STATE OF MICHIGAN

COURT OF APPEALS

PRIMETIME LANDSCAPING & SNOW REMOVAL, L.L.C.,	UNPUBLISHED April 10, 2012
Plaintiff-Appellant,	
v	No. 303045 Oakland Circuit Court
DAMICO DEVELOPMENT, INC.,	LC No. 2008-092056-CK
Defendant-Appellee.	

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

In this contract dispute, plaintiff appeals as of right from a judgment granting it $33,657.46. Plaintiff argues that the trial court should have awarded pre-judgment statutory interest and conducted an evidentiary hearing related to attorney liens placed on the judgment. We reverse in part and remand.

I. BASIC FACTS

Plaintiff, a landscaping and snow removal company, brought the instant action against defendant, alleging breach of contract for defendant's failure to pay invoices for snow plowing and salting from the 2007-2008 winter season. Defendant was responsible for managing and maintaining the Riverbend Commons retail mall located in Monroe, Michigan.

On November 11, 2007, the parties entered into a contract for snow/ice removal for the Riverbend property for the 2007-2008 season. Among the terms provided, the contract stated that salt was to be applied to "parking areas, driveways, and streets" at a price of $125 per ton.[1]

From November 2007 through mid-February 2008, plaintiff performed under the contract and charged $125 per ton of salt. However, Ron Asaro, the sole member of plaintiff company, testified that in mid-February, he talked to defendant's agent, Tammy Wilke, about getting a

[1] The contract also provided different pricing for snow removal depending on the amount of snow fall, but, since the appeal only implicates the salting aspect, those prices are not at issue.

price adjustment for the salt. Asaro claimed that due to drastic increases in salt pricing, he requested a new price of $200 per ton for salt, he provided forms to all of his clients detailing the price increase, and Wilke orally agreed to the increase in salt price. Plaintiff failed to introduce, however, any documentary evidence supporting his testimony that defendant had agreed to the price increase. Instead, plaintiff was only able to introduce into evidence a blank form, which did not have any fields filled in, including a client name or the proposed price adjustment for the salt.

Thereafter, from February 12, 2008, through the end of the snow season, plaintiff sent defendant invoices billing the salt application at $200 per ton, with the total amount of salt applied after February 12, 2008, being 86.5 tons. John Damico, an officer of defendant corporation, after being presented the invoices containing the price increase, withheld payment on the entirety of plaintiff's invoices (including payment for snow removal, which price had not changed).[2] Thus, plaintiff was not paid for *any* of the work it performed in February and March, and the amount claimed by plaintiff totaled $41,337.56. Before plaintiff filed suit, defendant offered to pay $10,000 less in total satisfaction of the debt, or $31,337.56, but plaintiff refused.

On June 6, 2008, plaintiff, represented by legal counsel from Ziegler & Associates, filed suit. On December 2, 2008, the trial court permitted the withdrawal of Ziegler & Associates as plaintiff's legal counsel. Asaro attempted to represent plaintiff in the trial court proceedings.[3] However, because Michigan law does not permit a non-lawyer to represent a corporate entity in court, even if the person is the sole shareholder or member of that entity, the trial court gave plaintiff until March 13, 2009, to obtain new legal counsel.

On March 5, 2009, Douglas Buk filed his appearance on behalf of plaintiff. Buk represented plaintiff through the court-ordered facilitation. But on October 7, 2009, Buk filed a motion to withdraw as counsel, citing a breakdown of the attorney-client relationship. On October 14, 2009, the trial court granted Buk's motion and gave plaintiff 30 days to obtain another attorney.

On November 13, 2009, Skye Suh, PLC ("Suh") filed its appearance on behalf of plaintiff. On November 30, 2009, defendant filed a motion requesting that discovery be extended because, by the time plaintiff had legal counsel, all of the relevant dates in the scheduling order had passed without discovery completing. On December 10, 2009, the trial

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[2] Damico testified that he withheld all payment because he thought that plaintiff was "gouging" on the invoices by claiming to have used a much larger quantity of salt (eight tons per application) than was necessary (three to five tons per application). However, the trial court did not find that plaintiff acted fraudulently or breached the contract in this manner, and no cross-appeal has been filed by defendant to challenge these findings.

[3] The parties stipulated to allowing Ziegler to withdraw. The stipulation further stated that "Plaintiff will represent itself in this matter." But the trial court's order stated that plaintiff "shall secure other counsel by December 19, 2008."

court entered an order setting new dates for certain discovery to take place, setting January 29, 2010, as the deadline for completing discovery.

On August 16, 2010, Suh filed a motion to withdraw as plaintiff's counsel. Suh's motion claimed that the attorney-client relationship had been so deteriorated that continued representation was impossible and that it had been "effectively discharged." On September 1, 2010, the trial court granted Suh's motion to withdraw. The order also required plaintiff to secure new legal counsel by September 29, 2010.

On September 29, 2010, Sharon Fox filed her appearance to represent plaintiff.

On November 22, 2010, the trial court conducted a one-day bench trial. After hearing the evidence and arguments, the trial court issued an opinion and order on December 6, 2010. The trial court concluded:

> The contract price was $125.00 per ton. There is no written change to the contract agreed upon between the parties, and therefore, the Court finds that the contract was breached as of 2/12/08. Such a breach would preclude any interest being assessed. The overcharge of $6487.50 ($75.00/per ton x 86.5 tons) is deducted from the original claimed amount of $40,144.96 and leaves a balance due from Defendant to Plaintiff in the amount of $33,657.46 plus statutory interest from the date of entry of judgment.

On December 30, 2010, plaintiff moved for entry of judgment. In its motion, plaintiff noted that the contract called for 18% annual interest, so it sought payment of statutory interest calculated at "13% per year compounded annually" as contemplated in MCL 600.6013(7).[4] Defendant opposed the motion, citing the existence of four attorney liens (including the court-ordered facilitator) and relying on the trial court's statement in its previous opinion that plaintiff could not recover interest because plaintiff was the first party to breach the contract.

On January 12, 2011, the trial court entered a judgment against defendant for $33,902.46.[5] The judgment specifically stated that the "court will not allow judgment interest."

On February 2, 2011, Asaro filed a motion "amendment of judgment, dismissal of liens, and motion for new trial" on behalf of plaintiff. On February 4, 2011, defendant filed a motion to, *inter alia*, strike plaintiff's motion because it was not filed by an attorney. On February 22, 2011, Asaro, again on behalf of plaintiff, filed a rambling response to defendant's motion to strike.

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[4] MCL 600.6013(7): "For a complaint filed on or after July 1, 2002, if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. . . . The rate under this subsection shall not exceed 13% per year compounded annually."

[5] $33,657.46 as ordered in the trial court's December 6, 2010, opinion, plus $245 in court costs.

On February 24, 2011, the trial court denied plaintiff's motion in its entirety because Asaro was legally unable to represent plaintiff in court. The trial court also approved the four attorney liens in the amounts of $1,970; $929.25; $1,401.91; and $3,889.85, and it ordered the balance of $25,711.45 to be dispensed to plaintiff.

On March 4, 2011, Asaro filed a motion entitled "emergency motion order to be stayed and liens not dispursed [sic] as to they are not owed, also motion for reconsideration for new trial and appearance of counsel," on behalf of plaintiff. Defendant opposed the motion on the basis that Asaro could not legally represent plaintiff. On March 11, 2011, attorney Bryan Schefman filed an appearance to represent plaintiff and also filed an "amended motion for reconsideration." On March 29, 2011, the trial court struck the motions filed by Asaro because he was not an attorney. The trial court also denied the motion for reconsideration filed by Schefman, on the basis that Schefman's motion, despite being labeled "amended," was filed more than 21 days after the decision from which reconsideration was being sought and, therefore, was untimely.

II. ANALYSIS

A. STATUTORY PRE-JUDGMENT INTEREST

Plaintiff argues that the trial court erred when failed to award pre-judgment interest according to MCL 600.6013. We agree.

A trial court's decision on whether to award pre-judgment interest under MCL 600.6013 is reviewed de novo. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 623-624; 550 NW2d 580 (1996). We also review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 251.

MCL 600.6013(1) provides that "[i]nterest is allowed on a money judgment recovered in a civil action." "The purpose of the statue is to compensate the prevailing party for loss of use of the funds awarded as a money judgment and to offset the costs of litigation." *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002). Furthermore, "an award of interest is mandatory in all cases to which the statute applies." *Everett v Nickola*, 234 Mich App 632, 638; 599 NW2d 732 (1999).

Here, although the trial court awarded damages to plaintiff, the trial court also adopted the position advocated by defendant that plaintiff breached the contract on February 12, 2008, before defendant breached the contract, and that accordingly, plaintiff was not entitled to an award of statutory interest. Defendant argued, and the trial court agreed, that under the well-established principle that the first party to breach a contract may not sue another party for that party's subsequent breach or failure to perform, *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007), plaintiff was precluded from recovering interest. However, the "first breach" rule only applies if the initial breach is "substantial." *Id.* A substantial breach

> can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other

> party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party. [*McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted).]

