

COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**THOMAS L. STROMEI and STROMEI REALTY,
LLC, a New Mexico Limited Liability Company,**

Plaintiffs-Appellees/Cross-Appellants,

vs.

No. 30,499

**RAYELLEN RESOURCES, INC., a New Mexico
Corporation, LIONEL BURNS, an individual,
JANE BURNS, a/k/a JANE MCVEY, an individual,
KENYON BURNS, et al.,**

Defendants-Appellants/Cross-Appellees.

Appeal from the District Court, Sandoval County
Before the Honorable George P. Eichwald, Thirteenth Judicial District

ANSWER TO CROSS-APPELLANTS' BRIEF IN CHIEF

FRANK M. BOND
FAITH KALMAN REYES
THE SIMONS FIRM, LLP
Post Office Box 5333
Santa Fe, New Mexico 87502-5333
(505) 988-5600

STEVEN L. TUCKER
TUCKER LAW FIRM, PC
520 Agua Fria Street
Santa Fe, New Mexico 87501-2508
(505) 982-3467

Attorneys for Defendants-Appellants/Cross-Appellees
Rayellen Resources, Inc., Lionel Burns,
Jane Burns a/k/a Jane McVey, and Kenyon Burns

TABLE OF CONTENTS

Introduction 1

Response to Summary of Proceedings 1

Argument – Response to Plaintiffs’ Point I..... 2

 A. Standard of Review: Defendants agree the standard of review
 is *de novo*..... 2

 B. Preservation: Defendants agree Plaintiffs preserved this issue for
 review. 2

 C. Plaintiffs’ Are not Entitled to Post-Judgment Interest at the
 Rate of 15% 2

Conclusion 5

TABLE OF AUTHORITIES

New Mexico Cases

<u>Hale v. Basin Motor Co.,</u> 110 N.M. 314 (1990)	5
<u>Sloan v. State Farm Mut. Auto. Ins. Co.,</u> 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230	4
<u>Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.,</u> 1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183	4

NM Rules and Statutes

NMRA 12-213(A)(3)	1
NMSA 1978, § 56-8-4.....	3, 4

Introduction

Plaintiffs' brief wastes little ink on the salient point: the jury did not award damages for any bad faith or tortuous conduct. Instead, completing Plaintiffs' own special verdict form, the jury was asked to consider awarding only breach of contract and punitive damages. The jury declined to award punitive damages, the sole award on which the claimed post-judgment interest rate sought by plaintiffs could be based. It instead awarded only breach of contract damages. The case law and the statute, the language of which is largely ignored by Plaintiffs, does not allow a Court to award post-judgment interest at the rate of 15% where the sole damages awarded are for breach of contract. Therefore, the Court could not have awarded post-judgment interest at the "bad faith" rate of 15% on any of the damages awarded to Plaintiffs.

Response to Summary of Proceedings

Based upon the requirement that all facts set forth in the Summary of Proceedings requires citation to the record, the Court must reject all of Plaintiffs' hyperbolic facts that fail to include such cites. NMRA 12-213(A)(3) (the summary of proceedings "shall contain citations to the record proper, transcript of proceedings or exhibits supporting each factual representation. A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of

the evidence bearing upon the proposition,” emphasis added). Therefore, the Court must ignore all of Plaintiffs’ unsupported assertions. *See, e.g.*, Pltfs. Cross Brf. at 1 (lacking any citation for the unsubstantiated assertion that Stromei “fully performed his part of the verbal agreement,” and his efforts in large part considerably increased the value of the ranch); Pltfs. Cross Brf. at 2, 2d paragraph (no record citation whatsoever for any of the assertions in the entire paragraph with regard to basis for claims related to closing of ranch sale).

Defendants adopt the Summary of Proceedings set forth in their own initial brief filed in the main appeal.

Argument – Response to Plaintiffs’ Point I

- A. **Standard of Review**: Defendants agree the standard of review is *de novo*.
- B. **Preservation**: Defendants agree Plaintiffs preserved this issue for review.
- C. **Plaintiffs’ Are not Entitled to Post-Judgment Interest at the Rate of 15%**

Plaintiffs ignore both those facts and law which are adverse to its position. Therefore, they make no attempt to explain to the Court the salient facts, nor do they discuss the dispositive case dealing with this issue. In their Statement of Facts, Plaintiffs never directly address their main problem: the special verdict form awarded damages only as to the claims of breach of contract:

✓ We find in favor of Plaintiff Tom L. Stromei on the issue of the breach of the oral contract for a percentage of the net profit from the sale or other final disposition of the L Bar Ranch and award compensatory damages in the total amount of \$ 4.5 million. We allocate these compensatory damages between the following defendant(s) in the following amount(s) (not to exceed 100% of the total amount of compensatory damages, above):

(RP 2965).

