Not Reported in N.E.2d, 2013 IL App (1st) 120605-U, 2013 WL 3227291 (Ill.App. 1 Dist.)
(Cite as: 2013 WL 3227291 (Ill.App. 1 Dist.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois,
First District, Fifth Division.
MITSUI RAIL CAPITAL, LLC, a Delaware limited liability company, Plaintiff–Appellee,
v.
AMERICAN COAL COMPANY, a Delaware corporation, Defendant–Appellant.

No. 1–12–0605.
June 21, 2013.

Appeal from the Circuit Court of Cook County. No. 08 CH 41140, Peter Flynn, Judge Presiding.

ORDER

Justice HOWSE delivered the judgment of the court:

***1** ¶ 1 *HELD:* The trial court's finding that leased railcars sustained structural damage while in possession of the lessee and such damage exceeded ordinary wear and tear was not against the manifest weight of the evidence; lessor was not required to prove the cause of structural damage to railcars to establish breach of contract where lease contract required lessee to return railcars to lessor at the end of the lease period in the same condition except for ordinary wear and tear.

¶ 2 Defendant American Coal Company (American) appeals from a circuit court order entering judgment in favor of plaintiff Mitsui Rail Capital, LLC, (Mitsui) in a breach of contract lawsuit. The trial court found that American breached its contract with Mitsui when it failed to pay the costs to repair corrosion damage on railcars it leased from Mitsui.

¶ 3 American argues that the trial court's order is in error because: (1) the court failed to determine the cause of the corrosion; (2) Mitsui failed to maintain the leased railcars in good condition; (3) damage to the railcars is exempted from American's maintenance duties because the damage occurred from a use permitted under the lease; and (4) the trial court awarded excessive damages and excessive prejudgment interest. For the reasons set forth below, we affirm the decision of the circuit court.

¶ 4 BACKGROUND

¶ 5 Defendant American Coal Company, a subsidiary of Murray Energy Corporation, is in the business of mining and selling coal. American operates two coal mines in Galatia, Illinois. On December 9, 2002, American entered into a five-year agreement to lease 220 railcars from C.I.T. Leasing Corporation (CIT). American used the railcars to transport the coal it produced. In June of 2003, plaintiff Mitsui Rail Capital, LLC, acquired the rights and obligations of CIT under the lease by assignment. Mitsui is a limited liability company specializing in procuring and leasing railcars.

¶ 6 On May 29, 2007, the tub of one of the leased cars collapsed after it was loaded with coal at American's Galatia mine complex. Following the tub failure, the leased railcars were inspected and corrosion was discovered. After an investigation, which included an examination of the cars by metallurgists, Mitsui determined 196 railcars leased to American were in need of substantial repairs due to corrosion. A dispute arose as to which party was responsible for paying for the repairs under the lease.

¶ 7 The parties initially worked to resolve the question of who would pay for the damaged railcars. They formulated a written agreement in the form of a letter of intent. In the letter of intent, American agreed to pay at least $1 million for the repairs and Mitsui was responsible to pay $350,000 with the agreement that a new extended lease agreement would be entered into by the parties. Mitsui later learned the damage to the leased railcars was of a greater extent than had previously been determined. American never paid for the repairs as agreed upon in the letter of intent.

***2** ¶ 8 Mitsui filed a lawsuit in the Circuit Court of Cook County against American on October 31, 2008. Under count I of the amended complaint, Mitsui alleged breach of contract, claiming American is responsible under the lease for the maintenance and repair of all damage to any of the cars while the cars are in its possession, custody or control. Mitsui alleged American loaded the railcars with coal and coal wash water with a high sulfur and chlorine content, causing severe damage to the railcars. Mitsui alleged it paid FreightCar America over $6 million to repair the 196 damaged railcars.

¶ 9 In count II of its amended complaint, Mitsui requested a declaration that American has repudiated the letter of intent and it is no longer binding and enforceable.

¶ 10 American filed an answer and affirmative defenses to the amended complaint on May 19, 2009, denying all allegations of wrongdoing against it and arguing, *inter alia,* that Mitsui had failed to meet its maintenance obligations under the lease, which directly led to extensive damage and corrosion of the railcars. American filed a counterclaim for breach of contract, requesting a return of the premium it paid for the full service lease because Mitsui failed to perform maintenance of the cars, which is included as part of the price of a full service lease.

