IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

CERAbio and PHILLIPS PLASTICS CORPORATION,

OPINION AND ORDER

Plaintiffs,

03-C-0092-C

v.

WRIGHT MEDICAL TECHNOLOGY, INC.,

Defendant.

- -

At the end of a second jury trial in this case, the jury returned a verdict of $1.5 million for plaintiffs CERAbio and Phillips Plastic Corporation on their breach of contract claim against defendant Wright Medical Technology, Inc. just as the jury had done in the first trial before the case was appealed and remanded. Following the return of the verdict, plaintiffs moved pursuant to Delaware law for an award of prejudgment interest at the rate of 7.25%, compounded annually. Defendant opposes the motion, arguing that the contract between the parties precluded such interest expressly; even if it did not, plaintiffs waived their right to collect prejudgment interest when they failed to move for it after their success in the first trial; and even if plaintiffs are entitled to such interest, the applicable statute is

Wis. Stat. § 138.04, which allows for an award of simple interest at the rate of 5% a year.

I conclude that plaintiffs' agreement does not apply to prejudgment interest because it made no specific reference to this category of interest and its prohibition of incidental, special or consequential damages does not apply to prejudgment interest. Such interest does not fall into any of the prohibited categories. As to waiver, plaintiffs asked for prejudgment interest in their original and amended complaints but did not ask for it again after the case was resolved in their favor ten months after filing. I am not persuaded that a party that fails to seek prejudgment interest after its suit has been resolved promptly is precluded from asking for it later after the time for resolution has stretched out to almost three and one-half years with appeal and a new trial. Finally, I conclude that Delaware law applies to the question of pre-judgment interest. That means that under the governing Delaware statute, plaintiffs are entitled to prejudgment interest at the rate of 7.25%; under Delaware law, the amount is to be compounded annually.

1. Incidental, special or consequential damages

In support of its position that the contract between the parties bars an award of pre-judgment interest, defendant cites § 9.4.2 of the parties' Asset Purchase Agreement, which provides that:

In no event shall any party be liable to another party for any incidental, special or

> consequential damages of any nature, including but not limited to loss of profits, loss of use of the Assets or revenue, expenses involving cost of capital, or claims of customers, whether such damages are a result of breach of this Agreement or otherwise.

According to defendant, this provision makes it clear that the parties agreed that no party could recover compensation for loss of use of the benefit of the bargain, or in plaintiffs' case, for lost interest on payments due under the agreement.

Defendant assumes that prejudgment interest is a form of "incidental, special or consequential damages," but case law does not bear out its assumption. In Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358 (7th Cir. 1985), abrogated on other grounds by Salve Regina College v. Russell, 499 U.S. 225 (1991), for example, the court held that the plaintiff-seller could not recover as damages the cost of borrowing money to pay the cost of acquiring the product it had contracted to sell to the defendant-buyer. The court noted that the Uniform Commercial Code allows a seller to recover *incidental* damages when it is the victim of a breach of contract and that such damages include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." Id. at 1368 (citing UCC § 2-710, Wis. Stat. § 402.715). It concluded, however, that the loss of the money the plaintiff might have earned had it been able to sell the product was an opportunity cost that fitted

more comfortably under the heading of *consequential* damages, which were not available to a seller such as Afram Export. Therefore, the plaintiff was not allowed to recover damages for the opportunity cost.

It is notable, however, that this adverse holding did not prohibit the plaintiff from collecting an award of prejudgment interest, provided it could show that the amount could be calculated by "'a reasonably certain standard of measurement.'" Id. at 1371 (quoting Dahl v. Housing Authority, 54 Wis. 2d 22, 31, 194 N.W.2d 618, 623 (1972)). The same result was reached in Firwood Manufacturing Co. v. General Tire, Inc., 96 F.3d 163 (6th Cir. 1996), a case in which the plaintiff-seller sued the defendant-buyer for breach of a contract to purchase machines. The plaintiff had taken out a loan to cover the money lost by the breach. The district court held that the plaintiff was entitled to recover the cost of the interest paid on the loan as an element of the damage award; the court of appeals overturned this ruling, finding that Michigan law did not permit a court to award interest to a seller as incidental damages. Instead, the court of appeals found, the interest cost was in the nature of consequential damage and thus available only to a buyer. The court went on to find, however, that plaintiff was allowed to claim statutory interest from the date on which it filed suit, "even if, as a seller, it was not entitled to interest as a measure of damages under the U.C.C." Id. at 172. The Wisconsin court of appeals reached a similar result in Owens v. Meyer Sales Co., 129 Wis. 2d 491, 385 N.W.2d 234 (Ct. App. 1986). It characterized as

"incidental damages" the interest paid by a buyer on a bank loan obtained to purchase a truck and awarded such damages to the buyer when the truck turned out to fall far short of the representations made for it. Id. at 492, 385 N.W.2d at 235. (It appears that courts do not always agree on the precise meaning of the terms "incidental damages" and "consequential damages.") Of significance to the instant case, the state court disagreed with the seller that awarding the buyer the amount of his interest charges amounted to prejudgment interest for which there was no reasonably certain standard of measurement by which he could determine the amount owed. "Whether Owen could alternatively have made a claim for prejudgment interest is irrelevant since he is entitled to the interest as incidental damages." Id. at 494, 385 N.W.2d at 236.

Defendant cites an additional case, Trzcinski v. American Casualty Co., 953 F.2d 307, 315-17 (7th Cir. 1992), for the proposition that the courts will enforce contract provisions that extinguish a party's right to pursue prejudgment interest. Unlike this case, Trzcinski involved an insurance policy that provided explicitly that in any case in which liability was disputed, money paid under the policy did not become "due" until after final judgment was entered. Thus, the condition for starting the running of prejudgment interest never came into existence.

Although plaintiffs have not asked yet for post-judgment interest, defendant contends that they have no more right to such interest under the Asset Purchase Agreement than they

do to prejudgment interest. By signing an agreement that included the paragraph disclaiming any right to incidental, consequential or special damages, defendant asserts, they gave up their right to collect interest. This argument is no more persuasive than defendant's contention that plaintiffs waived their right to prejudgment interest when they signed the agreement. Neither kind of interest comes under the category of "incidental, special or consequential" damages under § 9.4.2 of the Asset Purchase Agreement or the Uniform Commercial Code.

The parties to a contract are free to make their own agreements about the substance of a contract. When it comes to pre and post-judgment interest, however, the courts and the public have a stake in the matter. The opportunity to seek prejudgment interest is a disincentive to prolonging litigation, General Motors Corp. v. Devex Corp., 461 U.S. 648, 656 n.10 (1983), and the availability of post-judgment interest is an aid to enforcing compliance with judgments without involving the courts.

2. Failure to move for prejudgment interest at end of first trial

Citing McKnight v. General Motors Corp., 973 F.3d 1366 (7th Cir. 1992), defendant argues that plaintiffs waived their right to prejudgment interest when they failed to ask for it after the jury in their first trial returned a verdict for them. In McKnight, which involved a long and drawn-out litigation of a federal race discrimination case, the plaintiff won an

award of compensatory and punitive damages in the district court. On appeal, the court of appeals affirmed only that part of the compensatory damages award that was based on back pay and remanded the case to the district court to re-consider whether the plaintiff was entitled to reinstatement or an award of front pay. The district court affirmed its prior order on reinstatement, declined to award front pay and denied a request for prejudgment interest on the ground that the plaintiff had failed to ask for it initially. The court of appeals affirmed on all grounds, holding that awards of prejudgment interest are a matter within the court's discretion and McKnight's delay in seeking prejudgment interest was a sufficient reason to affirm the district court's denial of the request.

Unlike plaintiffs, McKnight did not ask for prejudgment interest in his complaint. In this case, defendant has been aware since the beginning of this litigation that plaintiffs intended to seek an award of prejudgment interest if they prevailed. Defendant does not claim that it would have litigated the case differently had it known that plaintiffs would act to enforce the claim they had specified in their complaint. It says only that it "might have planned differently." Dft.'s Br., dkt. #170, at 2. It is unlikely that it would have refrained from taking an appeal from the first jury verdict; it filed the notice of appeal almost immediately upon the court's entry of judgment. Once the appeal was decided against plaintiffs, they had no basis on which to ask for prejudgment interest until they prevailed again before the jury.

I conclude that plaintiffs did not waive their right to seek prejudgment interest when they failed to ask for it immediately after winning the first time. By raising the request in their complaint and amended complaint, plaintiffs gave defendant fair notice that they believed they were entitled to such interest.