On the record before us, we conclude that the trial court failed to make sufficient factual findings to support its conclusion that plaintiff was first to breach the contract. In disallowing any interest, the trial court simply found that "the contract was breached as of 2/12/08" and that "[s]uch a breach would preclude any interest being assessed." The trial court's conclusion was erroneous because it did not explicitly find that plaintiff's "breach"[6] was substantial. Regardless, the record before us would not support a finding that any breach by plaintiff was substantial because plaintiff's request or demand for a higher price for salt did not render defendant's performance *under the contract* "ineffective or impossible." Nothing prevented defendant from paying the agreed-upon price and disputing the increase. Instead, despite the fact that there was no dispute as to the amount due for some of the services rendered, such as the snow plowing, defendant chose to withhold *all* payments unless plaintiff accepted a reduced amount in satisfaction for the *entire* debt. Moreover, defendant received the benefit it sought – i.e., the Riverbend property was cleared of snow and salted. See *Able Demolition*, 275 Mich App at 585.

Defendant also asserts that an award of pre-judgment interest is not appropriate when plaintiff caused much of the delay at the trial court by hiring and firing multiple attorneys and attempting at various times to represent plaintiff himself despite being made aware that he was not legally permitted to do so. In support of this contention, defendant cites to *Heyler v Dixon*, 160 Mich App 130; 408 NW2d 121 (1987). However, *Heyler* does not stand for the proposition that *no* interest should be awarded.

In *Heyler*, the underlying case was stayed by the Chief Judge of the Wayne Circuit Court for a period of 16-1/2 months. *Id.* at 152. This Court concluded that the accrual of statutory interest was tolled during the period of the judicial stay of the lower court proceedings. *Id.* at 152-153. The Court relied on 45 Am Jur 2d, Interest and Usury, § 103, pp 90-91, which provided that

> "[i]f the adjudication is valid, interest will not accrue during the time that the payment of a debt is *prevented through no fault of the debtor* by the interposition of law, as *where payment is prevented by a judgment, order, statute, or judicial process*. Thus, interest will not, as a rule, be charged against one who is enjoined from making payment unless it appears or can fairly be presumed that he actually gained some advantage by the use of the money or received some interest or profit from its use by others, although, according to some authorities, he must pay the money into court in order to escape the payment of interest." [Emphasis added in *Heyler*.]

[6] Since it does not affect our analysis, we offer no opinion on whether plaintiff billing defendant for salt at a price different than the price set forth in the written contract was indeed a breach of contract.

Under § 103, then, interest should not accrue during a period of delay caused through no fault of the debtor. *Heyler*, Mich App at 152-153; see also *People v $176,598.00 US Currency*, 242 Mich App 342, 349; 618 NW2d 922 (2000). Notably, the defendant in *Heyler* was not excused from paying all pre-judgment interest – only the amount that would have accrued "during the period of stay" was tolled. *Heyler*, 160 Mich App at 153; see also *Eley v Turner*, 193 Mich App 244, 247; 483 NW2d 421 (1992); *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 494-495; 478 NW2d 914 (1991) ("[I]nterest should be waived for the period during which the stay was in effect.")

Defendant also claims that it should not have to pay interest because it tendered payment in satisfaction of the debt before the lawsuit was filed. However, defendant cites no authority to support this position. If defendant wished to stop pre-judgment interest from accruing once the complaint was filed, defendant had to submit payment to the court to hold in escrow. *Kleynenberg v Highlands Realty Corp*¸ 340 Mich 339, 343; 65 NW2d 769 (1954); *Cent Mich Univ Faculty Ass'n v Stengren*, 142 Mich App 455, 461; 370 NW2d 383 (1985). It is not disputed that defendant made no payments into escrow.

Therefore, pre-judgment interest will not accrue (1) during the period of any delay in making the payments owed that is not attributable to a defendant or (2) after the time a defendant tenders payment to the trial court. The record here establishes that defendant made no payments to the trial court and also that some periods of delay in the lower court proceedings occurred as a result of the breakdown in the attorney-client relationships between plaintiff and three of his four attorneys. On remand, then, the trial court is to award statutory interest pursuant to MCL 600.6013, and it shall exempt only those time periods of delay that occurred through no fault of defendant. See *$176,598.00 US Currency*, 242 Mich App at 349.

B. EVIDENTIARY HEARING FOR VALIDITY OF LIENS

Plaintiff next argues that the trial court erred when it failed to conduct any evidentiary hearings regarding the validity of the attorney liens. We decline to address the issue because it was not properly preserved for our review.

In order for an issue to be preserved for appellate review, an issue must be properly raised in and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). But here, the request for an evidentiary hearing was never properly raised in the trial court. Asaro sought to raise the issue on behalf of plaintiff in two separate post-judgment motions, but Asaro was not a licensed attorney and was prohibited from representing plaintiff in court. Asaro did this even though he was previously informed that he was not allowed to represent plaintiff. Therefore, the trial court properly struck both motions. Likewise, the motion for reconsideration filed by attorney Schefman did not properly raise the issue because it was filed more than 21 days after the judgment had been entered. MCR 2.119(F)(1). Thus, because this Court need not consider issues that have not been properly preserved, we decline to address the issue. *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005).

We reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck