Affinitec Corp. v. Siemens Business Communication Systems, Inc.
Cal.App. 4 Dist.,2002.
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Court of Appeal, Fourth District, Division 3, California.
AFFINITEC CORPORATION, Plaintiff and Respondent,
v.
SIEMENS BUSINESS COMMUNICATION SYSTEMS, INC., Defendant and Appellant.
No. G025942.
(Super.Ct.No. 790903).

March 25, 2002.

Software company brought breach of contract action against product developer for damages arising from developer's alleged failure to disclose to company the names of developer's new customers, and for developer's alleged failure to pay invoices. The Superior Court, Orange County, No. 790903,John H. Smith, J., awarded company $4.24 million in damages upon jury verdict, and awarded $743,956 in prejudgment interest. Developer appealed. The Court of Appeal, Bedsworth, A.P.J., held that: (1) damages based on company's claim for services provided to undisclosed customers were unliquidated, thus precluding prejudgment interest; (2) contract provided for fee to be paid to company for any configuration set-up, even if done by developer or customer; (3) evidence was sufficient to support $4.24 million in damages; and (4) statute of limitations for breach of contract based on nondisclosure of customers began to run when contract expired.

Affirmed in part, reversed in part, and remanded with directions.

West Headnotes

[1] Interest 219 39(2.30)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.30) k. Contract and Sales Matters. Most Cited Cases
Damages on software company's claims for services provided to undisclosed customers of product developer were unliquidated, and thus, company was not entitled to prejudgment interest on its breach of contract action against developer for failure to disclose new customers, where developer's records were in shambles, company only used developer's records it found reliable and then only as a corroboration source, and spreadsheet relied upon by company in calculating damages varied and took two days to explain to jury. West's Ann.Cal.Civ. Code § 3287(a).

[2] Interest 219 39(2.30)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.30) k. Contract and Sales Matters. Most Cited Cases
Software company was entitled to prejudgment interest of $18,587 on its breach of contract cause of action against product developer for failure to pay invoices for undisputed work, where developer was ready to pay company $133,000 in satisfaction of last invoice sent under contract due to expire that

month, developer withheld payment when company commenced suit, jury awarded company $146,219 on its claim for failure to pay invoices, and developer never disavowed the $133,000 check. West's Ann.Cal.Civ. Code § 3287(a).

[3] Interest 219 ⚿39(2.6)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.6) k. In General. Most Cited Cases

When a defendant can easily tally up damages from its own records, the mere fact that plaintiff sought more than the jury awarded is not grounds to deny prejudgment interest. West's Ann.Cal.Civ. Code § 3287(a).

[4] Damages 115 ⚿140

115 Damages
115VII Amount Awarded
115VII(D) Breach of Contract
115k140 k. Particular Cases. Most Cited Cases

Evidence was sufficient to support $4.24 million in damages awarded to software company for breach of contract based on product developer's failure to disclose to company the names of developer's new customers serviced by company, failure to pay invoices, and failure to pay last installment under a renewal contract, despite claim that company's calculations were based on mistaken assumptions so serious that the conclusions did not amount to substantial evidence; developer's argument appeared to be based on testimony of developer's accountant who reviewed company's spreadsheet and stated that company's numbers were too high, accountant opined that after adjusting for those and other mistakes, company's damages were approximately $1 million, and while this testimony might have supported a verdict in that amount, it hardly rendered company's evidence insufficient.

[5] Damages 115 ⚿118

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k118 k. Effect of Provisions of Contract. Most Cited Cases

Contractual provision stating that software company was responsible for all configuration work gave company a fee for any software configuration done, even if configuration was performed by product developer or developer's customer, and not company, and thus, fee was includable in portion of damages award to company in its breach of contract claim against developer, where various witnesses testified as to the parties' intent regarding provision, including two developer employees who supported company's interpretation that they were to be paid fee, and manager of developer was told that the goal was to have company, rather than developer, handle software support, as developer was paying company to do the work.

[6] Limitation of Actions 241 ⚿46(6)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k46 Contracts in General
241k46(6) k. Breach of Contract in General. Most Cited Cases

Limitation of Actions 241 ⚿95(9)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(9) k. Contracts; Warranties. Most Cited Cases

Statute of limitations for software company's breach of contract action against product developer

began to run when contract for software support services expired, rather than when each payment became due, in action arising from services provided by company to developer's undisclosed customers, where company did not know anything was duefor customers that were undisclosed when company sent periodic invoices, and to hold that a cause of action accrued as each partial breach occurred, even when the injured party was unaware of the breach and continued to perform the contract, would have been a serious injustice.

[7] Contracts 95 ⚷321(1)

95 Contracts
95V Performance or Breach
95k321 Rights and Liabilities on Breach
95k321(1) k. In General. Most Cited Cases

Limitation of Actions 241 ⚷46(6)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k46 Contracts in General
241k46(6) k. Breach of Contract in General. Most Cited Cases

When there are ongoing contractual obligations between a plaintiff and defendant, the plaintiff may elect to rely on the contract despite a breach, and the statute of limitations does not begin to run until the plaintiff has elected to treat the breach as terminating the contract.

Appeal from a judgment of the Superior Court of Orange County, John H. Smith, Judge. Reversed in part, with directions.