3. Applicability of Wisconsin or Delaware law

Plaintiffs have asked the court to award them prejudgment interest under Delaware law on the theory that the parties specified that Delaware law would apply to the interpretation of their agreement. Defendant believes Wisconsin law applies, citing an unpublished disposition of the Court of Appeals for the Sixth Circuit, Muglia v. Kaumagraph Corp., Nos. 93-1986/94-1156, 1995 WL 492933 (6th Cir. 1995), in which the court held that prejudgment interest related to the remedy only and was not covered by the parties' choice of Delaware law to govern the interpretation of the substantive contractual issues. "Prejudgment interest, however, relates to the remedy, and is not a matter of contract interpretation where the parties have not specifically included a clause stating that the statutory interest rate of a particular state will be used in calculating any interest payments made pursuant to the contract." Id. at *8.

Although the court's reasoning seems logical, most courts have taken the opposite view. E.g., Patton v. Mid-Continent Systems, Inc., 841 F.2d 742, 750 (7th Cir. 1988) (interpreting

Indiana law) ("the weight of authority elsewhere and the better view is that remedial issues are so bound up with substantive issues that they ought to be decided according to the same law that governs the substantive issues, see, e.g., Leflar, American Conflicts Law § 126 (3d ed. 1977)"); see also Century 21 Real Estate Corp. v. Meraj International Investment Corp., 315 F.3d 1271, 1281 (10th Cir. 2003) (parties' choice of New Jersey law to govern contract interpretation made New Jersey law the governing law for measure of damages; Valley Juice v. Evian Waters of France, 87 F.3d 604, 614 (2d Cir. 2000) (under Connecticut's choice of law principles, parties' contractual choice of New York law to govern their agreement also determined applicable prejudgment interest statute). The parties have not cited any Wisconsin case addressing the question; my own research has unearthed none. In the absence of any direction from the Wisconsin courts, I can only guess at what they would do. However, I think it is fair to assume that the state courts would be persuaded by the same reasoning that the federal circuit courts have adopted in recent years.

For the sake of completeness, I will mention defendant's contention that if the court were to undertake a choice of law analysis under Delaware law, it would determine that the forum state's law applies. I am not undertaking such an analysis because the parties made their own choice of law and both Delaware and Wisconsin recognize the right of parties to do so in cases like this one. Therefore, the only question is whether in such circumstances the parties' choice of law applies to a matter such as prejudgment interest that went

unmentioned in their contract. For the reasons discussed above, I conclude that it should. This conclusion makes it unnecessary to take up any choice of law analysis.

This is not the end of the interest issue. Defendant disagrees with plaintiffs that if Delaware law applies, the interest award should be compounded annually, as plaintiffs have requested. Defendant cites a number of cases in which the Delaware courts have declined to award compounded interest. None of these cases postdates the Delaware Supreme Court's decision in Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160 (Del. 2002), in which the court announced that although the Delaware courts "have traditionally disfavored compound interest, . . . 'the rule or practice of awarding simple interest, in this day and age, has nothing to commend it—except that it has always been done that way in the past.'" Id. at 173 (quoting Onti, Inc. v. Integra Bank, 751 A.2d 904, 929 (Del. Ch. 1999)).

Whether to award simple or compound interest remains a matter of discretion in the Delaware courts. Applying my discretion as I think a judge in a court in Delaware would, I find that an award of compound interest is proper in this case. Two different juries have found that defendant breached its obligation to plaintiffs to pay the second half of the purchase price ($1.5 million) due under the Asset Purchase Agreement. Plaintiffs have lost the use of that money since at least the date of filing of their complaint on February 26,

2003. Compounding the value of the money due will help restore plaintiffs to the position in which they were before defendant breached the agreement.

The parties agree that the amount due plaintiffs is $1,500,000 less the stipulated setoff of $92,500 or $1,407,550. They agree also that if Delaware law applies, the proper interest rate is 7.25%. Compounded annually, the amount of prejudgment interest due from February 26, 2003 until May 28, 2006 is $359,525. Interest accrues from May 28, 2006 until the date of judgment at the rate of $344.90 a day.

ORDER

IT IS ORDERED that plaintiffs CERAbio, LLC, and Phillips Plastics Corporation are awarded prejudgment interest on the amount due from defendant Wright Medical Technology, Inc.($1,407,550) in the amount of $359,535 calculated from February 26, 2003 until May 28, 2006 and additional interest at the rate of $344.90 a day from May 29, 2006 until the date of judgment. FURTHER, the clerk of court is directed to enter judgment in

favor of plaintiffs and close this case.

Entered this 13th day of June, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge