FSM SUPREME COURT APPELLATE DIVISION

WEBSTER GEORGE, Appellant, vs. JOHNSTON S. ALBERT, Appellee.	)	APPEAL CASE NO. K7-2007

OPINION

Argued: December 17, 2009
Decided: January 21, 2010

BEFORE:

Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

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HEADNOTES

Appellate Review – Standard of Review – Civil Cases

Issues of law are reviewed *de novo* on appeal. George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010).

Appellate Review – Standard of Review – Civil Cases

A trial court's findings are presumptively correct and findings of fact are reviewed using the clearly erroneous standard. George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010).

Appellate Review – Standard of Review – Civil Cases

When trial court findings are alleged to be clearly erroneous, an appellate court can find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or

3) if, after reviewing the entire body of the evidence and construing the evidence in the light most favorable to the appellee, the appellate court is left with a definite and firm conviction that a mistake has been made. George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

A court clerk cannot enter a default judgment for a sum certain when no affidavit of the amount due, as required by Rule 55(b)(1), was attached to the default judgment request. A court clerk also cannot enter a default judgment when the defendant appeared in the case and participated in discovery and motions and his default would thus not be for failure to appear but for failure to properly file his responsive pleading because, by its terms, Rule 55(b)(1), only applies if the defendant has been defaulted for failure to appear. George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

Any claim including attorney's fees is not one for a sum certain. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

When the complete ledger sheets and the open account agreement were not attached to the amended complaint, even just the principal and interest would not constitute a sum certain or liquidated damages. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

A claim for prejudgment interest, when it lies within the court's discretion because it is not specifically provided for in the parties' prior agreement (as it would be in a bank loan), is not a claim for a sum certain, for which the clerk could enter a default judgment. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure

Although to establish legal requirements FSM courts must first look to FSM sources of law rather than begin with a review of other courts' cases, when no FSM court has previously construed a Kosrae procedural rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule. George v. Albert, 17 FSM Intrm. 25, 31 n.1 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

In the Rule 55 context, a claim is not a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant's default. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

The Rule 55(b)(1) term "sum certain" contemplates a situation in which, once liability has been established, there can be no doubt as to the amount due, as in actions on money judgments and negotiable instruments, or similar actions where damages can be determined without resort to extrinsic proof. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

Merely requesting a specific amount in the complaint or statement of damages does not fulfill the sum certain requirement. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

Courts are clear that a claim is not for a "sum certain" merely because the demand in the complaint is for a specific dollar amount. A contrary holding would permit almost any unliquidated

amount to be transformed into a claim for a sum certain simply by placing a monetary figure on the item of claimed damage, even though that amount was not fixed, settled, or agreed upon by the parties and regardless of the nature of the claim. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

The term "sum certain" contemplates a situation where the amount due cannot be reasonably disputed, is settled with respect to amount, ascertained and agreed upon by the parties, or fixed by operation of law. A claim is not for a "sum certain" merely because the claim is stated as a specific dollar amount in a complaint, verified complaint, or affidavit. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments – Sum Certain

As with a "sum certain," a hearing is not normally required if the claim is "liquidated." The term "sum certain" has been held to have a meaning similar to "liquidated amount." "Liquidated" means adjusted, certain, settled with respect to amount, fixed. A claim is liquidated when the amount thereof has been ascertained and agreed upon by the parties or fixed by operation of law. George v. Albert, 17 FSM Intrm. 25, 31 (App. 2010).

Civil Procedure – Default and Default Judgments

When the clerk has entered a defendant's default, the grant of a default judgment is not automatic, but left to the court's sound discretion. The party making the request is not entitled to a default judgment as of right. George v. Albert, 17 FSM Intrm. 25, 31-32 (App. 2010).

Civil Procedure – Default and Default Judgments

If a defendant is determined to be in default, the complaint's factual allegations, except those relating to the amount of damages, are taken as true. Although liability is not deemed established simply because of the default, it is not always necessary to present testimony on the liability issue, but the court, in its discretion, may require proof of facts that must be established in order to determine liability. George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010).

Civil Procedure – Default and Default Judgments

An entry of default does not relieve a plaintiff of the burden of proving the damages that flowed from any liability thus established. George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010).

