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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001901-MR

THE ELK HORN COAL CORPORATION — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
CIVIL ACTION NO. 97-CI-00634

CHEYENNE RESOURCES, INC. and
PC&H CONSTRUCTION, INC. — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

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BEFORE: GUIDUGLI, JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.[1]

HUDDLESTON, SENIOR JUDGE: The Elk Horn Coal Corporation challenges the amount of an award of prejudgment interest granted it in a judgment of restitution. On appeal, Elk Horn claims that the circuit court used the wrong starting date in calculating the amount of interest due. Because we agree with Elk Horn, we affirm in part, reverse in part and remand.

[1] Senior Judges Joseph R. Huddleston and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

Elk Horn entered into a coal mining contract with Cheyenne Resources, Inc. The transaction turned sour, and Cheyenne, together with PC&H Construction, Inc., (hereinafter "Cheyenne") sued Elk Horn in Floyd Circuit Court claiming that Elk Horn had fraudulently induced it to enter into the contract. After a jury trial in October 1998, Cheyenne was awarded judgment against Elk Horn in the sum of $9.5 million. Elk Horn appealed to this Court and posted a supersedeas bond, thereby staying enforcement of the judgment. This Court affirmed the judgment.[2] Elk Horn then moved the Kentucky Supreme Court to grant discretionary review, but that Court declined to do so.

After the Supreme Court denied discretionary review, Cheyenne sought to enforce the judgment and requested, pursuant to Kentucky Revised Statutes (KRS) 26A.300, a supersedeas penalty of 10 percent of the judgment award arguing that Elk Horn had delayed the case beyond the first appeal to this Court when it sought discretionary review from the Supreme Court. In a response filed on March 15, 2001, Elk Horn argued that the circuit court should not force it to pay the 10 percent delay penalty because KRS 26A.300 was unconstitutional. The circuit court did not address Elk Horn's constitutional challenge, and, on March 16, 2001, awarded Cheyenne $14.5 million which included the original award, prejudgment interest, post-judgment interest

[2] 1998 CA-002815-MR and 1998-CA-002375-MR (unpublished opinion rendered February 25, 2000).

and the 10 percent supersedeas penalty, $950,000.00. Elk Horn promptly satisfied the judgment and paid the supersedeas penalty. Elk Horn again appealed to this Court arguing that KRS 26A.300 was unconstitutional. This Court affirmed, upholding the supersedeas penalty,[3] but the Supreme Court granted discretionary review and ultimately held that KRS 26A.300, the statute providing for a supersedeas penalty, was unconstitutional.[4]

After the Supreme Court's opinion became final, Elk Horn moved the circuit court to enter a judgment of restitution in its favor in the amount of $950,000.00. Elk Horn also asked for both prejudgment and post-judgment interest on the principal amount. A judgment of restitution was granted for the amount of the penalty, $950,000.00, together with post-judgment interest. Later, the circuit court awarded Elk Horn prejudgment interest at the rate of 8 percent per annum calculated from June 9, 2005, the date on which the Supreme Court's opinion became final.

Unsatisfied with the judgment, Elk Horn once again appeals to this Court where it makes three arguments in support of reversal.

First, Elk Horn argues that when judgment is granted for a liquidated amount, then the circuit court must award

[3] 2001-CA-000783-MR (unpublished opinion rendered August 9, 2002).

[4] *The Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.2d 408 (Ky. 2005).

prejudgment interest as a matter of law.[5] Since its claim was for a liquidated amount, Elk Horn reasons, it was entitled to prejudgment interest and, furthermore, the court had no discretion in awarding it. Not only did the court lack discretion in awarding prejudgment interest, it also lacked discretion in setting the amount. According to Elk Horn, the court had to use the date Elk Horn paid the penalty in calculating prejudgment interest.

Second, Elk Horn points out that if a defendant in a lawsuit pays the plaintiff a judgment award but the judgment is later reversed, the defendant is entitled to receive the amount paid plus interest.[6] So for Elk Horn to receive full restitution, prejudgment interest had to be included in the award. However, since the circuit court failed to give Elk Horn the full amount of prejudgment interest to which it was entitled, it denied Elk Horn full restitution. To be made whole, which is the objective of restitution, the court was required, Elk Horn argues, to award it prejudgment interest from and after March 16, 2001, the date it paid the unconstitutional penalty.

Finally, Elk Horn insists that if denied prejudgment interest from March 16, 2001, it would be as if it had given

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[5] *See Nucor Corp. v. General Electric Co.,* 812 S.W.2d 136 (Ky. 1991), and *Shanklin v. Townsend,* 434 S.W.2d 655 (Ky. 1968).

[6] *See Restatement of Restitution* § 74, comment d (1937).

