FILED
Court of Appeals
Division I
State of Washington
8/30/2022 1:45 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
8/30/2022
BY ERIN L. LENNON
CLERK

101225-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

Court of Appeals Case No. 828801

AARON LANCASTER, a single man; DENNIS DEMEYER AND DELORES DEMEYER, husband and wife; and ANGELA SHORES QUINN, a married woman; WELLS FARGO BANK, N.A.; STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES; JOHN AND JANE DOES Nos. 1 through 5; Unknown occupants of the subject real property; and all other persons or parties unknown claiming any right title and interest in the real property described herein,

Appellants/Defendants,

v.

SAVIBANK, Respondent/Plaintiff

PETITION TO REVIEW DECISION OF COURT OF APPEALS FOR DIVISION ONE

William Johnston, WSBA 6113
Attorney for Appellant
401 Central Avenue
Bellingham, Washington 98225
Phone: 360 676-1931
Fax: 360 676-1510
Email: wjtj47@gmail.co

A. IDENTITY OF PETITIONER

Aaron Lancaster asks this Court to accept review of the court of appeals decision terminating review designated as part B of this petition.

B. COURT OF APPEALS DECISION

A copy of the decision is in the appendix at pages 1-8.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a private bank competing in a market dominated by direct federal loans or guarantees, which provides the consumer farmer with protection from foreclosure and imposition of high interests costs, is required to disclose these differences to a prospective farmer borrower?

2. If so, whether Lancaster's offer of proof was sufficient to present a jury question as to whether Savibank fulfilled such a duty in this case?

3. Whether this court's common law making authority and equity jurisdiction provide a basis for interdicting the enforcement of an extraordinarily high interest rate of 18% as unconscionable in time of national economic and health emergency?

D. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner agrees with the statement of facts recited by the Court of Appeal but notes that the Court of Appeals did not address petitioner's argument that the particular economic circumstances brought about by the pandemic show most of the borrowers affected by the pandemic are given public subsidy and protected from eviction including the vast majority of farmers, while Lancaster is left standing alone with no protection from foreclosure and the exaction of an interest rate of 18%.

This case is a foreclosure action bought by Savibank against Aaron Lancaster, age 50, who is a farmer. Lancaster purchased the farm in 2018 from his father who had operated the farm for many years. The mortgage principal was $675,000 with an interest rate of 6.75% and the Savibank obtained a mortgage and security interest in all the farm equipment to secure the loan, see Complaint for Foreclosure plus attachments CP 25-34.

Savibank, a private bank that accepts no federal funds, provided the financing. Lancaster testified by declaration that he was not aware of the 18% penalty interest applicable after a declaration of default. Lancaster also testified in his discussions with Savibank in 2018 prior his decision to make the mortgage commitment to Savibank, he was not advised of the option of having a Farmers Service Agency USA mortgage or a federal guarantee payment of the mortgage. The Bank did not bring up these matters; Lancaster testified that had the option of a direct federal loan or a federal guarantee been disclosed, he would have opted for the federal guarantee, see Declaration of Aaron Lancaster, CP 70-73.

Savibank's response is found in the first and second declarations of Jordan Campbell. In the Second Declaration of Jordan Campbell, Campbell testified that a bank employee, Clay Appleton, and Mr. Lancaster met with a Mr. Turner of the Lynden FSA office in 2015 and Turner advised Lancaster in detail that he was not eligible for a federal loan or guarantee. Lancaster in his Second Declaration of December 2, 2019 admitted that he had been told in 2015 that he was not eligible for a direct Farmers Service Agency USA mortgage but at no time was the matter of eligibility for a federal loan guarantee brought up. CP73-75. Telling is the fact that Savibank does not deny a federal Farmers Service Agency USA mortgage option or guarantee was not brought up in its 2018 discussions which led to Lancaster's selection of Savibank as his lender.

Lancaster missed several payments and Savibank declared a default on February 20, 2020, CP 52, and filed suit. Lancaster filed an answer, CP 9-11, which was amended several times, CP 1-8, and cross claimed alleging fraud and intentional misrepresentation, fraudulent omissions and inducement and negligent misrepresentation in failing to disclose the material fact of the option of a FSA mortgage or federal guarantee, CP 12-15.

A Farmers Service Agency USA mortgage or a federal loan guarantee would protect the farmer from foreclosure during this pandemic. In norm times when foreclosures are allowed, Farmers Service Agency USA mortgage or a federal loan guarantee pursuant to federal law does not pay default interest rates. Declaration of William Johnston plus attachments CP 53-64. The default interest rate of 18% authorized under the Savibank

mortgage private bank loan added over a hundred thousand dollars of interest that could not be charged if a Farmers Service Agency USA mortgage or loan guarantee was in place; second Declaration of William Johnston, CP 67-69.

Lancaster argued that the foreclosure was barred and/or that the declaration of the default interest rate of 18% was unconscionable given the national emergency and the facts that most other banks were barred from foreclosure at all; see RP Vol. 1, pages 15, 26-31.

The Superior Court affirmed Savibank's argument that it was not barred from proceeding with a real estate foreclosure, as many other banks are. The Superior Court rejected Lancaster 's argument that the 18% default interest was unconscionable and rejected as well Lancaster's cross claim, finding that Savibank had no duty to disclose to Lancaster the advantage of a direct Farmers Service Agency USA mortgage or a loan with a federal guarantee.

E. ARGUMENT

1. Savibank was under a duty to mention to Lancaster the possibility and availability of a Farmers Service Agency USA mortgage government or guarantee of his loan because this fact was material to the decision to borrow the money, Tokarz v. Frontier Savings and Loan 33 Wa. App. 456 (1983). The banks' failure to disclose these options denied Lancaster the opportunity to get a mortgage or loan guarantee, which would have protected him from foreclosure in this pandemic and the imposition of any 18% interest penalty. This court should reinstate Lancaster's cross claim against Savibank for damages.

The Court of Appeals erred when it denied petitioner's motion to amend his answer to present a cross claim against Savibank for failure of

the bank to explain adequately to Lancaster his options for better terms through a Farmers Service loan or guarantee. The motions were made before summary judgment and well before trial. The Court of Appeals opined Lancaster's amendments would have complicated the case and prejudiced Savibank at the same time the Court of Appeals characterized Lancaster's legal argument relating to his cross claim as futile.

The Court of Appeals should have ruled the trial court abused its discretion under CR 15 (a), Walla v. Johnson 50 Wash. App. 879 (1988) and Tagliani v. Colwell 10 Wash. App. 227 (1973) in denying the motion to amend the answer and then rejecting the amended claims as futile. In disposing of the case in this fashion, the Court of Appeals opinion hypothetically could uphold an erroneous result on the merits because the lawyer acting defacto as a pro bono attorney with no experience in real estate foreclosure, which is an action in equity, did not amend the pleadings in time.

The substance of Lancaster's argument is that he was induced into accepting a mortgage loan from Savibank, which has a punishing interest of 18% if a default is declared, without disclosure by Savibank of facts material to the decision, the option and advantages of a Farmers Service Agency USA mortgage and/or federal guarantee of the mortgage loan.

The federal government has a significant role in the financing of farm loans and protecting farmers. This is and has been for generations the public policy of the United States, which is reflected in its statutory creation of Farmers Service Agency USA, which is part of the U S Department of Agriculture. Farmers Service Agency USA administers programs intended to subsidize and financially benefit farmers and was formerly known as the Farmers Home Loan Administration.

In addition, to facilitate the implementation of this public policy, Washington State has passed the RCW 31.35 to compliment the federal policy. Lancaster's argument is that Savibank and any other bank, which seeks to provide loans to farmers, must advise a farmer of a direct mortgage from the Farmers Service Agency USA or a federal loan guaranty option available from the Farmers Service Agency USA and its benefits and detriments, if any, as implemented by RCW 31.35. The reason for this is that while the lender and the borrower do not stand in a fiduciary relationship, where the lender bank has or should have superior knowledge and the loan is to a farmer where a direct government loan option or government guarantee is available with various benefits, the bank must disclose these options. This is particularly true in the case of a government guarantee of a mortgage with a private bank, like Savibank.

