Contracts Tea no. 13 (May - July 2012)

SOUTH CAROLINA

Contractually fixed interest rate is to apply on the payment of contractual damages.

On May 16, 2012, the SC Court of Appeals decided an issue of pre-judgment and post-judgment interest. *Bickerstaff v. Prevost*, Opinion No. 4972.

Under a contractual point of view, it is notable that the decision contains the restatement of the rule that when a contract establishes an interest rate, the latter is also the rate to be applied on the payment of contractual damages. The Court of Appeals held:

> Our Courts have held that the statutory interest rate under § 34-31-20(B) is applicable only in the absence of a written agreement between the parties fixing a different rate of interest. . . . Further, if a contract has specified a lawful rate of interest to be paid after maturity, the same rate will apply on the judgment entered on the contract. (Internal citations omitted)

Settlement agreements are agreements and therefore the ordinary contractual principles apply.

In *Byrd v. Livingston*, No. 4973, the Court of Appeals affirmed the trial court's finding that an agreement to settle a lawsuit relating to a land purchase was enforceable.

Forrest Byrd ("Byrd") entered into a contract to purchase property from Judy Livingston ("Livingston") in May 2007. Two days before executing and delivering a general warranty deed, Livingston granted an easement to TIAA Timberland, II, LLC

("TIAA"). Byrd sued Livingston and TIAA on several causes of action. Before trial and after a mediation conference, Byrd, Livingston, and TIAA signed an Agreement in Principle, which was to be followed by a detailed Settlement Agreement, which was never signed. Livingston and TIAA filed a motion to enforce the Agreement in Principle. Byrd alleged that he was not bound by the agreement[1] because his son – who became the owner of part of the property ten months after Byrd had filed his complaint against Livingston and TIAA – was a necessary party to the agreement, instead he was not bound by the agreement, not having signed it. The trial court found that the agreement was enforceable against Byrd, Livingston, and TIAA but not against Byrd's son.[2] Byrd appealed.

The Court of Appeals agreed with the trial court that the agreement was not enforceable as to Byrd's son and was enforceable as to Byrd. Indeed, "the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement."

The Court of Appeals restates settled principles of contract law that are worth repeating:

(1) "In South Carolina jurisprudence, settlement agreements are viewed as contracts." (2) "Enforcement of the terms of a settlement agreement is a matter of contract law." (3) "A release agreement is a contract and contract principles of law

[1] Byrd's position is that his son was intended to be a necessary party to a final agreement, and because his son did not sign the Settlement Agreement, he himself is not bound by the Agreement.

[2] The court also found that the subsequent conduct of the parties and attorneys, rather than demonstrating, as alleged by Byrd, that the parties wanted the son to be a necessary party of the agreement, established that "the parties had a meeting of the minds and intended to be bound by the Agreement."

should be used to determine what the parties intended." (4) "The 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. ... The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended."

Here, held the Court of Appeals, " we find no error with the [trial] court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement."

New York

Electronic signature in affirmations.

In *Martin v. Portexit Corp.*, the First Department had to decide whether a physician's affirmation containing an electronic signature complied with Civil Practice Law and Rule (CPLR) 2106. On June 21, 2012, the First Dept -- in clear conflict with the Second Dept -- held that it does.

In a no-fault case, the defendant presented two physicians' electronically signed affirmations as a basis for a summary judgment. The plaintiff contended that the affirmations were inadmissible because not compliant with the requirements of

CPLR 2106.[3] The trial court agreed with the plaintiff. The defendant appealed.

The First Department held that an electronic signature complied with the CPLR 2106 because of the provision §304(2) of the State Technology Law:

> [*U]nless specifically provided otherwise by law*, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand. [emphasis added]

The Court noted that the CPLR 2106 "does not specifically provide that an electronic signature may not be used and that the signature may only be affixed by hand." In addition pursuant to State Technology Law §306, an electronic record or signature may be admitted into evidence in any legal proceeding where the CPLR applies.

Recalling its own precedent *Naldi v Grunberg* (October 5, 2010)[4] dealing with the term "writing" and "subscribed" in the General Obligations Law § 5-703 the Court reasoned that the same principle of equivalence of physical signature-electronic signature should apply to the term "subscribed" used in CPLR 2106.

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[3] Rule 2106. Affirmation of truth of statement by attorney, physician, osteopath or dentist. The statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

[4] 80 AD3d at 12. In *Naldi* the First Dept held that "the Legislature appear[s] to have chosen to incorporate the substantive terms of E-SIGN (Electronic Signatures in Global and National Commerce Act, 15 USC § 7001 *et seq.*) into New York state law" and that therefore "E-SIGN'S requirement that an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper" is New York law. The court held therefore that the terms "writing" and "subscribed" in General Obligations Law § 5-703 should be construed to include, respectively, electronic communications and signatures.

The Second Department -- on which the plaintiff had relied to oppose the summary judgment motion -- had held otherwise[5].

Is there a private right of action according to the deceptive trade practice pursuant §395-a General Business Law?

On July 10, 2012, in *Schlessinger v. Valspar Corp*, the Second Circuit certified two questions to the New York Court of Appeals:

> (1) May parties seek to have contractual provisions that run contrary to General Business Law §395-a declared void as against public policy?; and (2) May plaintiffs bring suit pursuant to §349 on the theory that defendants deceived them by including a contractual provision that violates §395-a and later enforcing this agreement?

Plaintiffs brought a putative class action in the Eastern District of New York for breach of contract and under Section 349 GBL (deceptive trade practices) alleging that they purchased -- as an add-on to their purchase of furniture -- a furniture maintenance agreement ("Plan") containing a termination clause in violation of New York General Business Law § 395-a. Pursuant to the Plan, defendant Valspar agreed to repair or replace the covered furniture in the event of damage. Each Plan contained a "store closure provision"[6] according to which the defendant eventually terminated the contract. Plaintiffs argued that (i) the store closure provision

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[5] In *Vista Surgical Supplies, Inc. v Travelers Ins. Co.* (50 AD3d 778 [2008]), the Second Dept. held that the reports containing the computerized, affixed or stamped facsimiles of the physician's signature failed to comply with CPLR 2106 in that there was no indication as to who placed them on the reports, or any indicia that the signatures were authorized.

[6] If the particular store location where you originally purchased your furniture ("Store") has closed, no longer carries Guardsman as a supplier, changed ownership, or has stopped selling new furniture since your purchase, Guardsman will give you a refund of the original purchase price of this Protection Plan.

violated § 395-a 31 because it allowed Valspar to terminate the Plan for a reason that does not fit into § 395-a's 32 narrow grounds for termination; (ii) by inserting the store closure provision in the Plan, defendant violated General Business Law § 349, prohibiting deceptive business practices.

Defendant moved to dismiss the complaint for failure to state a claim, arguing that (i) § 395-a -- which specifically provides the Attorney General the right to bring suit -- does not provide for a private cause of action; (ii) also the contract action should be dismissed being based on § 395-a. The EDNY granted the defendant's motion and dismissed the complaint. Plaintiffs appealed.

The Second Circuit reformulated the issues posed by the case by asking whether § 395-a does grant a private cause of action (or anyway whether there is an implied private right of action) and whether a §349 action can be brought when the deceit would consist of inserting a clause allegedly contrary to the law and then of enforcing this clause.

The Second Circuit held that on both points the New York Court of Appeals should give guidance. Hence the court certified the two questions.

When a demand is necessary before a contract claim can accrue, contract statute of limitations starts when right to make the demand arises – and not when demand for payment is made.

In *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 18 N.Y.3d 765, 944 N.Y.S.2d 742 (March 29, 2012), the New York Court of Appeals, ruling 4-3, affirmed a lower court decision and held that the claims of American Zurich Insurance Company ("Zurich") against Hahn Automotive Warehouse ("Hahn") were

barred by the New York's six-year contracts statute of limitations.[7]

CPLR 206(a) provides that when a demand is necessary for a contract claim to accrue, time starts "when the right to make the demand is complete".

These are the facts in short. To cover various potential liabilities of Hahn arising out of its auto parts operations, Hahn had four categories of policies with Zurich. The premiums contemplated some "retrospective" calculations (i.e., calculations based on certain facts and invoiced at a later time.) The issue here was that Zurich invoiced Hahn many years later the calculation facts have acted.

Unlike the dissent, the majority of the court found that the accrual of the claims occurred when the insurer's right to make the demand was ripe, and not when an actual demand was made. Therefore Zurich's action was barred by the statute of limitations. For the majority, to uphold Zurich's position would allow a defendant "to extend the statute of limitations indefinitely" merely by withholding a demand.

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[7] State Supreme Court Justice Kenneth Fisher had granted Hahn summary judgment on the statute of limitations claim. In 2011, the Appellate Division, Fourth Division affirmed in part.