600 cash payments every four weeks being loan payments was more than two years after McGillin commenced his action against Centi. By letter dated May 21, 2010, Centi had his attorney send McGillin a letter, for the first time demanding repayment of an alleged "loan." R. 249. Centi commenced this action to collect on the alleged loan five days later by the filing of a summons and verified complaint. R. 29-31, and amended his verified complaint on July 26, 2010. R. 40-42. McGillin answered the verified complaint on July 21, 2010, R. 32-29 and the amended verified complaint on July 28, 2010. R. 43-49. In both the verified complaint and amended verified complaint, Centi alleged that McGillin had made 35 "monthly" loan payments. R. 30, 40.

At trial, McGillin testified that he was holding $209,600 of Centi's bookmaking profits and giving it back to Centi in accordance with Centi's instructions: in amounts of $400 per week (paid every four weeks). R.136-137. The envelopes show that the $1600 payments were made every four weeks (not monthly) and show the remaining balance after each payment. R.214-248. These envelopes are not consistent with Centi's allegations that they represented payments of monthly principal and interest. R. 30; 40, 214-248.

At trial, Centi submitted a loan amortization schedule showing a print date of 3/17/15, submitted as Trial Exhibit 5. R. 250 – 254. The payment amounts shown on Exhibit 5 are monthly payments in amounts lower than those set forth on the envelopes that McGillin wrote out in January 2005 and submitted to Centi every four weeks through 2007. R. 136-137. The figures on the envelopes at Exhibit 3 and the figures on the amortization schedule in Exhibit 5 do not line up. R. 214 – 248; 250-254. Based on that amortization schedule, after 35 payments at the payments amounts set forth in the table, McGillin would have owed Centi $131,484.88 (R. 252), a number which does not appear on the envelopes or anywhere else on the documents, in McGillin's handwriting or otherwise. R. 211-248.

The Exhibit 3 envelopes entered into evidence by Centi as proof of the payments by McGillin, which Centi alleged were loan payments, show payments every four weeks, not "monthly" as alleged in the complaint and amended complaint (R. 30, ¶ 5; R. 40-42, ¶5), nor every month as is set forth in the amortization schedule at Exhibit 5. R. 214-248; 250-254. The envelopes refute the allegation that there were monthly payments as was alleged in the verified complaint and verified amended complaint. Centi pleaded an unpaid principal balance amount based on his 2015 amortization schedule R.250-254; 263.

Critically, there is no amortization schedule in evidence based on four-week $1600 payments, which is the actual uncontested amount and time period.

Centi also submitted into evidence small notepad pages showing a few of the hundreds of calculations made by McGillin. R. 211-213. Although McGillin did not start making these calculations for Centi until he won his calculator in December 2005 (R. 140), Centi submitted these calculations as McGillin's calculations for the "loan" allegedly made between 2003-2004. R. 60-64. None of these handwritten numbers match the amortization schedule numbers either. R. 211-213; 251-254.

Centi admitted that the "loan" amount given to McGillin came from a safe located in Centi's sister's home. R. 93 – 95, 112. He admitted that the money contained within the safe were the proceeds from his illegal bookmaking business and that the police were never made aware of this money. R. 95.

After the bench trial concluded, the trial court asked for post-trial submissions on the issue of whether or not the alleged loan was unenforceable as a matter of public policy under a defense of illegality. R. 17. The parties made their submissions (R. 265-292) and the trial court then entered its full decision and judgment from which this appeal arises. R. 6-27.

By the decision and judgment, the trial court ruled that Centi had proven a loan in an unpaid principal amount of $131,484.88 (R. 7-8) based on the 3/17/15

amortization schedule for a loan of payments of $1,559.65 per month for 131 payments at an APR of 3.95%. R. 14; 250-254. This monthly payment amount from which the judgment principal balance was calculated and the trial court ruled in its decision, is not the actual amount of the four-week payments the trial court expressly found were made by McGillin upon Centi's proof. R. 12-13; 16. It is also does not appear on the loan calculations submitted by Centi, upon which the trial court based its decision. R. 13-14; 16; 211-213. None of the evidence cited by the trial court for its decision matches the amortization schedule, and therefore the judgment is not supported by the evidence. The trial court noted the difficulty it had in determining whether or not it could enforce Centi's claim due to the illegal source of the funds. R. 23. Yet, despite its "great consternation" (R. 25), the trial court expressly noted that its decision was "primarily motivated" to "reward[]" Centi for bringing his action to the court. R. 25-16.

