STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: July 21, 2014)

PHILIP BOURGOIN, d/b/a G.R.I.D. CONSTRUCTION	:	
V.	:	**C.A. No. KC-1992-0060**
MARK J. GLADSTONE and ALAN H. ROTHMAN, d/b/a STONEMAN FINANCIAL ASSOCIATES	:	

DECISION

K. RODGERS, J. This case came before the Court, sitting without a jury, on the Complaint by Plaintiff Philip Bourgoin, d/b/a G.R.I.D Construction (Bourgoin), for certain monies owed by Defendant Mark J. Gladstone (Gladstone) pursuant to an alleged contract.

Jurisdiction is pursuant to G.L. 1956 § 8-2-13. For the reasons set forth herein, judgment shall enter for Bourgoin.

I

Findings of Fact

Having reviewed the evidence presented by both parties, this Court makes the following findings of fact.

Bourgoin is a self-taught contractor engaged in the carpentry and construction business at the time of the events giving rise to this cause of action. Gladstone and Alan H. Rothman (Rothman) (collectively Defendants) were partners in a business known as

Stoneman Financial Associates (Stoneman Financial) based in Massachusetts. The business of Stoneman Financial included secured lending.

On March 24, 1988, Gladstone and Rothman, doing business as Stoneman Financial, recorded a first mortgage in the amount of $300,000 on commercial property owned by Alfred J. Gastonguay (Gastonguay) located at 95-99 Washington Street in West Warwick, Rhode Island (the Premises). In late 1988 and/or early 1989, Gastonguay hired Bourgoin to perform carpentry and construction work in two retail units in the Premises, which work generally included building interior walls, installing drop-ceilings, adding a display case, painting walls and installing flooring. On February 21, 1989, Bourgoin, through his then-attorney Linda S. MacDonald (now Linda MacDonald-Glenn and hereafter MacDonald-Glenn) recorded a Notice of Intention to Do Work or Furnish Materials, or Both (Notice of Intention) in the Land Evidence Records of the Town of West Warwick to secure the work performed at the Premises. (Joint Ex. 1.)

Sometime in 1989, Gastonguay failed to satisfy his mortgage obligation and it was expected that the Premises was headed toward a foreclosure sale. Indeed, MacDonald-Glenn became aware of the potential foreclosure in February 1989, while representing Bourgoin as well as the two tenants for which Bourgoin performed work in their respective retail units in the Premises. (Joint Ex. 4.)

Seeking to protect Bourgoin's rights, MacDonald-Glenn prepared both a Notice of Lis Pendens (Lis Pendens) and a Petition to Enforce Mechanics' Lien (Petition to Enforce) on Bourgoin's behalf. (Joint Exs. 2, 3.) On May 5, 1989, MacDonald-Glenn had a phone conversation with Gladstone in which she informed Gladstone that she was getting ready to file both. Gladstone, aware that such filings would result in suspending

the foreclosure sale, indicated he would be willing to take care of the Mechanics' Lien. Five days later, MacDonald-Glenn sent a letter to Gladstone confirming their May 5, 1989 phone conversation and further advising Gladstone that Bourgoin's lien was $22,000, $15,000 of which was out-of-pocket costs, and that Bourgoin was willing to accept $15,000 to forego court proceedings associated with the Lis Pendens and the Petition to Enforce. (Joint Ex. 5.) After some negotiations, including a face-to-face meeting in Stoneman Financial's Weymouth, Massachusetts office attended by Bourgoin, MacDonald-Glenn and Gladstone, the parties agreed that Gladstone would pay Bourgoin $12,950 and Bourgoin would forego filing the Lis Pendens and Petition to Enforce. The agreement was memorialized in a May 18, 1989 letter from Gladstone to MacDonald-Glenn which read in part:

> "In consideration of your foregoing the petition for enforcement of a mechanics' lien on behalf of your client referenced above on the Gastonguay property, please let this letter serve as representation to you that the sum of $12,950.00 shall be paid to your client at the time of the realization of funds from the successful bidder at foreclosure of said property." (Joint Ex. 6.)

