STATE OF MINNESOTA
IN COURT OF APPEALS
A12-22

Frontier Pipeline, LLC,
Respondent,

vs.

Metropolitan Council,
Appellant.

Filed June 18, 2012
Reversed
Schellhas, Judge

Ramsey County District Court
File No. 62-CV-10-11419

James T. Martin, Gislason, Martin, Varpness, & Janes, P.A., Edina, Minnesota (for respondent)

Peter A. Hanf, Associate General Counsel, Ann K. Bloodhart, Associate General Counsel, Metropolitan Council, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's partial-summary-judgment award, arguing that the court erred by awarding prejudgment interest on its contract retainage in the absence of (1) a provision in the parties' contract that requires appellant to pay

prejudgment interest on the retainage and (2) a judgment requiring appellant to pay the retainage to respondent. We reverse.

FACTS

Appellant Metropolitan Council entered into a contract with respondent Frontier Pipeline LLC in January 2006 for the installation of a 3.22-mile sewer pipe, construction of several forcemain access structures, and construction of a lift station to connect the sewer pipe with an existing sewer system. The contract provides for the council to pay Frontier in progress payments and that the council would retain five percent of each progress payment (retainage). This case is the second of two related cases between Frontier and the council arising out of a dispute under the contract.

Frontier commenced the first case in January 2008. In that case, Frontier did not request recovery of the retainage in its complaint; the district court denied Frontier's posttrial motion to amend its complaint to claim recovery of the retainage; and Frontier did not challenge that decision on appeal. *See Frontier Pipeline, LLC v. Metro. Council*, A10-1437 (Minn. App. July 25, 2011) (*Frontier I*). On June 10, 2008, during the pendency of *Frontier I*, Frontier applied to the council for a payment, which the council approved that month. In December 2009, also during the pendency of *Frontier I*, Frontier applied to the council for payment of the retainage. But the council refused to pay it because Frontier "had not yet complied with all the contractual provisions of the Contract, which is required prior to final payment and because there was a good faith dispute regarding [Frontier's] responsibility for [damage] in [the council's] existing sewer pipe." On appeal, the council argues that the district court erred by concluding that

the June 2008 payment application included a certification that Frontier was entitled to the retainage.

In November 2010, while *Frontier I*'s appeal before this court was pending, Frontier commenced *Frontier II*, alleging, among other things, breach of contract, and requesting recovery of the retainage with interest. On August 26, 2011, after this court rendered its decision in *Frontier I*, Frontier applied to the council for payment of the retainage. The council approved the payment application on August 30, 2011, and paid the retainage, which Frontier received on September 2, 2011. The council paid the retainage in the absence of a judgment, award, or verdict requiring it to do so.

Frontier subsequently moved for partial summary judgment in *Frontier II* to recover prejudgment interest on the retainage, noting:

> The largest bone of contention between the parties has been resolved. That is, [the council] has agreed to pay to Frontier the sum of $677,321.36 which it has previously withheld pending the final resolution of its claims against Frontier. A major legal issue, however, remains unresolved . . . Frontier is entitled to recover interest on the withheld amount . . . .

The district court granted Frontier's motion and entered final judgment on November 16, 2011, awarding Frontier $116,273.51 in prejudgment interest on the retainage and additional "statutory interest."

This appeal follows.

D E C I S I O N

Our review on appeal from summary judgment includes determining "whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503,

504 (Minn. 2011). "We review de novo the determination that there is a contractual, statutory, or remedial basis for damages." *Soderbeck v. Ctr. for Diagnostic Imaging, Inc.*, 793 N.W.2d 437, 440 (Minn. App. 2010). The prejudgment-interest statute provides the method for calculating prejudgment interest for preverdict, preaward, or prereport interest "[e]xcept as otherwise provided by contract or allowed by law." Minn. Stat. § 549.09, subd. 1(b) (2010). "By making an exception for prejudgment interest 'allowed by law,' the legislature supplemented, but did not replace, the existing common law allowing prejudgment interest." *Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn. App. 1998).

Prejudgment Interest by Contract

"The general rule is that liability for interest is purely a matter of contract, requiring a promise to pay it." *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn. App. 1984) (citing *Tate v. Ballard*, 243 Minn. 353, 360, 68 N.W.2d 261, 266 (1954)). The council argues that prejudgment interest on the retainage is unavailable to Frontier under the parties' contract because the contract does not expressly require the council to pay it. Frontier counters that it is entitled to prejudgment interest "[b]y [c]ontract" based upon its "claim of breach of contract." But Frontier cites no authority for the proposition that a party's breach-of-contract claim warrants reading into a contract a provision requiring a party to pay prejudgment interest. And the law requires that a promise to pay interest be "express." *Soderbeck*, 793 N.W.2d at 440 (quotation omitted). We therefore agree with the council that prejudgment interest on the retainage is unavailable to Frontier under the parties' contract because the contract does not expressly require the council to pay it.

Prejudgment Interest as Damages

Courts may award "[i]nterest [as damages] in the case of default . . . for 'failing to pay money when due' to compensate for 'the value of the use of the money' during the delay." *Id.* at 441 (quoting *Lund v. Larsen*, 222 Minn. 438, 441, 24 N.W.2d 827, 829 (1946) (noting that such interest is "interest as damages")). The council argues that the district court erred by granting Frontier prejudgment interest on the retainage because the council paid the retainage to Frontier in the absence of a judgment requiring the council to do so. The council's argument is persuasive.

