CASE NO. 22-0892

IN THE NEBRASKA COURT OF APPEALS

ADAM R. HERINK
Appellee and Cross-Appellant,

v.

BLUESTEM ENERGY SOLUTIONS, LLC
Appellant and Cross-Appellee,

Appeal from the District Court of Douglas County, Nebraska
Honorable Timothy P. Burns

REPLY BRIEF OF APPELLANT BLUESTEM ENERGY SOLUTIONS, LLC IN SUPPORT OF APPEAL AND ANSWER BRIEF ON CROSS APPEAL

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REPLY BRIEF

I. STATEMENT OF THE BASIS OF JURISDICTION

The parties agree that this Court has jurisdiction over this appeal.

II. STATEMENT OF THE CASE

Appellant Bluestem Energy Solutions, LLC ("Bluestem") incorporates the Statement of the Case from its opening brief.

PROPOSITIONS OF LAW

Bluestem incorporates the propositions of law set forth in its opening brief.

STATEMENT OF FACTS

Bluestem takes issue with many of the facts set forth in the opening brief filed by Appellee Adam Herink ("Herink"). Although contained in a section titled "Statement of Facts," the facts are presented in an argumentative fashion and, therefore, are best addressed in connection with the Argument section below.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING BLUESTEM'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF HERINK'S CASE IN CHIEF AND AT THE CLOSE OF ALL OF THE EVIDENCE.

Herink's answering brief acknowledges the fact that the parties' agreed-upon valuation methodology allows Bluestem's Manager to use his "sole discretion" in connection with determining the value of Herink's ownership interest. Herink does not, and cannot, point to any evidence showing that the Manager's discretion was incorporated into

the values that Herink and his expert presented to the jury. Since Herink failed to produce evidence incorporating this critical component of the agreed-upon valuation methodology, Bluestem's motion for directed verdict should have been granted. In addition, since Bluestem's counterclaim was the mirror opposite of Herink's claim, the district court also erred in granting summary judgment in favor of Herink dismissing the counterclaim.

Herink concedes—as he must—that the operative language in Bluestem's Operating Agreement for determining the value to be paid for Herink's ownership interest in Bluestem upon termination of his employment includes the "sole discretion" of Bluestem's Manager—Jon Crane. (Herink's Brief at pg. 7, paragraph 18.) As he did in the district court, however, Herink largely ignores that component of the valuation methodology and focuses on the "fair market value" and "commercially reasonable" components of the agreed-upon methodology. In response to Bluestem's argument that this is fatal to Herink's claim, Herink asserts that "there was abundant evidence on [the discretionary judgment] issue." (Herink's Brief at pg. 11, paragraph 38.) He then sets forth a summary of Herink's testimony regarding Bluestem's business and efforts to grow the company that **could have been** considered by the Manager in exercising his discretion. (*Id.*) What Herink ignores is the discretion that the Manager **actually** exercised and the fact that the Manager's discretion was not incorporated into the valuations Herink and his expert asked the jury to adopt.

The Manager, in his discretion, could and did consider that Bluestem was struggling at the time that Mr. Herink's employment was terminated. Jon Crane testified that at a meeting with Herink in late November 2019 (mistakenly stated as 2017 in Bluestem's opening brief), they discussed efforts to "get the horse out of the ditch." (438:2-9.) In Crane's view, Bluestem had lost momentum, had been losing people and they had to do something or the future for Bluestem was not very bright. (*Id.*).

Herink only begrudgingly acknowledges that several Bluestem employees whom he called as witnesses testified that Bluestem struggled "at times." (Herink Brief at pg. 13, paragraph 42.) The evidence of Bluestem's "struggles" was actually more pointed. Matt Robinette—who oversaw development activities for Bluestem—testified that 2019 and the early part of 2020 were years of "struggle." (357:7-20; 373:12-25) Will Crane—Jon Crane's son who tried without any success to expand Bluestem's business into Colorado and other states—testified that Bluestem didn't make any sales in geographic areas outside Nebraska from 2016 through the date of Herink's termination. (390:17-21). The reason was that Bluestem's pricing was not competitive: "We were too expensive in almost every instance." (390:22-391:5).

The Manager, in his discretion, could and did ask Bluestem's Director of Finance Jamie Crane to make a calculation of value using what Herink and his expert concede is a commercially reasonable valuation method, i.e. a discounted cash flow method. Herink tried to undermine Jamie Crane's qualifications to make such an analysis. He argues that "Jamie Crane was not adept at valuation of companies and had not done so previously." (Herink Brief at pg. 10, paragraph 34.) Herink cites no evidence in the record to support this contention. In fact, the evidence is undisputed that Jamie Crane performed numerous discounted cash flow valuations in the past, passed the CPA examination and was intimately familiar with projections—the same projections that Herink's expert relied upon in his valuation analysis. (587:21-588:10; 591:8-16).

The Manager, in his discretion, could and did direct Jamie Crane to include in his revenue projections projects that the Manager determined were anticipated to generate future revenues for Bluestem, including two projects that had not even begun construction. Parenthetically, it should be noted that the chart contained on page 8 of Bluestem's opening brief erroneously included the Burt County project that was not scheduled to be operational until September 2020

and should have included the Hastings project (at 1.7 Megawatts and placed in service on 12/29/16) instead.

The Manager, in his discretion, could and did add approximately $50,000 to the value of Herink's membership interest because he felt bad about having to terminate Herink. (448:7-21).

Herink asserts that the Manager somehow abdicated to the jury the Manager's role in determining the value to be paid to Herink. He bases that assertion on a so-called "admission" by Jon Crane that the jury has to decide "how much Bluestem has to pay Mr. Herink." (Herink's Brief at pg. 15, paragraph 55.) The suggestion that this so-called "admission" changed the agreed-upon valuation method is meritless. Indeed, the district court specifically instructed the jury to determine whether Bluestem offered to pay Herink an amount for his membership interest consistent with the agreed-upon valuation method, including specifically the sole discretion component. (T340). Herink did not object to that instruction. (711:22-24).

Finally, Herink points to his expert Jon Agogliati's valuation and claims that his expert's valuation was performed in a commercially reasonable manner while the valuation determined by Bluestem's Manager was not. Upon close examination, however, the valuation calculations made by Jamie Crane and Agogliati have much in common. Both Jamie Crane and Agogliati incorporated a discounted cash flow method into their valuations. Both Jamie Crane and Agogliati used the **same** revenue projections prepared by Jamie Crane for the **same** projects that were either completed or anticipated to be completed in the near future. In fact, neither Agogliati nor Herink pointed to a single **actual** project—completed or contemplated—that should have been included in Jamie Crane's valuation and none were used in Agogliati's valuations. Instead, Agogliati incorporated a future revenue component based on what he projected would be Bluestem's future growth. That fictitious revenue comprises the majority of the differences in the valuation numbers derived by Agogliati and Jamie Crane. (550:21-13).

Does the sole discretion of the Manager under the agreed-upon valuation methodology include the right to say what specific projects should be included in the valuation?

Does the sole discretion of the Manager under the agreed-upon valuation methodology include the right to say that future revenues based on projects that were not likely to come to fruition as of the valuation date should be excluded from the valuation?

Because the answers to both of the above questions are "yes," the district court erred in failing to direct a verdict in favor of Bluestem.

The fact that Herink's hired expert came up with a higher valuation using what he claims were commercially reasonable methods does not change this result. As Herink's expert conceded, "two different valuations even done by the same person can be done in a commercially reasonable manner and still be millions of dollars apart." (549:1-14).

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF HERINK ON BLUESTEM'S COUNTERCLAIM.

