IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 15-cv-01252-RBJ (consolidated)

WELLONS, INC., an Oregon corporation,

Plaintiff,

v.

EAGLE VALLEY CLEAN ENERGY, LLC, a Utah limited liability company,
EVERGREEN CLEAN ENERGY CORPORATION, a Colorado corporation,
CLEARWATER VENTURES, LLC, a Utah limited liability company,
DEAN L. ROSTROM, individually,
KENDRIC B. WAIT, individually,
WESTERN RESOURCES, LLC, a Utah limited liability company,
COLORADO FORESTRY FUNDING, LLC, a Delaware limited liability company, and
WEST RANGE FOREST PRODUCTS, LLC, a Colorado limited liability company,

Defendants.

EAGLE VALLEY CLEAN ENERGY, LLC,
EVERGREEN CLEAN ENERGY CORPORATION, and
CLEARWATER VENTURES, LLC,

Counterclaimants,

v.

WELLONS, INC.,

Counterclaim defendant.

EAGLE VALLEY CLEAN ENERGY, LLC,
EVERGREEN CLEAN ENERGY CORPORATION, and
CLEARWATER VENTURES, LLC,

Third-party plaintiffs,

v.

WELLONS GROUP, INC., and
MARTIN NYE,

Third-party defendants.

Civil Action No. 15-cv-02055-KMT

GCUBE INSURANCE SERVICES, INC., a California corporation,

Plaintiff,

v.

WELLONS, INC., an Oregon corporation,

Defendant.

ORDER ON PLAINTIFF'S MOTION RE ENTRY OF FINAL JUDGMENT

On June 5, 2007, at the conclusion of a two week trial, the jury rendered its verdicts (1) in case no. 15-cv-1252-RBJ, in favor of the plaintiff, Wellons, Inc., on plaintiff's breach of contract claims against defendants Eagle Valley Clean Energy, LLC and Evergreen Clean Energy Corporation, and awarding the same $10,840,000 in damages against both defendants; (2) in case no 15-cv-1252-RBJ, in favor of Eagle Valley Clean Energy, LLC, Evergreen Clean Energy Corporation and related individuals and entities on plaintiff's fraudulent transfer claim; and (3) in consolidated case no. 15-cv-02055-RBJ, in favor of defendant Wellons, Inc. and against plaintiff GCube Insurance Services, Inc. *See* ECF Nos. 367 and 368 (unredacted), 369 and 370 (redacted).

On June 7, 2017, at the Court's request, the Courtroom Deputy circulated a draft form of judgment prepared by the Court for comments by counsel.[1] Both Wellons and the Eagle Valley defendants disagreed with certain aspects of the draft as it related to case no. 15-cv-1252-RBJ. GCube indicated that it no objection to the form of judgment as it related to case no. 15-cv-02055-RBJ.

The Court here addresses the post-trial issues raised by the parties to case no. 15-cv-1252-RBJ. The issues have been briefed. *See* ECF Nos. 355, 377, 378, 379. Neither party has requested oral argument. The Court finds that it is sufficiently informed about the disputed issues to resolve them on the briefs.

A. <u>Interest</u>.

The first dispute concerns whether interest should be awarded on Wellons' verdicts against Eagle Valley Clean Energy, LLC and Evergreen Clean Energy Corporation. I will at times refer to Eagle Valley Clean Energy, LLC as "Eagle Valley;" to Evergreen Clean Energy Corporation as "Evergreen;" and to the two entities collectively as the "Eagle Valley defendants."

1. <u>The principal amount claimed under the contracts</u>.

In December 2011 Wellons contracted to construct a wood-fired electricity cogeneration facility for Eagle Valley. *See* Amended and Restated Engineer, Procure, and Construction Contract (the "EPC Contract"), Trial Exhibit (hereafter "Ex.") 17. Because Wellons later assisted Eagle Valley with construction financing until other financing, including a substantial

[1] Although the draft was circulated by email, its contents can be seen in a red-lined version returned by Wellons. ECF No. 375-1.

government grant, was obtained, Wellons obtained a Subordinated Promissory Note dated August 8, 2013 from the related party, Evergreen. Ex. 3.

Wellons achieved what it believed to be "Final Completion" of the construction project on March 20, 2014. However, Evergreen had not yet received the government funds, which were critical to its ultimate financing obligation. On or about May 1, 2014 Evergreen received the government funds. Despite that, neither Eagle Valley nor Evergreen paid the amounts owed under the EPC Contract and the Subordinated Promissory Note, claiming that the construction was defective and incomplete. Efforts to resolve the dispute over the ensuing several months were unsuccessful. On October 2, 2014 Wellons submitted a formal written demand for payment within seven days of the funds it claimed to be owed under the contracts. Ex. 55. No payment was made, and this lawsuit followed.

