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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH J. RICCI, GERALD E. DAVIDSON, ELAN ONE CORPORATION, GOLDEN ARK ENTERPRISES, INC., ELAN TWO CORPORATION, ELAN THREE CORPORATION, ELAN FOUR CORPORATION, ELAN FIVE CORPORATION, ELAN SIX CORPORATION, ELAN EIGHT CORPORATION, PERFORMING ARTS AND CONCERTS COMPANY, DAVRIC MAINE CORPORATION, WILLIAMSBURG CORPORATION,

Plaintiffs

v.

KEY BANCSHARES OF MAINE, INC., KEY BANK OF SOUTHERN MAINE, INC.,

Defendants

CIVIL NO. 82-0249 P

WRIT OF ATTACHMENT

The President of the United States of America, to the Marshal of the District of Maine, or his Deputy, Greeting:

In accordance with the Order of the Court, Watson, J., Sitting by Designation, dated June 16, 1987 and entered June 17, 1987 in the above entitled matter,

You are hereby commanded to attach the real property within the State of Maine of defendants Key Bancshares of Maine, Inc. and Key Bank of Southern Maine, Inc. to the value of $15,000,000 plus the sum of interest as provided by said Order, a copy of which is attached.

Dated at Portland, Maine, this 17th day of July, 1987.

WILLIAM S. BROWNELL, Clerk

By Constance E. Wilde
Deputy Clerk

SEAL

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ATTEST: William S. Brownell, Clerk
By Constance E. Wilde
Deputy Clerk

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UNITED STATES OF AMERICA

DISTRICT OF MAINE, ss: _____ A.D., 19

In obedience to the within writ, I have this day caused to be placed a lien on the real property of the defendants Key Bancshares of Maine, Inc. and Key Bank of Southern Maine, Inc. in the following manner:

_____
United States Marshal

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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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JOSEPH J. RICCI, et al.,

Plaintiffs,

v.

KEY BANCSHARES OF MAINE, INC., et al.

Defendants.

Civil No. 82-0249-P

MEMORANDUM OPINION AND ORDER

This opinion disposes of a number of post-judgment motions following a jury verdict on April 13, 1987 which assessed damages against defendants in the sum of $15 million on five counts of the complaint. The action arose from the termination by the defendant banks of the credit line previously extended to plaintiffs. The verdict assessed damages for various acts of defendants found to be violations of federal laws governing credit transactions as well as for breach of contract and tort under Maine law.

The verdict on Count I was an award of $3 million (consisting of $1 million to each of the two individual plaintiffs and $1 million to Golden Ark, the corporate plaintiff designated to represent all the corporate plaintiffs for the purpose of assessing damages) against defendant Key Bancshares of Maine, Inc. (Key Bancshares) for

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discrimination based on plaintiff Ricci's national origin in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq. The verdict on Count II was $1 million for plaintiff Davidson against defendant Key Bank of Southern Maine, Inc. (Key Southern) for failure to provide a statement of reasons for denial of credit, in violation of the Equal Credit Opportunity Act. The verdict on Counts V and VII was $5 million for plaintiff Golden Ark against Key Southern for breach of contract and breach of the implied covenant of good faith and fair dealing. The verdict on Count X was $6 million for plaintiff Ricci against defendant Key Bancshares for the intentional infliction of emotional distress.

On Count X the jury also returned a verdict of $12.5 million in punitive damages for plaintiff Ricci against defendant Key Bancshares. On April 27, 1987 the Court directed a verdict in favor of defendant Key Bancshares on the subject of punitive damages under Count X. At the same time the Court awarded $20,000 in punitive damages to plaintiffs Ricci and Davidson under the federal claims of Counts I and II.

Now pending before the Court are plaintiffs' motion for reconsideration of the Court's rejection of the $12.5 million punitive damage award and defendants' motion for judgments notwithstanding the verdicts or, in the alternative, for a new trial or remittitur.

Also pending are plaintiffs' motion for assessment of pre-judgment interest and defendants' motion for relief from pre-judgment and

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post-judgment interest. Plaintiff Ricci also moves for relief from the continued posting of a $30,000 bond to secure the sanctions which were earlier imposed against him by Judge Aldrich. See Ricci v. KeyBancshares of Maine, Inc., 111 F.R.D. 369, 380-81 (D. Me. 1986).

Finally, there are pending the plaintiffs' motion for attachment against defendants' real and personal property in the amount of $20,010,822.00, (comprising the verdict total of $15 million and an asserted amount of "at least" $4,980,822.00 in pre-judgment interest), plaintiffs' motion for post-judgment interest assertedly accruing at a rate of 15% on $15,020,000.00 from the date final judgment is entered, and defendants' motion for a stay of execution pending appeal.1/

The motion for judgment notwithstanding the verdict is denied for the same reasons that prior motions for a directed verdict were denied. With respect to both motions, the Court must view the evidence most favorably to the non-moving party, and give that party the benefit of all reasonable inferences from the evidence. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524 (1971). In the present case, the Court is satisfied that there was sufficient evidence introduced on the relevant claims from which the jury could

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1/ Defendants also moved for a stay of execution pending determination of the motion for judgment notwithstanding the verdict or for a new trial. Plaintiffs did not object to that motion. With this opinion, that motion for stay of execution is rendered moot.

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properly find a verdict for the plaintiffs. See discussion infra, (evidence sufficient to withstand motion for new trial.

The motion for a new trial is also denied. Defendants correctly suggest that, when considering this motion, the Court is free to weigh the evidence itself and is not required to view the evidence most favorably to the plaintiffs. Id. § 2806. Nevertheless, after examining the evidence in its entirety, the Court is not left with a "definite and firm conviction that a mistake has been committed." Id. Ratner, it is the Court's opinion that there was sufficient evidence, in each instance, for the jury to reach its verdict.

Specifically, as to the verdict on Count I there was a reasonable basis in law and sufficient evidence for the jury to conclude first, that Key Bancshares was involved in the extension of credit to plaintiffs to the point of being a "creditor" within the meaning of 15 U.S.C. § 1691(e), and second, that plaintiff Ricci's national origin was a factor causing Key Bancshares to treat Ricci and his associates less favorably than it treated or would have treated customers who were not of that national origin. Evidence from which the jury could reasonably have found or inferred discrimination included plaintiff Ricci's testimony that Leo Amato, a bank officer who, like Ricci, is an American of Italian descent, suggested that the bank was discriminating against Ricci because of his national origin and evidence that Amato, the bank officer most familar with

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Ricci's account, was not allowed to participate nor was he consulted on the decisions made with respect to the events that led to this lawsuit.

On Count II there was an abundance of evidence from which the jury could conclude that defendant Key Southern failed to give to plaintiff Davidson the legally required written statement of the reasons for its refusal to extend credit, first by total uncommunicativeness and then by incomplete and deceptive communications.

On Counts V and VII, there was sufficient evidence to allow the jury to find that by abruptly terminating their sustained, active and flexible credit relationship with plaintiffs, defendants breached the line of credit agreement and its implied covenant of good faith and fair dealing. The Court instructed the jury, that an implied covenant of good faith and fair dealing applied to this contract under Maine law. The Court notes that the opinion of the First Circuit Court of Appeals in Reid v. Key Bank of Southern Maine, Inc, Civ. Ct. 86-1820 slip op. (1st Cir. June 10, 1987) issued subsequent to the Court's instruction of the jury in this case holds that a covenant of good faith and fair dealing is implied in every contract under Maine law.

On Count X there was sufficient evidence to support the jury's finding that defendant Key Bancshares intentionally inflicted emotional distress upon plaintiff Ricci. This includes evidence that the conduct accompanying the termination of credit was reckless, callous, discriminatory, was prolonged by concealment and obduracy,

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and was exacerbated by a failure to take reasonable remedial measures. On the other hand, with respect to the exemplary or punitive damages awarded by the jury on Count X, the Court adheres to its decision of April 27, 1987, that evidence was lacking from which the jury could find it highly probable that the defendant acted with the requisite malice. The directed verdict in defendant's favor on that point will not be disturbed.

The Court is not persuaded that the jury's weighing of the evidence produced a seriously erroneous result or a manifest miscarriage of justice. In the the Court's opinion, the jury's verdict reflects reasonable conclusions based on the evidence presented.

Defendants also argue that the verdicts were excessive and that remittitur is therefore appropriate. See generally 11 C. Wright & A. Miller, Federal Practice and Procedure § 2815 (1973). The Court is not persuaded, however, that the amounts were either the result of inflamed passion or prejudice or a shocking miscalculation of actual damages. Considering the nature of the business interests affected here and the personal consequences testified to at trial, the Court cannot say that the jury's calculations were entirely out of proportion to the injuries found. Particularly in the absence of any contradictory expert testimony on behalf of defendants, the evidence regarding the business opportunities lost by plaintiffs in connection with Counts V and VII and the emotional distress suffered

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by plaintiff Ricci in connection with Count X provide a reasonable basis for the jury's verdict.

Beyond the evidentiary support adduced at trial, the Court would offer an additional explanation as to why the jury's verdict on Count X cannot be said to "shock the conscience." When a jury places a value on injuries in an area in which measures of damage have not been widely developed, such as torts committed by a bank against its customer, it is expressing the wisdom of the community with respect to the subject. If it is based on the evidence it ought to remain unaffected by a judge's abstract calculations, or by loose analogies to verdicts for other types of injury in other circumstances. In short, the Court does not find this verdict either shocking, or unjustified, or without basis in the evidence presented. Accordingly, the Court will not disturb the verdict either as to the merits or as to the amount.

The Court adheres to its award in connection with Counts I and II, of the maximum amount of $10,000 punitive damages for each count under 15 U.S.C. § 1691e(b). In the Court's view, the violations of the Equal Credit Opportunity Act were accompanied by a degree of callousness and recklessness that amounted to intentional conduct. Furthermore, the amount of punitive damages is small in relation to the actual damages awarded by the jury. Having considered the factors listed in 15 U.S.C. § 1691e(b) and other relevant factors, the Court is satisfied that the assessment of punitive damages in the maximum statutory amount is justifed.

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On the question of pre-judgment interest, the Court concludes that plaintiffs' failure to introduce evidence from which the jury could determine the rate of interest which should have applied to the federal claims, precludes an award of pre-judgment interest on those federal claims. See Segal v. Gilbert Color Systems, Inc., 746 F.2d 78, 81-84 (1st Cir. 1984). The Court's examination of the record, particularly a conference at sidebar with counsel during the testimony of plaintiff's economic expert, Dr. McAusland, does not reveal that any alternative to a jury determination was agreed upon. Accordingly, pre-judgment interest is awarded only as to the $11 million arising from the verdicts on the state law claims of Counts V, VII and X. This shall be calculated at the rate of 8% in accordance with 14 M.R.S.A. § 1602 (Supp. 1986). Interest shall accrue from the time the complaint was filed until the date on which judgment was entered, except that prejudgment interest will not be calculated during the six month suspension ordered by Judge Aldrich. See Ricci v. Key Bancshares, 111 F.R.D. at 380.2/

On the question of securing the judgment for plaintiffs, the Court has concluded that attachment is required under the circumstances of this case. Federal Rule of Civil Procedure 64 directs the Court to apply state law to determine the availablility of a

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2/ On May 12, 1986, Judge Selya issued an order providing, inter alia, "that the accrual of any and all prejudgment interest is terminated as of this date." Judge Aldrich later modified that Order by suspending pre-judgment interest for six months. Ricci v. Key Bancshares, 111 F.R.D. at 380.

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remedy providing for seizure of person or property to secure a judgment. On plaintiffs' motion for approval of attachment, therefore, Maine Rule of Civil Procedure 4A governs.

