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LORAIN COUNTY
2018 JUL 11 PM 1:12
COURT OF COMMON PLEAS
TOM ORLANDO

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# LORAIN COUNTY COURT OF COMMON PLEAS
## LORAIN COUNTY, OHIO
## JOURNAL ENTRY
## Hon. D. Chris Cook, Judge

Date July 11, 2018 Case No. 15CV188007

DESIGNERS CHOICE, INC.
Plaintiff

Mark Stephenson
Plaintiff's Attorney

VS

ATTRACTIVE FLOORING, LLC., *et al.*
Defendants

Geoffrey Smith
Defendant's Attorney

This matter is before the Court on Plaintiff, Designers Choice, Inc.'s, [Combined] Motion To Reopen Judgments And To Enter Judgments For Plaintiff For The Amount Of The Liquidated Damages; Motion For A New Trial On Only Compensatory Damages; Motion To Correct Rates And Types Of Interest On Judgments, filed June 8, 2018; Defendants filed their Response Brief on July 5, 2018; and Plaintiff filed its Reply Brief on July 9, 2018.

**THE COURT RULES AS FOLLOWS:**

The Motion To Reopen Judgments And To Enter Judgments For Plaintiff For The Amount Of The Liquidated Damages is not well-taken and DENIED.

The Motion For A New Trial On Only Compensatory Damages is not well-taken and DENIED.

The Motion To Correct Rates And Types Of Interest On Judgments is DENIED.

See Judgment Entry.

IT IS SO ORDERED. No Record.

**JUDGE D. Chris Cook**

cc: Stephenson, Esq.
Smith, Esq.

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Plaintiff

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sDefendant

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Defendant's Attorney

## INTRODUCTION

This matter is before the Court on Plaintiff, Designers Choice, Inc.'s ("Designers Choice"), [Combined] Motion To Reopen Judgments And To Enter Judgments For Plaintiff For The Amount Of The Liquidated Damages; Motion For A New Trial On Only Compensatory Damages; Motion To Correct Rates And Types Of Interest On Judgments, filed June 8, 2018; Defendants, Attractive Flooring, LLC and Eric Moen ("Attractive Flooring" and "Moen"), filed their Response Brief on July 5, 2018; and Designers Choice filed its Reply Brief on July 9, 2018.

## PROCEDURAL HISTORY

This matter was tried to a jury over two days in May, 2018. At the conclusion of the jury's deliberations, they returned a verdict in favor of Designers Choice in the amount of $50,0000.00 without an award of interest.

On May 15, 2018, the Court journalized the verdict and designated that Entry as a final appealable order.

Pursuant to Civ. R 50(B) and Civ. R 59(A), Designer's Choice has timely filed its post-judgment motions. Accordingly, the appeal time in this matter will not begin to run until the trial court enters an order resolving the last of the post-judgment filings. App. R 4(B)(2).

## ABBREVIATED STATEMENT OF FACTS

This case involves the sale of business assets by way of an Asset Purchase Agreement ("The Agreement"). Designers Choice agreed to sell to Attractive Floorings business assets and a lease for a total purchase price of $355,000.00. Moen guaranteed payment by Attractive Floorings.

The Agreement documents, including the Asset Purchase Agreement, the Lease, and a Promissory Note, were executed on December 30, 2011, with the first of 96 equal payments of $3,697.92 due on February 1, 2012. The Agreement had an interest rate of zero (-0-) percent.

Payments were timely made by Attractive Floorings until July, 2015, when it stopped making payments. On October 26, 2015, Designers Choice accelerated the balance due under the Promissory Note and demanded payment from Attractive Floorings and Moen in the amount of $200,885.28.

Around this time, Moen experienced serious health issues that prevented him from running Attractive Floorings and led to the default. The parties had a meeting to discuss a modification of The Agreement, but no modification occurred.

Ultimately, Attractive Floorings vacated the leased premises, brought the rent current, abandoned physical assets associated with the business and returned them to Designer's Choice, agreed to the substitution of a new tenant to take over the business, and, paid-off a $40,000.00 debt to "Mohawk Carpet" owed by Designers Choice (but incurred by Attractive Floorings).

