Reversed and Remanded and Opinion Filed March 30, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01424-CV

MARTIN PHILIP KOCH A/K/A PHILIP KOCH, Appellant
V.
BOXICON, LLC, Appellee

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-04678-2012

MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Whitehill

The pivotal question in this usury case is whether an agreement called a purchase of future business income, but which provides for a fixed rate of return on an unconditional promise to repay a fixed sum at a specified date, is really a disguised loan such that the usury laws apply to it.

Appellee Boxicon, LLC sued appellant Martin Philip Koch a/k/a Philip Koch[1] for breach of contract. Koch raised usury as a defense and counterclaim. The jury found for Boxicon on its claim and rejected Koch's usury defense and counterclaim. The trial court rendered judgment accordingly and denied Koch's motions for judgment NOV and for new trial.

[1] Koch referred to himself as "Philip Koch" in his notice of appeal, but the body of the judgment refers to him as "Martin Philip Koch," and he testified at trial that his name was Martin Philip Koch.

The issue on appeal is whether Koch conclusively proved that the parties' agreement was a usurious loan. We conclude that he did. Accordingly, we reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts

Koch was in chiropractic school from 2005 until January 2008. During that time, he met David Lindemuth, Boxicon's general manager. Boxicon was Balco Box, LP's general partner. Balco Box owned an office building in McKinney, Texas.

Lindemuth testified that he and Koch talked about Koch's future business. According to Lindemuth, he co-signed educational loans for Koch because he needed money to finish his education.

Koch opened his clinic in Balco Box's building after he graduated from chiropractic school in January 2008.

Lindemuth added that he thereafter paid Koch's mortgage and living expenses "as a friend" from January until June 2008, for a total of roughly $30,000. Koch, however, denied that Lindemuth loaned him $30,000 in spring 2008.

The controlling document in this case is a June 11, 2008 "Agreement to Purchase/Sell a portion of future business income" (Agreement). The Agreement defines Boxicon as the "Buyer" and "M. Philip Koch/Total Body Health Care, Inc." as the "Seller."[2] The Agreement contains the following recitals:

> [Boxicon] hereby agrees to provide said bridge capital under the terms of this agreement and Koch agrees to repay said bridge capital under the terms of this agreement. Capital provided to Koch by Boxicon shall be considered as a purchase of a portion of the future cash stream generated by the business and this agreement provides specific terms for such payment of future cash stream and

[2] Koch testified that, to his knowledge, no such entity as "Total Body Health Care, Inc." existed.

> repayment of original bridge capital. This agreement is NOT a loan, but a purchase of specific business assets, namely a portion of future cash flow as provided herein.

A later provision, however, states that, "This is NOT an agreement to buy a percentage of the business, but for a fixed return upon capital invested by Buyer as per this agreement."

The Agreement further provides that Boxicon will "tender on behalf of the benefit of Seller" $16,000 per month for six consecutive months, starting on June 30, 2008, for a total of $96,000. Each month, $11,000 would be paid directly to Seller, while $5,000 would be paid directly to Lindemuth "to reduce loaned funds previously tendered by Lindemuth to Seller."

The Agreement requires Seller to make the first "pay back payment" to Boxicon no later than January 30, 2009. At that point, Seller must begin paying Boxicon $2,400 per week for 80 weeks, for a total of $192,000. The Agreement also recites that "[t]his amounts to double the buy-in amount." The Agreement further provides that there will be a 1% per week penalty if Seller does not pay the full amount due within 88 weeks after the payback obligation begins.

Lindemuth testified that he understood that the Agreement was not a loan but a purchase of specific business assets.

The parties later signed other agreements. In February 2009, Balco Box and "Total Body Health, Inc." executed a ten-year commercial lease with an effective date of August 1, 2008. The lease provided for a $4,500 gross monthly rent. Also in February 2009, Koch signed a "Tenant improvement Cost Recovery agreement" whereby "Tenant" Total Body Health, Inc. agreed to pay $3,500 per month for five years to cover the cost of building alterations.

Lindemuth testified that he received only one $2,400 payment under the Agreement. He also said that $189,600 was still owed under the Agreement at the time of trial in June 2014. And he added that $210,000 was still owed on the tenant improvement cost recovery agreement and $506,200 was still owed on the commercial lease.

In early 2010, Balco Box lost the building to foreclosure. Koch, however, continued to operate his clinic there until April 2014. According to Koch, the clinic never made a profit.

B. Procedural History.

In January 2012, Balco Box, Boxicon, and Lindemuth sued Koch and TBHCCC, Inc.[3] for breach of the Agreement, the lease, and the tenant improvement cost recovery agreement. Koch answered and pleaded usury against Boxicon regarding the Agreement, both defensively and as a counterclaim. He also asserted a libel counterclaim against Lindemuth.

The case was tried to a jury. The jury found that Koch entered into the Agreement with Boxicon, that Koch breached the Agreement, and that Boxicon's actual damages from the breach were $189,600. The jury also found that TBHCCC, Inc. was a party to the lease and the tenant improvement cost recovery agreement and Koch was not. The jury further found that TBHCCC, Inc. breached those agreements. Jury Question 23 asked whether the Agreement was usurious, and the jury answered that question "no." The jury also failed to find that Lindemuth libeled Koch.

Koch filed a motion for judgment NOV attacking the jury's failure to find usury.

The trial judge signed a final judgment based on the jury's verdict. That judgment awarded Boxicon $189,600 against Koch, plus attorney's fees. The judgment also awarded Balco Box damages against TBHCCC, Inc. based on the lease and tenant improvement obligations that are not in dispute on appeal. The judgment ordered Koch to take nothing on his counterclaims.

Koch timely filed a new-trial motion, arguing that the jury's failure to find usury was against the great weight and preponderance of the evidence. The motion was overruled by operation of law. Koch timely appealed.

[3] There was evidence that TBHCCC, Inc. was the corporation through which Koch did business.

II. APPELLATE ISSUES

Koch presents three appellate issues, all based on the premise that the Agreement was usurious:

One, did the trial court err by denying his motion for judgment NOV?

Two, was the jury's failure to find that the Agreement was usurious against the great weight and preponderance of the evidence?

Three, did the trial court err by overruling Koch's objection to Jury Question 3, which submitted Boxicon's damages to the jury?

Boxicon's response is twofold:

One, Koch's usury theory fails because there was evidence that the Agreement comes within finance code § 306.103; and

Two, Koch's usury defense and counterclaim are barred by judicial estoppel.

Notably, Boxicon does not otherwise deny that the Agreement is usurious on its face.

III. ANALYSIS

A. Koch's First Issue: Did the trial court err by denying Koch's motion for judgment NOV?

Koch's first issue argues that the trial court erred by denying his motion for judgment NOV because the Agreement was usurious as a matter of law. We conclude that Koch is correct for the reasons we discuss below.[4]

[4] As to error preservation, we note that the record contains no order expressly overruling Koch's motion for judgment NOV. But we conclude that the trial court implicitly overruled the motion when it signed the judgment because (i) the court's docket sheet reflects that the motion was set for hearing at the same time as the plaintiffs' motion for entry of judgment, and (ii) the trial judge signed the judgment the day of the hearing. Docket sheets cannot be used to contradict orders, but appellate courts can use them "to determine what transpired in the trial court." *Haut v. Green Café Mgmt., Inc.*, 376 S.W.3d 171, 178–79 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Here, the docket sheet shows that the trial judge was aware of Koch's motion and rendered judgment effectively overruling it. *See AIS Servs., LLC v. Mendez*, No. 05-07-01224-CV, 2009 WL 2622391, at *2 (Tex. App.—Dallas Aug. 27, 2009, no pet.) (mem. op.) ("An essential element of an implicit ruling is awareness by the trial judge of the request or motion that is supposedly being ruled on.").

We also note that, although Koch called his motion a motion for judgment NOV, the motion argued that the evidence was factually insufficient to support the jury's answer to the usury question. Factual insufficiency is a ground for granting a new trial as opposed to a judgment NOV. *Wagner v. Edlund*, 229 S.W.3d 870, 874 (Tex. App.—Dallas 2007, pet. denied); *see also Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 436–37 (Tex. App.—Texarkana 2006, no pet.) (JNOV motion raising factual sufficiency points effectively a motion for new trial on those points). But the difference does not affect the result here because, as we explain below, the Agreement's unambiguous terms, Texas usury law, and this case's record produce the same result under either standard.

1. Standard of Review.

We review the denial of a motion for judgment NOV under the legal-sufficiency standard. *Brown v. Zimmerman*, 160 S.W.3d 695, 702 (Tex. App.—Dallas 2005, no pet.). Koch is attacking whether the evidence was sufficient to support the jury's adverse finding on an issue—usury—for which Koch bore the burden of proof. *See Apodaca v. Rios*, 163 S.W.3d 297, 305 (Tex. App.—El Paso 2005, no pet.) (usury is an affirmative defense); *see also Dyer v. Atteberry*, No. 05-07-00284-CV, 2008 WL 541824, at *4 (Tex. App.—Dallas Feb. 29, 2008, no pet.) (mem. op.) (defendant bore burden of proving usury counterclaim). Accordingly, he must show that that evidence conclusively establishes all vital facts to support the issue. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *see also Brown*, 160 S.W.3d at 702 ("A motion for judgment nov should be granted when the moving party has established each element of her defense so conclusively that reasonable minds could not differ as to the truth of the controlling facts.").

2. Applicable Law.

The elements of a usurious transaction are (1) a money loan, (2) an absolute obligation to repay the principal, and (3) the exaction of greater compensation than allowed by law for the borrower's use of the money. *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994). A "loan" is an advance of money made to or on behalf of an obligor, "the principal amount of which the obligor has an obligation to pay the creditor." TEX. FIN. CODE § 301.002(a)(10). "Interest" is compensation for the use, forbearance, or detention of money. *Id.* § 301.002(a)(4). "Usurious interest" is interest that exceeds the applicable maximum amount allowed by law. *Id.* § 301.002(a)(17). "A greater rate of interest than 10 percent a year is usurious unless otherwise provided by law." *Id.* § 302.001(b). "All contracts for usurious

interest are contrary to public policy and subject to the appropriate penalty prescribed by [finance code] Chapter 305." *Id*.

On the other hand, "[i]f there is no interest, there can be no basis for usury." *First Bank*, 877 S.W.2d at 287. To that end, "[a]n amount of discount in, or charged under, an account purchase transaction is not interest." FIN. § 306.103(a). And "the parties' characterization of an account purchase transaction as a purchase is conclusive that the account purchase transaction is not a transaction for the use, forbearance, or detention of money." *Id*. § 306.103(b).

An account purchase transaction is "an agreement under which a person engaged in a commercial enterprise sells accounts, instruments, documents, or chattel paper subject to this subtitle at a discount, regardless of whether the person has a repurchase obligation related to the transaction." *Id*. § 306.001(1).

Whether a transaction is usurious depends on its substance rather than its form. *See Temple Trust Co. v. Sewell*, 126 S.W.2d 943, 947 (Tex. 1939) ("The courts will diligently look through the form of a transaction to discover illegal interest and protect the borrower from its consequences . . . ."); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 97 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (parties' label does not determine whether a transaction is a loan); *Johns v. Jaeb*, 518 S.W.2d 857, 859–61 (Tex. Civ. App.—Dallas 1974, no writ) (purported partnership agreement was substantively a usurious loan as a matter of law).

3. Did Koch conclusively establish that the Agreement was a usurious loan?

The trial court submitted Koch's usury theory to the jury in Question 23, which read:

> Do you find from a preponderance of the evidence, if any, that the "Agreement to Purchase/Sell a portion of future business income" with an effective date of June 11, 2008, is usurious?
>
> You are instructed that:
>
> Interest is the compensation allowed by law for the use, forbearance, or detention of money.

> The maximum rate or amount of interest is 10 percent a year except as otherwise provided by law.
>
> A greater rate of interest than 10 percent a year is usurious unless otherwise provided by law.
>
> Whether or not an agreement is a loan or something else depends on the substance of the agreement, not what the parties call it. If a party is unconditionally obligated to repay in installments the entire amount advanced plus a fixed sum, the transaction is in substance a loan.
>
> You are instructed that you cannot find a party charged a usurious interest rate if the parties intended to buy and sell an asset or an account receivable. If the parties to the contract in question characterized the transaction as a purchase of an account, said act is conclusive that the account purchase is not for the use, forbearance, or detention of money.
>
> Answer "YES" or "NO"

Neither side objected to Question 23. The jury answered the question "no."

Koch, however, argues that we should disregard the jury's answer to Question 23 because the evidence established as a matter of law that the Agreement is a loan rather than an asset purchase agreement and that Boxicon charged him a usurious interest rate. Boxicon disagrees, relying on the Agreement's recitals and also on finance code § 306.103 concerning account purchase transactions.

a. Does the Agreement conclusively establish the parties' intent?

