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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

FIDELITY ENTERPRISES, LTD.,
a Guam Corporation,
Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a Foreign Corporation,
Defendant-Appellee.

Supreme Court Case No. CVA14-006
Superior Court Case No. CV0753-05

OPINION

Cite as: 2015 Guam 1

Appeal from the Superior Court of Guam
Argued and submitted August 13, 2014
Dededo, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] In 2002, Super Typhoon Pongsona caused extensive damage to a business facility owned by Fidelity Enterprises, Ltd. ("Fidelity") and insured by National Union Fire Insurance Company of Pittsburgh, PA. ("National Union"). Because an agreement could not be reached on the amount of loss that Fidelity suffered from the typhoon, the parties initiated an appraisal process. Outside of the appraisal process, National Union paid Fidelity $382,544.00 in an effort to settle the insurance claims. Fidelity received the payment, but declined to accept the money as full payment. After two failed attempts at the appraisal process, Fidelity filed suit against National Union in the Superior Court of Guam to recover its remaining damages. In a special verdict, the jury awarded Fidelity $950,000.00 in damages. Subsequently, Fidelity filed a motion for prejudgment interest, which the trial court denied. Fidelity challenges the trial court's denial of its motion for prejudgment interest. For the reasons set forth below, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Fidelity operates its wholesale distribution business out of an office and warehouse in Barrigada. On December 8, 2002, as Super Typhoon Pongsona passed over Guam, it caused damage to Fidelity's business facilities. At all relevant times, Fidelity's facilities were insured for a sum of $1,700,000.00 by National Union against typhoon losses and damages as well as fire and other perils.

[3] In the event of damages to the structure, the insurance policy required Fidelity to provide National Union with a written proof of loss. The amount of loss for which National Union may

be liable was to be payable within 60 days after receipt of proof of loss. If the parties could not agree on the amount of loss, the policy set out an appraisal procedure.

[4] The appraisal procedure stated, on written demand of either party, that each would select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers were then to select a competent and disinterested umpire. The umpire was to be utilized if the appraisers could not agree on the amount of loss after submitting their separate appraisals.

[5] On February 7, 2003, Fidelity submitted a sworn proof of loss claim to National Union, which stated the amount of damages was undetermined. Fidelity, in a March 23, 2003 letter to National Union, indicated it would claim $1,639,634.00 in losses, based on a calculation by Fidelity's appraiser, Ryder Hunt. National Union's appraiser, Alun Irvine, conducted a separate evaluation of the damaged property and determined the structure suffered $414,544.00 in damages. After accounting for the deductible, National Union offered Fidelity $382,544.00 as full settlement for the insurance claims. Fidelity rejected National Union's offer for full settlement, but demanded payment of the undisputed amount of $382,544.00. Fidelity then initiated the appraisal process, named Brian Molineaux as its appraiser, and submitted a proof of loss statement for $1,587,756.00. National Union named Gilbert Malmgren as its appraiser, and William Beyer was appointed as the umpire. On July 31, 2003, National Union paid Fidelity the undisputed amount of $382,544.00.

[6] Fidelity withdrew its demand for appraisal on October 14, 2003, and attempted to engage in negotiations with National Union. After unsuccessful negotiations, Fidelity retained attorney Wayson Wong and reopened the appraisal process, naming Mark Ruth as its appraiser. National Union named its same appraiser and renamed Mr. Beyer as umpire.

[7] Fidelity claims that during the appraisal, National Union made the process extremely difficult and expensive. Fidelity contends that National Union insisted that a formal appraisal, including attorneys and witnesses, be held in Hawaii. The cost of transporting and lodging the witnesses for a formal appraisal in Hawaii, Fidelity argues, would have been far too expensive. National Union disputes that they insisted upon a formal appraisal in Hawaii.

[8] On March 31, 2005, National Union informed Fidelity that the statute of limitations on Fidelity's claim had expired and that National Union was no longer liable. Despite National Union's repudiation of liability, it continued to participate in the appraisal process. On July 5, 2005, Fidelity withdrew its request for appraisal a second time.

[9] On August 1, 2005, Fidelity filed suit against National Union alleging, *inter alia*, breach of contract for failing to pay all covered losses under the insurance policy. On June 7, 2012, the trial court granted National Union's motion for partial summary judgment, dismissing four of Fidelity's claims, and the case moved forward on the breach of contract claim. After a trial on the merits, a jury returned a special verdict finding National Union liable in the amount of $950,000.00. Accounting for the $382,544.00 already paid by National Union and a $34,000.00 deductible, the trial court entered a judgment in favor of Fidelity in the amount of $533,456.00.

[10] On December 4, 2013, Fidelity filed a motion seeking prejudgment interest. Upon consideration of the papers, pleadings and file, the trial court denied Fidelity's motion for prejudgment interest. On February 7, 2014, Fidelity timely filed its notice of appeal.

II. JURISDICTION

[11] This court has jurisdiction over an appeal from a final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-234 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[12] The issue of whether a prejudgment interest award was certain or capable of being made certain by calculation is reviewed *de novo*. *See Asia Pac. Hotel Guam, Inc.* v *Dongbu Ins. Co.*, 2011 Guam 18 ¶ 6 (citing *Tanaguchi–Ruth & Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 81).

IV. ANALYSIS

A. Whether Damages Were Certain or Capable of Being Made Certain by Calculation

[13] Title 20 GCA § 2110 states, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him, upon a particular day, is entitled also to recover interest thereon from that day." 20 GCA § 2110 (2005). As we noted in *Guam Top Builders, Inc. v. Tanota Partners*, 20 GCA § 2110 was modeled after the 1950 version of California Civil Code section 3287. 2012 Guam 12 ¶ 65. The current version of section 3287 includes subsection (b), which gives judges the discretion to award prejudgment interest on unliquidated claims. *Id.* The Guam Legislature, however, has not adopted subsection (b) or its equivalent and, therefore, the damages must be certain or capable of being made certain for a party to be awarded prejudgment interest in Guam. *See id.*

[14] In its decision and order, the trial court explained that the test for the recovery of prejudgment interest is "whether the defendant actually knows the amount owed or from reasonably available information could the defendant have computed that amount." Record on Appeal ("RA"), tab 166 at 4 (Dec. & Order, June 26, 2008) (quoting *Guam Top Builders*, 2012 Guam 12 ¶ 68) (internal quotation marks omitted). Further citing *Guam Top Builders*, the decision and order stated that prejudgment interest is allowable if fixed by terms of the contract or if it can be easily determined by well-established market values. *Id.* The trial court ruled that the number of damaged items, the amount of loss, and the repair value of the loss were questions

of fact that needed to be decided by the jury. *Id.* Thus, the trial court denied Fidelity's motion for prejudgment interest. *Id.* at 5.

[15] Fidelity contends that because 20 GCA § 2110 is modeled after California Civil Code section 3287, California law must be given persuasive weight. Appellant's Br. at 12 (June 7, 2014). Fidelity cites to *Koyer v. Detroit Fire and Marine Insurance Co. of Detroit, Michigan*, 70 P.2d 927 (Cal. 1937), where the California Supreme Court ruled that the plaintiffs were entitled to prejudgment interest despite a failed attempt at an appraisal process and a dispute between the parties as to the amount of loss. Appellant's Br. at 13. Fidelity explains that although the parties in *Koyer* disputed the amount of damages and could not complete the appraisal process, the California court nonetheless ruled that the loss was capable of being made certain by calculation. *Id.*

[16] Moreover, Fidelity asserts the amount of loss was calculable because the jury award ($950,000.00) conformed closely to the amount Fidelity claimed in its complaint ($999,204.39)—as it did in *Koyer*. *Id.* at 14; *see Koyer*, 70 P.2d at 931. According to Fidelity, the close conformity proves the losses were capable of being calculated because the jury essentially confirmed Fidelity's calculation of its losses. Appellant's Br. at 16-17.

[17] Fidelity further argues that all knowledge and means of knowledge concerning the extent of the loss were available to the parties by way of appraisal. *Id.* at 17. Fidelity explains, the "appraisal process was to ascertain the exact or specific amount of the loss that the insurer would owe the insured, which would be done by calculations by the appraisers and/or the umpire; thus,

that process made the loss capable of being made certain by calculation, whether or not the appraisal process was completed."[1] Reply Br. at 6-7 (July 16, 2014) (emphasis omitted).

[18] National Union claims the damages were not capable of being made certain because a judicial determination was needed to resolve the conflicting evidence. Appellee's Br. at 10 (June 27, 2014). National Union notes the jury was presented with a range between $416,544.00 and $999,204.39. *Id.* at 12. The disparity in the figures, National Union explains, represents the differing quotes to repair the roof, the structure, the air conditioning units and the electrical system, as well as mold remediation. Because the parties could not agree on the cost of repairs, National Union argues, the amount of loss was not certain until the jury returned a verdict. *Id.*

[19] In *Koyer*, the plaintiffs suffered damages caused by an earthquake to their buildings, which were insured by the defendant. *Koyer*, 70 P.2d at 927. Although the plaintiffs submitted a proof of loss, as stipulated by the policies, the appraisal process ultimately failed and the plaintiffs brought suit. *Id.* at 928-29. The court held that the parties' inability to complete the appraisal process did not preclude the damages from being calculable because the parties stipulated to the means of calculating the damages in the policies. *Id.* at 931 ("Preliminary proofs of loss are calculations of the loss, as are also the estimates of appraisers, and these are the methods of adjustment contemplated by the parties and stipulated in the policies."). The terms of the policies provided:

> [T]he actual value could not exceed the amount which it would cost the insured to repair or replace the property with material of like kind and quality, "said cash

[1] Fidelity is seeking a 6% interest rate, the legal rate of interest on a loan or forbearance of money set forth in 18 GCA § 47106. Appellant's Br. at 11. If awarded prejudgment interest, Guam law supports a 6% interest rate. *See Yoshida v. Guam Transp. & Warehouse, Inc.*, 2013 Guam 5 ¶ 84 ("Prejudgment interest thereafter accrues at a rate of 6% per annum on the damages amount determined, beginning on the day the damages become due and owing until judgment."); *see also Duenas v. George & Matilda Kallingal, P.C.*, 2012 Guam 4 ¶ 45 ("Here, there are no special circumstances present that warrant compound interest.").

> value to be *estimated* without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating repair or construction of buildings."

Id. Thus, the court ruled that based on the calculation method outlined in the policies, all knowledge required for the calculation of the damages was available at the time of loss. *Id.*

[20] California courts have developed a few methods to determine if the losses are certain or capable of being made certain. One way is the defendant's knowledge of, or ability to compute, the damages. *See, e.g., Children's Hosp. v. Bonta*, 118 Cal. Rptr. 2d 629, 654 (Ct. App. 2002) ("The test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a) is whether defendant actually knows the amount owed or from reasonably available information could the defendant have computed that amount." (alteration in original) (emphasis and internal quotation marks omitted)). Another determination can be made by the contract terms or market values. *Great W. Drywall, Inc. v. Roel Constr. Co.*, 83 Cal. Rptr. 3d 235, 238 (Ct. App. 2008) ("[P]rejudgment interest is allowable where the amount due plaintiff is fixed by the terms of the contract, or is readily ascertainable by reference to well-established market values.") (internal quotation marks omitted); *U.S. Fidelity & Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1140 (9th Cir. 2011) ("[W]here the amount of the plaintiff's claim can be determined by established market values or by computation, that provision mandates an award of prejudgment interest." (citations and internal quotation marks omitted)).

[21] However, prejudgment interest is not allowable if the amount of loss requires a judicial determination. *See, e.g., Duale v. Mercedes-Benz USA, LLC*, 56 Cal. Rptr. 3d 19, 26-27 (Ct. App. 2007) ("[W]here the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate." (emphasis and citations omitted)); *see also Polster, Inc. v. Swing*, 210 Cal. Rptr. 567, 572 (Ct. App. 1985) (prejudgment interest is not authorized "as a

matter of law where the amount of damages depends upon a judicial determination based upon conflicting evidence.").

[22] Similar to *Koyer*, the case before us involves an action between an insured and insurer over the amount of damages brought after a failed appraisal process.[2] For a variety of reasons, the parties could not complete the appraisal process. Under the policy, had the parties completed the appraisal process, the amount of loss would have been certain based on the appraiser's and umpire's estimates. Therefore, the appraisers would have had the knowledge available to them to make a calculation of the damages. *See Koyer*, 70 P.2d at 931 ("There was available to the parties before suit all of the knowledge and all of the means of knowledge of the extent of the loss which was available to them or to the court or jury upon a trial of the question of loss."). The non-completion of the appraisal process does not remove the information readily available to the appraisers. All of the knowledge and means of knowledge were ascertainable prior to the commencement of the civil case. Thus, the parties' inability to move forward with the appraisal does not necessarily make the damages incalculable.

[23] Moreover, as in *Koyer*, the process described in the policy made the damages capable of being calculated. The terms of the policy between Fidelity and National Union state:

> [T]o the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property, with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture . . . .

[2] Both parties share equal responsibility for the failure to complete the appraisal process. Although Fidelity terminated the process twice, National Union made the process exceedingly difficult by demanding that a formal appraisal be held in Hawaii and claimed the statute of limitations had run while the parties were still in negotiation as to the amount of loss. Thus, responsibility for the failure of the appraisal process does not factor into our decision making in this case.

RA, tab 3, Ex. A at 1 (Compl., Aug. 5, 2005). This policy term on the first page of the insurance agreement describes the manner in which damages are to be calculated. *Id.* In such an agreement, the calculation of the damages does not depend on a formal appraisal process or a court to make such a calculation. *See Koyer*, 70 P.2d at 931 ("Where the parties have agreed upon the use of that method in fixing the amount of the insurers' liability and have bound themselves to settle upon that basis, they cannot consistently ask the court to declare the method they have adopted as an important element of their contract to be inadequate and uncertain and insist that trial of the issue in court is necessary for a correct and just determination."). Thus, the amount of damages was not dependent on a judicial determination because the parties bound themselves to a method of determining the amount of loss.

[24] Furthermore, National Union did not dispute the scope of the work or deny its liability to Fidelity. The parties were in agreement in regards to what needed to be replaced or repaired, but disagreed as to the cost and extent of the damages. Because the parties agreed on the scope of the work, the value of the loss was capable of calculation based on the agreement. In other words, the amount of loss was equal to the "cost to repair or replace the property, with material of like kind or quality." RA, tab 3, Ex. A at 1 (Compl.). The cost to repair or replace the particular damaged property in dispute could be ascertained using the market value of the damaged items.

[25] In regard to Fidelity's argument that a closely conforming jury award proves the damages were capable of calculation, we fail to see the connection. A jury award that is closely aligned with Fidelity's estimate of the damages proves that the jury agreed with Fidelity's estimate of the damages. A closely conforming jury award does not shed light on whether the damages were capable of being made certain prior to the commencement of the lawsuit. *See Guam Top*

Builders, 2012 Guam 12 ¶ 73. The jury's role was to assess the level of liability that National Union owed to Fidelity. The jury was not charged with determining whether Fidelity's proofs of loss were capable of being made certain at the time they were presented. Alternatively, a jury award not closely conforming to the proofs of loss is not evidence that the damages are incapable of being calculated.

[26] In *Guam Top Builders*, there existed a fundamental disagreement concerning the price of steel. *Id.* ¶ 71. A judicial determination became necessary due to the underlying dispute as to the basis of the computation of the damages. *Id.* ¶ 74. No such underlying dispute existed in the present case.