The parties and the district court understood going into the trial that Bluestem's counterclaim was the flip side of Herink's claim. As the district court stated after the trial: "I think we all agree that [Bluestem's] counterclaim has been taken care of by the jury verdict." (752:10-17.) Accordingly, once the jury concluded that Herink had prevailed on his claim it necessarily followed that the counterclaim should be dismissed. Although procedurally that should probably have been accomplished through a motion to alter or amend the judgment, Herink chose to file a motion for summary judgment which Herink's counsel acknowledged was "a way to get rid of that declaratory judgment action which I think goes away as a matter of law based on what's already happened. . .." (748:10-12).

Because there were conceptually two judgments, Bluestem assigned as a second error on appeal that the district court erred in granting summary judgment on the counterclaim. Herink argues in passing in his answering brief that Bluestem has waived this assignment of error by not including argument on that assignment in its opening brief. But that is not accurate. Bluestem specifically discussed the error in its Summary of Argument and informed the Court and the appellees that for the same reasons as the direct verdict should have been granted the motion for summary judgment was improper. Bluestem's argument in support of its first assigned error, i.e. the district court's failure to direct a verdict in its favor, is identical to the argument in support of the second assigned error. The argument made in Bluestem's opening brief is equally applicable to both assigned errors and there is no need to repeat the same argument in this case.

CONCLUSION

For the reasons set forth above and in Bluestem's opening brief, Bluestem respectfully requests that the Court reverse the judgment of the district court with instructions to enter judgment in favor of Bluestem.

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APPELLANT BLUESTEM ENERGY SOLUTIONS, LLC INC ANSWER BRIEF ON CROSS APPEAL

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ANSWER BRIEF ON CROSS-APPEAL

STATEMENT OF JURISDICTION

Bluestem incorporates by reference its Statement of Jurisdiction from its brief on appeal and reply brief.

STATEMENT OF THE CASE

Bluestem incorporates its statement of the case from its briefs on appeal. As it relates to this cross-appeal, the issues decided by the district court were: (1) whether pre-judgment and post-judgment interest should be awarded; and (2) if so, in what amount.

The district court awarded prejudgment interest in the amount of $79,731.84 (T409), calculated as follows from April 25, 2020 to December 1, 2022 (951 days) multiplied by $83.84/day, which is based upon the contract rate of 1.53%, shown by Exhibits 63, 125, and 166 (E63, p. 17-18; E125, p. 2; E166, p. 2). The district court also awarded post-judgment interest at the contract rate of 1.53% reflected in the same exhibits.

STANDARD OF REVIEW

"Awards of prejudgment interest are reviewed de novo." *Echo Group, Inc. v. Tradesman International*, 312 Neb. 729, 744 (2022).

On questions of post judgment intertest, "statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court." *Fry v. Fry*, 281 Neb. 1001, 1004 (2011).

It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *Weyh v. Gottsch*, 303 Neb. 280, 313 (2019).

PROPOSITIONS OF LAW

1. For prejudgment interest, "*Unless otherwise agreed,* interest shall be allowed at the rate of 12% per annum on money due on an instrument in writing . . ." Neb. Rev. Stat. § 45-104 (emphasis added).

2. "Where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract." *Lease Northwest Inc. v. Davis*, 224 Neb. 617, 625 (1987)(disapproved on other grounds, *Weyh v. Gottsch*, 303 Neb. 280 (2019)); *First National Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533.

3. "[U]nder certain circumstances prejudgment interest is allowed. In the instant case, the instrument sued on is an interest-bearing document. Because the parties have entered into an interest-bearing agreement, the award for a successful suit based on that agreement is the face amount of the instrument plus interest thereon as agreed to." *Skiles v. Security Sate Bank*, 1 Neb. App. 360, 371 (1992).

4, When the parties have "otherwise agreed" on a rate of interest in their contract, that rate of interest supersedes the statutory rate. *Prudential Ins. Co. of America v. Greco*, 211 Neb. 342, 347 (1982).

5. Damages in a breach of contract case are intended to make the injured party whole but not more than whole. *Dietzel Enterprises, Inc. v. J.A. Wever Const., L.L.C.,* 312 Neb. 426, 453 (2022).