¶ 11 The case proceeded to a bench trial in September of 2011. Mitsui's metallurgical expert witness, Dr. Michael Stevenson testified. Stevenson is the president and CEO of Engineering Systems, Inc. (ESI). Stevenson testified the railcars suffered six different forms of corrosive attack, including corrosion fatigue, crevice corrosion, galvanic corrosion, stress corrosion cracking, pitting corrosion and intergranular corrosion. Intergranular corrosion is a form of corrosion that attacks the boundaries between the individual metal grains, resulting in cracks or entire chunks of metal falling out.

¶ 12 Stevenson testified that intergranular corrosion occurs on a molecular level and caused the collapse of the railcar. Intergranular corrosion cannot be seen by the naked eye, it can only be detected with the use of a microscope. Stevenson testified that the inspection cited in the contract would not have included a microscopic exam for intergranular corrosion. Therefore, the inspections contemplated by the contract would not have detected the damage.

¶ 13 Stevenson testified that ESI prepared a comprehensive report where it concluded all the railcars had intergranular corrosion damage to a degree that would reduce the life of the cars and if not repaired could result in another failure and cause a derailment.

¶ 14 Stevenson testified that test results showed sulfates and chlorides present in the corroded metal in the railcars, which was being corroded at an aggressive rate.

¶ 15 Stevenson further testified:

> "[T]his is a car that has a 40–year life, but it's basically at 10 percent of its life in the four- to five-year life and we've got complete wastage, through holes in certain parts of the car."

***3** ¶ 16 Stevenson testified that the intergranular corrosion is consistent with corrosion coming from coal wash water. He testified:

> "[T]he rates and mechanisms [of corrosion] tell us that this isn't just a product of these cars sitting outside or getting exposed to rain water. So by now we have an aggressive electrolyte, by knowing we have some chemical signatures consistent with that electrolyte in the corrosion product, that's what allows me to link up the coal wash water and the aluminum—and the damage to the aluminum as being related."

¶ 17 American denied carrying chlorine wash water in the railcars and claimed all the coal it carried in the cars was completely dry.

¶ 18 Melvin Kusta, CIT's senior vice president of operations, discussed the railcar inspection process and explained "running repairs." Kusta testified:

> "Running repairs is the term given by the industry to repairs performed generally by railroads. They are repairs that keep the railcars running down the tracks. It's primarily a safety issue so that the railcar can move safely through."

¶ 19 Kusta testified that the railcar components that typically have running repairs are the wheels, axles, and brake shoes.

¶ 20 Kusta testified that the railroads generally inspect the railcars and direct that running repairs be performed. Running repairs are needed to keep the railcars in "interchange condition." Kusta described "interchange condition" when he testified:

> "Well, there's more than one railroad. So when a railroad car goes from one railroad to another it interchanges, and when it interchanges, the accepting railroad is supposed to or is obligated to inspect the car to ensure that it's in safe running condition. When they find unsafe conditions, they repair them and bill the car owner."

¶ 21 Phillip Daum, an engineer at Engineering Systems Inc., testified that the railcars were not in interchange condition when American returned them to Mitsui in 2009.

¶ 22 The trial court issued an oral ruling on December 15, 2011, finding American is responsible under the lease for paying for the repairs to the damaged railcars. In finding that American is liable for the damaged railcars, the trial court found that a determination of the cause of the corrosion and damage to the cars was unnecessary because the lease did not allocate responsibility by cause, rather it stated that the lessee is responsible for the repair of damage beyond ordinary wear and tear and responsible for damage that occurred while the cars were in its possession.

¶ 23 The trial court stated:

> "The lease, like many leases, provides that the lessee is not responsible for normal wear and tear. The lease, however, explicitly provides that the lessee is responsible for damage while the cars are in the lessee's or its affiliate's possession, custody or control.
>
> The understanding in the industry testified to not just by Mitsui but also by, for example, Mr. Lewis, Mr. Kusta, is that damage is conceptually that which cannot be ascribed to normal wear and tear.
>
> ***4** In this case, the corrosion which is the—which is the core of this dispute, was manifestly and by common consent of both sides not normal wear and [Missing Text].
>
> These railcars exhibited, after roughly five years,

conditions which the witnesses testified would not be expected after 25 years. Something happened outside the normal run of events, which means outside the process of wear and tear."