Upon appeal by McGillin, the Appellate Division Third Department affirmed the trial court's decision in a 3-2 split decision. R. 299-303. The Appellate Division found that there was "ample evidence" to support the trial court determination on the loan. R. 301; 302. The dissenting justices would have reversed the trial court's decision and dismissed the complaint, stating, "because the parties' transaction amounts to money laundering, it is unenforceable as a

matter of public policy and we would reverse the judgment and dismiss the complaint." R. 302. The dissent noted:

> The record establishes, by plaintiff's own admission, the following: that he is in the business of bookmaking, that he had accumulated from this illegal business approximately $500,000 in cash, that he this money in a safe at his sister's house, that he agreed to lend to defendant $170,000, to be repaid with interest over 11 years and, finally, that the monies he lent to defendant came directly from his illegal activities. Accordingly, in our view, even though the subject contract may not have been intrinsically illegal, the fact that the money plaintiff loaned to defendant was garnered directly from the fruits of an illegal bookmaking operation, the loan constitutes money laundering, and public policy and the fundamental concepts of morality and fair dealing should preclude plaintiff from accessing the court in order that he may obtain additional profit from the proceeds of his criminal activities (*see generally McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 469-471 [1961]).
> R. 302-303.

McGillin now appeals on the questions presented above upon the arguments that follow.

ARGUMENT

The trial court entered a judgment that not only allows Centi to launder his illegal gambling proceeds, it rewards Centi with a hefty profit in alleged and statutory interest on the gambling proceeds on his version of the transaction, he was laundering his bad money. On Mr. McGillin's far more credible version, the Courts below were also allowing Centi to extract from McGillin the balance of the gambling proceeds that McGillin had already returned to Centi.

I. ACCEPTING AS TRUE CENTI'S CLAIM THAT THE TRANSACTION WAS A LOAN, THE ALLEGED LOAN ARRANGEMENT IS ILLEGAL MONEY LAUNDERING, MAKING THE ALLEGED AGREEMENT VOID AND UNENFORCEABLE.

Centi's own admissions revealed that the transaction he alleges was a loan was made with funds he had accumulated from his illegal bookmaking business and hid in his sister's house. R. 93-95. "The principle that contracts against public policy are void and unenforceable is not based upon any desire to relieve a party from the obligation which he or she has assumed but, rather, is based upon the theory that such an agreement is injurious to the interests of society in general and that the only way to stop the making of such contracts is to refuse to enforce them and to leave the parties without a remedy for a breach thereof." *22 NY Jur 2d Contracts* § 149.

This Court has stated more than once that it makes no difference whether or not the defendant is alleged to have no title to the money sought by the plaintiff "since the court's concern 'is not with the position of the defendant' but with the question of whether 'a recovery by the plaintiff should be denied for the sake of public interests', ..." *McConnell v Commonwealth Pictures Corp*., 7 NY2d 465, 469 (1960) (quoting *Flegenheimer v Brogan*, 284 NY 268 [1940]).

A. It is well established that New York State will not enforce a contract that has an illegal purpose.

It is well-settled that the courts will not assist a party suing for "the fruit of a crime" or to profit from money acquired illegally. *McConnell v Commonwealth Pictures Corp*., 7 NY2d 465, 470 (1960) (citing *Stone v Freeman*, 298 NY 268, 271 (1948). Here, Centi asks the courts assist him to both launder and earn interest on the illegal gambling proceeds that he hid from law enforcement and never reported to the IRS.

Centi admitted:

- He was convicted of "promoting gambling" in 2004, as a result of a New York State Police Investigation. [Dep Transcript: 41/12-17 & 43/18-44/2 & Trial Testimony]. R. 278.
- He hid $500,000 in cash in his sister's safe, and claims he lent $170,000 of that cash to defendant. [Dep Transcript 57/14-58/1-11 and Trial Testimony]. R. 278.

- The money in the safe came from his illegal bookmaking business. [Dep Transcript 59/12-16 & Trial Testimony]. R. 278.
- The State Trooper Police investigation was not aware of the money he had hidden from them in his sister's safe. [Dep Transcript 59/19-21 & Trial Testimony]. R. 278.
- He never reported any of the alleged interest he purports to have received on the alleged loan to the Internal Revenue Service, or to the New York State tax authorities. [Dep Transcript 96/1-6 & 97/12-15, 98/10-16 & & Trial Testimony]. R. 279.

