# IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

FREITAG FUNERAL HOMES, INC.	)	
Plaintiff,	)	
v.	)	C.A. No. CPU4-11-003580
SUSAN GILDEA, a/k/a	)	
SUSAN MARIE ARNO, a/k/a`	)	
SUSAN M. ARNO-GILDEA	)	
	)	
Defendant.	)	

Submitted: April 25, 2013 Decided: May 23, 2013

# On Plaintiff's Motion for Judgment on the Pleadings

Donna L. Schoenbeck, Esquire Schoenbeck & Schoenbeck 1211 Milltown Road, Suite A Wilmington, DE 19808 Attorney for Plaintiff Susan Gildea 4745 Ogletown Stanton Road Suite 208 Newark, DE 19713 Self-represented Defendant

On June 3, 2011, Plaintiff Freitag Funeral Home, Inc. ("Freitag") brought this debt collection action in the Court of Common Pleas against Defendant Susan M. Gildea<sup>1</sup> for a debt in the amount of \$2,158.46. On October 18, 2012, Ms. Gildea filed an Answer, in which she admits that she owes a debt to Freitag.<sup>2</sup> On March 3, 2013, Freitag filed the instant Motion for Judgment on the Pleadings.

On April 5, 2013, the Court held a hearing on the Motion. Ms. Gildea did not appear before the Court. The Court heard oral argument from Freitag. Freitag argued that it is entitled

<sup>&</sup>lt;sup>1</sup> a/k/a Susan Marie Arno, a/k/a Susan M. Arno-Gildea

<sup>&</sup>lt;sup>2</sup>Ms. Gildea went on to explain that there was no money left in her mother's estate to pay the funeral expenses. Ms. Gildea offered to make monthly payments in the amount of \$75.00 per month.

to judgment on the pleadings because Ms. Gildea admitted the existence of the debt in her Answer. Freitag requested judgment in the amount of \$4,253.26. This amount represented the principal of \$2,158.46, plus: interest, calculated at 18.00% per annum, in the amount of \$1,442.11; costs of \$221.00, and; attorney fees of \$431.69. Freitag argued that although the interest charge constitutes over half of the debt owed, the 18.00% interest rate was provided for in the contract between the parties, as were the attorney's fees.<sup>3</sup> The Court granted Plaintiff's Motion for Judgment on the Pleadings, and requested that Freitag submit an affidavit in support of the amount sought for attorney's fees. With respect to the interest charge, the Court informed Freitag that it would consider the interest rate presented and, if determined to be excessive, Freitag would be given the opportunity to respond.

On April 9, 2013, Dona L. Schoenbeck, attorney for Freitag, filed an Attorney's Affidavit in Support of Judgment on the Pleadings. On April 11, 2013, the Court sent a letter to Ms. Schoenbeck clarifying that, at the April 5 hearing, the Court requested an affidavit in support of the *reasonableness* of the attorneys' fees sought. Additionally, the Court also asked Ms. Shoenbeck to: (1) provide a detailed certification in support of the pre-judgment interest calculation of \$1,442.11; (2) explain why this action–based on a contract which states that any dispute will be litigated in the Superior Court of New Jersey–was initiated in Delaware, contrary to the terms of the contract, and; (3) provide the Court with applicable New Jersey law on the calculation of interest under the present circumstances.<sup>4</sup>

On April 25, 2013, the Court received a response from Ms. Schoenbeck. In response to the Court's request for a detailed certification in support of the pre-judgment interest calculation,

<sup>3</sup> The contract called for attorney's fees not to exceed twenty percent of the total contract price.

<sup>&</sup>lt;sup>4</sup> The Court also noted that there was no certificate of service indicating that a copy of the Affidavit was provided to Ms. Gildea.

Ms. Schoenbeck stated that a "data entry code error" was discovered, and that the correct interest calculation was \$1,168.77, based on the outstanding balance of \$2,158.46. Ms. Schoenbeck stated that interest was calculated "through 2/26/13," and "additional interest to the date of this letter is \$88.35"; thus, the total interest sought through April 19, 2013 is \$1,257.12. In response to the Court's inquiry regarding the venue for this action, Ms. Schoenbeck asserted that the present action is subject to the Fair Debt Collection Practices Act, 15 USC § 1692, pursuant to which a consumer action may be brought in the judicial district in which the consumer resides at the commencement of the action.<sup>5</sup> Ms. Schoenbeck states that this action was commenced in Delaware, where Ms.Gildea resides, to avoid the need for long-arm service of process and additional costs to move the judgment from New Jersey to Delaware. Finally, in response to the Court's request for applicable New Jersey law on the calculation of interest under these circumstances, Ms. Schoenbeck provided case law that, in New Jersey, prejudgment interest in contract cases is governed by equitable principles. However, Ms. Schoenbeck asserted that Delaware is the "forum state," and under Delaware law, judgments entered after May 13, 1980, "shall bear interest at the rate in the contract sued upon."

#### **DISCUSSION**

### A. New Jersey law applies.

Ms. Schoenbeck appears to suggest that, despite the choice of law provision in the contract, Delaware law should apply to the calculation of interest. Relying on *Munich Reinsurance America, Inc. v. Tower Insurance Company of New* York, C.A. No.l 09-2598 (D. N.J.) (march 23, 2012), Ms. Schoenbeck suggests that the award of interest is a question of process, and therefore governed by the law of the forum state of Delaware. However, in *Munich Reinsurance* 

<sup>5</sup> 15 USC § 1692i(a)(2).

3

America, Inc., there is no suggestion that the contracts which were the subject of the litigation contained any choice of law provision. In the present case, the parties agreed to be bound by the laws of the state of New Jersey.

Generally, Delaware courts will honor a choice of law provision in a contract if there is some material relationship between the selected jurisdiction and the transaction.<sup>6</sup> "A material relationship exists where a party's principal place of business is located within the foreign jurisdiction, a majority of the activity underlying the action occurred within the foreign jurisdiction, and where parties to a contract performed most of their services in the foreign state." "Although the law of a foreign jurisdiction cannot be used to interpret a contract provision in a manner repugnant to the public policy of Delaware, there is corollary policy in favor of recognizing and enforcing rights and duties validly created by a foreign law."

The contract between Freitag and Ms. Gildea provided that the agreement "shall be governed by the laws of the State of New Jersey." Freitag's place of business was located in the state of New Jersey, the activity underlying this action occurred in New Jersey, and the services were provided in the state of New Jersey. Clearly a material relationship existed and, accordingly, the laws of New Jersey will apply to the enforcement of the contractually agreed upon terms, including the calculation of interest.

## B. Enforcement of the 18.00% interest rate is inequitable.

As Ms. Schoenbeck acknowledges, under New Jersey law, prejudgment interest in contract cases is governed by equitable principles.<sup>9</sup> "In New Jersey, the rate at which prejudgment

<sup>&</sup>lt;sup>6</sup> J.S. Alberici Const. Co., Inc. v. Mid-West Conveyor Co., Inc., 750 A.2d 518, at 520 (Del. 2000) (citing Annan v. Wilmington Trust Co., 559 A.2d 1289, 1293 (Del. 1989)).

<sup>&</sup>lt;sup>7</sup> Deuley v. DynCorp Intern., Inc., 8 A.3d 1156, at 1161 (Del. 2010) (citations omitted).

<sup>&</sup>lt;sup>8</sup> J.S. Alberici Const. Co., Inc., 750 A.2d at 520.

<sup>&</sup>lt;sup>9</sup> Cty. of Essex v. First Union Nat'l Bank, 186 N.J. 46, 891 A.2d 600 (2006).

interest is calculated is within the discretion of the court."<sup>10</sup> "In exercising its discretion, the Court may use New Jersey court rules regarding pre- and postjudgment interest in tort cases as a benchmark, but ultimately must square its decision with the equities of the particular case before it."<sup>11</sup> It is well established in New Jersey that, absent "unusual circumstances," Rule 4:42-11(a)(ii) "provides an appropriate starting point in determining the rate of prejudgment interest."<sup>1</sup>

After consideration of the equitable factors of the present case, the Court declines to impose the 18.00% interest rate Freitag seeks to enforce. Specifically, the equitable factors considered include: (1) the vast difference between the contract rate of 18.00% and the standards set forth in *R*. 4:42-11(a)(ii), pursuant to which the 0.5% average rate of return of the New Jersey Cash Management Fund would be the starting point in determining the rate of prejudgment interest; 12 (2) the circumstances surrounding the entry of the agreement, and; (3) the respective bargaining power of the parties.

Furthermore, Ms. Schoenbeck has not provided the Court with the *detailed* certification in support of the prejudgment interest calculation requested by the Court on April 11, 2013. Ms. Schoenbeck responded to the Court via letter on April 25, 2013, in which she acknowledged that the interest was miscalculated in the Motion. However, no detailed explanation of the newly calculated amount was offered, and concerns regarding the calculation of the interest remain unresolved.

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<sup>&</sup>lt;sup>10</sup> Spencer v. Long Valley Inn, Inc., 2005 WL 3488033, at \*6 (N.J. Super. Dec. 22, 2005) (citations omitted).

<sup>&</sup>lt;sup>11</sup> W.R. Huff Asset Management Co., L.L.C. v. William Soroka 1989 Trust, 2009 WL 2436692, at \*1 (D.N.J. Aug. 6, 2009) (citations omitted).

<sup>&</sup>lt;sup>12</sup> DialAmerica Marketing, Inc. v. KeySpan Energy Corp., 865 A.2d 728, at 734 (N.J. Super. Ct. App. Div. 2005) (citing Benevenga v. Digregorio, 737 A.2d 696, at 700 (N.J. Super. Ct. App. Div. 1999)).

**IT IS HEREBY ORDERED** that judgment is entered in favor of Freitag Funeral Home for \$2,158.46, plus attorney's fees in the amount of \$431.69, and pre and post-judgment interest at a rate of 5.75%.

IT IS SO ORDERED this 23<sup>rd</sup> day of May, 2013.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli