CITATION: ID Inc. v. Toronto Wholesale Produce Association, 2024 ONSC 158
COURT FILE NO.: CV-16-00564151
DATE: 20240109

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ID INC.	)	*James Zibarras* and *Richard MacGregor*, for the Plaintiff
Plaintiff	)	
- and -	)	
	)	
TORONTO WHOLESALE PRODUCE ASSOCIATION and STRATEGYCORP.	)	*Timothy M. Morgan* and *Jennifer Lake*, for the Defendant Toronto Wholesale Produce Association
	)	
Defendants	)	*Robert Bell*, for the Defendant StrategyCorp.
	)	
	)	**HEARD:** December 15, 2023

MERRITT J.

REASONS FOR DECISION ON PRE- AND POST-JUDGMENT INTEREST RATE

OVERVIEW

[1] This case proceeded to trial before me from March 13 to April 4, 2023. On August 25, 2023, I rendered a decision and found that the Toronto Wholesale Producer's Association's (the "TWPA") breached the terms of the Sale and Maintenance Agreement between the parties dated March 28, 2013 (the "SMA"). I awarded damages for breach of contract being lost profits on the construction component of the SMA in the amount of $277,614 plus damages for loss of the maintenance portion of the SMA for ten years based on expenses of an average of $6,000.00 per year using a discount rate of 5 percent ("maintenance damages"). I said that if the parties could not agree on the quantum of the maintenance damages, they could make further submissions in writing on or before September 29, 2023. The parties have agreed on the sum of $672,285.00 for the maintenance damages. The total damages are therefore $949,899.00.

[2] The issues of pre- and post-judgment interest and costs were left to be determined after the damages were fixed.

[3] The plaintiff now seeks an order awarding it pre- and post- judgment interest at the contractual interest rate of 26.8% per annum from September 2016 to August 25, 2023 in the amount of $1,803,244.94; and, if necessary, an order for leave to amend the Amended Statement of Claim to make this claim.

[4] I heard a full day motion with oral and written submissions on December 15, 2023 on the issue of ID Inc.'s entitlement to pre- and post- judgment interest at the contractual interest rate.

[5] The Amended Statement of Claim in this action seeks damages in the amount of $5,000,000.00 for breach of contract and other causes of action. The prayer for relief also seeks:

> (d) prejudgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
>
> (f) such further and other relief as this Honourable Court may deem just.

[6] The TWPA's Statement of Defence does not dispute that the SMA is valid and binding; in fact, the TWPA relies on the term of the SMA providing for automatic termination if a permit is not obtained within 360 days of execution.

[7] The SMA was marked as Exhibit 2 at trial.

[8] Clause 12 of the SMA, entitled "Default", provides that if the TWPA defaulted on payments owing under the SMA, interest would accrue at 26.8% per year (the "Default Clause"):

> 12. DEFAULT If [TWPA] files for bankruptcy, becomes insolvent, has a receiver appointed or defaults in the making of any payment or the performance of any of the terms, covenants, conditions, and obligations hereunder, the balance of the purchase price outstanding shall become due and payable forthwith at the option of [ID] and [ID] may, without notice or process of law, commence in [sic] action to recover the outstanding purchase price or retake possession and sell the Display in any manner it deems expedient and [TWPA] shall be liable for all expenses incurred by [ID] including legal fees and disbursements. Thereafter, [TWPA] shall be credited with the proceeds of such sale and charge for all costs, charges and expense incurred in connection therewith and [TWPA] agrees to forthwith pay any resulting deficiency in the purchase price to [ID] after all credits and charges have been made. **All unpaid amounts due under this agreement shall bear interest at the rate of 2% per month calculated monthly for an effective annual rate of 26.8% from the date of default.** If [TWPA] is a corporation, it agrees that,

> notwithstanding any statutory provision to contrary, [ID] may, on the occurrence of a default by the [TWPA], retake possession of the Display and commence legal proceedings to recover any deficiency owing to [ID] after a sale of the Display in accordance with the terms of this Agreement. (emphasis added and TWPA and ID substituted for Purchaser and Vendor respectively).

