

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BELL ATLANTIC-DELAWARE, INC./VERIZON DELAWARE, INC.	§ §	No. 444, 2006
Co-Plaintiff Below- Appellant,	§ § §	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§ §	
DOMENIC A. SAPORITO,	§ § §	C.A. No. 98C-01-118
Plaintiff Below, Appellee.	§ §	

Submitted: January 2, 2007
Decided: March 15, 2007

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

ORDER

This 15th day of March 2007, it appears to the Court that:

(1) Appellant Bell Atlantic-Delaware, Inc./Verizon Delaware, Inc. (“Verizon”) appeals the Superior Court Order requiring Appellee Domenic A. Saporito (“Saporito”) to pay Verizon \$6,920.44 to satisfy a workers’ compensation lien¹ and declining to award Verizon legal interest. Verizon raises two arguments on appeal. First, Verizon contends that the Superior Court incorrectly calculated

¹ 19 Del. C. § 2363(e).

the amount of Verizon's lien against Saporito's recovery. Second, Verizon contends that the Superior Court erred as a matter of law when it refused to award Verizon interest. We find no merit in the first argument but do find merit in the second one. Accordingly, we affirm in part and reverse in part.

(2) On July 15, 1997, Saporito, an employee of Verizon, was seriously injured in an automobile accident and was unable to work. As a result, Verizon paid Saporito disability benefits, including workers compensation and PIP benefits. Saporito and his wife filed a third-party lawsuit against Lankford Sysco, the company that employed the driver who caused Saporito's injuries. Verizon joined in that lawsuit and also filed a separate lawsuit against the company in order to recover the PIP benefits that it had been paying to Saporito. The parties reached a settlement in October 1999, wherein Saporito would receive \$1,235,000. In a November 8, 1999 Letter, Verizon wrote to Saporito and informed him that they had liens against his award totaling \$150,361.90. Of that amount, \$24,548.30 represented PIP benefits, which Lankford Sysco paid directly to Verizon. The letter also indicated that the amount of the workers' compensation lien was \$125,813.67, which was to be put into an interest-bearing escrow account pending resolution of the amount of legal fees and expenses under *Keeler*.² Saporito

² See *Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012 (Del. 1996).

complied with Verizon's request. On August 15, 2000, having heard nothing from Verizon on the *Keeler* issue, Saporito's counsel wrote to Verizon and informed them that if they did not offer "an alternative position" he was going to reduce the lien by \$43,883.86 (10.18%) to cover attorney's fees and costs and send the remaining amount to Verizon. Because Verizon did not respond, Saporito's counsel sent Verizon a check for \$83,449.54. Five months later, in January 2001, Verizon returned the check and claimed that the 10.18% calculation for costs and attorney's fees was unacceptable.

(3) At Verizon's request, the Superior Court reopened the case and issued a Letter Order on November 20, 2002, setting forth the two issues before the court. They included the amount of the lien due to Verizon and the amount by which it could be reduced to cover Saporito's attorney's fees and costs under *Keeler*. The Order stated that Saporito could tender the amount he believed was due without any prejudice to subsequent arguments on the amount of the lien. On December 12, 2002, Saporito sent a check to Verizon for \$85,135.39 (the amount of the original check that was rejected by Verizon including interest).

(4) The Superior Court held an evidentiary hearing on the amount of the lien and the *Keeler* issue on April 5, 2004, ordered post-hearing briefing and held an office hearing on June 29, 2004. The court concluded that the lien should have

been \$46,299.10, and that Saporito had overpaid Verizon \$38,836.29. The court further concluded that, based on *Keeler*, Verizon also owed \$16,134.28 in attorney's fees.

(5) Verizon appealed and this Court reversed and remanded, holding that Verizon was entitled to repayment of any amount over the \$15,000 PIP statutory limit.³ We also found no abuse of discretion on the percentage of fees and costs awarded under *Keeler*. Following remand the Superior Court held a hearing to determine attorney fees and costs under *Keeler* as well as interest. Verizon argued that it should be reimbursed \$8,770.64, plus legal interest beginning on January 1, 2000. It calculated legal interest in the amount of \$5,090.90 through October 21, 2005. Saporito argued that he owed Verizon nothing, or alternatively, \$7,049.51. Saporito also argued that because it was Verizon that had caused the delay in payment, the court should exercise its discretion and decline to award Verizon interest.

(6) On July 24, 2006, the Superior Court ordered Saporito to pay Verizon \$6,920.44, plus interest from the date of that Order at the legal rate, until the payment was made. In addition, the court declined to award Verizon prejudgment

³ *Bell Atl.-Del., Inc. v. Saporito*, 875 A.2d 620 (Del. 2005).

interest because it found that Verizon had caused the delay in payment. The Superior Court arrived at this conclusion as a result of the following analysis:

In order to determine the Keeler costs, the Court must calculate the percentage the amount of the lien (\$141,701.52)⁴ comprises of the total recovery (\$1,235,000.00). That figure, eleven and one-half percent (11.5%) must in turn be multiplied by the costs of litigating the third party action (\$431,701.63),⁵ or \$49,645.69. Subtracting the monies previously paid by Mr. Saporito (\$85,135.30) along with the Keeler costs (\$49,645.60), from the totals paid by Bell Atlantic, the amount remaining to due [sic] Bell Atlantic, absent any award of interest, is \$6,920.44, without interest.

(7) In an appeal from a judgment in a non-jury case, we accept the trial court's findings of fact if they are sufficiently supported by the record and are the product of an orderly, logical and deductive process.⁶ We review issues of law *de novo*.⁷

(8) Both parties agree that the total lien amount is \$141,701.52. Verizon, however, claims that the court should not have included interest that accrued on Saporito's funds while he waited for Verizon to accept partial payment. It argues that the court should have subtracted \$1,685.85 from the \$85,135.39 Saporito has paid. The Superior Court explicitly rejected this argument in its order, stating,

⁴ This represents the \$156,701.52 calculated by this Court minus the \$15,000 in PIP benefits.

⁵ There was some confusion between the parties as to the cost of recovery because two different figures were given: \$431,701.63 and \$431,397.95. Both parties agreed to use the *higher* figure.

⁶ *Marta v. Nepa*, 385 A.2d 727, 729 (Del. 1978); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

⁷ *Moss v. Prudential-Bache Sec., Inc.*, 581 A.2d 1138, 1140 (Del. 1990).

“Given the Delaware Supreme Court’s definition of the lien in question, the division between the ‘lien’ and applicable ‘interest’ drawn by Mr. Saporito in his December 12, 2002 tender of \$85,135.39, is of no consequence, legally or factually.” As Saporito waited for Verizon to accept partial payment, Saporito’s counsel placed the money into an interest bearing account. The money accrued interest simply because Verizon refused to accept partial payment. The Superior Court did not err when it credited Saporito with having paid Verizon \$85,135.39.

(9) Verizon next argues that the Superior Court should have used \$431,397.95 as Saporito’s cost of recovery, as opposed to \$431,701.63. Throughout this litigation, there has been confusion over the amount of the cost of recovery. Both parties have, in various memoranda to the Superior Court, used \$431,395.95 and \$431,701.63. The trial judge’s use of \$431,701.63 as the total cost of recovery is supported by the record.⁸

(10) Finally, Verizon argues that it is entitled to legal interest as “a matter of right.” Although interest is a matter of right in Delaware, the trial court has discretion to reduce the amount of interest due, especially where the party seeking

⁸ Verizon also argues in its reply brief that the Superior Court incorrectly calculated the *Keeler* percentage to be 11.5% instead of 11.74%. This argument was not properly raised in Verizon’s opening brief and is therefore waived. *See* Supreme Court Rule 14(b)(vi)(2).

interest has caused delay.⁹ “The Court may take into consideration all of the actions of the parties and apportion fault for any delay, thereby reducing the interest due in accordance with the degree of the plaintiff's or his attorney's responsibility for the delay in determining the question at issue.”¹⁰ Thus, the right to pre-judgment interest is not unqualified.¹¹

(11) In this case, the Superior Court found that Verizon had caused substantial delay and generated confusion in this litigation because of poor record-keeping and changes in its position.¹² Based upon the findings of the trial judge, we conclude that it was within his discretion to disallow interest from the time of the settlement to until the date of the first entry of judgment because of Verizon's conduct during that time period. However, we also conclude that the Superior Court abused its discretion by declining to award any interest at all for the time period thereafter. What Verizon did during the latter time period was take a successful appeal to this Court. The record does not support a conclusion that Verizon should be faulted for any delay attributable to its successful appeal.

⁹ *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 211 (Del. 1978) (citation omitted).

¹⁰ *Id.*

¹¹ See *Collins v. Throckmorton*, 425 A.2d 146, 152 (Del. 1980). In *Collins*, we held that the right to interest is not self-executing and that in order to receive pre-judgment interest, the party must request it. *Id.*

Accordingly, the Superior Court abused its discretion by not awarding Verizon interest on \$6,920.44 at the legal rate from the date of the Superior Court's original order.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is affirmed in part and reversed in part. This matter is remanded for entry of judgment in favor of Verizon consistent with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

¹² It appears that Saporito was ready and willing to pay Verizon from the outset but Verizon refused to determine the amount it owed under *Keeler*. When Saporito submitted a check based on the amounts he calculated, Verizon returned it five months later as being inadequate.