ROBERT F. CHERRY, JR., ET AL.	*	**IN THE**
Plaintiffs	*	**CIRCUIT COURT**
v.	*	**FOR**
MAYOR & CITY COUNCIL OF BALTIMORE CITY	*	**BALTIMORE CITY**
	*	
Defendant.	*	**Civil Case No.: 24-C-16-004670**

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MEMORANDUM OPINION

On May 23, 2019, Plaintiffs filed a Motion for Clarification of the Court's Orders and Memorandum Opinion Dated May 13, 2019 (Doc. No. 126), to which the City responded on June 6, 2019. Pursuant to court order of May 13, 2019, the court convened a status and scheduling conference on June 7, 2019, at which Plaintiffs' requested points of clarification were discussed. During the conference in open court, Plaintiffs requested the court to consider whether this action is appropriate for Rule 2-602(b) certification. The parties submitted letter briefs on June 18, 2019 (Doc Nos. 128/2 and 128/3), more fully addressing their positions regarding certain requested points of clarification in Plaintiffs' Motion for Clarification; and Plaintiffs set forth the bases for their Rule 2-602(b) request. The City's response on Plaintiffs' request for Rule 2-602(b) certification is not yet due. The court will reach that issue following submission of the City's response. As described below and consistent with discussion at the conference held June 7, 2019, this memorandum addresses all matters raised by Plaintiffs' Motion for Clarification save that pertaining to retiree marital status. In accordance with this memorandum, the court issues on this same date an Order Modifying Class Certification Order and Providing Requested Clarification as to Damages.

I. INDIVIDUAL DAMAGES CALCULATIONS

After consideration of the material cost (to both sides) and extensive time it will take to comply with the court's notice requirement set forth in the Class Certification Order, and upon continued reading of the law on the requirements and purposes of class notice, including due process considerations of absent Class members, the court has decided that it asked too much of the parties. Although the court expected that more than the typical amount of class notice work would be required to comply with the requirement that individual damage sums be set forth in the class notice, the court did not appreciate the months' long undertaking and considerable expense[1] that would be necessary to perfect the notice the court envisioned. In short, the court's notice requirement did not effectively balance the interests of the parties with the rights of the absent Class members, and general precepts of practicality. Adding to that and considering the many years the Class has waited for resolution of their claims, and the prospect that a material number of notice recipients may be expected to opt out in view of the court's decision on damages calculations, the court has concluded that the considerable delay in class notice were the court to demand inclusion of each member's damages entitlement (if any) itself works an undesirable result for all parties, including absent Class members. Given that an informative and fulsome notice can be issued with considerably more efficiency, the delay and cost are not worth their toll.

The court is satisfied that due process does not demand that class notice list the dollar sum of damages, if any, each notice recipient will be entitled to receive (short of an opt out), provided the notice neutrally and clearly states the manner in which damages are to be calculated as to Counts II and III, including material actuarial assumptions embedded therein, and otherwise

[1] That is, an expense well over and above what would necessarily be involved in sending out even the barest of class notice.

satisfies the letter of Rule 2-231(f). The court's modified Class Certification Order reflects this change.

II. TREATMENT OF RETIREMENT-ELIGIBLE SUB-CLASS

Although the notice is not required to set forth individual damages sums, to be clear as to calculation of damages of Retired and Retirement-Eligible Sub-Class members who do not opt out, as set forth on the record in open court on June 7, 2019, and in accordance with the Memorandum Opinion and orders of May 13, 2019, the Retirement-Eligible Sub-Class shall not be treated as having opted out of the Plan and shall be included in the calculation, and award, of damages.

III. MARRIAGE ASSUMPTIONS

Plaintiffs inquire as to "[w]hat marriage assumptions should be used for calculating the present value of future benefits." (Motion for Clarification at p. 11.) The court understands and expects that the parties are attempting to reach agreement on that issue and will address it further with the court at or before the conference scheduled for July 25, 2019.

