UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS-6

Case No.	CV 06-5201 CAS (FFMx)	Date	March 30, 2009
Title	TRADEWIND PRODUCTS, INC d/b/a YOUCANSAVE.COM v. HARTFORD FIRE INSURANCE COMPANY, ET AL		

Present: The Honorable	CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE	
CATHERINE JEANG	LAURA ELIAS	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Gary Osborne	Catherine Rivard

Proceedings: **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING CONTRACTUAL DAMAGES AND PREJUDGMENT INTEREST** (filed 03/09/09)

I. INTRODUCTION

On August 18, 2006, plaintiff Tradewind Products, Inc. dba Youcansave.com, filed suit against defendants Hartford Fire Insurance Company and Hartford Casualty Insurance Company (collectively "Hartford") alleging claims for (1) breach of contract and (2) tortious breach of the implied covenant of good faith and fair dealing. Defendants issued plaintiff two insurance policies and plaintiff alleges that defendants wrongfully refused to defend plaintiff in a lawsuit filed in the United States District Court for the Central District of California, captioned Guthy-Renker Corporation v. Tradewind Products, Inc., Case No. 03-2035 GHK (RZx).

On March 27, 2007, the district court granted defendants' motion for summary judgment and denied plaintiff's motion for partial summary judgment. The district court held that "[n]one of the allegations in the complaint nor any facts that were known to Hartford at the time of the suit brought Guthy-Renker's claims within the meaning of 'advertising injury.'" March 27, 2007 Order at 3.

On January 18, 2008, the Ninth Circuit reversed the district court's grant of summary judgment in favor of defendants and held that "Hartford had a duty to defend Tradewind because the Complaint raised issues that were potentially within the Policies' coverage." January 18, 2008 Order at 2.

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On March 9, 2009, plaintiff filed the instant motion for partial summary judgment as to contractual damages and prejudgment interest.[1] On March 16, 2009, defendants filed their opposition. On March 23, 2009, plaintiff filed its reply.[2] A hearing was held on March 30, 2009. After carefully considering the parties' arguments, the Court finds and concludes as follows.

II. BACKGROUND

A. The Subject Policies

Defendants issued two "Special Multi-Flex" policies to plaintiff, both with the policy number 83 UUN PU7497. The first policy was issued for a policy period of August 13, 2000 to August 13, 2001, and the second policy was issued for a period of August 13, 2001 to August 13, 2002. SUF ¶ 4. Both policies promised to defend and indemnify plaintiff against third-party lawsuits seeking damages for "advertising injury" caused by the "advertisement" of plaintiff's goods, products or services. SUF ¶ 6.

B. The Underlying *Guthy-Renker* Lawsuit

In 2003, plaintiff was named as a defendant in a lawsuit filed by Guthy-Renker Corporation in the United States District Court for the Central District of California, Guthy-Renker Corporation v. Tradewind Products, Inc., Case No. 03-2035 GHK (Rzx). SUF ¶ 7. The Guthy-Renker suit alleged, in pertinent part, that plaintiff had infringed Guthy-Renker's copyrights by advertising a counterfeit version of a Guthy-Renker skin care product "PROACTIV." SUF ¶ 8. On April 16, 2003, plaintiff tendered the defense of the Guthy-Renker suit to defendants and on May 19, 2003, defendants responded by

[1] This case was originally before the Honorable Edward Rafeedie, now deceased, and was randomly reassigned to this Court on August 6, 2008.

[2] On March 25, 2009, defendant filed a sur-reply. On March 27, 2009, this Court denied plaintiff's ex-parte application to file a sur-reply or, in the alternative, to strike defendant's sur-reply.

sending a letter to plaintiff's counsel denying a duty to defend plaintiff. SUF ¶¶ 9-10.

C. The District Court's Summary Judgment Ruling

On March 27, 2007, the district court granted defendants' motion for summary judgment on plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The district court held that "[n]one of the allegations in the complaint nor any facts that were known to Hartford at the time of the suit brought Guthy-Renker's claims within the meaning of 'advertising injury.'" March 27, 2007 Order at 3. The district court held that defendants did not breach their contract with plaintiff by refusing to defend plaintiff in the Guthy-Renker suit and that there could be no breach of the implied covenant of good faith and fair dealing without a breach of contract. Id.

D. Ninth Circuit Opinion

On June 18, 2008, the Ninth Circuit reversed the district court's grant of summary judgment in favor of defendants. Tradewind Products, Inc. v. Hartford Fire Insurance Company, Case No. CV-06-05201-ER at *2 (9th Cir. June 18, 2008). The Ninth Circuit held that defendants had a duty to defend plaintiff because the Guthy-Renker complaint raised issues that were potentially within the subject policies' coverage. Id. The Ninth Circuit further reversed the district court's finding to the effect that defendants did not breach the implied covenant of good faith and fair dealing. Id. at 4.

E. Plaintiff's Defense Costs

Plaintiff asserts that it incurred post-tender attorneys' fees and costs relating to the defense of the Guthy-Renker suit by their attorneys, Reed Smith Crosby Heafey LLP ("Reed Smith") in the amount of $845,757.97 and Dyer & White, LLP ("Dyer & White") in the amount of $67,402.68. Mot. at 3. The parties agree that plaintiff incurred post-tender attorneys' fees and costs in the total amount of $913,160.15.

III. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. See Fed. R. Civ. P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). See also Celotex Corp., 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. See also Abromson v. American Pacific Corp., 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See Matsushita, 475 U.S. at 587.

IV. DISCUSSION

A. Breach of Duty to Defend

The Ninth Circuit found in its June 18, 2008 order that defendants breached their

duty to defend. Tradewind Products, Inc. v. Hartford Fire Insurance Company, Case No. CV-06-05201-ER at *2 (9th Cir. June 18, 2008) ("Hartford had a duty to defend Tradewind because the Complaint raised issues that were potentially within the Policies' coverage.").

B. Contractual Damages

The parties agree that $913,160.15 is the correct amount of contractual damages and the Court therefore concludes that plaintiff is entitled to contractual damages of $913,160.65. Mot. at 6; Opp'n at 2.

C. Prejudgment Interest

The parties agree that prejudgment interest is appropriate and should be awarded at a rate of ten percent simple interest per year. Mot. at 7-8 (citing Cal. Civ. Code § 3289(b)); Opp'n at 5. The sole dispute concerns the date from which prejudgment interest accrues.

Plaintiff argues that in actions against insurers for breach of the duty to defend, the vesting date for the calculation of interest on defense costs is the date the insured was billed for legal services. Id. (citing Paramount Properties Co. v. Transamerica Title Ins. Co., 1 Cal. 3d 562 (1970); Copart, Inc. v. The Travelers Indemnity Co. of Illinois, 1999 WL 977948 at *3 (N.D. Cal. Oct. 22, 1999)). Plaintiff further argues that prejudgment interest runs from the date on which the invoices from Reed Smith and Dyer & White were submitted to plaintiff for payment, to the date on which Hartford actually tendered payment. Id. at 8. Plaintiff contends that using this formula, the prejudgment interest with respect to the Dyer & White defense costs totals $31,377.19 and the prejudgment interest with respect to the Reed Smith defense costs totals $435,897.31. Id. Therefore, plaintiff requests that the Court award it prejudgment interest in the total amount of $467,274.50. Id.

Defendants respond that prejudgment interest began to accrue when defendants were provided with information from which they could calculate plaintiff's contract damages. Opp'n at 2 (citing Paramount Properties, 1 Cal. 3d at 572; Ferrellgas, Inc. v.

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American Premier Underwriters, 79 F. Supp. 2d 1160, 1168 (C.D. Cal. 1999)). Defendants argue that they were unable to calculate plaintiff's contract damages until plaintiff produced invoices on July 24, 2008. Id. at 4. Defendants contend that prejudgment interest on $913,160.65 from July 24, 2008 is $35,638.27. Id. at 5 (citing Daley Decl. ¶ 2, Ex. C).

Defendants further respond that if the Court finds that plaintiff is entitled to prejudgment interest from the date of its injury, the Court cannot award prejudgment interest because plaintiff has not presented any evidence as to when it was injured. Opp'n at 6. Defendants argue that plaintiff must establish when it paid its defense expenses and how much it paid on those dates. Id.

Plaintiff responds that under California law, it is entitled to prejudgment interest from the dates it received invoices from its attorneys. Reply at 4. Plaintiff argues that although it did not submit invoices to defendants as it received them, defendants knew that they would be liable for plaintiff's costs if they were found to have breached the duty to defend. Id. at 5. Plaintiff further argues that its defense costs were capable of precise calculation. Id.

California Civil Code § 3287(a) provides that "[e]very 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 on a particular day, is entitled also to recover interest thereon from that day." Cal. Civ. Code § 3287(a). Under this provision, damages are considered certain or capable of being made certain "where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage." Safeway Stores, Inc. v. National Union, 64 F.3d 1282, 1291 (9th Cir. 1995). California courts have interpreted §3287(a) to "permit recovery of interest on damages recovered by an insured from the insurer ... where the insured had ... furnished the insurer with data from which the loss could be ascertained and where such data was not substantially disputed by the insurer." Id. (citing Executive Aviation, Inc. v. National Ins. Underwriters, 16 Cal. App. 3d 799, 808 (1971)).

The Court concludes that plaintiff is entitled to prejudgment interest from the dates

it received invoices from its attorneys until defendants tendered payment. Damages are capable of being made certain by calculation if they may be determined by "reasonably ascertainable market values." Cassinos v. Union Oil Co., 14 Cal App 4th 1770, 1789 (1993). The fair market value of legal services was available to defendants throughout this litigation and the fact that "actual damages incurred would have been subject to proof if challenged by [defendants] in court . . . does not make them uncertain for purposes of section 3287(a)."[3] Copart, 1999 WL 977948 at *2. Therefore, the Court concludes that plaintiff is entitled to prejudgment interest in the amount of $467,274.50, which is calculated from the dates plaintiff received invoices until Hartford tendered payment on November 24, 2008, and December 15, 2008.[4] Mot., Ex. O.

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[3] At oral argument, counsel for defendants argued that defendants could not calculate the amount of damages because they did not receive invoices from plaintiff. However, "the bills evidencing the expenses were readily available. [Defendants] never asked for them, and it can hardly fault [plaintiff] for not sending copies given the position [defendants] had taken ." Copart, 1999 WL 977948 at *2.

[4] Ferrellgas, Inc. v. American Premier Underwriters is inapposite. 79 F. Supp. 2d 1160, 1168 (C.D. Cal. 1999). In Ferrellgas, the Court held that "[p]laintiffs do not contend that Hartford knew, or had available to it information from which it reasonably could have calculated, the amount of plaintiffs' claim for defense costs before that date. Plaintiffs therefore are not entitled to prejudgment interest on their claim for defense costs until September 24, 1994, the date of their demand." Id. By contrast, plaintiff contends that defendants could have calculated the amount of plaintiffs' claim for defense costs. Reply at 5. Furthermore, Ferrellgas involved a claim against an "excess insurer" that had no duty to defend or pay for defense costs until the primary insurer's policy limits were exhausted. 79 F. Supp. 2d at 1168 n. 7 ("Hartford is liable for the amount of the judgment and defense costs in excess of $2,000,000.00."). In that context, the insurer cannot be aware that it is liable for defense costs until the insured notifies the insurer that its defense costs have exceeded the primary insurer's coverage. By contrast, this case involves a primary insurer that knew it would be liable for defense costs if it was found to have breached the duty to defend.

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V. CONCLUSION

In accordance with the foregoing, the Court hereby GRANTS plaintiff's motion for partial summary judgment and prejudgment interest. Plaintiff is hereby awarded $913,160.15 in contractual damages and $467,274.50 in prejudgment interest.

IT IS SO ORDERED.

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