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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

ROBERT GREGG MOORE,
Plaintiff and Appellant,

v.

BEBE AU LAIT, LLC et al.,
Defendants and Respondents.

H037266
(Santa Clara County
Super. Ct. No. CV176639)

Appellant Robert Gregg Moore appeals from a stipulated judgment entered after the superior court granted a motion by defendants Bebe au Lait, LLC (Bebe) and Claire and Ronnie Ekelund for summary adjudication of Moore's breach of contract cause of action against them and granted their motion to strike references to a 12 percent interest rate in Moore's amended complaint on the ground that it was usurious. Moore contends that the superior court's orders were erroneous because there were triable issues about the application of a release to the breach of contract cause of action and his amended complaint established that transaction was not usurious. We reject his contentions and affirm the judgment.

I. Undisputed Facts

Bebe is a limited liability company (LLC) that was formed by Claire Ekelund and Aimee Lagos in 2004. Lagos and Claire Ekelund originally each owned 50 percent of Bebe. In 2006, Claire Ekelund bought out Lagos's share of Bebe for an upfront cash payment plus a royalty stream. Moore financed the buyout with a \$100,000 loan to the Ekelunds. The original handwritten documentation of this loan reflected that the loan was due in two years and that it bore an interest rate of 10 percent per year. Moore made additional loans to the Ekelunds and Bebe in 2006 and 2007.

In 2007, Lagos, who by then resided in Minnesota, filed an action for unpaid royalties against the Ekelunds and Bebe in Minnesota state court. This action prompted Moore to create "formal written documentation" for his loans to Bebe and the Ekelunds. In November 2007, Moore and the Ekelunds formally documented both the initial loan and a series of subsequent loans. The formal promissory note for the original March 2006 loan provided that the Ekelunds would pay Moore \$100,000 plus 12 percent interest "per annum until paid." A series of amendments to that note documented the additional loans Moore had made to the Ekelunds and Bebe. The first amendment, dated July 2006, provided that the note had been assigned by the Ekelunds to Bebe, that Moore had loaned Bebe an additional \$50,000, and that the outstanding balance was \$128,549.36. The second amendment, dated September 2006, reflected an additional loan of \$75,000. The third amendment, dated October 2006, reflected an additional loan of \$75,000. The fourth amendment, dated November 2006, reflected an additional loan of \$25,000. The fifth amendment, dated December 2006, reflected an additional loan of \$50,000. The sixth amendment, dated September 2007, reflected an additional loan of \$50,000. The seventh amendment, dated October 2007, reflected an additional loan of \$50,000. The eighth amendment, dated November 2007, reflected an additional loan of \$100,000.¹ The

¹ Despite the dates on the note and the first seven amendments, it was undisputed that none of them were executed until November 2007.

ninth amendment, in December 2007, reflected an additional loan of \$100,000. The 10th amendment, dated February 2008, reflected an additional loan of \$100,000. The 10th amendment also provided that Bebe was executing a security agreement granting Moore priority over any collateral for repayment of the promissory note.

Lagos's Minnesota action also prompted Moore to file an action in Santa Clara County against Bebe, the Ekelunds, and Lagos in order to protect his right to repayment of his loans. The Minnesota and Santa Clara County actions settled in 2008. The 2008 settlement agreement contained a release signed by Moore, Lagos, Bebe, and the Ekelunds. The release referenced Moore's loans to Bebe and stated that, "in early 2008 Moore demanded payment from the Ekelunds and/or Bebe au Lait of all amounts due to him, but the Ekelunds and Bebe au Lait were unable to pay such amount." The release stated that it would "resolve all disputes and claims between them but for Moore's claim for payment from the Ekelunds and/or Bebe au Lait related to the loans made by Moore" It then stated: "Moore hereby forever releases and discharges Lagos, the Ekelunds and Bebe au Lait from any and all claims, demands, causes of action, damages, liabilities, expenses, attorney fees, or costs, known or unknown, based on any event or circumstance occurring up to the date of this Settlement Agreement, including but not limited to any claim or demand arising from or related to any of the Agreements, provided, however, that this release does not extend [to] Moore's claim against the Ekelunds and/or Bebe au Lait for repayment of the loans that were the subject of the California Action [by Moore against the Ekelunds and Bebe]." The release further stated: "[I]t is the parties' intention to hereby fully and finally and forever settle and release any and all matters, disputes, and differences, known or unknown, suspected or unsuspected, which do now exist, may exist or heretofore have existed, subject to the specific exceptions [for Moore's claim for repayment of the note]."

