

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-348

MARCH TERM, 2006

SMM Realty, Inc.

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APPEALED FROM:

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v.

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Chittenden Superior Court

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Sisters & Brothers Investment

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DOCKET NO. S0540-02 CnC

Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

Defendant Sisters & Brothers Investment Group appeals from a superior court order granting an award of prejudgment interest to plaintiff SMM Realty based on an underlying judgment and damage award in favor of SMM. Sisters & Brothers contends the court erred because: (1) the award was barred by principles of res judicata, collateral estoppel, and law of the case; (2) the underlying damage award was not capable of ready ascertainment; and (3) the court calculated interest at 12% per year rather than the 4% requested by SMM. We affirm.

This is the second appeal in this matter. In the original appeal, we affirmed the trial court's judgment and award of \$50,193.25 in favor of SMM, but remanded for the trial court to address SMM's claim for prejudgment interest. See SMM Realty, Inc. v. Sisters & Brothers Inv. Group, No. 2004-415, slip op. at 3 (Vt. Feb. 18, 2005) (unreported mem.). Following our remand, the court issued a written decision, concluding that SMM was entitled to an award of prejudgment interest. Thereafter, the court issued a judgment order awarding prejudgment interest in the amount of \$27,835.50. This appeal followed.

The underlying facts are fully set forth in our original decision and need only be summarized here. SMM agreed to sell a service station to Sisters & Brothers for \$232,000. The property, however, was encumbered by substantial debt. To reduce the encumbrance, Sisters & Brothers began purchasing the debt at a discount. Later, the parties entered into an addendum agreement providing that the purchase agreement would be reduced by expenses incurred by Sisters & Brothers in clearing the title. In a subsequent breach-of-contract action by SMM for the purchase price, the court interpreted the addendum agreement to require an offset to the original purchase price in an amount totaling \$181,806.75, and entered judgment for SMM in the amount of the difference, or \$50,193.25.

As noted, we affirmed the judgment on appeal, but, as to SMM's claim for prejudgment interest, concluded as follows: AThe trial court did not address SMM's claim for interest, however. We do not know whether it rejected SMM's claim or simply overlooked it. Therefore, we remand SMM's claim for prejudgment interest for the trial court's determination in the first instance.@ Id.

On remand, the court concluded that the damage award was reasonably ascertainable, and that SMM was therefore entitled to prejudgment interest. The court subsequently issued a judgment order awarding prejudgment interest of \$27,193.25, calculated at 12% per annum. This appeal followed.

Sisters & Brothers first contends that, notwithstanding this Court's express instruction to the trial court to address the issue on remand A in the first instance,@ the award of prejudgment interest was barred because it had been previously denied by the court. Sisters & Brothers relies on a handwritten comment by the trial court

in the margin of SMM=s objection to the judgment order that Sisters & Brothers had submitted following the court=s original decision. SMM objected to the proposed order on the ground that it did not allow for interest from the time of the breach to the entry of judgment. The court=s handwritten comment states, ADef. not allowed interest for delays he caused.@ Sisters & Brothers asserts that the court mistakenly referred to ADef.@ when it meant plaintiff, and that, in effect, the note represented a merits ruling by the court rejecting prejudgment interest, a ruling that was not brought to this Court=s attention by either party in the original appeal.

Sisters & Brothers thus argues that SMM is barred from relitigating the issue under principles of res judicata, law of the case, and collateral estoppel. The argument is unpersuasive. Apart from the question whether the court=s note constitutes an actual ruling on the merits, Sisters & Brothers cites no authority for the proposition that res judicata or collateral estoppel bars relitigation where, as here, the aggrieved party has raised an issue on appeal and the reviewing court, mistakenly or not, concludes that the matter has not been addressed below and remands for the trial court=s consideration. As for the law of the case, we have explained that this doctrine, which generally holds that a ruling on a point of law should govern in subsequent stages of the same case, is merely a Arule of practice from which the court may depart in a proper case.@ Morrisseau v. Fayette, 164 Vt. 358, 364 (1995) (quotations omitted). Given the uncertain nature of the trial court=s original margin note, and this Court=s express mandate to consider the issue on remand, we have no doubt that this was such a Aproper case.@

Sisters & Brothers next contends the court erred in awarding prejudgment interest where the amount owed was allegedly the subject of considerable uncertainty and dispute. We review such awards for abuse of discretion, and will not disturb the trial court=s ruling unless it appears that the court entirely withheld its discretion or that it exercised discretion for clearly untenable reasons. Remes v. Nordic Group, Inc., 169 Vt. 37, 39-40 (1999). APrejudgment interest may be awarded as damages for detention of money due for breach or default.@ Bull v. Pinkham, 170 Vt. 450, 463 (2000) (quotations omitted). Such interest is awarded as of right when the principal sum recovered is liquidated or capable or ready ascertainment. Id. The principal rationale for an award as of right is that, where the damages are ascertainable, the defendant can avoid the accrual of interest by simply tendering a sum equal to the amount of damages. Id. Moreover, even where

damages are not readily ascertainable, the trial court maintains the ability to award prejudgment interest in a discretionary capacity to avoid injustice. @ Estate of Fleming v. Nicholson, 168 Vt. 495, 500 (1998).

Here, although the precise amount to be offset from the original purchase price was disputed, Sisters & Brothers could have avoided the accrual of interest by tendering either the original purchase price (\$232,000), as SMM had demanded, or the balance owed after deduction of the full amounts expended to clear title, as urged by Sisters & Brothers at trial and ultimately found by the trial court. Indeed, Sisters & Brothers acknowledges on appeal that it claimed to owe a total of \$51,679.20, which was almost precisely the amount determined by the trial court to be owed. Although Sisters & Brothers asserts that it tried to pay SMM such an amount, it cites nothing in the record to support the claim. Thus, we cannot conclude that the court abused its discretion in determining that SMM was entitled to prejudgment interest.

Sisters & Brothers further contends the court erred in calculating interest at the statutory rate of 12% per year rather than at the rate of 4%, which was the amount SMM had requested in its objection to Sisters & Brothers proposed judgment order. We have held that, A[w]hen a debt becomes payable, if the contract does not stipulate a rate of interest, the statutory or legal rate applies. @ New Eng. P=ship v Rutland City Sch. Dist., 173 Vt. 69, 78 (2001) (quotations omitted). Sisters & Brothers does not assert that SMM contractually agreed to a lower rate of interest, and has cited no authority for the proposition that a request for a lower rate preempts the statutory rate, or that SMM is somehow estopped from asserting the legal rate. We note, moreover, that SMM requested the statutory rate of 12% when the court addressed the matter on remand.

Finally, Sisters & Brothers claims that the court erred in issuing a judgment order for \$27,835.50 in prejudgment interest, rather than amending the prior order to include an award of prejudgment interest on the principal amount of \$50,193.25. Sisters & Brothers speculates that this may influence SMM to seek interest on the prejudgment interest incurred during the pendency of the appeal. The claim is not ripe, and in any event is better addressed to the trial court in the event that SMM files such a request.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice