

# Minutes of Proceedings

Date: March 22, 2006

In re:

WEST PAN, INC.,

Debtor

Case No. 94-43517 (AJG)  
Adv. Pro. 95-1415

WEST PAN, INC.,

Plaintiff,

- against -

MARTHA PERRY, ALVIN TRENK, PIZZA PIZZA, INC.,  
PIZZA PIZZA OF NEW JERSEY, INC., PIZZA MIA, INC.,  
TECHTRON, INC. AND PIZZA PIZZA OF NEW YORK, INC.,

Defendants

Present: Hon. Arthur J. Gonzalez  
Bankruptcy Judge

\_\_\_\_\_  
Courtroom Deputy

\_\_\_\_\_  
Court Reporter

Parties appeared telephonically

**Proceedings:**     Motion for Relief from Automatic Stay Filed By \_\_\_\_\_  
 Motion to Void Lien Held By \_\_\_\_\_  
 Motion to Dismiss Filed By \_\_\_\_\_  
 Motion for Summary Judgment Filed By \_\_\_\_\_  
 Motion to Confirm/Modify Plan \_\_\_\_\_  
 Motion to Convert to Chapter \_\_\_\_\_  
 Appearances made, arguments presented  
 Appearances made, no arguments presented  
 No appearances  
 Oral findings and conclusions made of record  
 Witnesses sworn             See attached list     Exhibits entered     See attached list  
 Pretrial \_\_\_\_\_     Status Conference \_\_\_\_\_  
 Other Rendering decision on prejudgment interest  
 Continued to \_\_\_\_\_ at \_\_\_\_\_ for \_\_\_\_\_

**Orders:** For the reasons stated on the record of the hearing held on March 22, 2006,

Relief sought in Plaintiff's motion:  
                                   Granted                                     Denied  
                                   Dismissed                                    Awarded by Default  
 Relief sought in Defendant's motion:  
                                   Granted                                     Denied  
                                   Dismissed                                    Awarded by Default  
 Judgment to enter for:  
 Plaintiff                                     Defendant                                     Applicant                                     Respondent  
 In the amount of \$ \_\_\_\_\_     Cost in the amount of \$ \_\_\_\_\_  
 Matter taken under advisement  
 Formal order or Judgment to enter  
 Confirmation/modification of plan                                     granted                                     denied  
 Other For the reasons set forth in Exhibit A hereto, prejudgment interest is awarded pursuant to Title 6, Section 2301(a) of the Delaware Code. West Pan, Inc. is directed to settle an order recalculating prejudgment interest pursuant therewith.

FOR THE COURT:  
Kathleen Farrell, Acting Clerk of Court

s/Arthur J. Gonzalez  
United States Bankruptcy Judge

3/22/06  
Date

By: Jacqueline De Pierola  
Deputy

## EXHIBIT A

This opinion concerns whether prejudgment interest should be granted on damages awarded under a prior decision of this Court. In the Memorandum Decision, After Trial, Regarding Joint Venture Between West Pan, Inc. and Techtron, Inc., dated August 22, 2003 (the “Memorandum Decision”), the Court ruled that one of the defendants, Techtron, Inc. (“Techtron”), must provide the plaintiff, West Pan, Inc. (“WP”) with an accounting for profits for Techtron’s fiduciary breach and secret profit of \$100,000 related to the failure to distribute the Sale Proceeds<sup>1</sup> of the 6/1/92 Transfer. (See Mem. Decision, Section V.) The Memorandum Decision reserved consideration on the issue of prejudgment interest for a separate hearing. (See Mem. Decision, Section V.) In a letter dated February 22, 2006, counsel to WP indicated that the parties had previously briefed the issue of prejudgment interest. Thereafter, none of the parties requested to schedule a hearing on the issue. The Court is therefore issuing this opinion without conducting a separate hearing.

The parties’ pleadings come to opposite conclusions as to whether prejudgment interest should be awarded by this Court. In West Pan’s Brief in Support of Punitive Damages and Regarding Post-Judgment Interest, dated November 22, 2004 (the “Brief in Support”), counsel to WP states that the Second Circuit follows New York law when determining whether to award prejudgment interest in a federal case. In the Brief in Opposition to Punitive Damages and Pre-Judgment Interest, dated February 24, 2005 (the “Opposition Brief”), counsel to Techtron asserts that the Court must look to Delaware law, which was applied by the Court in

determining Techtron’s liability for breach of fiduciary duty. (See Mem. Decision, Section IV(B)(4)(a).)

The Court agrees with Techtron that Delaware law must be applied on the issue of prejudgment interest. While WP cites to several Second Circuit cases to support the application of New York law, each case cited specifically states that the use of New York law in determining prejudgment interest was appropriate under the particular circumstances of that case. See *North River Ins. Co. v. Ace American Reinsurance Co.*, 361 F.3d 134, 142 (2d Cir. 2004) (stating that “Section 5001 governs prejudgment interest in this case.”) (internal citations omitted); *Terwilliger v. Terwilliger*, 206 F.3d 240, 249 (2d Cir. 2000) (in a diversity case involving a New York corporation in which a choice of law provision for New York was present, the court stated that “[t]he award of prejudgment interest is a substantive issue governed here by New York law.”) (internal citations omitted); *Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 90 (2d Cir. 1998) (“[F]ederal law does not apply to the calculation of prejudgment interest on supplemental state law claims, such as the breach of implied contract claim under New York law at issue in this appeal . . . The district court therefore erred in applying federal principles governing prejudgment interest.”) (internal citations omitted); *Myheal Technologies, Inc. v. Fonar Corp.*, No. 95-7779, 1996 U.S. App. LEXIS 2912, at \*4 (2d Cir. 1996) (stating that New York law “indisputably applies in this case.”)<sup>2</sup> These cases can easily be distinguished from the situation at hand, which involves a Delaware choice of law

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meaning given them in the Memorandum Decision.

<sup>2</sup> Counsel to WP cites to *Myheal Technologies, Inc. v. Fonar Corp.*, 100 F.3d 944 (2d Cir. 1996). This citation, however, is to a decision without published opinion. The reported full-text format appears at 1996 U.S. App. LEXIS 2912.

provision to which this Court referred in determining the defendant's underlying liability.

In applying the choice of law rules of the forum state, New York, relating to prejudgment interest, the Second Circuit has held that it will look to the state law that was applied in making a substantive decision. *See Schwimmer v. Allstate Insurance Co.*, 176 F.3d 648, 650 (2d Cir. 1999) (“New York’s choice of law rules require that determination of contract disputes be governed generally by the laws of the state with the most significant contacts to the contract . . . Allstate, however, waived this argument by consenting to the application of New York law to the determination of liability in this case. Under New York choice of law rules, the law of the jurisdiction that determines liability governs the award of pre-judgment interest.”) (internal citations omitted); *Entron, Inc. v. Affiliated FM Insurance Co.*, 749 F.2d 127, 131 (2d Cir. 1984) (“The first question for decision is whether the law of New York, the forum state, or the law of New Jersey, which governed the determination of liability, applies to this issue. A federal court sitting in a diversity case is bound to apply the choice of law rules of the forum state. We agree with Judge Glasser’s determination that under New York choice of law principles, the allowance of prejudgment interest is controlled by the law of New Jersey, whose law determined liability on the main claim.”); *Patch v. Stanley Works (Stanley Chemical Co. Div.)*, 448 F.2d 483, 494 n.18 (2d Cir. 1971) (“This conclusion would also be reached under a consistent line of decisions in the courts of New York and in this court applying New York conflicts law, which hold that the allowance of pre-judgment interest is controlled by the rule of the jurisdiction whose law determines liability, whether this works for or against a New York plaintiff.”) (internal citations omitted); *Pereira v. Marshall & Sterling, Inc. (In re Payroll Express Corp.)*, Adv. No. 98-8405, 2005 WL 378932, at \*2 (Bankr.

S.D.N.Y. July 28, 2005); *see also* ALI RESTATEMENT OF CONFLICTS LAWS 2d, §171(c)

(“The law selected by application of the rule of § 145 determines whether the plaintiff can recover interest and, if so, at what rate for a period prior to the rendition of judgment as part of the damages for a tort.”).

Even if the Court were to look at the choice of law rules of the transferor court as opposed to the choice of law rules of the forum court, it is important to note that there is no actual conflict between the relevant choice of law rules of New York and New Jersey. *See Ferens v. John Deere Co.*, 494 U.S. 516, 519 (in referring to transfers under 28 U.S.C. § 1404(a), stating that “the transferee court must follow the choice-of-law rules that prevailed in the transferor court.”); *see also In re Finance One Public Company, Limited v. Lehman Brothers Special Financing, Inc.*, 414 F.3d 325, 333 (2d Cir. 2005). This is because when determining pre-judgment interest, the choice of law rules of New Jersey also look to the law that was applied in the initial determination of liability. *See Drapier v. Airco, Inc.*, 580 F.2d 91, 98 (3d Cir. 1978) (“The court goes on to state that the majority view is that the state whose law governs the substantive legal questions also governs the prejudgment interest issue. Restatement (2d) of Conflict of Laws (1971) § 171, comment c, specifically supports this result as do a number of cases from outside New Jersey. No New Jersey cases were cited. Thus, the Supreme Court of New Jersey determined that, by the majority view, damages generally and prejudgment interest specifically are a matter of substance insofar as conflict of laws principles are concerned. The court gave no indication that New Jersey's law was otherwise and, indeed, implied that New Jersey would follow this rule. We have found no subsequent cases that indicate a change of view.”) (citing *Busik v. Levine*, 307 A.2d 571, 580 (1973)); *see also*

*Marinelli v. K-Mart Corp.*, 318 N.J. Super. 554, 567 (N.J. Super. Ct. App. Div. 1999).

The Incorporation & Shareholders Agreement entered into on February 21, 1991 by WP and Techtron, among others (the “I&S Agreement”) contained a “Governing Law” provision stating that the I&S Agreement “shall be construed and enforced in accordance with the laws of the State of Delaware.” (Mem. Decision, Section IV(B)(1).) In the Memorandum Decision, the Court cites to this choice of law provision when applying Delaware law in its discussion relating to the fiduciary duties of joint venturers. (See Mem. Decision, Section IV(B)(4)(a)) (citing to Section 12.5 of the I&S Agreement). Through this governing law provision, the parties to this action essentially consented to the application of Delaware law with regard to the determination of liability, and there is no dispute that it was Delaware law that was applied in making such determination.

While the Court agrees with counsel to Techtron that Delaware law must be applied on the issue of prejudgment interest, the Court disagrees with counsel’s application of such law. Techtron cites to Title 6, Section 2301(d) of the Delaware Code as authority for the position that prejudgment interest cannot be awarded in this matter. Section 2301(d) states that “In any tort action for compensatory damages in the Superior Court or the Court of Common Pleas seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.” 6 Del. C. § 2301(d). Techtron argues that because WP failed to provide a written settlement demand in an

amount less than the amount of damages, WP failed to comply with Section 2301(d) and therefore cannot collect prejudgment interest. Techtron does not cite case law to support its position that Section 2301(d) applies to a case involving the breach of a fiduciary duty.

The Court finds that Section 2301(d), which specifically applies to “bodily injuries, death or property damage” is inapplicable to the case at hand. The breach of fiduciary duty is more akin to a breach of contract action in which a liquidated amount of damages exists. Indeed, there is no death, bodily injury or property damage evident in this set of circumstances. The damages awarded for Techtron’s breach of fiduciary duty and secret profit of \$100,000 related to the failure to distribute the Sale Proceeds of the 6/1/92 Transfer. (See Mem. Decision, Section IV(B)(4)(a)(i).) Furthermore, the Court has been unable to locate a single case applying Section 2301(d) in a business context.

Additionally, the legislative history of the statute appears to suggest that this is not the kind of case for which Section 2301(d) was enacted, stating that “[c]urrent law generally limits pre-judgment interest only to cases involving contract disputes or liquidated amounts, providing no financial incentive for insurance companies or wrongdoers to make prompt, good faith offers of settlement to plaintiffs. This Bill amends the Delaware Interest Statute . . . to provide for pre-judgment interest on awards of damages in tort cases where a plaintiff has made a demand to settle prior to trial or hearing which was less than the amount of damages ultimately obtained, calculated at the legal rate commencing from the date of injury. This Bill promotes the earlier settlement of claims, including prior to the filing of suit, by encouraging fair offers from defendants sooner, with the effect of reducing Court congestion.” DE B. Summ., 2000 Reg. Sess. S.B. 310. Section 2301(d) appears to have been intended to extend the right to pre-

judgment interest to personal and property injury torts under certain circumstances, where previously pre-judgment interest was permitted only for liquidated amounts or contract disputes.

As stated earlier, this case involves a liquidated damages judgment in a business context for Techtron's fiduciary breach and secret profit of \$100,000 that arose from the failure to distribute the Sale Proceeds of the 6/1/92 Transfer. Thus, Section 2301(d) is inapplicable. Furthermore, the purpose of pre-judgment interest is to promote fairness by compensating a plaintiff for the losses resulting from the inability to use the money awarded during the period in which it was not available. *Trans World Airlines, Inc. v. Summa Corp.*, C.A. No. 1607, 1987 Del. Ch. LEXIS 373, at \*3 (Del. Ch. January 21, 1987) (citing *Felder v. Anderson, Clayton & Co.*, 159 A.2d 278, 287 (Del. Ch. 1960); *Universal City Studios, Inc. v. Francis I. DuPont & Co.*, 334 A.2d 216, 222 (Del. Supr. 1975)).

It is well settled that under Delaware law, a plaintiff is entitled to interest on money damages as a matter of right and that a court has broad discretion in awarding such interest. Additionally, it appears that Delaware courts will award prejudgment interest in cases where there has been a breach of fiduciary duty in the business context. Generally, these courts look to the legal rate of interest as a benchmark. *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 909 (Del. Ch. 1999) (in awarding the legal rate of interest on damages for breach of fiduciary duty of loyalty, stating that "Delaware law is settled that a successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues . . . Generally, the legal rate of interest has been used as the benchmark for pre-judgment interest. . . . However, this Court has broad discretion, subject to principles of fairness, in fixing the interest rate to be applied.") (quoting *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403,



409 (Del. 1988); *see also* *CFLP v. Cantor*, C.A. No. 16297, 2003 Del. LEXIS 368, at \*3 (Del. June 19, 2003) (“A case involving a breach of the duty of loyalty permits broad, discretionary, and equitable remedies. Where there is a breach of the duty of loyalty . . . potentially harsher rules come into play and the scope of recovery . . . is not to be determined narrowly because the strict imposition of penalties under Delaware law are designed to discourage disloyalty . . . Here, after balancing the equities, I conclude that CFLP is entitled to compound prejudgment interest.”); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002) (awarding compound prejudgment interest in a case involving breach of fiduciary duty); *Bomarko, Inc. v. International Telecharge, Inc.*, 794 A.2d 1161, 1190 (Del. Ch. 1999) (stating in a breach of fiduciary duty case that “Delaware law is settled that a successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues. In fixing the rate of interest, I have broad discretion, subject to principles of fairness.”).

The legal rate of interest under Delaware law is set out in Title 6, Section 2301(a) of the Delaware Code, which states that “[a]ny lender may charge and collect from a borrower interest at any rate agreed upon in writing not in excess of 5% over the Federal Reserve discount rate including any surcharge thereon, and judgments entered after May 13, 1980, shall bear interest at the rate in the contract sued upon. Where there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due . . .” 6 Del. C. § 2301(a).

Based upon the aforementioned, the Court finds that the legal rate of interest under Title 6, Section 2301(a) of the Delaware Code is the appropriate interest rate to be applied in this

case. The Court will enter a minute order attaching this opinion as Exhibit A and directing WP to settle an order recalculating prejudgment interest pursuant to Title 6, Section 2301(a) of the Delaware Code.