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

APL-2018-00114
Appellate Division–Third Department Case No. 524695
Montgomery County Index No. 2010/545

Court of Appeals

of the

State of New York

MARK CENTI,

Plaintiff-Respondent,

– against –

MICHAEL MCGILLIN,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Defendant-Appellant Michael McGillin ("McGillin") respectfully submits this reply brief in further support of his appeal seeking to reverse the Decisions below.

PRELIMINARY STATEMENT

The legal arguments advanced in the brief of Plaintiff-Respondent Mark Centi ("Centi") can essentially be reduced to two propositions—*First,* this Court cannot review the Decision below because it involved factual questions only. *Second,* as the majority in the Appellate division concluded, McGillin's failure to raise illegality as an affirmative defense in his answer, notwithstanding a record replete with evidence and admissions of illegality, clears the way for Centi to use the court system to recover money which Centi acknowledged he garnered from illegal bookmaking and, compounding his criminality, then hid from the authorities at the time of his sentencing. Neither of these propositions are justified.

The first proposition should be rejected as Justice Egan, in his dissent in the Decision below, focused correctly on the fundamental issue that is a question of law within this Court's jurisdiction—whether the law precludes Centi from using the courts to recover money loaned from the proceeds of an illegal bookmaking business. If accepted, Centi's main argument would effectively tie the hands of this Court and prevent it from addressing a fundamental principle of public policy—a party may not use the civil justice system to profit from the fruit of illegality.

The second proposition exalts a formalism over what the record overwhelmingly established—that Centi admitted that he was involved in illegal bookmaking, that the $500,000.00 stored in Centi's sister's safe was accumulated from the bookmaking and hidden from the authorities, and a portion of those funds were "loaned" to McGillin. (R. 278). Indeed, the Trial Court requested the parties to brief the issue of whether recovery should be denied because the source of the funds were illegally obtained. R. 17.

The remainder of Centi's brief were variations on those two themes. Centi argued that the differences between the majority and dissent in the Appellate Division were in the finding and weighing of facts. But the trial court's and the majority's decision carry within them an error in law, so clear from the entire record - that long-standing public policy bars a wrongdoer from using the courts to assist in the recovery of the fruits of the wrong. Setting aside any dispute on the lower courts' findings that the transaction was a loan and whether illegality can be considered even though it was not expressly raised in McGillin's answers[1], the question is still one of public policy. As the Trial Court found, Centi conceded "that monies loaned to the Defendant were taken in in the illegal enterprise of bookmaking that he was involved in." R.16. As also noted by Justice Egan, in the

[1] McGillin's answer and amended [sic] answer to the amended complaint did both assert that Centi was "barred from the relief it [sic] seeks by the doctrines of unconscionability and unclean hands," R. 34, 45;

dissenting opinion, the "monies [Centi] 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."[2] R.302.

The dissent in the Appellate Division understood the legal error being made, and correctly concluded that Courts ought not to be used to perpetuate or further assist in an injustice. It is respectfully submitted that this Court should uphold the justice principles long upheld as stated in the dissent: "[P]ublic 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.

I. THE DISSENT RAISED A FUNDAMENTAL LEGAL DISTINCTION AND WAS NOT BASED ONLY ON FACT OR DISCRETION

A. A wrongdoer should not profit from his own misconduct.

In his brief, Centi argued that that the dissent essentially made a new finding of fact and did not raise a question of law, and thus under the provisions of CPLR §5601(a), this Court lacks jurisdiction to address the appeal. Contrary to that

[2] Centi argues that the dissent's conclusion that the transaction constitutes money laundering cannot be correct without a new finding of fact that Cenit "intended" to use the loan and $1600 cash payments every four weeks for spending money for that purpose. The intent is inherent in the arrangement. It was his own illegally garnered money that he was hiding and then slowly introducing into the economy, without paying taxes or revealing the existence of the money he had hid from the authorities.

assertion, the dissent made no new finding of fact—it merely drew the correct legal inference from the entire record.

As this Court has articulated, "the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be 'weakened by exceptions'," *Kirschner v. KPMG LLC*, 15 NY3d 446, 464 (2010)(quoting *McConnell v. Commonwealth Pictures Corp.*, 7 NY2d 465, 470).

This doctrine is "inflexible", *Kirschner*, 15 NY3d at 464 (characterizing the steadfast application of this doctrine, *Saratoga County Bank v. King*, 44 NY 87, 94 [1870]), because it is regarded as an important and unchanging public policy.

As this Court explained many years ago:

> There are, however, other phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare. *Veazy v. Allen*, 11 Bedell 359,368; 173 N.Y. 359, 368 (1903)

The record and facts of this case support the wisdom of this inflexible doctrine. As cited in the initial brief, 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.

And the alleged loan proceeds were admittedly the fruits of Centi's illegal bookmaking business. R. 95.

Nevertheless, both the trial court and the majority of the Appellate Division opted to frame the claims of the parties as a balancing of equities—while the initial funds were obviously and admittedly from illegal sources, neither the loan or its performance was "illegal", and the defendant did not raise it as an affirmative defense. R.301.

The distinctions raised by the Appellate Division majority weaken the policy and are of the type this Court warned against in *Kirshner* and *McConnell*—creating exceptions that diminish the rule.

Furthermore, the cases cited by the majority, *Balbuena v IDR Realty LLC*, 6 N.Y.3d 338 (2006) and *Jara v. Strong Steel Door Inc*, 58 A.D.3d 600 (2009) are instructive. Both involve undocumented workers seeking relief from the courts. In both, the courts decided that the illegality concerned (being undocumented) did not bar recovery because the public policy benefit against assisting illegality did not outweigh the public policy detriment of allowing the other party to get away with an injustice.

In *Jara*, the Appellate Division, Second Department wrote, "[h]owever, contrary to Strong Steel Door's contention, neither the contract at issue nor the work Huerta performed was illegal", 58 AD3d at 602, which the decision of the majority of the Appellate Division in this case borrowed as "[w]ere we to consider the issue, we would find that, because neither the agreement nor the performance of the agreement was illegal, the judgment was enforceable" R. 301.

But the majority erred when it made the illegality in this case and the illegality in *Jara* and *Balbuena* equivalent at law. In *Balbuena*, this Court explained how to evaluate whether a specific case merited an exception:

> In such a case, the injustice of denying recovery—embodied both in the hardship to the workers and the

> enrichment of the employers—would be gross, and it could be strongly argued that 'the denial of relief is wholly out of proportion to the requirements of public policy.' In such a case, we might consider whether we would characterize IRCA violations as 'merely *malum prohibitum*' (evil because prohibited) rather than *malum in se* (evil in themselves), and allow recovery." *Balbuena v IDR Realty LLC*, 6 N.Y.3d 338, 366.

The majority decision in the Appellate Division missed the distinction.

The dissenting justices, on the other hand, identified the basic public policy justifications as overcoming the distinctions of the majority because allowing Centi to recover, through use of the Courts, would perpetuate the *malum in se*:

> 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.

B. The failure to raise the affirmative defense of illegality

Centi's brief (p.12), and majority in the Appellate Division, opined that because McGillin did not raise illegality as an affirmative defense in his answers, he waived any right to assert it later even though a major focus of the case in discovery and at trial was whether the plaintiff could recover for the monies due on the alleged loan in light of the admitted facts that the monies lent to McGillin were obtained illegally and hidden from the authorities at the time of sentencing.

Initially, the argument that this Court cannot determine, as the dissent believed, that the Plaintiff cannot recover due to the illegal nature of the transaction which constitutes money laundering ignores the fact that the illegality issue was not just the elephant in the room throughout the case and trial, it was inherent in the transaction. Plaintiff was using $170,000 of the cash he had garnered illegally to have paid back to him in $1600 installments every four weeks so he could put the cash back into the economy, using it for his living expenses and walking around money.

There are other reasons why the failure to assert the affirmative defense of illegality in McGillin's answers does not bar this Court from holding as the dissent would have and dismiss the complaint.

First, 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. R. 6-27. By this fact alone, the Court confirmed that the issue of whether the Court could be used to allow Centi to recover these illegally obtained monies was one that was litigated and always before the Trial Court. The Trial Court considered the issue on the merits, R. 23-26, rejecting Plaintiff's argument that McGillin had waived the right to raise the issue. R. 268.