Moore financed the settlement with a loan that was memorialized in an 11th amendment to the original note. The 11th amendment reflected an additional loan of

\$350,000 and stated that “[t]he term of the Note shall be extended to July 1, 2008.” In 2009, Moore signed a personal guarantee for a \$200,000 line of credit that Bebe obtained from a bank. On July 1, 2010, Moore demanded immediate payment of the amount due, which he asserted was \$1,107,937.33.

II. Procedural Background

In July 2010, Moore filed an action against Bebe and the Ekelunds. His original complaint contained four causes of action. The first cause of action sought judicial foreclosure on the promissory note. The second cause of action was a common count for money lent in the amount of \$810,000 “plus interest.” The third cause of action was for breach of contract. It alleged that defendants had orally agreed to give Moore an ownership interest in Bebe in exchange for his loans and business advice. The fourth cause of action was a common count for “Work, Labor and Services.”

Bebe and the Ekelunds answered the complaint.² They attached a copy of the 2008 settlement agreement to their answer and asserted that the release barred the third and fourth causes of action. Moore filed an amended complaint alleging the same four causes of action.³ The Ekelunds and Bebe filed an amended answer to the amended complaint and alleged an affirmative defense of usury.

The Ekelunds and Bebe filed a motion for summary adjudication of the breach of contract cause of action on the ground that it was barred by the release. They argued that

² The Ekelunds and Bebe also filed a cross-complaint against Moore for breach of fiduciary duty, fraud, “Bad Faith,” professional malpractice, rescission, and unfair competition. They alleged that Moore had been acting as their attorney and had taken unfair advantage of them. The cross-complaint was dismissed as part of the stipulated judgment that resolved the entire action.

³ The amended complaint alleged that \$300,000 had been repaid so that the principal sum had been reduced to \$510,000 plus 12 percent interest, which amounted to \$391,583.03 as of April 2011.

Moore's claim for equity in Bebe arose before the 2008 release and had been thereby released. The Ekelunds and Bebe also brought a motion to strike all references in the amended complaint to a 12 percent interest rate on the ground that this rate was usurious.

Moore opposed both motions. He admitted that promises of an equity interest in Bebe occurred in 2006 and that the release had been entered into in 2008. Moore also conceded that he was "not contending fraud, duress o[r] undue influence" with respect to the release. The sole evidentiary support for Moore's opposition to the motions was his own declaration. Moore asserted that the promised equity interest was intended to be half of what a venture capitalist would demand in exchange for the loans. It would be determined by dividing the loan amount by Bebe's revenue at the time of the loan and dividing by two. He explained in his declaration that the equity interest was not "formally document[ed]" because he was concerned "about the ramifications of the equity arrangement on the Lagos litigation," but he believed that the equity interest would be documented "as soon as the Lagos litigation was over." Moore declared that he "put my trust in the bonds of friendship as opposed to legal documentation," as was his practice when doing business with friends. During the two years between the settlement and Moore's 2010 legal action, he negotiated with the Ekelunds about his equity interest. It was only in 2010 that Moore concluded that the Ekelunds were not going to grant him the promised equity interest.

Moore contended that the 12 percent interest rate was not usurious because it served as "partial compensation for the business advice and work that I was contributing to the company." In his declaration, he maintained that he and the Ekelunds behaved "as if" they "were in business together."

The court granted the summary adjudication motion. It concluded that the Ekelunds and Bebe had met their initial burden based on the release and that Moore had failed to raise a triable issue. The court found that Moore had not raised any triable issue as to equitable estoppel because Moore was aware of the release. Laches was not

applicable because the third cause of action sought damages. The release was not reasonably susceptible of the interpretation that Moore advocated. Civil Code section 1542 was inapplicable because the release was governed by Minnesota law, and, in any case, the release did not fail to comply with the statute.

The superior court granted the motion to strike as to the 12 percent interest rate. It found that the interest rate was plainly usurious and that the amended complaint did not describe a joint venture relationship between Moore and the Ekelunds. The parties thereafter entered into a stipulated judgment that was expressly intended to facilitate an appeal challenging the court's rulings on the motions. Moore timely filed a notice of appeal from the judgment.

III. Discussion

A. Summary Adjudication

“Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo.” (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) “[T]he party moving for summary judgment bears the burden of persuasion that there are no triable issues of material fact and that [the moving party] is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). The moving party also “bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Ibid.*) “A prima facie showing is one that is sufficient to support the position of the party in question.” (*Aguilar*, at p. 851.)

The Ekelunds and Bebe, the moving parties, satisfied their burden of production by producing evidence that Moore had signed the release. The release provided prima facie evidence that Moore had no surviving claim for violation of the alleged 2006

agreement to grant him equity in Bebe. Thus, the burden shifted to Moore to make a prima facie showing of a triable issue.

Moore contends that he made a prima facie showing that there were triable issues of fact regarding the release defense because (1) he proffered evidence that, after the parties signed the release, they acted in a manner inconsistent with the application of the release to his contract claim; (2) the Ekelunds and Bebe were equitably estopped from relying on the release because they misled Moore into believing that the release did not apply to his claim; (3) laches barred reliance on the release; (4) Civil Code section 1542 applied and barred the Ekelunds and Bebe from relying on the release; and (5) the release was invalid due to mutual mistake or fraud.

1. Interpretation of the Release

Moore contends that he created a triable issue by presenting extrinsic evidence that the release did not apply to *unaccrued* claims such as his claim for equity in Bebe. He claims that the release's "list is reasonably susceptible to a construction that excludes Moore's on-going entitlement to equity under an executory oral agreement from the scope of the matters released." In his view, the 2006 oral agreement was "executory" and created an "actionable claim" within the meaning of the release only when, after the release, the Ekelunds and Bebe failed to perform.⁴

"Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special

⁴ He ignores the fact that they had also failed to perform prior to the release. Moore's position is apparently that breach occurred only when he gave up hope that performance would be forthcoming, as no time for performance was allegedly specified.

meaning is given to them by usage’ (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a lay person would ascribe to contract language is not ambiguous, we apply that meaning.” (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.) “The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.” (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.)

Thus, the critical question is whether the language of the release is “reasonably susceptible” of a meaning that applies its provisions only to accrued or actionable claims. The language of the release used a host of broad terms to describe what was being released. It stated that it applied to “all disputes and claims,” “any and all claims, demands, causes of action, damages, liabilities,” and “any and all matters, disputes, and differences, known or unknown, suspected or unsuspected, which do now exist, may exist or heretofore have existed” other than Moore’s claim for repayment of the note.

Moore argues that his claim to equity in Bebe under the alleged 2006 oral agreement did not “exist” in 2008 because the Ekelunds and Bebe had not yet breached that agreement. He maintains that the release was limited to actionable claims. However, the release explicitly stated that it applied to more than just accrued “causes of action.” It stated that it applied to “any and all matters . . . , known or unknown, suspected or unsuspected, which . . . may exist” The release’s inclusion of “any and all matters” *in addition to* “causes of action,” “liabilities,” “claims,” “disputes,” and “differences” precluded the language of the release from being reasonably susceptible of an interpretation that limited its scope to only accrued claims or causes of action.⁵ “The

⁵ Moore argues that this construction of the release is inconsistent with the parties’ intent because it would mean that his loan to the Ekelunds and Bebe to finance the

way we define words should not produce redundancy, but instead should give each word significance.” (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 753.) Moore’s proffered construction would render the word “matters” redundant, so it must be rejected.

Since the language of the release is not reasonably susceptible of Moore’s proffered interpretation, extrinsic evidence was not admissible to determine the scope of the release.

Moore relies on *Butler v. Vons Companies, Inc.* (2006) 140 Cal.App.4th 943 (*Butler*). *Butler* was a Vons employee who claimed he was harassed and discriminated against by Vons. He was suspended after an unrelated altercation with his manager. His union filed a grievance regarding the suspension. *Butler* subsequently complained about the harassment and discrimination. Vons investigated and disciplined one of his harassers. (*Butler*, at p. 945.) The grievance was resolved by an agreement that gave *Butler* back pay and allowed him to return to work. (*Butler*, at pp. 945-946.) Vons told *Butler* that the agreement regarding the grievance did not pertain to the harassment and discrimination complaints. (*Butler*, at p. 946.) The agreement stated that it released claims under the collective bargaining agreement. (*Butler*, at p. 947.) *Butler* later filed a civil action against Vons for harassment and discrimination. (*Butler*, at p. 946.) Vons contended that the agreement released the harassment and discrimination claims. The

settlement would be subject to the release. Not so. The settlement agreement containing the release stated that it “memorialize[s] the settlement reached between the parties *on April 14, 2008.*” (Italics added.) The scope of the release was limited to matters “based on any event or circumstance occurring *up to the date of this Settlement Agreement.*” (Italics added.) Although the parties actually signed the settlement agreement on May 1, 2008, the only reasonable construction of this language is that the release applied only to matters arising prior to the April 14, 2008 settlement. Since Moore’s loan to the Ekelunds and Bebe to finance the settlement occurred on April 30, 2008, it was not a matter in existence at the time of the settlement, and therefore the release did not apply to it.

trial court granted summary judgment on that ground, but the Court of Appeal reversed. It found that the agreement was ambiguous with respect to whether it applied to the harassment and discrimination claims. (*Butler*, at pp. 947-948.) Since the grievance was initiated by the union, and the language of the agreement was consistent with an intent to resolve only the subject matter of the grievance, the agreement was reasonably susceptible of a construction that did not extend to Butler's "personal claims" against Vons. (*Butler*, at pp. 948-949.)

