

 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,
an individual, DESTINY RESOURCES, INC.,
a New Mexico Corporation, and DESTINY
CAPITAL, INC., a New Mexico Corporation,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

APR 27 2011

Jan M. Martinez

Defendants/Appellants/Cross-Appellees.

CROSS-APPELLANTS' BRIEF IN CHIEF

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

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SUMMARY OF PROCEEDINGS¹

A. Nature of the Case

This action arises from the bad faith breach of an oral agreement between Plaintiff/Cross Appellant Tom L. Stromei and Defendant/Appellant Rayellen Resources, Inc. (Rayellen), under which Mr. Stromei was to receive 25% of the net profit from the contemplated sale of a large ranch property in North-Central New Mexico known as the L Bar Ranch. This action also involves the bad faith breach of a written exclusive right to sell listing agreement between Rayellen and Mr. Stromei's real estate brokerage firm, Stromei Realty, arising from the aborted sale of the L Bar Ranch, and tortious interference by the individual defendants, Lionel Burns, Jane McVey, and Keyon Burns, with the contract for sale of the ranch.

In 1989, Mr. Stromei entered into a verbal agreement with Rayellen, under which Rayellen agreed to pay Mr. Stromei a percentage of the net profit from a contemplated future sale of the L Bar Ranch in exchange for Mr. Stromei's agreement to become the resident ranch manager, and promise to use his expertise to develop and improve ranch. Tr. 10:28-33; RP 2900-2901. Mr. Stromei fully performed his part of the verbal agreement, devoting seventeen years to the management, development, and improvement of the ranch. Due in large part to Mr. Stromei's efforts, the ranch increased considerably in value.

¹ Plaintiffs incorporate the more-detailed Summary of Proceedings set forth in their Answer Brief herein by reference.

In late 2005, Mr. Stromei, on behalf of Stromei Realty, entered a written exclusive right to sell listing agreement with Rayellen concerning the L Bar Ranch. Ex. X7. Mr. Stromei and Stromei Realty subsequently produced a purchaser for the L Bar Ranch at Rayellen's asking price of \$43,000,000. Rayellen then accepted the purchaser as a ready, willing and able buyer by executing a purchase and sale agreement in December of 2005. Ex. E7.

Closing on the sale of the L Bar Ranch was scheduled for April 20, 2006. Unfortunately, however, the sale of the L Bar Ranch did not close due to Rayellen's breach of the purchase and sale agreement and the individual defendants' tortious interference with the performance of the purchase and sale agreement. The failure of the sale, coupled with Defendants' repudiation of the net profit sharing agreement and refusal to pay Stromei Realty its 6% commission on the aborted sale of the L Bar Ranch, prompted Plaintiffs to file this action.

B. Summary of Proceedings and Disposition Below

In October, 2006, Mr. Stromei and Stromei Realty filed this lawsuit in the Thirteenth Judicial District. Following a trial on the merits, the jury returned a verdict in favor of Plaintiffs.

The Special Verdict form reveals that the jury found in favor of Mr. Stromei on his claim for breach of the oral agreement, and concluded that Rayellen breached the covenant of good faith and fair dealing in refusing to honor that

agreement. RP 2900-2902. The jury further found that Rayellen breached the listing agreement, and the duty of good faith and fair dealing implied in the listing agreement, in seeking to deprive Stromei Realty of its commission on the aborted sale of the L Bar Ranch. RP 2904. Finally, the jury found that the individual defendants tortiously interfered with the purchase and sale contract for the L Bar Ranch. *Id.*

The jury awarded plaintiff Mr. Stromei \$4,500,000 and Stromei Realty \$2,900,000 for a grand total of \$7,400,000 in compensatory damages. RP 2965. Both sets of damages were allocated between Rayellen, Lionel Burns, Jane McVey and Kenyon Burns. *Id.*

On January 7, 2010, the trial court entered judgment in favor of Mr. Stromei and Stromei Realty and against Rayellen and the individual defendants in the aggregate amount of \$9,106,153.70 inclusive of pre-judgment interest and costs. RP 3452. The judgment also reflects an award of post-judgment interest at the rate of 15% on 39% of the judgment amount and 8.75% on the remaining 61% of the judgment. *Id.*

