

RENDERED: JULY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001034-MR
AND
NO. 2007-CA-001156-MR

THOMAS & BETTS CORPORATION,
INC., AND ARMOUR ENTERPRISES,
INC.

APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 99-CI-002995

A & A MECHANICAL, INC.

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT AND MOORE, JUDGES, BUCKINGHAM,¹ SENIOR
JUDGE.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, JUDGE: Thomas & Betts appeals the final judgment of the Jefferson Circuit Court, arguing that it failed to properly follow the directions remanded to it by the Kentucky Court of Appeals and erred in not granting it pre-judgment interest and attorneys' fees. A&A Mechanical cross-appeals on the trial court's failure to grant it pre-judgment interest and attorneys' fees. After careful review, we affirm in part and reverse in part.

In 1996, the Transit Authority of River City (hereinafter "TARC") solicited bids for the construction of improvements to its bus storage facility. A&A Mechanical (hereinafter "A&A") bid on the work to be performed on the HVAC system and solicited quotes from subcontractors to provide sixteen large air units (hereinafter the "units"), used to collect, heat, and convey outside air into the building. MBH Equipment Sales, Inc., (hereinafter "MBH") a distributor of equipment manufactured by Thomas & Betts, submitted a sales quotation to supply the units.

A&A was awarded the contract and on January 7, 1997, received a notice to proceed, stating that all work was to be completed within 210 days and was to be performed in accordance with specifications drafted by TARC. On January 9, 1997, in accordance with MBH's quote, A&A submitted a purchase order to MBH with a price of \$170,000 and referenced the TARC specifications. Because MBH had financial difficulties, it could not purchase the units from Thomas & Betts; therefore Thomas & Betts directly delivered the units to A&A at the TARC facility. The units, however, were not vertical units as required by the

purchase order so they were returned to Thomas & Betts which then sent reconfigured units. Soon after installation, the units began having leakage problems, giving rise to the present controversy.

In an attempt to rectify the water problems, on February 12, 1998, Thomas & Betts, TARC, and A&A met and agreed that rubber membrane roofing needed to be installed. In April 1998 Thomas & Betts paid approximately \$9,000 for the installation of rubber roofs, but the leakage problems continued.

As of August 1998, A&A had not paid anything on the purchase order. Joe Salsman, A&A project manager, proposed that A&A would pay the invoice after deducting expenses incurred as a result of the problems with the units and in return Thomas & Betts would agree to extend the limited warranty of repairs on the units. Thomas & Betts disclaimed all other warranties, including warranties of merchantability and fitness for a particular purpose. Although TARC accepted the extended warranty, A&A refused and did not pay the invoice amount.

In February 1999 another meeting was held, and it was suggested that a hood should be installed over the units. At some point after that date, however, Thomas & Betts, having received no payment from A&A for the units, began to deny any responsibility for fixing the problem.

In May 1999, A&A filed an action against Thomas & Betts alleging various breaches of the purchase order. Thomas & Betts counterclaimed for the purchase price of the units. Subsequently, A&A amended its complaint alleging

Thomas & Betts committed fraud by failing to comply with the purchase order and denying liability for the defective units.

A jury found Thomas & Betts breached an express warranty to A&A and an implied warranty of fitness for a particular purpose. It also concluded that A&A did not accept the units and denied Thomas & Betts recovery of the purchase price. It finally found that Thomas & Betts committed fraud in the performance of the contract. A&A was awarded \$231,467 in incidental damages, \$134,878 in consequential damages, and \$400,000 in fraud damages. Thomas & Betts moved for a judgment notwithstanding the verdict and alternatively a new trial, arguing that the verdict was internally inconsistent, legally flawed, unsupported by the evidence, and the result of impermissible passion and prejudice demonstrated by the damages award which was almost double the amount claimed. The trial court summarily affirmed the verdict, and Thomas & Betts filed an appeal with this Court.

In an unpublished opinion, this Court affirmed in part, reversed in part, and remanded the matter to the trial court. This Court affirmed the jury's \$366,345 award against Thomas & Betts for breach of warranty but determined that the fraud claim was not legally cognizable and struck the \$400,000 portion of the award. Furthermore, this Court determined that A&A's installation, modification, and maintenance of the units constituted acceptance of the units and awarded Thomas & Betts a judgment on its counterclaim. In fact, this Court found that the trial court should have directed a verdict in favor of Thomas & Betts for

the price of the units. This Court then directed that the amount of the purchase order, \$170,000, be set off against A&A's \$366,345 award for breach of warranty damages and remanded the case to the trial court for "entry of judgment consistent with this opinion." A&A subsequently moved for discretionary review by the Kentucky Supreme Court, and that motion was denied on September 14, 2005.

On remand, the trial court issued a final judgment awarding A&A the principal amount of \$366,345 with post-judgment interest beginning on the date of the original judgment compounded annually. While the trial court also awarded Thomas & Betts a setoff of \$170,000, the final judgment failed to deduct that amount from the principal amount of \$366,345, instead providing setoff only after the accumulation of five years' post-judgment interest. The final judgment "intentionally declined" to award either party with pre-judgment interest, attorneys' fees, and court costs. Both parties now appeal.

Thomas & Betts first argues that the trial court erred in attaching post-judgment interest to the original judgment of \$366,345 rather offsetting that amount by the amount due to it on the purchase order, as instructed on remand by this Court, and then attaching post-judgment interest. Contrary to A&A's argument, Thomas & Betts is not arguing that post-judgment interest is not warranted at all. Instead, it is arguing that the method in which the trial court calculated the interest on remand was incorrect. This issue was properly preserved, and we review it *de novo*.

Kentucky jurisprudence follows the well-established legal principle that a judgment entered after remand should place each party in the position it would have been in had the trial court's original action been correct. This rule was applied in *Elpers v. Johnson*, 386 S.W.2d 267, 268 (Ky. 1965), in which the Court set aside a judgment notwithstanding the verdict and reasoned "the effect was to hold that the original judgment in favor of plaintiffs was in fact never effectively lost but always in fact existed." Therefore, this Court held that the plaintiffs were entitled to interest on the judgment from its original date. *See also Decker v. Glasscock Trucking Service, Inc.*, 403 S.W.2d 275, 276 (Ky. 1966)(holding that judgment on verdict for plaintiffs against whom circuit court erroneously entered directed verdict bore interest from date of first entry of judgment on verdict, not date that circuit court entered judgment for plaintiffs on verdict in accordance with opinion and mandate of Court of Appeals). The principle is most clearly expressed in *Commonwealth v. Transportation Cabinet, Department of Highways v. Esenbock*, 200 S.W.3d 489 (Ky.App. 2006), in which this Court held that:

the circuit court originally entered an erroneous judgment understating the awards to which appellants were entitled, which is analogous to the erroneous judgment notwithstanding the verdict entered in *Elpers*. On appeal, this Court issued a mandate increasing the award to the appellants, which is analogous to the decision of the Court of Appeals in *Elpers* that the award of judgment notwithstanding the judgment was erroneous. In *Elpers*, it was determined that interest should run from the date of the original erroneous judgment, March 22, 1960, rather than the date of the judgment entered upon remand, May 22, 1963.

...

‘A full correction of that error requires that interest be allowed from the date the erroneous judgment was entered and not from the date judgment was entered on the mandate.’

Id. at 494 (quoting *Helton v. Hoskins*, 128 S.W.2d 732, 733-734 (Ky. 1939)).

Following this logic, it was an error for the trial court to grant post-judgment interest on the original erroneous judgment of \$366,345. Instead, in order to place the parties in the position they would have been if the trial court had not erred in the first judgment, the \$366,345 should have been offset, as instructed by this Court on remand, by the amount due on the purchase order to Thomas & Betts before attaching post-judgment interest. Also consistent with the principles discussed above, post-judgment interest on the corrected judgment amount should run from the entry of the original order, November 4, 2002. We therefore remand this issue to the trial court for proceedings consistent with this analysis.

Both parties now argue that they are entitled to pre-judgment interest on their “liquidated claims.” The award of pre-judgment interest, as it would apply to the contract theory in this case, is covered in the Restatement (Second) of Contracts § 354, “Interest as Damages,” as follows:

- (1) If the breach consists of a failure to pay a *definite sum in money* or to render a performance with *fixed or ascertainable monetary value*, interest is recoverable from the time for performance on the amount due less all deductions to which the party in breach is entitled.
- (2) In any other case, such interest may be allowed *as justice requires* on the amount that would have been just

compensation had it been paid when performance was due.

(Emphasis added.) Thus, where the subject matter of the breach of contract claim falls under subsection (1) above, as Thomas & Betts' and a portion of A&A's claims do, interest is due as a matter of course. We accordingly find that Thomas & Betts is entitled to eight percent interest compounded annually on the \$170,000 due on the purchase order, as it is a failure to pay a definite sum of money.

Additionally, we find A&A is also entitled to eight percent interest compounded annually on the \$231,467 in incidental damages, as it is the result of failure to render performance with an ascertainable monetary value. *See Reliable Mechanical, Inc. v. Naylor Industrial Services, Inc.*, 125 S.W.3d 856 (Ky. 2003) (“Absent a contractually agreed upon rate, the appropriate rate of interest is governed by statute. KRS 360.010 [setting the legal rate of interest in general] provides that the ‘legal rate of interest is eight (8%) percent per annum.’”).

As to pre-judgment interest on A&A's \$134,878 in consequential damages, we find that it was within the sound discretion of the trial court to deny this claim. *See Nucor v. General Elec. Co.*, 812 S.W.2d 136, 143 (Ky. 1991). Therefore we will not now seek to replace our own judgment for that of the trial judge.

Both parties finally argue that they are each entitled to have their court costs and attorneys' fees paid by the other party. Our standard of review on appeal is whether the trial court abused its discretion in refusing to award costs and

attorney's fees. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)).

“Under our law, attorney's fees are not allowable as costs in absence of statute or contract expressly providing therefore.” *Kentucky State Bank v. Ag Services, Inc.*, 663 S.W.2d 754, 755 (Ky.App. 1984). In this case, it is undisputed that the purchase order provided that “the prevailing party shall be entitled to recover its costs of suit and reasonable attorney’s fees.” “The prevailing party” in this case, however, is unclear in light of the fact both parties prevailed on different issues. Therefore, we find that the purchase order does not govern this particular situation, and the determination of whether either party was entitled to court costs or attorney’s fees falls to the discretion of the trial court. After careful review, we find that the trial court did not abuse its discretion in not awarding attorney’s fees or court costs to either party.

In summary, we direct the trial court to award pre-judgment interest to both parties as set forth in this opinion. We additionally instruct the trial court to offset A&A’s damages by the \$170,000 plus pre-judgment interest, before it then calculates the post-judgment interest on A&A’s award.

Accordingly, we reverse in part, affirm in part, and remand for proceedings consistent with this opinion.

ALL CONCUR.

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