IV. MORTALITY TABLES

According to the parties' letter briefs of June 18, 2019, the parties reached agreement regarding the different approaches on mortality tables for calculation of Count II and III damages in the form of the present value of the Variable Benefit increases to which the Retired and Retirement-Eligible Sub-Class members (or their beneficiaries) would be entitled pursuant to the pre-10-306 Plan post-final judgment, if any. Therefore, the court will order that, for purposes of

the class notice and these damages calculations, the parties shall adopt and use the mortality tables proposed by Plaintiffs and outlined in a June 5, 2019 memo by Plaintiffs' actuary, Mr. Thomas Lowman.

V. PRESENT VALUE DISCOUNT RATE

The Plan (both pre- and post-10-306) provides that "'[r]egular interest' for the purposes of determining actuarial equivalents shall mean interest at 5% per annum compounded annually." In accordance with the parties' contract, and consistent with the court's reasoning and analysis set forth in the Memorandum Opinion of May 13, 2019, a five percent (5%) present value discount rate shall be employed for purposes of the class notice and calculations of damages to be awarded for liability on Counts II and III (in the form of the present value of the Variable Benefit increases to which the Retired and Retirement-Eligible Sub-Class members, or their beneficiaries, would be entitled pursuant to the pre-10-306 Plan post-final judgment, if any).

VI. RETIREES WITH NO DAMAGES

In view of the fact that the class notice need not state the dollar sum of damages to which each recipient will be entitled if he or she does not opt out, the court need not reach Plaintiffs' question whether the notice is required to state "individualized damage calculations … for [Class] members who are mathematically eliminated from the possibility of damages."

VII. RETIREE PRE-JUDGMENT DEATH

Plaintiffs inquire whether "[i]f a Retiree dies prior to the judgment date and a beneficiary begins receiving benefits, are separate damages calculated for each benefit recipient or are the

damages aggregated?" (Motion for Clarification at pp. 9-10.) Although the class notice need not state the dollar sum of damages to which each recipient will be entitled if he or she does not opt out, for purposes of final damages calculations, benefits of a retiree beneficiary shall be aggregated with those of the beneficiary's retiree such that damages awarded represent the net difference of a retiree Class member's and his or her beneficiaries' past and future benefits subject to the Variable Benefit and the 0-1-2 COLA under Ordinance 10-306.

VIII. PREJUDGMENT INTEREST

> There are three rules regarding prejudgment interest: 1) as a matter of right—prejudgment interest is allowed as a matter of right when "the obligation to pay and the amount due [have] become certain, definite, and liquidated by a specific date prior to judgment so that the effect of the debtor's withholding payment was to deprive the creditor of the use of a fixed amount as of a known date"; (2) absolute non-allowance—"where the recovery is for bodily harm, emotional distress, or similar intangible elements of damage not easily susceptible of precise measurement, the award itself is presumed to be comprehensive, and prejudgment interest is not allowed"; and (3) if the case falls in between the as of right and absolute non-allowance, "prejudgment interest is within the discretion of the trier of fact."

Baltimore County v. Aecom Services, Inc., 200 Md. App. 380, 424 (2011) (citing *Buxton v. Buxton*, 363 Md. 634, 656–57 (2001)).

Plaintiffs assert they are entitled to prejudgment interest as a matter of right. The City argues that this case is in the "in between" category and an award of prejudgment interest would be an abuse of discretion in this case. Neither party, of course, posits that this case is in the absolute "non-allowance" category; nor does the court.

The parties come to court as parties to a contract and the sole issues before the court pertain to breach of that contract.[2] Although the Variable Benefit was not stated as a sum certain in the

[2] As opposed to, for example, breach of fiduciary duty or other tort resulting in contract-like or lost profit damages.