Plaintiffs' cross appeal concerns only the court's decision to award post-judgment interest on a portion of the judgment at a rate of 8.75%. As discussed below, because the judgment was based on tortious, bad faith, intentional, and/or willful conduct, the court was required to award post-judgment interest at the rate

of fifteen percent (15%) per year on the entire judgment. The district court therefore erred in awarding interest on a portion of the judgment at a lower rate of eight and three-fourths percent (8.75%).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DECLINING TO AWARD POST-JUDGMENT INTEREST AT A RATE OF FIFTEEN PERCENT PER YEAR ON THE ENTIRE JUDGMENT.

A. Standard of Review

As discussed in more detail below, the Court is required by NMSA 1978 § 56-8-4 to award interest at a rate of 15% per year “[w]hen a judgment is based on tortious conduct, bad faith, or a finding that the defendant acted intentionally or willfully.” *Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 54, 131 N.M. 100, 116, 33 P.3d 651, 667. Because the special verdict form reflects findings of tortious, bad faith, willful, and intentional conduct, the district court’s decision not to award interest at the higher rate of 15% was based on a misinterpretation or misapplication of § 56-8-4. The Court must accordingly review *de novo* the district court’s decision to award interest on part of the judgment at a lower rate. *See Pub. Serv. Co. of N.M.*, 2001-NMCA-082, ¶ 48, 131 N.M. at 115, 33 P.3d at 666 (“Issues of statutory construction and interpretation are questions of law, which we review *de novo*.”); *State v. Gallegos*, 2007-NMSC-007,

¶17, 141 N.M. 185, 190, 152 P.3d 828, 833 (application of mandatory rule is a question of law to be reviewed *de novo*).

B. Preservation

Plaintiffs preserved their arguments concerning post-judgment interest by filing a motion seeking post-judgment interest at a rate of 15% per year. RP 2982-2983.

C. Contentions of Cross-Appellants

New Mexico Statute Section 56-8-4 requires interest to be awarded on judgments. NMSA 1978 § 56-8-4(A) (“[I]nterest shall be allowed on judgments and decrees for the payment of money from entry.”) NMSA 1978 § 56-8-4(A); *Westar Mortgage Corp. v. Jackson*, 2002-NMCA-009, ¶ 55, 131 N.M. 493, 509, 39 P.3d 710, 726 (“In 1983 . . . post-judgment interest under Section 56-8-4(A) became mandatory.”).

Section 56-8-4 also sets forth the applicable post-judgment interest rates. The default interest rate is 8.75% per year. NMSA 1978 § 56-8-4(A). But of significance to Plaintiffs’ cross appeal, § 56-8-4 provides that post-judgment interest “shall be computed at the rate of fifteen percent” when “the judgment is based on tortious conduct, bad faith or intentional or willful acts.” NMSA 1978 § 56-8-4(A)(2).

The district court awarded post-judgment interest at the rate of 8.75% on 61% of the judgment and at the rate of 15% on 39% of the judgment. RP 3452. That

decision is, however, in direct conflict with the plain language of § 56-8-4, because the jury specifically found that Defendants acted tortiously, intentionally, and in bad faith. In particular, the jury found that each of the individual defendants committed the tort of intentional interference with contract, and that Rayellen breached the duties of good faith and fair dealing included in both the verbal net profit sharing agreement and the listing agreement. RP 2902, 2904. And to find such breaches of the duties of good faith and fair dealing, the jury was required to find that Rayellen engaged in bad faith, intentional, and/or willful conduct. *See* Jury Instruction No. 30, RP 2943 (to establish breach of the duty of good faith and fair dealing, Plaintiffs must establish that “Rayellen wrongfully, intentionally, or in bad faith sought to prevent the performance of a contract; or sought to withhold the benefits of the contract from plaintiffs; or interfered with the performance of the contracts; or took any other action aimed at depriving plaintiffs of the benefits of their contracts with Rayellen”).