There appears here to be a direct and huge financial conflict of interest in favor of the bank getting the customer not to seek a government guarantee. The conflict is represented in this case where the Savibank assessed an 18% interest rate after Savibank's declaration of default in February 2020. At that time, a 30 year mortgage rate per annum for persons with excellent credit could be obtained with an interest rate under 3% so a secured 18% interest return is a windfall profit for the Savibank.[1]

---

[1] Before granting the loan, Savibank had an appraisal done for $7,000 which assessed the value of the farm to be 1.2 million; see footnote 1, CP 84. The original loan amount was $675,000. A default was declared in February 2020 when the 18% default interest rate was declared in effect. The Court of Appeals wrote Savibank purchased the farm at public auction in the Fall of 2021 for $889, 113, Court of Appeals Opinion, page 3. Petitioner's redemption right expires on September 3, 2022 at which time Savibank can sell the farm. Savibank can credibly tell a prospective purchaser that the farm was appraised in 2018 for1.2 million and sell it for that sum or more. That would be a hefty $300,000 or more on top of the excessive default interest rate of 18%.

In Tokarz v. Frontier Savings and Loan 33 Wa. App.456 (1983), the Court of Appeals affirmed the dismissal of lawsuit brought against the bank. Tokarz borrowed from Frontier money to build a new home. Tokarz hired Post, a general contractor to build it. The mortgage provided for periodic payment to Post for work as it progressed. Post did not pay the sub contractors who did the work and many properties upon which Post was building homes were liened. Post collapsed financially and Tokarz wound up with an unfinished house and liened property. Tokarz sued Frontier and one of his claims was that the he should have been warned by the bank of the pending insolvency of Post sooner. Tokarz claimed that the bank knew the Post was going into insolvency and failed to warn Tokarz. The Court found no fiduciary relationship and no duty by the bank to warn Tokarz. However, the Tokarz court opined upon circumstances in which a bank would be required to disclose particular facts. The test was materiality to the loan decision.

The Tokarz court made the following observation:

> Present-day commercial transactions are not, as in past generations, primarily for cash; rather, modern banking practices involve a highly complicated structure of credit and other complexities which often thrust a bank into the role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank to disclose facts when dealing with the customer. Stewart v. Phoenix Nat'l Bank, 49 Ariz. 34, 64 P.2d 101, 106 (1937). See also Hutson v. Wenatchee Fed. Sav. & Loan Ass'n, 22 Wash.App. 91, 588 P.2d 1192 (1978).

Later on the Tokarz court remarked:

> “Special circumstances” may impose fiduciary duty of disclosure upon bank: one who speaks must say enough to

> prevent his words from misleading the other party; one who has special knowledge of material facts to which other party does not have access may have duty to disclose these facts to other party; and one who stands in confidential or fiduciary relation to other party to transaction must disclose material facts.

This principle applies with full force in this case. Savibank is engaged in the business of loaning money to farmers. This business gives the bank special knowledge about all the implications of borrowing, risk and applicable federal and state programs.

Any reasonable consumer would want the federal guarantee if they were informed that the bank would charge an 18% interest on the entire balance once a default was declared. A federal loan guarantee would protect the farmer from these huge interest costs. This interest rate could add on hundreds of thousands of dollars that could not be charged if a Farmers Service Agency USA mortgage or loan guarantee was in place.

As to whether a consumer should elect to seek a Farmers Service Agency USA mortgage or a federal loan guarantee, the bank has a duty to disclose because of the great financial conflict of interest between the bank in seeking a loan without a federal guarantee in place. This is true in all cases but most particularly in this case where an appraisal shows a market value of 1.2 million. Stated differently, hypothetically if this was 1933 in the midst of the Great Depression, failing to disclose a federal guaranty would not benefit the bank because the bank would never collect on its 18% interest rate. Here the contrary is true because the Savibank profits by penalty interest and Savibank knew such would be the case at the time it issued the loan.

The Savibank failed to disclose material facts and as a consequence it should be barred from foreclosing on Lancaster or at least

charging the penalty interest it could not collect if the government guaranteed the loan.

2. This court has authority and grounds strike recovery of an 18% penalty interest during a pandemic as unconscionable and against public policy and award attorney fees.

This case is the classic sui generis case. Respectfully, the Court of Appeals erred in not declaring the18% interest as unconscionable because of the existence of a national health and economic emergency.

The Court of Appeals normalizes instant case as if it was just another mortgage foreclosure. Petitioner pointed out in his brief before the Court of Appeals, the Lancaster foreclosure is unique i.e., most likely the only farm to be foreclosed in the State of Washington during the pandemic see declaration of William Johnston CP 67-69.

The Court of Appeals did not mention or address in its opinion the unique circumstances of Lancaster's foreclosure. The reality is that all farmers across the country were protected from foreclosure and from the exaction of excessive rates of interest because 90 plus percent of all farm loans are either through the Farmers Service Agency or guaranteed by the federal agency. The Court of Appeals did not address the devastating effect the exaction of an 18% interest rate has upon a debtor, particularly one in a supposedly protected class such as farmers.

From petitioner's' perspective, the factor that weighs most heavily in reaching the conclusion that the exaction of an 18% interest rate against the farmer is unconscionable is because judicial endorsement of the 18% interest rate frustrates the public policy of the United States as evidenced by the many relief programs the US government enacted after the

commencement of the pandemic. The purpose of the public policy was to prevent a 1930's type complete economic collapse of the country. The federal statute passed was denominated the American Recovery Act.

In times of war, which the pandemic is the equivalent to, when the vast majority of people are working and sacrificing for our country, Savibank's refusal to sacrifice and, instead exacting a crushing interest rate when nobody else is making money, plants the seeds of anger and dissension. As President John F. Kennedy once said, "Ask not what your country can do for you but what you can do for your country."

Petitioner pointed out in this brief, and this is not addressed by the Court of Appeals in its opinion, that landlords and banks dealing with farmers loans through federal programs were protected from foreclosure during the pandemic and the fact that farm loans through government financing or guarantee prohibit the exaction of penalty interest. Permitting the Savibank which finances farm loans to collect an 18% interest frustrates the national recovery policy. It allows the Savibank to make an exorbitant profit at the expense and misery of the soon to become penniless farmer at a time when the United States government shut down the economy and passed legislation which authorized subsidies in the trillions of dollars to ameliorate the economic suffering of the affected citizenry. Allowing Savibank to insist upon a recovery which is way beyond the norm return on investment fosters discontent in a national crisis. Savibank stands on its right not to participate in the national effort to recover our health and economy and has successfully asserted its right to demand strict compliance with its loan agreement.

From petitioner's perspective, the pandemic is tantamount to a declaration of war and the actions of the Savibank frustrates and undermines the recovery. Savibank's decision to charge an excessive

interest rate is unpatriotic and detrimental to the public policy of the United States. This is because many creditors are suffering financial loss such as a landlord who cannot evict a nonpaying tenant. These landlords look to the conduct of Savibank in collecting an excessively high interest and implementing foreclosure. Savibank's action in we are getting ours, while very one else is suffering, creates dissension and frustrates the US government public policy in its war effort against the pandemic.

America in crises is like a team and success as a team requires all hands on deck. This court should not permit any citizen to stand by and do nothing and, even more, act to frustrate the national war effort. This is a recipe for team USA to lose. As Britain's greatest admiral Lord Nelson semaphored to the British fleet before the Battle of Trafalgar in which Nelson gave his life, "England expects every man to do his duty." For this reason, this court should impose normal equitable principles to restrain the Savibank from collection of 18% penalty interest.

Savibank's foreclosure action is an action in equity and as such it is subject to the strictures of equity. One such stricture is equity abhors forfeiture, Pardee v. Jolly 163 Wash2d 558 (2008). The court's equitable powers and duty allows the court to modify the terms of the contract if it is inequitable.

This court has used its equity authority to prevent unconscionable action see McKee v. AT & T Corporation, 164 Wash.2d 372 (2009).

To the extent this court has approved 18% as an acceptable default interest rate, those cases lack analysis as to why 18% default interest is not unconscionable. Savibank cited those cases in the Superior Court; Zahn v. Zahn LLC, No. 76177-3-I, 2018 Wash. App. LEXIS 15678, at 16 (ct. App. July 9, 2018; Shelcon Constr. Grp. LLC v. Haymond 187 App. 187 Wn.

