IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KENNETH J. KLEIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. N10C-03-297 PRW**
	)	
MICHAEL K. HANDLEY,	)	
	)	
Defendant.	)	

DECISION AND JUDGMENT[1] FOLLOWING TRIAL

I. Introduction

Plaintiff Kenneth J. Klein instituted this action against his three former partners in Accelapure Corporation ("Accelapure"), Michael K. Handley, Terry A. Berger ("Berger"), and Robert J. Nairn ("Nairn"). The four men established Accelapure, a pharmaceutical compounding company, in 2005 and incorporated the company in Delaware. Mr. Klein claims that upon the dissolution of Accelapure, he shouldered a disproportionate share of its liability personally to clear outstanding debts -- including a bank loan and a deficient employee benefits plan -- through the sale of his personal property.

[1] The Court entered judgment for Plaintiff at the bench trial conducted on July 22, 2013, and notified the participants that a written decision setting forth the specifics of that judgment would follow.

Prior to trial, Mr. Klein reached a settlement agreement with Berger and Nairn. Mr. Handley, who was *pro se*,[2] did not appear for the pretrial conference held in chambers on Friday, June 21, 2013. Although the Court attempted to contact Mr. Handley so he could participate in the conference by phone, Mr. Handley did not answer the phone number he provided.[3] Following the pretrial conference, the Court sent a letter to all counsel, including Mr. Handley, noting that the Court unsuccessfully attempted to contact Mr. Handley for the pretrial conference, that Mr. Handley was expected to fully participate as a *pro se* litigant, and that trial would not be delayed due to Mr. Handley's voluntary absence.

On Friday, July 19, 2013, the Court again phoned Mr. Handley to remind him that a bench trial in this matter was scheduled for July 22, 2013. Again unable to reach Mr. Handley, the Court, via the Civil Case Manager, sent an email to Mr. Handley with the trial information. That same day, at 7:52PM, Mr. Handley sent an e-mail response to the assigned Civil Case

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[2] Mr. Handley was represented by counsel through the denial of his motion for summary judgment. *See Klein v. Handley*, 47 A.3d 524 (Del. Super. Ct. 2012). His counsel was permitted to withdraw in April 2012. (Trans. No. 43713030). From then on, Mr. Handley was almost completely uncommunicative with opposing counsel and the Court, but he did participate *pro se* in the trial scheduling conference and was then notified of all subsequent deadlines and hearing dates. (Trans. Nos. 47954989 and 48218603).

[3] The Court did reach Mr. Handley's voicemail box which identified the number as his own.

Manager informing her that he did not have the funds to appear in court or to hire an attorney and that he had recently sent the Court a letter explaining his situation. He offered to participate by phone, if the Court could accommodate him.

Mr. Handley did not appear on the morning of trial, July 22, 2013.[4] The Court, with opposing counsel present in the courtroom, again attempted to contact Mr. Handley via phone, again to no avail. Counsel for Mr. Klein opposed any continuance. The Court did not grant a continuance, but rather found that Mr. Handley had voluntarily absented himself from the proceedings by completely ignoring his obligations as a *pro se* litigant. Mr. Klein then presented his case to the Court, after which his counsel submitted Proposed Findings of Facts and Conclusions of Law.[5] This is the Court's decision following the abbreviated trial.

II. Factual and Procedural Background[6]

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[4] Mr. Handley's above-mentioned letter was received on July 23, 2013, the day after trial. In the letter, Mr. Handley explained his financial circumstances, his defense to the suit, and "welcomed the opportunity to speak to [the Court] to discuss [his] situation." (Trans. No. 53304500).

[5] Hereinafter "Pltf's Proposed Findings."

[6] The following is a summation of the direct testimony of Kenneth J. Klein on July 22, 2013. *See also* Pltf's Proposed Findings.