The alleged loan proceeds were admittedly the fruits of Centi's illegal bookmaking business. R. 95. Thus, even if the $1,600 payments every four weeks were, somehow, in repayment of a loan, the effect of that loan was to continue to shield the monies from the public authorities and allow Centi to launder the money, gradually, as he used the cash in small amounts over a period of many months. Centi hid the money from the authorities upon his arrest and conviction, and under either scenario, his or McGillin's, Centi was continuing to conceal the cash and engage in money laundering by using small amounts every week to spend on whatever he choose to buy or consume.

The two dissenting Appellate Division justices correctly recognized the alleged loan agreement was money laundering by Centi (R. 302-303). Money

laundering is defined as "the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced." Black's Law Dictionary (10th Ed. 2014). Money laundering is illegal under both federal and New York State law. *See* 18 USC § 1956; NY Penal Law Art. 470.

As the Trial Court should have inferred, as it said it would do, based upon Centi's plea of his 5th Amendment right not to incriminate himself during his trial testimony and his deposition testimony which was before the Court, Centi was concealing the profits from his illegal bookmaking business which were supposed to have been disclosed to the investigating authorities and which may have been forfeited as part of any plea deal. R. 54-58; 98-103. And, if it was a loan as Centi claimed, he was also hiding this new interest income from the Federal and State authorities. R. 100-101.

Justice Egan in the Appellate Division dissent stated, "public policy and the fundamental concepts of morality and fair dealing should preclude plaintiff from accessing the court in order that he may obtain additional profit from the proceeds of his criminal activities." R. 302.

Yet the reason for the trial court's decision was in complete contradiction to this rule. Although Justice Sise acknowledged that he issued the judgment "after great consternation" (R.25), he expressly based his decision on "rewarding" Centi for bringing his lawsuit to the court. R. 25-26 ("The Court notes that this Decision

is primarily motivated by this Court rewarding the Plaintiff for using proper means to collect on this loan . . . .” [R. 25-26]). Such a “reward” is completely antithetical to the doctrine that the courts will not “serve as paymaster of the wages of crime, . . . [and] will not extend its aid to either of the parties . . . but will leave them where their acts have placed them.” *Stone*, 298 NY at 271.

> “It is the settled law of this State (and probably of every other State) that a party to an illegal contract cannot ask a court of law to help him [or her] carry out his [or her] illegal object, nor can such a person plead or prove in any court a case in which he [or she], as a basis for his [or her] claim, must show forth his [or her] illegal purpose.”

Linchitz Practice Mgmt., Inc. v Daat Med. Mgmt., LLC, 165 AD3d 908, 910 (2d Dept 2018) quoting *Stone v Freeman*, 298 NY 268, 271. If the trial court and Appellate Division rulings are allowed to stand, they will set precedent in complete contradiction to this well-settled doctrine.

B. Again, assuming a loan, the test is not what is on the face of the contract but whether or not the contract is a pretext for an illegal arrangement.

Even if a contract objective is not itself unlawful on its face, a court will refuse to enforce it if the contract is closely connected with an unlawful act. *Anabas Export Ltd. v Alper Indus. Inc*., 603 F Supp 1275, 1278 (SDNY 1985) (holding a contract unenforceable under New York law even where, on its face, the contract did not violate a statute and the words did not disclose the illegality, and the parties claimed that they did not intend to engage in an unlawful act). If a

contract "is opposed to the interests of the public, the agreement is void, even though in the particular case the intent of the parties may have been good. *Id.* In *Anabas Export*, it was found that although the face of the contract did not appear illegal, the evidence showed that the transaction would result in a misdemeanor under NYCRL § 50.

As the Second Department recently recognized, where the evidence shows that a contract that appears legal on its face is a pretext for an illegal arrangement, the contract will not be enforced as a matter of public policy. *Linchitz Practice Mgmt., Inc. v Daat Med. Mgmt., LLC*, 165 AD3d 908, 909-910 (2d Dept 2018). Here, the trial court and the Third Department majority focused only on the face of the alleged loan agreement, not its purpose and effect from Centi's perspective: use the hidden cash profits from his illegal bookmaking operation to earn interest on the bad money while spreading the cash around in small, untraceable amounts – laundering the money.