Civil Procedure – Default and Default Judgments

When, even if a default had been entered, an evidentiary hearing, such as the damages "trial" that was held would still have been required since the factual allegations relating to the amount of damages are not taken as true, any error in calling it a trial instead of a damages hearing, was harmless error. George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010).

Appellate Review – Standard of Review – Civil Cases

Harmless error is not a ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order. George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010).

Constitutional Law – Due Process; Evidence

A litigant's constitutional right to due process is violated when a trial court relies on evidence, not a part of the record, without prior notice to the parties or without an opportunity for the parties to comment on it, and it is constitutional error for the court to rely on exhibits never identified, described or marked at trial. George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010).

Constitutional Law – Due Process; Evidence; Judgments

Trial court judgments that were, in part, based on documents that were never authenticated by affidavit or by testimony and their accuracy was never vouched for by affidavit, or testimony, or other evidence will be vacated. George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010).

Constitutional Law – Due Process; Evidence; Judgments

When the receipts relied upon by the trial court were never identified, marked, described, or admitted at trial or evidentiary hearing; when those receipts were provided to the court post-trial and were never authenticated, introduced, or admitted into evidence; and when neither side had the opportunity to examine witnesses, or to produce witnesses to testify, on the accuracy, meaning, or completeness of the receipts or about the receipts that the trial court disallowed because someone else had signed them, the documents supplied to the court after trial were not evidence that was properly before that court and thus were not evidence in the record and the trial court's use of these documents violated due process. There is therefore no substantial evidence in the record to support the judgment amount. The judgment amount finding is thus clearly erroneous, and the judgment will be vacated since that figure is not supported by substantial evidence in the record, and, in fact, is not supported by any evidence in the record. George v. Albert, 17 FSM Intrm. 25, 32-33 (App. 2010).

Evidence – Burden of Proof

Substantial evidence is evidence which a reasoning mind would accept as sufficient to support a conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. George v. Albert, 17 FSM Intrm. 25, 33 n.3 (App. 2010).

Interest and Usury; Judgments

When there is no evidence in the record that the defendant knew of, or had agreed to, a contractual requirement that he pay interest and the ledger sheets admitted into evidence do not show any interest charges and when none of the situations where the courts have previously allowed prejudgment interest is present, prejudgment interest will be denied. George v. Albert, 17 FSM Intrm. 25, 33 (App. 2010).

Interest and Usury

When the parties have had an agreement stating that interest would be added to an unpaid balance, the FSM court has awarded prejudgment interest, and, prejudgment interest at the 9% statutory judgment rate has also been awarded when the defendant knew precisely the amount to which he was obligating himself and the effective date of that commitment to pay, and when the defendant was liable for conversion. George v. Albert, 17 FSM Intrm. 25, 33 (App. 2010).

Attorney's Fees – Court-Awarded; Judgments

The usual rule is that the parties are responsible for their own attorney's fees. Generally, a prevailing party will be awarded attorney's fees only if they are authorized by contract or by statute, or when the opposing party has acted vexatiously, or in bad faith, or presses frivolous claims, or employs oppressive litigation practices. George v. Albert, 17 FSM Intrm. 25, 34 (App. 2010).

Attorney's Fees – Court-Awarded; Judgments

The prevailing plaintiff will not be awarded attorney's fees when the defendant did not act vexatiously or in bad faith, or press frivolous claims, or employ oppressive litigation practices and when no statute or contractual provision authorized attorney's fees in the case. George v. Albert, 17 FSM Intrm. 25, 34 (App. 2010).

Attorney's Fees – Court-Awarded; Judgments

Whether a defendant is liable to the plaintiff for an attorney's fee award is properly part of the

matters that must be heard at trial and decided before judgment. The amount of the attorney's fees to be awarded will, however, be determined in response to a post-judgment motion. George v. Albert, 17 FSM Intrm. 25, 34 (App. 2010).