Accelapure was incorporated in 2004 to increase the speed of pharmaceutical development using purification technologies. From 2004 to 2007 the Board of Directors (the "Board") included Mr. Klein, Mr. Handley, Berger, and Nairn.[7] The Board appointed Mr. Handley as the Chief Executive Officer, Berger as President, Nairn as Vice President of Sales and Marketing, and Mr. Klein as the Vice President of Engineering and Operations. When the Board members established Accelapure, the company lacked necessary start-up capital. Thus, rather than purchase specialized laboratory equipment in Accelapure's name, Mr. Klein purchased the equipment under both his own name and the name of his personal S corporation, Klein Innovative Supply Service. Mr. Klein then entered into a lease agreement with Accelapure, whereby Accelapure would lease the laboratory equipment for $14,467 per month for thirty-six months.[8] Accelapure defaulted on the lease with Mr. Klein in April 2006, after making eleven of thirty-six payments.

In 2005, Accelapure sought additional funding for its business through a $400,000 commercial loan from Wilmington Trust Company. As a condition of the loan, Wilmington Trust required each of the four Board

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7 Complaint at ¶¶ 7-8.

8 *See* Trial Ex. 3.

members to sign a personal guarantee.[9] A little more than a year later, additional attempts to raise capital had proven unsuccessful. As of September 2006, Accelapure was already about two months behind on its payments to Wilmington Trust with the delinquencies continuing thereafter. Accelapure's last payment to Wilmington Trust was in March 2007, when the remaining principal loan balance was approximately $335,000. Wilmington Trust declared a default on the loan.

The next month, Mr. Klein began to sell the laboratory equipment to raise the necessary capital to satisfy the remaining Wilmington Trust loan balance. Mr. Klein first sold $330,000 worth of equipment to Lotus Separations, a company comprised of former Accelapure employees. That $330,000 was applied to and satisfied the remaining Wilmington Trust loan obligation. Of the $330,000, Mr. Klein raised $248,000 from the sale of his own equipment.

Accelapure also offered an employee-contributed 401(k) program as part of its employee benefits program. For each paycheck issued to an employee, Accelapure would withhold a certain amount that the company would then deposit in the employee's 401(k). As of May 2006, however, Accelapure discontinued those deposits into the 401(k) program even though

[9] *See* Trial Ex. 1; Trial Ex. 2.

it continued to withhold funds from employees' paychecks. In all, nine months of employee contributions totaling approximately $107,000 were withheld from the 401(k) account.[10]

The advice of Accelapure's then legal counsel was that the Accelapure officers and directors would be personally liable for the 401(k) account deficiency. So Mr. Klein, on behalf of Accelapure, satisfied the $107,000 short fall through the sale of $93,100 of his equipment, including two mass spectrometers which sold for approximately $80,000.

In the spring of 2007, Accelapure faced two lawsuits file by ex-employees, in addition to a Department of Labor judgment. Mr. Handley was personally named in each. In order to satisfy the $29,000 levied across those three judgments, Mr. Klein sold additional laboratory equipment totaling approximately $20,000.

In all, the sale of equipment owned by Mr. Klein satisfied $248,000 of the Wilmington Trust loan debt, $93,100 of the 401(k) deficiency, and $20,000 of the three legal judgments against Accelapure. Mr. Handley did not contribute to the satisfaction of any of the obligations discussed herein. As he voluntarily absented himself from the proceedings, Mr. Handley did not offer any evidence in defense of Mr. Klein's claims for contribution.

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[10] *See* Trial Ex. 4.

III. Discussion

A. Contribution

"The right of a surety or guarantor, upon being compelled to pay more than his just proportion of the principal's debt, to be reimbursed by his fellow guarantors for the excess is grounded in equitable principles."[11] "To succeed on a contribution claim, a party must show concurrent obligations existed to the same entities, and that the obligors essentially insured the same interests and the same risks."[12]

At trial, Mr. Klein established that either he or his personal corporation owned the laboratory equipment that was sold in order to partially satisfy Accelapure's outstanding debts.[13] Mr. Klein also established that Accelapure's four officers and directors were personally liable for each of the debts. First, the four had each personally guaranteed the Wilmington Trust loan.[14] Second, upon advice of legal counsel, as

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[11] *Collins v. Throckmorton*, 425 A.2d 146, 149 (Del. 1980); Pltf's Proposed Findings at ¶ 11; *see also Levy v. HLI Operating Co., Inc.*, 924 A.2d 210, 220 (Del. Ch. 2007).

[12] *Levy*, 924 A.2d at 220.

[13] *See* Ct. Ex. 3.

[14] *See* Ct. Ex. 1; Ct. Ex. 2.

officers and directors each was liable for any payments withheld from the employee-contributed 401(k) plan. Finally, each was personally named in three legal judgments against Accelapure. In turn, each of the four officers and directors could be found liable for one-quarter of the amount Mr. Klein paid to satisfy Accelapure's various debts. Because Mr. Klein contributed $361,100 to clear Accelapure's debts, Mr. Handley is indebted to Mr. Klein for $90,275.

B. Pre-Judgment Interest

Mr. Klein also requested, in his Complaint and at trial, pre-judgment interest calculated from June 2007. Under Delaware law, pre-judgment interest "must be made as a matter of fairness and to accomplish justice,"[15] but is only allowed where the amount of damages is easily ascertained.[16] Where pre-judgment interest is allowed, this Court generally applies the legal rate of interest pursuant to 6 *Del. C.* § 2301.[17] As a general rule, interest begins to accrue "on the date when the payment should have been

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[15] *E.M. Fleischmann Lumber Corp. v. Res. Corp. Intern.*, 114 F. Supp. 843, 845 (D. Del. 1953).

[16] *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1366 (Del. Super. 1980).

[17] *Id*. at 1367. *C.f. Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988) ("While the legal rate of interest has historically been the benchmark for pre-judgment interest, a court of equity has broad discretion, subject to principles of fairness, in fixing the rate to be applied.").

made."[18] Mr. Klein argues he is entitled to interest as a matter of right.[19] In support he offers *Collins v. Throckmorton*, in which the Delaware Supreme Court awarded pre-judgment interest as a matter of right to the plaintiff who, like Mr. Klein, paid more than his *pro rata* share of corporate debts.[20]

Based on the evidence presented, it is clear to this Court that Mr. Handley neglected his responsibilities as an officer and director of Accelapure, and left the remaining officers and directors to satisfy the company's obligations. Mr. Klein has established that on or about June 2007, proceeds from the sale of his laboratory equipment were applied to Accelapure's debts with respect to the Wilmington Trust loan, the 401(k) plan deficiencies, and the adverse legal judgments. In June 2007, Mr. Klein was entitled to receive $90,275 from Mr. Handley to cover Mr. Handley's *pro rata* share of the company's obligations. Thus, Mr. Klein is also entitled to receive interest at the legal rate defined by 6 *Del. C.* § 2301(a), calculated from June 1, 2007.[21] As of July 31, 2013, that interest amount is

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[18] *Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 782 (Del. 1966)

[19] Pltf's Proposed Findings at ¶ 14.

[20] *Collins v. Throckmorton*, 425 A.2d 146, 152 (Del. 1980); *see also Metro. Mut. Fire*, 220 A.2d at 781 ("In short, the Delaware authorities have uniformly treated interest as a matter of right rather than discretion in cases like the present one.").

[21] In June 2007, the Federal Reserve discount rate was 6.25%, thus the legal rate of interest applicable to this contribution claim is 11.25%.

$62,628.28.[22] A final judgment in the amount of $152,903.28 is hereby entered against Michael K. Handley.

SO ORDERED this 31st day of July, 2013

/s/ Paul R. Wallace
PAUL R. WALLACE, JUDGE

Original to Prothonotary
cc: Counsel via File and Serve

[22] Simple interest is calculated by multiplying the principle amount ($90,275) by the legal rate of interest (0.1125) by the number of years (6 1/6). Compound interest is generally disfavored by Delaware Courts. *Summa*, 540 A.2d at 410.