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LOFARO & REISER, LLP
55 Hudson Street
Hackensack, New Jersey 07601
T: (201) 498-0400
F: (201) 498-0016
Attorneys for Plaintiff

A-PAC GLOBAL, INC.,

Plaintiff,

vs.

FUTURE WORKS UNLIMITED, INC.,
ADVANCED DIGITAL REPLICATION,
INC. and JONATHAN RESNICK,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-2798-08

Civil Action

PLAINTIFF'S TRIAL BRIEF

On the Brief:

Glenn R. Reiser
Melanie R. Costantino

LOFARO & REISER, L.L.P.
55 Hudson Street
Hackensack, New Jersey 07601
Tel: (201) 498-0400
Attorneys for Plaintiff

PRELIMINARY STATEMENT

This is a commercial book account case against the corporate defendants, Future Works Unlimited, Inc. and Advanced Digital Replication, Inc. (collectively "Future Works"), combined with the enforcement of a personal guaranty against the individually named defendant, Jonathan Resnick ("Resnick"), an officer and shareholder in Future Works. Simply put, goods were ordered, shipped and delivered to Future Works but were not paid for.

Trial is scheduled for June 25, 2009. It is respectfully submitted that the evidence and testimony at trial will demonstrate that the Court should award judgment in favor of Plaintiff and against Defendants, jointly and severally, in the principal amount of \$131,160.00, plus \$34,025.00 in reasonable attorneys' fees, plus \$35,050.73 in contractual interest at the rate of 18% per annum, for a total judgment of \$200,235.73.

Alternatively, if the Court disallows interest at the 18% contractual rate then it is respectfully submitted that judgment be entered against Defendants, jointly and severally, in the total amount of \$174,907.38 computed as follows: \$131,160.00 in principal debt, plus \$34,025.00 in attorneys' fees, plus pre-judgment interest of \$9,722.38 pursuant to R. 4:42-11..

INTRODUCTION

Plaintiff, A-Pac Global, Inc. ("Plaintiff") is a seller/distributor of DVD plastic cases. Over a two-month period from December 2007 to January 2008 Future Works purchased and accepted several deliveries of goods from Plaintiff at agreed upon prices. Future Works breached its contractual agreements with Plaintiff by failing to pay for the goods sold and delivered. As personal guarantor, Resnick has also breached his obligations to Plaintiff.

As of June 25, 2009, Defendant owes Plaintiff the principal sum of \$136,160.00, plus \$35,050.73 in finance charges computed at the contractual rate of 18% per annum, plus

reasonable attorneys' fees of \$32,790.00 representing 25% of the principal debt pursuant to the express terms of the personal guaranty signed by Plaintiff.

In order to protect its interests, Plaintiff requested and acquired a personal guaranty from the individual defendant Jonathan Resnick ("Resnick") on or about January 18, 2009, thereby rendering him responsible for all debts to Plaintiff. Resnick is an officer and shareholder of Future Works. Resnick has breached his personal guaranty by failing to pay Plaintiff the debt due and owing from his company Future Works.

Resnick alleges that he only agreed to the personal guaranty toward the latter part of the parties' business relationship on the condition that Plaintiff agreed to make future shipments to Future Works. However, this alleged "understanding" was not memorialized in writing and the parties' business relationship was a relatively short one covering only 2 months. After Resnick signed the personal guaranty, Plaintiff did, in fact, make additional shipments to Future Works totaling approximately \$26,680.00. Future Works failed to pay Plaintiff for these additional shipments, in several instances tendering checks with insufficient funds or issuing stop payment orders on previously tendered post-dated checks. Consequently, in the absence of receiving payment Plaintiff ceased from making any further shipments to Future Works.

Plaintiff contends that Defendants are jointly and severally responsible for the entire indebtedness of \$136,160.00 - especially since Resnick signed a personal guaranty for all of the Future Works' indebtedness. In addition, Plaintiff seeks a 25% attorneys' fee pursuant to the terms of the personal guaranty, and contractual interest at the 18% annual rate set forth in Plaintiff's invoices.

Future Works has filed a Counterclaim alleging that Plaintiff's failure to continue shipping products resulted in causing its financial demise, but has not supported this claim with expert testimony. Future Works, through counsel, has represented that it is no longer operating and is defunct.

FACTS AND PROCEDURAL HISTORY

The parties' business relationship spans a very brief period from December 2007 to January 2008. The documents to be introduced into evidence at trial will demonstrate that from December 6, 2008 through January 21, 2008 Future Works ordered and received \$136,160.00 worth of merchandise from Plaintiff which remains unpaid. Future Works accepted delivery of the merchandise from Plaintiff at agreed upon prices set forth in Plaintiff's invoices, and provided Plaintiff with a series of post-dated checks.

