In the court of appeals in Knoxville

Flexibility Capital Inc.	)	
	)	
vs.	)	
	)	Case No.
Sabatino Cupelli &	)	
David Jonathan Tulis	)	E2023-00335-COA-R3-CV
10520 Brickhill Lane	)	
Soddy-Daisy TN 37379	)	**Oral argument requested**

Appellant reply brief

Qui accusat integrae famae sit et non criminosus. Let him who accuses be of a clear fame, and not criminal.

— 3 Co. Inst. 26.

Appellant asks the court to see the pimples, rash and bruises blighting his humiliated trial court defense as less significant than the facial tumor disfiguring appellee's pleas for relief and mercy and the lower court's balm daubed on the wrong party.

In denying a motion to reconsider, the court says it "will not disturb its earlier ruling." Appellant "failed to respond to plaintiff's specification of material facts as required by Rule 56.03," a fatal slipup not to be overshadowed as defendants "belatedly assert new defenses, including subject matter jurisdiction" (TR p. 264).

Appellee cites three grounds in defending the lower court's work.

I. Timeliness of appeal notice

Predatory lender Flexibility Capital says appellant's notice of appeal, filed March 8, 2023, is untimely and that the case must be tossed. The lower court's final judgment from which petitioner appeals is not until April 10, 2023, 33 days later. On that day the court rejects petitioner's Dec. 22, 2022, final pleading, Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice (TR p. 252).

Still awaiting an answer, appellant gives notice of appeal 63 days early, counting the 30 days for filing notice of appeal.

Appellee cites Tenn. R. App. P. 4(a).

> In an appeal as of right to the *** Court of Appeals *** the notice of appeal shall be filed with the clerk of the appellate court within 30 days **after the date of entry of the judgment appealed from**." [emphasis added] [1]

The judgment he appeals from is the court's April 10, 2023, denial of Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice (TR p. 252).

Flexibility says appellant's notice of appeal offends Tenn. R. App. P. 4(b), which says:

---

[1] The whole rule reads,

> **(a) Generally.** In an appeal as of right to the Supreme Court, Court of Appeals or Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from; however, in all criminal cases the "notice of appeal" document is not jurisdictional and the timely filing of such document may be waived in the interest of justice. The appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice. Any party may serve notice of entry of an appealable judgment in the manner provided in Rule 20 for the service of papers.

Tenn. R. App. P. 4

> In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: *** (4) under Rule 59.04 to alter or amend the judgment; the time for appeal for all parties **shall run from the entry of the order** denying a new trial or granting or **denying any other such motion.** [emphasis added]

The appellant has 30 days "after the date of entry" of the judgment appealed from per Rule 4(a). He files notice of appeal *ahead of* the court's denial of his motion to set aside the negative order because the "time for appeal *** shall run from the entry of the order *** denying any other such motion," such as appellant's motion to set aside. The set-aside motion with its mandatory judicial notice about fraud on the court is filed Dec. 22, 2022, and ordered denied April 10, 2023. Also in that judgment order is denial of the motion to reconsider (TR p. 288).

Key to Flexibility's timeliness claim is Tenn. R. Civ. P. 59.01, as follows:

> Motions to which this rule is applicable are: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to **alter** or amend the judgment. **These motions are the only motions** contemplated in these rules for **extending the time** for taking steps in the regular appellate process. **Motions to reconsider** any of **these motions** are not authorized and will not operate to extend the time for appellate proceedings. [emphasis added]

Petitioner is involved in "the regular appellate process" and does *not file a motion to reconsider* the anticipated denial to his *Motion to set aside order* for intrinsic fraud, & demand for mandatory judicial notice. His pleadings are authorized. None are "not authorized" for being "**motions to reconsider** any of **these motions,"** which rule forbids a motion to reconsider an earlier motion denied. Appellant files within ordinary litigation

time constraints. He rightly uses them to serve his quest for relief and justice, and are not untimely filed or unauthorized.