As a result of this agreement, MacDonald-Glenn never filed or recorded the Petition to Enforce or the Lis Pendens. Gladstone then directed his counsel to proceed with foreclosing upon the Premises. (Joint Ex. 7.)

On June 9, 1989, MacDonald-Glenn and Gladstone had a further telephone conversation in which they discussed Gastonguay's possible bankruptcy filing and agreed that if Gastonguay did file for bankruptcy, then Bourgoin would still be paid $12,950. A June 13, 1989 letter from MacDonald-Glenn to Gladstone memorialized the June 9, 1989 conversation, noting in part:

> "This is to confirm our telephone conversation of June 9, 1989. We discussed the possibility of Alfred Gastonguay filing bankruptcy and we agreed that if he files bankruptcy, my client will still be paid the amount agreed upon (referred to in your letter of May 18, 1989) at the time of realization of funds from the bankruptcy sale." (Joint Ex. 9.)

The foreclosure sale of the Premises took place as scheduled on December 28, 1989. Bourgoin and MacDonald-Glenn attended the foreclosure sale. Gladstone and Rothman, doing business as Stoneman Financial, were the successful bidders with a credit bid of $250,000, outbidding a third party by $50,000. At the sale, MacDonald-Glenn asked Gladstone for the $12,950 check. Gladstone informed MacDonald-Glenn that he needed "four to five days" to make payment. While this was not what had been agreed upon, MacDonald-Glenn assented to the delayed payment but nonetheless provided Gladstone with an executed Discharge of Notice of Intent to Do Work or Furnish Materials, or Both (Discharge Notice). (Joint Ex. 11.) Also, while at the foreclosure sale and at Gladstone's request, Bourgoin agreed to winterize the Premises in exchange for $1000, which would not be credited toward the $12,950 Gladstone had previously agreed to pay Bourgoin. That $1000 was tendered to Bourgoin, through his counsel, the following day. (Joint Ex. 12.)

At some point subsequent to the foreclosure sale, MacDonald-Glenn and Gladstone again spoke. Gladstone informed MacDonald-Glenn that he needed approximately forty-five days to make the payment. Believing that she may have misheard Gladstone's original request at the foreclosure sale as "four to five" rather than "forty-five" days, she again assented to the delayed payment. At no time during either of

the discussions between MacDonald-Glenn and Gladstone did Gladstone indicate that $12,950 was not due to Bourgoin.

The Foreclosure Deed Under Power of Sale evidencing the foreclosure sale and credit bid was recorded with the West Warwick Land Evidence Records on January 30, 1990. (Joint Ex. 15.)

Gladstone never paid Bourgoin the $12,950 as agreed. On April 3, 1991, MacDonald-Glenn sent a letter to Gladstone addressed to Stoneman Financial's Weymouth address. The letter advised Gladstone that if payment was not received by May 1, 1991, then suit would be filed. (Joint Ex. 13.) That letter, however, was returned as undeliverable. On April 18, 1991, MacDonald-Glenn sent a second letter to Gladstone at Stoneman Financial's 500 North Main Street, Randolph, Massachusetts address indicating that suit would be filed if payment was not received by May 15, 1991; the second letter was never returned. (Joint Ex. 14.)

On September 30, 1991, Gladstone and Rothman, doing business as Stoneman Financial, executed a Warranty Deed conveying the Premises to a third party for the sum of $60,000.

On January 21, 1992, Bourgoin filed suit in this action to recover $12,950. Both Gladstone and Rothman were timely served with a Summons and the Complaint on February 19, 1992 and March 2, 1992, respectively.[1] Gladstone, a Massachusetts

[1]The so-called "green cards" that serve as the return receipt for the delivery of certified mail reflect the dates of delivery of the Summons and Complaint on Gladstone and Rothman, respectively. The green card reflecting delivery to Gladstone is affixed to the original Summons, which is date-stamped as received by the Court on January 21, 1992, the date of filing the Complaint, and which Summons reflects that service was made upon both Gladstone and Rothman by way of certified mail, return receipt requested. Clearly, then, Gladstone's green card was later affixed to a previously-filed document. The green

licensed attorney, filed Defendants' Motion to Dismiss the Complaint as against both Gladstone and Rothman for lack of personal jurisdiction, to which Bourgoin objected. Defendants' Motion to Dismiss the Complaint was never called for hearing and neither MacDonald-Glenn nor Gladstone or any other counsel inquired about the status of Defendants' Motion to Dismiss the Complaint.[2]

