Ngiratkel Etpison Co., Ltd. v. Rdialul, 2 ROP Intrm. 211 (1991)
NGIRATKEL ETPISON COMPANY, LTD. (NECO),
Plaintiff/Appellant,

v.

ABBY RDIALUL dba ABBY'S MARINE,
Defendant/Appellee.

CIVIL APPEAL NO. 9-90
Civil Action No. 89-88

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: April 25, 1991

Counsel for Appellant: Douglas F. Cushnie

Counsel for Appellee: Kevin N. Kirk

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; ROBERT A. HEFNER, Associate Justice.

HEFNER, Associate Justice:

FACTUAL BACKGROUND

The trial court found that in 1984 the defendant possessed the only dealership in Palau for products of the Outboard Marine Corporation (OMC). This is significant because OMC produces Johnson and Evinrude motors which power many of the boats plying the waters of the Republic. In defendant's business he not only sold the products of OMC but he also repaired engines brought to him for service.

The defendant purchased various items from plaintiff on credit and an open revolving account was established. In ⊥212 1984, conversations between representatives of the plaintiff and the defendant occurred about the defendant transferring his inventory of engines and parts and the OMC distributorship to the plaintiff in exchange for service work which the plaintiff would have defendant perform.

On January 18, 1985, the plaintiff and defendant executed an agreement which was admitted into evidence as Exhibit 6. Essentially, this agreement contains eight paragraphs which set forth the arrangement for sales of certain parts and engines and for service work to be performed by the defendant at certain rates.

On February 28, 1985, the parties signed a second agreement which related to the transfer of defendant's inventory and the payment by the plaintiff. This agreement is Exhibit 7.

In March of 1988, the plaintiff filed suit for over $25,000 for goods sold and delivered to the defendant on the open account from August, 1983 to May, 1986. This shot across the bow caused the defendant to return fire with a counterclaim for the plaintiff's failure to pay for the engines and parts, damages for goods and services rendered at plaintiff's request, and for lost profits under the January, 1985 agreement.

The trial court found the defendant owed the plaintiff $442.20 on the open account but that the plaintiff owed $20,942.24 for the engines and parts delivered to plaintiff in 1985; $3,808.53 for the goods and services defendant provided ⊥213 plaintiff between December, 1984 and July, 1986; and $26,547.64 for lost profits under the 1985 agreement. In addition, the court assessed $1,256.81 against the plaintiff for attorney's fees based on the invoices defendant billed the plaintiff for the goods and services.

ISSUES PRESENTED

The appellant raises three issues on appeal. First, it is argued the defendant failed to establish a claim for lost profits. Second, the plaintiff attacks the judgment of the trial court for compounding pre-judgment interest. Lastly, the plaintiff asserts the evidence is insufficient to show the plaintiff failed to pay the defendant under the February 28, 1985 contract. Thus, the lens of our inquiry narrows to focus on only these issues and we need not re-visit many of the other claims and counterclaims. We address the last two issues first as they can be disposed of rather quickly.

DID THE TRIAL COURT COMPOUND THE PROBLEM BY COMPOUNDING PRE-JUDGMENT INTEREST?

That the prevailing party is entitled to pre-judgment interest is not disputed. The trial court used the 9% figure allowed in 14 PNC § 2001 but compounded it annually from the due date of the particular amount found owing to the other party up to the date of judgment. The defendant argues this was within the discretion of the trial court.

There is no statutory authority for compounding pre-judgment interest. Indeed, the

Restatement, Contracts ⊥214 Second, § 354[1] dictates only simple interest is allowable.[2] Comment (a) to § 354 specifically states the interest ". . . is payable without compounding the rate, commonly called the 'legal rate,' fixed by statute for this purpose."[3]

Pre-judgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered. *West Virginia v. United States* , 479 U.S. 305, 310, 107 S.Ct. 702, 706 (1987). Compound interest is generally not awarded as damages, although the parties may contract for such or a statute may provide for it. *Cherokee Nation v. United States* , 270 U.S. 476, 490, 46 S.Ct. 428, 433; 47 C.J.S. § 71.

⊥215 A statute may change the common law or American rule that pre-judgment interest is not compounded. *Stovall v. Illinois C. G. R. Co.* , 722 F.2d 190 (CA5 1984); *Smith v. JBJ, Ltd.* , 694 P.2d 352 (Colo. 1984).

Against this array of authorities, the defendant asks this panel to put its judicial stamp of approval on the award of compound interest. We decline the invitation. This is a matter for the legislature.

We conclude it was proper for the court to allow pre-judgment interest but only at the legal rate of 9% and not compounded.

WAS NON-PAYMENT BY THE PLAINTIFF PROVEN BY THE DEFENDANT?

The plaintiff argues the defendant failed to prove the plaintiff did not pay the defendant for the engines and parts inventory transferred pursuant to the February, 28, 1985 contract. This argument has no merit and we need only point out that a review of the testimony of the defendant was more than sufficient for the trial court to find the plaintiff did not pay defendant for the

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[1] Section 354 reads:

> "(1) If the breach consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.
>
> (2) In any other cases, such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due."

[2] Pursuant to 1 PNC § 303, the rules of the common law as expressed in the restatements of law as expressed by the American Law Institute shall be the rules of decision for the court unless there is other specific statutory authority.

[3] In the other instances where interest, as damages, is discussed in the Restatement, it is clear compound interest is allowed only in specific circumstances such as when a trustee or fiduciary commits a breach of trust and the trustee received compound interest on the assets he took from the trust. Restatement, Second, Trusts § 207; Restatement, Second, Torts § 913, comment b; Restatement, Restitution § 156, comment b.

inventory defendant delivered to the plaintiff.

LOST PROFITS OR LOST CAUSE?

Defendant bases his claim for lost profits on Exhibit 6, the January 18, 1985, written agreement between plaintiff and defendant.

There are eight paragraphs in the document. Paragraphs 1, 2, and 3 provide that the plaintiff agrees to ⊥216 sell motors, parts, and other marine supplies to defendant at certain discounted prices. These paragraphs do not form any basis for a claim of lost profits by defendant since the only obligation was on the plaintiff to sell certain items to defendant at certain prices. The defendant was not obligated to purchase any of these items from plaintiff.

Paragraphs 6, 7, and 8 involve agreements by which the defendant agreed to sell goods to the plaintiff at certain discounts and, if defendant ever chose to purchase outboard engines, to purchase them exclusively from plaintiff. The mere fact that the defendant agreed to sell parts and supplies to the plaintiff and further agreed to purchase all engines from the plaintiff, does not form any basis for a claim of lost profits by defendant.[4]

Therefore, by process of elimination, defendant's claim of lost profits must stem from the provisions of paragraphs 4 and 5. These paragraphs state:

> 4. NECO agrees to allow Abby's Marine to do all major service work to the NECO Boat Engines. Abby's Marine will ⊥217 provide service at 10% off the regular retail price, plus parts.
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> 5. Abby's Marine agrees to provide monthly engine tune-ups for all NECO Boat Engines at the rate of $20.00 per engine. The work should take no more than one day per boat. Tune-up includes: check plugs, gear oil, retorque head, clean and lube engine, and steering and clean boat.

A. Standard of Review.

The trial court interpreted paragraphs 4 and 5 of the January 18th agreement as an exclusive contract whereby the plaintiff had no choice but to have defendant perform the services outlined in those paragraphs. Generally, the interpretation or construction of contracts are matters of law for the court. 75 Am.Jur.2d, Trial §§ 395, 408. Whether the contract is ambiguous to an extent that would permit extrinsic or parol evidence of the content of the contract is also a question of law. In reviewing such a determination, the appellate court is not

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[4] This court's analysis of paragraphs 1, 2, 3, and 6, 7, 8 comports with that of the defendant and his counsel. Counsel conceded the only "exclusive" contract was encompassed in paragraph 8. There was no exclusiveness as to parts. The defendant agreed with this assessment - TR:352-353. "The Court: Was that your understanding in other words, that you weren't required to buy your parts and accessories and marine supplies, but if you did they would give you at a discount? A. Yes."

bound by the clearly erroneous standard of review. *Re Stratford of Texas, Inc.* , 635 F.2d 365 (CA5, 1981). Therefore, we review the trial court's interpretation of a contract de novo and we may interpret the contract language by our own independent examination. *SNS Contractors v. Algernon Blair, Inc.*, 892 F.2d 430, 433 (5th Cir. 1990).

B. Paragraph 5 - The Tune-up.

A plain reading of paragraph 5 does not support the conclusion that the plaintiff obligated itself to have defendant perform all of its engine tune-ups. At most, paragraph 5 ⊥218 obligated the defendant to perform the services when and if the plaintiff gave defendant the work. It would have been a simple matter to insert wording which would have given the defendant the right, to the exclusion of all others, to perform the tune-up work on plaintiff's engines but this was not done.

In simple contract terms, the defendant promised to perform a service for plaintiff at a certain rate. There was no promise by the plaintiff to use the services of the defendant but if such were the case, the plaintiff then had to pay at the rate offered by defendant. Until the plaintiff accepted the offer of the defendant by requesting tune-up services, the plaintiff was not obligated in any way.

The defendant argues that extrinsic evidence is available to explain the meaning of paragraph 5, particularly since the word "all" in the paragraph indicates the plaintiff had to have defendant do the tune-up work. Even if this were the case, a review of the transcript reveals the defendant provided no such evidence.[5]

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[5] The transcript has repeated references as to what the defendant was to attain from the contract.

Q "And what did he (plaintiff's representative) indicate he would be giving as consideration for giving up this dealership?

A: They told me that they promised to have me service their every engines they were selling, they promised me that I'll be the one to do the repairs or service them.

Q: So you are saying that they wanted to take over the retail aspects of it and wanted to give you the service aspects of the OMC business here in Palau, is that correct?

A: Yes. " TR: 202:2-12.

A: ". . . they guaranteed me that I would be invited in repairing their boats, so that's why I agreed." TR: 200:20-23. (emphasis added)

Q: "Did Mr. Adams (plaintiff representative) tell you why he wants to develop business . . . for his employer."

A: He didn't tell me but, I think or what went through my mind at that time was if I

The defendant's own "testimony" is nothing more than what he thought he was getting or how he interpreted the ⊥219 agreement and not what the plaintiff promised other than what the plaintiff was willing to provide defendant for service work on engines the plaintiff sold. In short, even accepting the defendant's version of paragraph 5 does not support a conclusion that the plaintiff was required to have defendant perform all tune-up service work on plaintiff's engines. Thus, paragraph 5 provides no basis for a cause of action for loss of profits because the defendant was not contractually entitled to the work for which he claims the profit loss.

⊥220 **C. Paragraph 4 - Overhauls for Over What Period of Time?**

Turning to paragraph 4, the court's interpretation that the plaintiff, in effect, was required to give defendant the major service work appears to be correct. Contrary to the wording in paragraph 5, the plaintiff agreed to have defendant do all this type of work. "Major service work" was explained to be overhauls of engines.

Through certain computations such as the number of engines the plaintiff had, the running hours of the engines and the charges for services, the defendant estimated he would make a profit of $900 per year on a certain size of engine, [6] and a different profit on smaller and larger engines.

To prove a claim for lost profits a party must show three things:

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get this one with the contracts or agreements that they have given me it was going to be easier for me and I didn't think that it was going to be -- ok, I didn't think that the contract won't be put into effect." TR: 207:9-18.

In the specific discussion as to paragraph 5 of Exhibit 6, the defendant stated it was ". . . suppose to give me guarantee for my services to perform services for them and also labor in a month for every month . . . . That's what came to my mind first, that at least every month I was guaranteed some amount of money." TR: 210:5-17.

Q: "So it was your understanding that every month you will provide a Tune-up for every one of their engines that they had operating for them at the time?

A: Yes." TR: 215:17-21.

[6] "Q: So on each of those engines (150 horsepower), if they would have given you the major service as they promised, at least three times a year you would have expected to do a overhaul?

A: Yes.

Q: $900 per engine total profit per year?

A: Per year." TR: 265:15-21.

The bigger engines the profit was calculated to be more and for smaller engines, less.

1. That the lost profits can be proved with a reasonable degree of certainty; and

2. That the wrongful act of defendant caused the loss of profits; and,

⊥221 3. That the profits were reasonably within the contemplation of the defaulting party at the time the contract was made.

22 Am.Jur.2d, Damages § 625, pp. 684-85 (1988).

Defendant's claim for lost profits must fail for three reasons. First, even construing paragraph 4 of the January 18, 1985, agreement as an exclusive contract, obligating plaintiff NECO to have only defendant perform "major service work" and requiring defendant Abby Marine to perform the work specified for the price indicated, the agreement contains no termination date. Generally, a contract for services which does not specify the duration of the contract is terminable at will by either party at any time. *See, e.g., Augusta Medical Complex, Inc. v. Blue Cross of Kansas, Inc.* , 608 P.2d 890, 895 (Kan. 1980) ("A review of contract law reveals a traditional distaste for contractual rights and duties unbounded by definite limitations of time." Citations omitted.); *Barton v. State of Idaho* , 659 P.2d 92, 94 (Idaho 1983) ("Absent clear manifestation to be perpetually bound, we will not infer such intent."); *Wickham v. Belveal* , 386 P.2d 315, 317 (Okla. 1963). Because the agreement lacks this element, the court is unable to establish with reasonable certainty any lost profits, since the duration of time during which profits were allegedly lost cannot be established. Thus, defendant cannot satisfy the first of the three prongs of the "lost profits" test.

Second, at most defendant had only an expectation that ⊥222 plaintiff would in the future send him engines to overhaul. Defendant testified to his own estimates as to the number of engines plaintiff owned and the nature and frequency of the type of repair and maintenance they might require. None of this information was included in the written agreement. Parol evidence can only be introduced where the terms of the contract are ambiguous. Parol evidence may not be introduced to alter or vary a complete, unambiguous sales agreement. *E-Z Livin' Mobile Homes, Inc. v. Tommaney*, 550 P.2d 658 (Ariz. App. 1976). Here, however, parol evidence is not truly involved since defendant's testimony referred only to his own subjective beliefs regarding the quantity of new business he hoped to enjoy as a result of the agreement with plaintiff. This is not "evidence" which can be accepted by the court and used to gauge lost profits; it is simply too conjectural and speculative.

Finally, even though defendant may have been able to foresee a reasonable expectation of some profits to him as a result of its agreement with the plaintiff, there was a lack of specificity in the agreement and a lack of admissible evidence at trial on this issue. Thus, the court is not in a position to impose on plaintiff the further burden of having to pay defendant's lost profits when those profits cannot with reasonable certainty be calculated.

CONCLUSION

In summary, we AFFIRM the court's finding that the plaintiff did not pay defendant for the latter's inventory, we ⊥223 REVERSE the award for lost profits, and REMAND to the trial court for computation of pre-judgment interest on a simple basis and not compounded.