## STANDARD OF REVIEW

CIVIL R 50(B) MOTION FOR JUDGMENT OR JNOV

A motion for directed verdict presents a question of law, [thus appellate] review is de novo. *Roberts v. Falls Family Practice, Inc.*, 9th Dist. Summit No. 27973, 2016-Ohio-7589, ¶ 11, citing *Spero v. Avny*, 9th Dist. Summit No. 27272, 2015-Ohio-4671, ¶ 17. "A trial court must grant a motion for directed verdict after the evidence has been presented if, 'after construing the evidence most strongly in favor of the party against whom the motion is directed, * * * reasonable minds could come to but one conclusion upon the evidence submitted[.]' " *Roberts* at ¶ 11, citing Civ.R. 50(A)(4) and *Parrish v. Jones*, 138 Ohio St.3d 23, 2013-Ohio-5224, ¶ 16. Nonetheless, "if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied." *Hawkins v. Ivy*, 50 Ohio St.2d 114, 115 (1977). "A motion for a directed verdict

assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses." *Jarvis v. Stone*, 9th Dist. Summit No. 23904, 2008-Ohio-3313, ¶ 7, citing *Strother v. Hutchinson*, 67 Ohio St.2d 282, 284 (1981). See: *Phoenix Lighting Group v. Genlyte Thomas Group,* 9th Dist. Summit No. 28082, 2018-Ohio-2393 at ¶ 15.

The Ninth District has held that a motion for judgment notwithstanding the verdict "is not the proper mechanism" to attack an excessive damage award. *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶ 25 (9th Dist.); *accord Magnum Steel & Trading, LLC v. Mink*, 9th Dist. Summit Nos. 26127 and 26231, 2013-Ohio-2431, 2013 WL 2713268, ¶ 44 **(noting that an argument that a damage award was inadequate is not appropriate under Civ.R. 50(B), but should instead be challenged under Civ.R. 59(A) )**; *Catalanotto v. Byrd*, 9th Dist. Summit No. 27302, 2015-Ohio-277, 2015 WL 340860, ¶ 9; *but see Kane v. O'Day*, 9th Dist. Summit No. 23225, 2007-Ohio-702, 2007 WL 518376, ¶ 23–25 (reversing denial of a motion for judgment notwithstanding the verdict where damages were not contested at trial because the parties had stipulated as to the amount of damages). An argument that a jury award is not supported by the evidence "is not appropriate on a motion for [judgment notwithstanding the verdict] because **Civ.R. 50(B) provides the means to challenge the jury's verdict, not the jury's award of damages.** Republic's 'assertion that the evidence does not support the award of damages is better placed in its argument for * * * remittitur, and will be addressed by this Court therein.'" *Desai* at ¶ 25, quoting *Jemson v. Falls Village Retirement Community*, 9th Dist. Summit No. 20845, 2002-Ohio-4155, 2002 WL 1842483, ¶ 17. See: *Tesar Ind. v. Republic Steel,* 9th Dist. Lorain No. 16CA010960, 2018-Ohio-2089, at ¶ 30, emphasis added.

CIVIL R 59(A) MOTION FOR NEW TRIAL

"**In Ohio, it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice** *or* a finding that the award is manifestly excessive." (Emphasis sic.) *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 655 (1994). *Phoenix Lighting Group, supra,* at ¶ 60, emphasis added.

The grant or denial of a motion for a new trial on the ground of excessive damages rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 108 Ohio App. 3d 96, 103 (9th Dist. 19956). An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219. " 'An appellate court reviewing whether a trial court abused its discretion on a motion for a new trial pursuant to Civ.R. 59(A)(4) must consider (1) the amount of the verdict, and (2) whether the jury considered improper

evidence, improper argument by counsel, or other inappropriate conduct which had an influence on the jury.' " *Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 9th Dist. Wayne No. 09CA0073, 2010-Ohio-4657, ¶ 35, quoting *Pena* at 104. "**To support a finding of passion or prejudice, it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities.**" *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, at ¶ 20, emphasis added. Nonetheless, when applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons*, 66 Ohio St.3d 619 at 621. *Phoenix Lighting Group, supra,* at ¶ 61.

