

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| AMERISOURCEBERGEN DRUG CORPORATION | : | |
| | : | CIVIL ACTION |
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| | : | |
| | : | NO. 03-CV-6769 |
| v. | : | |
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| RANDALL MEIER, and ADVANCED PHARMACY SOLUTIONS, LLC | : | |

SURRICK, J.

MAY 19, 2005

MEMORANDUM & ORDER

Presently before the Court is a dispute between Plaintiff Amerisourcebergen Drug Corporation (“ABDC”) and Defendants Randall Meier (“Meier”) and Advanced Pharmacy Solutions, LLC (“APS”) regarding the rate of prejudgment interest owed by Defendants. For the following reasons, we conclude that Plaintiff is entitled to a prejudgment interest rate of eighteen (18) percent.

I. FACTUAL BACKGROUND

APS was a specialty pharmacy company that sold psychotropic drugs to mental health clinics and managed their Patient Assist Programs. (Doc. No. 15 Ex. A at 18-19.) In 2003, Meier loaned APS \$2.6 million and became a 50.5% shareholder in the company. (*Id.* at 22-25, 44-45, 54.) Meier also became the President of APS and signed documents on its behalf. (*Id.* at 23; Meier Decl. ¶ 3.) APS was looking for a wholesale distributor to stock its pharmacies with

mental health-related drugs. (Doc. No. 15 at 4.) ABDC is a wholesaler of pharmaceuticals. (Chamberlain Decl. ¶ 2.) In June, 2003, ABDC and APS began discussing ABDC becoming a supplier to APS. (Doc. No. 15 Ex. A at 32-35.) The parties executed a Prime Vendor Agreement (“PVA”) dated July 1, 2003. (Doc. No. 15 Ex. D.) The PVA provided the terms by which APS would compensate ABDC for the drugs. (*Id.*) Section 2.6 of Exhibit 3 to the PVA provides for “a per-day late payment fee of the lower of 0.05% (18%/360) or the maximum rate permitted by law on the outstanding balance until paid, beginning on the first (1st) business day after such due date.” (*Id.*) A document styled “Agreement,” which was signed by Meier as president of APS on July 28, 2003, granted ABDC a security interest in all of the assets of APS. (Doc. No. 14 Ex. F.) Section 2(c) of the Agreement also provided that “[a] late charge of 1.5% per month will be assessed on all delinquent balances.” (*Id.*) In September, 2003, Meier executed an unconditional Personal Guaranty of APS’s obligations. (Doc. No. 15 Ex. G.) Three months later, on December 5, 2003, APS sold all of its assets to another company, RTIN Holdings, Inc. (“RTIN”). On March 19, 2004, RTIN, under its new name, Safescript Pharmacies, Inc., filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Texas. *In re Safescript Pharm., Inc.*, No. 04-60600 (Bankr. E.D. Tex. filed Mar. 19, 2004).

Plaintiff and Defendants filed cross-motions for summary judgment for breach of contract. The parties’ cross-motions were based on their opposing interpretations of the Personal Guaranty executed by Meier on September 2, 2003. (Doc. No. 15 Ex. G.) Defendants contended that Meier’s guarantor liability extended only to APS’s Opening Orders for its four pharmacy locations. Plaintiff contended that Meier’s guarantor liability extended to all APS obligations to

ABDC for a period of nine months from the date of the Personal Guaranty. On December 14, 2004, we granted Plaintiff's motion for partial summary judgment and denied Defendants' cross-motion for summary judgment. (Doc. No. 20.) We concluded that the Personal Guaranty clearly and unambiguously guaranteed payment of all of APS's obligations to ABDC incurred from the date of the signing of the Personal Guaranty for a period of nine months and awarded damages to Plaintiff in the amount of \$931,576.77. (*Id.* at 12.)

In January, 2005, the parties approached the Court regarding the issue of prejudgment interest. On January 18, 2005, we directed Plaintiff and Defendants to file Memorandums of Law briefing the issue of prejudgment interest. (Doc. No. 25.)

II. LEGAL STANDARD¹

"In a contract action, the award of prejudgment interest is not a matter of discretion, but is a legal right." *Verner v. Shaffer*, 500 A.2d 479, 482 (Pa. Super. Ct. 1985) (citing *Gold & Co. v. Northeast Theatre Corp.*, 421 A.2d 1151 (Pa. Super. Ct. 1980)). "It has been the law in this Commonwealth for well over a century that 'the right to interest upon money owing upon contract is a legal right. That right to interest begins at the time payment is withheld after it has been the duty to make such payment.'" *Schiller v. Royal Maccabees Life Ins. Co.*, 759 A.2d 942, 944 (Pa. Super. Ct. 2000) (quoting *Fernandez v. Levin*, 548 A.2d 1191, 1193 (Pa. 1988)).

The statutory rate of interest in Pennsylvania is defined in 41 Pa. Cons. Stat. § 202, which states:

¹The application of Pennsylvania law is not in dispute. This being a diversity case involving questions of state law, we will follow the decisions of the highest appellate court in Pennsylvania, the Supreme Court. *N. Ins. Co. v. Aardvark Assocs.*, 942 F.2d 189, 193 (3d Cir. 1991).

Reference in any law or document enacted heretofore or hereafter to “legal rate of interest” and reference in any document to an obligation to pay a sum of money “with interest” without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum.

41 Pa. Cons. Stat. § 202.

III. DISCUSSION

Defendants do not assert that they owe no prejudgment interest to Plaintiff. Rather, Defendants argue that any award of prejudgment interest must be limited to the rate of six percent because the debt incurred by Meier and APS was not incurred pursuant to the terms of the PVA. (Doc. No. 29 at 2.) Defendants argue that after the execution of the Guaranty, “ABDC extended credit to APS pursuant to terms that were not authorized by the PVA, nor by any written modification of the PVA.” (*Id.*) Defendants point to the fact that the PVA limited APS’s credit terms to Net/15 days, with the exception of a single Opening Order for each of APS’s pharmacy locations, while ABDC actually permitted APS to purchase \$600,000 of product payable in ninety (90) days. (*Id.*) Defendants contend that this oral change in terms constitutes a new and different agreement which did not provide for an eighteen (18) percent interest rate. Defendants argue that any award of prejudgment interest must therefore be limited to six (6) percent in accordance with 41 Pa. Cons. Stat. § 202.

Plaintiff argues that it is entitled to prejudgment interest at the rate of eighteen (18) percent because the parties contracted for that rate. (Doc. No. 28 at 1.) Plaintiff points to the PVA, which specifically provides that “a per-day late payment fee of the lower of 0.05% (18%/360) or the maximum rate permitted by law on the outstanding balance until paid, beginning on the first (1st) business day after such due date.” (Doc. No. 15 Ex. D.) Plaintiff also

refers to the language in the agreement signed on July 28, 2003, which states that “[a] late charge of 1.5% per month will be assessed on all delinquent balances.” (Doc. No. 14 Ex. F.) Plaintiff argues that section 202, by its express terms, is not applicable because it applies only when the document at issue does not otherwise specify an applicable interest rate. Defendants here expressly agreed to pay eighteen (18) percent interest on all unpaid balances due. (*Id.* at 4.)

The crux of this matter is whether the parties modified the Agreement when they orally agreed to change the credit terms or whether they terminated the contract and substituted a new contract by orally changing these terms. The PVA specifically spells out the ways that it can be modified or terminated. Section 9.5 of the PVA provides that “[t]he parties may not modify this Agreement other than by a subsequent writing signed by each party.” (Doc. No. 15 Ex. E at 8.) The parties agree that they modified the Agreement on September 1, 2003.² Defendants contend that this was the only modification of the Agreement. In fact, Meier’s declaration offered in support of his motion for summary judgment states:

The PVA between APS and ABDC was modified on one occasion after it was executed. I signed the written modification. . . . Other than Exhibit 1, the PVA was never modified in writing or otherwise. The PVA was never modified to give APS the option of extended payment terms for orders in addition to the one “Opening Order” per facility for the purpose of the building inventory. I did not negotiate or agree to any oral or written amendment of the PVA with ABDC.

(Doc. No. 15 Ex. M ¶¶ 14-15.) Thus, Defendants assert that the subsequent change in the credit terms was not a modification of the Agreement, but rather a termination of the Agreement and the creation of an entirely new agreement. Plaintiff contends that the PVA was not terminated

²It is interesting to note that the September 1, 2003, modification included the language “[t]he Original Agreement shall remain in full force and effect and is unmodified except as reflected in this Amendment.”

and that the eighteen (18) percent interest provision remained in full force and effect.

Section 5.1 of the PVA provides, in pertinent part, the following with regard to termination of the Agreement:

Default. In addition to other available remedies, either party may immediately terminate this Agreement for cause upon written notice to the other party upon the other party's:

....

(b) Failure to pay any amount due and each failure continues five days after written notice; or

(c) Failure to perform any other material obligation and such failure continues for 30 days after it receives notice of such breach from the non-breaching party; provided, however, if the other party has commenced to cure such breach within such 30 days, but such cure is not completed within 30 days, it will have reasonable time to complete its cure if it diligently pursues the cure until completion; and during any 12-month period, the non-breaching party may terminate the Agreement upon 30 days' written notice. "For cause" does not include Customer's receiving a more favorable offer from a competitor.

(Doc. No. 15 Ex. D at 7-8.)

The PVA does not contemplate that a change of credit terms or an extension of credit limits constitutes a basis for termination of the Agreement.³ We are satisfied that a change in credit terms or an extension of credit limits is at most a modification of the PVA.