(pre-10-306) Plan, in each fiscal year of the Plan's operation, the Variable Benefit due and owing to Plan members, if any, became quantifiable upon determination of whether earnings on the relevant assets attained certain levels. According to the Plan (and as found by the court at paragraph 15 of the Findings of Fact of the Memorandum of Law issued May 13, 2019), the Variable Benefit was contingent upon the annual investment performance of Plan assets as follows: any and all earnings between 7.5% and 10%, plus half the earnings in excess of 10% (if any), of the two funds that held assets earmarked for retiree payments would be allocated and transferred to the Paid-Up Benefit and Contingency Reserve Funds – the two Plan funds established to hold Variable Benefit assets. The amount of earnings formed the basis to calculate the annual increase to the pension benefit to be paid for the expected life of each eligible member or beneficiary in accordance with the statutory rate. Although the City's obligation to pay a Variable Benefit to the members of the Retired and Retirement-Eligible Sub-Classes is not as straight-forward as a classic promissory note or rent obligation, the Variable Benefit is determinable by the application of a formula, all components of which were known at all relevant times. Therefore, each Variable Benefit (if any) following the effective date of the Ordinance became "certain, definite, and liquidated by a specific date prior to judgment." *Id.* at 437*; I.W. Berman Prop. V. Porter Bros.,* 276 Md. 1, 16-17 (1975).

This conclusion is supported by *Baltimore County v. Baltimore County Fraternal Order of Police, Lodge No. 4*. There, against the backdrop of employment dispute arbitration issues not relevant here, the court evaluated application of prejudgment interest to police officers' vested rights in a percentage of health insurance premiums the county was obligated to pay. Like the City argues here, the county argued the plaintiff was not entitled to prejudgment interest because the claim was "unliquidated." The Court of Appeals disagreed:

> An unliquidated claim is "one, the amount of which has not been fixed by agreement or cannot be exactly determined by the application of rules of arithmetic or of law." 3 Samuel Williston & Richard A. Lord, a Treatise on the Law of Contracts § 7:34 (4th ed.2008). The County complains that the amount it owed the retirees in damages was unliquidated. But the County's own evidence proved otherwise. At issue was the County's liability, *vel non,* for its decision to discontinue the 85/15 subsidy split it had paid for retirees between 1992 and 2007. The higher amounts charged the retirees were specifically ascertainable amounts. Although the total amounts were not known by FOP, these amounts were readily quantifiable, and were not unliquidated. The arbitrator, the circuit court, and the Court of Appeals all found that the County had made a vested benefit agreement to maintain an 85/15 subsidy split for a specifically identifiable group of retirees until each became eligible for Medicare. Once liability was determined, the amount of damages was readily ascertainable from the County's own records. It depended on four fixed, known numbers: the total premium cost of the insurance, the amount the County should have been charging the retirees (15%), the amount the County had charged the retirees post-September 1, 2007, and the difference between what the County should have been charging and what it had actually collected from those retirees. The County provided the spreadsheet showing all these numbers, and FOP's expert witness, Dr. McCarthy, explained the numbers to the court at the damages hearing. … Here, FOP's entitlement to prejudgment interest was clear. All that remained to be done was the math.

Baltimore County v. Baltimore County Fraternal Order of Police, Lodge No. 4, 220 Md. App. 596, 664-65 (2014) *aff'd on other grounds*, 449 Md. 713 (2016).

Even assuming the City is correct that "[t]his case falls under *Buxton's* rule three," the court disagrees with the City that "there should be no discretionary award of prejudgment interest in this case." The City commends to the court's attention *Baltimore County*, *Buxton* and *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.* Each of these cases is materially distinguishable from the instant case.