¶ 24 The trial court further held that American did not establish "by a preponderance of the evidence that Mitsui spent more money on the repairs than it should have."

¶ 25 On February 22, 2012, the trial court entered judgment in favor of Mitsui and against American in the amount of $6,680,451.24, plus interest in the amount of $3,465,542.21, for a total judgment of $10,145,953.45.

¶ 26 American filed this timely appeal.

¶ 27 ANALYSIS

¶ 28 The lease at issue here contains a **choice** of **law** provision where the parties agreed that the lease is governed by the laws of the State of New York, excluding such laws' provisions relating to **choice** of **law**. Generally, so long as the provision does not contravene Illinois public policy and there is some relationship between the chosen forum and the parties to the transaction, an express **choice** of **law** provision will be given full effect. *Emigrant Mortgage Company, Inc. v. Chicago Financial Services, Inc .*, 386 Ill.App.3d 21, 26 (2007). The language of the contract is clear and neither party argues the application of New York law contravenes Illinois public policy or that Illinois law should apply. Accordingly, New York law will be applied to the substantive contract issues raised in this case. *Id.* In applying the law of New York, we are to accept the decision of an intermediate court of review as an accurate statement of the law of its own state, in absence of any conflicting decision by another appellate court of coordinate jurisdiction in the state or by its highest court of review. *Id.* However, with regard to procedural matters, the law of the forum controls. *Id.*

¶ 29 When a challenge is made to a trial court's rulings following a bench trial, the proper standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *Id.* at 25. A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on evidence. *Id.* at 26. Construction of a contract, however, is a question of law that is reviewed *de novo. Id.*

¶ 30 Under New York law, the elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. *Furia v. Furia*, 498 N.Y.S.2d 12 (1986).

¶ 31 A contract is formed when there are at least two parties with legal capacity to enter into a contract who give their mutual assent to the terms of a contract and there is consideration. *Maas v. Cornell University*, 94 N.Y.2d 87, 93 (1999).

***5** ¶ 32 In regard to damages, the plaintiff bears the burden of proving the extent of the harm suffered. *J.R. Loftus Inc. v. White*, 85 N.Y.2d 874, 877 (1995). It is well established under New York law that damages are recoverable for losses caused by the breach only to the extent that the evidence affords a sufficient basis for estimating the amount in money with reasonable certainty. *Haughey v. Belmont Quadrangle Drilling Corp.*, 284 N.Y. 136 (1940).

¶ 33 The parties' arguments concern the interpretation of certain paragraphs in the lease. Under New York law, "when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." *W.W.W. Associates v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). The intention of the parties may be gathered

from the four corners of the instrument. *Beal Savings Bank v. Sommers*, 8 N.Y.3d 318, 324 (2007). The court should " 'construe the agreements so as to give full meaning and effect to the material provisions.' " *Id.* (quoting *Excess Insurance Co., Ltd. v. Factory Mutual Insurance Co .*, 3 N.Y.3d 577, 582 (2004)). A reading of the contract should not render any portion meaningless. *Id.* In addition, a contract should be " 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.' " *Id.* at 324–25 (quoting *Matter of Westermoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003)).

¶ 34 American first claims the trial court committed reversible error when it found for Mitsui on its breach of contract claim without first making a finding about what caused the corrosion. American argues causation is an essential element of damages and that Mitsui was required to prove that American's breach of contract directly and proximately caused the damage to the railcars or that the damage was the fault of American. We disagree.

¶ 35 In its judgment order, the trial court acknowledged that it could not determine the exact cause of the corrosion damage to the railcars. However, the court made certain factual findings which underpinned the judgment that American was liable for breach of contract. The court found: (1) the cars were new when they were leased to American; (2) the cars suffered extensive corrosion damage during the time they were leased to American; (3) the leased railcars were expected to last 40 to 50 years; (4) that the corrosion damage exceeded ordinary wear and tear; (5) Mitsui was required to pay for extensive repairs to prevent the cars from collapsing and make them safe to use; and (6) American refused to pay the damages and refuted the letter of intent.

¶ 36 On appellate review, we examine the trial court's factual findings to determine whether the findings are against the manifest weight of the evidence. *Emigrant Mortgage Company*, 386 Ill.App.3d at 25. A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on evidence. *Id.* at 26.