Butler is inapplicable here. The release signed by Moore was not susceptible of a construction that it was limited to a settlement of Lagos's claims and did not extend to Moore's claims against the Ekelunds and Bebe. Indeed, the release explicitly excluded just a single claim from its purview, and that claim was a claim by Moore against the Ekelunds and Bebe. The fact that Moore's claim for repayment of the note was expressly excluded from the release confirms that the release was intended to be broad and to extend to all "matters" involving Moore, the Ekelunds, and Bebe. Since Moore's claim to equity in Bebe was based on the same consideration as his claim for repayment of the note, but was not excluded from the scope of the release, it was subject to the release.

Since Moore's proffered extrinsic evidence was inadmissible, the release could only be construed as barring his claim for equity in Bebe.

2. Equitable Estoppel

Moore claims that the Ekelunds and Bebe were equitably estopped from relying on the release as a defense. "The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he

must rely upon the conduct to his injury.” (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.)

Moore’s contention fails because he submitted no evidence that he was “ignorant of the true state of facts” while the Ekelunds and Bebe were “apprised of [those] facts.” Moore did not claim that he was unaware of the provisions of the release that he signed, and he submitted no evidence that the Ekelunds and Bebe had any greater knowledge than he did regarding the provisions of the release. The provisions of the release are not reasonably susceptible of a construction that excludes the alleged 2006 oral agreement from the scope of the release. While Moore claims that he did not believe that the release applied to the 2006 oral agreement, his mistaken belief was not one of fact but one of law. Since he did not contend that the Ekelunds and Bebe were aware of facts regarding the release of which he was not aware, they could not be equitably estopped from relying on the release.

3. Laches

Moore also claims that the Ekelunds and Bebe were barred by laches from relying on the release. Laches is an equitable defense, and it is not available in a legal action. (*Brownrigg v. De Frees* (1925) 196 Cal. 534, 539.) Moore’s action was for breach of contract, which is a legal action, not an equitable one. He acknowledges as much, but he contends that he could properly raise laches “as an equitable defense to the defendants’ affirmative defense of a release.” He claims that the defense of release was an equitable defense against which he could assert laches. Whatever the validity of this proposition, Moore failed to show that there was a triable issue regarding laches.

“Laches is an equitable defense based on the principle that those who neglect their rights may be barred from obtaining relief in equity. [Citation.] “The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.” [Citation.]

[¶] Laches is a question of fact for the trial court, but may be decided as a matter of law

where, as here, the relevant facts are undisputed. [Citation.]’” (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381.)

Moore’s claim is that laches bars reliance on the release due to the “silence” of the Ekelunds and Bebe regarding the effect of the release on Moore’s claim to equity in Bebe during the two years between the execution of the release and the initiation of Moore’s 2010 lawsuit. However, Moore produced no evidence that the Ekelunds and Bebe had any opportunity to legally pursue any “right” under the release prior to Moore’s initiation of his lawsuit. As Moore described it, during this two-year period, although the Ekelunds engaged in “negotiati[ons]” with him “on all issues, including repayment, equity and compensation,” the Ekelunds “declined to take action on my equity position” His contention is premised on his assumption that the Ekelunds were obligated to inform him that the release barred any claim based on the alleged 2006 oral agreement. The doctrine of laches does not so require. Laches simply does not apply where the party against whom it would be raised had no earlier opportunity to *seek a remedy*. Moore adduced no evidence that the Ekelunds had an earlier opportunity to seek a remedy based on the release. The trial court did not err in concluding that there were no triable issues regarding laches.

4. Civil Code Section 1542

Moore contends that, even if the release covered his claim to equity in Bebe, Civil Code section 1542 precluded the release from covering this claim because he “had no knowledge that he had such a claim.”

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.” (Civ. Code, § 1542.)

Moore’s contention lacks merit. The settlement agreement containing the release provided that it “shall be governed by the laws of the State of Minnesota.” Moore claims

that this choice of law provision should not be enforced. A choice of law provision will be enforced if (1) “the chosen state has a substantial relationship to the parties or their transaction,” and (2) there is no “fundamental conflict” between the laws of the chosen state and those of California. (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466.)