In the absence of a properly filed motion to dismiss or an answer, MacDonald-Glenn pursued a default judgment. An Affidavit and Request for Entry of Default (Affidavit) was executed by MacDonald-Glenn on April 14, 1992 and filed with the Court on April 15, 1992. The text of that Affidavit includes a handwritten notation "A.H. Rothman" above the signature block for "Default entered" to be executed by a Court clerk. The Affidavit does not otherwise indicate against which defendant the default is sought, but does seek the sum certain of $12,950, plus statutory interest from May 18, 1989, for a total of $17,612. The Judgment By Default Upon Application to Clerk was entered by a Court clerk on May 6, 1992, in the total amount of $17,612, as against Gladstone. A second Affidavit and Request for Entry of Default was executed by MacDonald-Glenn and filed with the Court on July 1, 1992, again seeking the sum certain of $12,950, plus statutory interest from May 18, 1989, for a total of $17,612, and again not specifying in the text thereof against which defendant default was sought. It is that later Affidavit and Request for Entry of Default, filed on July 1, 1992, to which

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card reflecting delivery to Rothman is affixed to a document date-stamped as received by the Court on July 1, 1992.

[2]The Court file does not include the original Defendants' Motion to Dismiss the Complaint, but does include the original Plaintiff's Objection to Defendants' Motion to Dismiss with a hearing date listed thereon as April 13, 1992. Not being a member of the Rhode Island Bar, it is axiomatic that Gladstone could not represent Rothman before this Court, which this Court infers is the reason that Defendants' Motion to Dismiss the Complaint was not accepted for filing and/or not called for hearing.

Rothman's green card is attached. There was no default or default judgment entered in response to the July 1, 1992 Affidavit and Request for Entry of Default.[3]

Subsequent to the July 1, 1992 filing and through 2002, Bourgoin made no attempt to enforce any default judgment or to pursue any cause of action against either Gladstone or Rothman. Likewise, Defendants made no attempt to prepare for trial or otherwise adjudicate this action by way of their previously-attempted Defendants' Motion to Dismiss the Complaint or otherwise. This case simply languished. On April 3, 2003, the then-Presiding Justice of the Superior Court dismissed the case pursuant to G.L. 1956 § 9-8-5 for failure to prosecute. No motion to reinstate the case was made within one year from the April 3, 2003 dismissal, as permitted by § 9-8-5.

On or about November 11, 2008, Bourgoin filed a Complaint in Norfolk (MA) County Superior Court against Gladstone seeking to enforce the May 6, 1992 default judgment entered against him in the instant action (the Massachusetts enforcement action). Gladstone was served with a copy of the Summons and Complaint in the Massachusetts enforcement action on November 25, 2008, and contends that this was the first time that he was aware that a default judgment had entered against him in the instant case. Present counsel for Gladstone thereafter filed a Rule 60 Motion for Relief from Judgment, which was heard by another Justice of this Court on October 9, 2009. Ultimately, the Court entered an Order on November 5, 2009, granting Gladstone's Motion for Relief from Judgment pursuant to Rule 60(a), vacating the default judgment

[3]The claim against Rothman has not been raised before this Court in any manner.

entered against Gladstone on May 6, 1992, and reinstating the Complaint against Gladstone.[4]

The matter came on for jury-waived trial before this Court on October 17, 2011.

II

Presentation of Witnesses

Bourgoin, Gladstone and MacDonald-Glenn testified before this Court. Also presented was Robert McCorry, a Rhode Island licensed attorney offering testimony on the law of mechanics' liens as it existed in or about 1989.[5]

Gladstone testified that he was unable to recall any facts relative to the Premises, the agreement with Bourgoin to take care of the Mechanics' Lien in order that foreclosure on the Premises would not be impeded, how any written letters between MacDonald-Glenn and him came about and/or the result thereof, or any conversation he had with MacDonald-Glenn. With one exception, Gladstone's testimony offered no factual information for the Court to assess, yet his inability to recall certainly was consistent with his overarching argument that he has been prejudiced by the extreme delay in Bourgoin's prosecution of this case. Gladstone did testify, though, that he recalled that he and Rothman did not "realize any funds" from the foreclosure sale itself but later did realize $60,000 when the Premises was sold to a third party in September 1991.

[4]While Gladstone was successful in vacating the May 6, 1992 default judgment, he has argued that this action should not have been reinstated against him as it had been properly dismissed pursuant to § 9-8-5. Such a result would allow Gladstone to have his cake and eat it too by reopening this case for Gladstone's purposes and no other. This Court rejects that argument in its entirety.

[5]At trial, it was determined that this Court would take judicial notice of the existence and status of the law relative to filing and/or enforcing mechanics' liens in or about 1989. Accordingly, Attorney McCorry's testimony was truncated and his credibility is not at issue before this Court.

This Court is not persuaded that Gladstone was so wholly incapable of recalling anything relating to this transaction, but rather concludes that his memory lapse has been amplified to better serve his defense of laches. Indeed, his ability to only recall that he and his partner did not realize funds from the foreclosure sale is self-serving and is further evidence that his inability to recall any other facts is contrived.

On the other hand, Bourgoin and MacDonald-Glenn were able to recall the facts and events involved in this case with appropriate and sufficient detail. Bourgoin credibly described his ability to recall as being based on the importance he placed on the monies that were owed to him, notwithstanding the tremendous lapse in time in his attempt to recover such monies after this action was filed. For her part, MacDonald-Glenn testified that she has not been actively engaged in the practice of law since 2000, and therefore, it is not beyond belief that she could recall specific conversations and meetings with Gladstone on this particular case some ten years before she ceased practicing. She also offered credible testimony concerning why she agreed to accept the delayed payment of $12,950 after the foreclosure sale took place and to deliver the Discharge of Notice of Intent to Do Work or Furnish Materials, or Both before receiving the payment that was due: because she trusted Gladstone as a fellow attorney.

In sum, Bourgoin offered credible testimony through himself and his prior counsel that supports his cause of action and this Court accepts such testimony as truthful. Gladstone offered no credible testimony that would support or dispute any of the facts alleged by Bourgoin.

III

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, "'the trial justice sits as a trier of fact as well as of law.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" Id. (quoting Hood, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court." McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

Furthermore, "[w]hen rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis and discussion of all the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not "'categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact

to support his [or her] rulings.'" Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

IV

Analysis

Bourgoin alleges that he entered into a contract in May 1989 whereby Defendants would pay Bourgoin $12,950 to forego the Lis Pendens and the Petition to Enforce. Bourgoin further alleges this agreement was modified twice: first, that payment would be made in four to five days after the foreclosure sale; and second, that payment would be made forty-five days after the foreclosure sale. Gladstone argues that he never had an obligation to pay because, given the credit bid by which Defendants acquired the Premises at the foreclosure sale, Defendants never realized any funds from said foreclosure sale.[6] The issues before this Court, then, are whether there was an enforceable agreement between the parties; and, if so, whether there was a subsequent oral modification and what the terms of the modified agreement were. Gladstone also argues that Bourgoin is barred from recovering under the doctrine of laches and, in the alternative, that any prejudgment interest should be tolled from 1992 to 2009, during which time Bourgoin allowed this case to languish. These issues will be addressed seriatim.

[6]Although not dispositive of the issues before the Court, this Court notes that Gladstone did acknowledge in his testimony that Defendants ultimately realized $60,000 in September 1991, when the Premises was sold to a third party.

A

The Existence of a Contract

"'A contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" Lamoureux v. Burrillville Racing Ass'n, 91 R.I. 94, 98, 161 A.2d 213, 215 (1960) (quoting 17 C.J.S. Contracts § 1, p. 310).

Here, the May 18, 1989 letter from Gladstone to MacDonald-Glenn sets forth an agreement between the parties supported by legal consideration—the promise of $12,950 in exchange for the promise to forego the Lis Pendens and the Petition to Enforce. Furthermore, the letter noted that the sum would be paid to Bourgoin "at the time of the realization of funds from the successful bidder at foreclosure of said property." (Joint Ex. 6.) MacDonald-Glenn's subsequent letter to Gladstone on June 13, 1989 further evidences that there was mutuality of agreement and obligation between the parties because it confirms the terms of the May 18, 1989 letter. MacDonald-Glenn's June 13, 1989 letter even uses the same phrase set forth in Gladstone's May 18, 1989 letter wherein they have agreed that if Gastonguay were to seek bankruptcy protection, then Bourgoin will still be paid the amount agreed upon "at the time of the realization of funds from the bankruptcy sale." (Joint Ex. 9.) Accordingly, as of June 13, 1989, there was a valid contract between the parties for the payment of $12,950 to Bourgoin upon "the realization of funds from the successful bidder at foreclosure of said property."

B

Modification and Terms

This Court now turns to whether there was a modification of the original agreement between the parties and, if so, then what were the terms of the modified agreement. In Rhode Island, parties to a contract can modify their understanding by a subsequent oral pact. To be legally effective, however, there must be evidence of mutual assent to the essential terms of the modification and adequate consideration. See Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998).

In this case, MacDonald-Glenn credibly testified that she spoke with Gladstone at the foreclosure sale on December 28, 1989. She testified that when she asked Gladstone for the $12,950 check, Gladstone informed her that he would make the payment four to five days after the foreclosure sale. Later, MacDonald-Glenn testified that Gladstone informed her he would make payment forty-five days after the foreclosure sale. Gladstone neither admitted nor denied that he requested such extensions but merely testified that he could not recall either conversation. In light of MacDonald-Glenn's credible testimony, this Court concludes there were two modifications to the initial agreement between the parties regarding the time within which Gladstone would pay Bourgoin—the first called for payment four to five days after the foreclosure sale, while the second called for payment forty-five days after the foreclosure sale.

Most importantly, though, was the removal of any condition that funds be realized from the successful bidder at the foreclosure sale. In other words, at the foreclosure sale on December 28, 1989, and even after the foreclosure sale had taken place when Gladstone was aware that his and Rothman's bid was the highest, Gladstone and

MacDonald-Glenn agreed, upon Gladstone's request, that he be afforded additional time after the foreclosure sale to pay Bourgoin. Thus, Gladstone himself modified the earlier provision that Bourgoin would be paid "at the time of the realization of funds from the successful bidder at foreclosure of said property" and MacDonald-Glenn accepted that modification on Bourgoin's behalf. Accordingly, this Court finds there was an enforceable agreement whereby Gladstone would pay Bourgoin $12,950 forty-five days after the December 28, 1989 foreclosure sale, without any condition that funds be realized from the foreclosure sale. It is undisputed that Gladstone has failed to pay Bourgoin and therefore is in breach of that modified agreement.

In so holding, this Court is not convinced by Defendants' arguments that the evidence of a subsequent oral modification is barred by § 9-1-4 and the parol evidence rule. Generally, where parties seek to modify an agreement that falls within the statute of frauds, the subsequent modification must also be in writing and signed by the party to be charged. See, e.g., Herreshoff v. Misch, 21 R.I. 524, 45 A. 145 (1900); Hicks v. Aylsworth, 13 R.I. 562, 565 (1882); CFN, Inc. v. Drake Petroleum Co., 2010 WL 3843748, *10 (R.I. Super. 2010). Here, however, the contract between Bourgoin and Defendants does not fall within the statute of frauds. Contrary to Gladstone's assertion, this was neither a contract "to pay any commission for or upon the sale of any interest in real estate," nor a contract "to charge any person upon any contract for the sale of personal property beyond five thousand dollars [.]" See §§ 9-1-4(6), (7). Therefore, the modifications relating to the time of payment did not need to be in writing.

Nor does the parol evidence rule bar the modifications here. "The parol evidence rule states that in the absence of fraud or mistake, parol evidence of prior or

contemporaneous agreements is generally inadmissible for the purpose of varying, altering or contradicting a written agreement." Fram Corp. v. Davis, 121 R.I. 583, 586-87, 401 A.2d 1269, 1272 (1979) (emphasis added). Here, Gladstone's agreement to pay Bourgoin four to five days after the foreclosure sale, and then the subsequent agreement to pay forty-five days after the foreclosure sale, occurred on and after December 28, 1989, well after the initial agreement was entered into in May 1989. Accordingly the parol evidence rule is inapplicable to the facts of this case.

C

Laches

Gladstone further argues that Bourgoin's sixteen years of inaction before bringing this matter to a conclusion is a complete bar to any relief on Bourgoin's claim. "'Laches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant.'" Hazard v. East Hills, Inc., 45 A.3d 1262, 1269 (R.I. 2012) (quoting O'Reilly v. Town of Glocester, 621 A.2d 697, 702 (R.I. 1993)). The defense of laches "involves not only delay but also a party's detrimental reliance on the status quo." Andrukiewicz v. Andrukiewicz, 860 A.2d 235, 241 (R.I. 2004). Being equitable in nature, the applicability of the defense of laches in a given case rests within the sound discretion of the trial justice. Id.

It is well settled that the defense of laches presents a two-part test for this Court. See, e.g., Hazard, 45 A.3d at 1270; School Comm. of Cranston v. Bergin-Andrews, 984 A.2d 629, 644 (R.I. 2009); O'Reilly, 621 A.2d at 702. First, this Court must determine if negligence on the part of Bourgoin leads to a delay in the prosecution of the case. Hazard, 45 A.3d at 1270; Bergin-Andrews, 984 A.2d at 644; O'Reilly, 621 A.2d at 702.

Second, this Court must determine whether the delay has prejudiced Gladstone. Hazard, 45 A.3d at 1270; Bergin-Andrews, 984 A.2d at 644; O'Reilly, 621 A.2d at 702. Indeed, such prejudice may come "from loss of evidence, change of title, intervention of equities, and other causes . . . " Chase v. Chase, 20 R.I. 202, 204, 37 A. 804, 805 (1897). The burden rests with Gladstone to show that the claim was "'first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied.'" Fitzgerald v. O'Connell, 120 R.I. 240, 246, 386 A.2d 1384, 1387 (1978) (quoting Lombardi v. Lombardi, 90 R.I. 205, 210, 156 A.2d 911, 913 (1959)).

Here, although Bourgoin's claim against Defendants was timely asserted approximately two years after payment to Bourgoin was due, Bourgoin inexcusably and negligently failed to prosecute the action he had filed for over sixteen years before seeking to enforce the May 6, 1992 default judgment by way of the Massachusetts enforcement action filed in November 2008 against Gladstone. Notwithstanding this delay, it has not been impossible for this Court to ascertain the truth of the matters in controversy, but rather, this Court concludes that Bourgoin has provided ample documentation and credible testimony to establish the validity of his claim. See Fitzgerald, 120 R.I. at 246, 386 A.2d at 1387.

Furthermore, this Court finds that the delay worked no prejudice to Gladstone. While Gladstone believes himself to be in the impossible position of defending a lawsuit involving a transaction that occurred in 1989 for which he no longer has any records or

recollection of events, this Court is not persuaded that unidentified documents that would have otherwise existed in 1989 would, in fact, refute Bourgoin's allegations or that Gladstone genuinely cannot recall any facts related to this case, save for the ability to recall that he and Rothman did not realize funds from the foreclosure sale. Moreover, Defendants were aware of Bourgoin's asserted claim as early as April 1991, based upon MacDonald-Glenn's unreturned letter to Gladstone at Stoneman Financial's Randolph office (Joint Ex. 14), and certainly upon being served with the Complaint in this action in early 1992. Prudence dictates that Defendants should have kept their records safe throughout the course of litigation. There was no evidence presented that such records had been destroyed prior to the commencement of this action, or that such records were destroyed during the sixteen-year period preceding Bourgoin's filing the enforcement action in Massachusetts. Any lost or destroyed evidence was done through no fault of Bourgoin.

Gladstone has failed to demonstrate that any prejudice he suffered was a result of Bourgoin's inaction. Accordingly, Gladstone has failed to demonstrate that these circumstances warrant the imposition of the doctrine of laches to bar Bourgoin's otherwise meritorious claim.

D

Tolling of Statutory Prejudgment Interest

Finally, Gladstone requests that the running of the statutory interest for the period of time between April 3, 1992 and October 9, 2009, be tolled and permanently barred from being added to any judgment entered in favor of Bourgoin.

"Statutes that award prejudgment interest generally serve the dual purposes of encouraging the early settlement of claims . . . and compensating plaintiffs for waiting for recompense to which they were legally entitled." Martin v. Lumbermen's Mut. Cas. Co., 559 A.2d 1028, 1031 (R.I. 1989) (citing Dennis v. R.I. Hosp. Trust Nat'l Bank, 744 F.2d 893, 901 (1st Cir. 1984) (internal citations omitted)). Our Supreme Court has implicitly recognized that it is within the Court's discretion to determine the extent to which interest should be awarded in any particular case. Martin, 559 A.2d at 1030 (prejudgment interest inappropriate where neither purpose would be served). However, more recently, our Supreme Court has determined that a trial court should not utilize a fault-based analysis in considering awards of prejudgment interest. In Greensleeves, Inc. v. Smiley, 68 A.3d 425, 439 (R.I. 2013), the defendant had moved to amend the judgment to reduce the award of prejudgment interest that had accrued during a twenty-nine month period in which the plaintiff had pursued two unsuccessful appeals. The Supreme Court held as follows:

> "This Court declines [defendant's] invitation to adopt a fault-based analysis with respect to awards of prejudgment interest. We agree with New York's highest court that:
>
> '[prejudgment] interest is not a penalty. Rather, it is simply the cost of having the use of another person's money for a specified period * * *. [Prejudgment interest] is intended to indemnify successful plaintiffs 'for the nonpayment of what is due to them' * * *, and is not meant to punish defendants for delaying the final resolution of the litigation. It accordingly follows that *responsibility for the delay should not be the controlling factor* in deciding whether [prejudgment] interest is to be computed * * *.' Love v. State [78 N.Y.2d 540, 577 N.Y.S.2d 359], 583 N.E.2d 1296, 1298 (N.Y. 1991) (emphasis added)." Greensleeves, 68 A.3d at 439.

Here, Gladstone continued to have use of Bourgoin's $12,950 since the time it was due, forty-five days after the December 28, 1989 foreclosure sale, or February 11, 1990. Bourgoin has been deprived the use of the monies owed to him. To deprive Bourgoin of statutory prejudgment interest based upon Bourgoin's inaction for over sixteen years would wholly violate the Supreme Court's express rejection of a fault-based analysis in Greensleeves. While it appears inequitable to permit Bourgoin to sit on his rights and accrue interest on a judgment he seeks to obtain, our Supreme Court appears to have eliminated that as a consideration. Id. at 439.

Accordingly, this Court is constrained to deny Gladstone's request to toll prejudgment interest. Prejudgment interest shall accrue from forty-five days after the December 28, 1989 foreclosure sale, or February 11, 1990.[7] This Court will, however, stay the accrual of prejudgment interest from November 7, 2011 to July 21, 2014, or from the time briefing was completed by counsel to the issuance of this Decision.

V

Conclusion

For all these reasons, this Court grants Bourgoin's Count I for breach of contract and awards Bourgoin $12,950, with statutory prejudgment interest from February 11, 1990 to November 6, 2011.

Counsel for Bourgoin shall prepare a judgment consistent with this Decision.

[7]This Court rejects any suggestion that prejudgment interest should accrue from May 18, 1989, the date of Gladstone's letter. The modified, enforceable agreement clearly allowed Gladstone up to forty-five days after the December 28, 1989 foreclosure sale to make the payment to Bourgoin. See Section IV.B., supra.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Philip Bourgoin d/b/a G.R.I.D. Construction v. Mark J, Gladstone, et al.
CASE NO:	C.A. KC-1992-0060
COURT:	Kent County Superior Court
DATE DECISION FILED:	July 21, 2014
JUSTICE/MAGISTRATE:	Kristin E. Rodgers
ATTORNEYS:	
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