IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

WILLIAM C. COX, Plaintiff, vs. THE ESTATE OF STEVE COOPER and DOROTHY COOPER, Defendants.	CASE NO. 3AN-15-10101 CI

ORDER

Defendant's Rule 12(b)(6) Motion to Dismiss
Defendant's Second Rule 12(b)(6) Motion to Dismiss
Motion for Summary Judgment

I. Introduction.

The parties do not dispute the basic facts underlying this case. On 2 October 2008 Steve Cooper[1] and Dorothy Cooper loaned William Cox $325,000. Cox executed a promissory note agreeing to pay 20% annual interest on the debt.[2] The note does not call for installment payments, but the loan was to be repaid by 2 April 2009.[3] The note was secured by a deed of trust on a parcel of land and house. On 3 June 2010 the parties renegotiated the note, extending its term to 2

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1 Since the original complaint was filed Steve Cooper died. His estate substituted as a party for him. The Court will refer to the defendants collectively as the Coopers.

2 Defendants' Answer and Counterclaim (8 January 2016) Exhibit 5 at 1.

3 *Id.*

April 2011 and reducing the annual interest rate thereafter to 8%. Cox made his last payment to the Coopers on November 2011.[4]

Om 7 July 2014 the trustee gave notice of default and sale and foreclosure. The notice alleged that a principal sum of $315,000 was owed plus interest accrued during the period of the higher rate of $98,450.72 and during the period of the lower rate to 23 June 2015 of $46,909.19. Interest continued to accrue. A public sale was to be held on 8 October 2015.

On 5 October 2015 Cox filed his complaint. He alleged that the original interest rate was usurious in violation of AS 45.45.010. Among the remedies sought were credit for double the interest paid and forfeiture of the remainder of any interest owed to the Coopers. The next day he recorded a Notice of Lis Pendens. The trustee postponed the sale.

On 16 October 2015 the Coopers filed a motion to dismiss pursuant to Civil Rule 12(b)(6). Cox opposed the motion. The Court heard oral argument on 4 January 2016.

On 5 January 2016 Cox filed his First Amended Complaint. He repeated his usury claim and included a claim that the trustee demanded an excessive amount of money to cure the alleged default in violation of AS 34.20.070(b). Cox also alleged that AS 09.10.053 set a three year limit upon

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[4] Cox made payments of $10,000 (December 2009), $42,000 (December 2010), and $48,000 (November 2011).

efforts to collect on a contract and thus the trustee's attempt to foreclose on the note and deed was begun after the three year period had expired.[5] The Coopers counterclaimed, contending that a constructive trust should be created to hold any rent Cox might be receiving from the property.

On 8 January 2016 the Coopers filed their second Rule 12 motion to dismiss. The Court held oral argument on the second motion to dismiss on 11 February 2016.

On 25 February 2016 moved for summary judgment. The Coopers opposed that motion.

II. Discussion.

The parties raised various arguments in the three sets of motions. Some of the motions repeat arguments or offer variations of a main argument. Rather than proceed entirely chronologically with each motion, the Court will address each argument as it is raised, including any subsequent development in subsequent motions.

A. AS 45.45.030.

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[5] Cox abandoned this claim at oral argument on the second motion to dismiss on 11 February 2016. In his subsequent motion for summary judgment Cox makes a cursory reference to the alleged untimeliness of the action on the note. Brief in Support of Motion for Summary Judgment (25 February 2016) at 1. The remainder of the brief has no discussion of that argument. The Court finds that the cursory mention of the argument in the brief does not supplant Cox's withdrawal of it at oral argument.

The Coopers contend that Cox may not seek a recovery of twice the amount of interest paid as he has not met the preconditions that pertain to AS 45.45.030. That statute provides, "If interest greater than that prescribed in AS 45.45.010 and 45.45.020 is received or collected, the person paying it may, by action brought within two years after the payment, recover from the person receiving the payment double the amount of the interest received or collected."

Although the Coopers do not agree that the interest rate they charged was usurious, even if it was, they argue that the remedy of the recovery of double interest paid is only available if two conditions are met. First, the debtor must have paid all of the interest owed under the usurious rate, and second, must file his complaint within two years of making the last interest payment. They argue that Cox has failed to meet either condition. The Court agrees that Cox has filed to meet the first precondition.

In *McGalliard v. Liberty Leasing Co. of Alaska, Inc.*,[6] the Alaska Supreme Court confirmed that a debtor may recover under AS 45.45.030 "only when he has paid a sum greater tha[n] the principal plus lawful interest."[7] Cox has not paid off the principal yet. This statutory remedy is not available to him.

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[6] 534 P.2d 528 (Alaska 1975). In *Western Enterprises v. Arctic Office Machines, Inc.*, 6667 P.2d 1232, 1235 (Alaska 1983) the supreme court overruled an unrelated holding of *McGalliard.*

[7] *Id.* at 533 (footnote omitted).

