COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2835

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DAVID A. BECKER, AND VIRGINIA M. BECKER,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

v.

ARAMIA I, LTD.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Aramia I, Ltd. (Aramia) appeals from a judgment awarding damages to David A. and Virginia M. Becker (the Beckers) for breach of contract. Aramia argues that the trial court erred by not limiting the damages to

the ninety-day notice period called for in the contract. We disagree and affirm. Aramia also contends that the trial court erred by not removing the damages for lost lodging from the damage award. We agree. We therefore reverse that part of the trial court's decision and remand with instructions to remove the lodging damages from the Beckers' award.

The Beckers cross-appeal. They argue that the trial court should have allowed them to recover damages for lost health insurance. In addition, the Beckers assert that the trial court erred by denying prejudgment interest on the damages. We agree with both arguments and reverse those portions of the trial court's decision. We remand with instructions to add the stipulated value of the health insurance to the damage award, and to add prejudgment interest to the damages for the lost wages and the lost health insurance.

I. Background

On April 24, 1994, David and Virginia Becker entered into a management contract with Aramia to become the twenty-four-hour managers of the Super 8 Motel in Prairie du Chien, Wisconsin. The contract provided in part:

> 1. The term of this contract shall run from April 1, 1994, through December 31, 1996. As of December 31, 1996, if not amended or re-written, this contract shall become a year to year contract.
>
> 2. Either party shall furnish the other a 90 day notice to terminate this contract.
>
> ….
>
> 5. The Owner shall furnish the Manager with health and accident insurance. The Owners shall furnish the Manager with the one bedroom living quarters on premises, plus utilities and local telephone. The Owner, however, reserves the right to set the value of the living quarters and utilities furnished in the event any governmental agency becomes involved in the calculation of wages and benefits

> paid with regard to the payment of minimum wage per hour worked.

The Beckers managed the motel and lived in the one-bedroom apartment provided to them until January 20, 1997, when Aramia terminated their contract without notice. The Beckers then moved back into the house they owned in Dubuque, Iowa. At the time they were terminated, the Beckers were earning $846.86 per two-week pay period. After their termination, both David and Virginia received unemployment compensation, and Virginia obtained other employment, but apparently the Beckers went without health insurance for the rest of 1997.

The Beckers sued, claiming that their termination breached the management contract. At trial, the Beckers sought damages for: lost wages for the period from February 1, 1997 through December 31, 1997; lodging for the eleven and one-third months remaining in 1997 after the date they were terminated; and eleven months of health insurance. David Becker testified that $650 per month was a fair and reasonable amount at which to value the apartment, based on the fact that a smaller unit in the motel was renting for $800 per month. Aramia stipulated that the health insurance they provided to the Beckers under the contract cost $509.79 per month. The extent to which the Beckers mitigated their lost wages is not in dispute.

At trial, the court concluded that, at the time of their termination, the Beckers' contract was for a one-year period. Thus, the jury considered damages based on the one-year term, rather than on the ninety-day notice period called for in the contract. The court reasoned that to rule otherwise would be to construe the contract as having an indefinite term with termination allowed at any time based on ninety days' notice. The court also held that lodging was an appropriate

damage element, but ruled that the jury should not consider the health insurance claim as part of the damages.

The jury returned a verdict in favor of the Beckers, finding that they were terminated without cause and were "entitled to damages in the amount of full compensation, $14,063.16." This damage amount included the full amounts the Beckers sought for lost wages and lodging, minus the amounts they earned from other employment and unemployment compensation. Both parties filed motions after the verdict. Aramia requested, among other things, that the trial court eliminate the lodging amount from the damages and limit the total damages to the ninety-day notice period provided for in the contract. The Beckers argued that the court should have included the health insurance costs in the damages, and that they were entitled to prejudgment interest. The court denied all motions, and entered judgment for the Beckers for $14,063.16 plus costs. Aramia appeals and the Beckers cross-appeal.

II. Discussion

A. Appeal

1. Contract Term

On appeal, Aramia argues that any damages resulting from the Beckers' termination should be limited to the ninety-day period following the termination date. It asserts that paragraphs one and two of the contract mean that, in 1997, the contract had a "year to year" duration, but could be terminated by either party at any time with ninety days' notice. Since the contract was terminated without notice, the Beckers could recover damages for the notice period, but no longer.

The construction of a written contract is normally a question of law that we will review de novo. *See* ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App. 1991). The "cornerstone of contract construction is to ascertain the true intentions of the parties as expressed by the contractual language." ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis.2d 704, 711, 456 N.W.2d 359, 362 (1990). When the language of a contract is unambiguous, we must enforce it as written, keeping in mind that the contract should be given a reasonable meaning so that no part is surplusage. *See* ***Wilke v. Wilke***, 212 Wis.2d 271, 274, 569 N.W.2d 296, 297 (Ct. App. 1997); ***Journal/Sentinel***, 155 Wis.2d at 711, 456 N.W.2d at 362.

Although we review de novo, we agree with the trial court's construction of the management contract. Paragraph one of the contract states that as of December 31, 1996, the contract was to "become a year to year contract." Paragraph two then states that "[e]ither party shall furnish the other a 90 day notice to terminate this contract." In order to give meaning to both of these provisions, we must construe the contract as demonstrating the parties' intent to have a year-long agreement that would automatically renew for the following year unless one of the parties provided a termination notice at least ninety days before the end of the year. Construing the ninety-day notice provision as allowing for termination at any time would instead make the contract term indefinite and render the "year to year" provision meaningless.

Aramia contends that, under ***Sonotone Corp. v. Ladd***, 17 Wis.2d 580, 117 N.W.2d 591 (1962), the fact that it terminated the contract without notice on January 20, 1997, simply meant that the contract continued to be in force until the lapse of the required ninety-day notice period. In conjunction, Aramia argues that ***Freiburger v. Texas Co.***, 216 Wis. 546, 257 N.W. 592 (1934), requires the

damages to be limited to that notice period. However, ***Sonotone*** holds only that when notice is given an insufficient length of time before the termination date, the contract will not terminate until a sufficient notice period has passed. ***Sonotone***, 17 Wis.2d at 585-86, 117 N.W.2d at 595. ***Sonotone*** involved a contract provision allowing for termination of a manager upon thirty days' notice should the manager fail to meet a monthly sales quota. ***Id.*** at 583, 117 N.W.2d at 593. Similarly, ***Freiburger*** holds that when a contract that is terminable "at any time" is terminated without notice, the damages are limited to the notice period. ***Freiburger***, 216 Wis. at 550, 257 N.W. at 594. The rules from ***Sonotone*** and ***Freiburger*** are dependent on contracts terminable at any time during the year. Neither case addresses whether a contract with an express "year to year" duration and requiring a "90 day notice to terminate" can be terminated at any time. Since we conclude that the contract between Aramia and the Beckers expressly provided for a year-long term, the rules from ***Sonotone*** and ***Freiburger*** do not apply. We affirm the trial court's decision to permit the jury to consider damages based on the one-year period.

2. Lodging Damages

Aramia also argues that the trial court erred by refusing to eliminate the lodging damages from the Beckers' award. Aramia's argument has two parts. First, Aramia contends that David Becker's testimony regarding the value of the one-bedroom apartment at the motel was insufficient to establish a damage claim. Second, it asserts that since the Beckers moved back into their own home upon their termination, they suffered no actual economic loss for lodging. We agree that since the Beckers were able to move back home, they were not entitled to claim damages for lodging. Thus, it is not necessary to consider Aramia's first argument regarding the sufficiency of David Becker's testimony.

The determination of the proper measure of damages is a question of law that we will review independently of the trial court. *See* ***Schorsch v. Blader***, 209 Wis.2d 401, 405, 563 N.W.2d 538, 540 (Ct. App. 1997). In breach of contract cases, damages are generally measured by the expectations of the parties. *See* ***Handicapped Children's Educ. Bd. of Sheboygan County v. Lukaszewski***, 112 Wis.2d 197, 206, 332 N.W.2d 774, 778 (1983). The nonbreaching party is entitled to compensation for any losses "necessarily flowing from the breach which are proven to a reasonable certainty and were within contemplation of the parties when the contract was made." ***Id.*** Compensation for these losses should ensure that the injured party receives the benefit of the agreement, but the party is not entitled to be placed in a better position than had no breach occurred. *See* ***Thorp Sales Corp. v. Gyuro Grading Co.***, 111 Wis.2d 431, 438, 331 N.W.2d 342, 346 (1983); ***Dehnart v. Waukesha Brewing Co.***, 21 Wis.2d 583, 595-96, 124 N.W.2d 664, 670 (1963).

We agree with Aramia that since the Beckers were able to immediately move back into their home, they suffered no economic loss and were not entitled to claim any damages for lodging. The Beckers argue that they are entitled to the benefit of their bargain and that damages for lodging would place them in the same position financially as if the contract had not been breached. We disagree. As evidenced by the contract, the bargain entitled the Beckers to a place to live at the motel. They were not entitled to rent from the apartment, nor did they receive any. In addition, there is no evidence that the Beckers had been renting their home to others while they lived at the motel. When Aramia breached the contract, the Beckers still had a place to live at no additional cost. Therefore, we reverse the trial court's decision to refuse to remove the lodging amount from the damages and remand with instructions to do so.

B. Cross-Appeal

1. Health Insurance Damages

On cross-appeal, the Beckers argue that the trial court erred by not allowing them to recover damages for health insurance. They contend that they should be allowed to recover the stipulated value of the health insurance because that was part of their bargain. When Aramia breached the contract, the Beckers were left without health insurance for the remaining eleven months of 1997 and were forced to bear the risk that had been assumed by the insurance company. We agree.

Unlike with the lodging, with the health insurance the Beckers suffered an economic loss when Aramia breached the contract. In a breach of contract case, the nonbreaching party is entitled to be compensated for any losses "necessarily flowing from the breach which are proven to a reasonable certainty and were within contemplation of the parties when the contract was made." ***Handicapped Children's***, 112 Wis.2d at 206, 332 N.W.2d at 778. The cost of the health insurance was proven to a reasonable certainty since Aramia stipulated that it cost $509.79 per month. It should have been foreseeable to both parties at the time the agreement was entered into that a breach would result in a possible loss of this health insurance coverage. Unlike with the lodging, where the Beckers were able to move back to their home, they had no other health insurance upon which to rely. The Beckers' other employment did not provide health insurance and instead of paying the monthly premium that Aramia had been paying for them, the Beckers apparently went without insurance. In doing so, the Beckers assumed the risk that the insurance company had previously assumed at the cost of $509.79 per month. Essentially, the Beckers became self-insured. To return the Beckers to the

same financial position they would have been in had the contract not been breached, they should be compensated for the cost of assuming the risk of future 1997 medical expenses. Therefore, we reverse and remand with instructions to add the stipulated value of the health insurance to the Beckers' damage award.

2. Prejudgment Interest

The Beckers also assert that they are entitled to prejudgment interest on their damages. They argue that since the amount of their wages was fixed and the value of the health insurance was fixed, both amounts were determinable to a reasonable certainty and thus appropriate for prejudgment interest. We agree.

Whether a party is entitled to prejudgment interest is a question of law that we review de novo. *See* ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis.2d 740, 776, 501 N.W.2d 788, 802 (1993). In ***City of Merrill v. Wenzel Bros.,*** the supreme court explained that prejudgment interest "is awarded where the amount of damages is determinable, either because the damages are liquidated or because there is a reasonably certain standard of measurement." ***City of Merrill v. Wenzel Bros.***, 88 Wis.2d 676, 697, 277 N.W.2d 799, 808 (1979). If the damages are liquidated or otherwise determinable by a reasonably certain standard of measurement, it enables the defendant to "avoid the accrual of interest by tendering the amount of the damages to the plaintiff." ***Beacon Bowl***, 176 Wis.2d at 777, 501 N.W.2d at 802. Even if the amount is determinable, if there is "some other factor" preventing the defendant from ascertaining how much to tender, then prejudgment interest is not appropriate. ***Merrill***, 88 Wis.2d at 697, 277 N.W.2d at 808. However, a "mere denial of liability is not a sufficient 'other factor.'" ***Id.***

The damage amounts for the lost wages and the health insurance were sufficiently determinable so that prejudgment interest is appropriate. In ***Madison Teachers Inc. v. Wisconsin Employment Relations Commission***, we awarded prejudgment interest to a teacher on the backpay she received when her school district failed to comply with an arbitration award. ***Madison Teachers Inc. v. WERC***, 115 Wis.2d 623, 626-30, 340 N.W.2d 571, 573-75 (Ct. App. 1983). We reasoned that since the teacher's rate of pay was fixed, the amount of backpay was determinable and prejudgment interest was appropriate. *See* ***id.*** at 630, 340 N.W.2d at 575. The Beckers' rate of pay and the value of the health insurance Aramia provided were similarly fixed. At the time of their termination, the Beckers received $846.86 per two-week period. Aramia stipulated that the health insurance cost $509.79 per month. Both of these amounts were fixed and determinable so that, had it wished, Aramia could have tendered the appropriate amount to avoid the accrual of interest. [1]

Aramia argues that no prejudgment interest is due because, under ***Congress Bar & Restaurant, Inc. v. Transamerica Insurance Co.***, 42 Wis.2d 56, 165 N.W.2d 409 (1969), and ***Tony Spychalla Farms, Inc., v. Hopkins Agricultural Chemical Co.***, 151 Wis.2d 431, 444 N.W.2d 743 (Ct. App. 1989), there is a genuine dispute about the amount due. However, in ***Congress Bar***, the supreme court denied a request for prejudgment interest because the damage claim had been substantially inflated. ***Congress Bar***, 42 Wis.2d at 71, 165 N.W.2d at 417; *see* ***Wyandotte Chems. Corp. v. Royal Elec. Mfg. Co.***, 66 Wis.2d 577, 586, 225 N.W.2d 648, 653 (1975). The plaintiff's claim was nearly double what it was

[1] The amount by which the Beckers mitigated their damages through other employment or unemployment compensation is not in dispute.

able to prove at trial. *See* ***Congress Bar***, 42 Wis.2d at 71, 165 N.W.2d at 417; ***Wyandotte***, 66 Wis.2d at 585, 225 N.W.2d at 653. In contrast, there is no allegation that the Beckers substantially overstated their damage claim. The amounts they requested for lost wages and health insurance were the same as were established at trial. Finally, in ***Spychalla Farms*** we held that prejudgment interest was inappropriate because there was a genuine dispute over the amount of damages throughout trial. ***Spychalla Farms***, 151 Wis.2d at 444, 444 N.W.2d at 750. ***Spychalla Farms*** was a negligence case involving damage caused to a potato crop by defective seed dust. ***Id.*** at 434-36, 444 N.W.2d at 745-46. In coming to a damage amount, the jury had to evaluate the plaintiff's fairly complicated methodology for estimating damages and then apportion liability. *See* ***id.*** at 442-43, 444 N.W.2d at 749. The Beckers' damage claims as to wages and health insurance, on the other hand, were based on fixed amounts known to both parties. Unlike with the damages to the potato crop in ***Spychalla Farms***, which could not be determined by a reasonably certain standard of measurement until the jury settled on a figure, the damages claimed by the Beckers were based on amounts sufficiently established before trial.

Aramia argues that the fact that they contest whether they are liable for damages for only ninety days or for the entire year, and whether they are liable at all for health insurance, should render prejudgment interest inappropriate. But a mere denial of liability is not sufficient to bar prejudgement interest. *See* ***Merrill***, 88 Wis.2d at 697, 277 N.W.2d at 808. Therefore, we reverse the trial court's decision denying prejudgment interest and remand so that the court can award prejudgment interest at the statutory rate for the damages for wages and health insurance. No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.