Immediately prior to receiving the last shipment of merchandise invoiced on January 21, 2008 in the total amount of \$26,680.00, Resnick signed a personal guaranty on January 17, 2008, which states in pertinent part as follows:

It is understood and agreed that I/we am/are signing the application in two separate capacities – both personally as a guarantor and as an agent for the appellant. It is agreed my signature shall be both capacities regardless of any agency designation including corporate title. In order to induce [Plaintiff] to extend credit to the credit applicant, the Guarantor(s) do(es) unconditionally personally guaranty to [Plaintiff] the payment not merely the collection, of all indebtedness of the credit applicant to [Plaintiff] whether existing on the date of this instrument or incurred after such date, and without limitation, the indebtedness includes collection cost and attorney's fees as provided herein and is subject to the terms and conditions herein.

Future Works never paid for the last shipment, however. Neither has Resnick.

Future Works' previously tendered a post-dated check dated 1/3/1/08 in the amount of \$11,152.00 which was intended to pay for a prior shipment made by Plaintiff on 12/6/2008,

however that check bounced. Shortly thereafter, Future Works issued a replacement check dated 2/4/08 in the same amount, but stopped payment on that instrument. Future Works also issued stop payment instructions for two additional post-dated checks issued in the respective amounts of \$3,456.00 and \$7,560.00 with a payment date of 2/13/08.

On or about April 10, 2008, Plaintiff commenced this action in the Superior Court of New Jersey. Defendants Counterclaimed alleging unspecified damages resulting from the termination of the parties' business relationship. Due to prior unresolved conflicts with Plaintiff concerning payment of legal fees for defending the Counterclaim, this firm was relieved as Plaintiff's counsel by Order entered in March 2009. Shortly thereafter, the conflict was resolved and the Court entered an Order reinstating this firm as counsel for Plaintiff.

A trial date of June 25, 2009 is presently scheduled. The parties did not engage in any pretrial discovery. Depositions were previously noticed by Defendants. However, those depositions were adjourned when this firm was relieved as counsel. Defendants made no further efforts to reschedule these depositions after the Court allowed this firm back into the case.

LEGAL ARGUMENT

POINT I

THE COURT SHOULD ENTER A JUDGMENT AGAINST DEFENDANTS, JOINTLY AND SEVERALLY, IN THE PRINCIPAL AMOUNT OF \$136,100 PLUS REASONABLE ATTORNEYS' FEES AND FINANCE CHARGES BASED ON THE CORPORATE DEFENDANT'S UNPAID BOOK ACCOUNT AND THE INDIVIDUAL DEFENDANT'S PERSONAL GUARANTY

A. Book Account

Books of account properly admitted into evidence are legitimate prima facie evidence to show the sale and delivery of the merchandise in question in the usual course of business.

Johnson vs. Hoffman, 7 N.J. 123, 129 (1951), citing Oberg v. Breen, 50 N.J.L. 145 (E. & A.1887); Bayonne v. Standard Oil Co., 81 N.J.L. 717 (E. & A.1910); Benoliel v. Homack, 87 N.J.L. 375 (Sup. Ct. 1915). Here, Plaintiff's business records clearly establish a book account with Future Works in the amount of \$136,100 based on goods delivered and not paid for.

B. Enforcement of Personal Guaranty

As a personal guarantor of Future Works' book account with Plaintiff, the individual defendant Resnick is liable to Plaintiff in the amount of \$136,100. A personal guaranty is generally considered a contract of adhesion under New Jersey law.¹ See generally, Martindale v. Sandvik, Inc., 173 N.J. 76 (2002). A contract of adhesion is a contract presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity of the adhering party to negotiate the terms of it except perhaps on a few particulars. Id. Upon considering whether to enforce a contract of adhesion, courts must look not only to the standardized nature of the contract, but also to the subject matter, the parties' relative bargaining positions, the degree of economic compulsion motivating the adhering party, and the public interest affected by the contract. Id. Personal guaranties that are in writing, and unequivocal and unconditional are normally enforceable. See generally, The Summit Trust Company v. Willow Business Park, L.P., 269 N.J.Super. 439 (App. Div. 1994).

In the present case, the personal guaranty signed by Resnick should be deemed an enforceable contract of adhesion. As a shareholder/officer of Future Works Resnick is an

¹ The prima facie elements to establish an enforceable breach of contract claim under New Jersey law are:

1. The parties entered into a contract containing certain terms.
2. The plaintiff did what the contract required the plaintiff to do.
3. The defendant did not do what the contract required the defendant to do. This failure is called a breach of the contract.
4. The defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff.

experienced businessman, thus denoting that the bargaining power between the parties is not unbalanced. While there was a degree of economic compulsion motivating Resnick to sign the guaranty, he did not need to personally guaranty payments of Future Works' indebtedness to Plaintiff in order to get the deliveries he sought. Future Works could have purchased the products from another supplier.

While Resnick will undoubtedly argue that his personal guaranty was conditioned on the delivery of previously ordered goods, this so-called condition or amendment was not placed in writing. Additionally, Plaintiff was within its right to stop shipping additional orders placed by Future Works since its checks for the payments for previous shipments either bounced or were stopped. Since Future Works failed to make payments on previous shipments, Plaintiff minimized its damages by not shipping additional goods to Future Works. As personal guarantor of Future Works, judgment should be entered against Resnick in the amount of \$136,100 based on the terms of his personal guaranty.

C. Allowance of Reasonable Attorneys' Fees

While parties to litigation normally bear their own counsel fees, a party can recover counsel fees pursuant to a contract. See Packard-Bamberger Co. v. Collier, 167 N.J. 427, 440 (2001). Such an agreement may provide for recovery of a counsel fee as a percentage of the debt to be recovered. As our Appellate Division has explained:

A contractual provision in a note requiring payment of counsel fees in the event of default "is not against public policy and is valid and enforceable." Under the HEAA's agreement with counsel, the attorney is to receive 30% of the amount he recovers on defaulted loans. Counsel must first obtain a judgment in favor of the HEAA. Then, he must undertake collection efforts in order to receive payment. Counsel's payment is dependent upon recovery and the HEAA is not billed on an hourly basis. It is thus inappropriate to view the reasonableness of the fee only up until the date of the judgment without any consideration of future collection problems.

Under these circumstances, we find nothing unreasonable in the amount of attorneys' fees the HEAA requested.

New Jersey Higher Educ. Assist. Auth. v. Martin, 265 N.J. Super. 564, 568-69 (App.Div.1993) (citations omitted).]

The law will not enforce a different contract than the parties have seen fit to express in their writing. Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 149 (App. Div. 1961). Generally, a contract which permits an aggrieved party to recover fixed or reasonable attorneys' fees as part of any damages is enforceable unless some larger public policy mandates a contrary result. Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J. 442, 448 (1965); Cohen v. Fair Lawn Dairies, Inc., 86 N.J. Super. 206, 212-216 (App.Div.1965), aff'd 44 N.J. 450, 2 (1965). However, any fee arrangement is subject to judicial review as to its reasonableness. In re Estate of Kish, 52 N.J. 454, 471-472 (1968); Cohen v. Fair Lawn Dairies, Inc., 44 N.J. at 452.

In this case, in executing the personal guaranty Resnick represented to Plaintiff his agreement to pay a reasonable attorneys' fee of 25% of the amount due once the matter is placed into collection. The following provision of the personal guaranty is illustrative:

In the event the account is placed in the hands of a collection agency or an attorney at law to collect same or any portion thereof, in addition to the amounts owed hereunder, I've agreed and promise to pay an attorney's fee or collection fee of 25% of the balance then due and owing.

In addition, at the bottom of each of Plaintiff's invoices it states, "[A]ttorney's must be paid by losing party should you default on payment."

The principal amount of indebtedness owed by Future Works to Plaintiff is \$136,100 based on a book account. Computing a 25% attorneys' fee against a \$136,100 debt yields the sum of \$34,025 as for a reasonable attorneys' fee award. There is nothing contrary to public

policy that would prohibit enforcement of a 25% attorneys' fee against Resnick. After all, he agreed to it.

POINT II

PLAINTIFF IS ENTITLED TO FINANCE CHARGES OR INTEREST AT THE CONTRACTUAL RATE OF 18% PER ANNUM AS SET FORTH IN PLAINTIFF'S INVOICES TO FUTURE WORKS

Each of Plaintiff's invoices to Future Works contains the following provision: "A finance charge will be added to all overdue term balances @ 18% per annum." Our courts will award contractual interest under the "benefit of the bargain" concept which is at the root of voluntary contractual agreements. As one New Jersey appellate court explained:

We must distinguish, at the outset, conventional or contractual interest from interest allowable as damages. The former is the compensation fixed by the parties for the use, detention, or forbearance of money or its equivalent. *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 468, 33 A.2d 366 (Ch.1943), affirmed 135 N.J. Eq. 244, 38A.2d 199 (E. & A. 1944). Since it is grounded in contract, being 'part of the bargain that was struck when the loan was made,' . . . it is recoverable as of right along with the principal.

Deerhurst Estates v. Meadow Homes, 64 N.J. Super. 134, 154 (App. Div. 1961), certif. den. 34 N.J. 66 (1961). (some internal citations omitted).

Plaintiff's invoices to Future Works were on a "C.O.D. Mail" basis, meaning that payment was required to be sent in the mail upon delivery. Each invoice lists a ship date and a due date. For example, the first invoice of December 6, 2007 lists a ship date of 12/4/07 with a due date of 12/6/07. Future Works provided Plaintiff with post-dated checks for each invoice, however its bank either dishonored payment or Future Works issued stop payment orders.

For purposes of simplicity, Plaintiff computes its finance charges from January 21, 2008 through and including the June 25, 2009 trial date to be \$35,050.73, as follows:

$\$136,160 \times 18\% = \$24,508.80$

$\$24,508.80 \div 365 \text{ days} = \$67.147/\text{per diem}$

522 days between 1/28/08 to 6/25/09

$522 \text{ days} \times \$67.147/\text{per diem} = \$35,050.73$

Accordingly, Plaintiff respectfully requests an award of \$35,050.73 in finance charges computed at the contractual interest rate of 18%.

POINT III

ALTERNATIVELY, PLAINTIFF IS ENTITLED TO PRE-JUDGMENT INTEREST PURSUANT TO R. 4:42-11

Alternatively, if in the exercise of its discretion the Court disallows interest at the 18% contractual rate, then Plaintiff is entitled to an award of pre-judgment interest pursuant to R. 4:42-11. Pursuant to the official Comment to R. 4:42-11, the annual rate of interest for the calendar year 2008 is 5.5%, and for 2009 is 4%.

Prejudgment interest is awarded in contract cases to compensate the claimant for the loss of income the money owed would have earned if payment had not been delayed. *Busik v. Levine*, 63 N.J. 351, 358, 307 A.2d 571, appeal dismissed 414 U.S. 1106, 94 S.Ct. 831, 38 L.Ed.2d 733 (1973).

Interest is payable on liquidated damages, not as of right, but in the exercise of judicial discretion and in accordance with equitable principles. Meier v. New Jersey Life Ins. Co., 101 N.J. 597, 622 (1986). It is not necessarily of consequence that a defendant's opposition to the claim was interposed in good faith. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 506 (1974). The equities ordinarily lie with an obligee who had to litigate the claim while the obligor retained the use of the funds. Small v. Schuncke, 42 N.J. 407, 416, (1964); Fasolo v. Division of Pensions, 190 N.J. Super. 573, 585, 587 (App. Div.1983).

Pursuant to R. 4:42-11, the Court should respectfully award Plaintiff pre-judgment interest commencing from January 21, 2008 through and including June 25 2009. Thereafter, post-judgment interest would continue to accrue under the same Rule.

Again, for purposes of simplicity, Plaintiff computes its pre-judgment interest from January 21, 2008 through and including the June 25, 2009 trial date to be \$9,722.38, as follows:

For 2008:

$$\$136,160 \times 5.5\% = \$7,488.80$$

$$\$7,488.80 \div 365 \text{ days} = \$20.51/\text{per diem}$$

$$346 \text{ days between } 1/21/08 \text{ to } 12/31/08$$

$$346 \text{ days} \times \$20.51 \text{ per diem} = 7,096.46$$

For 2009:

$$\$136,160 \times 4\% = \$5,446.40$$

$$\$5,446.40 \div 365 \text{ days} = \$14.92/\text{per diem}$$

$$176 \text{ days between } 1/1/09 \text{ to } 6/25/09$$

$$176 \text{ days} \times \$14.92 \text{ per diem} = \$2,625.92$$

Accordingly, Plaintiff respectfully requests an award of \$7,096.46 in pre-judgment interest for the calendar year 2008, and \$2,625.92 for the calendar year to date 2009, for a total pre-judgment interest award of \$9,722.38.

CONCLUSION

Based on the foregoing reasons, evidence and testimony at trial, the Court should award judgment in favor of Plaintiff and against Defendants, jointly and severally, in the principal amount of \$131,160.00, plus \$34,025 in reasonable attorneys' fees, plus \$35,050.73 in contractual interest at the rate of 18% per annum, for a total judgment of \$200,235.73.

Alternatively, if the Court disallows interest at the 18% contractual rate then it is respectfully submitted that judgment in the total amount of \$174,907.38 be entered against Defendants, jointly and severally, and computed as follows: \$131,160.00 in principal debt, plus \$34,025.00 in attorneys' fees, plus pre-judgment interest of \$9,722.38 pursuant to R. 4:42-11.

Respectfully submitted,

LOFARO & REISER, LLP
Attorneys for Plaintiff

By: 

Glenn R. Reiser

Dated: June 24, 2009