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United States District Court, S.D. New York.

GOLD–FLEX ELASTIC LTD., Plaintiff,
v.
EXQUISITE FORM INDUSTRIES, INC. d/b/a Exquisite Form, Defendant.

No. 95 Civ. 3881 (LMM).
|
Dec. 28, 1995.

MEMORANDUM AND ORDER

McKENNA, District Judge.

OPINION

***1** Plaintiff, Gold–Flex Elastic Ltd. ("Gold–Flex"), a Hong Kong corporation, brings this action for breach of contract against defendant, Exquisite Form Industries, Inc. ("Exquisite"), a Delaware corporation. Jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2).

Plaintiff moves for summary judgment, pursuant to Fed.R.Civ.P. 56. Plaintiff seeks to recover $286,016.79 in unpaid invoices, plus interest on that amount. Plaintiff also seeks to recover its attorneys' fees incurred in the course of this litigation as a sanction against defendant for denying certain allegations in the complaint. For the reasons discussed below, plaintiff's motion for summary judgment is granted. Plaintiff is entitled to recover the outstanding debt with interest. Plaintiff's request for sanctions is denied.

I.

Background

The facts of this case have been gleaned from plaintiff's complaint and from the affidavits submitted by both parties. Upon review of the record, it is apparent that the parties agree on the essential relevant facts. It is well-established that summary judgment is appropriate where there is "no genuine issue as to any material fact" and the moving party is entitled to "judgment as a matter of law." Fed.R.Civ.P. 56(c). To the extent that any ambiguities exist, all will be resolved and all reasonable inferences drawn in favor of the defendant, as the Court must do on a plaintiff's motion for summary judgment. *See Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 456 (1992); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). The facts relevant to the present dispute are the following:

Gold–Flex is a corporation organized and existing pursuant to the laws of, and having its principal place of business in, Hong Kong. (Diestel Aff. ¶ 2) Gold–Flex is a manufacturer, wholesaler and distributor of elastic webbing used in garments. (Diestel Aff. ¶ 3) Exquisite is a Delaware corporation engaged in the manufacture and sale of women's undergarments. (Def. Letter to Court, 12/13/95) Exquisite has a New York showroom and, until recently, had an operations center in California. (Def. Letter to Court, 12/13/95) Prior to this dispute, Exquisite and Gold–Flex had been doing business for twenty years and Gold–Flex considered Exquisite a valued customer. (Pansa Aff. ¶ 2)

In the period between August 22, 1994 and January 1, 1995, Gold–Flex shipped seven orders of elastic webbing to Exquisite. (Diestel Aff. ¶ 3) Gold–Flex sold and delivered goods to Exquisite on an "open account sixty day basis" which meant that payment was due sixty days after shipment of the goods. (Diestel Aff. ¶ 3, Def. Letter to Court, 12/13/95, Pl. Letter to Court, 12/6/95) The selling price of these combined shipments totalled $286,318.51. (Pl.Ex. A & B) After adjusting defendant's account for shipping costs and credits, the total amount owed by defendant was $286,016.79 (the "Debt"). (Diestel Aff. ¶ 4)

***2** The goods were accepted by Exquisite. Exquisite does not dispute the price of the goods nor does it dispute the fact that the Debt to Gold–Flex was not paid. (Pansa Aff. p. 5) In November of 1994, the president of Gold–Flex, Gus Diestel, and his son, David Diestel, contacted Exquisite to request that payments be made on the outstanding invoices. (Pansa Aff. ¶ 3) Between December 1994 and May 1995, Exquisite made a number of proposals for payment of its debt but ultimately was unable to meet any of the schedules agreed to as a result of financial difficulties. (Pansa Aff. ¶ 4)

On May 26, 1995, Gold–Flex filed the present suit, seeking payment of the Debt, together with interest on the sum and attorneys' fees. Prior to the initiation of this action, the parties had not discussed the possibility that interest would be owed on any past due amounts. (Pansa Aff. ¶ 5)

In July of 1995, the parties entered into settlement discussions and agreed upon a long-term payout of the Debt, without interest. Pursuant to this agreement, Exquisite wired the first agreed-to installment of $25,000 to Gold–Flex. Exquisite did not make the second payment under the terms of the settlement agreement. (Pansa Aff. ¶ 6, Reply ¶ 9) Accordingly, Gold–Flex withdrew its settlement offer and the parties returned to litigation.

II.

Analysis

Both plaintiff and defendant agree that plaintiff is liable for the Debt. The question remaining is whether defendant should be liable for prejudgment interest on the Debt. Plaintiff sold its goods to defendant on a "open account sixty days" basis. Payment was due sixty days after shipment of the goods. The parties had no contractual provision addressing interest on late payments nor had plaintiff ever, in the twenty years during which the two parties had been doing business, charged, or discussed the possibility of charging, interest on defendant's late payments. However, the present dispute appears to be the first time that defendant made late payments to plaintiff.

A. Choice of Law.

Since no contractual provision or course-of-dealing between the parties exists in regard to interest due on late accounts, the Court has no evidence to suggest that the parties intended to avoid the application of background law. Neither party briefed the issue of the content of that background law, namely which jurisdiction's law should be used to determine the basis and extent of defendant's liability for interest on late payments.

A federal court sitting in a diversity case is bound to apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941). Under New York choice of law principles, the allowance of prejudgment interest is controlled by state law, namely the law of the state that was used to determine liability on the main claim. *See Patch v. Stanley Works,* 448 F.2d 483, 494 n. 18 (2d Cir.1971) (noting "consistent line" of decisions holding that under New York choice of law principles "allowance of pre-judgment interest is controlled by the rule of the jurisdiction whose law determines liability"); *Entron, Inc. v. Affiliated FM Ins. Co.,* 749 F.2d 127, 131 (2d Cir.1984) (following *Stanley*).

***3** This Court must then determine what jurisdiction's law would have been applied to determine liability on the main claim—namely defendant's breach of its contract to pay for goods received—had defendant not conceded liability. New York courts apply a "paramount interest" test to choice of law issues involving contractual disputes; "[t]he task of the court is first to ascertain what the relevant legal issues are and then to determine, if more than one state is involved, which state's legitimate interests are most crucially implicated." *Hutner v. Greene,* 572 F.Supp. 49, 52 (S.D.N.Y.), *aff'd in part, rev'd in part,* 734 F.2d 896 (2d Cir.1984). The court should give "controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue in the litigation." *Intercontinental Monetary Corp. v. Performance Guar., Inc.,* 705 F.Supp. 144, 147 (S.D.N.Y.1989); *see also Totalplan Corp. of America v. Colborne,* 14 F.3d 824, 832 (2d Cir.1993).

Under New York choice-of-law rules, it is likely that foreign law would determine the nature of the parties' obligations. Hong Kong has a strong interest in this dispute as plaintiff is incorporated in Hong Kong and plaintiff manufactures its goods in Hong Kong and ships its goods from Hong Kong. The Philippines also have a strong interest in this dispute as the elastic webbing was delivered, inspected, and manufactured into undergarments in the Philippines by Exquisite's affiliate, Royal Undergarments.

Neither side has called for an application of the law of Hong Kong or of the Philippines. A federal court sitting in diversity may, in its discretion, take judicial notice of the laws of foreign countries. Fed.R.Civ.P. 44.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his

> pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Since the parties have given no indication that they find foreign law relevant to the present dispute, the Court may, and does, decline to raise and investigate the issue *sua sponte.* The parties' silence on the applicability and substance of foreign law constitutes a waiver of the issue. *Vishipco Linve v. Chase Manhattan Bank, N.A.,* 660 F.2d 854, 860 (in diversity action, when forum's choice of law principles would deem Vietnamese law controlling, parties' failure to provide evidence of Vietnamese law left court to apply forum law); *Luckett v. Bethlehem Steel Corporation,* 618 F.2d 1373, 1368 n. 3 (10th Cir.1990) (parties' failure to brief Singapore law viewed as acquiescence to forum law); *Commercial Ins. Co. of Newark, New Jersey v. Pacific–Peru Const. Corp.,* 558 F.2d 948, 952 (9th Cir.1977) (when contacts in the case point to application of either Peruvian or Hawaiian (forum) law and parties failed to brief applicability of Peruvian law, forum law applied); *Bartsch v. Metro–Goldwyn–Mayer, Inc.,* 391 F.2d 150, 155 n. 3 (2d Cir.), *cert. denied,* 393 U.S. 826 (1968) (when it appears German law should be applied to contract interpretation but parties did not suggest that German law differs from forum (New York) law in any relevant respect, and the transactions had contacts with forum, court properly applied forum law); *Clarkson Co. v. Shaheen,* 660 F.2d 506, 512 n. 4 (2d Cir.), *cert. denied,* 455 U.S. 990 (1982) (court's application of forum (New York) law to determine obligations of directors of Canadian corporation upheld when no party claimed Canadian law applicable or that it differed from forum law, and Canadian corporation had sufficient contacts with forum); Restatement (Second) of Conflict of Laws, § 136, comment h at 378 (calling for application of forum law when little or no information regarding foreign law has been supplied).