6. The statutory post-judgment interest rate shall not apply to actions founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section. Neb. Rev. Stat. § 45-103(2); *see Aurora Co-op Elevator Co. v. Larson*, 204 Neb. 755, 759 (1979).

7. The statutory rate of post judgment interest does not apply to: "(2) an action founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section." Neb. Rev. Stat. § 45-103.

STATEMENT OF FACTS

I. COSTS

Bluestem did not dispute the amount of costs to plaintiff and no error has been assigned to the Court's ruling on cross-appeal.

II. PREJUDGMENT INTEREST

Herink sought prejudgment interest pursuant to Neb. Rev. Stat. § 45-104 and the rationale announced by this Court in *Weyh v. Gottsch*, 303 Neb. 280 (2019). Herink's basis for seeking prejudgment interest was exclusively upon the existence of a of an instrument in writing. (T358) Herink referenced exhibits 61-63 in support of his motion for prejudgment interest. (*Id*).

The Operating Agreement, found at exhibit 63, (E63, p. 17-18) Section 7.03(e), provides the relevant language for this cross appeal. That section provides, in relevant part:

> Purchases of Units by the Company and payment of the purchase price under this Section 7.03 may be, at the option of the Company, either (i) by payment of the entire price by cash or check (if the single sum payment option is elected by the Company), or (ii) payment by delivery of a promissory note from the Company ("Promissory Note") to the Member (or Member's estate) providing for payment in three (3) equal annual installments commencing one year

> from the occurrence of the Mandatory Operative Event or Optional Operative Event, as applicable. The Promissory Note shall bear interest on the unpaid principal balance at an interest rate per annum equal to the Applicable Federal Rate for Mid-term obligations, as published by the Internal Revenue Service for the month of the Mandatory Operative Event or Optional Operative Event, as applicable.

(E 63, p. 18). Bluestem elected the promissory note option. (E125, p. 1-2) It tendered a promissory note with the interest rate of 1.53% (*Id.*) This is the rate identified by the IRS as the Applicable Federal Rate for Mid-term obligations for the month of March 2020. (E 166, p. 2). Herink was terminated on March 26, 2020. (171:12-13).

The parties' agreement gave Bluestem the option to either pay the required consideration as a lump sum or via promissory note. (E63, p. 17-18). If Bluestem elected to pay via promissory note, the parties' agreement specified the interest rate. (*Id*). Bluestem did not have a choice under the Operating Agreement as to what interest rate to use. (*Id*).

Herink stipulates that Bluestem attempted performance under the promissory note in accordance with its terms. (206:4-20). There is no claim that Bluestem breached its obligations under the note. (*Id*). Herink claims that the price was wrong. (*Id*).

The district court used the parties' agreed-upon interest rate of 1.53% for the prejudgment interest calculation. (T409-410). The district court calculated prejudgment interest from April 25, 2020 (30 days after notice of termination pursuant to Section 4.a. of Ex 61, p. 3) through December 1, 2020. (T409-410).

III. POST-JUDGMENT INTEREST

Herink sought post judgment interest in accordance with Neb. Rev. Stat. § 45-103. The district court used the parties' agreed upon rate of interest. (T 410).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT TO CALCULATE PREJUDGMENT INTEREST USING THE PARTIES' AGREED UPON CONTRACT RATE.

The question presented in this appeal is whether the language of Neb. Rev. Stat. § 45-104 is optional or mandatory. The plain language of the statute makes clear that the statutory rate of interest applies "unless otherwise agreed." Neb. Rev. Stat. § 45-104. That same plain language does not give a purportedly aggrieved party the option to choose whether to use the statutory rate instead of the agreed-upon rate. In this case, the district court simply followed the parties' agreement and, under Neb. Rev. Stat. § 45-104, the district court did not err.