MOTION FOR PRE-JUDGMENT & POST JUDGMENT INTEREST

RC 1343.02, "Written Stipulations For Payment of Interest" reads *in toto,* "Upon all judgments, decrees, or orders, rendered on any bond, bill, note, or other instrument of writing containing stipulations for the payment of interest in accordance with section 1343.01 of the Revised Code, interest shall be computed until payment is made **at the rate specified in such instrument.**" (Emphasis added.)

And, RC 1343.03(A), "Rate Not Stipulated," reads, in pertinent part, ". . . when money becomes due and payable . . . and upon all judgments . . . arising out of . . . a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, **unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.**" (Emphasis added.)

## ANALYSIS

DESIGNERS CHOICE MOTION FOR JUDGMENT OR JNOV

Designers Choice claims against Attractive Flooring and Moen were for breach of the parties contract (The Agreement). According to Designers Choice, when the jury found in its favor – that there was no modification and Attractive Flooring and Moen did in fact breach The Agreement the jury should have awarded the sum of $200,885.28 as liquidated damages.

This argument is not persuasive.

Designers Choice designation of its damages as "liquidated" does not, *ipsi dixit,* make it so. Regarding liquidated damages, the Ohio Supreme Court has noted, "Simply stated, liquidated damages are damages that the parties to a contract agree upon, or stipulate to, as the actual damages that will result from a future breach of the

contract. *Sheffield–King Milling Co. v. Domestic Science Baking Co.,* 95 Ohio St. 180, 183, 115 N.E. 1014 (1917)." *Boone Coleman Constr. v. Piketon,* 145 Ohio St.3d 450, 2016-Ohio-628, at ¶ 11.

The court went on, "'The effect of a clause for stipulated damages in a contract is to substitute the amount agreed upon as liquidated damages for the actual damages resulting from breach of the contract, and thereby prevents [sic] a controversy between the parties as to the amount of damages.' " *Dave Gustafson & Co., Inc. v. South Dakota,* 83 S.D. 160, 164, 156 N.W.2d 185 (1968), quoting 22 American Jurisprudence 2d, Damages, Section 235, at 321 (1965). " 'If a provision is construed to be one for liquidated damages, the sum stipulated forms, in general, the measure of damages in case of a breach, and the recovery must be for that amount. No larger or smaller sum can be awarded even though the actual loss may be greater or less.'" *Id.* quoting Section 235 at 321. Put another way, "a liquidated damages clause in a contract is an advance settlement of the anticipated actual damages arising from a future breach." *Carrothers Constr. Co., L.L.C. v. S. Hutchinson,* 288 Kan. 743, 754, 207 P.3d 231 (2009). *Boone Coleman, supra,* at ¶ 12.

In the case at bar, there is no liquidated damages clause in The Agreement, nor could there in any appropriate legal fashion have been one. Designers Choice sued for a deficiency on a promissory note upon which amortized payments were scheduled and made for the payment of business assets. As such, a liquidated damages provision in The Agreement would have been legally inapposite. Put another way, the parties could not anticipate actual damages from a breach because the amount due was constantly changing as payments were made thus making a liquidated damages clause incongruent.

Moreover, Designers Choice reliance on *L.S. Indus. v. Coe,* 9th Dist. Summit No. 22603, 2005-Ohio-6736 is misplaced. In that case, plaintiff sued on an account, not a note. And, that case involved a determination of the appropriate amount of damages where the trial court granted a default judgment and whether or not the court should have held a hearing.

Moreover, in *L.S. Indus.,* the Ninth District held, "Liquidated damages" are defined as "[a]n amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches." Black's Law Dictionary (7 Ed. 1999) 395. "A liquidated claim is one that can be determined with exactness from the agreement between the parties or by arithmetical process or by the application of definite rules of law." Huo Chin Yin v. Amino Prods. Co. (1943), 141 Ohio St. 21, 29. *L.S. Indus.* at ¶ 22.

Here, the parties did not stipulate contractually as to damages in the event of a breach and while there is some dicta in *L.S. Indus.* about damages that can be determined with exactness or ". . . by arithmetical process . . ." that analysis is irreconcilable with the Supreme Court's much more recent holding in *Boone Coleman* and thus *L.S. Indus.* is inapplicable herein.

Finally, pursuant to *Tesar, Ind.*, and its progeny, a motion for judgment or judgment notwithstanding the verdict "is not the proper mechanism" to attack an insufficient damages award.

DESIGNERS CHOICE MOTION FOR NEW TRIAL

Conversely, a Civ. R 59(A) motion is the appropriate vehicle in which to challenge an inadequate damage award and Designers Choice has done so here under both Civ. R 59(A)(4), "Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice," and Civ. R 59(A)(5), "Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property."

CIVIL RULE 59(A)(4) – INADEQUATE DAMAGES DUE TO THE INFLUENCE OF PASSION OR PREJUDICE

The gravamen of Designers Choice in this argument is that the Court should grant a new trial on damages only because the jury verdict of $50,000.00 when Designers Choice sought $200,885.28 is insufficient and must have been influenced by passion or prejudice.

In support of this contention, Designers Choice again urges that its damages were "liquidated" and since the jury found no modification by Designers Choice and found a breach by Attractive Flooring and Moen, the jury had no choice but to award the liquidated amount.

Further, in its Reply Brief, Designers Choice argues that "The sole determinative issue of fact for the jury was whether the defendants breached the Asset Purchase Agreement and/or Promissory Note" and that once the jury determined that Attractive Flooring and Moen breached The Agreement, they should have ended their deliberations and entered and returned a verdict in Designers Choice favor in the amount of $200,885.28.

This Court disagrees with all of these propositions.


First, there is nothing about an award of damages in a contract case of $50,000.00 when the sum of $200,885.28 is sought that "is so overwhelmingly disproportionate as to shock reasonable sensibilities." *Phoenix Lighting Group, supra.* While there is admittedly a disparity in the amount sought and the amount awarded, the differential can hardly be classified as "shocking."

Moreover, there is no evidence in the record or arguments briefed to support Designers Choice's contention that the jury's verdict was borne of improper passion or prejudice. As noted, the disparity between what was sought and what was awarded is not outrageous – in fact, the differential is about 25%. And, there is no argument advanced by Designers Choice that that jury considered improper evidence; that improper arguments were made by counsel; or some other inappropriate conduct occurred which had an influence on the jury. *Dragway 42, L.L.C., supra.*

Next, Designers Choice's argument that the damages were liquidated and should have been awarded in full is again rejected.

Finally, Designers Choice's argument that "The sole determinative issue of fact for the jury was whether the defendants breached the Asset Purchase Agreement and/or Promissory Note" and if so, "they should have ended their deliberations and entered the full amount of damages sought" is simply not accurate nor consistent with the jury instructions – instructions agreed to by Designers Choice.

As noted by both parties, the jury could certainly have considered the many facts that they heard regarding the consideration that Attractive Flooring provided to Designers Choice once Moen became ill. Attractive Flooring voluntarily vacated its leased premises and left materials and good-will for Designers Choice's new tenant; Attractive Flooring brought the rent current and paid-off a line of credit in Designers Choice's name; and, Attractive Flooring acquiesced in the substitution of the new tenant to take over the business.

While none of these actions were found to contractually modify The Agreement or absolve Attractive Floorings and Moen *in toto,* the jury was well within its province to consider them as valuable to Designers Choice and "set-off" that value against the $200.885.28.

Contrary to Designers Choice assertion, the jury was clearly instructed to consider the issue of damages. The jury was not instructed that if they found for Designers Choice their deliberations were over and they should return some fixed damages amount. Instead, they were instructed to consider "DAMAGES,"[1] to wit:

[1] Instructions of Law to the Jury, page17.


