Supreme Court, Appellate Division, Second Department, New York.
155 HENRY OWNERS CORP., et al., Respondents-Appellants,
v.
LOVLYN REALTY CO., Appellant-Respondent, et al., Defendants.

Sept. 16, 1996.

Plaintiffs sued to recover for contractor's breach of agreement to install replacement windows. The Supreme Court, Kings County, Aronin, J., entered judgment in favor of plaintiffs, but failed to award damages for lost tax abatements, and both sides appealed. The Supreme Court, Appellate Division, held that: (1) plaintiffs were not entitled to recover, as additional damages, the tax abatements which they lost as consequence of contractor's breach; (2) plaintiffs, as prevailing parties, were entitled to prejudgment interest; but (3) interest accrued only from date that plaintiffs first sustained ascertainable damages, when their payments to replacement contractor had exceeded original contract price.

Modified and affirmed as modified.

West Headnotes

[1] Contracts 313(1)
95k313(1) Most Cited Cases

[1] Damages 120(2)
115k120(2) Most Cited Cases
Contractor wrongfully repudiated its contract for the installation of replacement windows, and was liable for any damages suffered by plaintiffs as natural and probable consequence of its breach, when it refused to perform for contract price after the Landmarks Preservation Commission approved window submitted by contractor.

[2] Damages 120(2)
115k120(2) Most Cited Cases
Plaintiffs were not entitled to recover, as additional damages resulting from contractor's breach of contract in failing to install replacement windows as promised, the tax abatements which they lost as consequence of contractor's breach; such damages were not within contemplation of parties at time contract was made.

[3] Interest 39(2.30)
219k39(2.30) Most Cited Cases
Plaintiffs, as prevailing parties in action to recover for defendant's breach of contract, were entitled to prejudgment interest. McKinney's CPLR 5001(a).

[4] Interest 39(2.30)
219k39(2.30) Most Cited Cases
Prejudgment interest to which plaintiffs were entitled, as prevailing parties in action to recover for defendant's breach of contract in failing to install replacement windows as promised, began to accrue only from date that plaintiffs first sustained ascertainable damages (when their payments to replacement contractor had exceeded original contract price). McKinney's CPLR 5001.

[5] Interest 9
219k9 Most Cited Cases
While prevailing party is entitled to prejudgment interest from the earliest ascertainable date that cause of action existed, award of interest is founded on theory that there has been deprivation of use of money or its equivalent, and sole function of interest is to make whole the party aggrieved. McKinney's CPLR 5001.

[6] Interest 39(2.6)
219k39(2.6) Most Cited Cases
Principle that prevailing party is entitled to prejudgment interest from the earliest ascertainable

date that cause of action existed assumes that whatever damages are sought are shown to have been sustained at least by that time. McKinney's CPLR 5001.
****31** Lerner, Lapidus & Franquinha, New York City (Steven R. Lapidus, Wayne R. Smith, and Jeremy J. Krantz, of counsel), for appellant-respondent.

Himmelstein, McConnell & Gribben, New York City (Kevin R. McConnell, of counsel), for respondents-appellants.

Before ROSENBLATT, J.P., and RITTER, COPERTINO and SANTUCCI, JJ.

MEMORANDUM BY THE COURT.

***559** In an action, *inter alia*, to recover damages for breach of contract, (1) the defendant Lovlyn Realty Co. appeals from so much of a judgment of the Supreme Court, Kings County (G. Aronin, J.), entered June 26, 1995, as, after a nonjury trial, is in favor of the plaintiffs and against it in the principal sum of $93,148.12, and (2) the plaintiffs cross appeal from so much of the same judgment as failed to award damages for lost tax abatements and the cost of replacing penthouse windows.

ORDERED that the judgment is modified by deleting the provisions thereof awarding the plaintiffs prejudgment "interest from August 4, 1988 through December 4, 1994, in the sum of $33,818.12", and remitting the matter to the Supreme Court, Kings County, for entry of an appropriate amended judgment consistent herewith; as so modified, the judgment is affirmed ***560** insofar as appealed and cross-appealed from, without costs or disbursements.

[1][2] The Supreme Court properly determined that the defendant Lovlyn Realty Co. (hereinafter Lovlyn) wrongfully repudiated its contract with the plaintiffs when it refused to perform for the contract price after the Landmarks Preservation Commission approved the replacement window submitted by Lovlyn. Moreover, the award of damages was proper because the loss suffered by the plaintiffs was the "natural and probable consequence of [Lovlyn's] breach" (*Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 319, 540 N.Y.S.2d 1, 537 N.E.2d 176). The plaintiffs, however, were not entitled to additional damages for the loss of J-51 tax abatements since such loss was not "within the contemplation of the parties at the time the contract was made" (*American List Corp. v. U.S. News & World Report*, 75 N.Y.2d 38, 43, 550 N.Y.S.2d 590, 549 N.E.2d 1161).

[3][4][5][6] Contrary to Lovlyn's contention, the plaintiffs were entitled to prejudgment interest since they were the prevailing party (*see*, CPLR 5001 [a]; *DeLeonardis v. EFG Plumbing & Heating Corp.*, 222 A.D.2d 339, 636 N.Y.S.2d 619; *City Univ. of N.Y. v. Finalco, Inc.*, 129 A.D.2d 494, 496, 514 N.Y.S.2d 244). However, the Supreme Court erred in awarding prejudgment interest from August 4, 1988. While the prevailing party is entitled to prejudgment interest "from the earliest ascertainable date the cause of action existed" (CPLR 5001[b]), "[t]he award of interest is founded on the theory that there has been a deprivation of use of money or its equivalent and that the sole function of interest is to make whole the party aggrieved. It is not to provide a windfall for either party" (*Kaiser v. Fishman*, 187 A.D.2d 623, 627, 590 N.Y.S.2d 230; *see also*, 5 Weinstein-Korn-Miller, N.Y. Civ Prac ¶ 5001.10). Thus, the ascertainable date "assumes that whatever damages are sought are shown to have been sustained at least by that time" (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C5001:4, at 359; *see also*, 5 Weinstein-Korn-Miller, N.Y. Civ Prac ¶ 5001.10 supra; *Gelco Bldrs. v. Simpson Factors Corp.*, 60 Misc.2d 492, 493, 301 N.Y.S.2d 728). Following Lovlyn's breach, the plaintiffs contracted with Ecker Manfacturing (hereinafter Ecker) in March 1989 to install the replacement windows. Between March 7, 1989, and May 8, 1990, the plaintiffs made eight payments to Ecker. It was not until the plaintiffs tendered payment to Ecker on August 1, 1989, that their payments exceeded the cost of the original contract with Lovlyn. Thus, this is the earliest ascertainable ****32** date from which prejudgment interest may accrue. Thereafter, the plaintiffs made three additional payments. Since it is within the

Supreme Court's discretion to award prejudgment interest from the date of each payment or ***561** an ascertainable "single reasonable intermediate date" (*see*, CPLR 5001[b]), the matter is remitted to the Supreme Court, Kings County, for a new computation of prejudgment interest consistent herewith.

We have reviewed the parties' remaining contentions and find them to be without merit.

231 A.D.2d 559, 647 N.Y.S.2d 30

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