Under Pennsylvania law, "a plaintiff seeking to show that oral statements made subsequent to the execution of a written agreement contained in an integrated document modified that agreement must show, by 'clear, precise, and convincing' evidence, that the parties intended such a result." *PPG Indus., Inc. v. Zurawin*, 52 Fed. Appx. 570, 575 (3d Cir. 2002) (quoting *Nicolella v. Palmer*, 248 A.2d 20, 23 (Pa. 1968)). In *Nicolella*, the Supreme Court of

³We pointed out in our December 14, 2004, Memorandum and Order that Meier did not claim that he was even aware of any credit limits. (*Id.*) In fact, Meier testified that he "had no expectations" about the debt from APS to ABDC. (Doc. No. 15 Ex. A at 102.)

Pennsylvania also stated:

[W]here the writing contains an express provision that it constituted the entire contract between the parties and *should not be modified except in writing*, the party seeking to show subsequent oral modifications in the agreement must prove it by clear, precise, and convincing evidence, as in most cases where fraud, accident, or mistake is alleged.

Nicolella, 248 A.2d at 23 (emphasis added). In addition, Pennsylvania law dictates that “an oral statement constitutes a purported oral modification of a written contract where the oral statement and the written contract ‘relate to the same subject matter and are so interrelated that both would be executed at the same time and in the same contract.’” *Zurawin*, 52 Fed. Appx. at 575 (quoting *Mellon Bank Corp. v. First Union Equity & Mortgage Inv.*, 951 F.2d 1399, 1405 (3d Cir. 1991)).

The clear and convincing evidence in this case establishes that both parties agreed to a change in credit terms and an extension of credit limits and thereafter continued the relationship as if nothing else in the PVA had changed. (Doc. No. 16 at 7.) We fail to see how this modification altered the other terms in the PVA. Moreover, there is no indication whatsoever that the parties intended to terminate the original agreement. *See In re Monsour Med. Ctr. v. United States*, 11 B.R. 1014, 1017 (W.D. Pa. 1981) (“Parties may, by subsequent oral agreement, modify a written contract which they have previously entered into. The new contract thus agreed upon is a substitute for the original one in *so far as it alters, modifies or changes it . . .*’ [W]hen the subsequent oral contract makes only a modification of the prior written one, the terms of the written contract not modified or changed remain effective.”) (quoting *Knight v. Gulf Ref. Co.*, 166 A. 880, 882 (Pa. 1933) (emphasis added)); *see also Crew Levick Co. v Phila. Inv. Bldg. & Loan Ass’n.*, 117 A. 498, 500 (Pa. 1935). In fact, the parties continued to operate pursuant to the PVA.

Defendants cite only one case, *Daset Mining Corp. v. Industrial Fuels Corp.*, 473 A.2d 584 (Pa. Super. Ct. 1984), in support of their position that the eighteen (18) percent interest rate should not apply. *Daset* is inapposite. (Doc. No. 29 at 2.) In *Daset*, the court was dealing with the issue of whether the interest rate of six (6) percent should apply when market rates were greatly in excess of that amount. *Id.* at 594. In the instant case, the parties contracted for a rate of eighteen (18) percent.

Plaintiff cites *Pittsburgh Construction Co. v. Griffith*, 834 A.2d 572 (Pa. Super. 2003). In that case, the parties similarly agreed to an eighteen (18) percent prejudgment interest rate, and the defendants argued that the rate should be limited to the six (6) percent statutory rate. *Id.* The court stated, “[i]n contract cases, statutory prejudgment interest is awardable as of right. . . . [I]n anticipation of non-payment of money due, parties to a contract may stipulate to a higher rate of prejudgment interest.” *Id.* at 590 (citations omitted); *see also Reliance Sec. Serv., Inc. v. 2601 Realty Corp.*, 557 A.2d 418, 418-19 (Pa. Super. Ct. 1989) (“Interest was computed at the rate of . . . eighteen percent per annum, as provided in the parties’ agreement,” rather than the six (6) percent legal rate); *In re Estate of Braun*, 650 A.2d 73, 78 (Pa. Super. Ct. 1994) (“[T]he courts of this Commonwealth have found that the parties may agree to a postjudgment interest rate in excess of that provided by statute.”)

Under the circumstances, we are compelled to conclude that the parties agreed in the PVA to an eighteen (18) percent prejudgment interest rate and that the PVA was only modified, not terminated. Accordingly, we conclude that Plaintiff is entitled to the prejudgment interest rate of eighteen (18) percent provided for in the PVA.

An appropriate Order follows.

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AMERISOURCEBERGEN DRUG
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v.

NO. 03-CV-6769

RANDALL MEIER, and
ADVANCED PHARMACY SOLUTIONS,
LLC

ORDER

AND NOW, this 19th day of May, 2005, it is ORDERED that Plaintiff Amerisourcebergen Drug Corporation is entitled to prejudgement interest from Defendants Randell Meier at the rate of eighteen percent (18%) in accordance with the terms of their agreement.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge