

A-22-0892

NEBRASKA SUPREME COURT / COURT of APPEALS

**Adam R. Herink
Plaintiff – Appellee & Cross-Appellant,**

v.

**Bluestem Energy Solutions, LLC
Defendant – Appellant.**

**Appeal from District Court, Douglas County, Nebraska
Hon. Timothy Burns, Judge**

Appellee’s Reply Brief On Cross-Appeal

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Statement of Jurisdiction

1. Mr. Herink offers no new comments here.

Statement of the Case

2. See Mr. Herink's Opening Brief on his cross-appeal.

Standard of Review

3. Prejudgment interest awards are reviewed de novo. *McGill Restoration, Inc. v. Lion Place Condominium Ass'n*, 309 Neb 202, 242 (2021). So are post-judgment interest awards. *Weyh v. Gottsch*, 303 Neb 280, 316 (2019).

Assignments of Errors

Error 1: The trial court erred when it determined that the rate of **prejudgment** interest should be 1.53%, and not 12% as provided by *Neb Rev Stat* §45-104.

Error 2: The trial court erred when it determined the **post-judgment** rate of interest at its erroneously established contract rate of 1.53% and not at the rate of 5.981%

Propositions of Law

4. Post-judgment interest is governed by *Neb Rev Stat* §45-103.01 (Reissue 2010). It provides that such interest begins to accrue "from the date of entry of judgment." Construing §45-103.01 and §45-104 the rule is that prejudgment interest under §45-104 ends, and post-judgment interest begins, on the date of entry of judgment. *Weyh v. Gottsch*, 303 Neb 280, 316 (2019).

5. "A judgment is the final determination of the rights of the parties in an action." *Neb Rev Stat* §25-130.

6. A contract is an exchange of promises upon which parties agree to be bound. *Gibbons Ranches v. Bailey*, 289 Neb 949 (2015).

Statement of the Facts

7. Bluestem Energy Solutions, LLC contends that its very act found by the jury to have *breached* the contract with Herink now *binds* this Court to confer a prejudgment interest benefit on Bluestem.

8. Under Bluestem's theory, the breaching party reaps a benefit from the act of breach, and the law approves.

9. Mr. Herink stands on his Opening Brief on Cross Appeal's Statement of the Facts. While Bluestem's Answer Brief on cross-appeal, p3, asserts that Bluestem disagrees with Herink's Statement of Facts, it identifies no areas of discord.

Argument

Error 1: The Prejudgment Interest Rate Should Be Corrected to 12.0%.

10. Mr. Herink contends a party who breaches a contract *cannot* take advantage of portions of the breached instrument that favor the breaching party. He contends that *Neb Rev Stat* §45-104 provides a statutory rate of interest that applies here. He contends that Bluestem should not have the advantage of a 1.53% per annum interest rate that did not exist when the parties entered the contract in question. Bluestem contends it can have its cake, and eat it too, that is Bluestem may wrongfully deny Herink the benefits of his bargain but retain its own benefits.

11. Prejudgment interest under *Neb Rev Stat* §45-104 ends, and post-judgment interest begins, on the date of entry of judgment. *Weyh v. Gottsch*, 303 Neb 280, 316 (2019).

12. Bluestem's position on prejudgment interest ignores the fact that the contract did not state a binding interest rate. It did provide a reference tool to determine a rate of interest that would have been due on a promissory note if a) a sale after contracting occurred, b) the buyer chose the promissory note payment alternative in the contract, and c) the amount offered in the Note had been commercially reasonable and the buyer did not breach the contract. The contract does not *require* a promissory note or an interest rate; it creates an option for a payment method that could be selected unilaterally later when, and if, a sale of LLC interests occurred.

