

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THULE AB,

Plaintiff,

-against-

ADVANCED ACCESSORY HOLDINGS  
CORPORATION, AAS ACQUISITIONS, LLC,  
CHAAS ACQUISITIONS, LLC, VALLEY  
INDUSTRIES, LLC,

Defendants.  
-----X

P. KEVIN CASTEL, District Judge:

The nature of this action and its history are set forth in prior decisions of this Court. See Memorandum and Order of April 2, 2009 (DE 35), Memorandum and Order of May 4, 2010 (DE 73) and Memorandum and Order of June 1, 2010 (DE 84). The reader's familiarity with same is assumed.

Thule AB ("Thule") now moves for an order awarding (1) prejudgment interest pursuant to N.Y. C.P.L.R. § 5004, and (2) costs and attorneys' fees pursuant to Rule 54(d), Fed. R. Civ. P. For the reasons discussed, the motion is granted.

The Purchase Agreement Section 2.10(e) of the Purchase Agreement provides for the computation of interest on the purchase price adjustment in the following manner:

interest at a fixed annual rate equal to 100 basis points over the "Prime Rate" as reported in the Wall Street Journal as in effect from time to time and shall be calculated on the basis of the actual days elapsed between the Closing Date and the payment date based on a 365-day year.

The foregoing methodology controls the calculation of interest on the purchase price adjustment through the date of this Court's April 2, 2009 Memorandum

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09 Civ. 00091 (PKC)

MEMORANDUM  
AND ORDER

and Order confirming the arbitration award. For reasons explained in the June 1, 2010 Memorandum and Order, the April 2, 2009 Memorandum and Order was a final order.

After the amount, including interest, was not paid, the Court granted plaintiff leave to amend (Order of May 12, 2009; DE 45) and plaintiff filed a Second Amended Complaint invoking an indemnification provision permitting recovery of “[l]osses.” As noted in the May 4, 2010 Memorandum and Order, section 8.2 of the Purchase Agreement provides that defendants shall indemnify Thule “from and against any and all Losses that may be asserted against or paid, suffered or incurred by [Thule] that, directly or indirectly, arise out of, result from, are based upon or related to: . . . (b) any failure by [defendants] to duly and timely perform or fulfill any of its covenants or agreements required to be performed by [defendants] under this Agreement . . . .” (Purchase Agreement § 8.2.) The unpaid post-closing adjustments became losses covered by section 8.2. “Losses” also expressly include “interest.” The losses were measured under Section 8.2 and, therefore, not limited by the interest calculation provision of Section 2.10. Unless another rate is specified—and it is not under Section 8.2—New York provides for the payment of interest at the simple rate of 9% per annum. N.Y. C.P.L.R. § 5004. See Action S.A. v. Marc Rich & Co., 951 F.2d 504, 508 (2d Cir. 1991); O'Brien v. Young, 95 N.Y. 428, 432-33 (1884). I conclude that plaintiff is entitled to pre-judgment interest at the simple rate of 9% after April 2, 2009.

The definition of “[l]osses” also expressly includes the “fees and costs of attorneys” and “other expenses of litigation. . . .” The reasonableness of the amount claimed by Thule, \$368,247.50 in fees and \$5,619.28 in disbursements and expenses, is not challenged by defendant CHAAS Acquisitions, LLC (“CHAAS”), although it

challenges Thule's entitlement to any fees or costs. Based upon my knowledge of the case, the amount is reasonable and approved for the period after April 2, 2009.

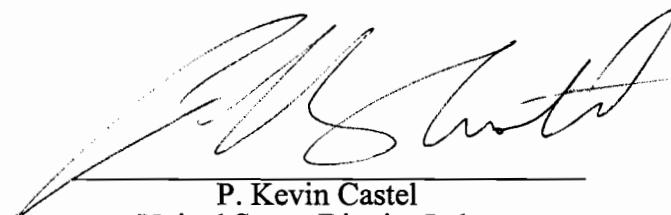
CHAAS filed for bankruptcy on June 26, 2009. Although the automatic stay (as will be discussed) was modified, CHAAS argues that the Bankruptcy Code prohibits the accrual of unmatured interest against a debtor after the filing of the bankruptcy petition. 11 U.S.C. § 502(b)(2). On its face the statute applies to the claims process and permits an objection to a claim seeking unmatured interest once a proof of claim is filed. It does not apply to a claim which the bankruptcy court has permitted to be litigated to judgment in a federal district court without restriction on the award of unmatured interest.

CHAAS further argues that the Order of the Honorable Marci B. McIvor, United States Bankruptcy Judge, modifying the section 362 stay precludes an award of interest and attorneys' fees. In re CHAAS Acquisitions, LLC, 09-60117-MBM, United States Bankruptcy Court, Eastern District of Michigan (Southern Division) (Order of December 10, 2009). The Order recites that the stay "shall be modified solely to the extent necessary to permit the Parties to proceed with the litigation of the LC Issue, as defined in the Stipulation, in the United States District Court for the Southern District of New York, Case No. 09-00091. . . ." The Stipulation defines the "LC Issue" as the "issue of whether the purchase price adjustment in favor of Thule of \$4,121,200 plus interest should be satisfied by a draw down on the LC, as more fully set forth in the pleadings." (emphasis added). The pleadings, as of the date of the Stipulation, included the Second Amended Complaint, which in Count I expressly sought interest and attorneys' fees under Section 8.2. I conclude that the argument

is contrary to the express language of the bankruptcy court's Order and the documents the Order incorporates. It is without merit.

Finally, CHAAS seeks a temporary stay of the judgment once it is entered so that it then may move this Court for a stay pending appeal. CHAAS has not made a showing that it is likely to succeed on the merits of any appeal or any other sufficient reason why a stay pending the filing of a motion ought to be granted, and its application is denied.

SO ORDERED.



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P. Kevin Castel  
United States District Judge

Dated: New York, New York  
July 21, 2010

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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Thule AB,

Plaintiff,

v.

Advanced Accessory Holdings Corporation,  
AAS Acquisitions, LLC, CHAAS Acquisitions,  
LLC, and Valley Industries, LLC,

Defendants.

) 09 CV 00091(PKC)

) ECF Case

*PKC* FINAL JUDGMENT

WHEREAS, pursuant to this Court's Order dated April 2, 2009 confirming an arbitration award, CHAAS Acquisitions LLC ("CHAAS") <sup>was</sup> ~~and the other Defendants were~~ required to pay Plaintiff Thule A.B. ("Thule"), as of April 2, 2009, a total of \$4,911,985;

WHEREAS, despite this Court's order on April 2, 2009, CHAAS and the other Defendants failed to pay Thule the \$4,911,985 owed;

WHEREAS, Thule filed a Second Amended Complaint on May 22, 2009 asserting a claim against CHAAS for indemnification and performance of an escrow agreement between Thule and CHAAS dated September 6, 2006 ("Escrow Agreement");

WHEREAS, in its Orders dated May 4, 2010 and June 1, 2010 this Court held in favor of Thule on its claim set forth in the Second Amended Complaint and against CHAAS, and held that CHAAS is required to authorize the release of escrow funds available pursuant to the Escrow Agreement to indemnify Thule for losses caused by the Defendants' failure to pay Thule the \$4,911,985 owed pursuant to the confirmed arbitration award;

WHEREAS, pursuant to C.P.L.R. § 5004, Thule is entitled to prejudgment interest on the \$4,911,985 owed at the rate of 9% per annum from April 3, 2009;

WHEREAS, on <sup>PKC</sup> July 21, 2010 this Court granted Thule the right to recover its costs and attorney's fees in the amount of \$373,866.78 <sup>PKC</sup>;

It is hereby ORDERED, ADJUDGED and DECREED that:

<sup>PKC</sup> 1. Judgment is hereby entered in favor of Thule and against CHAAS in the in the amount of \$574,094.00 following amounts: (a) \$4,911,985 plus prejudgment interest (at the rate of 9% per annum from April 3, 2009 to the date of entry of this judgment) and (b) \$ 373,866.78 <sup>PKC</sup> in costs and attorney's fees;

2. Thule is entitled to recover the aggregate amount set forth in Section 1 herein (the "Judgment Amount") from the funds available pursuant to the Escrow Agreement;

3. Thule is hereby directed to submit to CHAAS a Certificate of Payment authorizing the release of the Judgment Amount upon entry of this Judgment;

<sup>PKC</sup> 4. CHAAS is hereby ORDERED and directed to execute the Certificate of Payment within two (2) days from receipt thereof;

5. If CHAAS refuses to execute the Certificate of Payment as set forth herein, the Escrow Agent, Mellon Investor Services LLC, is hereby directed to pay the Judgment Amount over to Thule from funds available pursuant to the Escrow Agreement, upon presentation of this Judgment.

Dated: New York, New York  
July 21, 2010

SO ORDERED.

  
United States District Judge