Question 23 allowed the jury to reject Koch's usury theory if it found that the parties intended the sale of an asset rather than a loan.[5] The "no" answer to Question 23 means the jury found that Koch did not carry his burden to prove that the parties created a usurious loan transaction. To avoid that answer as a matter of law, Koch must demonstrate that he conclusively established the parties' intent to create a loan, which turned out to be usurious. Whether he did so has two parts: (1) Does the Agreement alone establish the parties' intent, and,

[5] We measure whether there is sufficient evidence to support the jury's answer against these unobjected to instructions. *See Jackson v. Axelrad*, 221 S.W.3d 650, 657 (Tex. 2007).

if so, (2) does the Agreement conclusively establish that the Agreement created a loan transaction with a usurious interest rate? As discussed below, the answer to both questions is "yes."

To answer these questions, we begin by considering the parties' intent as they expressed it in the Agreement. When construing a contract, we must ascertain and give effect to the parties' intent as they expressed it in their document. *Frost Nat'l Bank v. L&F Distribs., Ltd.*, 165 S.W.3d 310, 311–12 (Tex. 2005) (per curiam). We consider the entire writing and attempt to harmonize and give effect to all the contract's provisions by analyzing its terms with reference to the whole agreement. *Id*. at 312. If, after applying the pertinent rules of construction, we can give the contract a definite or certain legal meaning, it is unambiguous and we construe it as a matter of law. *Id*. Unless the circumstances require a different course, such as when a contract is ambiguous, we look only within the Agreement's four corners to determine the parties' intent. *See Esquivel v. Murray Guard, Inc.*, 992 S.W.2d 536, 544 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

Here, the Agreement has two clauses which mandate that the Agreement alone represents the parties' final expression of their intent. The first clause provides, "This Agreement terminates and supersedes all prior understandings or agreements on the subject matter hereof." The other clause provides:

> This written document represents the entirety of the binding agreements between the parties on the subject matter. No prior nor subsequent oral nor prior written agreements or promises are binding, whether implicit, explicit, or a result of miscommunication.

These clauses are merger clauses—provisions to the effect that the agreement's written terms cannot be varied by prior agreements because all such agreements have been merged into the written document. *Rosa's Café, Inc. v. Wilkerson*, 183 S.W.3d 482, 487 (Tex. App.—Eastland 2005, no pet.). Written agreements cannot be added to, varied, or contradicted by parol

testimony, and this is particularly true if the agreement contains a merger clause. *Garner v. Fid. Bank, N.A.*, 244 S.W.3d 855, 860 (Tex. App.—Dallas 2008, no pet.). These merger clauses on their face state the parties' then present unambiguous intent to ignore any prior intent they may have had and to adopt the Agreement as their final intent regarding their arrangement.[6] Thus, the Agreement's operative terms conclusively state the parties' intent. *See Smith v. Smith*, 794 S.W.2d 823, 827 (Tex. App.—Dallas 1990, no writ) (all prior agreements relating to a transaction are merged into written agreement, especially if it contains a merger clause, and agreement cannot be added to or varied by parol testimony).

b. Was the Agreement a loan imposing an absolute obligation to repay the principal?

It remains to be determined whether Koch conclusively proved the elements of usury. We start with usury's first two elements: Was the Agreement a loan under which Koch[7] owed an absolute obligation to repay the principal? *See First Bank*, 877 S.W.2d at 287; *see also* FIN. § 301.002(a)(10) (defining loan as an advance of money made to or on behalf of an obligor, "the principal amount of which the obligor has an obligation to pay the creditor"). Boxicon agreed to pay $66,000 to Koch and $30,000 to Lindemuth on Koch's behalf by six equal monthly payments ending in November 2008. And Koch agreed to pay Boxicon $2,400 a week starting in January 2009. Koch further agreed to make these payments for 80 weeks, for a total of $192,000. Thus, Koch owed an absolute obligation to repay the $96,000 principal. Accordingly, the Agreement's unambiguous terms and conditions conclusively establish that the parties intended to create a loan when they signed the Agreement.

[6] No party has argued an exception to the parol evidence rule, such as ambiguity, fraud, accident, or mistake, *see Thompson v. Chrysler First Bus. Credit Corp.*, 840 S.W.2d 25, 33 (Tex. App.—Dallas 1992, no writ), and we conclude that the Agreement's terms and conditions are unambiguous.