[27] We do not believe the decision in this case lowers the required threshold for obtaining prejudgment interest. As noted, the Guam Legislature has not added subsection (b) to 20 GCA § 2110, as California has with California Civil Code section 3287. Prejudgment interest remains within the discretion of the judges in Guam, and damages still must be shown to be certain or capable of being made certain. In this particular case, the damages were capable of being made certain.

B. Date in which Prejudgment Interest Began to Accrue

[28] Having determined that Fidelity is entitled to prejudgment interest, we must now decide on which date the interest began to accrue. Fidelity claims the interest began to accrue on the date National Union repudiated its liability to pay Fidelity. Appellant's Br. at 20. Fidelity explains that during the appraisal process, National Union denied further liability to Fidelity by claiming the statute of limitations had run. *Id.* Fidelity argues that interest usually begins when payment is due; however, because payment never became due, the repudiation on April 1, 2005, should mark the beginning of the accrual period. *Id.*

[29] National Union claims that prejudgment interest should not begin until June 7, 2012, when the trial court granted National Union's motion for partial summary judgment, if at all. Appellee's Br. at 9-10. If the prejudgment interest started to accrue, National Union argues, it should not have started until the case moved forward with the breach of contract claim after the partial summary judgment.[3] *Id.*

[30] A California court ruled that "interest should run from the date the damage is inflicted or at least from the commencement of suit." *Amador Valley Investors v. City of Livermore*, 117 Cal. Rptr. 749, 756 (Ct. App. 1974) (quoting *Heimann v. City of Los Angeles*, 185 P.2d 597, 605 (Cal. 1947)) (internal quotation marks omitted). Conceivably, in an insurance case, damage is inflicted when an insurer fails to make a payment when due. In the present case, the insurance policy stated that payment was due within 60 days after proof of loss. Because the appraisal process was never completed, a joint appraisal was never submitted to National Union, and therefore, payment never became due. As an alternative, another option is to award prejudgment interest beginning from the date of repudiation. *See, e.g., Chase v. Nat'l Indem. Co.*, 278 P.2d 68, 75-76 (Cal. Ct. App. 1954). However, National Union continued to participate in the appraisal process after the alleged date of repudiation. Thus, because it is uncertain if National Union actually repudiated its liability and payment never became due, the only logical date to begin the prejudgment interest is the commencement of the suit on August 1, 2005. *See Amador Valley Investors*, 117 Cal. Rptr. at 756. Interest shall have accrued from that date until the date

[3] In making this argument, National Union appears to conflate the interest available under 22 GCA § 18608 and 20 GCA § 2110. Title 22 GCA § 18608 applies to insurers who fail to pay the insured within the time period specified in the policy, requiring them to pay an additional 12% of the loss, as well as reasonable attorney's fees. 22 GCA § 18608 (2005). In its decision on the partial summary judgment, the trial court ruled National Union did not violate section 18608 because payment never became due under the policy. Thus, Fidelity was not entitled to the 12% interest under section 18608. The trial court did not make a ruling on the certainty of Fidelity's damages under 20 GCA § 2110 in its decision granting partial summary judgment.

of the entry of the judgment. *See Yoshida v. Guam Transp. & Warehouse, Inc.*, 2013 Guam 5 ¶ 84.

V. CONCLUSION

[31] Pursuant to 20 GCA § 2110, Fidelity is entitled to recover damages certain or capable of being made certain by calculation. We hold, based on the agreement between the parties in combination with all knowledge readily available at the time, that the amount of damages suffered by Fidelity was capable of being made certain by calculation. Accordingly, we **REVERSE** the trial court's denial of Fidelity's motion for prejudgment interest and **REMAND** to the trial court to enter an award to Fidelity of 6% non-compound annual interest on the judgment of $533,456.00, from August 1, 2005 to December 10, 2013.

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Chief Justice