At trial the parties stipulated that the maximum principal amount Wellons could recover under either or both of the EPC Contract and the Subordinated Promissory Note was $10,841,166.80. ECF No. 365 at 10 (Instruction No. 8, ¶¶2, 4). In the verdict form, with the approval of both parties, the maximum amount claimed by Wellons under both contracts, exclusive of interest, was rounded off to $10,840,000. *See* Verdict I, ECF No. 367 (unredacted), No. 369 (redacted), at 2, 3. That amount was awarded by the jury to Wellons against Eagle Valley on the EPC Contract and against Evergreen on the Subordinated Promissory note. *Id.*

2. Interest claimed under the contracts.

The EPC Contract provides that late payments by Eagle Valley "shall incur a simple interest charge at the legal rate of five percent (5%) per annum." Ex. 17 at 50, ¶XI(B)(2). The Subordinated Promissory Note provides that Evergreen would repay Wellons' advances plus

interest "promptly following the initial funding under the RUS Financing but in no event later than two (2) years from the date hereof." Ex. 3 at 2. The RUS Financing refers to government funds. The interest rate provided in the Subordinated Promissory Note was 15.0% percent per annum on Wellons' Initial Advance in the amount of $5,352.675; 15.0% on Wellons' Intermediate Advances in the amount of $3,000,000; and 0% on Wellons' Final Advances in the amount of $3,389,600. *Id.* at Schedule 1.1.

During the trial Wellons' Chief Financial Officer, Robert Harold Moore, calculated what he believed to be interest due on the contract claims. An unedited realtime transcript of his testimony was filed by the Eagle Valley defendants at ECF No. 378-2. His calculations are documented in Ex. 107A, submitted as ECF No. 378-3.

Mr. Moore began by breaking the $10,841,166.80 principal amount into two parts: (1) $7,920,264.24, which he characterized as "Initial and Intermediate Advances at 15%" (referring obviously to the interest rate provided in the Subordinated Promissory Note for the first two levels of Wellons' advances), and (2) $2,920,902.56, which he characterized as "Final Advances (Retention)." ECF No. 378-3. He used October 1, 2014 as his "Start Date" and April 30, 2017 as a "Current End Date." He applied the 15% rate to the $7,920,264 component. However, he applied an 8% rate to the $2,920,902.56 component.

When asked to explain the 8% rate he testified that it is the "statutory amount that's allowed in Colorado." ECF No. 378-2 at 112. He did not use the 0% rate provided in the Subordinated Promissory Note for the third level of Wellons' advances. He likewise did not mention the 5% late payment rate provided in the EPC Contract, apparently believing that it was subsumed within the larger rate provided by the Subordinated Promissory Note.

Mr. Moore then added a category he labeled "Past Due/Pre-Construction Financing interest – as of 8/16/13," using the 8% rate for that category. ECF No. 378-3. He testified that August 16, 2013 was the date when Eagle Valley obtained construction financing from Deutsche Bank, and that this category amounted to "interest on past due interest." ECF No. 378-2 at 111-12. Finally, he added a category labeled "Preferred Debt Interest on Initial & Interim Advances as of 09/30/14," at 15%. ECF No. 378-3. He explained that that was "the bridge loan or the preferred debt based on the advances made to Evergreen on the capital contribution agreement." *Id.* Moore's grand total of principal and interest of April 30, 2017 was $17,629,535.35. *Id.*

It is hard to understand, even in retrospect, why Mr. Moore believed that he could use an 8% rate that was not provided in either contract and that was contrary to the 0% rate provided for the third tier of advances in the Subordinated Promissory Note. Presumably he (or whoever was advising him) was referring to the 8% interest rate provided at Colorado Revised Statutes § 5-12-102(2). But, that rate applies only where there is no agreement in the contract to a rate, *see* C.R.S. § 5-12-102(1). Moreover, both contracts provide that they will be governed by Utah law. Ex. 17 at 73; Ex. 3 at 2. Even apart from the erroneous inclusion of the Colorado 8% rate in his figures Mr. Moore's analysis was, at best, difficult to understand and to relate back to either of the parties' contracts.

Nevertheless, in his closing argument Wellons' counsel asked the jury to award the stipulated maximum principal amount of $10,840,000 plus interest as calculated by Mr. Moore. This was consistent with his opening statement in which he had informed the jury that Wellons claimed "over $17 million which includes accrued interest." ECF No. 378-1 at 2-3, 4.

