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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOANN CANNON,

Plaintiff and Respondent,

v.

BARBARA VON HOHENBERG,

Defendant and Appellant.

H040497

(Monterey County

Super. Ct. No. M115147)

Defendant Barbara Von Hohenberg was the guarantor of two promissory notes between plaintiff-lender Joann Cannon and borrower Dermot L. McAtamney. Plaintiff sued defendant and McAtamney when the debt went unpaid. After a bench trial, the court found defendant liable for the \$32,000 face value of the notes, prejudgment interest, and some \$60,000 in attorney's fees and costs. Defendant argues on appeal that no interest should accrue on the promissory notes because their interest rates are usurious; substantial evidence does not support the court's finding of financial elder abuse (Welf. & Inst. Code, § 15610.30); and the court abused its discretion in awarding attorney's fees. For the reasons stated here, we will affirm the judgment.

**I. TRIAL COURT PROCEEDINGS**

Our summary is based on the trial court's Order After Submission (Order) filed after a one-day bench trial, as well as exhibits admitted into evidence at trial. By waiver and agreement of the parties, the trial was neither recorded nor transcribed by a court reporter.

Plaintiff attended a seminar presentation by defendant regarding “the relative values of the dollar and the euro.” Following the seminar, plaintiff requested financial advice from defendant, who told her she was not a financial advisor. Defendant then referred plaintiff to McAtamney, whom defendant “described as a former employee of the Federal reserve.” Plaintiff ultimately wired \$20,000 to DLM Asset Management and received a promissory note in that amount. The note was signed by McAtamney as president of DLM Asset Management and maker of the note, and by defendant as guarantor. Two months later, plaintiff wired an additional \$12,000 directly to McAtamney and received a second promissory note in that amount, again signed by McAtamney as president of DLM Asset Management and maker of the note, and defendant as guarantor. Without informing plaintiff, McAtamney sent defendant half of each wire transfer within days of receiving it.

The two promissory notes were consolidated into a third note (the Note), which defendant once again signed as guarantor. The Note had a term of 180 days and a 15 percent interest rate for that term. Upon maturation, the Note was to bear interest at 30 percent per annum. The Note stated that plaintiff could recover “all costs, expenses, and reasonable attorney’s fees incurred” in enforcing the Note. Apart from a single \$200 payment by defendant, plaintiff was never repaid.

Plaintiff sued defendant, McAtamney, and DLM Asset Management, Inc. in November 2011, alleging causes of action for financial elder abuse (Welf. & Inst. Code, § 15610.30), fraud, negligent misrepresentation, breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, conversion, and unfair business practices. McAtamney and DLM Asset Management never appeared, leading to entry of default judgment. After a one-day bench trial, the trial court found defendant liable for breach of contract. The court also found defendant liable for “deliberate and negligent nondisclosure” as well as “statutory financial elder abuse” for failing to disclose to plaintiff that defendant would be receiving half of plaintiff’s investment. The court stated

it “cannot in good conscience allow the recovery of 30% interest” and instead awarded prejudgment interest at the statutory rate of 10 percent beginning in June 2009 (the Note’s maturation date), citing Civil Code section 3287, subdivision (a).<sup>1</sup> The court awarded plaintiff \$32,000 for the Note’s principal; \$13,310.14 in prejudgment interest (\$13,510.14 minus \$200 for defendant’s single payment toward the Note); \$54,960.08 in attorney’s fees; \$5,351.21 in costs; and \$3,500 in discovery sanctions that had been previously imposed against defendant.

## II. DISCUSSION

Code of Civil Procedure section 632 states that “[i]n superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required.” While findings of fact and conclusions of law are never required, a court must issue “a statement of decision explaining the factual and legal basis for its decision ... upon the request of any party appearing at the trial.” (*Ibid.*) That request must be made “within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision.” (*Ibid.*; see also California Rules of Court, rule 3.1590.)