***6** ¶ 37 Initially, we note Mitsui argues that American has waived all its evidentiary arguments because it did not cite the proper standard of review in its brief. *Addis v. Exelon Generation Co.*, 378 Ill.App.3d 781, 786–87 (2007). However, waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court. *Jackson v. Board of Election Commissioners of the City of Chicago*, 2112 IL 111928, ¶ 33. Waiver aside, we will consider this case on the merits and review the trial court's findings under the standards previously stated.

¶ 38 In this case, there is testimony that the railcars were new when they were delivered to American at the outset of the lease. Testimony showed during the years the cars were in the possession of American they suffered extensive corrosion damage. Trial testimony showed the cars were severely damaged during the years American had them in its possession. Experts testified the cars had a normal serviceable life span of 40 to 50 years, but only 10% of the life of the cars was left after only four to five years in possession of the lessee.

¶ 39 The lease contract itself provided no definition for "ordinary wear and tear." However, in view of the unrebutted expert testimony that the railcars had a normal life expectancy of 40 to 50 years and there remained only 10% of usable life left in the cars after being in possession of the lessee for four to five years, we cannot say the trial court's finding, the damage here exceeded normal wear and tear, is against the manifest weight of the evidence.

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¶ 40 The court's findings that the corrosion damage on the cars occurred during the time they were in possession of American is not against the manifest weight of the evidence because trial testimony supported the findings and we cannot say the findings appear to be unreasonable, arbitrary, or not based on evidence or that the opposite conclusions are apparent.

¶ 41 The court also interpreted the lease contract. Construction of a contract is a question of law that is reviewed *de novo.* *Emigrant Mortgage Company*, 386 Ill.App.3d at 26.

¶ 42 The court examined the lease and identified several provisions of the lease, which under the court's interpretation, required American to return the cars at the end of the lease in the same condition as it received them, except for ordinary wear and tear. The court determined that American was obligated under the lease to pay for damage which exceeded ordinary wear and tear. We find provisions found in paragraphs 4(A)(ii), 8(B) and 11(B) of the contract relevant to the question of whether American is responsible for all damage to the cars which exceeded ordinary wear and tear.

¶ Section 4(A)(ii) provides:

"(ii) It is further understood that Lessee Maintenance Items shall include:

(a) damage while in Lessee's or Lessee's shipper or consignee's possession, custody or control, and (b) damage or corrosion occurring from use other than permitted under this Agreement."

***7** ¶ 44 Under our reading of section 4(A)(ii)(a), the lessee assumes financial responsibility for damage while in its possession.

¶ 45 Section 8(B) of the lease provides:

"Casualty Cars

* * *

B. In the event that any of the Cars, or the fittings, appliances or appurtenances thereto, shall be damaged, ordinary wear and tear excepted, or destroyed either as a result of the acts of a Lessee's employees, agents or customers or from any commodity or other material loaded therein or thereon, Lessee agrees to assume financial responsibility for such damage or destruction."

¶ 46 Again, under our reading, the plain language of this provision makes the lessee responsible for all damage to the cars with the exception of ordinary wear and tear.

¶ 47 Section 11(B) of the lease provides:

"Lessee, shall return each such Car to Lessor (i) in interchange condition in accordance with Interchange Rules and FRA rules and regulations in effect on the date the Cars are returned to Lessor and Free of AAR Interchange Rule 95 damage; (ii) free from all accumulations or deposits from commodities transported in or on it while in the service of Lessee; (iii) suitable for loading the commodities allowed in the applicable Schedule; (iv) with respect to the specific parts or equipment specified in Section 7 of the applicable Schedule, in as good condition, order and repair as when delivered to Lessee, normal wear and tear excepted."

¶ 48 Here, under our interpretation, lessee is responsible to return the railcars in interchange condition and is responsible for all damage with the exception of ordinary wear and tear.

¶ 49 The trial court concluded that since the damage to the cars exceeded normal wear and tear and that the lease required American to pay for all dam-

ages which exceeded normal wear and tear, American breached the contract when it returned the cars in a damaged condition and refused to pay the repair costs. A trial court's finding that a party breached a contract is a factual finding which is reviewed under the manifest weight of the evidence standard. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 72 (2006). Here, we cannot say the trial court's finding that American breached the contract is against the manifest weight of the evidence because the finding is supported by the evidence.