As to the meaning of “judgment appealed from,” Tenn. R. App. P. 4(a), this phrase reasonably need not apply only to the court’s Nov. 17, 2022, grant of summary judgment (TR p. 219). The 30-day rule is not intended to prevent a litigant from exhausting process in the trial court and to compel him into appeal before exercising available remedies. Appellant is before a court with no subject matter jurisdiction, and citing fraud on the court is attempting to secure his cause and the integrity of judicial process.

Flexibility opines that Motion to set aside order for intrinsic fraud, & demand for mandatory judicial notice “[is] essentially a motion to reconsider the trial court’s previous denial of their motion to reconsider” in breach of P. 59.01. Not true. The mandatory judicial notice and its supporting brief develop a record of evidence for intrinsic fraud on the court with participation of the court, giving notice thereto as the court’s breaching Rule 10, the judge’s controlling rules of ethics (TR p. 255).

The court’s rejection of his notice about judicial fraud, the final “no” on the most shocking of his claims, is the judgment from which he appeals. And he appeals *before* the judgment is filed April 10, 2023.

Judgments are several in instant case. At a hearing Nov. 9, 2022 (ref. TR p. 206), the court orally grants summary judgment. It does so by written order of judgment Dec. 5, 2022 (TR p. 219). Other judgments are denials of motions (Jan.18, 2023 [TR p. 264], and April 10, 2023 [TR p. 288]).

Notice of appeal is timely filed.

II. Statement of material facts

The failure of appellant to file a statement of material fact is inconsequential in a case where the court lacks subject matter jurisdiction. In a case being pulled out to sea in a rip tide question of subject matter jurisdiction, it might appear initially that failure to heed Rule 56.03 in the Tennessee rules of civil procedure is fatal. But no amount of paddling by Flexibility nor the court will put their feet back on sand.

III. Subject matter jurisdiction

> **MANDATORY JUDICIAL NOTICE: Petitioner asks the court to recognize that if the lower court has no subject matter jurisdiction, the court has no authority to say anything about the merits of the case except to vacate or remand the cause ministerially to the trial court with an order to dismiss the action ministerially with prejudice on grounds of the contract being unenforceable in Tennessee as it is fraudulent and in breach of state law as a usury loan, hence giving the plaintiff no standing, and the court no subject matter jurisdiction with which to give relief.**

An affirmative defense operates in a court with subject matter jurisdiction. In a court without authority to hear a matter, an affirmative defense is a legal phantasm shimmering in a void. Lack of subject matter jurisdiction is not an "affirmative defense" such as fraud and illegality, as appellee states (brief p. 19). Flexibility breezes over the subject matter jurisdiction claims by describing them (p. 20) as affirmative defenses made too late. It states appellant "waived such defenses," implying that appellant's defense is merely a fraud allegation, not lack of subject matter jurisdiction challenge.

Appellee's bid to deal with the court's subject matter jurisdiction problem has three parts. As Flexibility relates it, (1) the court folds subject matter jurisdiction matters into affirmative defenses untimely made and thus waived, (2) says appellant's no-subject-matter-jurisdiction claim is waived "because of the forum selection clause"

that is the claim's basis was not raised, and (3) views the sole interest rate at play in the case as a 12 percent default rate.

Appellant deals with Flexibility's three points in reverse order, from lesser to greater.

Interest rate argument. Flexibility says "the assertion that the underlying agreement is usury and illegal is without merit." (brief p. 20) "The default interest rate provided in the underlying agreement is not usurious. Cupelli and Tulis' allegation that the agreement provides for interest at the annual rate of 208.05 percent is simply incorrect" (brief p. 22).

If the contract were not fraudulent — if it were not a money loan contract, as admitted in the complaint (TR p. 6) — the terminology of actual interest rates would apply solely to default interest at 12 percent.

But the disputed contract is a loan, *absolutely repayable*, and illegal in New York and in Tennessee because the effective annual percentage rate of interest is 208.05 percent. This figure is the one of legal significance in the case.

Forum selection claim. In the loan contract "Any lawsuit *** arising out of or in connection with this agreement shall be instituted exclusively in any court sitting in New York State" (TR p. 169, ¶ 37). Flexibility credits appellant with having raised an "acceptable forum" defense. "Cupelli and Tulis assert that the trial court lacked subject matter jurisdiction because of the forum selection clause in the underlying agreement," Flexibility says (brief p. 22).

