State of New York
Court of Appeals

MEMORANDUM

No. 105
Mark Centi,
Respondent,
v.
Michael McGillin,
Appellant.

Edward B. Flink, for appellant.
Daniel J. Centi, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

The doctrine of waiver does not preclude consideration of defendant's challenge here to the enforceability of the loan on the ground that it was funded by illegal gambling

proceeds. Nevertheless, that defense was properly rejected on the merits. Given our strong public policy favoring freedom of contract, agreements are generally enforceable by their terms (159 MP Corp. v Redbridge Bedford, LLC, 33 NY3d 353, 359-361 [2019]). There is an affirmed finding, supported by the record, that the parties entered into a bona fide loan agreement and the facts do not support voiding the agreement on public policy grounds.

Neither the terms of the agreement nor plaintiff's performance – i.e., loaning money to a friend – was intrinsically corrupt or illegal. Although the loan was funded by the parties' illegal gambling operation (for which both were criminally prosecuted), the record does not support a characterization of their conduct as "*malum in se*, or evil in itself" (Lloyd Capital Corp. v Pat Henchar, Inc., 80 NY2d 124, 128 [1992]) and the source of funds used for a loan is not typically a factor in determining its validity. Defendant argues the agreement should be deemed unenforceable because the courts should not assist a party in profiting from ill-gotten gains. But, here, where both parties were involved in the underlying illegality, neither enforcement nor invalidation of the contract would avoid that result. Indeed, if the loan is not enforced, defendant receives a windfall despite his participation in the criminal acquisition of the funds. We have been reluctant to reward "a defaulting party [who] seeks to raise illegality as 'a sword for personal gain rather than a shield for the public good'" (id., quoting Charlebois v Weller Assoc., 72 NY2d 587, 595 [1988]; cf. McConnell v Commonwealth Pictures Corp., 7 NY2d 465 [1960]). Although

we do not condone plaintiff's illegal bookmaking business, for which he was prosecuted and fined, the circumstances presented here do not warrant a departure from this tenet.

We have considered defendant's remaining contentions and conclude they are without merit.

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Order affirmed, with costs, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided December 19, 2019