STATE OF MICHIGAN

COURT OF APPEALS

THE PACKLINE COMPANY,

Plaintiff/Counter-Defendant/Appellee,

v

DAVID T. RYDER and DAVID T. RYDER, TRUSTEE TO THE DAVID T. RYDER TRUST,

Defendants/Counter-Plaintiffs/ Third Party Plaintiffs/Appellants,

v

STEPHEN RYDER,

Third Party Defendant/Appellee.

UNPUBLISHED
November 24, 1998

No. 200942
Wayne Circuit Court
LC No. 94-412163 CZ

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Defendants/counter-plaintiffs/third party plaintiffs ("defendants") appeal as of right from a judgment entered in favor of plaintiff/counter-defendant ("plaintiff") and third party defendant Stephen Ryder following a bench trial. We affirm in all respects except the calculation of interest.

Defendants first argue on appeal that the ten percent interest rate on the promissory note under which defendants were found liable was usurious, and that the trial court erred in failing to apply the law of usury. Defendants waived the usury defense by failing to assert it in their responsive pleading. MCR 2.111(F)(2); *Campbell v St John Hospital*, 434 Mich 608, 615-617; 455 NW2d 695 (1990); *Shaw Investment Co v Rollert*, 159 Mich App 575, 580; 407 NW2d 40 (1987). Relying on MCR 2.118(C)(1) and *Hornack v Young*, 63 Mich App 650; 234 NW2d 746 (1975), defendants argue that the usury defense was not waived because it was impliedly tried below. We disagree. Defendants failed to raise the usury defense until after trial, thereby depriving plaintiff of the opportunity of presenting

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

evidence on the issue. Plaintiff would thus have been prejudiced by such a late amendment to the pleadings. MCR 2.118(C)(2). Also, defendants never moved to amend the pleadings to assert the usury defense. We therefore conclude that defendants have waived the usury defense.

Defendants next argue that the trial court clearly erred in finding that a certain $50,000 payment by plaintiff to defendant David Ryder in October 1989, was a prepayment on plaintiff's buyout of David's stock in plaintiff rather than a capital contribution to David's and Stephen's partnership, DJS Investment. We disagree. Conflicting evidence was presented on this issue below. The trial court found plaintiff's evidence to be more credible and reliable. Plaintiff's position was supported by the testimony of Stephen and of plaintiff's treasurer. Moreover, the documentation submitted by defendants did not conclusively establish that the payment was a capital contribution to DJS. We defer to the trial court's special opportunity to assess the credibility of the witnesses appearing before it. MCR 2.613(C). Because we are not left with a definite and firm conviction that a mistake has been made, the trial court's finding on this issue was not clearly erroneous. *Berry v State Farm Mut Automobile Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996).

Defendants next argue that the trial court erroneously awarded compound interest to plaintiff. We agree. "[I]n the absence of a statute to the contrary, an explicit agreement of the parties, or some special circumstance dictating otherwise, the rule in this state is that interest shall be calculated on the basis of simple interest rather than compound interest." *Norman v Norman*, 201 Mich App 182, 187; 506 NW2d 254 (1993). Here, it is evident from the court's calculations that it awarded compound interest for the approximately one-year period between trial and the issuance of the court's written opinion. We therefore remand the case to the trial court to recalculate interest based on simple, rather than compound, interest, and to take any additional evidence which may be required to recalculate interest. MCR 7.216(A)(5).

Defendants also argue that the trial court erred in failing to deduct the amount owed by plaintiff to David before calculating interest on David's promissory note. Defendants have cited no authority in support of this argument. This Court will not search for authority to support a party's position. *Winiemko v Valenti*, 203 Mich App 411, 419; 513 NW2d 181 (1994).

Lastly, defendants argue that the trial court erred in failing to award attorney fees to defendants under a guaranty and a security agreement undertaken by the parties. We disagree. "When presented with a [contractual] dispute, a court must determine what the parties' agreement is and enforce it. Contractual language is given its ordinary and plain meaning, and technical and constrained constructions are avoided." *G & A Inc v Nahra*, 204 Mich App 329, 330-331; 514 NW2d 255 (1994) (citations omitted). The plain language of the guaranty makes clear that attorney fees are only available to "the prevailing party." Defendants did not prevail in this case because they did not successfully prosecute the action or successfully defend against it. Black's Law Dictionary (6th ed) (definition of "prevailing party"). Although defendants were owed money by plaintiff, that amount was offset by the amount that defendants owed plaintiff. Defendants also were not entitled to attorney fees under the security agreement. That agreement provides for the payment of attorney fees incurred by defendants in protecting and enforcing their rights under the security agreement. The agreement was never enforced because the amount owed to defendants was offset by the amount owed by defendants to plaintiff. We

therefore conclude that defendants are not entitled to attorney fees under either the guaranty or security agreement.

Affirmed in all respects except the calculation of interest. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Robert J. Danhof