In *David Sloane,* the Court of Appeals affirmed the trial court's disallowance of prejudgment interest on the basis that the amount due to the prevailing party "was not liquidated until judgment." The case involved a breach of contract claim for lost profits by an ad agency against a former client. The client, David Sloane, Inc., had an exclusive agency agreement with the House agency. The client began using another agency, G-M, in breach of its exclusivity deal with House. House sued the client. At trial, the House agency founded its damages demand on

G-M's invoices to arrive at proof of its lost profits arising from Sloane's breach of contract entitling House to be the exclusive agency of record. Based on G-M's invoices to the defendant client, House calculated its lost profits in the form of would-be commissions for things like media buys, as well as fee-based work, less costs such as artist fees and other agency out-of-pockets. The Court of Appeals did not disturb the trial court's election not to award prejudgment interest on the basis that the amount due House was not liquidated until judgment. *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. 36 (1987).

In *Buxton*, a vulnerable adult sued his father's estate and stepmother for breach of fiduciary duty pertaining to alleged mismanagement and misappropriation of funds and other assets. *Buxton* recites the oft- (and above-) cited three-rule summary of the law on prejudgment interest and proceeds to explain why prejudgment interest would not have been appropriate.[3] First, the Court explains, *Buxton* did not involve breach of contract, but rather of a tort duty. Second, and "[m]ore important," the damages "were not only unliquidated but wholly incapable of reasonable ascertainment prior to verdict." *Buxton v. Buxton,* 363 Md. 634, 657 (2001). The damages at issue were based in part on the "loss of rent" of a property the defendant fiduciaries were charged with managing for the benefit of the vulnerable adult plaintiff. The loss of rent figure "was based

[3] In fact, there was no prejudgment interest awarded in that case. The Court of Appeals explains that the trial court's damages award of $228,254 more than the $83,916 in "estimated rental loss" (incurred as a cause of the defendants' breach of their fiduciary duties to the plaintiff) had been mistakenly understood on review by the Court of Special Appeals as an award of prejudgment interest in excess of the legal rate, but in fact arose out of the trial court's finding that the defendant stepmother failed to invest funds in the best interest of the plaintiff. The Court of Appeals elucidated that the trial court had not awarded prejudgment interest, but rather had applied a *Cummins* "surcharge" as "the amount that reasonably could have been earned" had the fiduciaries honored their duties to the plaintiff. *Buxton,* 363 Md. at 652 (citing *Maryland Nat'l Bank v. Cummins,* 322 Md. 570 (1991)). To provide clarity on the issue given the Court of Special Appeals' conclusion, the Court of Appeals expressed that prejudgment interest would not have been appropriate based on the facts of the case. *Id.* at 656-57.

entirely on statistical assumptions developed by expert witnesses employed for the purpose of the litigation, rather than on any hard evidence of actual rental value." *Id.* at 657. In other words, as is often the case in business tort litigation, the damages expert witnesses based their opinions on a legal fiction and the trial court made related findings. "This is not a case in which the rent was actually received but withheld or even where specific rent was due under a lease but not collected. …The issue of substantive liability was determined … largely on the basis of credibility of the witnesses, rather than on the interpretation of any documents from which a predictable result could flow." *Id.*

In *Baltimore County v. Aecom Services, Inc.,* Baltimore County sued an architect for negligence and breach of contract on a county construction project and the architect filed a counterclaim for non-payment. At trial, the architect requested a jury instruction on prejudgment interest, which the court declined to give. On appeal, the Court of Special Appeals determined that the trial judge did not abuse his discretion by refusing to give the instruction. In addition to the important fact that the proposed jury instruction "was not consistent with the evidence generated at trial," the Court of Special Appeals held that application of prejudgment interest ought not to have been subject to the jury's discretion given that the amount of damages due the architect was not liquidated or reasonably ascertainable prior to the verdict for a confluence of reasons, including the complications presented by the mix of tort and contract claims and counterclaims – and the county's assertion that many of the challenged architect invoices were unpaid due to "offsets" of the county. *Baltimore County v. Aecom Services, Inc.,* 200 Md. App. 380, 430-32 (2011).[4]

[4] To the extent that damages to which certain members of the Retired and Retirement-Eligible Sub-Classes are entitled are subject to setoff due to tiered COLA payments made under the post-10-306 Plan, the payment data has been known to and within the control of the City from the effective

