

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

DONALD D. LYONS and JOAN L.)
 LYONS as Individuals, and as)
 Assignees of James F. Scott and)
 Auburn Automotive Heritage, Inc.,)
)
 Plaintiffs)
 v.)
)
 TIMOTHY S. DURHAM, and)
 DIAMOND INVESTMENTS, LLC.)
)
 Defendants)

Case No. 1:09-CV-348

ORDER

This matter is before the Court on Plaintiffs Donald and Joan Lyons’ Motion for Leave to Voluntarily Dismiss Certain Claims and Enter Final Judgment on Remaining Claims [DE 262].

After the parties informed the Court that they were nearing settlement of the pending claims in this matter, I ordered them to file dismissal papers [DE 261]. In that order, I also denied the parties’ Joint Motion to Dismiss, Without Prejudice, Provided Defendants do Not Appeal the New York Judgment by July 14, 2013, or Alternatively, a Stay Pending Appeal [DE 259]. That (somewhat confusingly titled) motion purported to stipulate to the dismissal of any and all of Webster Business Credit Corporation’s claims against the Defendants and terminated Webster’s involvement in the litigation, but was contingent upon Durham not appealing the ruling of another court – and at the time it was filed, he still had time to do so. Accordingly, because the motion was premature and the parties informed me that they intended to agree to the dismissal of the entire case, I denied the motion without prejudice to the parties incorporating the dismissal of all of Webster’s claims into the settlement papers that I had ordered them to file [DE 261].

And that brings us to the present motion. The motion is not a stipulation of dismissal

signed by all parties; did not incorporate language dismissing Webster's claims; and was not signed by Webster. It simply states that based on the previously-filed (and previously denied) Joint Motion to Dismiss, the Lyons "understand that all other issues in this matter – including those relating to pending cross-claims between . . . Webster . . . and Defendant Timothy Durham . . . are also resolved," and thus ask the Court to enter a final judgment [DE 262 at ¶ 6].

For its part, on July 31, 2013, Webster filed a response to the Plaintiffs' motion, in which it referred the Court to the Joint Motion [DE 263]. The response states that Webster wishes to dismiss, without prejudice, its seven cross-claims [*Id.*]. The Court construes this as a renewal of the Joint Motion, which was signed by all parties who have appeared in the case [DE 259]. Accordingly, the Court **GRANTS** Webster's request to dismiss its seven cross-claims with prejudice.

Thus, what remains in this case is a request to dismiss all remaining claims between the Lyons and Durham and Diamond Investments without prejudice, and to enter final judgment in the principal amount of \$1 million on the Plaintiff's breach of contract claim, as ordered in the Court's September 7, 2012 summary judgment order [DE 245].

First, I will dismiss all of the remaining claims between the Lyonses and Durham and Diamond. Federal Rule of Civil Procedure 41(a)(2) permits the Court to dismiss an action at the plaintiff's request "on terms that the court considers proper." Here, the parties have indicated to the Court both at a hearing on the matter [DE 260] and by motion [DE 259; DE 262; DE 263] that they have agreed that dismissal of the remaining claims and cross-claims and termination of this litigation is their desired outcome. Webster has indicated in its response to the motion to dismiss that it is in agreement. Durham and Diamond have not objected to the motion, and the time for doing so has now passed. Therefore, I will **GRANT** the motion to dismiss all remaining counts of the Third Amended Complaint without prejudice.

Finally, I agree that entry of final judgment on the Plaintiffs' breach of contract claim is

appropriate. I previously granted the Plaintiffs' motion for summary judgment on this claim and determined that the appropriate measure of damages was \$1 million [DE 245 at 25-26]. In addition to the request for entry of final judgment in the amount of \$1 million on their breach of contract claim, the Lyons ask for prejudgment interest of 8% per day since September 9, 2009, the date on which Durham received \$1 million [DE 262 at 2]. In diversity actions like this one, a federal court must look to state law to determine the propriety of prejudgment interest. *Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1051 (7th Cir. 1998); *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1383 (7th Cir. 1990). Under Indiana law, prejudgment interest is available in a contract action when "the amount of the claim rests upon a simple calculation and the terms of the contract make such a claim ascertainable." *Kummerer v. Marshall*, 971 N.E.2d 198, 201 (Ind. App. 2012). Indiana Code section 24-4.6-1-103 governs prejudgment interest in contract cases. *Id.* According to the statute, "interest at the rate of eight percent . . . per annum shall be allowed . . . [f]rom the date of settlement on money due on any instrument in writing which does not specify a rate of interest." Accordingly, the Lyonses claim that they are entitled to prejudgment interest in the amount of \$219.18 per day from September 9, 2009 through the entry of judgment. The Court finds that this is appropriate under Indiana law, and **GRANTS** the request.

For the foregoing reasons, the Court **GRANTS** the Plaintiffs' Motion for Leave to Voluntarily Dismiss Certain Claims and Enter Final Judgment on Remaining Claims [DE 262]. Defendants Timothy Durham and Diamond Investments are **ORDERED** to pay Plaintiffs Donald and Joan Lyons \$1,000,000 on Plaintiffs' Count II, and prejudgment interest in the amount of \$219.18 per day from September 9, 2009 through the entry of judgment. All remaining claims of Plaintiffs Donald and Joan Lyons are **DISMISSED WITHOUT PREJUDICE**. All remaining cross-claims of Webster Business Credit Corporation are **DISMISSED WITHOUT PREJUDICE**. All pending motions are **DENIED AS MOOT**. The

Clerk is directed to **ENTER FINAL JUDGMENT** stating that the Plaintiffs are entitled to the relief stated herein. The Clerk is further directed to treat this matter as **TERMINATED**.

SO ORDERED.

ENTERED: March 6, 2014

s/ Philip P. Simon

PHILIP P. SIMON, CHIEF JUDGE
UNITED STATES DISTRICT COURT