To Be Argued By: Daniel J. Centi
Time Requested: 20 Minutes

STATE OF NEW YORK COURT OF APPEALS

MARK CENTI,

Plaintiff-Respondent,

-against- APL-2018-00114

MICHAEL MCGILLIN,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Date Completed: February 15, 2019

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QUESTIONS PRESENTED

1. Is the Appellate Division dissent based upon a question of law resulting in jurisdiction of defendant's appeal to this Court?

   We assert that the dissent is not based on a question of law, but on a question of fact or discretion, and thus the appeal should be dismissed.

2. If jurisdiction does lie for defendant's appeal, is defendant's money laundering argument, never made below, subject to review?

   We submit that such argument is not subject to review.

3. Are the findings of fact of the Trial Court and adopted by the Appellate Division concerning the loan subject to review?

   We submit that they are not subject to review.

PRELIMINARY STATEMENT ON LACK OF JURISDICTION AND LIMITED SCOPE OF REVIEW.

Defendant argues that this Court has jurisdiction for his appeal under the "two dissent" rule of CPLR 5601(a). However, that statute and the constitutional provision underlying it require that the dissent be based on a question of law. The dissent herein was not so based.

As we explain in our Argument, the dissent relied on a new finding of fact, i.e., that in making the loan sued upon, plaintiff had intended to launder money. Thus, the dissent was not based on a question of law under CPLR 5601(a).

Also, with exceptions not applicable herein, the New York State Constitution empowers this Court to review questions of fact in nonjury cases only when the Appellate Division has reversed a judgment or order and has found new facts, and a final judgment has been entered thereon. A reversal or modification has not occurred here, and thus the findings of fact concerning the loan are not reviewable by this Court.

In addition, we will point out in our Argument that money laundering was never raised by defendant in the Trial Court. (For that matter, defendant never raised it in the Appellate Division.) Consequently, this Court is prevented under the law from reviewing defendant's argument.

In view of the above, we will address in this Brief not only that the evidence in support of plaintiff's case was exceedingly strong, but that defendant's appeal should be dismissed for lack of jurisdiction; in the event that jurisdiction exists in the view of the Court, the limits on this Court's scope of review should still result in a decision in favor of plaintiff.

COUNTERSTATEMENT OF FACTS

This case concerns defendant's failure to repay in full a loan obtained from plaintiff. Defendant denied the existence of the loan, but the Trial Court accepted plaintiff's case as true.

Plaintiff has a high school education and is now retired from having last worked in his brother's restaurant in Amsterdam, New York. [52-53]*. Defendant testified that he owns and operates a retail store selling athletic footwear and shoes. [135] Defendant's experience included having worked for a bank in its reconciliation department. [154] At the time plaintiff made the loan to defendant, they had been friends for many years. [57-58]

Plaintiff gave detailed testimony, supported by a large collection of defendant's own writings, concerning the loan made in this case. Plaintiff's testimony was found by the Trial Court to be "clear and concise and forthright" [16] and "completely credible." [24]

Such testimony by plaintiff included that in 2003 defendant discussed borrowing money from plaintiff. "He said he wanted to borrow 170,000 for the construction of a home he was building...on the Perth Road in Galway." [59] Plaintiff added regarding defendant's proposal to repay the loan:

> He said he would pay me the 1,600 every four weeks or a month unless I needed it, and then he could get it all at once after his house was built because his house was paid for and he could get a line of credit on his house. [65]

Plaintiff agreed to this request of defendant, and made the loan. [65]

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*Unless otherwise indicated, numbers in brackets refer to pages of the Record on Appeal.

The first installment of the loan to defendant in 2003 it was $40,000, and the balance came in two or three installments in 2004. The total amount loaned by plaintiff was $170,000. [63-64]

During plaintiff's testimony, three important Exhibits were admitted without objection. All were conceded by defendant to be in his handwriting.

In the beginning, plaintiff's Exhibit 1 was given to plaintiff by defendant, who wrote therein several loan possibilities. [211, 60-61]

Next given to plaintiff by defendant was Plaintiff's Exhibit 2. [61-63, 212-213] This was defendant's writing to plaintiff that the requested loan of 170,000 would be at 3.95% annual interest, and that there would be 131 payments at $1,600 per payment, so that total interest to be paid would be 39,600.

When asked on cross-examination how long the repayment would take if not demanded earlier, plaintiff testified, again, "1,600 a month every four weeks or every month until I had the money back, which would be 11 years." [83]

Plaintiff's Exhibit 3 was written evidence of the installments made. [214-248] These were the actual envelopes in which defendant had made cash payments, and defendant had made notations on the outside of the envelopes recording the amount of the payment and what he claimed was the balance of the loan. Plaintiff testified that defendant "would either stop by the house or I would stop at his shoe store, and he would have the envelope, and he would have the total

marked on it minus the 1,600 that he gave me and then the balance." The payments started in 2005 and ended in 2007. [65-66] These payments were made in the amount of $1,600, until a different amount was made in envelope number 33. Plaintiff explained in detail that defendant marked the amount included in that envelope as $1,590 because of an offset of $10 they agreed upon. Similarly, an offset of $20 was made in envelope number 34, and in envelope number 35. [70-71] **

Plaintiff explained that after the aforesaid installments were made, defendant "said he had a $5,000 payment for me, and he wasn't going to be paying by the month anymore, but once a year he would try to come up with the 5,000." Plaintiff agreed to that. [72-73] In 2008 defendant made a payment of $5,000 and he made another payment of $5,000 in 2009. Both payments were made in cash. Plaintiff recalls that one of those payments was made in the month of March. He explained this as follows:

> Yes, because I was on the road driving home from Florida, and he called me and asked if I was home, and I says, "No, but I will be home tomorrow," and he says, "Okay. I'll have a $5,000 payment for you," and I says, "I'll see you tomorrow." [73-74]

** Envelope 34 was inadvertently not included in the Record on Appeal, although it was contained in Plaintiff's Exhibit 3 as admitted into evidence. A copy of envelope 34 is shown in Respondent's Supplemental Appendix.

Inasmuch as plaintiff was driving at the time of this conversation, he put defendant on speaker phone. The words of defendant were heard by plaintiff and by plaintiff's friend, John Phillip Barone ("J.P. Barone") who was in plaintiff's car. [74]

J.P. Barone testified that this call by defendant did take place. Mr. Barone recalled it to be in March of either 2008 or 2009, when he and plaintiff were returning by car from Florida. [205] He testified that defendant "said he was making a payment, and he wasn't able to make another payment until the middle of the Summer." [206]

By letter dated May 21, 2010, plaintiff demanded payment in full on the loan. [249] The Judgment which ultimately resulted herein reflected an amount due taking into account all payments made by defendant. Plaintiff's calculation of the amount due was not made by plaintiff himself. He testified that this was done with the help of his lawyer who came up with a lower number than did the plaintiff himself. Plaintiff testified that he had not been capable of making calculations of principal or interest on this loan. In fact, he just took defendant's word on the calculations of payments. [87-88]

In defendant's Brief (p. 7), he claims that plaintiff admitted having $500,000 in his sister's safe and loaned $170,000 of that money to defendant. Actually, plaintiff testified that although the safe did contain about $500,000 [93-94], about

half of such money was defendant's. [112, 113] Later, defendant retrieved all his money. [128-129]

Plaintiff's testimony was that the funds in the safe were involved in the parties' bookmaking business. Defendant was plaintiff's "50 percent partner." [125] Plaintiff was convicted of promoting gambling as a result of that business. When plaintiff was asked if he had profited from that business, he testified "No, not after the fines and the forfeit of my truck and legal expenses and expense in the business, probably no." [125] Plaintiff's monetary fine alone was $100,000. [98]

Plaintiff's testimony about the lack of profit was not contradicted by defendant. He testified he was arrested also in connection with that business, he too was convicted of the misdemeanor of promoting gambling, he paid a fine of $50,000, that plaintiff indeed was fined $100,000, and that "I never profited from that business." [137-138, 189, 191] Defendant's conviction did not prevent him from obtaining a liquor license in 2007. [140]

Defendant claimed that Plaintiff's Exhibit 1 (his memo to plaintiff) was simply a list of different loan terms or annual percentage rates plaintiff had requested. Defendant said he created this list in "very late 2005 or 2006/2007." [139] Defendant conceded that he never asked plaintiff why he wanted this information. [161-162]

Concerning Plaintiff's Exhibit 2, which happens to reflect 170,000, total interest over term of 39,600, 3.95 APR, 131 payments of 1,600 [212], defendant testified that plaintiff had asked him on hundreds of occasions "to figure something out", and this Exhibit was defendant's response to plaintiff on one of those occasions. Defendant's explanation of what he meant by "to figure something out" was not comprehensible. [163-173] For instance, "I was trying to figure out how much money he would make on something that he asked me to do, and I couldn't come up with it because of the amounts that he told me, so I just wrote it down." [171] He could not remember what plaintiff told him that lead him to write this out. [175] When asked if plaintiff requested he write "131 payments @ 1,600, defendant answered "He didn't tell me to write anything down." [181] Defendant testified that APR means annual percentage rate but plaintiff did not tell him to calculate a loan with a 3.95 APR. [166-167]

Concerning Plaintiff's Exhibit 3, defendant admitted the envelopes given to plaintiff with notations thereon were his [156-157], and contained the cash payments plaintiff asserted. However, his explanation was that plaintiff had "asked me to hold money for him a little while after his arrest...he said it was 210,000." [136] Defendant testified several times to this amount of 210,000 to be held [157-159], but at his deposition when asked if plaintiff did indeed say it was $210,000, he testified "I don't know, I can't recall." [157] Defendant first stated

this was in January of 2007, but upon prompting, said it was in "January of '05." [136]

Defendant claimed that he had not really been a partner with plaintiff in the bookmaking business, but only had helped him. "To clarify, I was not in it with him. I was not a partner. I just helped him take calls once in a while, and I never profited from that business." [191] He did not report any income from the business to the Internal Revenue Service or the New York State Department of Taxation. When asked if the bookmaking business existed before he joined it or whether the two parties started the business up themselves, he claimed "I don't know if he had it before or not." [189] Defendant denied any cash existed in the safe, but only bonds and papers belonging to plaintiff. [147]

