

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

LI CHENG, et al., :
 :
 Plaintiffs, :
 :
 -vs- : Case No. 14 CV H 10 0735
 :
 TIMOTHY HANEY, :
 :
 Defendant. :

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CLERK OF COURTS
DELAWARE COUNTY, OHIO
COMMON PLEAS COURT
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Judgment Entry Awarding Damages to Plaintiffs

This matter came before the Court for a jury trial on September 26-29, 2017. The jury found in favor of Plaintiff Li Cheng on his claim for declaratory relief and found that he is the sole member and 100% owner of Smart Art America, LLC. The jury found in favor of Plaintiff Smart Art America, LLC on its claim for theft, and the jury awarded damages in the amount of \$77,830. The jury found in favor of Plaintiff Smart Art America, LLC on its claim for breach of contract, and the jury awarded damages in the amount of \$35,670. The jury found in favor of Plaintiff Li Cheng on his claims for promissory estoppel and unjust enrichment but did not award any damages for these claims. The jury also awarded Plaintiffs Li Cheng and Smart Art America, LLC punitive damages in the amount of \$45,000. The jury found in favor of Defendant Timothy Haney on the Plaintiffs' claims for breach of fiduciary duty and fraud.

The parties submitted post-trial briefing on the issue of damages. Plaintiffs Li Cheng, Smart Art America, LLC ("SAA"), and Smart Art Co., Ltd. seek treble damages on the verdict for civil theft, prejudgment interest on the verdict for breach of contract, and reasonable attorney fees and expenses.

Plaintiffs Are Entitled to Treble Damages on the Verdict for Civil Theft

Plaintiff SAA submits that under Ohio's civil theft statute, it has elected to recover an award of treble damages on the theft claim.

R.C. 2307.60(A)(1) provides:

Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.

R.C. 2307.61 provides that if a property owner brings a civil action under R.C. 2307.60(A) to recover damages from a person who commits a theft offense under R.C. 2913.01 involving the owner's property, the property owner may elect to recover either compensatory or liquidated damages. Plaintiff SAA submits that it elects to recover liquidated damages in the amount of "[t]hree times the value of the property at the time it was willfully damaged or was the subject of a theft offense." R.C. 2307.61(A)(1)(b)(ii).

Defendant Haney argues that there was no evidence presented at trial of his criminal act of theft. Defendant Haney emphasizes the difference in the standard of proof for a jury finding of civil theft and a criminal conviction of theft. Defendant Haney also attempts to re-litigate the theft claim to the Court. Because this was a jury trial, the findings of the jury – as expressed in the jury interrogatories – will control.

In *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 10, the Ohio Supreme Court held that "R.C. 2307.60(A)(1), by its plain and unambiguous terms, creates a statutory cause of action for damages resulting from any criminal act." The Fifth District Court of Appeals has held that "R.C. 2307.60 recognizes the availability of

civil actions for victims of theft.” *Roseman Bldg. Co., LLC v. Vision Power Sys., Inc.*, 5th Dist. Stark No. 2009CA00009, 2010-Ohio-229, ¶ 24.

The criminal act of theft is defined in R.C. 2913.02 as follows:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception

(4) By threat;

(5) By intimidation.

R.C. 2307.61 is premised on R.C. 2307.60(A), which requires injury “by a criminal act.” However, “[a] guilty plea or criminal conviction is not a precondition to a determination that the owner’s property was ‘willfully damaged or that a theft offense involving the owner’s property has been committed.’” *Roseman Bldg. Co.*, 2010-Ohio-229 at ¶ 32. Because R.C. 2307.61 is a civil remedy, it is not necessary to find that Defendant Haney committed a criminal act “beyond a reasonable doubt.” *Id.* at ¶ 34.

The jury found that Plaintiff SAA was the owner of the funds at issue in the trial. (Jury Interrogatory #3.) The jury found that Defendant Haney knowingly obtained these funds. (Jury Interrogatory #4.) The jury also found that Defendant Haney did not have the consent of Plaintiff SAA – or that he acted beyond the scope of Plaintiff SAA’s express consent – when he obtained the funds. (Jury Interrogatory #5.) The jury then found that Plaintiff SAA was damaged in the amount of \$77,830 by Defendant Haney’s

theft. (Jury Interrogatory #6.) The findings made by the jury satisfy the elements of R.C. 2913.02.

R.C. 2307.61 sets a range of damages that can be sought by an aggrieved property owner. R.C. 2307.61(A)(1)(b) provides that a party may seek damages in the amount of three times the value of the property that was the subject of a theft offense. Plaintiff SAA indicated that it was seeking treble damages on the theft claim in the complaint it filed on October 2, 2014. Defendant Haney, therefore, was put on notice of Plaintiff SAA's election for treble damages at the very beginning of this case.

The Court finds that Plaintiff SAA is entitled to treble damages on the theft claim, for a total award of \$233,490.

Plaintiffs Are Not Entitled to Prejudgment Interest on the Verdict for Breach of Contract

Plaintiff SAA seeks an award of prejudgment interest on the verdict for breach of contract. Plaintiff SAA submits that the jury awarded it \$35,670 on the breach of contract claim, which represents 29 payments of \$1,230 that Plaintiff made for the storage of the Lone Star picture frames. Plaintiff SAA has calculated interest at the statutory rate from the time each charge was incurred, and calculated only simple interest on the balance, for a total of \$1,542.79 as of October 10, 2017, with an additional \$3.91 per day thereafter.

Plaintiff SAA submits that it is entitled to an award of prejudgment interest under R.C. 1343.03(A), which provides:

In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious

conduct or 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.

Plaintiff SAA submits that “R.C. 1343.03(A) automatically bestows a right to statutory interest as a matter of law on a judgment, and does not leave any discretion to the trial court to deny such interest.” *Marion Plaza, Inc. v. 700 Block, LLC*, 7th Dist. Mahoning No. 09 MA 113, 2010-Ohio-1539, ¶, quoting *Cafaro Northwest Partnership v. White*, 124 Ohio App.3d 605, 608 (7th Dist.1997). Other courts have determined that “[a]lthough the terms of R.C. 1343.03(A) clearly allow interest to run from every breach of contract judgment, prejudgment interest is not an entitlement in every breach of contract action.” *Jack F. Neff Sand & Gravel, Inc. v. Great Lakes Crushing, Ltd.*, 11th Dist. Lake No. 2012-L-145, 2014-Ohio-2875, ¶68. The terms of R.C. 1343.03(A) provide that prejudgment interest is limited to contracts that provide for a payment of money from the breaching party. *Id.* “Prejudgment interest under R.C. 1343.03(A) is based on the premise that a party to a contract should not retain the use of money owed under a contract when that amount is due and payable to the other contracting party.” *RPM, Inc. v. Oatey Co.*, 9th Dist. Medina Nos. 3282-M, 3289-M, 2005-Ohio-1280, ¶ 64, quoting *Kott Enterprises, LTD v. Brady*, 6th Dist. Lucas No. L-03-1342, 2004-Ohio-7160, ¶ 72.

Defendant Haney contends that the award of damages on the breach of contract claim represents consequential damages from the breach of an implied license to sell the Lone Star picture frames. Defendant Haney submits that Plaintiff SAA is not entitled to prejudgment interest under the circumstances of this case.

The plain language of R.C. 1343.03(A) requires that Plaintiff SAA's entitlement to prejudgment interest was dependent on there being a debt due to it under the terms of the contract. The damages awarded by the jury on the breach of contract claim do not constitute money "due and owing" on an instrument of writing. Because there was no money "due and payable" by Defendant Haney under the terms of the contract, this Court is without authority to award prejudgment interest on the breach of contract judgment.

The Court finds that Plaintiff SAA is not entitled to an award of prejudgment interest on the verdict for breach of contract.

Plaintiffs Are Entitled to Reasonable Attorney Fees and Expenses

Plaintiffs seek an award of attorney fees based on the jury's finding that Defendant Haney acted with malice or with aggravated or egregious fraud, and the jury's award of punitive damages and finding that Plaintiffs are entitled to an award of reasonable attorney fees in this lawsuit. Plaintiffs submit an affidavit for award of attorney fees, together with a summary and copies of legal invoices from February 2014 through the conclusion of trial. Plaintiffs submit that the reasonable and appropriate award of attorney fees to Plaintiffs is \$158,583.56.