Costs

Upon a post-judgment application, costs are routinely awarded to the prevailing party. George v. Albert, 17 FSM Intrm. 25, 34 (App. 2010).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This appeal is from the Kosrae State Court's October 2, 2007 decision, George v. Albert, 15 FSM Intrm. 323 (Kos. S. Ct. Tr. 2007), that awarded plaintiff Webster George $108.90 in damages as the balance due on defendant Johnston S. Albert's open account at George's store and that denied George's claims for prejudgment interest and for attorney's fees. We affirm the trial court ruling on prejudgment interest and attorney's fees but vacate the damage award and remand the matter to the trial court for a new evidentiary hearing. Our reasons follow.

I. PROCEDURAL BACKGROUND

George first filed a complaint on April 12, 2006 asking for a judgment against Albert in the amount of $5,993.93, plus interest on the judgment, attorney's fees and costs. On May 23, 2006, he amended his complaint to increase the amount to $10,987.88. George moved for an entry of default after Albert failed to answer. The trial court denied the motion because there was insufficient proof of service of the complaint. It also set a October 25, 2006 deadline to answer, a date to complete discovery, and a trial date.

Albert did not file an answer by the deadline but, on November 17, 2006, sought permission to file a late answer and filed the proposed answer. On November 23, 2006, the trial court denied the request to file the answer late due to Albert's failure to properly serve George, with leave to renew the motion with proper service, and that if Albert did not renew the motion, George could refile his request for entry of default. Albert did not renew his motion. The parties proceeded with discovery. On May 23, 2007, the day before trial, George renewed his motion for default.

Trial was held on May 24, 2007. The last two pages of the ledger sheets for Albert's open account and George's attorney retainer agreement were admitted into evidence. After the close of testimony, the trial court ordered counsel to submit written argument and supplemental exhibits, and took the matter under advisement. The parties submitted written closing arguments. After further court order, George submitted 14 pages of ledgers and 39 receipts. Albert followed with an opposing affidavit.

Without further hearing, the trial court, on October 2, 2007, issued its decision. It 1) denied the entry of a default because George's request was late and because, even if it had been granted, the court would still have had to hold a hearing on damages which would have produced the same evidence and the same outcome, George v. Albert, 15 FSM Intrm. at 327; 2) denied George's request for pre-judgment interest because the parties had not agreed to that term, *id.* at 328; 3) denied George his attorney's fees because the usual rule is that each party pays its own attorney's fees, *id.*; and 4) awarded George "$108.90 with post-judgment interest at the statutory rate," *id.* at 329. This amount

was calculated using the documents submitted after trial. It bears no relation to the amounts on the ledger sheets.

George then appealed.

II. Issues Presented and Standards of Review

George contends that the trial court erred 1) when it proceeded to trial without Albert's answer or amended answer and when it did not instead enter a default and a default judgment in George's favor; 2) when it relied on receipts submitted after trial that were neither introduced, nor authenticated, nor admitted into evidence; 3) when it entered a judgment for George for $108.90; 4) when it denied George prejudgment interest; and 5) when it denied George his attorney's fees and costs.

These are generally issues of law, which we review *de novo* on appeal. Narruhn v. Aisek, 16 FSM Intrm. 236, 239 (App. 2009). The $108.90 figure as the amount due is a finding of fact. A trial court's findings are presumptively correct. Ponape Island Transp. Co. v. Fonoton Municipality, 13 FSM Intrm. 510, 513 (App. 2005). We review findings of fact using the clearly erroneous standard. Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 24 (App. 2006). When trial court findings are alleged to be clearly erroneous, we can find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing the evidence in the light most favorable to the appellee, we are left with a definite and firm conviction that a mistake has been made. *See* Narruhn v. Aisek, 13 FSM Intrm. 97, 99 (Chk. S. Ct. App. 2004), *aff'd*, 16 FSM Intrm. 236 (App. 2009).

III. Analysis

A. *Default and Default Judgment*

George contends that the trial court should have granted his request for an entry of default and for a default judgment in the amount prayed for in his amended complaint. He contends that that amount is a sum certain which the court clerk could have automatically entered as a Kosrae Civil Procedure Rule 55(b)(1) default judgment for a sum certain.

First, the clerk could not have entered a default judgment for a sum certain because no "affidavit of the amount due," as required by Rule 55(b)(1), was attached to George's default judgment request and because, by its terms, Rule 55(b)(1), only applies "if [t]he [defendant] has been defaulted for failure to appear." Albert did appear in the case and participated in discovery and motions. His default would thus not have been for failure to appear but for failure to properly file his responsive pleading.

Furthermore, the amount prayed for in George's amended complaint was not a sum certain. It included a claim for attorney's fees. Any claim including attorney's fees is not one for a sum certain. Bank of the FSM v. Bartolome, 4 FSM Intrm. 182, 184 (Pon. 1990). And since the complete ledger sheets and the open account agreement were not attached to the amended complaint, even just the principal and interest would not constitute a sum certain or liquidated damages. A claim for prejudgment interest, when it lies within the court's discretion because it is not specifically provided for in the parties' prior agreement (as it would be in a bank loan), is also not a claim for a sum certain, for which the clerk could enter a default judgment. *See* United States v. Rainbolt, 543 F. Supp. 580,

580 n* (E.D. Tenn. 1982).[1] This was not a sum certain case.

"In the Rule 55 context, a claim is not a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant's default." KPS & Assocs., Inc. v. Designs by FMC, Inc., 318 F.3d 1, 19 (1st Cir. 2003). The Rule 55(b)(1) term "sum certain . . . contemplates a situation in which, once liability has been established, there can be no doubt as to the amount due, as in actions on money judgments and negotiable instruments." Reynolds Sec., Inc. v. Underwriters Bank & Trust Co., 378 N.E.2d 106, 109 (N.Y. 1978). "Such situations include actions on money judgments, negotiable instruments, or similar actions where damages can be determined without resort to extrinsic proof." Interstate Food Processing Corp. v. Pellerito Foods, Inc., 622 A.2d 1189, 1193 (Me. 1993). "Merely requesting a specific amount in the complaint or statement of damages does not fulfill the sum certain requirement." Zorach v. Lenox Oil Co., 1996 Mass. App. Div. 11, 13, 1996 WL 7614, at *3 (Mass. Dist. Ct. 1996).

> Courts . . . are clear that a claim is not for a "sum certain" merely because the demand in the complaint is for a specific dollar amount. A contrary holding would permit almost any unliquidated amount to be transformed into a claim for a sum certain simply by placing a monetary figure on the item of claimed damage, even though that amount was not fixed, settled, or agreed upon by the parties and regardless of the nature of the claim.
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> [T]he term "sum certain" . . . contemplates a situation where the amount due cannot be reasonably disputed, is settled with respect to amount, ascertained and agreed upon by the parties, or fixed by operation of law. A claim is not for a "sum certain" merely because the claim is stated as a specific dollar amount in a complaint, verified complaint, or affidavit.

Farm Family Mut. Ins. Co. v. Thorn Lumber Co., 501 S.E.2d 786, 791 (W. Va. 1998) (citations omitted).

"As with a 'sum certain,' a hearing is not normally required if the claim is 'liquidated.'" KPS & Assocs., 318 F.3d at 20. "The term 'sum certain' has been held to have a meaning similar to 'liquidated amount.'" Interstate Food Processing Corp., 622 A.2d at 1193. "'Liquidated' means adjusted, certain, settled with respect to amount, fixed. A claim is liquidated when the amount thereof has been ascertained and agreed upon by the parties or fixed by operation of law." Hallett Constr. Co. v. Iowa State Highway Comm'n, 139 N.W.2d 421, 426 (Iowa 1966); *see also* KPS & Assocs., 318 F.3d at 20; Interstate Food Processing Corp., 622 A.2d at 1193; Farm Family Mut. Ins. Co., 501 S.E.2d at 791. The damages amount sought by George was thus neither a sum certain nor a liquidated amount. It had been neither ascertained and agreed upon by the parties or fixed by operation of law.