***4** Once foreign law is deemed inapplicable, the cases cited in the paragraph above suggest that the default law to be applied is forum law. However, these cases do not address directly the question posed by the facts before the Court—namely what law to apply when more than one domestic jurisdiction, here New York and California, has significant contacts with the dispute. [1]

California has an interest in this dispute as the finished products manufactured by Royal Undergarments in the Philippines were shipped to Exquisite's operations center in California. From California, the products were distributed to various markets, primarily in the United States. Exquisite closed its operations center in November of 1995. New York has an interest in this dispute as defendant maintains its showroom and headquarters in New York at 38 East 32nd Street. Currently, this showroom is defendant's only remaining place of business.

While California's interest in these transactions is strong, the Court finds that the contacts between defendant and New York are substantial. These contacts, combined with the presumption in favor of the application of forum law once foreign law is waived, are sufficient to tip the balance in favor of applying forum law.

B. Liability for prejudgment interest under New York law. Under New York law, the Court is required to award prejudgment interest to plaintiff. [2] New York Civil Practice Law and Rules § 5001(a)–(b) states in part:

> Interest shall be recovered upon a sum awarded because of a breach of performance of a contract....
>
> Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.
>
> (N.Y.Civ.Prac.L. & R. § 5001(a), (b) (McKinney 1992).)

An award of interest is mandatory under these provisions, such that a court applying New York law has no discretion to decide not to award prejudgment interest to a litigant who has successfully claimed a breach of contract. *See Lee v. Joseph*

E. Seagram & Sons, Inc., 592 F.2d 39, 41 (2d Cir.1979); *United Bank Ltd. v. Cosmic Int'l, Inc.,* 542 F.2d 868, 878 (2d Cir.1976); *Specter v. Mermelstein,* 485 F.2d 474, 482 (2d Cir.1973).

Since plaintiff shipped the goods in question on an "open account 60 days" basis, the Court finds that the "earliest ascertainable date the cause of action existed" is sixty days after the date of shipment. Accordingly, interest is awarded as of that date for each transaction respectively.

III.

Conclusion

For the foregoing reasons, the clerk is directed to enter judgment in favor of plaintiff and against defendant in an amount to be calculated as follows. In addition to the sum of $286,318.51, interest of nine per centum per annum, as set by N.Y.Civ.Prac.L. & R § 5004, shall be awarded. Interest shall begin to accrue on each of the component amounts as of the date listed for each transaction in column D.

A. Inv.	B. #Shipping Date	C. Amount	D. Date Interest Begins to Accrue
8114	08/26/94	$ 6,231.94	10/23/94
8124	09/09/94	$97,917.98	11/08/94
8161	09/30/94	$52,563.62	11/29/94
8020	11/04/94	$52,879.64	01/03/95
8219	11/22/94	$ 441.87	01/21/95
8243	12/16/94	$49,008.23	02/14/95
8300	02/03/95	$27,275.23	04/04/95

***5** From the total of $286,318.51 plus interest so calculated, the clerk shall subtract: 1) $301.72, with nine per cent interest from January 1, 1995, to reflect adjustments to defendant's account; and 2) $25,000, with nine per cent interest from July 28, 1995, to reflect the payment made by defendant to plaintiff in the course of their failed settlement negotiations. Judgment is to be entered in favor of plaintiff and against defendant in the resulting amount.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1995 WL 764191

Footnotes

1 The factual scenarios of these cases fall into two basic categories. The first scenario occurs when the law that clearly would have been chosen under the relevant choice of law analysis is the foreign law and no other; thus the parties' failure to brief foreign law leaves the court to apply forum law as there is no clearly preferable alternative. The second scenario occurs when the foreign jurisdiction's law is the best choice but the forum

has both contacts with and an interest in the litigation. Under the latter circumstance, the parties' failure to brief foreign law prompts the court to apply forum law—the second best alternative. The present case more closely resembles the second scenario.

2 As a matter of course, the winning party is also entitled to interest from the date of decision to judgment and interest from the date of the judgment's entry until the payment of the judgment. *See* N.Y.Civ.Prac.L. & R. §§ 5002–5003 (McKinney 1994) (interest computed by clerk of the court at statutorily determined rate).