

STATE OF MICHIGAN
COURT OF APPEALS

ABC STORAGE, L.L.C.,

Plaintiff/Counterdefendant-
Appellant,

v

MARIO AUTUNNO, d/b/a M.A.
CONSTRUCTION, d/b/a MARIO AUTUNNO
CONSTRUCTION,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

January 27, 2004

No. 243138

Wayne Circuit Court

LC No. 01-105838-CK

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Plaintiff/counterdefendant (“plaintiff”) appeals by leave granted. The issues on appeal concern the trial court’s entry of final judgment following a special jury verdict. On appeal, plaintiff argues that the trial court erred when it provided the jury with an instruction on consequential damages, when it failed to provide the jury with an instruction on delay as it relates to breach of contract, and when it calculated the prejudgment interest on defendant’s award. We affirm but remand to the trial court for recalculation of prejudgment interest.

Plaintiff argues that the trial court erred when it provided a jury instruction that assumed a breach of contract by plaintiff and focused on damages and failed to provide a jury instruction on delay as it relates to breach of contract. Plaintiff also argues that the trial court’s jury instruction on consequential damages was erroneous because it did not provide sufficient direction for calculating consequential damages, it provided an improper measure of damages, and it permitted the jury to consider costs or expenses that were not incurred as a consequence of any breach by plaintiff. “A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection.” MCR 2.516(C). Although the parties discussed a delay instruction, plaintiff neither requested a delay instruction nor objected to the trial court’s decision not to provide one to the jury. When the trial court asked the parties if there were any objections to the given jury instructions, both parties specifically stated that they had no objections. The trial court also discussed the jury verdict form with the parties, and no objections were made. Therefore,

plaintiff has waived the jury instruction issues for appeal. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002); *Hilgendorf v St John Hosp and Medical Center Corp*, 245 Mich App 670, 696; 630 NW2d 356 (2001).

Finally, plaintiff argues that the trial court erred when it calculated prejudgment interest pursuant to MCL 600.6013(5) instead of MCL 600.6013(8). We agree.

The issue of prejudgment interest must be raised before the trial court in order to be preserved for appeal. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002). Plaintiff failed to object to the trial court's entry of judgment or to appear at the hearing on the motion for entry of judgment. Because plaintiff failed to raise this issue before the trial court, it is unpreserved. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), applying *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 600.6013 provides, in pertinent part:

(5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).

* * *

(8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

Defendant filed its counterclaim on May 3, 2001. On June 28, 2002, the trial court entered judgment in favor of defendant in the amount of \$368,215 pursuant to the special jury verdict. The trial court calculated prejudgment interest at the rate of twelve percent compounded annually, pursuant to MCL 600.6013(5), yielding a total interest calculation of \$51,915.80 and a judgment amount of \$420,130.80 in defendant's favor. The trial court ordered judgment in favor of plaintiff for \$95,000 and \$15,877.03 in interest pursuant to MCL 600.6013(5), for a total award of \$110,877.03. Finally, defendant's net judgment was calculated at \$309,253.77.

On July 23, 2002, the trial court entered a stipulated order of dismissal of U.S. Filter's complaint against plaintiff and defendant. On August 9, 2002, the trial court entered an order of voluntary dismissal of defendant's crossclaim against plaintiff in the U.S. Filter action. This Court has determined that the June 28, 2002, order was not a final order and that the August 9, 2002, order disposing of defendant's crossclaim against plaintiff in the U.S. Filter action was a final order.

The trial court applied the twelve percent interest rate under MCL 600.6013(5). Because the instant action did not result in a "final, nonappealable judgment as of July 1, 2002," MCL 600.6013(6) dictates that MCL 600.6013(8) applies. Therefore, the trial court erred when it applied MCL 600.6013(5). This error is plain, i.e., clear or obvious, because it resulted from the misapplication of a statute. This error affected plaintiff's substantial rights because it resulted in an interest calculation error, which would result in plaintiff overpaying prejudgment interest. Therefore, we conclude that this was a plain error that affected substantial rights. *Kern, supra*, 240 Mich App 336.

We remand this case to the trial court for recalculation of prejudgment interest at six-month intervals from May 3, 2001, which is the date defendant filed its counterclaim. The trial court is instructed to use a rate of interest "equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually" pursuant to MCL 600.6013(8).

Affirmed and remanded to the trial court for recalculation of prejudgment interest. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage