

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LAWRENCE M. CLARKE, INC.,

Plaintiff/Counterdefendant-  
Appellant,

v

SMRT, L.L.C.,

Defendant/Counterplaintiff/Cross-  
Plaintiff/Third-Party Plaintiff-  
Appellee,

and

STONEWOOD CORPORATION, THE NORMAN  
STEEL, INC., MONEY PURCHASE PENSION  
TRUST, THE NORMAN STEEL, INC.,  
RETIREMENT PROFIT SHARING TRUST, THE  
LAWRENCE STEEL, INC., MONEY PURCHASE  
PENSION TRUST, GRAND RIVER  
INFRASTRUCTURE, INC., and IDEN & FINK,

Defendants,

and

TRANSENVIRONMENTAL ENGINEERS, INC.,

Defendant/Cross-Defendant,

and

HANUMAN MARUR,

Third-Party Defendant.

UNPUBLISHED

May 3, 2005

No. 250671

Wayne Circuit Court

LC No. 00-031623-CK

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Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff brought this circuit court action against defendant SMRT, L.L.C., for foreclosure of its construction lien, breach of contract, and unjust enrichment. Thereafter, pursuant to the parties' stipulation, the matter was submitted to arbitration, but the trial court retained jurisdiction for purposes of entering a judgment on the arbitration award. After the matter was arbitrated, plaintiff filed a motion requesting that the trial court enter judgment in the amount of the arbitrator's award, \$309,829, and also requested both prejudgment and postjudgment interest. The trial court confirmed the arbitration award and initially awarded plaintiff prejudgment interest under MCL 600.6013(6) and (8). On reconsideration, the trial court vacated its earlier order and instead awarded plaintiff interest under MCL 438.7 and 438.31, from the date of the arbitration award. Plaintiff appeals as of right. We affirm in part and reverse in part. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews awards of interest de novo. *Farmers Ins Exchange v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002).

Plaintiff first argues that it is entitled to prejudgment interest under MCL 600.6013(5). We disagree. The arbitrator stated in the award that he considered plaintiff's request for interest on the unpaid invoices it sent to SMRT. This was equivalent to a request for preaward or prejudgment interest. In *Holloway Constr Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608, 618; 543 NW2d 923 (1996), the Supreme Court held that "[t]he decision whether to award preaward, prejudgment interest as an element of damages is reserved as a matter of the arbitrator's discretion." Unless the parties agree otherwise, preaward damages claims including interest are deemed to have been submitted to arbitration. *Id.* If the arbitrator did not award interest, courts will not step in and allow for preaward interest. *Id.* Here, the arbitrator considered plaintiff's request for preaward interest.

Moreover, the parties' arbitration agreement only allowed the trial court to award judgment interest "on to any arbitration award by the parties, subsequent to such an award, pursuant to the controlling statutes in Michigan." It is apparent that the parties agreed to allow the arbitrator to decide whether plaintiff was entitled to preaward interest, and to allow the trial court to only consider postaward and postjudgment interest when entering a judgment on the arbitration award.

Because the parties submitted plaintiff's request for preaward interest to the arbitrator, the trial court properly refused to award any interest before January 6, 2003, the date of the arbitration award.

Plaintiff also argues that it is entitled to postaward and postjudgment interest under MCL 600.6013(5), not MCL 600.6013(6) and (8), or MCL 438.7. The trial court awarded plaintiff postaward interest under MCL 438.7, at the rate of five percent.

We conclude that the trial court erred in awarding interest under MCL 438.7. Pursuant to *Old Orchard By the Bay Associates v Hamilton Mutual Ins Co*, 434 Mich 244, 260-262, 265; 454 NW2d 73 (1990), and *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 506; 475 NW2d 704 (1991), any postaward or postjudgment interest is governed by MCL 600.6013, not MCL 438.7. The trial court erred as a matter of law in awarding interest under MCL 438.7.

The parties further disagree on whether judgment interest is available under MCL 600.6013(5), or (6) and (8). MCL 600.6013(5) allows a party to recover interest at a higher rate than that typically allowed by MCL 600.6013(8), if the claim is based on a written instrument. Here, plaintiff has not established the existence of a "written instrument" within the meaning of the statute. In general, the term "written instrument" is interchangeable with the term "written contract." *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998). In the trial court, plaintiff relied on copies of its sworn statements and construction liens filed against the subject property, and copies of its invoices to establish a written instrument. Although the parties may have had a contractual arrangement, these documents do not satisfy the definition of a "written instrument." The invoices sent to SMRT, which included a statement that interest was being charged at a monthly rate of 1.5%, do not establish a written contract between the parties with respect to interest. Plaintiff failed to show that SMRT ever agreed to pay that rate of interest.

Because plaintiff failed to produce appropriate evidence of a written instrument that supported an award of interest under MCL 600.6013(5), plaintiff is not entitled to interest under that subsection. Instead, postaward interest is governed by MCL 600.6013(6) and (8).

SMRT also argues that under MCL 600.6013(1), as amended by 2001 PA 175, effective March 22, 2002,<sup>1</sup> an award of interest under MCL 600.6013 is no longer mandatory, but rather discretionary. SMRT made this same argument below and further argued that an award of interest was discretionary because plaintiff was seeking equity. See *Everett v Nickola*, 234 Mich App 632, 639; 599 NW2d 732 (1999); *Dep't of Treasury v Central Wayne Co Sanitation Authority*, 186 Mich App 58, 61; 463 NW2d 120 (1990). Further, an award of interest under MCL 438.7, the statute on which the trial court relied, is also discretionary. *Cataldo v Winshall, Inc*, 3 Mich App 290, 295-296; 142 NW2d 28 (1966). Thus, it is apparent that the trial court decided to award plaintiff interest as a matter of discretion. We find no basis for disturbing that decision.

In sum, the trial court properly refused to award interest that was incurred before the date of the arbitrator's decision. Further, while the trial court did not err in awarding plaintiff postaward interest, it erred in calculating that interest under MCL 438.7. Interest should instead be calculated under MCL 600.6013(6) and (8). We remand for that purpose.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly  
/s/ David H. Sawyer  
/s/ Kurtis T. Wilder

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<sup>1</sup> Although MCL 600.6013 was amended after this action was filed, the amended version applies to this case. See *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 524 n 14; 679 NW2d 106 (2004).