Cheyenne an interest-free loan. Consequently, Cheyenne would have been unjustly enriched.

While the Supreme Court of Kentucky has not addressed the subject of prejudgment interest often, it has consistently held that prejudgment interest may be awarded under appropriate circumstances. If a claim is for an unliquidated amount, then the circuit court may, within its discretion, award prejudgment interest.[7] But, if the claim is for a liquidated amount, as here, then the court must award prejudgment interest.[8] While it is sometimes difficult to determine whether a claim is for a liquidated or an unliquidated amount, in this case Cheyenne does not dispute that Elk Horn's claim was for a liquidated amount. Since the amount was liquidated, Elk Horn was entitled to prejudgment interest, and the circuit court, in fact, awarded Elk Horn such interest.

Since Elk Horn was awarded prejudgment interest, we are left with the question: what starting date should have been used in calculating the amount of prejudgment interest? Our research has failed to disclose a case that directly addresses

[7] *3D Enterprises Contracting Corp. v. Louisville and Jefferson Co. Metropolitan Sewer District,* 174 S.W.3d 440, 450 (Ky. 2005).

[8] *Nucor Corp. v. General Electric Co., supra,* note 5, at 141.

this question. The closest case that we have found is *Alexander Hamilton Life Insurance Company of America v. Lewis*.[9]

In *Alexander Hamilton*, the Lewises' daughter disappeared and was thought to be dead. When seven years had passed since her disappearance, the Lewises sued the life insurance company to collect the proceeds from two policies on their daughter's life. The Lewises were successful, and the insurance company paid them the proceeds from the policies.[10] Sometime later, the insurance company found out that the daughter was alive and moved to set aside the judgment. The circuit court did so and ordered the Lewises to pay back half the insurance proceeds without prejudgment interest.[11]

Addressing the issue of prejudgment interest, the Supreme Court held that the insurance company's claim was for liquidated damages and so it was entitled to prejudgment interest. But the Court concluded that interest should not be awarded according to a rigid theory of compensation, but instead should be based on notions of fairness.[12] The Court reasoned that a circuit court should take into consideration the fault of the party who is required to pay the interest. The Court

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[9] 550 S.W.2d 558 (Ky. 1977).

[10] *Id.*

[11] *Id.* at 559.

[12] *Id.* at 560.

observed that when a party owes a debt and fails to pay, then the party has deprived its creditor of the money the creditor deserved. Since the party was at fault, then the date on which the debt was owed should be used to calculate the amount of prejudgment interest.[13] But, if a party received money pursuant to a final and unappealed judgment which was later set aside, then the party was innocent. In that situation, prejudgment interest should run from the date on which that party "was put on notice of circumstances that justify . . . setting the judgment aside."[14]

In *Alexander Hamilton,* the Lewises were innocent parties who received the proceeds of the life insurance policies as the result of a judgment that was later set aside when their daughter was found to be alive. The Lewises did not learn that their daughter was alive until July 25, 1971. The Supreme Court held that prejudgment interest should run from that date since it was then they learned of circumstances that would justify reversal of the judgment.[15]

Like the Lewises in *Alexander Hamilton,* Cheyenne was an innocent party since it received the supersedeas penalty pursuant to a judgment. So prejudgment interest should have

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[13] *Id.*

[14] *Id.*

[15] *Id.*

been awarded from the time Cheyenne was on notice of circumstances that justified reversal of that portion of the judgment awarding a supersedeas penalty. Since Elk Horn challenged the constitutionality of KRS 26A.300 before paying the penalty, Cheyenne was on notice that the judgment awarding the penalty could potentially be reversed. And, since Cheyenne had such notice, equity requires that Elk Horn receive prejudgment interest from the date it paid the penalty now declared unconstitutional.

We affirm that portion of the judgment of restitution awarding prejudgment interest, but reverse that portion of the judgment setting the date used to calculate the amount of prejudgment interest. This case is remanded to Floyd Circuit Court with directions to award Elk Horn prejudgment interest in the amount of 8 percent per annum[16] from and after March 16, 2001, the date on which Elk Horn paid Cheyenne the supersedeas penalty.

ALL CONCUR.

[16] KRS 360.010(1). *See also Borden v. Martin,* 765 S.W.2d 34, 35 (Ky. App. 1989).

BRIEF FOR APPELLANT:

Richard C. Ward
Jeff A. Woods
Maureen D. Carman
WYATT, TARRANT & COMBS, LLP
Lexington, Kentucky

William S. Kendrick
FRANCIS, KENDRICK & FRANCIS
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Bruce E. Cryder
Margaret A. Miller
GREENBAUM DOLL & McDONALD PLLC
Lexington, Kentucky