B. AS 45.45.010.

Alaska Statute 45.45.010 sets an upper limit to the interest rate that may be charged for a particular loan. However, there are varying upper limits depending upon, in part, the amount of the loan. Unfortunately, the interplay of the first two subsections of AS 45.45.010 is somewhat confusing. They provide:

> (a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.
>
> (b) Interest may not be charged by express agreement of the parties in a contract or loan commitment that is more than the greater of 10 percent or five percentage points above the annual rate charged member banks for advances by the 12th Federal Reserve District on the day on which the contract or loan commitment is made. *A contract or loan commitment in which the principal amount exceeds $25,000 is exempt from the limitation of this subsection.*[8]

The parties disagree on how to construe the second sentence of subsection (b). The Coopers read it to mean that every loan over $25,000 is exempted from the usury caps. Cox reads it to mean that a loan over that amount is exempt from the caps in subsection (b) but still subject to the cap in subsection (a).

The Court concludes that Cox has the better argument. When construing a statute the Court must assume that the legislature intended every

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[8] Italics supplied.

sentence and word to have meaning.[9] Thus the Court should determine what each part of the two subsections adds to the meaning of the entire statute. The Court undertakes this analysis with a set of hypothetical scenarios. The Court first reads subsection (a) alone and applies it to the various scenarios. Then the Court construes subsection (a) and the first line only of subsection (b), applying this combination to the same scenarios. Finally, the Court construes subsections (a) and (b) together in their entirety and applies them to the same scenarios.

The scenarios assume two loans, one for $10,000 and the other for $50,000. The scenarios then assume that the 12th Federal Reserve District interest is one of four rates: 0%, 5 %, 6% or 10%. In each scenario the question is What is the maximum interest rate that can be charged under each of the three statutory combinations? The results can be summarized in the following table.

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[9] *State, Dept. of Commerce v. Progressive Casualty Insurance Co.*, 165 P.3d 624, 629 (Alaska 2007) ("We must presume 'that every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words of provisions are superfluous.'") (quoting *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999).

Subsection	**Amount of Loan**							
	$10,000				**$50,000**			
a	10.5%				10.5%			
	Federal Rate				***Federal Rate***			
	0%	***5%***	***6%***	***10%***	***0%***	***05%***	***6%***	***10%***
a & b.1	10%	10%	11%	15%	10%	10%	10%	10%
a & b.1&2	10.5%	10%	11%	15%	10.5%	10.5%	10.5%	10.5%

1. Subsection (a) only. Subsection (a) does two things. First, it sets the rate of interest where the parties have not established a rate.[10] Second, it sets a maximum rate, unless parties contract for an express rate, in which case the limits of subsection (b) apply.

If only section (a) is applicable, then the maximum interest rate allowable, regardless of the size of the loan, would be 10.5%. In the absence of subsection (b) there is no exception to the rate set by subsection (a). The maximum rate for all loans is 10.5%.

2. Subsection (a) and the first line of subsection (b). If we add the first line of subsection (b), then subsection (a) allows contracting parties to

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[10] *Riley v. Northern Commercial Co.*, 648 P.2d 961, 966 (Alaska 1982) ("Where a contract does not contain an express interest rate, prejudgment interest is set at the legal rate. AS 45.45.010(a).") (footnote omitted).

ignore the 10.5% rate that subsection (a), standing alone, establishes. Instead, in this scenario, the limits of subsection (b), sentence one apply. The first sentence of subsection (b) adopts a variable maximum rate, one that is tied to the fluctuating Federal interest rate. Thus depending upon the economic conditions in the broader economy at the inception of the loan, as reflected in the Federal interest rate, the limit applicable to contracting parties fluctuates. The new limit is the greater of either 10% or five percentage points above the Federal interest rate. The size of the loan is not relevant.

The table shows four different Federal rates. If the Federal rate is 5% or lower, then the maximum rate is 10% since that rate exceed the Federal interest rate plus five points. Once the Federal interest rate exceeds 5%, so that the combination of the Federal rate plus five points exceeds 10%, then the maximum allowable rates may go above 10%.

3. **Section (a) and all of section (b).** The second sentence of subsection (b) is straightforward in one sense but confusing in its results. If read just as part of subsection (b), then it is simple. It creates two sets of loans; one set consists of loans that are for $25,000 or less. The second set consists of loans above $25,000. So far, so good. The rub comes in determining what happens to each set.

The second set of loans, those over $25,000, is "exempt from the limitation of this subsection." Cox reads this to mean only that the higher loans are

not subject to the first line of subsection (b). Thus the higher loans are not subject to the alternate limits set by subsection (b) (the higher of 10% or five points above the Federal interest rate). Cox construes this to mean that subsection (a) remains intact. Thus the 10.5% limit applies to the second set of subsection (b) loans, those over $25,000.