[7] Although the Agreement identifies Seller as "M. Philip Koch/Total Body Health Care, Inc.," the jury found that M. Philip Koch entered into and breached the Agreement. So in our analysis we refer to "Koch" rather than "Seller."

Boxicon, however, argues that the Agreement's recitals expressly say that the arrangement "is NOT a loan." We reject that argument for two reasons:

One, a contract's recitals are not strictly part of the contract, and they will not control the operative phrases of the contract unless those phrases are ambiguous. *Furmanite Worldwide, Inc. v. NextCorp, Ltd.* 339 S.W.3d 326, 336 (Tex. App.—Dallas 2011, no pet.). As we have explained, the Agreement's operative terms and conditions are unambiguous on this point.

Two, the label that the parties place on a transaction does not determine whether is it a loan for purposes of usury law. *See Johns*, 518 S.W.2d at 859–61. Instead, a transaction's substance, not its form, is controlling. *See Temple Trust Co.*, 126 S.W.2d at 947. As we explained above, the Agreement's terms and conditions have all the characteristics of a loan and do not provide for the purchase of a specific asset.

Furthermore, the Agreement in fact does not provide for the purchase of a portion of Koch's future cash flow. Rather, Koch's repayment obligation is specific and fixed, not contingent on the existence or amount of cash flow.

As we said in *Johns*, "[w]hen money is advanced to enable one to engage in a business venture with the understanding that the advance and an added amount are to be returned, there is a loan." 518 S.W.2d at 859. That is what Boxicon and Koch did here.

Based on all the above, the evidence shows conclusively that the Agreement was a loan in which Koch owed Boxicon an absolute obligation to repay the principal.

c. Did the Agreement exact more interest than permitted by law?

Usury's third element is charging usurious interest, meaning compensation for the use, forbearance, or detention of money that exceeds the applicable maximum amount allowed by law. FIN. § 301.002(a)(4), (a)(17). The maximum rate or amount of interest allowed by law in this instance is 10 percent per year. *Id.* § 302.001(b). Koch does not calculate the Agreement's

de facto interest rate. But we conclude that the Agreement on its face provides for usurious interest.[8]

Boxicon nonetheless argues that the $96,000 Koch was required to pay over and above the $96,000 principal was not "interest" under finance code § 306.103 because the parties characterized this transaction as a purchase.[9] Under § 306.103(b), "the parties' characterization of an account purchase transaction as a purchase is conclusive that the account purchase transaction is not a transaction for the use, forbearance, or detention of money"—that is, it is not a transaction for "interest" as defined by § 301.002(a)(4). *See id.* § 306.103(b). We must then analyze to what extent § 306.103 affects this transaction.

We must apply the statute according to its words' plain and ordinary meaning. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). Boxicon's argument fails because § 306.103, by its own terms, applies only to a transaction that is an "account purchase transaction." *See* FIN. § 306.103(b) ("[T]he parties' characterization *of an account purchase transaction* as a purchase is conclusive . . . .") (emphasis added). "Account purchase transaction" is defined as "an agreement under which a person engaged in a commercial enterprise sells accounts, instruments, documents, or chattel paper subject to [finance code title 4, subtitle A] at a discount, regardless of whether the person has a repurchase obligation related to the transaction." *Id.* § 306.001(1).

Here, however, there is no evidence that the Agreement involves the sale of an account, instrument, document, or chattel paper. On its face, the Agreement involves only the lending

[8] Usurious interest results regardless of the period for which interest is calculated. For example, had the full loan amount been advanced on the first advance date (June 30, 2008) and no repayment due until the end of the repayment period (August 6, 2010), which would spread the interest over the longest period, the result would be a 47% interest rate. Conversely, had the full loan amount been advanced on the date of the last advance (November 30, 2008) and no repayment due until the end of the repayment period, the result would be a 58.7% interest rate. Thus, no matter how the interest is calculated, the result is an interest rate more than double the legal limit.

[9] Boxicon did not plead § 306.103, nor did Question 23 clearly instruct the jury about the facts that would have made § 306.103 applicable. But, as we discuss, there is no evidence that § 306.103 applied in any event.

and repayment of money. *Cf. Korrody v. Miller*, 126 S.W.3d 224, 227–28 (Tex. App.—San Antonio 2003, no pet.) (sufficient evidence that the parties engaged in a factoring relationship and not a usurious loan). Thus, there is no evidence that § 306.103 applies, and it cannot support the jury's negative answer to Question 23.

Accordingly, the evidence as a matter of law established (i) the third element of usury and (ii) that the Agreement was a usurious loan.

4. Was Koch judicially estopped from asserting his usury defense and counterclaim?

Boxicon argues that judicial estoppel barred Koch from asserting his usury defense and counterclaim. More specifically, Boxicon argues that Koch, during divorce proceedings that preceded this trial, represented to the court that the $192,000 debt under the Agreement was a marital estate community liability. Boxicon further contends that this representation judicially estopped Koch from contesting the Agreement's validity.

Judicial estoppel is an affirmative defense that must be pled. *In re Estate of Araguz*, 443 S.W.3d 233, 249 (Tex. App.—Corpus Christi 2014, pet. denied); *Gulf States Abrasive Mfg., Inc. v. Oertel*, 489 S.W.2d 184, 186 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.); *cf.* TEX. R. CIV. P. 94 (listing "estoppel" as an affirmative defense that must be pled). But because Boxicon did not plead judicial estoppel, it cannot now rely on that doctrine to support the judgment. *See In re Estate of Araguz*, 443 S.W.3d at 249 (summary judgment could not be upheld based on unpled doctrine of judicial estoppel).

Boxicon, however, offers that judicial estoppel is not, strictly speaking, an estoppel at all. *See Washburn v. Associated Indem. Corp.*, 721 S.W.2d 928, 931 (Tex. App.—Dallas 1986), *writ ref'd n.r.e.*, 735 S.W.2d 243 (Tex. 1987) (per curiam). Regardless, judicial estoppel is still an affirmative defense. *See Cricket Commc'ns, Inc. v. Trillium Indus., Inc.*, 235 S.W.3d 298, 309

(Tex. App.—Dallas 2007, no pet.) (referring to the "affirmative defense of judicial estoppel"). And affirmative defenses must be pled. TEX. R. CIV. P. 94.

Nonetheless, Boxicon also asserts that we can consider judicial estoppel since Boxicon is not attacking the trial court's judgment. We understand Boxicon to be invoking the principle that an appellate court may affirm a judgment if it is correct on any legal theory applicable to the case. But, as we have explained in other cases, the principle is that we must uphold the lower court's judgment if it was correct on any legal theory *that was properly before the trial court*. *See Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 290 (Tex. App.—Dallas 2008, pet. denied). Except in limited situations not present here, we cannot affirm based on a theory not presented to the trial court, to which the appellant had no opportunity to respond. *See id*. Because Boxicon did not plead judicial estoppel, it was not before the trial court. Accordingly, we cannot consider judicial estoppel as a basis for affirmance.

5. Conclusion.

We sustain Koch's first appellate issue. As a result, we need not address his other two issues.

B. What is the appropriate relief?

Although Koch has shown that the trial court erred by denying his motion for judgment NOV, he does not explain what judgment the trial court should have rendered. He does not discuss the remedies available under usury law, and he does not attempt to apply that law to the evidence. Nor, so far as the record reveals, did he tell the trial court what judgment the court should have rendered based on his NOV motion. The motion did not state what the judgment should have been. The motion referred to an "attached judgment," but no judgment is attached in the appellate record.

In his prayer for appellate relief, Koch does not ask us to render judgment in his favor. Instead, he asks us to reverse the judgment, rule that the Agreement is usurious as a matter of law, and remand the case for the determination of damages. But we cannot order a new trial solely on unliquidated damages if liability is contested. TEX. R. APP. P. 44.1(b). Here, liability is contested. Accordingly, we reverse without rendering judgment.

IV. CONCLUSION

For the foregoing reasons, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARTIN PHILIP KOCH A/K/A PHILIP KOCH, Appellant

No. 05-14-01424-CV V.

BOXICON, LLC, Appellee

On Appeal from the 429th Judicial District Court, Collin County, Texas
Trial Court Cause No. 429-04678-2012.
Opinion delivered by Justice Whitehill.
Justices Fillmore and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with the opinion.

It is **ORDERED** that appellant Martin Philip Koch A/K/A Philip Koch recover his costs of this appeal from appellee Boxicon, LLC.

Judgment entered March 30, 2016.