Specifically, the verdict form, as is pertinent to the present discussion, asked the jury to answer the following questions:

> 3. What was the amount of damages incurred by Wellons as the result of Eagle Valley's breach of contract (the maximum amount, not including interest, is $10,840,000; the minimum amount is $0)?
>
> Answer: _____
>
> 6. What was the amount of damages incurred by Wellons as the result of Evergreen's breach of the promissory Note between Wellons and Evergreen (the maximum amount, not including interest, is $10,840,000; the minimum amount is $0)?
>
> Answer: _____

Counsel asked the jury to insert $17,629,535 (plus per diem interest of $4,623 per day starting on May 1, 2017) in its answers to both questions 3 and 6. ECF No. 378-2 at 4-5. However, the jury awarded only the stipulated principal amount on both the EPC Contract claim against Eagle Valley and the promissory note claim against Evergreen.

The Court's draft form of judgment added 5% interest per annum to the principal amount of the verdict on the EPC Contract and 15% interest per annum on the first $8,352,675 advanced under the Subordinated Promissory Note, with the proviso that Wellons could not recover the same interest (or principal) twice. The Eagle Valley defendants informally responded that it would be inappropriate to award interest that the jury declined to award. Wellons responded with its motion re entry of final judgment. ECF No. 375. Wellons did not respond to the Eagle Valley defendants' argument as such. Rather, Wellons asked the Court to award interest on the $10,840,000 principal amount using the 15% rate provided in the Subordinated Promissory Note, from the date of the note, August 13, 2013 forward. *Id.* at 3. However, seemingly contrary to the Subordinated Promissory Note (and to Mr. Moore's method), Wellons now asks the Court to

award 15% interest on the entire $10,840,000 principal amount. ECF No. 375 at 3. In response the Eagle Valley defendants reiterate their opposition to any award of interest. ECF No. 378 at 6.

I find that Wellons lost the opportunity to obtain an award of interest under either the EPC Contract or the Subordinated Note when it made the choice to ask the jury to award such interest, however confusingly it did so, and the jury did not award it.

3. Prejudgment Interest.

However, I conclude that Wellons' failure to obtain an award of interest is not the end of the matter. "Prejudgment interest" can in some circumstances be awarded by the Court as a matter of law. The underlying theory is either that the defendant should not benefit from the use of money wrongfully withheld or that the plaintiff should not be deprived of the use of the money that was wrongfully withheld.

Here, the Eagle Valley defendants wrongfully withheld the principal amount due under both contracts, i.e., $10,840,000. I find that this amount was due at least by October 9, 2014, the date when Wellons formally demanded that the Eagle Valley defendants pay what they owed.[2] The Eagle Valley defendants have enjoyed the use of the wrongfully withheld funds (and conversely Wellons has not had the use of the funds) for more than two and one half years. Even though Wellons' clumsy effort to obtain a mish-mash of contractual interest and other interest from the jury failed, I conclude that it would be unjust to deny Wellons prejudgment interest based on the wrongful withholding of the funds for more than two and one half years. Otherwise, the Eagle Valley defendants' wrongful conduct would reap an unjust windfall.

[2] Wellons' demand letter of October 2, 2014 demanded payment of 14,441,874.31 within seven days. Ex. 55 at 2. As I have said, the parties later agreed that the maximum principal amount due was $10,840,000.

Federal courts look to state law regarding prejudgment interest in a diversity case. *Pegasus Helicopters, Inc. v. United Technologies Corp.*, 35 F.3d 507, 512 (10th Cir. 1994). Here there is a least some question as to which state's law – Colorado or Utah – should be applied. A federal court applies the conflict of laws rules of the forum state in a diversity action. *Kipling v. State Farm Mut. Automobile Ins. Co.*, 774 F.3d 1306, 1310(10th Cir. 2014). Colorado follows the Restatement (Second) of Conflict of Laws for contract actions. *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369, 1372 (Colo. 1979). Section §187 of the Restatement provides, in pertinent part,

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Here, as I have indicated, both contracts have a choice of law provision designating Utah law. The Subordinated Promissory note provides that it "shall be deemed to be made under and shall be interpreted under the laws of the State of Utah law (without giving effect to the conflict of laws principles thereof)." Ex. 3. The EPC Contract provides that "all matters arising hereunder or in connection herewith shall be governed by and construed in accordance with the

laws of the State of Utah." Ex. 17 at 73, ¶XI(M)(12). Eagle Valley is, or at least was at the time of the EPC Contract, a Utah Limited Liability Corporation, as were some of the related parties. The EPC Contract provides that notices and other communications provided for in the contract shall be provided to Eagle Valley Clean Energy, LLC at Suite 365, 4626 North 300 West, Provo, Utah. *Id.* ¶XI(M)(14). Evergreen is a Colorado corporation and, of course, the plant was constructed in Colorado. Wellons is an Oregon corporation. However, while there are Oregon, Colorado and Utah connections to this case, I conclude that under either subsection (1) or subsection (2) of §187 of the Restatement, Utah law governs as to prejudgment interest.