Defendant Haney submits that Plaintiffs' request for attorney fees is not reasonable. Defendant Haney first opposes Plaintiffs' attempt to recover attorney fees related to claims that Plaintiffs voluntarily dismissed prior to trial. Second, Defendant Haney opposes Plaintiffs' attempt to recover attorney fees related to matters that were a direct result of Plaintiffs' default in this action. Defendant Haney submits that Plaintiffs were found in default on July 28, 2015 and, although Plaintiffs reentered the case on September 21, 2015 to defend at the damages hearing, Plaintiffs remained in default

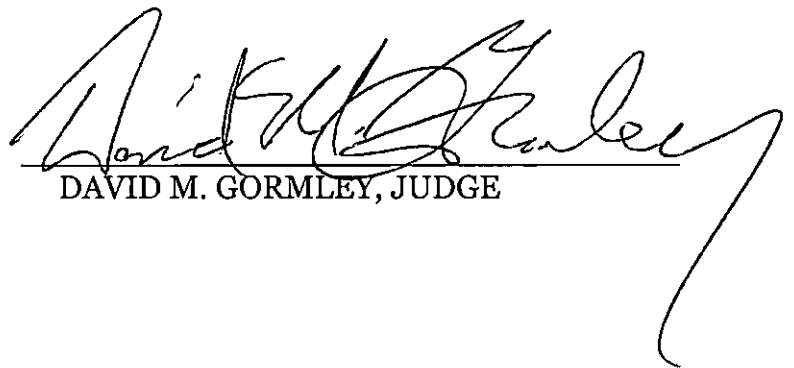
until May 16, 2016. Defendant Haney contends that Plaintiffs' billing documents show that the fees accrued during the time that Plaintiffs were in default total \$54,930. Plaintiffs' reply brief does not address Defendant Haney's arguments regarding attorney fees.

The Court agrees with Defendant Haney that Plaintiffs are not entitled to recover attorney fees related to work on claims that were voluntarily dismissed prior to trial or on claims that Plaintiffs did not prevail on at trial. Neither party has offered an amount of attorney fees that should be deducted from the total amount of attorney fees requested. The Court, therefore, requests further briefing on the limited issue of the amount of attorney fees that relate only to claims that Plaintiffs prevailed on at trial. Plaintiffs should file their supplemental brief on this issue by **February 19, 2018**. Defendant may file a response to Plaintiffs' supplemental brief by **March 2, 2018**.

The Court also agrees with Defendant Haney that Plaintiffs should not be entitled to recover attorney fees accrued in defending the default judgment entered against Plaintiffs. Any attorney fees related to the damages hearing and to vacating the default judgment are fees that were incurred as a result of Plaintiffs' failure to properly defend against the claims brought by Defendant Haney. It would be inequitable to allow Plaintiffs to recover fees associated with their default. Defendant Haney calculated the fees associated with Plaintiffs' default to be \$54,930. Plaintiffs do not offer any response to Defendant Haney's arguments regarding attorney fees. In doing its own calculations, the Court determines that the attorney fees invoiced for the time Plaintiffs were in default total \$52,317.50. This amount will be deducted from the total amount of attorney fees sought by Plaintiffs.

The Court now enters judgment for Plaintiff Li Cheng declaring him the sole member and 100% owner of Smart Art America, LLC. The Court also enters the following judgments: (1) \$35,670 to Plaintiff Smart Art America, LLC on the breach-of contract-claim; (2) \$233,490 to Plaintiff Smart Art America, LLC on the theft claim; and (3) \$45,000 to Plaintiffs Smart Art America, LLC and Li Cheng for punitive damages. The Court will award attorney fees and expenses by a separate entry after the parties submit their supplemental briefing.

Dated: February 2, 2018.



DAVID M. GORMLEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

Michael J. Anthony, *Counsel for Plaintiffs*, Anthony Law LLC, 383 North Front Street, LL, Columbus, Ohio 43215

David G. Bale, *Counsel for Defendant*, Bale and Associates, Ltd., 592 Office Parkway, Suite B, Westerville, Ohio 43082

William F. McGinnis, *Co-counsel for Defendant*, 10230 Upper Little Creek Rd., Bangor, PA 18013

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