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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ZURICH AMERICAN INSURANCE) 3:13-cv-00512-HDM-VPC
COMPANY, a foreign corporation,)
individually and as subrogee for)
its insureds UNION PACIFIC) ORDER
RAILROAD COMPANY AND UNION)
PACIFIC MOTOR FREIGHT COMPANY;)
DISCOVER PROPERTY & CASUALTY)
INSURANCE COMPANY, a foreign)
corporation, individually and as)
subrogee for its insureds UNION)
PACIFIC RAILROAD COMPANY and)
UNION PACIFIC MOTOR FREIGHT)
COMPANY,

Plaintiffs,

vs.

INTERMODAL MAINTENANCE SERVICES,
INC., a foreign corporation; DOES
I-X, inclusive; and ROE INSURANCE
COMPANIES XI-XX, inclusive; and
MOE CORPORATIONS XXI-XXX,
inclusive,

Defendants.

Before the court is plaintiffs Zurich American Insurance
Company and Discover Property & Casualty Insurance Company's
("plaintiffs") motion for prejudgment interest, filed April 16,
2015 (#78). Defendant Intermodal Maintenance Services ("defendant")

1 filed a response (#79) and plaintiffs replied. (#80).

2 **Background**

3 The present action involves claims of indemnity and
4 contribution in a subrogation matter stemming from an underlying
5 action for personal injuries sustained by Bert Brasher, a truck
6 driver for Devine Intermodal. Plaintiffs were the defending and
7 indemnifying insurance companies for Union Pacific Motor Freight
8 Company and Union Pacific Corporation. That action was resolved in
9 the Second Judicial District Court for the State of Nevada in and
10 for the County of Washoe, when plaintiffs paid a total settlement
11 of \$2,000,000 to Bert and Linda Brasher.

12 On September 18, 2013, plaintiffs filed the instant complaint
13 asserting claims for relief for Breach of Contract, Express
14 Indemnity, Implied and Equitable Indemnity, and Contribution. The
15 parties submitted cross-motions for summary judgment and at a
16 hearing on February 26, 2015, the court granted summary judgment in
17 favor of plaintiffs on the express indemnity and breach of contract
18 claims. A written order was filed on March 20, 2015. Judgment was
19 rendered in the amount of \$2,589,313, which represents the
20 \$2,000,000 settlement payment to the Brashers and \$589,313 in
21 attorneys' fees and costs plaintiffs incurred in the underlying
22 case. Defendant filed a notice of appeal on April 10, 2015.

23 **The Motion**

24 Plaintiffs move for prejudgment interest. Defendant asserts:
25 1) the court has no jurisdiction to hear the motion; 2) plaintiffs'
26 motion is untimely; 3) courts have discretion to choose whether
27 state or federal prejudgment interest rules apply in the event of a
28 conflict between state and federal laws; 4) plaintiffs never filed

1 and/or served an offer of settlement and therefore cannot recover
2 prejudgment interest under Neb. Rev. Stat. 45-103.2 Section 1; 5)
3 the \$2,000,000 settlement paid to underlying plaintiff Bert Brasher
4 was not a liquidated claim; and 6) as the ramp contractor agreement
5 is silent as to prejudgment interest and the parties never
6 stipulated to prejudgment interest, none should be awarded.

7 **Analysis**

8 A) Jurisdiction

9 Preliminarily, the court must determine whether it has
10 jurisdiction to consider the motion brought by plaintiffs.

11 "[A] postjudgment motion for discretionary prejudgment
12 interest constitutes a motion to alter or amend the judgment under
13 Rule 59(e)." *Osterneck v. Whitney*, 489 U.S. 169, 175 (1989).

14 Defendants contend that by filing their notice of appeal, they
15 divested this court of jurisdiction; however, "if a party files a
16 notice of appeal after the court announces or enters a judgment -
17 but before it disposes of a [motion under Rule 59(e)] - the notice
18 becomes effective . . . when the order disposing of the last such
19 remaining motion is entered." FED. R. APP. P. 4(B)(i). Therefore,
20 defendant's notice of appeal does not transfer jurisdiction to the
21 court of appeals until after this court adjudicates any timely
22 brought motion to alter or amend the judgment.

23 Plaintiffs had 28 days from the entry of judgment to file
24 their motion. "A motion to alter or amend a judgment must be filed
25 no later than 28 days after the entry of the judgment." Fed. R.
26 Civ. P. 59(e).¹ Plaintiffs timely filed their motion on April 16,

27
28 ¹ The 2009 Amendments to FRCP 59 extended the period for post-judgment motions to be filed from 10 days to 28 days.

1 2015.²

2 Defendant asserts the window for filing a motion pursuant to
3 FRCP 59(e) is ten days under the holding of *McCalla v. Royal*
4 *MacCabees Life Ins. Co.*, 369 F.3d 1128 (9th Cir. 2004). *McCalla* was
5 decided prior to the 2009 amendments to FRCP 59, which extended the
6 time from 10 days to 28 days. In *McCalla*, the court found a motion
7 for prejudgment interest should be considered a motion to alter or
8 amend the judgment pursuant to FRCP 59(e). *Id.* The ten day time
9 limit is mentioned only in the context of it being the time limit
10 enumerated in the rule. *Id.* at 1130. Consequently, the court finds
11 the 28 day time limit created by the 2009 amendments does not
12 conflict with circuit precedent. Accordingly, the court has
13 jurisdiction to consider plaintiff's motion.

14 B) Choice of Law

15 Plaintiffs contend the choice of law provision of the contract
16 requires the application of Nebraska law, and that using Nebraska
17 law is also consistent with this court's previous order concerning
18 the parties' motions for summary judgment. Defendant asserts it is
19 unclear whether state or federal law should apply to this case, and
20 therefore federal law should be applied.

21 State law generally governs awards of prejudgment interest in
22 diversity cases, unless the "substantive claim derives from federal
23 law alone." *Oak Harbor Freight Lines, Inc. v. Sears Roebuck, & Co.*,
24 513 F.3d 949, 961 (9th Cir. 2008). The Ninth Circuit has found that
25 when an action arises under diversity jurisdiction, the prejudgment
26 interest is evaluated under state law, as it is substantive in

27
28 ² Judgment was entered on March 20, 2015. Plaintiffs had until April 17,
2015, to file their motion.

1 nature. See *Lund v. Albrecht*, 936 F.2d 459, 464-65 (9th Cir.
2 1991); *In re Exxon Valdez*, 484 F.3d 1098, 1101 (9th Cir. 2007).
3 Once a federal court determines the request is for prejudgment
4 interest, it should look to the choice of law principles of the
5 forum state when determining which state law to applies. *Klaxon Co.*
6 *v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

7 In looking at state law, Nevada consistently upholds
8 contractual provisions such as the Nebraska choice of law provision
9 contained in the subject contract. In Nevada, courts "routinely
10 honor contractual choice of law provisions." *Rio Properties, Inc.*
11 *v. Stewart Annoyances, Ltd.*, 420 F.Supp.2d 1127, 1130-31 (D. Nev.
12 2006) (citing *Engel v. Ernst*, 102 Nev. 390 (1986)). Furthermore,
13 the defendant has not alleged that the contract or the choice-of-
14 law clause is invalid.

15 This court applied Nebraska law when considering the parties'
16 summary judgment motions:

17 Here, applying the Restatement's conflict of law provision,
18 the court finds (1) there is no evidence that Nebraska
19 governing law was selected in anything other than good faith
20 between the parties; (2) Nebraska has a substantial relation
21 to the transaction because Union Pacific is headquartered in
22 Nebraska; and (3) applying Nebraska's statute of limitations
23 comports with Nevada's recognized public interest in
24 recognizing freedom to contract. Therefore, the court
25 concludes Nebraska's statute of limitations applies to this
26 case.

27 #71 at 11; 11-19. Moreover, defendant's attorney conceded during
28 the hearing on the summary judgment motion that Nebraska law should
govern the statute of limitations issue. He stated that Nebraska
was "the choice of law selected by Union Pacific in the contract
that they drafted. Matter of fact, their contract specifically says
that these types of lawsuits had to be brought in Nebraska, and

1 would certainly suggest that they had a definite intent that all
2 laws associated with Nebraska would be applied." #81 at 28; 1-8.

3 Therefore, the court concludes that Nebraska law governs the
4 issue of prejudgment interest.

5 C) Applicable Nebraska Law

6 Plaintiffs assert the prejudgment interest rate under Nebraska
7 law is 12 percent per annum. Defendant asserts Nebraska law does
8 not permit the recovery of prejudgment interest on claims that
9 involve unliquidated claims, and as the instant case involves such
10 an unliquidated claim, plaintiffs may not recover prejudgment
11 interest.

12 Under Nebraska law, a claim is liquidated when there is "no
13 reasonable controversy as to both the amount due and the
14 plaintiff's right to recover." *Brook Valley*, 285 Neb. at 172-73.
15 This inquiry is "two-pronged" and there must be no reasonable
16 controversy on either issue. *Gerhold Concrete Co., Inc. v. St. Paul*
17 *Fire and Marine Ins. Co.*, 269 Neb. 692, 701 (2005); see also *BSB*
18 *Const., Inc. v. Pinnacle Bank*, 278 Neb. 1027, 1044 (2009).

19 The court concludes the claim in this case is liquidated.
20 During the motion for summary judgment hearing filed on June 6,
21 2015, the court found that defendant failed to "assert that there
22 are any material issue of fact in dispute on the amount of damages
23 that were recovered in the underlying claim" at 48-49. In
24 the response to plaintiff's motion for prejudgment interest,
25 defendant presents no further evidence or argument in regard to the
26 specific amount due to plaintiffs, but instead focuses on the
27 issues currently on appeal in the Ninth Circuit concerning active
28 negligence and spoliation of evidence. #79 at 11. Defendant thereby

1 disputes whether it is required to pay the judgment, but does not
2 question the specific amount involved.

3 Additionally, it is undisputed that plaintiffs paid a
4 settlement of \$2,000,000 to the Brashers in the underlying action
5 on March 13, 2013. As no reasonable controversy exists as to the
6 amount due to plaintiffs, and plaintiffs are entitled to
7 prejudgment interest at a rate of 12 percent per annum.

8 4) Pre-Judgment Interest Rate

9 Defendant contends that because the original contract does not
10 address the rate of prejudgment interest and the parties did not
11 stipulate to it, plaintiffs should not be allowed to collect
12 prejudgment interest. Plaintiffs assert there is no requirement
13 that the parties stipulate to an interest rate in the contract, and
14 that they are entitled to prejudgment interest from the date the
15 cause of action arose until the entry of judgment pursuant to
16 Nebraska law.

17 Prejudgment interest for a liquidated claim runs from the
18 "date the cause of action arose until the entry of judgment." Neb.
19 Rev. Stat. § 45-103.02(2) (2014). Nebraska law provides, "unless
20 otherwise agreed, interest shall be allowed at the rate of twelve
21 percent per annum on money due on any instrument in writing..."
22 Neb. Rev. St. § 45-104 (2014). In *Knox v. Cook*, the court
23 determined that even though the lease in question did not specify a
24 prejudgment interest rate, Neb. Rev. § 45-104 applied and the
25 prejudgment interest rate would be twelve percent. *Knox v. Cook*,
26 233 Neb. 387, 395 (1989); see also *Valley County School Dist. 88-*
27 *0005 v. Ericson State Bank*, 18 Neb.App. 624, 628 (2010) (finding
28 that "because no interest rate had otherwise been agreed upon, the