The attorney here makes a false statement. Appellant does not make a forum defense. Statements falsifying the case record are a knowing and intentional breach of the candor rule for attorneys at Rule 8 rules of professional conduct. Attorney Cheadle, violating Rule 3.8, makes "a false statement of fact or law to a tribunal" and does "fail to disclose

to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client *** .” Appellant hereby gives notice of this breach against the court.

Appellant does not raise the forum issue. Flexibility violates the contract by suing in Hamilton County. Appellant demand for a ministerial act of dismissal with prejudice by the trial court is based instead on the fraudulent nature of the contract such that it cannot be enforced in Tennessee, that Flexibility lacks standing to pursue claims for which relief may be granted. The contract itself is a fraud; that is the basis of the challenge to subject matter jurisdiction the court ignores.

Subject matter jurisdiction. This case is void, not just voidable. Flexibility says the court cannot reach appellant's lack of subject matter jurisdiction claims arising from a fraud allegation because fraud is an affirmative defense, and an affirmative defense is waived if untimely raised. Hence, Flexibility suggests, appellant waives the right to bring up subject matter jurisdiction because he objects untimely to fraud as an affirmative defense under Rule 8.03 in the rules of civil procedure.

It is the nature of fraud to be hidden. Petitioner's perceiving fraud later rather than sooner is no bar to raising a subject matter jurisdiction challenge based on a criminal unenforceable contract, even if it were true that subject matter jurisdiction is an affirmative defense, as alleged.

The party stained with iniquity lets rascality operate even amid legal proceedings in which the tortmonger prosecutes his victim for payment. Legal maxims tell the power of fraud to deceive. Fraud strives to cover-up its tracks. *Fraus est celare fraudem.* (It is a fraud to conceal a fraud.) *Suppressio veri suggestio falsi*. (The suppression of the truth is

the suggestion of what is false.) Fraud has the outward visible sign of honesty, but lacks the inward spiritual grace. The knot that fraud ties, equity delights to untie. [2]

The record shows appellant enters litigation a dupe. Two filings show his defense of a seemingly honorable "future receivables sale and purchase agreement":

> ➤ Motion for Rule 8 sanctions on attorney for referring to a loan for money, TR p. 67
>
> ➤ Affidavit and amended answer to motion for summary judgment, citing risk sharing provisions, TR p. 94
>
> ➤ Accused's motion for summary judgment and supporting brief, citing risk-sharing provisions, the "pandemic" shutdown of economy as creating *supervening impossibility* and incoherence in contract as an *original impossibility,* TR pp. 142, 144

Accuseds' motion to reconsider Nov. 17, 2022, (TR p. 205) reveals they have come to cognition and awareness of fraud. The fogbombed merchant operators dig out of their delusion regarding the Flexibility contract, and defend their rights in new filings challenging subject matter jurisdiction.

The trial court refuses to aid the victims despite admissions against interest on Page 1 of the complaint, Plaintiff's motion for summary judgment (TR p. 6), that "[d]efendants borrowed money from plaintiff and failed to pay as promised," indicating the loan nature of the relationship. The court ignores same-page statements such as: "Plaintiff loaned defendants money. Defendants failed to pay the money back."

Flexibility and the trial court evade the fatal matter of lack of subject matter jurisdiction by plaintiff's claiming this threshold question is an affirmative defense untimely raised, and that the 12 percent annual interest rate taking effect on default is the only true interest

[2] Robert Gibson, *Gibson's Suits in Chancery* (Charlottesville, Va.: Michie, 1955), § 58. Equity aids the vigilant, not those who sleep upon their rights, p. 73

figure in the case. "The default interest rate provided in the underlying agreement is not usurious," Flexibility says. "Circuit Courts in Tennessee have the authority and jurisdiction to hear breach of contract disputes" and, therefore, as Flexibility *childishly* urges, "[t]he Hamilton County Circuit Court had subject matter jurisdiction over this matter."

Like the prodigal son in the Lord's parable, appellant "[comes] to himself" mid-proceedings, realizes the contract is fraudulent, the complaint void and the court powerless to act.

The rules of civil procedure cannot justly be used to say recognition of fraud "is not timely" and that the court has subject matter jurisdiction by virtue of the fog clearing out from appellant's optics too late in the game. Subject matter jurisdiction is a foundational objection that can be raised at any time. "Whenever subject matter jurisdiction is challenged, the burden is on the plaintiff to demonstrate that the court has jurisdiction to adjudicate the claim" Redwing v. Cath. Bishop for Diocese of Memphis, 363 S.W.3d 436, 445 (Tenn. 2012). Many other cases make the same point. See a review in appellant's Affidavit and objection to signing final order (TR p. 269).

The lack of subject matter jurisdiction problem is not justly locked away in an affirmative defense that, untimely raised, Flexibility and the court can ignore. It is a due process and procedural roadblock external to the case that prevents it from being filed with the clerk. Flexibility is seeking to violate state law at T.C.A. § 47-14-103. Maximum rates, and to enforce its contract at 208.05 percent annual interest.

IV. No meeting of the minds

The parties to this alleged contract have not had a meeting of the minds, a crucial element for the court to have subject matter jurisdiction. The confusion over whether the

agreement is a high-interest usury loan or a true risk-sharing advance purchase of future receivables at a discount shows there is no meeting of minds between merchant radio owners and the unnamed and no-signature parties at Flexibility Capital.

The court should have explored the parties' states of mind as regards this foundational dispute rather than simply adopting Flexibility's analysis as it shifted. Do the parties agree on what they agreed on?

Flexibility sues to enforce an absolutely repayable money loan, and the radio operators defend the agreement as a risk-sharing cash advance wrecked by external state pressures in the pandemic. The parties swap positions, the record show. The accused argue that the contract is for a money loan, at a forbidden rate, making the contract illegal and unenforceable, and depriving the court of subject matter jurisdiction. Flexibility convinces the court the contract is a lawful advance purchase of future receivables, with no 208.05 percent interest rate, only a 12 percent APR on balance due after default. Nothing more clearly shows appellant's state of mind than their motion to sanction, and the court's siding with Flexibility. Appellant truly thought the arrangement was an advance purchase of future receivables. "[T]he existence of a contract, the meeting of the minds, the intention to assume an obligation, and the understanding are to be determined ... not alone from the words used, but also the situation, acts, and the conduct of the parties, and the attendant circumstances" Moody Realty Co. v. Huestis, 237 S.W.3d 666, 675 (Tenn. Ct. App. 2007).

The record shows a lack of a meeting of the minds, hence no enforceable contract.

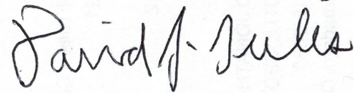
The trial court is letting a corporate malefactor get away with crime in state of Tennessee. It does so despite clear arguments the brief ignores:

➤ Statements against interest in the complaint itself, calling the transaction a loan for money (TR p. 6), absolutely repayable

➤ Court blooper of denying accuseds' motion for sanctions. They naively blast Flexibility for calling the contract a money loan because they believe (in error under fraud) it is an advance purchase of future receivables — the court refusing to sanction Mary Cheadle for calling the deal a money loan

➤ The self-contradictory nature of the contract, with the personal guaranty pp. 11-14 overwriting the risk-sharing cash advance provisions pp. 1-10, making the agreement a loan, absolutely repayable, hence criminal usury

Respectfully submitted,



____

David Jonathan Tulis

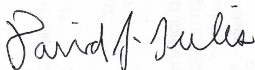
CERTIFICATE OF COMPLIANCE

This brief, according to rule Rule 30(e)(1), is 2,858 words in length.

CERTIFICATE OF SERVICE

David Jonathan Tulis certifies that a true and exact copy of this brief is being sent by email this 8th day of October, 2023, to Mary Cheadle at mcheadle@cheadlelaw.com.

John R. Cheadle Jr.
And Mary Barnard Cheadle
2404 Crestmoor Road
Nashville, TN 37215



David Jonathan Tulis