✓ We find in favor of Plaintiff Stromei Realty, LLC on the issue of the breach of the listing agreement and award compensatory damages in the total amount of \$ 2.9 million. We allocate these compensatory damages between the following defendant(s) in the following amount(s) (not to exceed 100% of the total compensatory damages, above)

(Id.).

Nor is Plaintiffs' argument assisted by the form of judgment, the salient document pursuant to NMSA 1978, § 56-8-4, which Plaintiffs' drafted and submitted. (RP 3451-3453). The judgment fails to reference Plaintiffs' specific claims, and reflects only the jury's damages awards. Those damages were, of course, awarded solely for "breach of the oral contract" and "breach of the listing agreement." (RP 2965). No damages were awarded in the judgment (or the special verdict form) for "tortious conduct, bad faith or intentional or willful acts." NMSA 1978, § 56-8-4. The statute does not authorize post-judgment interest at 15% for breach of contract.

Further, the claims for which damages are awarded govern the interest rate:

[W]e do not read Section 56-8-4 (A) as requiring a single post-judgment interest rate for the entire judgment. If, for example, a portion of a judgment is based on a tort cause of action and another portion is based on a contract cause of action, the interest rate on the first portion of the judgment could be fifteen percent and the interest rate on the second portion, eight and three-quarters percent.

Teague-Strebeeck Motors, Inc. v. Chrysler Ins. Co., 1999-NMCA-109, ¶¶ 61-62, 127 N.M. 603, 985 P.2d 1183, *overruled on other grounds*, Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

The statute provides that post-judgment interest “shall” be set at 8.75% per year unless the judgment is based on the conduct described in NMSA 1978, § 56-8-4 (A)(2). The judgment itself fails to reflect the conduct on which it is based, but reflects solely the amount of damages awarded. By reference to the jury verdict, it is abundantly clear that the sole damages were for breach of contract, not the conduct for which the post-judgment interest rate can be set at 15%. Since the jury’s award of damages was not based on anything other than breach of contract, neither was the judgment. The rate of 8.75% applies, and the Court could properly award only 8.75% interest as to any part of the judgment. RP 3452.

Plaintiffs’ assertion, in a footnote, that because the jury could not award the same damages twice, it had to draft the special verdict form in a way that awarded damages only for breach of the two contracts is simply incorrect. There are many ways to draft a verdict form which would have allowed a single measure of

damages for all related causes of action, without limiting a judgment amount to contract damages. Nor were Plaintiffs so limited; they could have asked the jury to determine damages under each theory and then elect their ultimate remedy. See Hale v. Basin Motor Co., 110 N.M. 314, 320 (1990) (“When a party may recover damages under separate theories of liability based upon the same conduct of the defendant, and each theory has its own measure of damages, the court may make an award under each theory. In that event the prevailing party must elect between awards that have duplicative elements of damages”, emphasis added). Having failed to ask for damages for a bad faith or tort claim (other than punitive damages, which the jury denied), Plaintiffs cannot obtain interest based upon a non-existent tort or bad faith judgment.

Conclusion

Based upon the foregoing and upon Defendants’ argument at Point 8 of their initial brief on appeal, Plaintiffs are not entitled to an award of post-judgment interest at any rate other than 8.75%.

Respectfully submitted,

THE SIMONS FIRM, LLP

By: Frank M. Bond
FRANK M. BOND
FAITH KALMAN REYES
P.O. Box 5333
Santa Fe, New Mexico 87502-5333
(505) 988-5600

By: Steven L. Tucker
STEVEN L. TUCKER
TUCKER LAW FIRM, PC
520 Agua Fria Street
Santa Fe, New Mexico 87501-2508
(505) 982-3467

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2011, a true and correct copy of the foregoing pleading was sent via U.S. mail, postage prepaid, to Luis G. Stelzner, Robert P. Warburton, and Jamie Dawes, Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A., P.O. Box 528, Albuquerque, NM 87103

Frank M. Bond