

**FILED**

UNITED STATES DISTRICT COURT

SEP 07 2011

FOR THE EASTERN DISTRICT OF CALIFORNIA

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FOR THE EASTERN DISTRICT OF CALIFORNIA  
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<p>FLAGSHIP WEST, LLC, a California limited liability company, MARVIN G. REICHE, and KATHLEEN REICHE,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>EXCEL REALTY PARTNERS, L.P., a Delaware limited liability partnership, and NEW PLAN EXCEL REALTY TRUST, INC., a Maryland corporation, et al.,</p> <p style="text-align: center;">Defendants.</p>
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1:02-cv-5200 OWW DLB

MEMORANDUM DECISION AND ORDER RE DEFENDANTS' MOTION TO RECONSIDER MEMORANDUM DECISION AND ORDER DATED JULY 5, 2011

(DOC. 530, 532)

I. INTRODUCTION

Before the court are (1) Excel Realty Partners, L.P.'s and New Plan Excel Realty Trust, Inc.'s (together, "Defendants") motion to reconsider the memorandum decision and order dated July 5, 2011 ("Memorandum Decision") (Doc. 530), and (2) Defendants' opposition to Plaintiffs' proposed judgment (Doc. 532). Both motions are opposed (Docs. 536, 533), and were heard August 22, 2011.

II. BACKGROUND

On February 28, 2011, Plaintiffs filed a request for entry of judgment of rescission and for prejudgment interest. Doc. 518. On March 17, 2011, Defendants filed a motion to strike

-DLB Flagship West LLC, et al v. Excel Realty Partner, et al Doc. 540

1 Plaintiffs' request for entry of judgment of rescission and  
2 request for prejudgment interest. Doc. 523. Both motions were  
3 opposed, and were heard May 23, 2011.

4 The Memorandum Decision dated July 5, 2011 (Doc. 529) denied  
5 Defendants' motion to strike and granted in part and denied in  
6 part Plaintiffs' request for entry of judgment of rescission and  
7 for prejudgment interest. The Memorandum Decision awarded  
8 Plaintiffs \$2,142,175 for damages in rescission, as follows:  
9

\$1,239,030	Construction Costs
\$ 589,271	Equipment Expenditures
\$ 30,000	Opening Inventory for Restaurant
\$ 104,176	Building & Related Fees
\$ 30,000	Franchise Fee
\$ 18,749	Training of Modesto Staff
\$ 27,956	Construction Interest
\$ 372,575	Rent Paid to Excel
\$ 186,394	Interest Paid After Opening
(\$ 434,716)	Credit for Rent Paid/Owed to Excel
(\$ 10,000)	Credit for Rental Income Credit
(\$ 11,260)	Credit for Equipment Sale
\$2,142,175	TOTAL

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18 The Memorandum Decision granted Plaintiffs' request for  
19 prejudgment interest as to the \$214,350 interest paid on the  
20 Money Store loan (\$27,956 in construction interest and \$186,394  
21 in interest paid after opening) from the rescission date, and  
22 denied Plaintiffs' request for prejudgment interest as to the  
23 other unfixed components of Plaintiffs' damages award. The  
24 Memorandum Decision instructed Plaintiffs to submit a consistent  
25 proposed form or order, which Plaintiffs filed on July 11, 2011.  
26  
27 Doc. 531.  
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1 upon the same or any alleged different set of facts, counsel  
2 shall present to the Judge or Magistrate Judge to whom such  
3 subsequent motion is made an affidavit or brief, as  
4 appropriate, setting forth the material facts and  
5 circumstances surrounding each motion for which  
6 reconsideration is sought, including:

7 (1) when and to what Judge or Magistrate Judge the  
8 prior motion was made;

9 (2) what ruling, decision, or order was made thereon;

10 (3) what new or different facts or circumstances are  
11 claimed to exist which did not exist or were not shown upon  
12 such prior motion, or what other grounds exist for the  
13 motion; and

14 (4) why the facts or circumstances were not shown at  
15 the time of the prior motion.

16 B. Discussion

17 Defendant moves for reconsideration of the award of  
18 \$589,271.00 in rescission damages for equipment expenditures. The  
19 Memorandum Decision's grant of rescission damages was based on  
20 the damages in the November 14, 2006 Order. Doc. 387. Defendant  
21 points out that the court amended its November 14, 2006 Order on  
22 May 30, 2007:

23 Excel's motion is GRANTED to the extent the November 14,  
24 2006 Order states: "It is most reasonable to award  
25 Plaintiffs the lower, but better-documented \$589,271 in  
26 rescission damages for equipment, less any offset for  
27 salvage." The Court intended to award \$581,526 in rescission  
28 damages for equipment, less any offset [the \$11,260.00] for  
salvage." The November 14, 2004 Order should have stated:  
"It is most reasonable to award Plaintiffs the lower, but  
better documented \$581,526 in rescission damages for  
equipment, less any offset for salvage."

Doc. 424, 34. The award of \$589,271.00 in rescission damages for  
equipment expenditures in the Memorandum Decision was clearly  
erroneous, and should have reflected the court's May 30, 2007

1 order. The Memorandum Decision should have awarded "\$581,526 in  
2 rescission damages for equipment, less any offset for salvage."

3 Defendants' motion for reconsideration is GRANTED.

4 IV. OPPOSITION TO PROPOSED JUDGMENT

5 A. Equipment Damages

6 Defendants repeat the objection to the award of rescission  
7 damages for equipment expenditures. As stated above, the amount  
8 of rescission damages for equipment expenditures in the judgment  
9 should be "\$581,526 in rescission damages for equipment, less any  
10 offset for salvage."  
11

12 B. Date of Prejudgment Interest

13 Defendants contest Plaintiff's proposed date of rescission,  
14 April 4, 2001. The Memorandum Decision granted prejudgment  
15 interest on the \$214,350 paid on the Money Store loan from the  
16 rescission date. Doc. 529, 15. Plaintiffs submitted a proposed  
17 judgment granting "pre-judgment interest on \$214,350, at the rate  
18 of \$58.73 per day, from and after April 4, 2001 through the date  
19 of judgment . . . ." Doc. 531, 2.  
20

21 Plaintiffs contend that Defendants have never contested the  
22 date of rescission throughout ten years of litigation, and waived  
23 it by failing to present it in opposition to Plaintiffs' request  
24 for entry of judgment. The date of rescission, however, was not  
25 at issue in Plaintiffs' request for entry of judgment.  
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27 Defendants contend that prejudgment interest should run from  
28 November 14, 2006, not April 4, 2001. Defendants contend that

1 because Defendants did not know, and could not calculate the  
2 amount due for Plaintiffs' interest payments prior to the court's  
3 November 14, 2006 order, prejudgment interest should begin on  
4 November 14, 2006. Defendants once again attempt to reargue their  
5 opposition to Plaintiffs' request for prejudgment interest.  
6 Defendants do not present newly discovered evidence, show that  
7 the Memorandum Decision is clearly erroneous or manifestly  
8 unjust, or point to any intervening change in controlling law.  
9 See *Allstate Ins. Co. v. Herron*, 634 F.3d at 1111. Defendants'  
10 argument will not be reconsidered. Prejudgment interest on  
11 Plaintiffs' interest payments does not accrue from November 14,  
12 2006.  
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14  
15 Defendants contend that April 4, 2001 is irrelevant to the  
16 issue of prejudgment interest because Plaintiffs never made an  
17 unconditional demand for rescission on April 4, 2001. Plaintiffs  
18 rejoin that Trial Exhibit 30, Plaintiffs' rescission notice,  
19 establishes the rescission date as April 4, 2001.

20 Under California law, rescission of a contract is  
21 accomplished by giving notice of the rescission and offering to  
22 restore everything of value which the rescinding party has  
23 received "or offer[ing] to restore the same upon condition that  
24 the other party do likewise, unless the latter is unable or  
25 positively refuses to do so." Cal. Civ. Code § 1691. "When notice  
26 of rescission has not otherwise been given or an offer to restore  
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1 the benefits received under the contract has not otherwise been  
2 made, the service of a pleading in an action or proceeding that  
3 seeks relief based on rescission shall be deemed to be such  
4 notice or offer or both." *Id.* "When a party gives notice of  
5 rescission, it has effected rescission, and any subsequent  
6 judicial proceedings are for the purpose of confirming and  
7 enforcing that rescission." *Peterson v. Highland Music, Inc.*, 140  
8 F.3d 1313, 1322 (9<sup>th</sup> Cir. 1998).

10 On April 4, 2001, Plaintiffs' counsel sent Defendant a  
11 letter containing the following notice of rescission:

12 Flagship West demands that New Plan agree to remedy the  
13 damages caused by its willful breaches. Flagship West  
14 demands rescission of the lease, and to that end, Flagship  
15 West has paid rent through March 31, 2001 and is willing to  
16 tender rent due through the date of rescission, in return  
17 for reimbursement by New Plan to Flagship West of all  
18 damages which Flagship West has incurred. These damages  
19 include rents paid to New Plan, costs of constructing the  
20 building and other improvements, equipment costs, franchise  
21 payments, the balance owing to Flagship West's lender and  
22 other consequential and incidental damages. Alternatively,  
23 Flagship West demands that New Plan immediately acknowledge  
24 that the Lease is canceled and that New Plan pay the current  
25 balance owing to the lender and reimburse Flagship West for  
26 its losses and out-of-pocket costs.

27 Doc. 518-5, Ex. 23. The April 4, 2001 letter does not offer to  
28 restore Defendants' property and benefits received under the  
lease, as California Civil Code § 1691(b) requires. Service of a  
pleading seeking relief based on rescission, however, will be  
deemed "notice or offer or both." Cal. Civ. Code § 1691(b). On  
April 27, 2001, Plaintiffs filed and served on Defendants a

1 Complaint seeking rescission. Doc. 1, ¶¶ 1-2. Under California  
2 Civil Code § 1691, the date of service of Plaintiffs' Complaint,  
3 April 27, 2001, is the date of rescission.

4 Defendants' opposition to the date of rescission is DENIED.  
5 Prejudgment interest on the \$214,350 paid on the Money Store loan  
6 shall accrue from April 27, 2001.  
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8 V. CONCLUSION

9 For the reasons stated:

- 10 1. Defendants' motion for reconsideration is GRANTED.  
11 2. Defendants' objection to Plaintiffs' proposed judgment is  
12 GRANTED in part and DENIED in part, as follows:  
13 a. GRANTED as to the amount of rescission damages for  
14 equipment; and  
15 b. DENIED as to the date of rescission. Prejudgment  
16 interest on the \$214,350 paid on the Money Store loan  
17 shall accrue from April 27, 2001.  
18 3. Plaintiffs shall submit an amended proposed form of  
19 judgment consistent with this memorandum decision within  
20 five (5) days following electronic service of this  
21 memorandum decision.  
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24 SO ORDERED.

25 DATED: 9-7-11

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27 Oliver W. Wanger  
28 United States District Judge