¶ 50 American, argues that the transportation of coal is a permitted use under section 4(A)(ii)(b) of the lease. Therefore, American argues it cannot be liable for damage caused by a permitted use and it could not be held liable to pay for the corrosion damage unless Mitsui could prove American employed the cars in a non-permitted use which caused the damage and corrosion. American further argues it was not proven it hauled chlorine contaminated coal wash water and the trial court made no finding they hauled wash water.

¶ 51 In support of its argument American cites section 4(A)(ii)(b), which reads as follows:

> ***8** "(ii) It is further understood that Lessee Maintenance Items shall include: * * * *
>
> (b) damage or corrosion occurring from use other than permitted under this Agreement."

¶ 52 American asks us to interpret this provision as implying an exclusion that American is not responsible for damage which occurs from a permitted use.

¶ 53 The resolution of the issue requires interpretation of the lease. The court should construe the lease so as to give full meaning and effect to the material provisions. *Beal Savings Bank*, 8 N.Y.3d at 324. A reading of the contract should not render any portion meaningless. *Id.* "A contract should be " 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.' " *Id.* at 324–25 (quoting *Matter of Westermoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003)).

¶ 54 Under a plain reading of the contract it is clear that under paragraph 4(A)(ii)(b), the contract specifies maintenance items American is responsible for "*includes* " damage or corrosion from other use than is permitted by the agreement. Under our reading of the contract, however, this section simply specifies American is responsible for damage from a non-permitted use but it does not provide an exclusive list of American maintenance items. The language that the maintenance items "*includes* " damage from non-conforming use, makes it clear that there are other possible maintenance responsibilities not listed in section 4(A)(ii)(b). The language of the paragraph does not provide an "*exclusive* " list of American's maintenance responsibilities nor does it *exclude* any other maintenance responsibilities, including damage resulting from a permitted use.

¶ 55 Moreover, American's suggested interpretation would violate the rule of contract interpretation that contracts should be read in a manner that would not render other provisions meaningless. *Beal Savings Bank*, 8 N.Y.3d at 324. Earlier we discussed our interpretation of three other provisions of the lease—section 4(A)(ii)(a) makes American liable for all damage that occurs while the cars are in its possession, custody or control; section 11(B)(i) requires American to return the cars in interchange condition and the same condition except for ordinary wear and tear; section 8(B) makes American financially responsible for any damage to the cars caused by any commodity loaded therein—including coal.

¶ 56 American's interpretation of 4(A)(ii)(b) would render sections 4(A)(ii)(a), 8(B) and 11(B)(i)

meaningless because these three sections charge American with liability for damage exceeding ordinary wear and tear regardless of the cause. A reading of the contract should not render any portion meaningless. *Beal Savings Bank*, 8 N.Y.3d at 324. The court should construe the lease so as to give full meaning and effect to the material provisions. *Beal Savings Bank*, 8 N.Y.3d at 324.

***9** ¶ 57 Under the express language of paragraphs 4(A)(ii)(a), 8(B) and 11(B)(i) of the lease, American is liable for any damages to the cars except ordinary wear and tear, regardless of cause. American's suggested interpretation that section 4(A)(ii)(b) implies it is responsible only for damage or corrosion resulting from non-permitted use ignores the full meaning and effect of the entire lease. To interpret 4(A)(ii)(b) as suggested by American would render other sections 4(A)(ii)(a), 8(B) and 11(B)(i) in the lease meaningless, violating the rules of contract interpretation. Therefore, we reject this interpretation and agree with the trial court.

¶ 58 In its reply brief, American claims that there was no evidence as to when the damage occurred and whether it occurred during the time the cars were in the possession of American. Mitsui filed a motion to strike this portion of the reply brief because American never made this argument in the trial court or in its opening brief.

¶ 59 An examination of the record shows American never made this argument in the trial court and it stated to the trial court in its post-trial brief that it is uncontested that the damage occurred while in the possession of American. Furthermore, American never argued in its opening brief that the damage did not occur while the railcars were in its possession. The motion to strike this argument is granted because: (1) the argument is waived because it was not made in either the trial court or opening brief and (2) the argument is not permitted on appeal because it is inconsistent with its position at trial and, therefore, not allowed under Illinois Supreme Court Rule 341(h)(7) (Ill.Sup.Ct. R. 341(h)(7) (eff.Feb.6, 2013)). Accordingly, the motion to strike this argument is granted.

¶ 60 Next, American claims Mitsui is barred from recovering damages because it failed to repair the cars during the term of the lease and the failure to inspect and repair the cars caused the extensive damage. We disagree.

¶ 61 Peter Jones, Mitsui's vice president of operations, testified and the court made a finding that the inspections required under the lease pertained only to the wheels and moving parts. No inspection would be required of the tubs themselves because no wear would normally be expected. Mitsui's metallurgical expert witness, Dr. Michael Stevenson, testified and the trial court found that a visual inspection of the cars would not find intergranular corrosion. Intergranular corrosion can be found only by microscopic examination which was not contemplated by the contract.

¶ 62 American also claims Mitsui is barred from recovering damages for breach of contract because under Rider A, along with paragraph 7 of Schedule No. 01, and paragraph 5 of the lease, Mitsui is required to maintain the cars in good condition suitable for hauling coal. American claims Mitsui failed to maintain the railcars.

¶ 63 American's claims are not persuasive. As defined under Rider A: " 'Maintenance' shall mean all repairs, servicing, maintenance, replacement or furnishing of parts, mechanisms and devices as are needed to keep any Car in good condition and working order and repair, suitable for loading of the commodities listed in the applicable Schedule and in according with the Interchange Rules, the FRA rules and the applicable rules of any other applicable regulatory body having jurisdiction over the Cars."

***10** ¶ 64 Rider A merely defines "maintenance"

but does not require an affirmative act by either party. As previously stated, contracts are enforced according to its terms. *W.W.W. Associates*, 77 N.Y.2d at 162. Moreover, Peter Jones's testimony at trial showed this provision was intended to allow Mitsui to keep the cars rolling in interchange condition.

¶ 65 Under paragraph 7 of Schedule No. 01 to the lease, "[c]ars are to be made available to lessor for inspection and prevention maintenance for no less than five (5) days per every six (6) month period."

¶ 66 We cannot say paragraph 7 of Schedule No. 01 requires Mitsui to inspect and perform prevention maintenance. Instead, this clause requires American to make the railcars available for inspection and prevention maintenance but again, does not expressly require an affirmative act on the part of Mitsui.

¶ 67 Paragraph 5 of the lease states:

"5. INSPECTION

Lessee shall permit Lessor or its agents reasonable access during normal business hours to examine the Cars wherever located or Lessee's records relating to the Cars."

¶ 68 The argument has no merit because paragraph 5 does not require Mitsui to inspect the cars. Rather, this paragraph requires American to allow Mitsui to examine the cars and review American's records relating to the cars—no express affirmative act on the part of Mitsui is required.

¶ 69 None of the sections in the lease cited by American expressly requires Mitsui to maintain the cars in any manner. The experts testified the damage to the railcars would not have been prevented had Mitsui regularly inspected and maintained the cars because the inspections contemplated in the contract did not require microscopic examination to detect intergranular corrosion. Mitsui was not required under the lease to inspect and maintain the cars.

¶ 70 Next, American claims the trial court awarded excessive damages for the repairs. American claims the parties "had a clear mutual understanding of what constituted economically reasonable repairs and memorialized it in a letter of intent."

¶ 71 The trial court found American repudiated the letter of intent (LOI). Since the LOI was repudiated, no one is bound. The trial court heard testimony of the experts, who testified that the repairs ordered by Mitsui were the most economically feasible method because an individual microscopic examination of each car would be more costly. The finding is not against the manifest weight of the evidence.

¶ 72 Next, American claims the trial court awarded excessive prejudgment interest.

¶ 73 The lease provides for interest "at a rate equal to one and a half percent (1.5%) per month [18% per annum] or the maximum rate permitted by law, whichever is less." New York's general interest statute provides: "Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute." N.Y. CPLR § 5004.

¶ 74 American claims the lease calls for the prejudgment interest rate of the lesser of the contract or the statute, thus, the rate should be 9%.