> If you find for Plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate him **for the actual damages, if any**, proximately caused by the conduct of the Defendants. (Emphasis added.)

As such, the jury could have found for Designers Choice and awarded no damages, nominal damages, something significant but less than $50,000.00, or even something more than $200,885.28!

Moreover, Designers Choice agreed to these instructions. After the parties gave their closing arguments, but before the jury was charged, the Court inquired if either party wished to proffer anything on the record relative to the instructions. Designers Choice reiterated that it wanted the jury instructed on fraud and contract modification consistent with its proposed jury instructions. The Court indicated that some of those instructions were used but not all. The Court then inquired of Designers Choice,

* * *

> "Any other issues on the instructions you wanted to bring to my attention?"
>
> Mr. Stephenson: **No, Your Honor.**[2] (Emphasis added.)

Accordingly, Designers Choice agreed with the inclusion of a "Damages" instruction, did not request any instruction on liquidated damages, and fully understood that the amount of damages, should the jury find for Designers Choice, would be determined by the jury as they deemed appropriate.

Finally, and significantly, the Ninth District has spoken clearly regarding damages awarded by juries. "**In Ohio, it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice . . .**" *Phoenix Lighting Group, supra*, emphasis added.

As there is no evidence or compelling argument that the jury's verdict in this case was the result of passion or prejudice, there is no reason to grant a new trial.

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[2] Transcript of Proceedings, Pg. 54, Lines 9-11, Day Two of trial.


DESIGNERS CHOICE MOTION FOR PRE-JUDGMENT & POST-JUDGMENT INTEREST

Finally, Designers Choice moves this court to award both pre-judgment and post-judgment interest. In support of this position, Designers Choice relies upon RC 1343.03, "Rate Not Stipulated."

This reliance is misplaced.

While Designer's Choice correctly posits the law regarding interest that must be award after a party receives a judgment, it does so for situations where there is no amount of interest stipulated by the parties in their agreement.

RC 1343.03(A) reads, in pertinent part, ". . . the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, **unless a written contract provides a different rate of interest** in relation to the money that becomes due and payable, **in which case the creditor is entitled to interest at the rate provided in that contract** . . ." (Emphasis added.)

Moreover, RC 1343.02 reads *in toto,* "Upon all judgments, decrees, or orders, rendered on any bond, bill, note, or other instrument of writing containing stipulations for the payment of interest in accordance with section 1343.01 of the Revised Code, **interest shall be computed until payment is made at the rate specified in such instrument**. (Emphasis added.)

In the case at bar, the parties *did* stipulate to a rate of interest – zero (-0-) percent and included that specific rate in The Agreement. Both RC 1343.02 and 1343.03(A) can be read *in pari materia* as they both call for the rate of interest in a judgment to be the rate "provided in that contract" or the rate "specified in such instrument."

Parenthetically, the Court would note that Designers Choice's reliance on *Hookom v. Hookom,* 12th Dist. Clermont No. CA89-03-015, 1989 WL 95768 (8/12/1989), is also misplaced. *Hookom* was a domestic case where an obligor gave a $75,000.00 note to an obligee that was "non-interest bearing." In rejecting the trial court's decision to not award post-judgment interest after default, the 12th District stated, "More recent cases have held that where the note does not provide for interest and the amount of a debt is liquidated, the obligee is entitled to interest from the date the sum became due."

In the case at bar, the party's Note and The Agreement did provide for a specific rate of interest. That rate just happened to be zero (-0-) percent. If Designers Choice wanted to protect itself from a non-interest bearing judgment in the event of a default, it could

have done so. All it had to do was insert a clause that increased the rate of interest from zero to some rate greater than zero "in the event of default." It chose not to do so – and this Court will not do so now.

## CONCLUSION

For the numerous reasons articulated above, the Court does not find Plaintiff's Motion For Judgment, JNOV, New Trial, or Pre-Judgment or Post-Judgment interest well-taken and the Motion[s] are DENIED *in toto*.

JUDGE D. Chris Cook

**THE COURT FINDS NO JUST CAUSE FOR DELAY**