Where, as here, the plaintiff fails to timely request a statement of decision from the trial court, “all intendments favor the ruling of the trial court and an appellate court must assume the trial court made whatever findings are necessary to sustain the judgment, as long as those findings are supported by substantial evidence,” (*Wallis v. PHL Associates, Inc.* (2013) 220 Cal.App.4th 814, 825), being evidence that is “reasonable in nature, credible and of solid value.” (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057.)

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<sup>1</sup> Unspecified statutory references are to the Civil Code.

## **A. PREJUDGMENT INTEREST**

Defendant does not challenge the trial court's findings that she guaranteed the Note or that (other than the \$200 payment) she never paid the amount due on the Note after McAtamney failed to do so. Defendant challenges the 30 percent per annum interest rate as usurious, arguing that it renders the entire Note void and absolves her of the obligation to pay principal and interest.

The trial court implicitly concluded that the Note's 30 percent per annum interest rate was usurious, stating it "cannot in good conscience" allow recovery of interest at that rate. Article XV, section 1 of the California Constitution provides that, absent exemptions not applicable here, a "loan or forbearance of any money, goods or things in action" not for primarily personal, family, or household use may provide for an interest rate "not exceeding the higher of (a) 10 percent per annum or (b) 5 percent per annum plus the rate prevailing on the 25th day of the month preceding the earlier of (i) the date of execution of the contract to make the loan or forbearance, or (ii) the date of making the loan or forbearance established by the Federal Reserve Bank of San Francisco on advances to member banks under Sections 13 and 13a of the Federal Reserve Act as now in effect or hereafter from time to time amended ... ." (Cal. Const., art. XV, § 1, subds. (1), (2).) As neither party provided the trial court or this court with evidence of the Federal Reserve Bank's advance rate, we will assume for purposes of this opinion that 10 percent per annum is the higher of the two alternative rates described in the foregoing subdivision. Because the Note's 30 percent per annum interest rate exceeds the constitutional maximum and plaintiff did not show that any exemption applied, substantial evidence supported the trial court's implicit finding that the Note's interest rate was usurious. Notwithstanding that implicit finding, the trial court awarded prejudgment interest at a rate of 10 percent per annum.

Appellate courts have allowed recovery of prejudgment interest in breach of contract actions where the contract contains a usurious interest rate. For example, in

*Epstein v. Frank* (1981) 125 Cal.App.3d 111 (*Epstein*), the plaintiffs sued to collect on promissory notes. The trial court found that certain notes were usurious and denied the plaintiffs any interest on those notes. On appeal, the plaintiffs claimed they were “entitled to interest at the legal rate by way of damages for wrongful retention of the principal of the notes from the time of maturity to the date of judgment.” (*Id.* at pp. 117-118.) The *Epstein* court explained that when a note purports to charge a usurious interest rate, that interest provision is rendered void. However, a usurious rate provision does “not affect the right of the payee to recover the principal amount of the note when due.” (*Id.* at pp. 122-123.) The note effectively becomes “a note payable at maturity without interest.” (*Id.* at p. 123.) While the usurious interest rate precludes recovery of interest that accrues *before* the note matures, the *Epstein* court concluded that if a note becomes overdue, interest may be “awarded in the nature of damages for the retention of the principal amount of the note and not by virtue of any provision in the note.” (*Ibid.*) The court reasoned that the denial of pre-maturation interest was a sufficient deterrent against charging usurious interest rates and that “it is neither unjust nor contrary to policy” to charge prejudgment interest against a borrower who has improperly withheld payment. (*Ibid.*; see also *Green v. Future Two* (1986) 179 Cal.App.3d 738, 744 [citing *Epstein* to award prejudgment interest on usurious note]; *Mark McDowell Corp. v. Lsm* 128 (1989) 214 Cal.App.3d 1427, 1432 [awarding 10 percent per annum prejudgment interest on usurious note, citing § 3289, subd. (b) and *Epstein*], disapproved on other grounds by *Southwest Concrete Products v. Gosh Construction Corp.* (1990) 51 Cal.3d 701, 704, 706-709.)

We find this reasoning persuasive and conclude that the trial court properly awarded prejudgment interest on the Note. We likewise find that the trial court correctly established both the start date and interest rate for that prejudgment interest. The court cited section 3287, subdivision (a), which provides in relevant part: “A 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 the person upon a particular day, is entitled also to recover interest thereon from that day ... .” That subdivision applies here, as plaintiff was entitled to a specific amount of damages (the Note’s \$32,000 principal) on a particular day (180 days after its creation). To arrive at the 10 percent interest rate, the trial court presumably relied on section 3289, subdivision (b), which provides: “If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.”

Substantial evidence thus supports the award of prejudgment interest at a rate of 10 percent per annum. Because we conclude that the trial court’s award of interest was proper-and because plaintiff did not cross-appeal to challenge the trial court’s implicit finding that the Note was usurious-we do not reach plaintiff’s argument that defendant failed to demonstrate the Note was usurious in the trial court. Having found that the entire damages award was proper as a remedy for plaintiff’s breach, we also do not reach defendant’s challenge to the sufficiency of the evidence supporting the alternative theory of liability for statutory elder financial abuse (Welf. & Inst. Code, § 15610.30).

#### **B. ATTORNEY’S FEES**

Defendant apparently acknowledges, as she must, that plaintiff was entitled to attorney’s fees based on the Note, which allows recovery of “all costs, expenses and reasonable attorney’s fees incurred in the collection of sums due” on the Note. (See § 1717, subd. (a) [“In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract ... shall be entitled to reasonable attorney’s fees in addition to other costs.”].) Defendant contends, however, that the amount of attorney’s fees awarded by the trial court was excessive.

We review a trial court’s award of attorney’s fees for abuse of discretion. (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) This standard involves

determining “whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria.” (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831.) In the attorney’s fees context, “ ‘the exercise of that discretion must be based on the lodestar adjustment method.’ ” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134 (*Ketchum*), quoting *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322.) The lodestar consists of the number of hours reasonably expended on a case multiplied by a reasonable hourly rate. (*Ketchum, supra*, 24 Cal.4th at p. 1134.) “[W]here the award corresponds to either the lodestar amount, some multiple of that amount, or some fraction requested by one of the parties, the court’s rationale for its award may be apparent on the face of the record, without express acknowledgment by the court of the lodestar amount or method.” (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101 (*Gorman*).) On appeal, “ ‘[a]ll intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Ketchum, supra*, 24 Cal.4th at p. 1140.) “The ‘ ‘experienced trial judge is the best judge of the value of professional services rendered’ ” and the determination will not be disturbed on appeal unless it is clearly wrong. (*Ketchum, supra*, at p. 1132, quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

Here, the trial court awarded \$54,960.08 in attorney’s fees.<sup>2</sup> That figure corresponds exactly to the attorney’s fee summary provided by counsel for plaintiff and admitted into evidence at trial. Given that one-to-one correspondence, we must infer that the trial court found both the hourly rate and number of hours claimed by plaintiff’s attorneys reasonable and awarded the full lodestar amount requested. (*Ketchum, supra*, 24 Cal.4th at p. 1140.) Defendant argues that the trial court should have reduced that award because plaintiff harassed defendant through “an avalanche of discovery requests”

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<sup>2</sup> The Order refers to “attorney’s fees of \$60,311.29” but the judgment clarifies that the amount included both \$54,960.08 in attorney’s fees and \$5,351.21 in costs.

and also that plaintiff should have moved for summary judgment instead of taking the case to trial. Absent a greater showing than defendant's bare assertion that plaintiff could have incurred lower fees, we cannot say that the trial court's decision is clearly wrong. (*Ketchum*, at p. 1132.) Further, the fact that defendant was the subject of a \$3,500 discovery sanction suggests that at least some of the fees plaintiff incurred were the result of defendant's intransigence. On this record, we find no abuse of discretion.

### **III. DISPOSITION**

The judgment is affirmed. Plaintiff shall recover costs on appeal.

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Grover, J.

**WE CONCUR:**

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Rushing, P.J.

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Márquez, J.