"Utah law provides for prejudgment interest if the damages are fixed as of a particular time and can be calculated with mathematical accuracy." *Clearone Communications, Inc. v. Chiang*, 432 F.App'x 770, 772 (10th Cir. 2011) (unpublished). I find that the principal amount of the debt was fixed by the parties' stipulation; that the amount was due no later than October 9, 2014; and that prejudgment interest can be calculated with mathematical accuracy.

U.C.A. (Utah Code Annotated) 1953 § 15-1-1, entitled "Interest rates—Contracted rate—Legal rate," provides in pertinent part:

> (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
>
> (2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

The EPC Contract is not a loan or forbearance and therefore § 15-1-1 has no potential application to it. *USA Power, LLC v. Pacificorp*, 372 P.3d 629, 670 (Utah 2016). The Subordinated Promissory Note does document a loan. The parties agreed on a rate of interest,

thus mooting subsection (2) of § 15-1-1. However, I have held above that Wellons cannot recover the interest specified in the Subordinated Promissory Note, having failed to obtain it from the jury. I conclude that § 15-1-1 cannot be applied here.

Because § 15-1-1 is not applicable, U.C.A. § 15-1-4, entitled "Interest on Judgments," provides the appropriate rate for calculating prejudgment interest. *Fuller v. Bohne,* 392 P.3d 898, (Utah Ct. App. 2017) (citing *USA Power,* 372 P.3d at 670). That statute provides that the rate is the federal post-judgment interest rate as of January 1 of each year, plus 2%. *Id.* §(3)(a). I interpret that to mean the federal post judgment rate in effect as of January 1 of the year when the debt became due.

I take judicial notice that the federal post judgment interest rate as of January 1, 2014 was 0.13%.[3] I conclude that prejudgment interest should be calculated on the principal amount of $10,840,000 from October 9, 2014 to the date of this Court's judgment at the rate of 2.13% (the federal post judgment rate at January 1, 2014 plus two percent).

Even in diversity cases, however, federal law, not state law, governs post-judgment interest. *See, e.g., In re Riebesell,* 586 F.3d 782, 794 n.11 (10th Cir. 2009). I take judicial notice that the federal post-judgment interest rate at July 24, 2017 is 1.22%.[4]

B. Unjust Enrichment.

The elements of an unjust enrichment claim are (1) a benefit conferred on the defendant by the plaintiff; (2) the defendant knew of the benefit; and (3) the defendant accepted the benefit

[3] *See* Federal Reserve Bank of St. Louis, Economic Data,"Weekly Selected Interest Rates Instruments, Yields in percent per annum for the period 2014-01-01," *available at* https://fred.stlouisfed.org/release/tables?rid=18&eid=290&od=2014-01-01.

[4] *See* Federal Reserve Bank of St. Louis, Economic Data, "Weekly Selected Interest Rates Instruments, Yields in percent per annum for the period 2017-07-21," *available at* https://fred.stlouisfed.org/release/tables?rid=18&eid=290&od=.

under circumstances that would make it unjust for defendant to retain the benefit without payment of its value. *See Desert Miriah, Inc. v. B&L Auto, Inc.*, 12 P.3d 580, 582 (Utah 2000); *DCB Construction Co., Inc. v. Central City Development Co.*, 965 P.2d 115, 119-20 (Colo. 1998). In its Fourth Claim, plaintiff asserted the following:

> 46. At the request of [Eagle Valley], plaintiff provided valuable labor, materials, and services for the development of the Property and the Project.
>
> 47. Neither Clearwater, [Eagle Valley], nor [Evergreen Clean Energy Corporation] paid plaintiff for the full value of plaintiff's work on the Property.
>
> 48. Clearwater, [Eagle Valley], and [Evergreen Clean Energy Corporation] have received a benefit at plaintiff's expense and it would be unjust for them to retain the benefit without paying for it in full.
>
> 49. Clearwater, [Eagle Valley], and [Evergreen Clean Energy Corporation] have been unjustly enriched in an amount to be determined at trial.

Third Amended Complaint, ECF No. 139, at 8.

That equitable claim was not presented to the jury. The jury did, however, resolve plaintiff's contract claims against Eagle Valley and Evergreen Clean Energy, mooting the unjust enrichment claim against them.