[9] At trial, the TWPA did not contest the validity of the SMA, rather, the TWPA said the SMA expired when the plaintiff did not obtain a permit within 360 days of its execution. I found that the SMA did not automatically terminate because ID did not fail to get a permit and was not unable to do so. Rather, the TWPA waived this condition or was estopped from relying on it and breached the SMA.

POSITIONS OF THE PARTIES

[10] The plaintiff submits that it is entitled to pre- and post-judgment interest at the contractual interest rate in the Default Clause of the SMA of 26.8% per annum ("contractual interest rate") because even where a contractual interest rate is not specifically pleaded and the pleadings are not amended to included contractual interest, the court has jurisdiction under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") to award contractual interest.

[11] The plaintiff says the Default Clause containing the contractual interest rate was the subject of evidence and findings during the trial; specifically, TWPA's evidence was that the Default Clause was expressly negotiated and the TWPA relied on this and other negotiated terms of the SMA in executing it. The plaintiff says that if an amendment is required, there is no prejudice to the defendant TWPA because the SMA agreement and its terms set out therein were the subject matter of evidence and findings during the trial, TWPA admitted that it considered the negotiated terms to be important, the SMA was central to the action since its commencement.

[12] The TWPA submits that ID Inc. never sought to rely on the contractual interest rate in its pleading, in its opening statement, or in its oral or written closing submissions. It did not lead any evidence on the contractual interest rate at trial. ID Inc. does not meet the test for leave to bring the motion having presented no reason why the amendments are sought only after trial. The TWPA says that it will suffer presumed and actual prejudice if ID Inc. is allowed to amend its claim.

[13] StrategyCorp. takes no position on ID Inc.'s claim for interest.

DECISION

[14] ID Inc. is entitled to pre- and post-judgment interest at the contractual interest rate of 26.8% in the amount of $1,803,244.94.

ANALYSIS

[15] There are three issues:

> Issue 1: Is ID Inc. entitled to the contractual interest rate without amending its pleading?

Issue 2: If the answer to Issue 1 is no, should ID Inc. be granted leave to bring a motion to amend? and

Issue 3: Should ID Inc. be allowed to amend its pleading?

Issue 1: Is ID Inc. entitled to contractual interest without amending its pleading?

[16] Section 128 (1) of the *CJA* provides for pre-judgment interest ("PJI") at the prescribed rate. Section 128 (4)(g) provides that interest is not awarded under ss. (1) "where interest is payable by a right other than under this section." Section 129(5) has a similar provision with respect to post-judgment interest.

[17] "The courts have the jurisdiction to award pre-judgment and post-judgment interest at both common law and equity. Sections 128(4)(g) and 129(5) of the *CJA* allow courts to award interest by means of these powers as a substitute for the interest prescribed by those sections": *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, at para. 62.

[18] Section 130 of the *CJA* provides:

> (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (a) disallow interest under either section;
> (b) allow interest at a rate higher or lower than that provided in either section;
> (c) allow interest for a period other than that provided in either section.
>
> (2) For the purpose of subsection (1), the court shall take into account,
>
> (a) changes in market interest rates;
> (b) the circumstances of the case;
> (c) the fact that an advance payment was made;
> (d) the circumstances of medical disclosure by the plaintiff;
> (e) the amount claimed and the amount recovered in the proceeding;
> (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
> (g) any other relevant consideration.

[19] Sections 128(4)(g), 129(5) and 130 *CJA*, each allow the court to award interest other than at the rates specified in sections. 128 and 129. These sections indicate that the rates and calculation methods of interest provided in sections 128 and 129 are applicable in the absence of more appropriate rates and methods of calculation. Section 130 allows a court to vary the interest rate or the period for which interest may be awarded where it is just to do so. Sections 128(4)(g) and 129(5) allow a court to award pre-judgment and post-judgment interest, respectively, where interest is payable by another right: *Bank of America Canada* at para. 40.

[20] In *Bank of America*, in determining a right to compound interest as opposed to the rates prescribed by the *CJA*, the SCC said at para. 55:

> An award of compound pre- and post-judgment interest will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages.

[21] Contract law entitles the plaintiff to the full value of the benefit of the bargain at the time payment is finally made. Where the parties have agreed on an interest rate, it is fair for the court to have the power to award that rate for pre-and post judgment interest: *Bank of America Canada*, at para 50.

[22] In the present case, the parties agreed and knew or should have known that the SMA interest rate would apply. ID Inc. pled the breach of the SMA, and claimed pre- and post-judgment interest. The TWPA did not dispute the validity of the SMA in its pleading or at trial, and in fact, led evidence that there was negotiation on the Default Clause, that the changes to it were important and specifically cross-examined the principal of ID Inc. Paul Kenny ("Kenny") on the 26.8% interest rate at trial. It cannot be said that the contractual interest rate was not within the contemplation of the parties.

[23] The TWPA says the contractual interest rate only applies to unpaid amounts due under the agreement with regard to any deficiency after selling the sign, or alternatively, only to unpaid amounts due under the agreement generally and should not be applied as a rate for pre- or post-judgment interest on damages for breach of contract.

[24] The language of the Default Clause is clear. All unpaid amounts due under the SMA bear interest at the rate of 2% per month calculated monthly for an effective annual rate of 26.8% from the date of default. This provision is not limited to deficiencies after taking possession of and selling the sign. There is no other provision in the contract for interest on unpaid amounts due. It would not make sense for the contractual interest rate to apply only to amounts owing under the construction component of the SMA after ID. Inc. has mitigated its damages by selling the sign, and not the maintenance component on the SMA.

[25] There is no reason to apply a different rule because ID Inc. has been awarded damages for breach of contract as opposed to demanding payment for services rendered under the contract. The damages awarded are the payments due under the SMA less the expenses, discounted to reflect that ID. Inc. is being compensated all at once rather than over the life of the SMA.

[26] Generally, courts should give effect to interest rates contained in an agreement unless the terms are vague, unclear or infringe a statutory provision such as the *Interest Act*, R.S.C., 1985, c. 1-15: *Capital One Bank v. Matovska; Capital One Bank v. Blackwell; Capital One Bank v. Semple*, 2007 CanLII 37015, at para. 13 and *Gyimah v. Bank of Nova Scotia*, 2013 ONCA 252, at para. 10. Absent exceptional circumstances, it is appropriate and fair to use a contractual interest rate to which the parties have agreed: *Bank of America Canada* at paras. 49-50, *Professional Court Reporters Inc. v. Pistachio Financier Corp.*, 2022 ONCA 669.

[27] There are no exceptional circumstances and it is appropriate and fair to use the contractual interest rate to which the parties have agreed.

[28] In some cases, when considering whether to apply a contractual interest rate that was not pled, courts have said they would have granted an amendment, if necessary, but have not actually amended the pleading: *Robert McAlpine Ltd. v. Woodbine Place Inc.*, [1998] O. J. No. 2518, at para. 7, *Bank of America Canada*, at paras. 13 and 14.

[29] I find that it was sufficient for the plaintiff here to plead the breach of the SMA and a claim for interest pursuant to the *CJA* and an amendment to the claim is not necessary. However, in the event that I am wrong, I will consider whether I would have granted leave to amend the claim.

[30] I was not referred to any case where the court relied on section 130 to apply a contractual interest rate. In *Bank of America Canada*, the trial judge did rely on section 130 but the SCC held that sections. 128(4)(g) and 129(5) provide the statutory authority to award compound interest which is payable according to the court's common low power to award damages for breach of contract. In view of my finding that ID Inc. is entitled to the contractual interest rate under the common law right to damages for breach of contract, and the exceptions under ss. 128(4)(g) and 129(5) apply, it is not necessary for me to consider whether I would exercise my discretion under s. 130.

Issue 2: should ID Inc. be granted leave to bring a motion to amend?

[31] Rule 48.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that a party who sets an action down for trial may not initiate a motion without leave of the court.

[32] Rule 26.01 provides:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[33] The test under r. 48.04 is the subject of some disagreement. Some courts have required a change in circumstances, others have determined that leave should be granted if the motion is necessary in the interests of justice, and some courts have considered both a change in circumstances and the interests of justice: *Horani v. Manulife Financial Corporation,* 2023 ONCA 51, at paras. 16-19.

[34] When considering whether to grant leave under r. 48.04 to bring a motion to amend pleadings, the court considers the broad and mandatory language of r. 26:01: *Woodhouse v. Snow Valley*, 2021 ONSC 2449 (CanLII), at para. 12. The mandatory language of r. 26.01 defines the scope of the exercise of the court's discretion to grant leave to bring a motion to amend a pleading under r. 48.04(1): *Horani v. Manulife Financial Corporation*, 2023 ONCA 51, at para. 20.

[35] In this case, there has been no change in circumstances but it is necessary, in the interests of justice, to grant leave to bring the motion to amend because the existence and breach of the SMA was pled, the TWPA did not deny the validity of the SMA, there was evidence led at trial

about the contractual interest rate and I found a breach of the SMA at trial. I find that the interests of justice require me to consider whether the amendment should be granted under r. 26.01 and whether there is non-compensable prejudice to TWPA.

Issue 3: Should ID Inc. be allowed to amend its pleading?

[36] Rule 20.01 is mandatory and does not impose any limit on the time for bringing a motion to amend pleadings. Rule 26.06 specifically contemplates amendment of a pleading at trial.

[37] This court has allowed amendments at trial (even after many days of evidence), at the conclusion of trial and on appeal where the defendants were not taken by surprise or prejudiced: *Dagarsho Holdings Ltd. v. Bluestone*, 2004 CanLII 11271, at para. 68 aff'd on appeal at *Dagarsho Holdings Ltd. v. Bluestone*, 2005 CanLII 39321, at para. 16. The timing of the motion is not, in and of itself, relevant. Rather it is the prejudice that must be considered: *Auto Workers' Village (St. Catharines) Ltd. v. Blaney, McMurtry, Stapells, Friedman*, 1997 CarswellOnt 3739.

[38] In this case, the amendment sought is consistent with some of the evidence adduced at trial and the Reasons for Judgment: *Lobsinger y Zeleny*, 2016 ONSC 7441, at paras. 23-31; *Hale v. Innova Medical Ophthalmics Inc.*, 2018 ONSC 1551, at para. 6; *Cardwell v. Devley Manufacturing* Ltd. et al., 1977 CanLII 1076, at para. 7.

[39] The real issue is whether there is prejudice.

[40] In some cases, prejudice may be presumed; for example, where the delay is extremely long and the justification inadequate or where a limitation period has expired. The onus to rebut presumed prejudice lies with the moving party. If actual prejudice is alleged, the onus to prove actual prejudice is on the party opposing the amendment and the prejudice should be sufficiently particularized in evidence to allow the court to take a hard look at the merits: *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42, at para. 25, citing *Haikola v. Arasenau*, 1996 CanLII 36, at paras. 3-4; and *Plante v. Industrial Alliance Life Insurance Co.*, 2003 CanLII 64295 (ON SC), at para. 21.

Presumed Prejudice

[41] In this case, assuming an amendment is required, the delay is long. ID Inc. commenced its action in November 2016. Discoveries were conducted in 2017. ID Inc. amended its claim in December 2018. It set the case down for trial in July 2020. The trial occurred from March 13 to April 4, 2023. The reasons were released in August 2023. There has been no justification or explanation offered. Given the length of the delay and the lack of explanation, prejudice is presumed. ID Inc. bears the onus of rebutting presumed prejudice. ID Inc. has rebutted the presumption of prejudice since the TWPA has known about the contractual interest rate from the outset as set out at paras. 23 and 36 above.

Actual prejudice

[42] The TWPA says it has suffered actual prejudice because it did not know that ID Inc. was pursuing contractual interest.

[43] The TWPA did not file any affidavit evidence on the motion to demonstrate prejudice. Rather, its counsel made submissions about how he would have run the case differently had he known that ID Inc. would be advancing a claim for pre-and post- judgment interest at the contractual rate.

[44] At trial, ID Inc.'s position was that the SMA memorialized the construction and maintenance portions of the alleged oral agreement and, to the extent that the SMA contained more terms than the alleged oral agreement, these additional terms were mere details. The TWPA says had it known that ID. Inc. was pursuing the contractual interest rate, it would have cross examined Kenny on whether the contractual interest rate was a mere detail.