On appeal, Herink asserts that Bluestem cannot avail itself of the parties' agreement because Bluestem breached it; however, the "prior material breach" doctrine is not applicable here. First, Herink chose to sue for money damages, and in so doing, he is subject to the principle that the object of damages in a breach of contract case is to make the injured party whole, not more than whole. *Dietzel Enterprises, Inc. v. J.A. Wever Construction, L.L.C.*, 312 Neb. 426, 453 (2022). Here, making Herink whole would mean giving him the agreed-upon interest rate of 1.53% on the principal amount of the sum for his shares. The statutory rate of 12% would make Herink more than whole—he would receive a windfall.

Second, Herink does not allege or argue that Bluestem breached the promissory note it tendered or that it tendered a note with the incorrect interest rate. (206:4-20). Instead, Herink sought a money

judgment in a principal amount greater than the original principal amount tendered by Bluestem. (T 348-350; T353). In other words, Herink does not contend the interest rate was incorrect or subject to any dispute.

Under Neb. Rev. Stat. §45-104, the parties agreed on an interest rate for the value of the buyout. That rate is 1.53%. When a contract rate is established, the question is a contractual question, and the contract controls. *Lease Northwest, Inc. v. Davis,* 224 Neb. 617, 625 (1987)(disapproved on other grounds by *Weyh v. Gottsch*, 303 Neb. 280 (2019)). This Court in *Prudential Ins. Co. of America v. Greco,* 211 Neb. 342, 347 (1982) provided guidance on the interplay between a contract rate of interest and the statutory prejudgment rate. There, in response to a prevailing party's cross appeal seeking 12% - instead of the 9% in the parties' agreement – reasoned:

> [h]aving "otherwise agreed," the provisions of § 45-104 were superseded by section 34 of the lease.

Prudential Ins. Co. of America, 211 Neb. at 347. This case is no different. Bluestem and Herink superseded the statutory rate through their agreement in the Operating Agreement. If, as Herink contends, Bluestem should have tendered $2,000,000.00 upon his termination, then the $2,000,000.00 would have been subject to the same interest rate agreed upon by the parties (i.e. 1.53%). The district court's application of the contract rate to the jury's determination of value is consistent with the parties' agreement and puts Herink in the same place that he would have been had Bluestem tendered a note at the contract rate in the principal amount of $2,000,000.00. The district court was correct on its calculation of prejudgment interest and should be affirmed.

II. THE DISTRICT COURT WAS CORRECT TO CALCULATE POST JUDGMENT INTEREST USING THE PARTIES' CONTRACT RATE.

The post judgment interest statute also provides an interest rate but only if the parties have not previously agreed upon a rate. The post judgment rate in Neb. Rev. Stat. § 45-103 is tied to the bond investment yield as published by the Secretary of the United States Treasury. However, as with prejudgment interest, that rate is only applicable in the absence of an agreement.

The statute identifies the rate, but provides:

> [t]his interest rates shall not apply to:…(2) An action founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section.

Neb. Rev. Stat. § 45-103. Here, as explained above, a rate of interest has been agreed upon, and the same contract that Herink sued upon is the contract that contains the interest rate (E63, P. 17-18). Accordingly, the district court did not err when it followed Neb. Rev. Stat. § 45-103 and enforced the parties' agreement on the applicable interest rate. The district court's decision deserves to be affirmed on the post judgment interest issue.

CONCLUSION

Although Bluestem believes its appeal is meritorious and judgment should be reversed and entered in favor of Bluestem, if the denial of directed verdict (and corollary grant of summary judgment) is affirmed, then Bluestem contends the district court's determination of interest should also be affirmed.

Dated this 23rd day of March 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief contains 4013 words. The undersigned relies upon the word-count function of Microsoft Office 365 Word version 2019 applied to all text, including the cover page, headings, and signature block. The undersigned further certifies that the foregoing Brief also complies with the typeface requirements of Neb. Ct. R. App. P. § 2-103.

/s/ *William F. Hargens*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of March 2023, the foregoing was electronically filed with the Clerk of the Nebraska Supreme Court on Nebraska.gov, which sent electronic notification of such filing to the individual listed below.

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Certificate of Service

I hereby certify that on Thursday, March 23, 2023 I provided a true and correct copy of this *Reply Brief* to the following:

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