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COURT OF APPEALS

STATE OF NEW YORK

J. D'ADDARIO & COMPANY, INC.,

Respondent,

-against-

No. 192

EMBASSY INDUSTRIES, INC.,

Appellant.

27 Madison Avenue
New York, New York 10010
October 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

DAVID I. ROSENBERG, ESQ.
ROSENBERG FORTUNA & LAITMAN, LLP
Attorneys for Appellant
666 Old Country Road
Garden City, NY 11530

SCOTT M. KARSON, ESQ.
LAMB & BARNOSKY, LLP
Attorneys for Respondent
534 Broadhollow Road, Suite 210
Melville, NY 11747

Jessica B. Cahill
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 192, J. D'Addario.
2 Counselor, would you like any rebuttal
3 time?

4 MR. ROSENBERG: Yes, three minutes, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

7 MR. ROSENBERG: May it please the Court,
8 David Rosenberg on behalf of the appellant Embassy
9 Industries.

10 Your Honors - - -

11 CHIEF JUDGE LIPPMAN: Counsel, why can't
12 the parties chart their own course in this case?

13 MR. ROSENBERG: No problem with them
14 charting their own course, and I think that's the
15 purpose of the contract.

16 CHIEF JUDGE LIPPMAN: And say that the - -
17 - that liquidated damages this is what you get, this
18 is the only remedy. Why is that not the open and
19 shut answer to this case?

20 MR. ROSENBERG: Your Honor, they did say
21 that. However, what I think the respondent is
22 missing here, and what I think the Appellate Division
23 was incorrect about, is that, as this court has said
24 on numerous occasions the matter of interest is a
25 separate and distinct wrong.

1 I have no problem with the fact that from
2 the period the money was deposited on the signing of
3 the contract in January of 2006 through July 31st of
4 2006, my sole remedy is to take whatever that 650,000
5 dollar deposit was with whatever few dollars it
6 earned - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. ROSENBERG: - - - in an IOLA account -
9 - - or, excuse me, an interest bearing account - - -

10 CHIEF JUDGE LIPPMAN: Right.

11 MR. ROSENBERG: - - - and go home. The
12 problem that we have and what I don't think that the
13 Appellate Division either under - - - well, I won't -
14 - - excuse me - - - I don't think what counsel
15 understands is that there is a separate and distinct
16 wrong. Although it took five years to finally
17 determine it, as of July 31st, 2006, it is now
18 determined that my client was entitled to that 651 -
19 - - 652,000 dollars.

20 JUDGE READ: So you want to be compensated
21 for the loss of use.

22 MR. ROSENBERG: Yes, Your Honor.

23 JUDGE READ: The opportunity cost.

24 MR. ROSENBERG: Right. And now, as - - -

25 JUDGE GRAFFEO: Even though they didn't

1 have - - -

2 JUDGE CIPARICK: Even though it was in
3 escrow - - - oh, I'm sorry. Even though the money
4 was in escrow this entire period of time?

5 MR. ROSENBERG: Right, the cases that we've
6 - - -

7 JUDGE CIPARICK: And they weren't using it.
8 It was in escrow. That doesn't make a difference?

9 MR. ROSENBERG: Your Honor, I don't think
10 it does, and the cases we've cited in our brief
11 specifically say it doesn't. In fact, I think most
12 recently this case - - - this court referred to - - -
13 and I'll have the case for you in a second - - -
14 where there was a fact that the money was in escrow,
15 and it shouldn't make a difference.

16 In fact, the Second Department before they
17 decided this case had similar - - -

18 CHIEF JUDGE LIPPMAN: So what are you - - -
19 so what are you entitled to now?

20 MR. ROSENBERG: Your Honor, it is our
21 feeling, and to answer Judge Ciparick's question more
22 specifically, I think that we don't look at this like
23 the glass is half empty, it's the glass is half full
24 situation. The fact that they didn't have the use of
25 the money is meaningless. The point is, is that my

1 client who has now been determined to have been
2 entitled to that money as of July 31st - - -

3 JUDGE SMITH: So but what are you - - - you
4 say you're entitled to from them - - - you're
5 entitled to nine percent on the principal, so you get
6 the escrow plus the interest earned on the escrow,
7 and then you subtract that from the nine percent?

8 MR. ROSENBERG: Judge, specifically
9 answering your question, the 650,000 dollars is the
10 amount we were entitled to. We get nine percent on
11 that from the earliest possible date. It's been
12 determined that the cause of action accrued was July
13 31st of '06, through the date of the judgment.

14 CHIEF JUDGE LIPPMAN: Why do you get - - -
15 go ahead, I'm sorry.

16 JUDGE GRAFFEO: And you also - - -

17 JUDGE SMITH: But it's been earning
18 interest all that time.

19 MR. ROSENBERG: Excuse me?

20 JUDGE SMITH: But it's been earning
21 interest all that time in escrow.

22 MR. ROSENBERG: We'll get a credit for that
23 interest.

24 JUDGE SMITH: You'll give them credit for
25 that interest.

1 MR. ROSENBERG: Sure. I'm only entitled to
2 the 650 plus the statutory rate.

3 JUDGE READ: So the actual interest it
4 earned gets subtracted.

5 MR. ROSENBERG: I am entitled to 650 plus
6 nine percent. So if there was some - - - now forget
7 - - - don't forget here that the fact that the money
8 was in escrow was solely to secure either client - -
9 -

10 CHIEF JUDGE LIPPMAN: Yeah, but why are you
11 entitled when there's an agreement that says - - -
12 that uses language like sole remedy, sole obligation.
13 Why are you entitled to that nine percent?

14 MR. ROSENBERG: Judge Lippman - - -

15 CHIEF JUDGE LIPPMAN: Why didn't you - - -
16 again, I use the term chart your own course, this is
17 the remedy, and the money that was sitting there was
18 bearing interest during that period, why would -- why
19 is there - - - why do you argue that there's a
20 separate wrong? On what legal basis are you entitled
21 now to nine percent interest?

22 MR. ROSENBERG: 5001, Your Honor. That's
23 the whole point. Now, the Appellate Division
24 decision in - - -

25 CHIEF JUDGE LIPPMAN: What does 5001 say?

1 MR. ROSENBERG: The Appellate Division
2 decision - - - and if I can show contrast, Your
3 Honor, I'll answer your question directly - - - is
4 that under the circumstances presented herein the
5 Supreme Court improvidently exercised its discretion
6 in awarding the interest.

7 CPLR 5001 says that interest shall be
8 recovered upon a sum awarded because of a breach of
9 contract.

10 CHIEF JUDGE LIPPMAN: Yeah, but you - - -
11 but I go to the original question. Your agreement
12 says something very specific, that this is the sole
13 remedy, this is the sole obligation. Why can't you
14 agree to that?

15 MR. ROSENBERG: Your Honor - - -

16 CHIEF JUDGE LIPPMAN: Even assuming - - -
17 assuming that under the statute, in general, in
18 contract actions, you're entitled to statutory
19 interest, assume that. Why do you get it when
20 there's an agreement that this is the sole
21 obligation, that's it? There's a default, you get
22 the money; you get the interest that's been
23 accumulating. Why do you get anything more? What
24 case do you rely on, what precedent, what's the
25 statutory language that entitles you, despite that

1 language, to get statutory interest?

2 MR. ROSENBERG: Your Honor, the posing of
3 the question implies the fact that the contract says
4 something which I don't think it says.

5 CHIEF JUDGE LIPPMAN: What does it say?

6 MR. ROSENBERG: There should have been a
7 provision in there, and it could have been inserted,
8 that says that notwithstanding the provisions of CPLR
9 5001, the parties agree that if there's any
10 litigation in this matter that the only interest
11 either party shall be entitled to, whoever ultimately
12 gets the principal, will be - - -

13 CHIEF JUDGE LIPPMAN: Assuming that - - -

14 MR. ROSENBERG: - - - what's earned in the
15 escrow.

16 CHIEF JUDGE LIPPMAN: Assuming that's
17 better language, what else could the language that's
18 in the agreement mean other than that you get
19 liquidated damages, you get the money, and you get
20 the interest that's accumulated on that money since
21 then?

22 MR. ROSENBERG: And, Your Honor, I agree
23 with that. I agree with the fact that as of July
24 31st, 2006, when they defaulted, that is all I was
25 entitled to, that is all I would have accepted. We

1 would not be here. The problem is - - -

2 JUDGE CIPARICK: But once there was a
3 judgment - - -

4 MR. ROSENBERG: - - - there was a separate
5 and distinct wrong with the fact that I was deprived
6 of the use of that money while this litigation went
7 on, and 5001 specifically says "shall". There is no
8 discretion for the Appellate Division to have found
9 to have been abused.

10 JUDGE CIPARICK: So that language cannot
11 equal - - -

12 CHIEF JUDGE LIPPMAN: Assume - - -

13 JUDGE CIPARICK: - - - a waiver of your
14 statutory interest?

15 MR. ROSENBERG: Your Honor - - - Judge
16 Ciparick, the case we cite from a waiver has to be
17 explicit. It can't be implied by silence. The fact
18 that - - - just for example - - -

19 JUDGE SMITH: Suppose that we were in an
20 interest rate environment, that's now hard to
21 imagine, and the escrow earned ten percent all these
22 years, would you get the ten percent?

23 MR. ROSENBERG: Well, when the calculation
24 was made, and it turns out that the statutory
25 interest - - - when the money was released I would

1 have - - - my judgment would be fully satisfied.

2 JUDGE SMITH: I'm sure you'd be satisfied.
3 He says, wait a minute, I overpaid you. I want my
4 one percent back. Does he get it back?

5 MR. ROSENBERG: Well, the answer to your
6 question, Judge, is found in the contract itself,
7 because in the contract in 15.2 or whatever it talks
8 about the escrow agent, it says that the money - - -
9 the interest shall follow the principal.

10 JUDGE SMITH: The interest goes to the
11 person entitled to the down payment.

12 MR. ROSENBERG: So the answer is yes.

13 JUDGE SMITH: And it also says sole remedy.
14 Why isn't that your sole remedy? If you have to - -
15 - if you get the benefit of the ten percent why don't
16 you have to be satisfied if it's only eight percent
17 or one percent?

18 MR. ROSENBERG: Again, Your Honor, because
19 as of July 31st, '06, the contract is silent as to
20 what happens. There was a breach here. My client
21 did not - - -

22 JUDGE SMITH: But you - - - but if it had
23 been running at ten percent since July 31, '06, and
24 that had been accumulated in the escrow since July
25 31, '06, you're entitled to the ten percent, right?

1 MR. ROSENBERG: Yes.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MR. ROSENBERG: Because of the provisions
4 in the contract.

5 CHIEF JUDGE LIPPMAN: You'll have rebuttal
6 time, thanks.

7 MR. KARSON: Good morning, may it please
8 the court. My name is Scott Karson. This is my
9 colleague Michael Mullin.

10 CHIEF JUDGE LIPPMAN: Counselor, your
11 adversary says there's a separate wrong here, that
12 beyond the interest on the money that accumulated
13 they're entitled to nine percent statutory interest.
14 Why is that not the case? Why is that not a separate
15 wrong here?

16 MR. KARSON: Well, there are two reasons
17 why the statutory interest provision does not apply
18 here. Number one, the parties waived it or excluded
19 it in their agreement, which says clearly - - -

20 JUDGE CIPARICK: Well, why was that a
21 waiver? It says defendant's sole remedy and
22 plaintiff's sole obligation. That -- that
23 constitutes a waiver, that language?

24 MR. KARSON: Absolutely. It's - - - as
25 Judge - - - Chief Judge Lippman said earlier, they

1 made a decision to chart their course and to make an
2 agreement which happened to be at variance with the
3 provisions of 5001.

4 JUDGE SMITH: How do we know that that
5 agreement doesn't apply just to principal and not to
6 interest?

7 MR. KARSON: Well, because you can't - - -
8 I can't imagine - - -

9 JUDGE SMITH: It doesn't say - - - it
10 doesn't say the interest on the escrow shall be the
11 sole and inclusive interest.

12 MR. KARSON: I can't imagine more - - -
13 clearer language - - -

14 JUDGE SMITH: Oh, you can imagine it.

15 MR. KARSON: - - - when it says "sole
16 remedy and sole obligation, and no further rights or
17 causes of action shall remain against the purchaser,
18 nor shall purchaser have any further rights under
19 this contract."

20 JUDGE SMITH: I'll imagine some for you.
21 You put in the words "as to principal and interest".

22 MR. KARSON: Well, you know, if, for
23 example, we took up Mr. Rosenberg's invitation and
24 the contract had said sole obligations, sole remedy,
25 and that shall include 5001, you would inevitably

1 then get into a situation, well, listen they excluded
2 5001, there must be some other remedy that we - - -

3 JUDGE SMITH: You're making a point - - -

4 MR. KARSON: - - - can't even envision
5 here.

6 JUDGE SMITH: - - - you can always - - -
7 when you say you could always imagine clearer
8 language.

9 MR. KARSON: Well, sure. I mean this
10 language - - -

11 JUDGE SMITH: All right.

12 MR. KASON: - - - is as clear as reasonably
13 can be - - -

14 JUDGE GRAFFEO: What about the - - -

15 CHIEF JUDGE LIPPMAN: It would be better to
16 have the other language that your adversary - - -

17 MR. KARSON: I'm not so sure that it would,
18 Judge, because, again, you would open yourself up for
19 an argument, gee, they considered 5001; maybe there's
20 some other liability that we haven't even conjured up
21 yet.

22 JUDGE PIGOTT: This is not uncommon though.
23 I mean in real estate deals, you know, they could
24 have made the claim that because you didn't buy it
25 when you said you were going to buy it they lost

1 another opportunity and that opportunity was ten
2 million dollars. And so, they want to sue you for
3 ten million dollars. You'd say, no, the agreement
4 said you get the down payment, that's it.

5 Now, if you were holding, as the attorney
6 for the purported buyer, that 650, and you said, I'm
7 not turning it over, because we don't think we
8 breached, and you held it for five years until the
9 court finally said turn it over, wouldn't they be
10 entitled to nine percent interest from the date of
11 the breach, because you didn't give them their money?

12 MR. KARSON: No, because we didn't have the
13 benefit of the money either.

14 JUDGE PIGOTT: It's sitting in your account
15 though.

16 MR. KARSON: No, it's sitting - - -

17 JUDGE PIGOTT: You could have - - - you
18 could have given it to them.

19 MR. KARSON: It's sitting in an escrow
20 account - - -

21 JUDGE PIGOTT: I know, I'm using the - - -
22 I'm using the example of if it was in your personal
23 account as the attorney for the purchaser or the - -
24 -

25 MR. KARSON: But that's not - - - with all

1 due respect that's not - - -

2 JUDGE PIGOTT: No, but do you see the
3 problem then?

4 MR. KARSON: - - - the case here.

5 JUDGE PIGOTT: So your main argument is
6 because we did not control the escrow, we don't have
7 to pay the interest?

8 MR. KARSON: This court has consistently
9 held, and most recently, I think, in the
10 Manufacturer's case that in order for interest to
11 accrue there's not only an entitlement to the money
12 by one party, but there's also the unfair use of the
13 money by the other party during the period in
14 question. That circumstance does not apply where the
15 money is placed in an escrow account, by agreement of
16 the parties, where neither party has access to or use
17 of that money at all - - -

18 JUDGE SMITH: So on that theory you don't
19 even need the sole remedy language in the agreement?

20 MR. KARSON: Well, what I'm saying - - -

21 JUDGE SMITH: Even if that weren't there
22 the interest on the escrow would be the only interest
23 they get?

24 MR. KARSON: Yes, I think that would be the
25 case, because - - -

1 JUDGE GRAFFEO: Except in the Spodek case
2 we made clear that the purpose of the statute is to
3 make the aggrieved party whole. And they did not
4 have the use of this money they were entitled to for
5 five years.

6 MR. KARSON: Well, with all due respect,
7 Judge Graffeo - - -

8 JUDGE GRAFFEO: Why is it that we - - - why
9 is it that we give your lack of being able to use
10 that money more importance than their lack of the
11 money?

12 MR. KARSON: Well, respectfully, Judge
13 Graffeo, I think there are two prongs to the test to
14 see whether or not interest shall be payable.

15 One is that one party is deprived of the
16 use of the money, but the other part of the test - -
17 - the other prong, is that the other party unfairly
18 has the use of that money over a period of time.
19 That's the exact language - - -

20 JUDGE GRAFFEO: You're saying - - -

21 MR. KARSON: - - - used by the court - - -

22 JUDGE GRAFFEO: - - - you're saying both
23 factors - - -

24 MR. KARSON: Exactly.

25 JUDGE GRAFFEO: - - - have to be met.

1 MR. KARSON: And then the Manufacturer's &
2 Traders - - -

3 JUDGE GRAFFEO: What do we do with the fact
4 that the statute uses the word "shall", which
5 generally indicates a mandatory obligation?

6 MR. KARSON: Well, it shall in a case where
7 interest is payable, and it shall in a case where the
8 parties have not otherwise decided in their agreement
9 to dispense with that requirement.

10 JUDGE SMITH: Well, was the Appellate
11 Division right to say that this was a matter of
12 discretion?

13 MR. KARSON: You know, it's interesting
14 that you brought that up, Judge Smith. I don't
15 understand that very candidly. I think that the
16 Appellate - - -

17 CHIEF JUDGE LIPPMAN: So you think the
18 Appellate Division may be right for the wrong
19 reasons?

20 MR. KARSON: Well, I think that the
21 Appellate Division reached the right result, but it
22 should have been as a matter of law rather than as an
23 exercise of discretion.

24 CHIEF JUDGE LIPPMAN: You don't think it's
25 a matter of discretion?

1 MR. KARSON: I don't think so in this case.
2 I think that as a matter of law the statute was
3 waived by the agreement and that in any event
4 interest is not payable under the circumstances where
5 the money is - - -

6 CHIEF JUDGE LIPPMAN: What's - - -

7 MR. KARSON: - - - held in escrow.

8 CHIEF JUDGE LIPPMAN: What's the
9 significance of Manufacturer's? How does it impact
10 on this - - - on our facts here?

11 MR. KARSON: Well, Manufacturer's, I think,
12 is very pertinent, because there the money was - - -

13 CHIEF JUDGE LIPPMAN: It's an equity case,
14 though, it's a little different, right?

15 MR. KARSON: Yeah, but the part that I
16 think is on all fours - - -

17 JUDGE READ: And also involved an es - - -

18 MR. KARSON: - - - with our case is that
19 there the money was paid into court, which in our
20 view is the equivalent of paying it into an escrow
21 account. And there the court said that because it
22 was paid into court neither party had the use of the
23 money, and therefore there was no justification for
24 an interest award.

25 JUDGE CIPARICK: And gave the courts

1 discretion - - -

2 MR. KARSON: I think that applies here.

3 JUDGE CIPARICK: - - - in that case.

4 MR. KARSON: Excuse me?

5 JUDGE CIPARICK: It gave the courts
6 discretion.

7 CHIEF JUDGE LIPPMAN: Well, there were
8 claimants who didn't really do anything wrong, right?
9 They hadn't breached.

10 MR. KARSON: In Manufacturer's?

11 CHIEF JUDGE LIPPMAN: Yes.

12 MR. KARSON: Yes, but I'm not sure - - -

13 CHIEF JUDGE LIPPMAN: That's the distinct
14 difference, right?

15 MR. KARSON: Yeah, but I'm not sure that
16 for this purpose the point is, and this court said
17 very clearly, that there was no justification for an
18 interest award, because the money was in the hands of
19 an independent third party; there, the court, in our
20 case an escrow agent.

21 JUDGE READ: So what's the rule that you're
22 asking us to enunciate for parties so they can guide
23 themselves with certainty in the future?

24 MR. KARSON: Well, the rule is, is that the
25 parties can, as this court has frequently held, by

1 their agreements, chart a course which dispenses with
2 statutory requirements, at least in a case such as
3 this where there is no discernible violation of a
4 public policy by giving up an award of statutory
5 prejudgment interest. And there is also a rule that
6 in a case where money is placed in escrow where
7 neither party has the benefit of the use of that
8 money that interest should not accrue.

9 JUDGE READ: In that case, the provision Of
10 the CPLR doesn't apply, if it goes into escrow?

11 MR. KARSON: Correct.

12 JUDGE SMITH: You have two alternative
13 rationales for the same result?

14 MR. KARSON: Yes.

15 CHIEF JUDGE LIPPMAN: Okay, thanks,
16 counselor.

17 MR. KARSON: Thank you, Your Honors.

18 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

19 MR. ROSENBERG: Briefly on the
20 Manufacturer's case, this court itself said that that
21 was an interpleader case that was equitable in
22 nature. 5001 specifically says that for a contract
23 case it shall and for an equitable case there is
24 discretion.

25 In Manufacturer's you also said that one of

1 the reasons you would not award interest was because
2 there the two other claimants were never found to
3 have been in breach - - -

4 CHIEF JUDGE LIPPMAN: They didn't breach
5 anything, yes.

6 MR. ROSENBERG: - - - there was no sum
7 awarded against them - - -

8 CHIEF JUDGE LIPPMAN: Yes.

9 MR. ROSENBERG: - - - and therefore it
10 doesn't apply. In Manufacturer's you have 1006, the
11 interpleader statute itself, which precludes that
12 interest from being awarded. So I think the fact
13 that the court relied upon 1006 - - - excuse me - - -
14 the Appellate Division relied upon 5001, citing
15 Manufacturer's, makes no sense to me, quite frankly.

16 CHIEF JUDGE LIPPMAN: Well, the Appellate
17 Division's decision may be on different grounds, but
18 the question is why is the result wrong?

19 MR. ROSENBERG: The result is wrong,
20 because 5001 says "shall". That's as simply as I can
21 put it, Judge. And, again, that a separate ruling -
22 - -

23 CHIEF JUDGE LIPPMAN: Even though the
24 agreement says sole remedy and all of that. Your
25 bottom line is you feel that up to a point that's

1 true, but then beyond that you should get the
2 statutory interest.

3 MR. ROSENBERG: Right, Judge. In fact this
4 court within the last year in this Republic of
5 Argentina case where there was a question of
6 interest, and the bonds having been paid, and whether
7 they should get interest on the non-interest payments
8 that weren't made, I don't believe that they're
9 mutually exclusive, because what counsel has argued
10 is that there must be both his use of the money and
11 our loss of the money, because it says - - - and this
12 is this bench speaking: "As we have previously
13 explained the function of pre-judgment interest is to
14 compensate the creditor for the loss of use of money
15 the creditor was owed during a particular period."

16 CHIEF JUDGE LIPPMAN: You agreed to give up
17 that pre-judgment interest?

18 MR. ROSENBERG: Not in this contract we
19 didn't, Judge.

20 CHIEF JUDGE LIPPMAN: You can though.

21 MR. ROSENBERG: Oh, using the language I
22 suggested to the court, yes. And, of course, a
23 waiver has to be expressed. It can't be implied by
24 silence. There was no indication that there was a
25 waiver here. If in fact the court is going to go

1 down the slippery slope - - -

2 CHIEF JUDGE LIPPMAN: What's - - - yeah.

3 MR. ROSENBERG: - - - and this - - -

4 CHIEF JUDGE LIPPMAN: But that language is
5 pretty strong though about sole remedy.

6 MR. ROSENBERG: As to the principal on the
7 day it became due - - -

8 CHIEF JUDGE LIPPMAN: Okay. All right.

9 MR. ROSENBERG: - - - as to the principal.
10 And, again, the only thing I would say if there is
11 going to be some discretion, some balancing of the
12 equities, they're the ones who breached the contract.
13 We were found to have done nothing wrong. We were
14 the ones entitled to - - -

15 JUDGE SMITH: You - - - on his second
16 argument he - - - the argument that it has to be not
17 only your loss, but also his gain, you don't get
18 interest, you say that's just wrong.

19 MR. ROSENBERG: Yes.

20 JUDGE SMITH: Have you got a case that
21 actually hold - - - have you got one where there was
22 loss to the plaintiff, but no gain to the defendant
23 and statutory interest was nevertheless awarded?

24 MR. ROSENBERG: Well, I think the Argentina
25 case is an example of that. There's also the Callen

1 case, the case that the lower court, Justice Emerson
2 relied upon, and that was specifically - - - there
3 was an escrow arrangement there on real estate and
4 the court originally, which we think correctly found,
5 that as of the date of the breach the separate and
6 distinct cause of action entitled us to prejudgment
7 interest - - -

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. ROSENBERG: - - - and mandatorily.

10 CHIEF JUDGE LIPPMAN: Thanks. Thank you
11 both. Appreciate it.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Jessica B. Cahill, certify that the foregoing transcript of proceedings in the Court of Appeals of J. D'Addario & Company, Inc. v. Embassy Industries, Inc., No. 192 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: October 15, 2012