[45] The TWPA says that had it known ID Inc. was pursuing the contractual interest rate, it could have cross examined Kenny on the idea that he intentionally said nothing for two years when he knew the SMA had expired because, by letting time go by, he was making a large return on his money.

[46] The TWPA says that had it known ID Inc. was pursuing the contractual interest rate it could have cross examined Kenny on whether it applied to lost profits for breach of the agreement or only to unpaid invoices which he rendered.

[47] The TWPA says that had it known ID Inc. was pursuing the contractual interest rate, it could have steered clear of the issue when examining Evans, or led other evidence from Evans to clarify his testimony or provide further evidence that TWPA did think the interest rate would apply unless it failed to pay invoices.

[48] The TWPA says it did not have the opportunity to consider the claim for contractual interest when weighing the benefits and risks of, and making decisions about, proceeding to trial or settling.

[49] The TWPA says it lost the opportunity to lead evidence relevant to the exercise of the court's discretion under section 130 of the *CJA*. Given that I am not exercising my discretion under section 130, this alleged prejudice is irrelevant.

[50] In *Robert McAlpine Ltd. v. Woodbine Place Inc*., [1998] O.J. No. 2518, in setting the pre-judgment interest rate after trial, the court discussed applying a contractual interest rate even though it had not been pled. B.J. Wein J said that she would, if necessary, have granted the requested amendment to the Statement of Claim to include a specific plea that interest be awarded at the rate set out in the contract. With respect to the issue of prejudice, Justice Wein said:

> 7. Given the reliance of both parties on the contract and the initial agreement that the terms and conditions of the contract govern the relationship of the parties, such an amendment does not prejudice Woodbine. It is an argument that warrants consideration by the Court on the merits, and it should not be barred merely by the form of the pleadings.

[51] In the present case, both parties relied on the SMA and agreed that its terms and conditions governed their relationship.

[52] In *Bank of America Canada*, the SCC upheld the trial judge's finding that a pleading could be amended to seek compound interest at trial because the defendant was not prejudiced, was fully aware of the issue and had the ability to call evidence on the question: paras. 13-14 and 54.

[53] The TWPA has suffered no prejudice. It knew about the contractual interest rate. ID Inc. pled a breach of SMA. The interest rate is set out in the SMA which was filed as an exhibit at trial. The TWPA did not dispute that the SMA was a valid and binding agreement and in fact, relied on the automatic termination provision of the SMA. Evans testified that he and TWPA's lawyer were involved in negotiating changes to the SMA including the Default Clause and the changed terms were important to TWPA. The TWPA specifically cross-examined Kenny on the contractual interest rate and the then prevailing bank interest rate and his answer was to reference the high rates of interest that he pays on his credit cards.

[54] There is no reason why the TWPA could not have done the things it now suggests it would have done. It did cross examine Kenny on the contractual interest and the difference between it and the prevailing bank interest rates. It could have gone further and pursued the lines of questioning it now raises to make the arguments it now raises. It had the opportunity to make and did make oral and written submissions on the pre-and post-judgment interest rate including arguing that the contractual rate should not be used because in the SMA it applied only to deficiencies after taking possession of and selling the sign. It raised unconscionability. The fact that the TWPA can now think of different ways to run its case or different arguments it could have advanced, does not mean that it suffered actual prejudice.

FORM OF JUDGMENT

[55] Given that I have now decided the issue of pre-and post-judgment interest, it is appropriate to issue one judgment dealing with all issues except for costs.

[56] Judgment to go as signed by me today.

COSTS

All costs of this action are reserved to be addressed on February 7, 2024.

Merritt J.

Date: January 9, 2024

CITATION: ID Inc. v. Toronto Wholesale Produce Association, 2024 ONSC 158
COURT FILE NO.: CV-16-00564151
DATE: 20240109

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ID INC.

Plaintiff

- and -

TORONTO WHOLESALE PRODUCE ASSOCIATION and STRATEGYCORP.

Defendants

REASONS FOR DECISION

Merritt J.

Released: January 9, 2024