App. 878, 903-904; 351 P.3d 895 (2015) Meyers Way v. Univ. Sav. 80 Wn. App. 655, 660, 669-72, 910 P.2d 1308 (1996) ; Xebek, Inc. v. Nickum & Spaulding Assocs. 43 Wn. App. 740, 718 P.2d 851 (1986). No analysis was given in those cases as to why the default interest rate was not unconscionable. The cases cited by Savibank are distinguishable because of the presence of the pandemic and its adverse economic and health consequences upon the entire citizenry. As mentioned before, those unique facts make the instant case sui generis.

The public policy of this state is evidenced in the Governor's emergency orders, which have interdicted all eviction lawsuits and have penalized landlords and others who attempt to impose sanctions against tenants for nonpayment. The Governor has not extended protection to those who reside in homes and make a payment necessary to be able to legally remain in the premises pursuant to a mortgage or deed of trust, or real estate sales contract payment, rather than a payment of rent pursuant to an oral month by month rental agreement or a payment pursuant to a written lease payment.

The present unprecedented health and economic crises grants to the Governor emergency police powers to act which include the exercise of governmental power divesting owners of real property from exercise of otherwise available legal recourse, i.e., e., lawsuits for nonpayment of rent and eviction. The emergency powers action of the executive branch of government stems from the pandemic and its consequences. People like petitioner Lancaster who make a mortgage payment and live in a house and all others who make lease and rent payments and live in a house or apartment experience those dire economic consequences equally.

Lancaster asks this court to exercise its judicial authority to strike the 18% interest default rate as unconscionable because it is excessive and frustrates the public policy of the United States to recover and minimize economic suffering taking place during the pandemic. This court should also rule that Savibank and other private banks, which compete with Federal Service Agency in providing mortgage loans to farmers, carefully advice the farmer of the differences between the private bank loan and that offered by a Federal Service Agency or guarantee.

3. Prevailing Party Attorney Fees Section RAP 18.1

This section is added because appellant seeks an award of attorney fees as prevailing party in his argument that the foreclosure and the 18% default interest rate are unconscionable given the adverse economic and health risks caused by the pandemic. Savibank recovered an award of attorney fees for attorney fees incurred in the Superior Court pursuant to the attorney fees provision in the mortgage agreement. Petitioner asserts if he prevails on his argument that the foreclosure and 18% default interest rate are unconscionable, petitioner is entitled to an award of attorney fees and costs pursuant to RCW 4.84.330. That statute provides that actions on a contract or lease, which provides that attorney fees and costs incurred to enforce the contract or lease provisions be awarded to one of parties, then both parties are, pursuant to the statute, entitled to attorney fees if they prevail; Herzog Aluminum, Inc. v. General American Window Corporation 39 Wash.App. 188 (Div. 1, 1984).

F. CONCLUSION

Although Lancaster appeals from an order granting Savibank summary judgment, this case resembles the thousands of cases summarily dismissed by the federal courts under CrR 12 (b) (6). Counsel and court have the luxury of postulating facts available in the public forum, such as state and federal policies, laws and other information bearing on the economics, politics that are relevant to cases that have broad health and economic impact.

In this historic moment, in light of unprecedented actions by federal and state government to prop up the economy to avoid a 1930's potential depression, this court should overturn the Superior Court foreclosure order and remand for trial on petitioner's cross claim. The court should declare the default interest of 18% is unconscionable as excessive and unpatriotic. The court should strike the penalty interest rate as unconscionable and limit Savibank's recovery to 6.75%, the norm interest rate.

Because the Savibank also failed to disclose the options available for a Farmers Service Agency USA mortgage or a federal loan guarantee and its benefits as compared with the loan offered by Savibank, Savibank's failure to disclose makes the loan defective as procedurally unconscionable as well as substantively unconscionable and a basis to sue Savibank for damages. Again, petitioner requests that the court strike the 18% penalty interest rate, award reasonable attorney fees and costs enhanced by a lode star accelerator because Petitioner's counsel is litigating this case without payment. Lancaster is destitute. Petitioner also requests that this court remand the case for trial for money damages on appellant's cross claim.

