

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

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JUN 28 2011

Ben M. Minter

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,

Defendants/Appellants/Cross-Appellees.

CROSS-APPELLANTS' REPLY BRIEF

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

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TABLE OF CONTENTS

I. Introduction.....1

II. Reply to Response to Summary of Proceedings.2

III. Argument.....2

 A. The District Court Erred In Declining To Award Post-Judgment
 Interest At A Rate Of Fifteen Percent Per Year On The Entire
 Judgment.....2

 B. The Jury Did Award Damages Based Upon Findings Of Bad Faith
 and Tortious Conduct.....3

IV. Conclusion.....8

TABLE OF AUTHORITIES

NEW MEXICO CASES

Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.,
2001-NMCA-082, 131 N.M. 100, 33 P.3d 651.....6-7

Sanders v. Fedex Ground Package System, Inc.,
2008-NMSC-040, 144 N.M. 449, 188 P.3d 1200.....5

Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.,
1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183.....6-8

STATUTES

NMSA 1978 § 56-8-4.....2-4, 7

STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally-spaced type style or typeface, Times New Roman, and the body of the brief contains 1,837 words, as indicated by Microsoft Office Word 2007.

I. INTRODUCTION

Plaintiffs' cross appeal challenges the district court's decision to award post-judgment interest at a rate of 8.75% on part of the judgment. As detailed in plaintiffs' Brief in Chief, because the jury found that all of the defendants engaged in tortious or bad-faith conduct, the district court erred in declining to award post-judgment interest at the rate of 15% on the entire judgment.

Defendants base their argument concerning the proper rate of post-judgment interest entirely on the special verdict form. Notwithstanding the jury's express findings that defendants engaged in tortious and bad-faith conduct, defendants maintain that the wording of the verdict form requires a conclusion that the jury only awarded damages for breach of contract. The findings of the jury cannot, however, be so easily ignored. And defendants' suggestion that the jury failed to expressly allocate damages for tortious or bad-faith conduct is in any event unsupported. Because the jury indisputably found that all of the defendants engaged in tortious or bad-faith conduct, the judgment is based on such conduct, and the district court was required to award post-judgment interest on the entire judgment at a rate of 15%.

II. REPLY TO RESPONSE TO SUMMARY OF PROCEEDINGS

Defendants take issue with plaintiffs' Summary of the Proceedings, asserting that "the Court must reject all of Plaintiffs' hyperbolic facts" that fail to include cites to the record. Yet, plaintiffs' summary of facts contains citations to the record proper, and incorporates the more-comprehensive summary of the proceedings set forth in plaintiffs' Answer Brief. Moreover, there is no dispute as to the facts relevant to plaintiffs' cross appeal, and the statements included in the summary of proceedings about which defendants complain do not concern facts relevant to the limited issue before the court on plaintiffs' cross appeal. The Court should therefore reject defendants' arguments concerning the alleged deficiencies in the summary of proceedings.

III. ARGUMENT

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

New Mexico Statute Section 56-8-4 governs the rate of post-judgment interest. It sets forth a default rule that post-judgment interest will be awarded at the rate of 8.75% per year, and then 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. Plaintiffs are appealing the decision of the district court to the extent it awards interest at the rate of 8.75% because “the judgment is based on tortious conduct, bad faith or intentional or willful acts.” *See* NMSA 1978 § 56-8-4(A)(2). Indeed, the jury expressly found that Rayellen breached the duties of good faith and fair dealing contained in both the net-profit sharing agreement and the listing agreement; and that each of the individual defendants committed tortious interference with the contracts at issue. RP 2902, 2904.

B. THE JURY DID AWARD DAMAGES BASED UPON FINDINGS OF BAD FAITH AND TORTIOUS CONDUCT.

In support of their argument that the district court properly applied a rate of 8.75%, defendants assert that “the special verdict form awarded damages only as to the claims of breach of contract,” and therefore, “[n]o damages were awarded in the judgment (or the special verdict form) for ‘tortious conduct, bad faith or intentional or willful acts.’” Answer Brief at 2-3. Defendants ignore the fact that the jury did award damages specifically and separately against each of the individual defendants and Rayellen. See RP 2965. The special verdict form instructed the jury that they **may** allocate compensatory damages due to Tom Stromei and Stromei Realty among the individual defendants if they answered “yes” to special interrogatory No. 8. See RP 2907. In response to Special

Interrogatory No. 8, the jury determined that each of the individual defendants tortiously interfered with the performance of the purchase and sale agreement for the L Bar Ranch. *See* RP 2904. By allocating a portion of the compensatory damages to each of the individual defendants, the jury necessarily concluded that plaintiffs had suffered damages as a result of the individual defendants' tortious conduct. *See* RP 2965. If the jury intended only to award damages for breach of contract, then logically, the entire amount of compensatory damages would have been allocated to Rayellen Resources, Inc., the only defendant that was actually a party to the two contracts at issue. Moreover, to the extent the damages awarded against Rayellen could be attributable to breach of the contracts, the 15% post-judgment interest rate still applies because the jury also determined that Rayellen breached both contracts in bad faith. *See* RP 2902, 2904.