13. The Court's Judgment is not for payments in installments. Bluestem lost that right when it breached. It makes no sense that Bluestem cannot pay in installments but can get a beneficial interest rate for the time between when payment was due and today. The amount due to Mr. Herink is due in a single amount and Bluestem has no discretion about how payment must be made. The debt has been due since the date of breach. Accordingly, the debt includes prejudgment interest for nonperformance. Bluestem cannot be rewarded with an interest rate 10.47% below the statutory rate as a congratulatory handshake for its breach of the contract.

14. Bluestem concedes that interest is due. It disputes the rate. Bluestem offers no response to the decisions of this Court, federal courts, and commentary of treatise authors cited by Mr. Herink that a party who breaches a contract cannot take advantage of his own act or omission to escape liability. Not a single decision cited in Mr. Herink's first argument is cited, analyzed, distinguished, or countered, in Bluestem's Answer Brief's argument concerning prejudgment interest.

15. On the contrary, Bluestem cites *Dietzel Enterprises, Inc. v. J. A. Wever Construction LLC*, 312 Neb 426, 453 (1952).

But the word "interest" does not appear anywhere in *Dietzel Enterprises*. Interest, either before or after judgment, was not an issue in that case.

16. Before the trial court, Bluestem argued that the case most supportive of its position was "the Aurora Co-op case". I,750:9-751:3 The case is not cited by Bluestem in its Answer Brief in this Court. This is probably because it was decided under a prior version of *Neb Rev Stat §45-103. Aurora Co-op Elevator Co. v. Larson*, 204 Neb 755 (1979).

17. Bluestem does cite *Prudential Ins Co of America v. Greco*, 211 Neb 342, 347 (1982) as a case that "provided guidance on the interplay between a contract rate of interest and the statutory prejudgment rate." Bluestem Brief at 17. Perhaps Bluestem's use of the past tense verb "provided" is recognition that *Prudential's* prejudgment interest analysis was supplanted by *Weyh v. Gottsch*. *Weyh* recognized that precedent on prejudgment interest had failed to analyze the availability of interest under §45-104.

18. This Court reasoned in *Weyh* that §45-104 allows prejudgment interest "on money received to the use of another and retained without the owner's consent."

19. Bluestem owed Herink money. The amount owed was a commercially reasonable amount for his equity ownership interest. Bluestem tendered a deficient amount and has enjoyed use of the money since this controversy arose. Herink contends prejudgment interest at the statutory rate of 12% commenced when the funds were due. Bluestem established that date, April 17, 2020 when it tendered an unreasonable sum. E31

20. Bluestem cannot claim the advantage of a lower interest rate under the contract it breached. The interest rate used should be 12% per annum. The interest calculation commences April 17, 2020. (206:4-22) The conclusion date is the

date of the Judgment, November 4, 2022. (T355). The Judgment was later amended on December 2, 2022. T409. The calculation is: \$2 million x 12% = \$240,000 /yr, ÷ 365 days = \$657.5342 /day. **930 days x \$657.5342 / day = \$611,506.80. The judgment should be the principal plus prejudgment interest or the total of \$2,611,506.80.**

Error II. The Post-judgment Interest Rate Should Be Corrected to 5.891%.

21. The post-judgment rate is 5.891%. It applies to the total principal and interest or \$2,611,506.80. The trial court incorrectly used 1.53% as the post-judgment rate. The Judgment date is November 4, 2022. T355. The Judgment was amended on December 2, 2022. T409

22. Bluestem contends the post-judgment interest rate should be 1.53% under the same flawed prejudgment interest theory discussed in Argument I above. As to post-judgment interest, Bluestem's position has two overt flaws:

22.1 Bluestem contends that its very act found by the jury to have *breached* the contract with Herink now *binds* this Court to confer a benefit on Bluestem.

22.2 Bluestem ignores that interest is accruing on a *Judgment*, not a *contract*.

23. The 1.53% rate cannot stand for all the reasons argued concerning Error 1. *Weyh* mandates that the prejudgment interest rate continues until the Judgment is entered. Then, post-judgment interest law applies.

24. Judgments and contracts are decidedly different. Only sworn judges make the former; people of all kinds make the latter.

25. "A judgment is the final determination of the rights of the parties in an action." *Neb Rev Stat* §25-130. A contract is

an exchange of promises upon which parties agree to be bound. *Gibbons Ranches v. Bailey*, 289 Neb 949 (2015).

26. No direct Nebraska precedent has been located on the governing post-judgment interest rate. The Eighth Circuit's decision in *Drovers Bank of Chicago v. National Bank & Trust Co of Chariton*, 829 F2d 20, 23 (8th Cir 1987)(Iowa law) reaches the result for which Herink argues and awards post-judgment interest on both judgment principal and prejudgment interest.

27. Help for Herink's position is found in *Weyh*. It distinguishes prejudgment and post-judgment interest and ends the former to begin the latter when judgment is entered. "[W]e hold that prejudgment interest under §45-104 ends, and post-judgment interest begins, on the date of entry of judgment." *Weyh*, 303 Neb 280, 316 (recognizing demarcation between an agreement and a judgment.)

28. Bluestem's argument concerning the post-judgment rate is dependent on a) its success or failure on Argument I and b) ignoring the sharp difference between judgments and contracts. The law and society have greater interests in enforcement of judgments than contracts, even though both are important to the orderly affairs of society.

29. Federal courts permit parties to contract for a post-judgment interest rate which differs from the federal rate that would ordinarily apply, as long as they do so through "clear, unambiguous and unequivocal language" and those rates do not violate state usury or other applicable laws. *FCS Advisors, Inc. v. Fair Finance Co.*, 605 F3d 144, 147 (2d Cir 2010) (quoting *Westinghouse Credit Corp. v. D'Urso*, 371 F3d 96, 102 (2d Cir 2004)); *Jack Henry & Associates, Inc. v. BSC, Inc.*, 487 Fed Appx 246, 258 (6th Cir 2012); *In re Riebesell*, 586 F3d 782, 794 (10th Cir 2009); *Central States, Southeast and Southwest Areas Pension Fund v. Bomar Nat., Inc.*, 253 F3d 1011, 1020 (7th Cir 2001).

Herink cannot identify a Nebraska decision that adopts this rule or rejects it. The Court is urged to adopt the federal rule.

30. Here, the parties did not contract for a post-judgment interest rate. The statutory rate should control. A Judgment of the district court is a horse of a different color from a promissory note authorized, but not required, by a private contract describing what might happen but has not occurred.

Conclusion

31. Mr. Herink requests that the Court modify the Judgment to \$ 2,611,506.80, finding that the prejudgment interest rate is 12% per annum. It runs from April 17, 2020 (E31) to Judgment on November 4, 2022. T355 The Judgment was later amended on December 2, 2022. T409. He asks the Court to impose post-judgment interest on the entire \$2,611,506.80.

32. The post-judgment rate under *Neb Rev Stat* §45-104 is 5.891% from November 4, 2022. The Court is urged to affirm the Judgment of \$1,316.32 for costs in the trial court, and award costs on appeal to Mr. Herink. Finally, Mr. Herink again urges the Court to reject Bluestem's appeal.

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Certificate of Compliance

This Brief complies with Neb S Ct R § 2-103, including typeface, all and consists of 2,128 words including cover page, table of contents, and table of authorities as well as signature blocks, but excludes certificates. It was prepared using Microsoft WORD computer software.

This brings the **total** number of words in all Herink Briefs in this case is 13,267.

/s/ David A. Domina

Certificate of Service

I am a Nebraska lawyer and certify that on March 29, 2023 I:

Served the foregoing by filing with the Court using the Nebraska Judicial Branch “Justice” Efiling system which sent notice to counsel of record when accepted and filed.

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Certificate of Service

I hereby certify that on Wednesday, March 29, 2023 I provided a true and correct copy of this *Appe Reply Brf Cross Appeal Herink* to the following:

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