This brief contains 4059 words.

DATED this **30**th day of August **2022**

/s/ William Johnston

____

WILLIAM JOHNSTON WSBA 6113

Attorney for Petitioner Aaron Lancaster

JAMES STURDEVANT ATTORNEY AT LAW

August 30, 2022 - 1:45 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82880-1
Appellate Court Case Title:	SaviBank, Respondent v. Aaron Lancaster et al, Appellants
Superior Court Case Number:	20-2-00733-8

The following documents have been uploaded:

- 828801_Motion_20220830134131D1259695_4137.pdf
  This File Contains:
  Motion 1 - Discretionary Review
  The Original File Name was Petition for Review.pdf
- 828801_Other_20220830134131D1259695_5540.pdf
  This File Contains:
  Other - Appendix
  The Original File Name was Appendix.pdf

A copy of the uploaded files will be sent to:

- BPage@CarmichaelClark.com
- gdouglas44@hotmail.com
- shelly@carmichaelclark.com
- wjtj47@gmail.com

Comments:

I am filing this as a favor for attorney, William Johnston

Sender Name: James Sturdevant - Email: sturde@openaccess.org
Address:
119 N COMMERCIAL ST STE 235
BELLINGHAM, WA, 98225-4477
Phone: 360-671-2990

Note: The Filing Id is 20220830134131D1259695

FILED
Court of Appeals
Division I
State of Washington
8/30/2022 1:45 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

Court of Appeals Case No. 828801

AARON LANCASTER, a single man; DENNIS DEMEYER AND DELORES DEMEYER, husband and wife; and ANGELA SHORES QUINN, a married woman; WELLS FARGO BANK, N.A.; STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES; JOHN AND JANE DOES Nos. 1 through 5; Unknown occupants of the subject real property; and all other persons or parties unknown claiming any right title and interest in the real property described herein,

Appellants/Defendants,

v.

SAVIBANK, Respondent/Plaintiff

APPENDIX TO REVIEW DECISION OF COURT OF APPEALS FOR DIVISION ONE

William Johnston, WSBA 6113
Attorney for Appellant
401 Central Avenue
Bellingham, Washington 98225
Phone: 360 676-1931
Fax: 360 676-1510
Email: wjtj47@gmail.co

FILED
8/1/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SAVIBANK, a Washington bank,

Respondent,

v.

AARON LANCASTER, a single man,

Appellant,

DENNIS DEMEYER and DELORES DEMEYER, husband and wife; ANGELA SHORES QUINN, a married woman; WELLS FARGO BANK, N.A.; STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES; JOHN and JANE DOES, Nos. 1 through 5, unknown occupants of the subject real property; and all other persons or parties unknown claiming any right, title, estate, lien or interest in the real property described herein,

Defendants.

No. 82880-1-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — When Aaron Lancaster stopped making mortgage payments on his farm, his lender, SaviBank, filed a foreclosure and repossession action in Whatcom County Superior Court. Lancaster appeals from the superior court's rulings in favor of SaviBank, asserting that imposing an 18 percent default interest rate during a pandemic is unconscionable. We affirm the trial court and award reasonable attorney fees and costs on appeal to SaviBank.

I

In order to purchase his father's Whatcom County farm, Aaron Lancaster obtained a $675,000 loan from SaviBank in 2018. The farm's appraised value was $1.2 million.

Lancaster's loan documents included a two page promissory note, which designates the loan date of February 21, 2018 and provides for repayment of the loan at an annual interest rate of 6.75 percent. Under the heading "INTEREST AFTER DEFAULT," the note states, "Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased to 18.000% per annum." The loan was secured by a mortgage against the farm and a security agreement granting SaviBank interests in Lancaster's personal property, including two livestock trailers.

Lancaster stopped making mortgage payments in November 2019. Three months later, SaviBank notified him by letter that he was in default. SaviBank exercised its right to accelerate, declaring the unpaid principal balance and accrued unpaid interest and late fees immediately due and payable. SaviBank filed a foreclosure and repossession action in Whatcom County Superior Court on June 10, 2020.