Since the settlement agreement containing the release resolved a Minnesota action brought by a Minnesota resident, Minnesota, the “chosen state” clearly had the requisite “substantial relationship” to the settlement agreement. As to the “fundamental conflict” issue, Moore makes no attempt to demonstrate that there are any Minnesota laws pertaining to this subject that “fundamental[ly] conflict” with Civil Code section 1542. Instead, his argument is limited to his unsupported assertion that “Civil Code Section 1542 reflects the fundamental policy of California.”

Since Moore fails to assert any “fundamental conflict” between Minnesota and California law on this subject, we need not consider it further. “[R]eview is limited to issues which have been adequately raised and briefed.” (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.) Moore has failed to show that California law should be applied despite the choice of law provision selecting Minnesota law.

Furthermore, Moore’s claim that Civil Code section 1542 bars reliance on the release because he *did not know* of his claim to equity in Bebe at the time of the settlement agreement is not supported by any evidence. Moore asserted that he was promised equity in Bebe in 2006, and the equity was never forthcoming. While, at the time of the 2008 settlement agreement, he may have retained hope that he would yet receive the allegedly promised equity, he plainly was not *unaware* of his alleged entitlement to it.

5. Mutual Mistake or Fraud

Moore argues that the release was invalid on the grounds of mutual mistake or fraud. He concedes that he “did not raise these issues before the trial court *per se*.” Moore understates the matter. In the trial court, Moore explicitly conceded that he was “not contending fraud, duress o[r] undue influence” with respect to the release. As he disclaimed any attack on the release based on fraud, the Ekelunds and Bebe were deprived of any opportunity to produce evidence establishing the absence thereof. He cannot rely on mutual mistake as he produced no evidence that the Ekelunds believed that the release did not apply to the alleged 2006 oral agreement.

B. Motion to Strike

Moore contends that the transactions involving the 12 percent interest rate were not usurious and fell within an exception to the usury prohibition.

The exception upon which he relies applies “[w]here the relationship between the parties is a bona fide joint venture or partnership.” (*Junkin v. Golden West Foreclosure Service, Inc.* (2010) 180 Cal.App.4th 1150, 1155 (*Junkin*)). If there is a joint venture, “the advance by the partners or joint venturers is an investment and not a loan, and the profit or return earned by the investor is not subject to the statutory maximum limitations of the Usury Law.” (*Ibid.*) The relevant factors in determining whether a transaction is a joint venture are: (1) “whether there is an absolute obligation of repayment”; (2) “whether the investor may suffer a risk of loss”; and (3) “whether the investor has any right to participate in management.” (*Junkin*, at pp. 1155-1156.) “[W]here the relevant facts are undisputed, the proper characterization of a transaction presents a question of law that this court reviews de novo on appeal.” (*Junkin*, at p. 1156.)

Here, Bebe was absolutely obligated to repay the loans, and Moore had no *right* to participate in management of Bebe.⁶ While he might suffer a loss if Bebe failed to repay his loans, this was no different than the situation faced by any lender. Moore contends that his status as a joint venturer was established by the alleged 2006 oral agreement to give him an equity interest in Bebe as additional consideration for his loans. Although the alleged 2006 promise of equity in Bebe was made prior to the interest rate being raised to 12 percent in 2007, Moore was never actually given an equity interest in Bebe. Consequently, he lacked an actual equity interest in Bebe at the time of the loans and therefore cannot rely on his expectation that he would subsequently acquire such an interest to support his claim that this equity interest excused the usurious rate of interest on the loans.

Moore maintains that, even if the joint venture exception does not apply, the transaction was not usurious because 2 percent of the 12 percent interest rate was “not for the forbearance of money” but “to compensate Moore partially” for his “additional” investment of “time and business knowledge” after the initial loan in 2006. “In determining whether a transaction constitutes a loan or forbearance, we look to the substance rather than the form of the transaction. ‘In all such cases the issue is whether or not the bargain of the parties, assessed in light of all the circumstances and with a view to substance rather than form, has as its true object the hire of money at an excessive rate of interest.’” (*Southwest Concrete Products v. Gosh Construction Corp.* (1990) 51 Cal.3d 701, 705 (*Southwest*)). Moore’s reliance on *Southwest* is misplaced. Nowhere in *Southwest* did the California Supreme Court intimate that a transaction in which the debtor agreed to pay the lender a usurious interest rate would be rendered nonusurious if the premium portion of the interest rate that rendered the rate usurious could be

⁶ Moore contends that he participated in managing Bebe, but the relevant factor is whether he had a “right” to do so. He does not contend that he had such a right.

characterized as being compensation for something other than the “hire of money.” Moore cites no authority for his theory that a usurious interest rate can be partitioned in such a manner. In the absence of any authority for this proposition, we reject it.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.