As the *Linchitz* decision directly addresses, it is the illegal pretext that will bar enforcement. In *Linchitz*, the parties had entered into an agreement to sell tangible assets and an interest in a lease, and the defendant signed a promissory note to pay the remaining balance. *Id*. at 909. Upon searching the record, the Second Department found that the agreement and promissory note were a pretext for an unlawful fee-splitting arrangement between a physician and non-physician.

Id. This case presents an analogous circumstance. Centi alleges that the loan was made for the purpose of McGillin's construction, but it was really to avoid the authorities from finding the hidden gambling proceeds.

While there is no evidence at all in the record to support that McGillin utilized the money he was holding in any manner other than to hand it back to Centi, (first every four weeks, then the remainder in lump sum), even accepting Centi's version results in an unenforceable transaction. The transaction was made with cash from Centi's hidden illegal bookmaking profits and would result in the money being laundered. And, according to Centi's allegations, allow him to make a profit in interest on bad money as well.

C. Centi's claims are dismissible on the basis of illegality where Centi revealed the source of the disputed funds were his hidden illegal gambling proceeds and the illegality issue was fully explored in both discovery and trial.

The Appellate Division majority erred when it further found that McGillin "waived his right to challenge the loan on the bases of illegality because it was not raised as an affirmative defense." R. 301. Given that McGillin has always taken the position that the money was not a loan to be paid back with interest (but simply a way for Centi to hide his gambling proceeds and spend it in increments), under the circumstances presented in this case, "waiver" does not apply.

"The defense of illegality, i.e., that a contract is void as against public policy, is not waived by a failure to affirmatively plead it in an answer, and will be entertained without reference to the state of the pleadings . . . at least where its interposition does not take the plaintiff by surprise (CPLR 3018[b])." *Spiegel v. 1065 Park Ave. Corp*., 305 AD2d 204, 205 (1st Dept 2003) (citing *Attridge v Pembroke,* 235 AD 101, 102–103 [4th Dept 1932], *Carlson v Travelers Ins. Co.,* 35 AD2d 351, 353–354 [2d Dept 1970]). Where, as here, the plaintiff is well aware of the facts that create the illegality, the failure to affirmatively plead the defense will not prevent the defense from being asserted and considered, particularly where an issue of public policy is raised. *Carlson*, 35 AD2d at 353–354.

Here, Centi cannot possibly claim surprise as he was well aware of the source of the money in question, that it came from illegal bookmaking proceeds he had hidden from authorities in a safe in his sister's house, and that he was using McGillin to launder the money. The facts were revealed in Centi's deposition during discovery (R. 278-279), and the topic was extensively covered in trial. It was Centi's own testimony that proved the issue (R. 94-95). There can be no claim of surprise or prejudice to Centi.

"The Court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just . . . ." CPLR 3025(c). "If there is nothing in the nature of the amendment as to which [the

plaintiff] can claim prejudice, the proof at trial should be given the upper hand and defects in pleading either overlooked or conformed to the proof adduced." (Connors, 2018 Supplementary Practice Commentary, McKinney's Consolidated Laws of New York Annotated, WESTLAW, C3025:15.) When no prejudice is shown, the amendment may be allowed "during or even after trial" (*id*. [quoting *Dittmar Explosives Inc. v A.E. Ottaviano, Inc*., 20 NY2d 498, 502 (1967)]). *See also*, *Loomis v Civetta Corinno Const. Corp*., 54 NY2d 18, 23 [1981]; *Murray v City of New York*, 43 NY2d 400, 401 [1977]. Both the trial courts and the appellate courts are empowered to amend the pleadings *sua sponte*. (Connors, 2018 Supplementary Practice Commentary, McKinney's Consolidated Laws of New York Annotated, WESTLAW, C3025:17 [citing *Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc*., 52 AD3d 674, 678 (2d Dept 2008); *Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 (1st Dept 2006); *Padro v Bertelsman Music Group*, 278 AD2d 61 (1st Dept 2000); *AVR Acquisition Corp. v Schorr Bros. Dev. Corp*., 270 AD2d 372 (2d Dept 2000)].)

This case falls squarely within the rule that the defense of illegality is not barred by waiver.