SaviBank sought summary judgment, including a monetary award for amounts owed, judicial foreclosure of the real property, and repossession of the personal property serving as collateral. The motion was granted, in part, with the court reserving determination of the final interest rate pending its ruling on Lancaster's "unconscionability affirmative defense to the 18% default interest rate."

In June 2021, the court granted SaviBank's second summary judgment motion, dismissing Lancaster's unconscionability defense and awarding SaviBank a final judgment, decree of foreclosure, and writ of replevin. Three months later, the farm was sold at public auction to SaviBank for $889,113. At the time of foreclosure, interest at the default rate of 18 percent totaled more than $90,000.

Lancaster appealed.

II

Lancaster opposed SaviBank's first motion for summary judgment by presenting defenses that had not been pleaded, asserting that the bank had a duty to disclose other loan options, and that the default interest rate is unconscionable. He presented a variety of amendments to the answer and a cross claim for fraud and misrepresentation in a series of filings. Next, he moved to amend the answer and to assert a cross claim for violation of Washington's consumer protection law.

The trial court granted the motion to amend, in part: "Defendant Lancaster is allowed to amend his answer to include an affirmative defense of procedural and substantive unconscionability to SaviBank's claim for 18% default interest." Requests to amend in all other respects were denied "on the basis that they fail as a matter of law."

A

Lancaster assigns error to the trial court's ruling on the motion to amend the answer and to the dismissal of the cross claim for damages.

"The decision to grant leave to amend the pleadings is within the discretion of the trial court." Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

The trial court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

"The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party." Caruso v. Loc. Union No. 690, Int'l Brotherhood of Teamsters, 100 Wn.2d 343, 350, 670 P.2d 240 (1983).

Here, the trial court acted within its discretion in determining that the efforts to add new contentions in response to SaviBank's summary judgment motion were prejudicial. The motion to amend came almost six months into the case. It would have greatly expanded the scope of the action, necessitating potentially extensive discovery not previously relevant, and not based on any new facts, new information, or new analyses not in Lancaster's possession from the start of the action. The motion was interposed only as a defensive measure in response to a dispositive motion with strong merit. It would have necessitated delaying the properly set merits adjudication to which SaviBank was entitled. And, finally, the proposed amendments appear futile.

To the extent Lancaster offered any substantive basis for his claims of fraud, misrepresentation, and violation of the Consumer Protection Act, chapter 19.86 RCW, he asserted that SaviBank did not disclose to him the availability of alternative loans or loan guarantees with supposedly better terms. But he offered no proposed pleadings compliant with CR 11 that would have supported a duty to

affirmatively advise him, nor that he would have qualified for a more favorable loan, nor that there was any other unfair or deceptive act or practice by SaviBank.

Lancaster bases the argument that SaviBank had a duty to disclose potentially better loan alternatives on Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 33 Wn. App. 456, 656 P.2d 1089 (1982). But Tokarz acknowledged the possibility of a duty to disclose only in "special circumstances." Id. at 462. These "special circumstances" were lacking in Tokarz and are similarly lacking in any of Lancaster's well-pleaded allegations. Tokarz explained (in a setting where the fact that was claimed to be omitted was that a contractor was in financial difficulty) as follows:

> There is no allegation or evidence that Frontier (1) took on any extra services on behalf of Tokarz other than furnishing the money for construction of a home; (2) received any greater economic benefit from the transaction other than the normal mortgage; (3) exercised extensive control over the construction; or (4) was asked by Tokarz if there were any lien actions pending. In fact, section 2, paragraphs 2 and 7 of the contractual agreement between the parties specifically limited Frontier's participation and liability. The parties did not contractually agree to impose on Frontier an additional duty to disclose financial information regarding the builder, nor does Frontier's conduct impliedly create such a duty. To hold otherwise would impose an awesome burden on lenders to notify all of their customers whenever a contractor had difficulties.

Id. at 462-63 (footnote omitted). Here, Lancaster similarly failed to support the existence of any similar relationship which would impose on SaviBank a duty to disclose to him the speculative possibility that he could have obtained more advantageous loan terms than he accepted with SaviBank.

The trial court correctly limited Lancaster solely to the affirmative defense of unconscionability as to SaviBank's default interest rate.