The Advisory Committee Notes to the Maine Rules of Civil Procedure presume that attachment is available after judgment or pending appeal. C. Harvey, R. McGuire, & L.K. Wroth, Maine Civil Practice 70 (2d Ed. Supp. 1981) (Advisory Committee's Note of April 15, 1975). The availablility of post-judgment attachment is also suggested by the history of the remedy. Attachment was originally obtainable in Maine without judicial intervention and later was made available under Rule 4A upon a relatively low threshold showing of likelihood of success. Maine National Bank v. Anderschat, 462 A.2d 482, 484 (Me. 1983). The Advisory Committee Note, together with the history of the remedy, clearly suggest that attachment is obtainable after judgment has been entered. The question then becomes whether and to what extent a court has discretion to order attachment.

When a motion for attachment is made during the course of an action and after notice to the other party, Maine law requires attachment upon a showing of a reasonable likelihood that the moving party will recover judgment. Dartmouth Company v. Day's, Inc., 419 A.2d 366, 367 n.1 (Me. 1980); See Anderschat, 462 A.2d at 484. In that situation, a court has no discretion to deny attachment on the grounds that attachment would be "inequitable." Anderschat, 462 A.2d at 484.

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It would be illogical to find that attachment -- which is mandated prior to judgment upon a showing of a likelihood of success -- is available but not mandated after success has been achieved in the concrete form of a jury verdict. Plaintiffs' case has not only survived motions to dismiss and motions for a directed verdict, but also, through this opinion, a motion to set aside or alter the verdict. The Court concludes, therefore, that plaintiffs have clearly demonstrated a likelihood of success and that attachment is required under Maine law.

As to the amount of the attachment the Court finds that in order to be consistent with Rule 4A, the amount must at least equal the amount of the judgment considered by the Court to be sound. In this case that amount consists of the sum of $15 million, plus 8% pre-judgment interest on $11 million for the period indicated ante, plus 6.30% interest on $15 million from date of entry of judgment.3/

The Court notes that pursuant to 14 M.R.S.A. § 4613 (1964), defendants could apparently vacate the attachment by posting a bond. The Court is also satisfied that the attachment, or any bond eventually posted to vacate the attachment, entitles defendants to a stay of execution pending appeal. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2905 (1973).

3/ The rate of post-judgment interest is based on the average accepted auction price for United States Treasury bills, to be calculated by the Director of the Administrative Office of the United States Court. See 28 U.S.C. § 1961 (1982). The applicable

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The Court has not been persuaded that plaintiffs should be relieved of their obligation to post the $50,000 bond required in connection with the sanctions imposed by Judge Aldrich. The intention expressed by both parties to appeal various aspects of this case is reason enough to continue the bond for judicially-imposed sanctions independently of the jury verdict.

ORDER

In accordance with the foregoing, it is hereby ORDERED that:

1. Defendants' motion for judgment notwithstanding the verdict, for a new trial, and for remittitur is hereby denied;

2. Plaintiffs' motion to reconsider the setting aside of the jury verdict for punitive damages on Count X is hereby denied;

3. Defendants' motion to set aside the Court's award of punitive damages under Counts I and II is hereby denied;

4. Pre-judgment interest shall be awarded to plaintiffs at the rate of 8% on the $11 million verdict on Counts V, VII, and X, said interest to be calculated from the date on which the Complaint was filed until the date on which judgment was entered, except that pre-judgment

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(CONT.)rate in this case is 6.30%.

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interest shall be suspended for a six month period beginning May 12, 1985;

5. Post-judgment interest shall be awarded to plaintiffs at the rate of 6.30% on the entire $15 million verdict, to be calculated from the date judgment was entered;

6. Plaintiffs' motion for attachment is granted in an amount consistent with this Memorandum Opinion;

7. Plaintiffs' motion for relief from the posting of the $50,000 bond is denied;

8. Defendants' motion for stay of execution pending appeal is hereby granted.

James L. Watson, Judge
United States Court of
International Trade sitting by
Designation

Dated: June 16, 1987

SEAL

A TRUE COPY
ATTEST: William S. Brownell, Clerk
Deputy Clerk

ANDROSCOGGIN SS.
RECEIVED JUL 14 1987
AT 4 H. 05 M. P.M.