"[P]rejudgment interest is inappropriate . . . under . . . Minn. Stat. § 549.09, subd. 1, [when] there was no judgment or award that could serve as the basis for a prejudgment interest award." *Warrick v. Graffiti, Inc.*, 550 N.W.2d 303, 310 (Minn. App. 1996), *review denied* (Minn. Sept. 20, 1996); *see* Minn. Stat. § 549.09, subd. 1(a) (2010) (predicating an award of prejudgment interest that is *post*verdict, *post*award, or *post*report on the prior existence of "a judgment or award . . . for the recovery of money"); Minn. Stat. § 549.09, subd. 1(b), (c)(1)–(2) (2010) (predicating an award of prejudgment interest that is *pre*verdict, *pre*award, or *pre*report on the prior existence of a "judgment or award" by predicating the determination of the proper subdivision 1(c) interest rate on a prior "judgment or award"); *see also Great W. Cas. Co. v. Barnick*, 529 N.W.2d 504, 506 (Minn. App. 1995) (construing an insurance policy and agreeing that "the term 'prejudgment interest' presupposes that there was a judgment"). Similarly, a verdict is a prerequisite for a prejudgment-interest award in both *post*verdict and *pre*verdict circumstances because both types of interest cannot be calculated in the absence of a

verdict. *See* Minn. Stat. § 549.09, subd. 1(a) (providing that prejudgment-postverdict interest does not begin to accrue until "the time of the verdict"); *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988) ("[Preverdict] 'interest' cannot be calculated until the amount on which interest is allowed has been fixed by verdict.").

In this case, there was no judgment, award, or verdict for the retainage on which prejudgment or preverdict interest could be calculated because the district court in *Frontier I* rejected Frontier's posttrial motion to amend its complaint to include a claim for retainage, and Frontier did not challenge that decision on appeal. Consequently, when the council paid the retainage to Frontier, it did so in the absence of a judgment, award, or verdict requiring it to do so.

Frontier argues that the district court's prejudgment-interest award on the retainage was not erroneous because the retainage was liquidated as of June 10, 2008, and because the prejudgment-interest statute permits prejudgment interest even if the amount on which interest is requested is "not readily ascertainable." But Frontier's argument is unpersuasive in light of the absence of a judgment, award, or verdict on which prejudgment interest could be calculated.

Frontier also argues that, in an August 26, 2011 letter to Frontier, the council waived its right to argue that the existence of a judgment, award, or verdict is necessary for the district court to award prejudgment or preverdict interest. We disagree. "[W]aiver is the intentional relinquishment of a known right." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009) (quotations omitted). A judgment, award, or verdict on which interest can be calculated is not a right but rather is a legal prerequisite.

See Minn. Stat. § 549.09, subd. 1(a)−(b), (c)(1)–(2) (regarding the necessity of a judgment or an award); *Warrick*, 550 N.W.2d at 310 (regarding the necessity of a judgment or an award);; *Lienhard*, 431 N.W.2d at 865 (regarding the necessity of a verdict).

Again relying on that August 26 letter, Frontier argues that the council is equitably estopped from raising the absence of a judgment, award, or verdict in its opposition to the prejudgment-interest award because the council "promised that Frontier's acceptance of the [retainage] would not be relied upon by [the council] in challenging Frontier's pre-judgment interest claim." Frontier argues that "Frontier would not have accepted the [retainage] payment . . . if [the council] had indicated that it would be later arguing against liability for interest precisely on account of the absence of a judgment." Frontier's argument is unpersuasive.

A party seeking to equitably estop a governmental entity from engaging in an action bears a "heavy burden of proof" to prove that: (1) the authorized government agent engaged in "wrongful conduct"; (2) the party "reasonably rel[ied] on the wrongful conduct"; (3) the party "incur[red] a unique expenditure in reliance on the wrongful conduct"; and (4) the balance of the equities favors estoppel. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011) (quotation omitted). Here, the council's August 26 letter to Frontier states:

> I understand that the Council agrees that it will now pay Frontier [the retainage] with the issue of interest to be determined by the Court. I further understand that you agree that the submitting of the new Claim for Payment as of August 24, 2011 is without prejudice to Frontier in respect to

> the issue of what the accrual date for the computation of interest might be.

The language in the letter does not include the council's promise not to raise the absence of a judgment, award, or verdict in its opposition to a prejudgment-interest award. Under Frontier's broken-promise theory, the evidence is insufficient to prove that the council engaged in "wrongful conduct," that Frontier reasonably relied on the alleged promise, that Frontier "incur[red] a unique expenditure," or that the balance of the equities favors estoppel. *See id*.

The council submits additional arguments that the district court erroneously granted prejudgment interest on the retainage to Frontier because: (1) the council paid the retainage when it was due and Frontier did not make a claim for the retainage on June 10, 2008; (2) a prejudgment-interest award is time-barred under section 549.09, subdivision 1(b); and (3) the payment of prejudgment interest should not be implied in equity. We do not reach these arguments because we conclude, on other grounds, that the district court's prejudgment-interest award was erroneous.

Reversed.