IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION AT KNOXVILLE

SOUTHEASTERN STRUCTURES, INC.,	)	
	)	
Plaintiff/Appellant	)	KNOX CHANCERY
v.	)	
	)	NO. 03A01-9708-CH-00334
ARTHUR H. HEIL, JR.,	)	
	)	HON. H. DAVID CATE, CHANCELLOR
Defendant/Appellee	)	
	)	MODIFIED and AFFIRMED

Barry W. Eubanks, Knoxville, for Appellant.
John O. Threadgill, Knoxville, for Appellee.

O P I N I O N

INMAN, Senior Judge

The plaintiff, Southeastern Structures, Inc.["SSI"], sought a declaratory judgment on June 14, 1991 to determine if its former employee, Arthur H. Heil, Jr. ["Heil"], was contractual or at-will and whether he was entitled to purchase additional shares of the plaintiff corporation or otherwise entitled to benefits resulting from his termination on November 5, 1990 and whether he should be held liable for damages to the plaintiff for his negligence in the matter of plaintiff's bid on the Farragut Town Hall.

Heil agreed that a declaratory judgment was proper to determine the stock controversy, but he denied liability for the loss of the contract on the Farragut Town Hall project. He counterclaimed for salary and benefits through January 27, 1992 because he was allegedly wrongfully terminated, and that he

was entitled to purchase an additional 540 shares of SSI which, in turn, should be required to repurchase all of his shares pursuant to the contract.[1]

The Chancellor found:

1. The Option Agreement and Letter Amendment was an employment contract for a definite annual term;

2. Heil's inattention to duty relative to the Andy Johnson building and the failure to follow orders by obtaining and studying the Farragut Town Hall plans and specifications prior to the bid were sufficient to justify his termination;

3. Heil was not liable for the loss of the Farragut Town Hall project;

4. Heil was entitled to receive an additional 360 shares of common stock in SSI, the issuance of which had been deferred by agreement;

5. SSI was required to repurchase all of the shares owned by Heil (1,260) at $81.49, for a total purchase price of $102,677.40;

6. Heil was awarded pre-judgment interest to accrue on the total purchase price of the stock at the rate of 10% per annum from December 5, 1990 until payment; and

7. Costs were to be taxed one-half to SSI and one-half to Heil.

SSI presents the following issues for review:

I. Did the Chancery Court err in awarding an additional 360 shares of SSI common stock to Heil?

II. Did the Chancery Court err in valuing the shares of SSI common stock held by Heil at $81.49 instead of $78.05 as determined by the accounting firm for SSI?

III. Did the Chancery Court err in awarding pre-judgment interest?

IV. Did the Chancery Court err in finding that Heil was not liable to SSI for the loss of the Farragut Town Hall project?

Heil presents the following issue for review:

I. Whether the Chancery Court erred in finding that Heil was terminated from his employment for cause and in failing to award damages for the wrongful termination?

---

[1]He already owned 900 shares.

II. Whether the Chancery Court erred in awarding Heil simple interest on the judgment rather than compound interest as contemplated under the contract?

SSI hired Heil as a Construction Superintendent on November 24, 1981, and he began work on January 2, 1982. His duties, weekly salary and benefits were confirmed by letter dated November 24, 1981.

On September 1, 1983, Heil wrote a letter to Hogue Crossley, President of SSI, requesting that he be given the position of Vice-President and a percentage of future gains and profits of the company.

Crossley and Heil conferred shortly after the letter was delivered. Crossley told Heil that he would not "give" him any portion of the company, explaining that the company had been operating on the capital which he and his wife had saved over a number of years. Crossley was willing for Heil to become a stockholder in the company if he was willing to risk his own capital. The agreement reached between them was that Heil would be allowed to purchase 20 percent of the company over a period of eight years, but only if he remained with SSI. If he left SSI voluntarily or involuntarily, he would be required to sell the stock he had purchased back to the company. Each year, Heil was to use his bonus money and $5,000.00 of other earnings to buy stock in the company.

These discussions resulted in an Option Agreement for the Purchase of Stock dated January 27, 1984, which provides that it terminates upon Heil "ceasing to be an employee of Southeastern Structures, Inc., for any reason." Further, the Option Agreement provides that Heil must sell his stock back to the company upon "Heil for any reason ceasing to be an employee of the company," and that the purchase price of Heil's shares of stock shall be determined as follows:

> The price to be paid to the company for any shares purchased by Heil under this Agreement, and the price to be paid to Heil for any shares repurchased by the company under this agreement shall be an amount equivalent to the book value of the shares as determined by the accountant regularly employed by Southeastern Structures, Inc., as of the end of the fiscal year preceding the year in which the option is exercised. The book value shall be calculated by establishing the net worth of the corporation and dividing that net worth by the number of outstanding shares prior to the issue of the new shares of stock being purchased by Heil during that year. Book value as determined by said accountant shall be conclusive and binding on both parties hereto.

Heil did not use all of his bonuses to purchase stock and did not invest his other earnings in the stock. Consequently, he did not accumulate stock in the company as rapidly as the parties had originally expected. By 1987, it appeared that the option period would expire before Heil was able to purchase 20 percent of the company, and he became dissatisfied with the Option Agreement.

Heil expressed his dissatisfaction to Crossley, stating that he did not believe he was being treated fairly. Crossley then asked for Heil's written resignation, which he submitted. Heil later asked Crossley to reconsider his resignation and to consider another stock ownership plan.

Crossley agreed to amend the Option Agreement if Heil would allow payroll deductions on a weekly basis to pay the taxes on the stock to be distributed each year, and if Heil would actually accept the stock and pay the taxes when due.

The result of these discussions was a letter agreement dated September 30, 1987, which purports to be an amendment to the Stock Purchase Agreement dated January 27, 1984. In this agreement, SSI agreed to issue 180 shares of stock as part of Heil's annual compensation. The agreement also pledged a "minimum" salary and bonus for the next five years to address Heil's concern that he would have sufficient income to pay the taxes on the stock.

Heil refused to accept stock in 1989 and 1990, because he did not want to pay the taxes on the stock. He also did not allow SSI to withhold taxes during the year so that the taxes on the stock would be paid by year-end.

Heil continued in his employment with SSI as Vice-President. His duties evolved beyond those of a construction superintendent as the company expanded, and eventually they included the review of plans and specifications and assisting with all of the bids for projects made by SSI.

In 1990, SSI and Heil again began experiencing problems. In early 1990, SSI contracted with Andy Johnson to build a warehouse on a cost-plus basis. Heil was in charge of this project. Johnson testified that several mistakes were made on this job which were costly; e.g., an area near the dock level had to be filled twice because of mistakes. When the concrete floor was finally poured in the building, numerous cracks and settlement in the concrete floor developed, owing to poor compaction. In addition, the floor sounds hollow underneath because the ground has settled under the concrete. A subcontractor was supposed to install the roof system, including the angle irons on the roof. SSI, however, had already purchased and installed the angle irons. Johnson was therefore charged twice for these angle irons. In addition, SSI installed the angle irons in the wrong places, and the subcontractor had to remove the angle irons and reinstall them. The workmanship where the roof joins with the wall is unaesthetic. Other problems developed, unnecessary to be recited here. Crossley testified that he cautioned Heil that clients should not be treated in ‘this manner’and that Heil’s attitude was cavalier.

With respect to the Farragut Town Hall project, SSI was not awarded the contract even though its bid was the lowest submitted. The owner discovered two glaring clerical errors in SSI’s bid and disqualified SSI. Crossley

attributed these errors to Heil, who was responsible for the preparation of the bid. Heil denied negligence and attributed the mistakes elsewhere.

Crossley decided on August 31, 1990 to fire Heil because of these problems and went to a construction site to talk to him. According to Crossley, Heil came as close as he had ever come to apologizing for his actions. "He said, Hogue, you were right. It won't happen again, so I decided not to fire him at that time."

Crossley testified that he decided to determine for himself whether the Farragut Town Hall project was an isolated incident of poor judgment or whether it was a result of an 'attitude problem,' since he had been having problems with Heil for the last 18 months.

He testified that he reflected upon the types of problems he had with Heil in the past, that he and Heil seemed to be always at odds, that he had to overcome Heil's objections to get things accomplished, and that Heil's approach to the owners was short-sighted and abusive.

Crossley concluded that he could no longer work with Heil and could not trust him to do what he was told to do and consequently fired him.

At the time of Heil's termination, he owned 900 shares of SSI stock. Heil asked for an additional 360 shares on November 5, 1990, which were the shares Heil had rejected in January of 1989 and January of 1990. SSI agreed by letter dated November 19, 1990 to issue the additional 360 shares, bringing Heil's ownership to 1,260 shares, retroactive to January 1990, as originally anticipated.[2] SSI also informed Heil in this letter that it would repurchase all of these shares as required by the Option Agreement.

---

[2]SSI's agrument that Heil is entitled to only 900 shares is frustrating, since Crossley agreed, by letter written to Heil *after* he was terminated, to issue him an additional 360 shares.

The accountants, McWilliams & Company, had calculated the book value of the stock at $78.05 per share, based on the stock issue being retroactive to January 1990, and Heil agreed this calculation was correct. The total value of Heil's shares was calculated at $98,343.00. SSI elected to pay the purchase price in installments as provided in the Agreement. The Option Agreement specifies that the book value of the stock as determined by SSI's accountants "shall be conclusive and binding on both parties."

I

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. R. APP. P., RULE 13(d).

II

It is conceded that Heil was a contractual employee. Consequently, his employment could be terminated only for cause. The Chancellor found that good cause was proved to justify Heil's discharge. We cannot find that the evidence preponderates against this finding.

III

The Chancellor found that Heil was not liable for the loss of the Farragut Town Hall project. SSI strenuously insists that this finding is contrary to the preponderance of the evidence, which indicates that the job was lost because of Heil's negligence in clerical details. The issue is close, but we cannot find that the evidence preponderates against the finding of the Chancellor; superimposed is the arguable conclusion that this issue was raised in hindsight to strengthen the complaint.