Accordingly, George was not entitled to a default judgment without a hearing and a judicial determination of damages. "When the clerk has entered a [defendant's] default, the grant of a default judgment is not automatic, but left to the court's sound discretion. The party making the request is

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[1]Although to establish legal requirements FSM courts must first look to FSM sources of law rather than begin with a review of cases decided by other courts, FSM Const. art. XI, § 11, when we have not previously construed a Kosrae procedural rule which is identical or similar to a U.S. counterpart, we may look to U.S. sources for guidance in interpreting the rule, *see, e.g.*, Heirs of George v. Heirs of Dizon, 16 FSM Intrm. 100, 107 n.4 (App. 2008); Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 589 n.1 (App. 2008). No FSM court has previously considered the meaning of the term "sum certain" as used in Rule 55(b)(1).

not entitled to a default judgment as of right." Pohl v. Chuuk Public Utility Corp., 13 FSM Intrm. 550, 553-54 (Chk. 2005) (citations omitted). If a defendant is determined to be in default, the complaint's factual allegations, except those relating to the amount of damages, are taken as true. *Id.* at 554. Although liability is not deemed established simply because of the default, it is not always necessary to present testimony on the liability issue, but the court, in its discretion, may require proof of facts that must be established in order to determine liability. *Id.* An entry of default does not relieve a plaintiff of the burden of proving the damages that flowed from any liability thus established. Primo v. Refalopei, 7 FSM Intrm. 423, 428 (Pon. 1996).

Thus, even if a default had been entered, an evidentiary hearing, such as the May 24, 2007 damages "trial," would still have been required since the factual allegations relating to the amount of damages are not taken as true. If there was any error in calling it a trial instead of a damages hearing, it was harmless error. Harmless error is not a "ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order." Kos. Civ. R. 61. We therefore affirm the trial court's denial of an entry of default and default judgment. A default judgment damages hearing would have or should have produced the same evidence and the same outcome as the trial.

B. *Reliance on Post-Trial Documents and Resulting $108.90 Judgment*

George contends that the trial court improperly relied on the receipts and other documents that were ordered produced after the end of trial to somehow arrive at the $108.90 judgment amount. Albert contends that the $108.90 award was supported by substantial evidence and that, since trial court findings are presumed correct unless clearly erroneous, it should be upheld.

Our cases clearly show that a litigant's constitutional right to due process is violated when a trial court relies on evidence, not a part of the record, without prior notice to the parties or without an opportunity for the parties to comment on it. Thomson v. George, 8 FSM Intrm. 517, 523 (App. 1998); Senda v. Creditors of Mid-Pacific Constr. Co., 7 FSM Intrm. 664, 669 (App. 1996) (constitutional error for the trial court to rely on a special master's report, not a part of the record, without prior notice to the parties and an opportunity for the parties to comment on it). And "it is [constitutional] error for the court to rely on exhibits never identified, described or marked at trial." Waguk v. Kosrae Island Credit Union, 6 FSM Intrm. 14, 18 (App. 1993); *cf.* Livaie v. Weilbacher, 13 FSM Intrm. 139, 144 (App. 2005) (evidence first introduced in response to questioning by the trial judge during closing argument was not properly in evidence before the trial court as it was made during the closing arguments and not under oath, not subject to cross-examination, and not subject to any rebuttal testimony). And, we have vacated trial court judgments that were, in part, based on documents that were never authenticated by affidavit or by testimony and their accuracy was never vouched for by affidavit, or testimony, or other evidence. Albert v. George, 15 FSM Intrm. 574, 580 (App. 2008).

To make its finding of the amount owed, the trial court relied on unadmitted receipts signed by Albert or his wife ($950 of the receipts provided) that had been produced after trial, and deducted from the receipts the amount of the payments shown [$850] on the last two ledger sheets, which had been admitted into evidence, while ignoring the running totals on those same ledger sheets. George v. Albert, 15 FSM Intrm. at 326. It found that "[b]ased on the amounts shown in the receipts and ledger, the Court awards Plaintiff the principal amount of $950.40, with credit for the payments and the unidentified 25-cent charge made at the time of each payment, for a total of $108.90." *Id.* at 327. These numbers do not quite add up.

The receipts relied upon by the trial court were never identified, marked, described, or admitted at trial or evidentiary hearing. The receipts were provided to the court post-trial and were never

authenticated, introduced, or admitted into evidence. Neither side had the opportunity to examine witnesses, or to produce witnesses to testify, on the accuracy, meaning, or completeness of the receipts or about the receipts that the trial court disallowed because someone other than Albert or his wife had signed them. Nor did anyone testify to the receipts' relation to the figures on the ledger sheets or how the two might be considered together. The documents supplied to the court after trial were not evidence that was properly before that court and thus were not evidence in the record.[2] The trial court's use of these documents violated George's due process rights.