B

"The existence of an unconscionable bargain is a question of law for the courts." Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).

Washington courts recognize two categories of unconscionability that may void a contract term: (1) substantive unconscionability, involving a term that is "one-sided or overly harsh," and (2) procedural unconscionability, involving "blatant unfairness in the bargaining process and a lack of meaningful choice." Beroth v. Apollo Coll., Inc., 135 Wn. App. 551, 560, 145 P.3d 386 (2006); Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 303, 103 P.3d 753 (2004); Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 518, 210 P.3d 318 (2009). Either substantive or procedural unconscionability is sufficient to void an agreement. Burnett v. Pagliacci Pizza, Inc., 196 Wn.2d 38, 54, 470 P.3d 486 (2020).

In the present case, the trial court correctly determined that SaviBank's 18 percent default interest rate is neither substantively nor procedurally unconscionable. SaviBank asserted, without rebuttal, that "[a]n 18% default interest rate is very common in commercial and agricultural loans provided by SaviBank and other banks in the industry." Lancaster had even agreed years earlier to the same rate for another loan with SaviBank. In addition, Lancaster failed to show impropriety in the formation of the parties' agreement. He was able to review the loan documents in an outside lawyer's office, the terms of the agreement were standard and straightforward, and he made the choice to accept SaviBank's loan offer, including the default interest rate.

Likewise, Lancaster provided no facts that would support the argument that the COVID-19 pandemic caused him to default on his mortgage payments or made the default interest rate unconscionable. In examining a claim of unconscionability, the court considers "the circumstances at the time the contract was made." State v. Brown, 92 Wn. App. 586, 601, 965 P.2d 1102 (1998). Lancaster agreed to the terms of the loan, including the default interest rate, in February 2018—two years before the pandemic lockdown in Washington. And he stopped making mortgage payments in November 2019—months before the outbreak began.

"Once a party moving for summary judgment makes an initial showing that there is no genuine issue of material fact, the nonmoving party must demonstrate the existence of such an issue by setting forth specific facts which go beyond mere unsupported allegations." Tokarz, 33 Wn. App. at 466; CR 56(e).

Lancaster presented neither legal nor factual support for an unconscionability defense.

The trial court correctly granted summary judgment to SaviBank.

C

Both parties request attorney fees on appeal. "[A]ttorney fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity." Kaintz v. PLG, Inc., 147 Wn. App. 782, 785, 197 P.3d 710 (2008). "A party may be awarded attorney fees based on a contractual fee provision at the trial and appellate court level." Kathryn Learner Fam. Tr. v. Wilson, 183 Wn. App. 494, 502, 333 P.3d 552 (2014). In this case, the loan documents provide that the lender may recover attorney fees and expenses if the borrower does not pay.

Provided it complies with RAP 18.1(d), SaviBank is awarded attorney fees on appeal.

III

We affirm the trial court and award reasonable attorney fees and costs on appeal to SaviBank.

Birk, J.

WE CONCUR:

Coburn, J.

Dwyer, J.

JAMES STURDEVANT ATTORNEY AT LAW

August 30, 2022 - 1:45 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82880-1
Appellate Court Case Title:	SaviBank, Respondent v. Aaron Lancaster et al, Appellants
Superior Court Case Number:	20-2-00733-8

The following documents have been uploaded:

- 828801_Motion_20220830134131D1259695_4137.pdf
  This File Contains:
  Motion 1 - Discretionary Review
  The Original File Name was Petition for Review.pdf
- 828801_Other_20220830134131D1259695_5540.pdf
  This File Contains:
  Other - Appendix
  The Original File Name was Appendix.pdf

A copy of the uploaded files will be sent to:

- BPage@CarmichaelClark.com
- gdouglas44@hotmail.com
- shelly@carmichaelclark.com
- wjtj47@gmail.com

Comments:

I am filing this as a favor for attorney, William Johnston

Sender Name: James Sturdevant - Email: sturde@openaccess.org
Address:
119 N COMMERCIAL ST STE 235
BELLINGHAM, WA, 98225-4477
Phone: 360-671-2990

Note: The Filing Id is 20220830134131D1259695