The record demonstrates, upon Centi's own admissions, that the money at issue is illegally gained bookmaking profits (R. 94-95), which Centi continued to hide from law enforcement when he was convicted. R. 99-100. Centi's own

allegations and testimony reveal that he is seeking the court's assistance to criminally launder this money and to use it to make additional profit on interest. New York State public policy does not permit Centi to use the courts to further his illegal objectives, as this Court has repeatedly recognized. The trial court and Appellate Division decisions should be reversed and Centi's complaint dismissed.

II. THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE APPELLATE DIVISION'S AFFIRMATION OF THE TRIAL COURT'S JUDGMENT.

The evidence simply does not support the "loan" and judgment affirmed by the Appellate Division. Even if, for argument's sake, an enforceable loan could be found on this record, the principal amount of the judgment awarded to Centi was not supported by any of Centi's testimony and payment evidence.

The issue of whether there is legally sufficient evidence for the Appellate Division's decision is within this Court's jurisdiction (*Heary Bros. Lightning Protection Co., Inc. v Intertek Testing Services, N.A., Inc.*, 4 NY3d 615 [2005]). Here the Appellate Court ruled on the sufficiency of the evidence, holding that there was "ample evidence" for the existence of the subject loan. R. 301, 302. The evidence is insufficient to support the loan pleaded by Centi.

A. The judgment is based wholly on the numbers and calculations in Centi's March 17, 2015 amortization schedule which numbers were not supported by any testimony or evidence.

The $131,484.88 loan balance alleged and used in the judgment (R. 7-8; R. 30-31) is shown on Exhibit 5, an amortization table that shows a print date of 3/17/2015 ("3/17/15 Table") (R. 250-254). The 3/17/15 Table shows calculations based on amortized monthly payments of $1599.65 to be made monthly (*id.*). After 35 monthly payments of $1599.65, the 3/17/15 Table calculates that the principal balance due would be $131,484.88 (R. 252). However, the evidence submitted and testified to by Centi established that McGillin made payments in higher amounts and more often than the schedule shows (R. 66, 214-248). Centi testified that every four weeks McGillin made payments in amounts of $1600.00, yet the judgment was not calculated or amortized using the admitted payment amounts or the timing of the payments, but instead relied on the 3/17/15 Table. The 3/1/7/15 Table cannot be used as proof of any principal balance owed under the evidence in this record, and to that extent, the judgment must be voided.

The evidence does not support Centi's allegations and only supports McGillin's story. McGillin has consistently stated that he was given the money to hold for Centi and to return it to Centi in $400 per week increments so that Centi could use it for spending money. R. 136-138, 214 – 248. McGillin testified that Centi asked McGillin to hold $210,000 as a favor. R. 136-138, 158-159. McGillin

agreed, and testified that when he was handed the cash, he gave Centi his first Centi every four weeks in $1600 amounts. R. 136-137, 214 – 248.

The envelopes submitted into evidence demonstrate this. R. 214-248. The 34 envelopes evidencing the first 35 increments of $1600 show dates and remaining balances wholly consistent with McGillin's version of events. *Id*. The payments were made every four weeks (not monthly). *Id*. The remaining balance written on each envelope showed the balance being reduced by exactly $1600 each time. *Id*. Centi accepted all 35 payments with the writing on the front of each envelope without any question or objection. R. 65-72.

The Appellate Division's comment that, when the cash was returned, McGillin also returned the rest of the envelopes which were empty "but inexplicably marked with payment and balance amounts" (R. 300-301) again demonstrates a misunderstanding of the documentary evidence and McGillin's not-well-stated testimony which is wholly consistent with the documentary evidence. As McGillin was being entrusted with Centi's $209, 600 which Centi was hiding from the government to be doled out in $1600 installments every four weeks, McGillin wanted the envelopes to document each "payment" as, while Centi and McGillin were friends, they both knew it important to have a record of the payments and remaining balance. Centi admitted hiding illegal bookmaking gains which were undisclosed to investigating authorities to prevent their potential

forfeiture and that those illegally gained funds were used in the transfer to McGillin to "pay back" to Centi in installments. Whether or not one believes Centi's allegation that the transaction was a loan, the source of the funds is undisputed.

B. The calculations Centi alleges were made before he began loaning McGillin money sometime in 2003 could not have been made by McGillin prior to December 2005.

Centi submitted into evidence as Exhibits 1 and 2, a handful of calculations in McGillin's handwriting that were made on scrap paper. R. 211-213. The calculations were made on various principal balances ranging from $140,000.00 through $170,000.00. Centi testified these calculations were potential loan terms that McGillin proposed to him before the alleged loan was made. R. 60-63. Centi testified that he loaned McGillan a total of $170,000.00 made in multiple payments of various amounts throughout 2003 and the end of 2004, but could not remember all the amounts and when they were made. R. 63-64. In other words, Centi's story requires that the calculations must have been made by McGillin in 2003, but no later than 2004. That was impossible.

It was uncontested in the record that McGillin won his calculator that was able of amortization calculations in December 2005. R. 140. Frequently thereafter, Centi would ask McGillin to use the calculator to make various calculations for loans and investments Centi was considering making. R. 139-140. Sometimes

these requests required McGillin to make multiple calculations based on various scenarios depending on a certain target profit or loan amounts or other factors. R. 160-164, 177-179. McGillin estimated he did hundreds of such calculations for Centi over time with this calculator during down times at the shoe store in which he worked. R. 161, 164, 166.

The record reveals that McGillin was highly confused by the allegation that Centi's Exhibit 2 was related to the money he was given to hold a year before McGillin even won his calculator, and the presumption that was needed to determine that this particular one of many, many calculations McGillin had made at Centi's request related back to McGillin's agreement back in January of 2005 to hold Centi's cash for him. R. 166- 173, 175-186.

The face of Exhibits 1 and 2 reveal that the calculations which Centi claimed to be various potential loan terms written down by McGillin prior to the alleged loan having been made do not correspond in any way to the eventual alleged loan terms which Centi claims he and McGillin settled upon (compare R. 211-212 with R. 40). More importantly, they do not correlate to the 3/17/15 Amortization Table that was relied on to grant the judgment (R. 252, line 35; R. 7). The calculations listed on the outside of the thirty-five (35) envelopes which served as Plaintiff's Trial Exhibit 3 correspond exactly with McGillin's claims as to the amount which Centi initially asked him to hold and the subsequent $1,600 payments made by

McGillin to Centi. It bears repeating that Centi accepted all of these envelopes and payments without question or objection. It is revealing that Centi never demanded payment of the alleged unpaid portion of the "loan" until 2010 – until more than two years after McGillin filed a lawsuit against Centi for tortious interference in January 2008. R. 91-92. And, of course, how could McGillin have given Centi these calculations a year before he got the calculator.[2]

The Appellate Division, in quoting from *Danka Off. Imaging Co. v Gen. Bus. Supply*, 303 AD2d 883, 884 (2003) stated correctly the rule that the appellate court "looks not to the parties' after-the-fact professed subjective intent, but rather at their objective intent as manifested by their expressed words and conduct at the time of the agreement" (R.300). But the evidence does not support that at the time McGillin agreed to hold the money for Centi, that the parties had any meeting of the minds that this was a loan of $170,000 at 3.95% interest for 11 years, with a provision that Centi could demand full payment at any time. Centi's story does not withstand scrutiny and is contradicted by the documentary evidence.

To any reasonable jury, the evidence simply cannot support the decision and judgment affirmed by the Appellate Division.

[2] Not intending to cast any dispersions on the trial court or McGillin's trial counsel who was confronted with a highly active trial judge who, at times, almost took over the questioning, we believe the record demonstrates that Mr. McGillin was confused, not realizing that his points had not all been made with precise clarity, but still expressing himself as best as he could.

If this Court does not find that Centi's claims must be dismissed as a matter of public policy because the Court will not assist him in money laundering and profiting off his illegal bookmaking proceeds, then this Court should look at the record and rule that the trial court and Appellate Division rulings are unsupported by legally sufficient evidence.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the Appellate Division decision and dismiss Centi's complaint.

DATED: Lake Placid, New York
December 11, 2018

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CERTIFICATION OF WORD COUNT

I hereby certify pursuant to 22 NYCRR 500.13(c)(1) that the foregoing Brief was prepared on a computer using Microsoft Word, using a proportionally spaced font, Times New Roman, 14 point, double spaced, with footnotes in 12 point Times New Roman font. The total number of words of the body of this brief, including headings and footnotes, as calculated by the word processing program used to prepare this brief is 6,949.

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