There is therefore no substantial evidence in the record to support the $108.90 judgment amount. The finding that Albert owed George only $108.90 is clearly erroneous since that figure is not supported by substantial evidence in the record.[3] In fact, it is not supported by any evidence in the record.

The $108.90 judgment is accordingly vacated and this matter remanded for a new trial or evidentiary hearing on the issue of damages, limited to the principal amount owed. On remand, the trial court, for the reasons given below, is not to consider or award prejudgment interest or attorney's fees.

C. *Pre-judgment Interest*

George contends that he is entitled to prejudgment interest because Albert knew there would be consequences for his failure to pay George and that Albert had breached his promise to pay. George contends that it was explained to Albert when the agreement was made that he would pay interest.

We find no evidence in the record that Albert knew of, or had agreed to, a contractual requirement that he pay interest. Furthermore, the ledger sheets admitted into evidence do not show any interest charges. When the parties have an agreement stating that interest would be added to an unpaid balance, the FSM court has awarded prejudgment interest. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 502, 504 (Pon. 2002). Also, prejudgment interest at the 9% statutory judgment rate has been awarded when the defendant knew precisely the amount to which he was obligating himself and the effective date of that commitment to pay, Coca-Cola Beverage Co. (Micronesia) v. Edmond, 8 FSM Intrm. 388, 393 (Kos. 1998), and when the defendant was liable for conversion, Bank of Guam v. Nukuto, 6 FSM Intrm. 615, 616 (Chk. 1994).

None of those situations is present here. We therefore affirm the trial court's denial of prejudgment interest.

D. *Attorney's Fees and Costs*

George contends that he is entitled to attorney's fees and costs because Albert knew that he owed George some money but made no attempt to settle or to pay the amount owed and has been dilatory in defending this suit. At oral argument, George declined to go further into this issue and may

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[2]Albert's post-trial affidavit was also not properly before the court and thus not evidence in the record since if it were it would constitute testimony that George had no opportunity to cross-examine Albert about or to offer rebuttal testimony. We are, however, uncertain whether the trial judge considered Albert's affidavit. He should not have.

[3]Substantial evidence is evidence which a reasoning mind would accept as sufficient to support a conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. Nakamura v. Moen Municipality, 15 FSM Intrm. 213, 217 n.1 (Chk. S. Ct. App. 2007).

have abandoned it.

The usual rule is that the parties are responsible for their own attorney's fees. *E.g.*, Oceanic Lumber, Inc. v. Vincent & Bros. Constr. Co., 16 FSM Intrm. 222, 225 (Chk. 2008); Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 472 (Pon. 2004). Generally, a prevailing party will be awarded attorney's fees only if they are authorized by contract or by statute, FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 256 (App. 2006), or when the opposing party has acted vexatiously, or in bad faith, or presses frivolous claims, or employs oppressive litigation practices, Semens v. Continental Air Lines, Inc. (II), 2 FSM Intrm. 200, 208 (Pon. 1986). Albert did not act vexatiously or in bad faith, or press frivolous claims, or employ oppressive litigation practices. And no statute or contractual provision authorized attorney's fees in this case.

We therefore affirm the trial court's denial of George's attorney's fees even though he was the prevailing party. But we further note that the trial court ruled that costs and attorney's fees "issues will *only* be considered if Plaintiff makes a post-judgment motion for costs and attorney's fees." George, 15 FSM Intrm. at 328 (emphasis in original). This is inaccurate. Whether a defendant is liable to the plaintiff for an attorney's fee award is properly part of the matters that must be heard at trial and decided before judgment. The amount of the attorney's fees to be awarded will, however, be determined in response to a post-judgment motion. And, upon a post-judgment application, costs are routinely awarded to the prevailing party. Kos. Civ. R. 54(d).

IV. Conclusion

Accordingly, we affirm the trial court decision denying prejudgment interest and attorney's fees and denying an entry of default and a default judgment. Otherwise, we vacate the trial court judgment and remand this matter for further proceedings consistent with this opinion. The parties shall bear their own costs.

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