IV

We are uncertain of the exact thrust of SSI's argument that Heil was awarded 360 shares to which he was not entitled, notwithstanding the essential concession of Crossley to the contrary. We concur in the Chancellor's finding that Heil owned 1,260 shares. On the face of it, we agree that as of the date Heil was terminated he owned only 900 shares, having elected to defer the purchase of 180 shares in 1989 and 180 shares in 1990. But by letter written after the termination, Crossley agreed to the issuance of these deferred shares.

V

The Chancellor found that SSI should repurchase the 1,260 shares for $81.49 per share. SSI argues that the per-share value was $78.05. The difference arises out of a provision in the Option Agreement that the book value of the shares will be "calculated by determining the net worth of the corportion and dividing the net worth by the number of outstanding shares prior to the issuance of new shares being purchased by Heil that year." Heil deferred any stock purchases in 1989 and 1990, as we have seen. The Chancellor took this fact into consideration in his findings. We cannot say that the evidence otherwise preponderates.

VI

The obligation of SSI to repurchase Heil's shares in the event he ceases to be an employee is not disputed. The contract requires SSI to pay ten percent interest on any unpaid amount owing to Heil. We reproduce the pertinent provision:

> 5. RIGHT OF COMPANY TO REPURCHASE: A. Upon the death of Heil or upon Heil for any reason ceasing to be an employee of the company, Heil or his personal representative, as the case may be, shall sell and the company shall purchase all of the shares of stock in the company owned by Heil at the time of his death or at the date Heil ceases being an employee of the company, at a purchase price to be established by a method as set forth in paragraph 3 hereof. The company shall have the right to pay the purchase price in cash,

> or at its option, the purchase price shall be paid in Five (5) equal annual installments of twenty (20%) percent of the purchase price each: the first installment to be paid in cash on the closing date. The unpaid balance of the purchase price shall be evidenced by a promissory note in the principal amount of the balance of the purchase price bearing interest at that rate of ten (10%) per annum, due in three annual installments on each consecutive anniversary of the closing date. Such note shall provide for acceleration of maturity upon default in the payment of any such installment and shall provide for prepayment at any time; interest shall cease on the day of prepayament. The closing for the purchase of Heil's shares shall take place within thirty (30) days from the date of death of Heil or from the date his employment by the company ends.

SSI complains of the award of interest from 30 days after the termination of Heil, arguing that it offered to repurchase Heil's shares (900) soon after he was terminated, and since Heil insisted that he was entitled to purchase 1,800 shares, which SSI was obligated to repurchase, the rights of the parties should be adjudicated as of November, 1990, rather than seven years later. Heil admits that SSI offered to purchase his 900 shares but argues that the offer was conditional upon his releasing SSI from all claims arising out of his contract and employment with them. This argument is meritorious to an extent, *See, Johnson v. Midland Bank & Trust Co.,* 715 S.W.2d 607 (Tenn. App. 1986), but we think the reasons why Heil declined the offer in 1990 should be scrutinized to avoid an unwarranted windfall to him.

Heil declined to execute a release and thereby settle this matter because he claimed damages for an alleged wrongful discharge and claimed entitlement to 1,800 shares. It developed that he was not entitled to this relief. The offer of SSI involved only 900 shares, and except for the award of Heil of 1,260 shares, the judgment is similar to the offer.

The shares paid no dividends, but Heil will realize a substantial capital gain in any event. He argues that SSI could have tendered payment for the 900 shares in 1990 and litigated the issue of additional shares. We agree. SSI

apparently took the calculated risk, kept its money, and offers no legally cognizable reason why it should not be onerated with interest except as noted hereafter.

As we have seen, Heil elected not to exercise his right to purchase shares in 1989 and 1990, and by agreement the purchase was deferred. But the interest award treats these 360 shares as having been purchased, or issued, to Heil in a timely manner. Since Heil requested a deferral, we think he should not be entitled to interest on the value of 360 shares, or $29,336.40, and the judgment will be accordingly modified.

The appellee insists that he is entitled to compound, pre-judgment interest, as contrasted to simple interest allowed by the Chancellor pursuant to T.C.A. § 47-14-123. Pre-judgment interest is not awarded as a matter of right, and its allowance is discretionary with the Court. Appellate review is limited to a determination of whether the Court abused its discretion. *B. F. Myers & Son v. Evans,* 612 S.W.2d 912 (Tenn. App. 1981). The statute has been construed by the Supreme Court in *Otis v. Cambridge Mutual Fire Ins. Co.,* 850 S.W.2d 439 (Tenn. 1992) as authorizing an award of simple interest only. Compound interest is, consequently, not appropriate.

As modified, the judgment is affirmed, with costs assessed 75 percent to the appellant and 25 percent to the appellee.

_____

William H. Inman, Senior Judge

CONCUR:

_____

Houston M. Goddard, Presiding Judge

_____

Charles D. Susano, Jr., Judge