Furthermore, the relevant question is not whether damages were awarded specifically for tortious, bad faith, or intentional conduct, but rather, whether the "judgment is based on tortious conduct, bad faith or intentional or willful acts." *See* NMSA 1978 § 56-8-4(A)(2). The judgment is necessarily based on the jury's findings, including express determinations that all of the defendants engaged in tortious, bad-faith, intentional, and/or willful conduct. *See* RP 2902, 2904.

Defendants' interpretation of the special verdict form is simply wrong. While defendants argue that plaintiffs could have formulated a special verdict

form making it more clear that damages were awarded for tortious interference with contract and breach of the duty of good faith and fair dealing, *see* Answer Brief at 4-5, now is not the time to second-guess the verdict form. The verdict form actually used must instead be interpreted to address the dispute concerning post-judgment interest.

The Special Verdict form must be read together with the findings made by the jury in response to the Special Interrogatories. *See Sanders v. Fedex Ground Package System, Inc.*, 2008-NMSC-040, ¶ 32, 144 N.M. 449, 188 P.3d 1200 (The Court does not consider any one jury instruction in a vacuum) The jury was specifically asked to make findings regarding each cause of action, and in fact did so. *See* RP 2900-2906. The jurors were first instructed to determine the total compensatory damages due to Tom L. Stromei and Stromei Realty and then were instructed that they may allocate the compensatory damages among the defendants based upon their determinations of Rayellen's bad faith breach of the contracts and the individual defendants' tortious interference with the contracts. *See* RP 2907. Because the jurors exercised their discretion to allocate compensatory damages among all of the defendants based upon their specific findings of bad faith and tortious conduct, the entire judgment is subject to post-judgment interest at 15%. "When 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.” See *Pub. Serv. Co. of N.M. v. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 54, 131 N.M. at 116, 33 P.3d at 667.

Defendants’ suggestion that those findings did not form a part of the award of damages is entirely unfounded. Furthermore, the implication that the jury was asked to make decisions on certain causes of actions that could not form a basis for an award of compensatory damages is absurd. The jury was asked to make specific findings for a reason, and all of the jury’s findings must be given effect. When the findings of the jury are considered along with the award of damages, the judgment is, without question, based on tortious, bad faith, intentional, and/or willful conduct.

Accordingly, defendants’ efforts to establish that the judgment was based only on breach of contract fail. Moreover, the Special Verdict Form did not provide the district court with a basis on which to conclude that only a portion of the judgment was based on tortious, bad faith, intentional, and/or willful conduct. Compare *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶¶ 60-64, 127 N.M. 603, 619-20, 985 P.2d 1183, 1196-97, *overruled on other grounds by Sloan v. State Farm Mutual Auto Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230. Since the Special Verdict form did provide the jury with a mechanism to award damages separately by legal theory; given that the jury expressly found bad faith and tortious conduct; and given that the jury allocated the

compensatory damage award among the defendants based upon their bad faith and tortious conduct, the district court was required to award post-judgment interest at the rate of 15% on the entire judgment. *See* NMSA 1978 § 56-8-4(A)(2); *Pub. Serv. Co. of N.M.*, 2001-NMCA-082, ¶ 54, 131 N.M. at 116, 33 P.3d at 667. The district court therefore erred in awarding interest at a rate of 8.75% on a portion of the judgment.

Finally, defendants' reliance on *Teague-Strebeck Motors Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183 is misplaced because that case is clearly distinguishable on its facts. *Teague-Strebeck* arose from a fire that destroyed a car dealership's property and the ensuing dispute between an insured and insurer over the extent of coverage for the loss. Following a bench trial, the district court entered a judgment against the insurance company which included an award of \$75,000 for bad faith as well as other compensatory damages. The Court of Appeals held that the 15% post-judgment interest rate required at NMSA 1978 §56-8-4(A) clearly applied to the bad faith award. *Id.* at ¶ 63, 127 N.M. at 620, 985 P.2d at 1200. However, the record below was not clear as to which legal theory the district court had relied upon in awarding the remaining compensatory damages. *Id.* at ¶ 64, 127 N.M. at 620, 985 P.2d at 1200. In the absence of such clarity, the Court of Appeals reasoned that, because the district court used a contract measure of damages in arriving at the remaining

compensatory damages, the award could best be understood as arising from a contract cause of action, and on that basis, affirmed the award of pre-judgment interest at 8.75% for the remainder of the judgment.

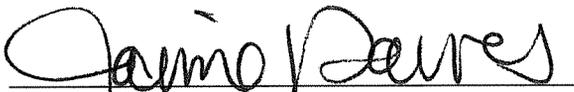
Unlike *Teague-Strebeck*, the record in this case contains specific findings by the jury of bad faith conduct on the part of Rayellen and tortious conduct on the part of each of the individual defendants (RP 2902, 2904) and clearly reflects the jury's decision to award compensatory damages against Rayellen and each of the individual defendants based on its findings of bad faith and tortious conduct. This is not a case where the Court must read the proverbial tea leaves to ascertain the intentions of the jury when rendering its verdict.

IV. CONCLUSION

Despite defendants' efforts to establish otherwise, the judgment was based on bad faith, tortious, willful, and/or intentional conduct. The district court was therefore required to award post-judgment interest on the entire judgment at the rate of 15%, and this Court must 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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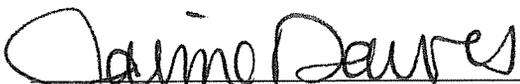
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CERTIFICATE OF SERVICE

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