The Coopers read the exemption of subsection (b) to mean not only are the higher loans exempted from the alternate rates established by the first line of subsection (b), but also from the impact of subsection (a). Thus the higher loans would be subject to no usury limit at all. They argue that *Rockstad v. Erickson*[11] supports their reading of AS 45.45.010. There the narrow issue was whether two parties had contracted for two separate loans of $12,200 and $13,800 or a single loan of $26,000.[12] The supreme court held that the trial court had not erred when it found there had been on loan.[13] In the course of its description of the dispute the supreme court wrote:

> As mentioned, Erikson claimed he had loaned $26,000 to Rockstad, thus putting the loan outside the reach of AS 45.45.010. Rockstad argued at summary judgment, however, that his transaction with Erikson involved two separate loans, each loan below the statute's

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11 113 P.3d 1215 (Alaska 2005).

12 *Id.* at 1218.

13 *Id.* at 1222.

> $25,000 limit. Thus, Rockstad claims, the transaction should be void as unlawful.[14]

The Coopers read that language to be an implicit construction of subsections (a) and (b) of AS 45.45.010. The Court concedes that this is a possible reading of *Rockstad*. But the supreme court had not been asked to consider the argument that Cox presents here. *Rockstad* makes no mention of any assertion that the exemption of the second sentence of subsection (b) is only applicable to subsection (b) and has no impact on subsection (a). The Court does not read *Rockstad* as broadly as the Coopers do.

If the legislature intended to say that the limit of subsection (a) was applicable only to loans under $25,000, one would think the more natural place to state that exception or restriction would be in subsection (a). If the legislature intended that the exemption for higher loans was intended to exempt those loans from both subsections (b) and (a), then it should have said just that. Instead, the legislature expressly stated that the set of higher loans was exempted, not from both subsections, but from "this subsection," that is, subsection (b) alone. The exemption language of subsection (b) does nothing to the limitation set by subsection (a).

The Court concedes that it would be reasonable to step back and assume that the legislature thought that persons needing smaller loans, say of $500

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[14] *Id.* at 1221.

or $2,000, are likely to be persons with fewer resources and thus in greater need of protection from usurious interest rates. Persons and businesses with more wealth would need less protection and perhaps be more likely to engage in activities that required financing, even at high rates of interest. Yet the way the Court construes the interplay of subsections (a) and (c) place more restrictions on the rates applicable to larger loans between contracting parties.

Does this counterintuitive result mean that the Court should construe the words of subsections (a) and (b) differently? Should it read subsection (b) as the Coopers do, so that higher loans are free from any limit on the rate that may be charged? Whatever the wisdom of limits on interest rates and the categories of loans to which various rates might be placed, the Court does not have the authority to assume a desired policy outcome and construe language to be consistent with the outcome. The Court should construe language to have its normal meaning. To do otherwise would be to risk misinterpreting language if the Court's identification of legislative purpose was erroneous.

The Court concludes that the maximum interest the Coopers could have charged Cox was 10.5%.

C. AS 34.20.070(b).

The Notice of Default and Sale and Deed of Trust Foreclosure stated that the amount owed on the obligation was $460,859.91 as of a certain date plus

interest, costs and fees that might continue to accrue.[15] Cox alleges that the Coopers "grossly overstated"[16] the amount due to cure the alleged default in violation of AS 34.20.070(b). That statute provides, in part:

> (b) Not less than 30 days after the default and not less than 90 days before the sale, the trustee shall record in the office of the recorder of the recording district in which the trust property is located a notice of default setting out..., (4) a statement that a breach of the obligation for which the deed of trust is security has occurred, (5) the nature of the breach, (6) the sum owing on the obligation, (7) the election by the trustee to sell the property to satisfy the obligation, (8) the date, time, and place of the sale, and (9) the statement described in (e) of this section describing conditions for curing the default. An inaccuracy in the street address may not be used to set aside a sale if the legal description is correct. At any time before the sale date stated in the notice of default or to which the sale is postponed under AS 34.20.080(e), if the default has arisen by failure to make payments required by the trust deed, the default may be cured and sale under this section terminated by payment of the sum then in default, other than the principal that would not then be due if no default had occurred, and attorney and other foreclosure fees and costs actually incurred by the beneficiary and trustee due to the default.[17]

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15 Memorandum in Support of Defendants' Rule 12(b)(6) Motion to Dismiss (16 October 2015), Exhibit 2 at 1. The Notice identified the original debt to be $325,000, but only $315,500 of the principal was still owed. There were two sets of interest owed, $98,450.72 and $46,909.19 ($315,500 + $98,450.72 + $46,909.19 = $460,359.91).

16 First Amended Complaint (5 January 2016) at 4, ¶ 25.

17 AS 34.20.070(e) provides:

> (e) The statement required by (b)(9) of this section must state that, if the default has arisen by failure to make payments required by the trust deed, the default may be cured and the sale under this section terminated if

Cox alleges that the Notice overstated the amount need to cure the default. The Coopers moved to dismiss this claim observing that it depends upon the validity of Cox's assertion that the original rate of interest on the loan was usurious.[18] Since the Coopers contend the rate was legal, the notice claim must fail. Now that the Court has concluded the initial rate was usurious, this argument is no longer viable.

The Coopers have a fallback position. In *Semlek v. National Bank of Alaska*,[19] the Alaska Supreme Court considered the impact of an erroneous cure amount on a completed foreclosure sale. A couple obtained two loans from a bank. One was secured by a deed of trust on real property.[20] The second, a home improvement loan, was unsecured.[21] When the couple stopped making payments,

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> (1) payment of the sum then in default, other than the principal that would not then be due if default had not occurred, and attorney and other foreclosure fees and costs actually incurred by the beneficiary and trustee due to the default is made at any time before the sale date stated in the notice of default or to which the sale is postponed; and
> (2) when notice of default under (b) of this section has been recorded two or more times previously under the same trust deed and the default has been cured under (b) of this section, the trustee does not elect to refuse payment and continue the sale.

18 Second Motion to Dismiss at 5.

19 458 P.2d 1003 (Alaska 1969).

20 *Id.* at 1004.

21 *Id.*

the bank issued a notice of default on the trust deed note. The notice included the amount owed on the home improvement loan ($787.45) to the amount owed on the trust deed note ($4,978.04).[22] The real property was sold for just under $7,000 and those proceed paid off both loans.[23] The borrowers argued that the overstatement of the cure amount on the trust deed note violated AS 34.20.070 and required that the sale be voided.

The supreme court stated the general law regarding the effect of inaccurate cure amounts in the notice of a foreclosure sale.

> It is generally held that where the amount due is grossly overstated or so excessive that it might deter bidders, it will render the foreclosure sale invalid. While noncompliance with the statutory provisions regarding foreclosure by the power under a mortgage or trust deed is not to be favored, the remedy of setting aside the sale will be applied only in cases which reach unjust extremes.[24]

The supreme court held that the erroneous inclusion of the second loan was not so excessive that it deterred bidders.[25] The borrowers had presented no evidence of such deterrence. Furthermore, the amount paid by the buyers exceeded the amount owed on both loans. The supreme court allowed the foreclosure sale to stand.

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22 *Id.*

23 *Id.*

24 *Id.* at 1006.

25 *Id.* at 1007.

Semlek held that not very overstatement of the cure amount will void a foreclosure sale. It does not expressly address the impact of an excessive cure amount that is discovered in advance of a sale. The Court does not read *Semlek* to mean that a notice that includes an incorrect cure amount should be corrected in advance of a foreclosure sale only if the incorrect amount is "grossly overstated." The most obvious remedy for notice that states an inaccurate cure amount would be to correct the notice in advance of a new sale.

The Court cannot determine as a matter of law that Cox cannot show that the initial default notice overstated the cure amount. In fact, it most certainly did in light of the Court's ruling on the usurious interest rate. His claim on this theory may go forward.

D. Junior Lienholders.

Cox alleges that there are junior lienholders whose rights will be adversely affected if the trustee is permitted to go forward with the foreclosure sale on behalf of the Coopers. This may or may not be true. But Cox has no standing to pursue any rights the junior lienholders may have.

E. Remedy.

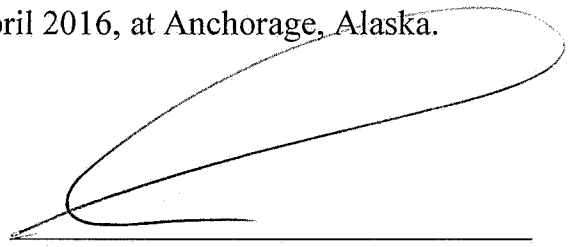
Cox did not indicate what remedy he thinks is appropriate upon a finding that the 20% interest rate was usurious. The Court is unwilling to fashion a remedy without the input of the parties. Even if the Court were to say that the

initial interest rate must be reduced to 10.5%, it cannot be confident that no further disputes about the default and foreclosure sale remain.

III. Conclusion.

The Defendant's Rule 12(b)(6) Motion to Dismiss is GRANTED in part and DENIED in part. The Defendant's Second Rule 12(b)(6) Motion to Dismiss is DENIED. The Motion for Summary Judgment is GRANTED, in part and DENIED in part.

DONE this 18th day of April 2016, at Anchorage, Alaska.



William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 18 April 2016
a copy of the above was emailed to each of the
following at their addresses of record:

Gaines
Walker
Bergt

Ellen Bozzini
Judicial Assistant