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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

**USI INSURANCE SERVICES NATIONAL,
INC., f/k/a and f/d/b/a WELLS FARGO
INSURANCE SERVICES USA, INC.**

Plaintiff,

v.

**ERIC M. FRIEMAN and RCM&D SELF-
INSURED SERVICES COMPANY, INC.,**

Defendants.

JANUARY TERM, 2018

No. 00954

COMMERCE PROGRAM

2163 EDA 2020

2211 EDA 2020

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SUPPLEMENTAL OPINION

On June 23, 2020, this court docketed an Order following trial in this matter. On July 2, 2020, a Motion to Mold Verdict to Reflect an Award of Interest was filed on behalf of USI (Control Number 20070246) (hereinafter “Motion to Mold Verdict”). Following the filing of the Answer in Opposition of said motion, oral argument was held on August 14, 2020. Following said oral argument, this court entered an Order docketed on October 17, 2020 denying the Motion to Mold Verdict.

On November 10, 2021, the Superior Court of Pennsylvania (*hereinafter* PA Superior Court) Ordered this court to file a supplemental opinion setting forth the reasons for its denial of Appellant’s request for pre-judgment interest. (See Attached Order of the PA Superior Court).

SUMMARY OF CASE

USI Insurance Services (*hereinafter*, USI) filed a complaint against Eric Frieman (*hereinafter*, Frieman) for breach of contract, and against RCM&D Self-Insured Services Company for tortious interference with contract. USI purchased all of the equity in Wells Fargo Insurance Services in 2017, and therefore USI is the successor of Wells Fargo. In 2010, Frieman, was employed as an insurance salesman by USI’s predecessor, Wells Fargo Insurance

Services, and signed a contract with non-solicitation and non-compete provisions (*hereinafter* “TSA”). The TSA states plainly that continued employment with Wells Fargo is dependent on signing the TSA. In other words, Wells Fargo would not continue employing any insurance salesmen who did not sign the contract.

The TSA prohibited Frieman for two (2) years after leaving USI’s employment, from soliciting and accepting business from clients he serviced while employed by USI. Frieman received new consideration for signing the TSA – an additional one percent (1%) on his commission rate (additional 1% for new revenue and another 1% for net new revenue), which amounted to \$1,769.61 additional compensation.

Frieman quit his position as an insurance salesman with Wells Fargo in 2016 and was hired by RCM&D for the same position. In 2016 and 2017, while working for RCM&D, it is undisputed that Frieman solicited eighteen (18) clients whom he had serviced while employed by Wells Fargo in violation of the TSA, and said solicitation and service was worth in excess of one million dollars (\$1,000,000). The main defense raised by Frieman is that he did not sign the TSA, that his signature on the document is a forgery, that the \$1,769.61 consideration is insufficient, and therefore he should not be bound by the restrictions.

Following trial, this court entered the following Order:

- “Judgment is entered against Defendant Eric M. Frieman in favor of Plaintiff for breach of contract.”
- “Plaintiff is awarded damages in the amount of one million, seventy-three thousand, five-hundred-sixty dollars, and twenty-one cents (\$1,073,560.21).

RELIEF REQUESTED

USI requests pre-judgment interest at the statutory rate of six per cent (6%) per annum (accruing from July 1, 2018, through June 20, 2020), and totaling \$127,062.47, to be added to the damages award of \$1,073,560.21, totaling a verdict of \$1,200,622.68.

AWARD OF INTEREST IN BREACH OF CONTRACT MATTERS

(1) “Interest as such” or “as a matter of right”

After examining the contract, trial courts must award interest “as a matter of right” and “as a matter of law, not of discretion” only in cases where a defendant commits a breach of contract involving the following obligations:

- (1) to pay a definite sum of money; or (2) to render a performance the value of which in money is stated in the contract; or (3) to render a performance the value of which is ascertainable by mathematical calculation from a standard fixed in the contract; or (4) to render a performance the value of which in money is ascertainable from established market prices of the subject matter.

Cresci Constr. Servs. v. Martin, 64 A.3d 254, 259 (Pa. Super. Ct. 2013).

Therefore, “[t]he disputed amount must be either specified in the contract or ascertained from the terms of the contract such that at the time of the breach, the breaching party can proffer a tender.” *Cresci Constr. Servs. v. Martin*, 64 A.3d 254, 265 (Pa. Super. Ct. 2013); see also *Frank B. Bozzo, Inc. v. Elec. Weld Div. of Fort Pitt Div. of Spang Indus., Inc.*, 498 A.2d 895, 901 (Pa. Super. Ct. 1985) (“Where the breach was the failure to pay a fixed or ascertainable sum, the damages will be awarded in the form of ‘interest as such’ and as ‘a matter of right.’”)

Here, there was not a specified disputed amount in the contract or that could be ascertained from the contract. Moreover, this matter did not involve a failure to pay a fixed or

ascertainable sum. As such, this matter does not fit the criteria for an award of “interest as such” or “as a matter of right.”

(2) “Compensation for delay in the nature of interest” –

Here, the relevant type of interest is “compensation for the delay” because the language of the TSA contract between Plaintiff and Defendant Frieman does *not* specify any of the above-mentioned contract obligations, i.e. the contract includes no definite sum of money, no stated value, no mathematical calculation, and no relevant market prices. Therefore, the applicable interest and legal standard here involves the compensation for delay in the nature of interest, and not interest as a matter of right.

In contrast to interest as a matter of right, the decision to award “compensation for delay in the nature of interest” is left to the discretion of the trial court, which depends upon analyzing all the circumstances of the case. *Cresci Constr. Servs. v. Martin*, 64 A.3d 254, 260 (Pa. Super. Ct. 2013) (citing *TruServ Corp. v. Morgan's Tool & Supply Co., Inc.*, 39 A.3d 253, 264–65 (Pa. 2012); Restatement (Second) of Contracts, § 354, cmt. D (1981)). See also *Marrazzo v. Scranton Nehi Bottling Co., Inc.*, 263 A.2d 336, 337 (Pa. 1970) (affirming that compensation for delay “is an issue for the finder of fact, the resolution of which depends upon all the circumstances of the case.”).

“[T]he damages will be awarded as necessary to ensure that in the particular circumstances of the case, the plaintiff has been fully compensated. Such damages are . . . measured by the legal [statutory] rate of interest. *Frank B. Bozzo, Inc. v. Elec. Weld Div. of Fort Pitt Div. of Spang Indus., Inc.*, 498 A.2d 895, 901 (Pa. Super. Ct. 1985).

STANDARD/INQUIRY FOR DETERMINING WHETHER TO AWARD INTEREST AS “COMPENSATION FOR DELAY” IN BREACH OF CONTRACT CASES

“[C]ompensation for delay in the nature of interest may nevertheless be awarded if, in the circumstances of the case justice so requires, . . . [such that] ‘the plaintiff will not be fully compensated unless he receive’ compensation for delay.” *Frank B. Bozzo, Inc. v. Elec. Weld Div. of Fort Pitt Div. of Spang Indus., Inc.*, 498 A.2d 895, 895, 900 (Pa. Super. Ct. 1985) (adopting Restatement (Second) of Contracts, § 354 (1981)) (quoting *Richards v. Citizen's Natural Gas Company*, 18 A. 600 (Pa. 1889)).

In other words, the plaintiff has suffered injuries that, for plaintiff to be fully compensated for the loss from the breach, requires an interest award “added for the delay in obtaining the award of damages.” *Frank B. Bozzo, Inc. v. Elec. Weld Div. of Fort Pitt Div. of Spang Indus., Inc.*, 498 A.2d 895, 899 (Pa. Super. Ct. 1985) (quoting *Funkhouser v. Preston*, 290 U.S. 163, 168 (1933)).

“The basic premise underlying the award of prejudgment interest to a party centers on the fact that the breaching party has deprived the injured party of using interest accrued on money which was rightfully due and owing to the injured party.” *Widmer Eng'g, Inc. v. Dufalla*, 837 A.2d 459, 469 (Pa. Super. Ct. 2003) (*appeal denied* 852 A.2d 313 (Pa. 2004)) (citing *Somerset Community Hosp. v. Allan B. Mitchell & Associates, Inc.*, 685 A.2d 141, 148 (Pa. Super. Ct. 1996)).

The trial court, in determining whether the circumstances of the case warrant an award of “compensation for delay” interest, must consider whether the fault for nonpayment rests with the defendant or the plaintiff. *Marrazzo v. Scranton Nehi Bottling Co., Inc.*, 263 A.2d 336, 338 (Pa. 1970) (holding that the defendant should be required to compensate for the delay when the fault in nonpayment rests with the defendant, but the defendant should not be required to pay interest

for the delay in settlement of the claim where plaintiff is at fault due to an excessive and unconscionable demand such that defendant resorted to protective litigation).

If a trial court awards interest as “compensation for delay,” the order granting the interest must include specific “findings of fact and conclusions of law as to the delay” demonstrating that “all circumstances relevant to the delay [are] developed and analyzed.” *Frank B. Bozzo, Inc. v. Elec. Weld Div. of Fort Pitt Div. of Spang Indus., Inc.*, 498 A.2d 895, 901-02 (Pa. Super. Ct. 1985) (quoting *Marrazzo v. Scranton Nehi Bottling Co., Inc.*, 263 A.2d 336, 338 (Pa. 1970)).

USI’S MOTION FOR PRE-JUDGMENT INTEREST

USI asserts that the circumstances of the breach by Frieman warrant this court to exercise its discretion to award pre-judgment interest because the court already awarded damages to USI, therefore the Court “implicitly recognizes that Plaintiff USI was deprived of the use of those sums in violation of Pennsylvania law since at least July 1, 2018.” (Plaintiff’s Motion to Mold Verdict, ¶¶ 12-13). “It is in the interests of justice that the Court award prejudgment interest to Plaintiff USI on the damages awarded . . . in order to fully compensate USI for its losses.” (Plaintiff’s Motion to Mold Verdict, ¶ 14).

Despite USI’s arguments, the Motion for pre-judgment interest should be denied. The breach of contract in this matter does not fall into the instances that support an award of pre-judgment interest as stated by the Pennsylvania courts. Here, the TSA breached by Frieman was a non-solicitation agreement prohibiting, Frieman, from soliciting any clients whom he serviced while working for his prior employer, Wells Fargo/USI, for a period of two (2) years after leaving the employment of Wells Fargo/USI. Frieman, breached the TSA by soliciting eighteen (18) clients whom he serviced while he worked for Wells Fargo/USI. The TSA has no language

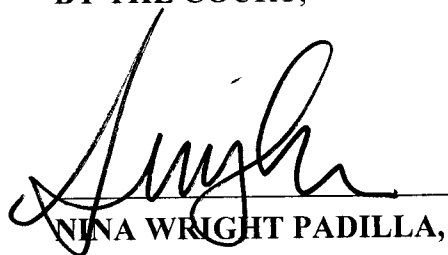
setting a definite amount of money in the event of a breach, has no standards from which a monetary amount can be calculated in the event of a breach, and the TSA did not involve performance for which a monetary amount can be calculated by established market prices.

This court's award has sufficiently and fully compensated USI for its losses from the clients solicited by Frieman. The award of interest as compensation for delay is the exception under Pennsylvania law and is used only in the most severe circumstances where the breaching party is at fault for not settling the dispute by paying the amount owed. Here, in a non-compete/non-solicit breach of contract, Frieman could not have immediately paid to USI an amount for the clients. There is no established method by which a company's good will from clients is calculated into dollar amounts, so Frieman is not at fault for the delay in compensation to USI. Frieman could not have paid compensation to USI at the time of the breach because any damages or loss involved several disputed factors that would change the calculated amount. Such changes include the time period for which each client stayed with USI, the amount of the revenue or profits generated by the clients, and the amounts paid by Frieman's new employer to secure those clients. Moreover, the nature of this breach, that is, a non-compete/non-solicit is not a type of purposeful delay of non-payment by Frieman, but instead merely a dispute that required litigation to determine the amount lost.

Accordingly, this court's denial of Appellant's request for pre-judgement interest should be affirmed.

BY THE COURT,

DATE: December 10, 2021


NINA WRIGHT PADILLA, SJ.

USI INSURANCE SERVICES
NATIONAL, INC. F/K/A AND F/D/B/A
WELLS FARGO INSURANCE
SERVICES USA, INC. V. ERIC M.
FRIEMAN AND RCM&D SELFINSURED
SERVICES COMPANY, INC. D/B/A
RCM&D

Appellants

USI INSURANCE SERVICES
NATIONAL, INC. F/K/A AND F/D/B/A
WELLS FARGO INSURANCE
SERVICES USA, INC.

Appellant

V. ERIC M. FRIEMAN AND RCM&D
SELFINSURED SERVICES COMPANY,
INC. D/B/A RCM&D

Appeal from the Judgment Entered October 23, 2020
In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): No. 180100954

USI INSURANCE SERVICES
NATIONAL, INC. F/K/A AND F/D/B/A
WELLS FARGO INSURANCE
SERVICES USA, INC. V. ERIC M.
FRIEMAN AND RCM&D SELFINSURED
SERVICES COMPANY, INC. D/B/A
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USI INSURANCE SERVICES
NATIONAL, INC. F/K/A AND F/D/B/A
WELLS FARGO INSURANCE
SERVICES USA, INC.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2163 EDA 2020

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2211 EDA 2020

V. ERIC M. FRIEMAN AND RCM&D :
SELFINSURED SERVICES COMPANY,
INC. D/B/A RCM&D

Appeal from the Judgment Entered October 23, 2020
In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): No. 180100954

BEFORE: LAZARUS, J., DUBOW, J., and PELLEGRINI, J.*

ORDER

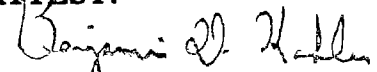
In its brief to this Court, Appellant, USI Insurance Services National, Inc., has challenged the trial court's denial of Appellant's request for pre-judgment interest. Our review of the trial court's June 24, 2020, and April 15, 2021 opinions indicates that the trial court did not explain the basis for its denial of Appellant's request for pre-judgment interest.

AND NOW this 10th day of November, 2021, the trial court is hereby directed to file a supplemental opinion within thirty (30) days of the date of this order setting forth the reasons for its denial of Appellant's request for pre-judgment interest. Appellant shall thereafter have three (3) weeks to file a supplemental brief, if any, limited to the issue of pre-judgment interest. Appellees, Eric M. Frieman and RCM&D Selfinsured Services Company, Inc., shall file a supplemental Appellees' brief, if any, also limited to the issue of pre-judgment interest, within two (2) weeks of Appellant's supplemental brief.

Per Curiam

(True copy from record)

ATTEST:



Benjamin Kohler

Deputy Prothonotary

SUPERIOR COURT OF PA

* Retired Senior Judge assigned to the Superior Court.