Defendant claimed that he had a falling out with plaintiff in September of 2007 over a dispute concerning the purchase of a liquor store. [189] He believed that he had a legal claim against plaintiff, and immediately took steps to bring suit concerning same. He believed that this claim was worth millions of dollars. [188] In spite of this claim against plaintiff, he returned to plaintiff the remaining money he was supposedly holding for plaintiff. He described this as follows: "This was September. I called him up. He met me outside of his house. I took it. I handed it to him. I took a shopping bag, took the stacks of money that he had. All the envelopes that were written - - they weren't filled with money, but they were

written, put it all in the bag, handed it to him and drove away. No conversation. I was done." [144] When asked how many stacks of currency he returned to plaintiff, he testified "I don't recall." When asked if there was more than one stack, he testified "There was probably more than one, but I don't know how many." [187]

ARGUMENT

As pointed out in Karger, The Powers of the New York Court of Appeals (Third Ed.), p. 216:

> Accordingly, in order to determine whether a particular dissent comes within the purview of CPLR 5601(a), it is necessary to ascertain whether that dissent is based on a properly preserved question of law which is reviewable by the Court of Appeals, or whether it is, instead, addressed to a question of fact or discretion or to an unpreserved claim of right or of error which is reviewable by the Appellate Division but not by the Court of Appeals.

In other words, the dissent must be based upon 1) a question of law, and not of fact or discretion, and 2) the question must have been properly preserved by appellant. The absence of either is fatal to jurisdiction of the appeal. In our case, the dissent was based upon a question of fact or discretion, and the question was not properly preserved. Therefore, jurisdiction does not lie.

POINT I. THE DISSENT WAS BASED UPON A QUESTION OF FACT OR DISCRETION.

The dissent below commenced with its conclusion:

> We do not disagree with Supreme Court and our colleagues' finding that plaintiff loaned defendant $170,000 and that defendant thereafter partially repaid this money to plaintiff, prior to the parties subsequent falling out, thereby providing ample evidence with respect to the existence of the subject loan agreement. In our opinion, however, because the parties' transaction amounts to money laundering, it is unenforceable as a matter of public policy... (Underlining added.) [302]

This Court's Civil Jurisdiction and Practice Outline (p. 3) contains citation to Matter of Cindy M.G. v. Michael A., 71 NY2d 948 (1988) for the "difference between majority and dissent based on differing view of underlying facts, not applicable legal standard." This statement is pertinent to our case, in which the Appellate Division majority stated that on appeal from a nonjury verdict,

> ...our authority is as broad as the trial court, we "independently consider the probative weight of the evidence and the inferences to be drawn therefrom but we defer to the factual findings made by the trial court, particularly when they are based on credibility assessments." [300]

After detailed review of the parties' testimony, including plaintiff's about the terms of the loan extended to defendant for "construction of his new home," the Court concluded that there was "ample evidence" to support the agreement on the loan and its breach. [301]

The Appellate Division majority found no illegal purpose to the loan. After finding that "defendant waived the right to challenge the loan on the basis of

illegality, because it was not raised as an affirmative defense," the Court stated that in any event "we should find that because the agreement nor the performance of the agreement was illegal, the judgment was enforceable." [301]

The dissent, however, after agreeing with the findings of fact on the loan and its partial repayment, made a new finding of fact, not made by the Trial Court (or the Appellate Division majority), i.e. that the loan constituted money laundering. In other words, the dissenting justices implicitly found that the purpose of the loan was to launder money and not to assist defendant in building a home.

Resultantly, the dissent herein is based upon a question of fact as to the purpose intended of the loan and cannot supply a jurisdictional basis for this appeal. It is based also on a matter of discretion, because money laundering was never even raised in this case by defendant, but the dissenting justices would choose to reach it. The majority of the Appellate Division stated it would not permit defendant to assert illegality at all because he waived the defense. If the argument had been allowed below, it would have been allowed as matter of discretion. As stated in another case: "Although the Appellate Division demonstrated its reversal as 'on the law,' inasmuch as the unpreserved error was reviewed by the Appellate Division, this Court construes the reversal as an exercise of discretion which is beyond this court's power to review." Brown v. New York, 60 NY2d 893, 894 (1983).

Indeed, the case of Merrill v. Albany Medical Center Hospital, 71 NY2d 990 (1988) is an example of a dissent based on unpreserved issues, and in which was stated at 991:

> Although the dissent in the present case purports to address questions of law, an examination of the full record reveals that the arguments upon which the dissent is predicated were not raised by appellant in the trial court. While the Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, the Court of Appeals may not address such issues in the absence of objection in the trial court. Accordingly, the dissent was not on a question of law which would be reviewable by the Court of Appeals and the appeal must be dismissed. (Citations omitted.)

At best, the dissent is based upon a mixed question of law and fact, i.e. that plaintiff by the loan had intended to launder money, and as a matter of law the claim is barred. An example of a mixed question is found In re Robert S., 76 NY2d 770 (1990), in which this Court dismissed the appeal because the two-justice dissent was not a question of law under CPLR 5601(a). Karger describes the Robert S. dissent as "involving mixed question of fact and law, held not dissent on question of law." Karger, *supra*, p. 217 fn. 51.

Also "[w]here it is equivocal whether a dissent rests upon disagreement in fact or law, the dissent is not on a question of law within the meaning of CPLR 5601 (subd. [a])." Gillies Agency, Inc. v. Filor, 32 NY2d 759, 760 (1973). In that case, the Appellate Division had affirmed a nonjury verdict for plaintiff claiming a

brokerage commission, and the dissenting justice had opined that no meeting of the minds occurred concerning the alleged agreement, and the record failed to disclose evidence of a conspiracy to deprive plaintiff of commissions.

Again, the very words "money laundering" were not uttered in this case by defendant or his counsel in the Trial Court (or even in the Appellate Division). However, since it is now raised for the first time, we must at least discuss briefly what constitutes money laundering, and explain why the dissent was based upon a finding of fact.

The dissent does not contain a reference to money laundering law, or an explanation of how the loan was an attempt to launder money. As relevant here, money laundering is a "specific intent" crime, requiring the individual to have a specific purpose when performing the act, rather than just a general purpose to perform the act.

New York's money laundering statutes contained in our Penal Law (§§ 470.05-470.24) are specific intent statutes. In each case, the covered financial transaction (the laundering) must be proved to have been with "intent" or "design" to carry on criminal conduct, or intent or design to evade tax law laws, conceal proceeds, or avoid reporting requirements. Indeed, these statutes have been held as requiring even greater proof of specific intent than the federal ones on money laundering.

> While the federal and New York State statute require that the defendant engage in financial transactions designed to conceal that funds were derived from criminal conduct, the New York statute requires that the defendant had the intent to conceal or disguise the source of the proceeds – "a different mental state, with a more significant level of culpability." Matter of Bristol, 94 AD3d 85, 87 (First Dept. 2012), quoting from Matter of Stern, 205 AD2d 162 (First Dept. 1994).

The requirement of proof of specific intent to launder is present also with the federal crime. In United States v. Garcia, 587 F.3d 509 (Second Cir. 2009), the Court reversed a conviction for participating in a money laundering conspiracy. Defendant possessed $300,000 derived from the sale of cocaine. He admitted at a sentencing hearing "that he conspired to transport ill-gotten cash proceeds across the country, that the cash was disguised during this attempted transaction, and the he knew the money would not be declared as income."

His conviction was reversed due to insufficient factual basis. The Court relied upon the then recently decided case of Cuellar v. United States, 553 U.S. 550 (2008), which held, said the Court at 512, "that the purpose, not merely the effect of the endeavor must be to conceal or disguise a listed attribute of the proceeds." In Cuellar, defendant was convicted of money laundering. The Supreme Court reversed the conviction saying the purpose of the subject event, i.e. the transportation of the proceeds of illegal drug sales, was not to money launder but to compensate the drug trafficking bosses.

Relying on Cuellar, the court in Garcia stated that "use of cash to effect the transaction, coupled with knowledge that the cash would not be declared as income as a sufficient factual basis for the plea would essentially turn every clandestine transaction involving unlawful proceeds into money laundering." 587 F.3d at 519. The Court concluded that "While this transaction was effected covertly in an effort to conceal the transaction from the authorities, there is no indication from the record that the transaction itself was an effort to conceal anything about the money." 587 F.3d at 519.

In our case too, the record is devoid of evidence that the loan by plaintiff was intended to conceal or disguise funds. The point here though is that the dissent is based upon a finding of fact of specific intent to launder, and not upon a question of law. Therefore, the dissent is not based on a question of law, and jurisdiction fails for the appeal.

POINT II. THE FINDINGS OF FACT CONCERNING THE TERMS OF THE LOAN AND ITS PURPOSE ARE NOT REVIEWABLE.

In the event that the Judgment herein is determined appealable, the Court must then consider which questions are reviewable. Such determination is necessary because of the New York State Constitution, Art. VI, § 3(a), which limits this Court's review to questions of law, except in death cases, and except where the

Appellate Division reverses or modifies a judgment and finds new facts upon which a new judgment is entered. The exceptions of course do not apply here.

The above constitutional mandate is embodied in CPLR 5501(b) which provides:

> (b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered.

This authority thus differs from the Appellate Division, which is empowered to review questions of fact and law, make new findings of fact in nonjury cases, and may review unpreserved claims in the interest of justice. (Karger, *supra*, pp. 215-216.)

In Cannon v. Putnam, 76 NY2d 644 (1990), the Trial Court, following a nonjury hearing, dismissed a personal injury claim based on the Labor Law. The dismissal was based upon a statutory exemption for a landowner of one and two family dwellings who did not control the work. Plaintiff had argued the exemption inapplicable due to commercial use of the property, or because of landowner's direction and/or control over the project. After rejecting the commercial use argument, because a site and use test was mandated, regardless that some commercial activity occurred on the property, this Court stated at 651:

> As to plaintiffs' alternative contention, there was plainly support in the hearing record for the trial court's finding that defendant's participation in some of the preliminary stages of the project did not rise to the level of "direct[ion] or control [of] the work" within the meaning of the statutes. Since that finding has now been affirmed by the Appellate Division, the question is beyond our Court's power to review *(see, e.g., Smirlock Realty Corp. v Title Guar. Co., 63 NY2d 955)*

In our case, the Appellate Division majority stated that even if defendant had not waived the illegality defense, they would find the judgment enforceable anyway "because neither the agreement nor the performance of the agreement was illegal." [301] That followed a detailed review of the proof, which was described as "ample evidence." This Court may not review a determination that ample evidence for findings of fact exist in the Record.

In Lue v. English, 58 AD2d 805 (Second Dept. 1977), the Appellate Division had found a verdict "amply supported by the evidence in the record" without (unlike in our case) describing any of such evidence. For reasons not relevant here, jurisdiction existed for appeal to this Court. However, the findings of fact as opposed to certain questions of law on the appeal, were not reviewable. This Court stated "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." (Citations omitted.) Lue v. English, 44 NY2d 654, 655 (1978). That result is consistent with the principle that when an Appellate Division

dissent is on a question of law, thus furnishing jurisdiction for the appeal, the other aspects of a judgment or order may be reviewed but only if this Court is empowered to review them. Karger, *supra,* p. 219.

POINT III. DEFENDANT'S FAILURE TO CLAIM THE LOAN AS MONEY LAUNDERING IS ADDITIONAL REASON THE CLAIM IS NOT SUBJECT TO REVIEW.

As the Appellate Division held, "We also find that defendant waived his right to challenge the loan on the basis of illegality because it was not raised as an affirmative defense." [301] Defendant's failure to attack the loan as illegal "money laundering," prevents review of such claim.

In Farr v. Newman, 14 NY2d 183 (1964), plaintiff entered into an agreement to purchase certain real property. When the owner thereof conveyed instead to a third party (defendant), plaintiff sued to compel conveyance to him on the basis of his initial agreement. Plaintiff claimed defendant knew of plaintiff's contractual rights because they had been made known to defendant's counsel before defendant took title. The Trial Court dismissed the complaint. The Appellate Division reversed the Trial Court, and directed judgment for plaintiff. This Court affirmed the Appellate Division. One of the arguments raised by defendant for the first time was that his attorney's conflict of interest precluded imputation of his knowledge to defendant. This Court stated at 188 that such contention could not be reviewed.

> On this state of the record it would be manifestly improper to now look at the evidence in a new light, draw an inference of duplicity therefrom, and then invoke the reasoning of the cases relieving a principal on the ground. The well-settled rule is that this court will not consider new arguments, whether of law or fact, or both, where it appears that if they had been raised at the trial an adequate defense might have been adduced by the other party (*Osgood v. Toole*, 60 N.Y. 475; *Persky v. Bank of America Nat. Assn.*, 261 N.Y. 212; Cohen and Karger, Powers of the New York Court of Appeals [1952], § 162). Quite obviously, the assertion of faithlessness comes within the above description of arguments that may not be made for the first time in this court. (Underling added.)

If faithlessness is an argument not to be raised for the first time in this Court, so is defendant's new argument about plaintiff's intent in making the loan.

In the Persky case cited above, the facts were critically different from those in our case. Plaintiff sued on a promissory note which had been assigned to him. The answer of defendant endorser was stricken by the Appellate Division which granted summary judgment in plaintiff's favor. This Court reversed based upon a legal defense raised for the first time on appeal, i.e. that the note was not a negotiable instrument. (If not negotiable, then plaintiff as assignee took subject to all equities that might have been asserted against his assignor.)

This Court first acknowledged at 217-218 that:

> 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." 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.)

The Court then quoted language from the promissory note that made clear it was not a negotiable instrument. The Court was addressing a legal issue that could be resolved by the note's very terms, and thus "which could not have been avoided if brought to the attention of the respondent in the court below." 261 N.Y. at 218. Similarly, and consistent with the Persky holding, questions of statutory interpretation are legal questions that can be raised for the first time on appeal because they could not have been avoided if they had been raised in the Trial Court. Karger, *supra,* pp. 616-617.

As stated in Bingham v. N.Y. City Transit Auth., 99 NY2d 355, 359 (2003):

> As we have many times repeated, this Court with rare exception does not review questions raised for the first time on appeal. Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice. A new issue--even a pure law issue--may be reached on appeal only if it could not have been avoided by factual showings or legal countersteps had it been raised below...this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the trial and intermediate appellate courts...Had defendants' new argument been presented below, plaintiff would have had the opportunity to make a factual showing or legal argument that might have undermined defendant's position.

In Osgood v. Toole, 60 N.Y. 475 (1875), defendant pleaded but did not argue at trial the statute of limitations. This Court refused to review that issue. To raise it for the first time on appeal, "It must appear that there is no possible answer which can be made to it." 60 N.Y. at 479. In other words, this Court does not have power to review unpreserved error. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 NY3d 759 (2015).

In our case, plaintiff testified that defendant requested the loan for the building of a house; that defendant claimed he would use it as a bridge to a line of credit; that the loan was extended to defendant in 2003 and 2004. [63-65] Defendant testified that indeed he did have a house built during that time period, but to pay for it, he utilized funds from his savings and the proceeds of sale of another property. [146-147]

However, defendant never raised the argument that the loan was an illegal money laundering scheme. Hence, plaintiff did not seek to adduce evidence, in disclosure or at trial, to rebut the argument never made. If it had been made, plaintiff could have examined or investigated the amount of money used in defendant's house construction, the source of the funds for construction, whether defendant inquired of lenders about a line of credit, applied for a line of credit, or obtained a line of credit.

Additionally, plaintiff could have adduced evidence, through testimony and

documents, concerning all transactions between and among defendant and those who constructed his house, showing they did not occur under requirement that they be clandestine or confidential. Also, plaintiff could have testified expressly that the loan was not an attempt to launder anything, but as the Appellate Division majority stated, was merely for the purpose of constructing his friend's new house. In other words, plaintiff could have addressed the point forcefully to the Trial Court, which ultimately found his testimony on the loan "clear and concise and forthright." [16, 21]

Defendant has the burden of demonstrating that his new argument could not have possibly been avoided if raised in Supreme Court. Karger, *supra,* p. 618; Silverman v. Bennor Coats, 61 NY2d 299 (1984). In view of the above, defendant cannot meet that burden. In Silverman, this Court referred to the legal question raised as a "specific argument" not raised below, and thus not to be reviewed by the Court. 61 NY2d at 310-311. That principle applies here.

POINT IV. PROOF OF THE LOAN WAS OVERWHELMING AND THE LOAN WAS LEGAL IN ANY EVENT.

Defendant acknowledges in his Brief (p. 26) the Appellate Division ruled that "ample evidence" existed in the Record of the loan sued upon. Defendant concludes (Brief, p. 31) "To any reasonable jury, the evidence simply cannot support the decision and judgment affirmed by the Appellate Division."

First, this case was not presented to a jury in the Trial Court, but to a Judge. The Memorandum and Order of the Appellate Division reflects the Court's independent review of the "evidence and the inferences to be drawn therefrom," and all five justices agreed with the findings of fact concerning the loan and the partial repayment thereof. The proof adduced by plaintiff was strong and was enhanced by the incomprehensible testimony of defendant himself.

After a detailed review of the testimony, the Trial Court in its June 16, 2015 Decision found as follows:

> The Court finds that Plaintiff's testimony was clear and concise and forthright including the source of the loaned monies. As a result, in view of all the evidence, having a chance to view both the Plaintiff and the Defendant's testimony first hand, the Court does find that a loan of 170,000 at 3.95 interest was entered into over 131 months repayment schedule which was proven by the testimony of Plaintiff and the writings of Exhibit 2, Exhibit 3, the 35 marked envelopes indicating the balance and the payments that were in the Defendant's handwriting.The Court finds that the two additional $5,000 payments were also paid by the Defendant to the Plaintiff.
>
> The Court finds that the Defendant's testimony regarding Exhibits 2 and 3 was not credible. [16-17]

Plaintiff's testimony about the material terms of the loan was quite clear. He had fortunately kept the 35 envelopes, constituting Plaintiff's Exhibit 3, which had contained the payments by defendant to plaintiff. As the Court recited, "Each envelope reflected the principle [sic], payment and new principle [sic] amounts for

each month." [13] Defendant's handwritten envelopes confirmed plaintiff's testimony in material respects.

Defendant in his brief presents various "facts" as if the Trial Court accepted his version thereof or was in some way obligated to accept them. For instance, he claims (Brief, p.) "It was in December, 2005... 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." However, that was defendant's testimony, not plaintiff's. Another example is seen in defendant's Brief (p. 29): "It was uncontested in the record that McGillin won his calculator that was able of amortization calculations in December 2005." That was defendant's testimony, and the Trial Court was not compelled to accept it as credible or relevant.

Defendant's attempt to explain away the proof as the payments of spending money for plaintiff was rightly deemed "not credible" by the Court. Again, Plaintiff's Exhibit 2 was, as the Court stated, "Defendant's handwritten calculations that reflected the loan of 170,000 at 3.95 APR paid back over 131 payments of $1,600 resulting in interest of $39,600 for a total repayment of $209,600." [13]

Defendant conceded that Plaintiff's Exhibit 2 was in his own handwriting. [173] His explanation for this document was more than "not credible." It was

incomprehensible in large part. He testified that plaintiff had asked him to "figure something out." We invite the Court to read defendant's words about what he meant by this. [163-173] And referring to plaintiff, "He was trying - - I was trying to figure out how much money he would make on something that he asked me to do, and I couldn't come up with it because of the amounts he told me, so I just wrote it down." [171]

Whatever defendant was talking about, he could not avoid the fatal flaw in his story. Defendant was certain that at the time he created Plaintiff's Exhibit 2, he had been making for many months payment of "spending money" to plaintiff in the envelopes of Plaintiff's Exhibit 3.

> Q. My question is Plaintiff's Exhibit 2 you wrote out and you gave it to Mark Centi. Correct?
> A. Yes.
> Q. Did you write it out and give it to him before or after he asked you to hold money for him?
> A. That would be after. A long time after.

That was his testimony, that in January 2005 he commenced holding the "spending money" as he put it. [186] And he gave Plaintiff's Exhibit 2 to plaintiff in 2006. Plaintiff's Exhibit 2 contains defendant's own notation of "131 payments @ 1600.00." Defendant testified that plaintiff did not tell him to write that information down on Plaintiff's Exhibit 2. "He did not tell me to write anything down." [118]

Furthermore, defendant was asked "did you have any question in your mind as to why 1,600 happened to be the amount you were giving him back on a four week basis in those envelopes?"

A. No.
Q. You never gave it a thought?
A. No. [181]

That is a fatal flaw in his testimony. Defendant wanted the Trial Court to believe that the consistency of Plaintiff's Exhibits 2 and 3 is an astonishing coincidence, and yet a coincidence that never even occurred to defendant.

Furthermore, as the Appellate Division stated in its Memorandum and Order [301] "...defendant testified that in September 2007, he returned all of plaintiff's remaining cash, together with envelopes that were empty, but inexplicably with payment and balance amounts." The defendant's handwritten payment and balance amounts on those envelopes is not the only other fact unexplained by defendant.

Additionally, as mentioned in our Counterstatement of Facts, the envelopes numbered 33, 34 and 35 of plaintiff's Exhibit 3 reflected, in defendant's own handwriting, payments with reductions of $10, $20 and $20 respectively. [247-248] These were not explained by defendant. They were explained by plaintiff [70-71].

Unsurprisingly, the Trial Court rejected defendant's testimony on the loan as not credible, and the Appellate Division agreed.

And this loan was legal. Illegality is an affirmative defense and the facts showing such must be pleaded. CPLR 3018(b). Defendant did plead illegality but only that "plaintiff was not registered in the State of New York as a broker, dealer, banker or otherwise, to lend monies or engage in loan practices, and to loan monies and charge the various fees/interest plaintiff purports to have charge [sic] defendant." [44] This defense was specious and never pursued by defendant. He raised also that the "purported loan...may contain usurious terms." [45] Defendant did not pursue that defense either.

In any event, as the Appellate Division majority stated, "neither the agreement nor the performance of the agreement was illegal..." [301] First of all, the loan agreement is presumed to be lawful. A contract is presumed to be legal unless illegality appears on its face or by pleading. Brearton v. DeWitt, 252 NY 495 (1930); I. Tanenbaum Son & Co. v. Brooklyn Furniture Co., 229 A.D. 469 (First Dept. 1930).

Generally stated, a contract to carry out an illegal purpose (unlike the one in our case) cannot be enforced through the court. Although, as explained below, such a contract may be enforced in order to avoid forfeiture to one party and a windfall to the other. In our case, the agreement was for a legal purpose, i.e. the

construction of a home. Plaintiff fully performed by making the loan, and defendant failed to repay in full.

In Jara v. Strong Steel Door, Inc., 58 AD3d 600 (Second Dept. 2009), defendant hired plaintiff for the performance of certain construction work. In response to defendant's request, plaintiff first provided documentation of his eligibility to work in this country. Plaintiff performed certain work, was then terminated, and sued for payment of prevailing wages. Defendant raised illegality of contract because plaintiff's work documents were false, a fact conceded by plaintiff. Defendant raised also the defense of unclean hands on plaintiff's equity claim.

Supreme Court denied defendant's motion for summary judgment and the Appellate Division affirmed. After stating that illegal contracts were generally unenforceable, the Court observed that "neither the contract at issue nor the work Huerta [plaintiff] performed was illegal." 58 AD3d at 602. The Court emphasized, quoting another case at 602:

> Although recoveries have been denied to parties who have engaged in illegal activities, in those cases it was the work being performed that was outlawed, whereas here, the construction work itself was entirely lawful.

In Jara, plaintiff's unjust enrichment claim was validated also, with the Court citing among others National Distillers & Chem. Corp. v. Seyopp Corp., 17 NY2d 12 (1966). In that case, this Court stated that unclean hands is never present

"unless the plaintiff is guilty of immoral, unconscionable conduct" and the conduct is directly related to the subject matter in the lawsuit and "the party seeking to invoke the doctrine was injured by such conduct." 17 NY2d at 15.

In our case, the only illegal conduct that was mentioned in the proof was collateral to the agreement enforced by the Court. Both parties testified that they pled guilty to promoting gambling. Each party testified without contradiction that after payment of all of their expenses in that collateral matter, he had not realized a financial gain. The fact that cash used for the loan was previously involved in illegal activity, though not a profit thereof, is not pertinent to the legal loan which posed a substantial benefit to defendant.

The parties both paid society's price for the unrelated activity which is prohibited in the State of New York. However, that conduct is not deemed by the State or society to be immoral, such as is theft for instance. Indeed, the State of New York itself promotes gambling in a grand and intense way, and grants gambling licenses to many entities including churches.

If the Court did not issue a judgment for plaintiff based upon the facts as found, defendant would have benefitted unjustly under the law. Although he made substantial payments on the debt to plaintiff, he still owes to plaintiff the amount found by the Court. Defendant had the use of that money and possesses a house as a result.

This Court has used strong language that is pertinent here. In Lloyd Capital Corporation v. Pat Henchar, Inc., 80 NY2d 124 (1992), suit was brought upon a loan agreement. Defendant raised the defense that the contract was illegal. Apparently, the loan was made at an illegal rate of interest and also required an illegal commitment fee. The Court stated the principle that illegal contracts as a general rule are not enforceable, but that rule does not always apply when the illegal conduct is merely *malum prohibitum*. The Court further stated that forfeitures by operation of law are not favored especially when the defaulting party seeks to raise illegality as a sword for personal gain rather than a shield for the public good. The Court stated also that "Allowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law." 80 NY2d at 128. Applying these principles, the Court rejected the defense of illegality and affirmed judgment for the plaintiff.

This Court in Lloyd Capital stated too that the judgment for the plaintiff does not require the Court to "command illegal conduct," and the Court quoted the United States Supreme Court as follows:

> Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy * * * of preventing people from getting other people's property for nothing when they purport to be buying it. 80 NY2d at 129.

This "overriding general policy" was followed by the Trial Court upon granting the judgment to be entered herein. Moreover, as the Trial Court recognized in its November 24, 2015 Decision, our case is stronger than Lloyd Capital. "Unlike the Court of Appeals case where the very terms of the loan were illegal in Lloyd, in this case the terms were proper." [25] The Trial Court's conclusion was clearly within the facts and the law.

> As a general rule forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as a sword for personal gain rather than a shield for public good. Allowing parties to avoid their contractual obligation is especially inappropriate where there are regulating sanctions and statutory penalties in place to redress violations of the law. [25].

Finally, although the question of legally sufficient evidence for findings of fact is a legal one, "[w]hen this court is confronted by affirmed findings of fact, its scope of review is limited to ascertaining whether there is any evidence in the record to sustain the lower courts' determination." Albert v. 28 Williams St. Corp., 63 NY2d 557, 574 (1984). Even if jurisdiction were to lie for this appeal, defendant has not demonstrated the absence of "any evidence" to support plaintiff's Judgment.

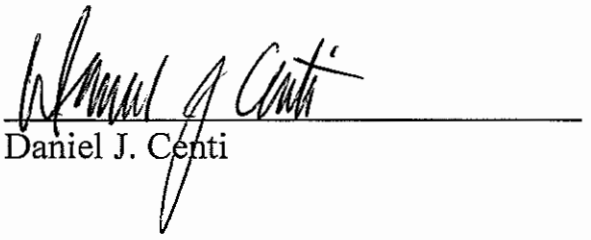
CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the event jurisdiction exists in view of the Court, the Judgment should be affirmed in all respects.

CERTIFICATION OF WORD COUNT

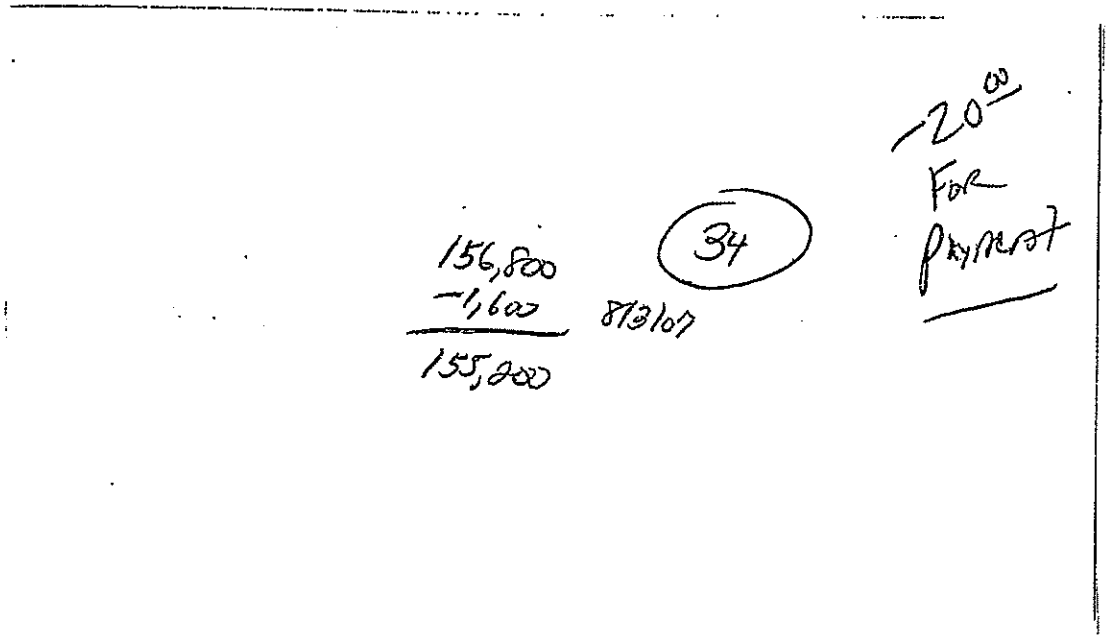
I hereby certify pursuant to 22 NYCRR 500.13(c)(1) that the total word count for all printed text in the body of this Brief according to word processing system used herein is 7,723.

Dated: February 15, 2019



Daniel J. Centi

RESPONDENT'S SUPPLEMENTAL APPENDIX



CERTIFICATION

The undersigned, an attorney at law admitted to practice in the courts of the State of New York, hereby certifies that I have compared the foregoing page with the original thereof contained in Plaintiff's Exhibit 3 admitted into evidence in the Trial Court and which has been filed also with this Court, and I have found it to be a true and complete copy thereof.

Dated: February 15, 2019

Daniel J. Centi