Based on the jury’s findings, it is obvious that the judgment was “based on tortious conduct, bad faith or intentional or willful acts.” *See* NMSA 1978 § 56-8-4(A)(2). Indeed, the trial court recognized as much when awarding post-judgment interest at a rate of 15% on a portion of the judgment. Once the court properly made that determination, it was required by the plain language of § 56-8-4 to apply an interest rate of 15% to the entire judgment. *See Pub. Serv. Co. of N.M.*, 2001-

NMCA-082, ¶ 54, 131 N.M. at 116, 33 P.3d at 667 (“[w]hen a judgment is based on tortious conduct, bad faith, or a finding that the defendant acted intentionally or willfully, a court must award interest at the higher rate of [fifteen] percent.”); NMSA 1978 § 56-8-4(A) (“Interest shall be allowed on judgments and decrees for the payment of money from entry and shall be calculated at the rate of eight and three-fourths percent per year, unless . . .the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest **shall be computed at the rate of fifteen percent.**”) (emphasis added).

The district court consequently erred in awarding interest at the higher rate of 15% on only part of the judgment. Although the court could properly have awarded interest on a portion of the judgment not based on tortious conduct, bad faith, or intentional or willful acts, the Special Verdict Form did not give the court a basis on which to apply separate interest rates. Instead, the Special Verdict Form contained only two sections under which the jury could award compensatory damages against each defendant: one relating to the verbal agreement under which Mr. Stromei was to receive a 25% share of the net profits from the sale of the L Bar Ranch and one relating to the listing agreement, under which Stromei Realty was to receive a commission on the sale of the L Bar Ranch. RP 2965. The jury was not given an opportunity to award separate damages as to each cause of action,

or to indicate that a portion of the judgment was not based on the tortious, bad faith, intentional, and willful conduct it indisputably found.²

Accordingly, there is simply no factual basis on which to conclude that only 39% of the judgment was based on tortious, intentional, willful and/or bad faith conduct. Rather, it appears that the district court simply chose the smaller of two categories of damages awarded—\$2.9 million related to the listing agreement—for the higher interest rate. *See* RP 2965 (\$4.5 million awarded for claims concerning verbal agreement, and \$2.9 million awarded for claims relating to the listing agreement); Tr., December 23, 2009 hearing, 3:55:36-3:57:50 (interest would be awarded at the rate of 15% on the \$2.9 million portion of the judgment stemming from the listing agreement, and at the rate of 8.75% for the \$4.5 million portion of the judgment relating to the verbal agreement).

² It would not have been proper to give the jury an opportunity to award separate compensatory damages for breach of the duties of good faith and fair dealing or interference with contract, because Plaintiffs did not suffer damages in addition to the damages caused by the breaches of contract as a result of Defendants' bad faith, tortious, and intentional conduct. The same measure of damages applied to the breach of contract claims and the claims of bad faith and tortious interference, i.e., benefit-of-the-bargain damages. A verdict form allowing the jury to award damages by cause of action would likely have resulted in an award of damages in excess of those actually suffered by Plaintiffs and a potential double recovery. The factual separation of the Special Verdict form was both proper, and superior, to a form that would have allowed separate awards of damages based on legal theory. Moreover, Defendants did not object to this portion of the special verdict form. (Tr. 13:155, 188-202; Tr. 14:3-4)

Yet, § 56-8-4 plainly does not give the district court discretion to selectively apply interest rates in this manner. Quite the contrary, because the judgment was based on bad faith, tortious, willful, and/or intentional conduct, the Court was required to award post-judgment interest at a rate of 15% per year. *See Pub. Serv. Co. of N.M.*, 2001-NMCA-082, ¶ 54, 131 N.M. at 116, 33 P.3d at 667. The district court's arbitrary decision to award interest at two separate rates is, therefore, at odds with § 56-8-4, and must be reversed.

CONCLUSION

The jury's Special Verdict form clearly reflects that the judgment is based on bad faith, tortious, willful, and/or intentional conduct. Post-judgment interest must therefore be awarded at a rate of 15%, and the district court erred in applying a rate of 8.75% to a portion of the judgment. This Court should accordingly reverse the decision of the district court to the extent it awards interest at a rate of 8.75% on part of the judgment.

Respectfully submitted,

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