***11** ¶ 75 Mitsui cites *Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 875 F.Supp. 165 (1994), for the proposition that the 18% rate applies. In Morse/Diesel, a general contractor sued its subcontractor for breach of contract. *Morse/Diesel, Inc.*, 875 F.Supp. at 168. The court awarded judgment in favor of the general contractor. The parties' contract provided prejudgment interest "at three (3) percentage points in excess of the rate of interest announced from time to time by Man-

ufacturers Hanover Trust Co. as its prime rate or if it is less, at the maximum interest rate permitted by law." *Id.* at 174. At that time, "three percentage points above the Manufacturers Hanover Trust rate" was greater than the rate provided in the New York general interest statute.

¶ 76 However, the court found that New York law permits parties to contract for a higher interest rate than the interest statute provides. The contract term, "at the maximum interest rate permitted by law" did not serve to cap interest at the rate provided in the general interest statute because the parties have contracted for a higher interest rate than the statute provides and New York law allows parties to contract at a higher interest rate than the interest statue provides. Therefore, § 5004 does not operate as an interest cap in contracts where parties contract for a higher interest rate than the 9% permitted by the statute. Accordingly, the court allowed a prejudgment rate greater than the 9% allowed under the statute because the law permits parties to contract for a rate.

¶ 77 Here, like *Morse/Diesel*, the parties have contracted for a higher rate than provided by § 5004. Since the parties could legally contract for a 18% contract prejudgment interest rate, the New York general interest statute does not provide a cap on the prejudgment interest rate. It is well settled when a contract provides that interest shall be paid at a specified rate until the principal is paid, the contract rate of interest, rather than the legal rate set forth in § 5004 governs until payment of the principal or until the contract is merged in a judgment. See *O'Brien v. Young*, 95 N.Y. 428, 429 (1884); *Schwall v. Bergstol*, 468 N.Y.S.2d 47 (1983).

¶ 78 American claims the New York **usury** statute provides for a maximum interest rate of 25%. See N.Y. Penal Law 190.42. American argues that the **usury** statute does not apply to a railcar lease because the monetary award is not tied to a loan or forbearance of money, citing *Orix Credit Alliance v. Northeastern Tech Excavating Corp. 222 A.D.2d 796, 797–798*. Accordingly, American argues that the only applicable statutory interest rate provided by law is the 9% provided in the general interest statute and therefore the prejudgment interest rate is capped at 9%.

¶ 79 However, the case cited by American does not support its argument. In setting the prejudgment interest rate at 18%, the trial court relied on New York case law which allows the court to award a higher prejudgment interest rate than the 9% rate that is provided by the New York general interest statue if the parties to a contract agree to the higher rate. *O'Brien v. Young*, 95 N.Y. 428, 429 (1884); *Schwall v. Bergstol*, 468 N.Y.S.2d 47 (1983). The court did not rely on the New York **usury** statute to set the interest rate at 18%. American has not provided any authority contrary to the cases cited by Mitsui. Ironically, in *Orix*, the case cited by American, the court allowed an interest rate in excess of the 25% **usury** rate in a breach of contract case involving a lease, because the **usury** statute did not apply to prohibit that rate. Therefore, we conclude the issue raised by American of whether the **usury** statute is applicable to this transaction has no bearing on whether the court was authorized to enforce the 18% prejudgment interest rate the parties agreed to in their contract. American's argument has no merit and we do not find the trial court erred in applying the 18% prejudgment interest rate.

***12** ¶ 80 Lastly, American claims it paid a premium on the lease for services and inspections Mitsui did not perform and that it is entitled to a refund. American relied primarily on testimony of Jerry Charaska as a expert witness. Charaska stated Mitsui did not shop the cars every six months. American paid a premium of $1,455,888 to $2,279,088 for the services that Mitsui did not perform over a standard lease. However, Charaska admitted he had no information that Mitsui failed to perform any preventative maintenance under the contract and that the lease provision to shop cars every six months was an option for Mitsui not a requirement under the contract. The

trial court found Charaska not credible and held American did not prove its case. The trial court's ruling is not contrary to the manifest weight of the evidence.

¶ 81 CONCLUSION

¶ 82 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 83 Affirmed.

Presiding Justice McBRIDE and Justice PALMER concurred in the judgment.

Ill.App. 1 Dist.,2013.
Mitsui Rail Capital, LLC v. American Coal Co.
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