The damages awards in *David Sloane* and *Buxton* relied entirely on the court's admission in evidence of foundational testimony and documents, and the court's credibility evaluation of expert and fact witnesses. In *David Sloane*, the court considered evidence of the work directed by the defendant client to G-M, the commissions that would have been earned on that work had it be done by House, and evidence of what would have been out-of-pocket House agency expenses. In *Buxton*, among other things, the court had to determine which of the expert witnesses' fictional reconstruction of the rental market for the Montauk property was more credible and persuasive. In *David Sloane* and *Buxton*, the parties' relationships (by contract or other operation of law) gave rise to particular rights and entitlements (in the case of *House*, exclusive advertising agency work; in the case of *Buxton*, proper investment management), but the damages awards were based entirely on the court's evaluation of evidence generated for purposes of litigation. Neither case involved a contract that identified a sum certain or was ascertainable by operation of arithmetic (or law) based on the four corners of the paper in advance of judgment.

In the instant case, the Plan is a written contract with an express mathematic formula to be applied at regular, pre-determined intervals for the payment of the Variable Benefit, when conditions permit. As the court ruled in January 2018, the City breached its contract with the Retired and Retirement-Eligible Sub-Class members by enacting Ordinance 10-306. The amount of Variable Benefit that would have been paid to each of these Class members, if any, became quantifiable at the close of each fiscal year (beginning June 30, 2010, the effective date of Ordinance 10-306). The Memorandum Opinion of May 13, 2019 requires application of the Plan precisely as it existed prior to enactment of the Ordinance – nothing more, nothing less. At trial,

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date of Ordinance 10-306 and does not materially affect the court's evaluation of whether prejudgment interest is appropriate in this case.

the City argued that the Plan, as written – and not as Plaintiffs wished it had been written – was the only proper foundation for damages because it was the parties' express contract all along. The City argued that Plaintiffs "couldn't have it both ways" – that Plaintiffs could not at once argue for the application of Plan provisions they preferred and substitute others for more favorable terms. What was true then is true now. The City will not be heard now to assert that the same black and white contracted-for formula on which it based its trial argument did not provide the basis to quantify Variable Benefits along the way.

Further, the City's argument that the importance of expert testimony in this case weighs against an award of prejudgment interest is not persuasive. The importance of expert testimony at trial is not a talismanic wiping away of the nuts and bolts of the dispute pertinent to the question of prejudgment interest. The expert witnesses testified at trial on all manner of things – including to aid the court in determining whether the Ordinance passed muster under *Quinn* for purposes of Count IV, not relevant to this discussion of prejudgment interest. In any event, the court's ruling on how damages are to be calculated is a mirror image of the black letter of the Plan, the outcome the City advocated for as the terms the parties agreed to and lived according to, and the outcome supported by the opinion of its expert.

In summary, the court is persuaded that Plaintiffs are entitled to prejudgment interest (whether as of right or as a discretionary matter) because computation of Variable Benefits that would have been paid, if any, following enactment of Ordinance 10-306 based on the Plan provisions in place just prior to enactment of the Ordinance became liquidated, certain and definite at the close of each fiscal year (including FY 2010). Therefore, damages awarded as to Counts II and III for Variable Benefits from June 30, 2010 through the date of judgment shall include prejudgment interest at the legal rate of six percent (6%); damages reflecting Variable Benefits

going forward from the date of judgment and reduced to present value shall not be subject to prejudgment interest, as these are not funds the Plaintiffs were deprived of using prior to judgment. The class notice shall state that damages awarded, if any, are subject to pre- or post-judgment interest at the legal rates consistent with this ruling and the attendant court order.

June 25, 2019

[JUDGE'S SIGNATURE APPEARS ON ORIGINAL]

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Judge Julie R. Rubin

Madam Clerk: Please mail copies to all counsel and named parties of record.