

Affirmed and Memorandum Opinion filed July 27, 2010



In The

Fourteenth Court of Appeals

NO. 14-09-00567-CV

DAVID QUARTARO, Appellant

V.

STRATEGIC OUTSOURCING, INC., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 896,407

MEMORANDUM OPINION

David Quartaro appeals the trial court's judgment awarding Strategic Outsourcing, Inc. ("Strategic"), prejudgment interest as well as attorney's fees. Quartaro argues because he made an offer or tender in good faith to Strategic and Strategic refused the offer, the trial court erred in granting Strategic prejudgment interest and attorney's fees. We affirm.

I

In 2004, Strategic hired Quartaro to work in its Houston office. In September 2005, Quartaro entered into an agreement with Strategic titled "Agreement to Repay Advance on Wages" in which Quartaro promised to repay Strategic \$9,000 in wage

advances. In his motion to modify the trial court's judgment, Quartaro alleges he left Strategic's employment on January 15, 2006. Of the \$9,000, Quartaro had only paid back \$375. Seeking to collect the outstanding debt, Strategic hired United Commercial Collections, Inc., to contact Quartaro and collect the unpaid debt from him. The debt-collection agency was unsuccessful in collecting the debt. In his motion to modify as well as in his briefs and during oral argument, however, Quartaro claims he offered to pay Strategic what he believed he owed, but Strategic continuously rejected his offers.

On June 18, 2007, Strategic filed suit against Quartaro for the unpaid wage advances, totaling \$8,625, as well as for money Strategic claimed it overpaid Quartaro during his employment, totaling \$16,354.18. After hearing the evidence in a bench trial, the court awarded Strategic \$7,036.41 in actual damages, prejudgment interest in the amount of \$767, and attorney's fees in the amount of \$2,800.¹ Quartaro then filed a motion to modify the final judgment, which the trial court denied. This appeal followed.

II

Quartaro claims that he offered to repay the amount he owed Strategic before the case went to trial, but Strategic rejected his offer. Quartaro contends that the trial court erred in awarding Strategic prejudgment interest because prejudgment interest does not accrue during the time period in which a settlement offer may be accepted. His offer, therefore, tolled the accrual of prejudgment interest. In response, Strategic contends that the trial court did not err because Quartaro never made an unconditional offer or a tender of any kind. Strategic argues that the only potential evidence Quartaro offered regarding a settlement was an email that stated he needed to talk to someone at Strategic about arranging a payment plan, but he neither followed up nor paid any money.

¹ Quartaro and Strategic agree that in reaching the final-judgment amount, the trial court subtracted or offset from the judgment what Strategic owed Quartaro in commission fees—\$1,588.59.

The primary purpose of awarding damages in civil cases has always been to compensate the injured plaintiff, rather than to punish the defendant. *City of Houston v. Texas Land & Cattle Co.*, 138 S.W.3d 382, 391 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Thus, the purpose of prejudgment interest is to compensate a party for the lost use of money due as damages during the lapse of time between the accrual of the claim and the date of judgment. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998); *Texas Land & Cattle Co.*, 138 S.W.3d at 388–89. Another purpose of prejudgment interest is to encourage settlements. See *Texas Land & Cattle Co.*, 138 S.W.3d at 389.

There are two legal bases for prejudgment interest: (1) an enabling statute and (2) general principals of equity. *Johnson & Higgins of Tex., Inc.*, 962 S.W.2d at 528; *Texas Land & Cattle Co.*, 138 S.W.3d at 388. “The enabling statute, Texas Finance Code section 304.104, only applies to wrongful death, personal injury, and property damage cases.” *Citizens Nat’l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 487 (Tex. App.—Fort Worth 2004, no pet.); see Tex. Fin. Code Ann. § 304.102 (Vernon 2006) (“A judgment in wrongful death, personal injury, or property damage case earns prejudgment interest.”). Here, Quartaro contends that Strategic’s claim is not one within the confines of the Texas Finance Code’s enabling statute, but rather is governed by common law.² An award of equitable or common-law prejudgment interest is within the trial court’s discretion. *Kurtz v. Kurtz*, No. 14-08-00351-CV, 2010 WL 1293769, at *11 (Tex. App.—Houston [14th Dist.] Apr. 6, 2010, no pet.) (mem. op.); *Citizens Nat’l Bank*, 142 S.W.3d at 487; see *Larcon Petroleum, Inc. v. Autotronic Sys., Inc.*, 576 S.W.2d 873, 879 (Tex. App.—Houston [14th Dist.] 1979, no writ). A trial court abuses its discretion if its decision is “arbitrary, unreasonable, and without reference to guiding principles.”

² Courts have rejected the argument that the enabling statute in the Texas Finance Code applies to all common-law cases and not just to wrongful death, personal injury, or property damage cases. See *Johnson & Higgins, Inc.*, 962 S.W.2d at 530; *de la Garza v. de la Garza*, 185 S.W.3d 924, 928 (Tex. App.—Dallas 2006, no pet.); *Head Indus. Coatings & Servs., Inc. v. Md. Ins. Co.*, 981 S.W.2d 305, 311 (Tex. App.—Texarkana 1998, pet. denied).

Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997) (quoting *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)); see *Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex. App.—Houston [14th Dist.] 1997, no writ).

Quartaro argues that the evidence of his offer or tender to Strategic is in emails he attached to his motion to modify the trial court’s final judgment. Assuming the attachments constitute admissible evidence, the record contains a series of emails between Quartaro and an employee of United Commercial Collections, Inc.—the debt-collection agency. In his first email dated March 10, 2006, Quartaro claims the “only balance I am aware of is the advance on future commissions that was given to me in the months of September, October, and November of 2005 . . . totaling \$9,000.” Quartaro stated he paid \$375 of the \$9,000, so he only owed the remaining \$8,625. On July 14, 2006, the debt-collection employee explained to Quartaro that the matter had not moved forward, the amount Strategic was seeking—\$26,567.77—was “sound,” and Strategic wanted a response from Quartaro. The debt-collection employee continually sent emails asking for a response. In a letter dated August 14, 2006, the debt-collection employee stated, “If there is an offer then I would encourage you to make it.” On August 15, 2006, Quartaro responded, “I will pay back the advance [Strategic] gave me in September, October, and November of 2005. The remaining balance owed is \$8,625. I will need to talk to someone at [Strategic] to arrange a payment plan.”

In his briefs, Quartaro relies on three cases for the proposition that “a principle of common law provides that the running of prejudgment interest is tolled to the extent and during the time that the obligor makes and keeps open an offer to settle the claim.” See, e.g., *J.M. Hollis Constr. Co. v. Paul Durham Co.*, 641 S.W.2d 354, 357 (Tex. App.—Corpus Christi 1982, no writ); *Robberson Steel, Inc. v. J.D. Abrams, Inc.*, 582 S.W.2d 558, 565 (Tex. Civ. App.—El Paso 1979, no writ); *Edson & Hamm, Inc. v. Murray*, 285 S.W. 659, 661–62 (Tex. Civ. App.—Beaumont 1926, no writ). Quartaro argues that the Beaumont court of appeals in *Edson & Hamm, Inc. v. Murray* held that if a debtor, in

good faith, makes a reasonable and good faith offer of the amount owed to the creditor, then the offer is sufficient tender to prevent any prejudgment interest from accruing. 285 S.W. at 662. Comparatively, however, the Texas Supreme Court has stated that if a debtor *tenders* the amount due to the creditor, then the creditor is prevented from recovering prejudgment interest as long as the tender is effective. *Keystone Pipe & Supply Co. v. Zweifel*, 127 Tex. 392, 94 S.W.2d 412, 415 (1936), *overruled on other grounds, Tex. Co. v. State*, 154 Tex. 494, 281 S.W.2d 83 (1955). A tender is an unconditional offer by a debtor to pay another a sum not less in amount than that due on a specified debt. *Baucum v. Great Am. Ins. Co. of New York*, 370 S.W.2d 863, 866 (Tex. 1963). A valid and legal tender of money consists of the actual production of funds to pay the amount due. *Id.* The debtor must relinquish actual possession of the funds under such circumstances as to enable the person to whom the money is tendered, without special effort on his part, to acquire possession of the money. *Id.* The cases Quartaro cites discussing an offer being a sufficient tender are not binding precedent on this court. We agree with the supreme court that a sufficient, effective, or legal tender involves “actual production of funds”; hence, Quartaro’s alleged offer is not a tender.

In addition to contending his offer tolled any prejudgment interest, Quartaro also leans heavily on what he portrays as Strategic’s refusal of the alleged offer. During oral argument Quartaro focused on *Denta Rama, Inc. v. Lavastone Industries of Central Tex., Inc.*, for the proposition that if a debtor can present evidence that a creditor refused the debtor’s tender or would refuse a debtor’s tender, then the debtor does not have to make an actual tender to prevent the creditor’s recovery of prejudgment interest and attorney’s fees. 597 S.W.2d 507, 509 (Tex. Civ. App.—Dallas 1980, no writ); *see also Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942) (explaining that no actual tender is required if the creditor has signified in advance that he will refuse any money from the debtor). This is an exception to the abovementioned rule requiring a tender. *See Denta Rama*, 597 S.W.2d at 509.

In *Denta Rama*, the appellant challenged the trial court's award of prejudgment interest and attorney's fees to the appellee on the basis that the appellee would have refused the appellant's tender. *Id.* The appellant claimed there were mistakes in the appellee's invoice, so the appellant did not want to pay the appellee the full amount it demanded. *Id.* The appellant argued it would have paid what it believed was due to the appellee, but the appellee would have refused the appellant's offer. *Id.* To show that tender would have been refused, the appellant offered the testimony of the appellee's president and attorney regarding the appellee's insistence on payment of the entire amount it demanded. *Id.* After reviewing the evidence, the court found the evidence insufficient to demonstrate that the appellee would have refused a tender. *Id.*

Here, while Quartaro claims Strategic refused his offer, the record is void of evidence of a refusal. According to the emails in the record, and assuming Quartaro's emails comprised an "offer," Strategic sought \$26,567.77, and Quartaro's last offer was \$8,625. There is simply no evidence in the record that Strategic would have rejected Quartaro's last alleged offer if Quartaro had tendered it to Strategic. We cannot conclude that the trial court's decision was an abuse of discretion because Quartaro never tendered any money to Strategic, and there is no evidence Strategic would have refused Quartaro's potential tender. Accordingly, we overrule Quartaro's first issue.

III

Quartaro's attorney's-fee argument is similar to his prejudgment-interest argument. He claims that the trial court erred in awarding attorney's fees because he offered to repay the advanced wages and kept the offer open until trial. He asserts that his open offer was "sufficient to satisfy the defense of section 38.002 [of the Texas Civil Practice and Remedies Code] against attorney's fees." Strategic contends that it is entitled to attorney's fees. Strategic argues that the trial court did not err because Quartaro never made an unconditional offer, payment, or tender of any kind, which Strategic argues is required under the statute.

Both Quartaro and Strategic agree Strategic was eligible to receive attorney's fees under chapters 38.001 and 38.002 of the Texas Civil Practice & Remedies Code if Strategic met all the statutory requirements. In Texas, the award of attorney's fees to a plaintiff recovering on a valid contract claim is mandatory under section 38.001 if there is proof of the reasonableness of attorney's fees. *Graybar Elec. Co., v. LEM & Assocs., L.L.C.*, 252 S.W.3d 536, 549 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see* Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (Vernon 2008) (describing that chapter 38.001 allows a party to recover attorney's fees from the opposing party if the claim is for an oral or written contract). Chapter 38.002 Texas Civil Practices & Remedies Code states:

To recover attorney's fees under this chapter: (1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.

Tex. Civ. Prac. & Rem. Code Ann. § 38.002 (Vernon 2008). In a bench trial, it is within the trial court's discretion to set the amount of attorney's fees, but the court does not have discretion to refuse to grant attorney's fees if the fees are proper under section 38.001. *Graybar Elec. Co.*, 252 S.W.3d at 549. We review a trial court's award of attorney's fees for an abuse of discretion. *Broesche v. Jacobson*, 218 S.W.3d 267, 277 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Here, Quartaro does not dispute the amount of attorney's fees that the trial court awarded to Strategic; he disputes the award altogether. Quartaro argues that in accordance with chapter 38.002(3), he "made a truly unconditional tender of the amount for which the trial court ultimately found that he was liable." As previously stated, a tender is an unconditional offer by a debtor to pay another a sum not less in amount than that due on a specified debt. *Baucum*, 370 S.W.2d at 866. Generally, if a debtor tenders a payment, the payment must include everything the creditor is entitled to, and anything less is ineffective. *Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.*, 176 S.W.3d 307,

320 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). In *Staff Industries, Inc. v. Hallmark Contracting, Inc.*, the creditor claimed the debtor owed it \$99,524.45, but the debtor tendered a check to the creditor for only \$53,119.71. 846 S.W.2d 542, 548 (Tex. App.—Corpus Christi 1993, no writ). On the back of the check, the debtor wrote, “Endorsement constitutes payment in full of PO 270-003.” *Id.* The creditor refused the tender, and after the bench trial, the court awarded the creditor \$53,119.71, plus both prejudgment interest and attorney’s fees. *Id.* at 545. The debtor challenged the award of attorney’s fees claiming his proper tender was a defense to the creditor’s recovery of attorney’s fees. *Id.* at 548. The Corpus Christi court of appeals held that the debtor’s offer was conditional upon the creditor relinquishing any claim for a higher amount; therefore, it was an offer to settle the dispute for a lesser amount. *Id.* at 549. The court concluded that an offer to settle was not equivalent to an unconditional tender because “an offer to settle for a lower amount would deprive the plaintiff of his right even to seek the higher amount.” *Id.*; see also *Giannakopoulos v. Eris*, No. 14-08-00566-CV, 2010 WL 431273, at *3 n.3 (Tex. App.—Houston [14th Dist.] Feb. 9, 2010, no pet.) (mem. op.) (discussing the holding in *Staff Industries, Inc.*).

Quartaro’s argument is flawed for two reasons. First, Quartaro failed to “relinquish actual possession of the funds” to Strategic, so he did not tender anything to Strategic. See *Baucum*, 370 S.W.2d at 866. Second, at best Quartaro only made a potential settlement offer to Strategic, which does not constitute an unconditional offer to pay the creditor everything to which it is entitled. See *Staff Industries, Inc.*, 846 S.W.2d 542 at 549. Thus, we cannot conclude the trial court abused its discretion in awarding Strategic attorney’s fees. Accordingly, we overrule Quartaro’s second issue.

* * *

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.