Second, McGillin raised and pled two equitable affirmative defenses that were akin to an illegality affirmative defense - unclean hands and unconscionability R. 34, 45. In his answer and [amended] *sic* answer to the amended complaint, McGillin asserted that "Plaintiff is barred from the relief it [sic] seeks by the doctrines of unconscionability and unclean hands". The issue was also raised to some extent by other affirmative defenses in McGillin's answers of failure to state a cause of action and that "[b]y virtue of plaintiff's own culpable conduct in the acts or omissions with regard to the transactions and occurrences complained of, plaintiff's alleged cause of action is barred by the doctrines of equitable estoppel and waiver." R. 33-34, 44-45.

Third, to focus on whether a specific affirmative defense was raised confuses the underlying purposes of the various public policies involved, and this Court should adopt the conclusion of the dissent, namely in this case the court must

protect the larger public policy values.

In fact, a cognate equitable defense is *in pari delicto,* the underlying public policy principle that this Court addressed in *Kirschner*. *In pari delicto* does not focus on the legality or illegality of a contract—the contract may be perfectly legal but upon the background facts behind the suit. "The doctrine of *in pari delicto* mandates that the courts will not intercede to resolve a dispute between two wrongdoers. This principle has been wrought in the inmost texture of our common law for at least two centuries" *Kirschner v. KPMG, LLP*, 15 NY3d 446, 464.

The purpose of the affirmative defense pleading rule is to allow the opposite party to have notice of issues of fact and to avoid unfair surprise. The CPLR provides that a "party must plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of facts not appearing on the face of a prior pleading" going on to list some affirmative defenses that must be pled. CPLR § 3108(b). Although the Trial Court did not set forth its reasoning for considering the illegality defense over Centi's objection, based on the absence of the "illegality" defense in the answers, it would be fair to presume that, in this case, the Trial Court knew that there was no surprise and that there were no issues of fact as to the illegal source of the funds which were hidden at Centi's sister's house.

Moreover, the CPLR also allows liberal amendment when the proof at trial

warrants it. CPLR § 3025 (c); *Murray v. City of New York,* 43 NY2d 400, 405 ("Where no prejudice is shown, the amendment may be allowed 'during or even after trial'" [cite omitted]). This is another reason why we submit that the failure to include expressly in Appellant's answer "facts showing illegality either by statute or common law" as an affirmative defense should not prohibit the Court from dismissing the complaint when these facts were known by Centi and are not in dispute.

On the other hand, the purpose of the policy of not allowing wrongdoers from accessing the courts to assist them in recovery is to protect the court system and the public, whether the consequence assists another wrongdoer or not. "Proper and consistent application of a prime and long-settled public policy closes the doors of our courts to those who sue to collect the rewards of corruption," *McConnell v Commonwealth Pictures Corp*., 7 NY2d 465, 460 (1960)

As referenced in McGillin's brief, "[t]he defense of illegality, i.e., that a contract is void as against public policy, is <u>not</u> 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]).

There was no surprise in the instant case: Centi testified to and admitted the facts that created 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. Finally, McGillin raised equivalent affirmative defenses (R. 33-34, 44-45) and the trial court requested the parties brief the issue of "whether a judgment can be granted for this loan that I found existed…." R.17. And after considering the parties submissions on the issue, ruled on the merits, even if not correctly.

II. THE FINDINGS OF FACT ARE NOT THE SUBJECT OF THIS APPEAL

As referenced supra, Justice Egan made no findings of fact—he concluded that the overarching public policy articulated by this Court warranted a different conclusion.

Centi argued in his brief that even if the dissent raised a legal question this Court may not review "a determination" that "ample evidence for findings of fact exist in the Record." (p. 18). Centi referred the Court to *Cannon v. Putnam*, 76 NY2d 644 (1990) and *Lue v English*, 58 AD2d 805 (Second Department 1977), aff'd 44 NY2d 654 (1978).