In its motion, plaintiff argues that it still has a valid unjust enrichment claim against Clearwater Ventures. It purports to satisfy the elements of the claim through evidence that (1) Clearwater owns the real property on which Wellons constructed the biomass facility that is the subject of the contracts; (2) Evergreen Clean Energy leases the property from Clearwater; (3) the value of the property was increased by Wellons' construction of the facility on the property. ECF No. 375 at 4. Wellons argues that it can meet the "unjust" piece by showing "some type of improper, deceitful, or misleading conduct by the landlord." *See DCB Construction*, 965 P.2d at 122. Wellons evidence is that the wives of defendants Wait and Rostrom are the members of

Clearwater Ventures, and that Clearwater received approximately $3.5 million from Evergreen Clean Energy after Evergreen received money from the government that was supposed to be used to pay Wellons. ECF No. 375 at 5. Wellons adds that if it cannot collect its judgment against Eagle Valley or Evergreen Clean Energy, Clearwater Ventures and its assets would be the only remaining viable avenue to collect on the judgment. *Id.*

I am not convinced. In the first place, as pled, the claim seeks recovery of the benefit of Wellons' work on the property. But that benefit of the work, i.e., the benefit of the bargain, was the price established in the Eagle Valley contract and Evergreen Clean Energy's promissory note. Wellons prevailed on its contract claims and was awarded the amount that the jury found to be due. No additional benefit was conferred on Wellons by Clearwater Ventures.

Moreover, the theory of the unjust enrichment claim against Clearwater, as it has evolved, is that Clearwater unjustly was enriched when a portion of the government funds that should have been reserved to pay Wellons was transferred by Messrs. Rostrom and Wait to their wives' LLC. But the jury effectively rejected this theory when it rejected Wellons' fraudulent transfer claim, including specifically its claim that funds were fraudulently transferred to Clearwater Ventures.

In short, the Court finds and concludes that the elements of an unjust enrichment claim against Clearwater Ventures were not established and resolves that claim against Wellons.

C. <u>Prevailing Party</u>.

The Court should award the "prevailing party" its costs, other than attorney's fees, to the extent allowed by law. Fed. R. Civ. P. 54(d)(1); D.C.COLO.LCivR 54.1. The term "prevailing party" is not defined in these rules. Generally, rather than counting claims won and lost, this

Court takes a more global or common sense view of which party realistically prevailed and awards costs accordingly.

The present case is somewhat unusual. Wellons sued Eagle Valley and Evergreen Clean Energy on contract claims which asserted that Wellons was not paid what it was due under the EPC Contract and the Subordinated Promissory Note. But, apparently concerned that it might not ultimately be able to collect a judgment on the contract claims, Wellons asserted its fraudulent transfer claims. Wellons asserted that once the Eagle Valley defendants transferred the government funds either to Mr. Rostrom and Mr. Wait, the principals of the Eagle Valley defendants, or to related entities in an attempt to put the funds beyond Wellons' ultimate reach. The defendants vigorously argued that the Court should bifurcate the fraudulent transfer claims, noting that they would be relevant only if (1) Wellons won on its contract claims and (2) Wellons could not satisfy its judgment against Eagle Valley or Evergreen Clean Energy. Defendants equally vigorously argued that Eagle Valley and Evergreen Clean Energy had ample assets to satisfy a judgment. Wellons opposed bifurcation, and ultimately the Court elected to have all issues resolved in one trial.

The defendants prevailed on the fraudulent transfer claims. But the Court finds that Wellons was the prevailing party for purposes of an award of costs. The focus of the case was a dispute concerning whether allegedly defective construction excused Eagle Valley and Evergreen Clean Energy from their contractual obligations. The jury resolved those issues in favor of Wellons and awarded more than $10 million in damages. Realistically, Wellons won its case.

Nevertheless, the Court recognizes that the fraudulent transfer claim was the source of repeated discovery disputes, consumed significant trial time, and undoubtedly accounted for a portion of the parties' costs. The Court has the discretion to reduce the prevailing party's cost award under Rule 54(d)(1) to reflect partial success. *See, e.g., Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1224 (10th Cir. 2001). The Court directs Wellons to eliminate all costs which primarily are attributable to the fraudulent transfer claim and to submit its bill of costs only after conferring with the defendants and attempting in good faith to reach agreement that such costs have been eliminated.

ORDER

For the foregoing reasons, plaintiff's motion regarding entry of final judgment, ECF No. 375, is DENIED. The rulings set forth in this order will be reflected in the Final Judgment.

DATED this 24th day of July, 2017.

BY THE COURT:

R. Brooke Jackson
United States District Judge