These cases do not involve the same public policy question. The opinion in *Cannon v. Putnam* addressed a legal question under the Labor Law §240(1) and §241 of the homeowner's exemption and then in a brief paragraph declined to

review the appellant's alternative request that factual determinations below were in error. *Lue v. English* involved a question of medical malpractice before a jury which made special findings. This Court determined:

> There was ample evidence to support the findings of fact. Given the affirmance of those findings by the Appellate Division, they are conclusive on this court (see NY Const, art VI, §3, subd a; Cohen and Karger, Powers of the New York Court of Appeals, § 109). *With respect to the alleged errors of law, they are few, in most instances not preserved for review by objection or exception, and in no event substantial enough to warrant reversal.* The theories on which plaintiffs have recovered involved concurrent rather than alternative causes of the injuries. Besides, the jury by its special findings found causation on each of the theories. (Emphasis added). *Lue v. English*, 44 NY2d 654, 655 (1978)

It is respectfully submitted that the errors of law made by the Trial Court and the majority in the Appellate Division are substantial enough to warrant reversal. The failure to identify that the acts of Centi as *malum in se* and to see the distinction between those acts and those acts that are "illegal because prohibited", was and is the original error.

III. THIS COURT IS NOT BEING ASKED TO REVIEW A NEW REQUEST FOR RELIEF BY APPELLANT

A subset of the affirmative defense objection, Centi argued in his brief that this Court cannot agree with the dissent that the transaction constitutes money laundering because the words "money laundering" were not used below.

First, as referenced infra, the facts of illegality which established that the transaction constitutes money laundering were raised below at the Trial Court.

Moreover, 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.

Centi also argued because the words "money laundering" had not been used by McGillin in the lower court, he did not seek to adduce evidence to rebut the argument, going on to explain what he would have done, including testifying that the transaction "was not an attempt to launder anything." Centi Brief, pp. 22-23. The evidence Centi asserts he would have adduced from defendant and others has nothing to do with whether the transaction to loan $170,000 of his hidden ill-begotten cash, to be repaid in cash, in $1600 installments every four weeks, constitutes money laundering. As for the testimony Centi claims he would have given that the transaction was not "an attempt to launder anything", that testimony would have been patently frivolous and would have flied in face of reason.

Although Justice Egan did not identify any particular money laundering

statute, on a review of Penal Law §470.05, Money laundering in the fourth degree, a Class E Felony, it is clear why the Justice concluded that the "loan constitutes money laundering". R. 302. This was a conclusion of law based on the undisputed evidence, and was not a legal conclusion Centi "could have addressed … forcefully to the Trial Court." Centi Brief, p. 23. This was also not an argument or conclusion of law that Centi could have met.

The cases Centi cited in support of his contention by and large do not address the question on this appeal. Centi attempted to distinguish the facts in *Persky v. Bank of America Nat. Assn*, 261 NY 212, but a review of the holding and the reasoning of the Court of Appeals supports what McGillin seeks in this appeal.

Persky was an action on a promissory note. The parties and the courts below treated the promissory note as "negotiable", that is it complied with the Negotiable Instruments Law and was for a sum certain. The Court of Appeals noted that because the note contained a promise to pay not only a sum certain but also "all taxes assessed upon that sum", which was not a sum certain, the note was not "negotiable".

The Court went further:

> That point was overlooked in the courts below, and the appellant frankly concedes that in the arguments presented in those courts there was a tacit assumption that the rights of the parties were governed by the law of negotiable instruments. Indeed, the description of the note in the plaintiff's affidavit contains no reference to

> any promise to pay taxes and the defendant did not point out any error in the description. It was accepted by the courts below. The right of the appellants to change the theory, upon which the motion for judgment was argued below, is challenged now. *Presky*, 212 NY at 217.

Centi quoted the following language:

> We have said that 'it is well settled that this court will not, for the purpose of reversing a judgment, entertain questions not raised or argued at the trial, or upon the intermediate appeal (citing cases).' It is also true that 'as general rule a party who has obtained a judgment will not be allowed in this court to sustain that judgment upon grounds which were not considered in the courts below.' We do not intend to change or weaken these rules, but they are not applicable in this case. (Citations omitted). *Presky*, 212 NY at 217

The final sentences in this paragraph, however, demonstrate the reasons why this Court has authority to correct the errors committed by the preceding courts:

> In our review we are confined to the *questions* raised or argued at the trial but not to the arguments there presented. 'Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such judgment as they ought to have given' (Citation omitted). *Presky*, 212 NY at 218

Judge Sise below raised the question the question of illegality and asked the parties to brief him on it. R. 17. The majority in the Appellate Division first opined that McGillin failed to address the question of illegality. But the majority

adopted too narrow a view of the gravity of the illegality, not looking upon the "whole law", and separated the wrong from its seemingly benign manifestations.

Only the dissent in the Appellate Division identified the fundamental reason why the Trial Court and their colleagues in the majority were mistaken. R. 303.

IV. THE FACTS THAT THE LOAN AGREEMENT WAS ESTABLISHED AND NOT ITSELF ILLEGAL DOES NOT CHANGE THE FACT THAT THE LOAN CONSTITUTES MONEY LAUNDERING AND, THEREFORE, IS UNENFORCEABLE AS A MATTER OF PUBLIC POLICY

In his final section of his brief, Centi offered a rebuttal of facts to persuade this Court that this appeal does not lie because the dispute is about the interpretation of those facts. As pointed out herein, on the admitted facts and record as a whole, the question is not one of factual deference, but of legal significance.

The legal question is clarified when Centi later argued that the illegality was a collateral matter to the present suit (Respondent's brief p30) and recited sections of *Lloyd Capital v. Pat Henchar*, Inc. 80 NY2d 124 (1992).

In *Lloyd*, this Court addressed the distinction between *malum prohibitum* and *malum in se*. The plaintiff in *Lloyd* sued on a debt the terms of which violated the regulations of the US Small Business Administration by having too high an interest rate and a prohibited commitment fee. The defendants raised the defense that the contract was illegal and argued it was not recoverable as a result. The Court, like *Balbuena, infra*, characterized this illegalilty as merely *malum*

prohibitum, that is, the illegality complained of does not rise to the level of importance to justify denying a right to recover.

The Court quoted *Rosasco Creameries v. Cohen*, 276 NY 274, 278 as explaining "[w]here contracts which violate statutory provisions are merely *malum prohibitum,* the general rule does not always apply. If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy ... the right to recover will not be denied." *Lloyd*, 80 NY2d at 127.

There are two points to raise. The courts below looked only at the contract and once they concluded it was not "illegal", there was an end to the inquiry. But as *Kirschner* explained, it is a strong principle in New York that a wrongdoer should not profit from his misconduct that still applies in difficult cases. 15 NY3d 446, 464.

The second point is that the conduct underneath this case is *malum in se*, "money plaintiff loaned to defendant was garnered directly from the fruits of an illegal bookmaking operation", R. 302, not *malum prohibitum*--whether the interest rate in a loan agreement was usurious, or as in *Rosasco Creameries*, *e.g.,* whether a milk dealer was barred from getting paid because it was not licensed properly. As Judge Kaye noted, in *Lloyd*, about *Rosasco*, "[w]e concluded that since the primary purpose of the statute was to protect producers and the consuming public, not milk

dealers such as defendants, and since the wrong committed by the violation of the statute did not endanger health or morals, the contract should be enforced" 80 NY2d at 129-129

The wrong committed in this case is the use of the court system to recover what at bottom was illegal and immoral. That is the paramount public good

CONCLUSION

The Decision of the majority of the Appellate Division would effectively expand the number of exceptions this Court warned about in *Kirschner* and create a precedent that would limit this Court's analysis to whether the contract and its performance meets some indicia of legality. Once the Court was satisfied on the facts that this was so, that would be the end of the inquiry.

In a number of cases, this Court has articulated the importance of the public policy and long-standing precedent that the court system will not allow itself to be used as the paymaster on behalf of wrongdoers. These cases distinguished between those wrongs that were merely prohibited and those that were fundamental. For those that were fundamental, the courts would do right by the public policy despite one of the parties getting a benefit he or she may not deserve. The dissent in the Appellate Division recognized this and correctly identified the importance of asserting the public policy justification.

For the foregoing reasons, this Court should reverse the Decision of the Appellate Division and dismiss the complaint of Centi.

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Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
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