Crosby, Heafey, Roach & May, James C. Martin and Joseph P. Mascovich; Beck, De Corso, Daly, Barrera & Kreindler, Suzanne E. Tracy and Timothy M. Thornton for Appellant.

Klein & Wilson, Gerald A. Klein and Mark B. Wilson for Respondent.

OPINION

BEDSWORTH, Acting P.J.

*1 Siemens Business Communication Systems, Inc. appeals from a jury verdict for Affinitec Corporation in this breach of contract action. Siemens argues there was insufficient evidence of damages, a statute of limitations instruction was wrong, and prejudgment interest should not have been allowed. We agree that interest on one cause of action was improper, and so reverse in part. Because an alernative basis for interest was not addressed by the trial court, we remand with directions to consider that argument.

Siemens makes sophisticated telephone equipment used to operate large call centers, such as reservations systems and customer service centers.[FN1] Affinitec sells software that allows users to manage call center information. Siemens offered its hardware for sale in a package that included Affinitec's software.

FN1. We consider the evidence most favorable to Affinitec under the rule that a judgment of a lower court is presumed correct, and all intendments and presumptions must be indulged in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133, 275 Cal.Rptr. 797, 800 P.2d 1227.)

In 1992, Siemens decided it no longer wanted to handle software set-up or maintenance, and the parties entered into the contract at issue. It required Affinitec to provide software support to Siemens' call center customers who had purchased Affinitec's software from Siemens. This consisted of setting up the software (software configuration), providing assistance under Siemens' warranty and service contracts, and helping Siemens' customers who had neither. Affinitec was to be paid a one-time fee for software configuration, annual fees per customer for warranty and support work, and an hourly fee for aiding customers without a contract. The annual and hourly fees were payable monthly. Siemens

gave Affinitec a list of its customers, and it was supposed to provide ongoing updates following each software sale. The contract was for three years, and it was renewed in 1995 for another three year term, the only change being the fees were to be paid quarterly.

Calls for assistance came to Affinitec via a Siemens' support center. When making a referral, Siemens would tell Affinitec if the customer had a warranty or service contract, and provide the customer's identification number. Affinitec would then check this against its database, which contained the Siemens' customer list.

From the outset, Siemens' various service centers did not keep accurate records of new customers, with the result that Affinitec's list, as updated, never matched Siemens' list. Between 1992 and 1995, the parties thought they had an accurate list. Siemens had assigned one employee (Kutzner) to keep its list updated, and he regularly contacted his Affinitec counterpart to make sure both companies' lists matched.

But things fell apart in 1996. Kutzner was reassigned, his successors at Siemens fumbled the ball, and then Siemens kicked it into the stands by assigning all customers new identification numbers. When Siemens' service centers gave Affinitec these new numbers, the software company added them to its database, assuming they were existing customers with a new number. Some of them were; unfortunately, some of the numbers provided represented new customers. A request for a cross-referenced list of old and new numbers proved futile, as Siemens had discarded the old numbers.

*2 In 1997, in an effort to resolve this problem (and others not material here), Siemens finally provided Affinitec with a list of customers using Affinitec software (the "Ryan list," complied by Siemens' Jim Ryan). It revealed many more customers than Affinitec had on its books, and the software company concluded it was owed additional fees. After negotiations faltered, Affinitec sent Siemens invoices for approximately $1.8 million, the sum it then believed due for services to unrevealed customers going back to 1992. Further negotiations proved unavailing, and this action was commenced in February 1998, when the contract expired.

As later amended, the complaint set out three causes of action for breach of contract. The first alleged an unspecified amount was owed for services provided to undisclosed customers between 1992 and 1998. The second cause of action alleged Siemens failed to pay invoices for undisputed work done in 1998, during the last quarter of the contact. The third cause of action claimed the parties had renewed the contract for a final year at a flat rate (after the initial complaint was filed)-so that Siemens' customers would not be left without software support-and Siemens refused to pay the last installment due in 1999.

Siemens' evidentiary challenge concerns only the damages awarded on the first cause of action. These were calculated by David McGaughey, Affinitec's director of support and technical services, who testified for two days. Basically, McGaughey used a computer spreadsheet program to list approximately 530 undisclosed customers, the products they purchased, the relevant fees, and numerous other data. The information was gleaned from Affinitec's records, the Ryan list, and documents obtained from Siemens in discovery. McGaughey explained what he had been asked to do, where he obtained his data, and the assumptions he made. Throughout his testimony, McGaughey used a projector to put the spreadsheet on a screen set up in the courtroom, to illustrate his efforts for the jury. He concluded that Siemens owed Affinitec approximately $3.8 million. He also recalculated the amount due without relying on information obtained from Siemens' documents, after Siemens' cross-examination questioned his understanding of that data. McGaughey then said Affinitec was due approximately $2.9 million for undisclosed customers, based solely on data derived from its own records.

Affinitec's chief financial officer, David Cunning-

ham, was in charge of calculating damages, and he had directed McGaughey to prepare the spreadsheet. Cunningham testified to the preparation of two written calculations of damages based on McGaughey's spreadsheet, one using the Siemens' documents (exhibit 273) and the second without including them (exhibit 274). Both were received in evidence. Exhibit 273 showed approximately $3.8 million due and exhibit 274 showed $2.5 million, after correcting an error overlooked by McGaughey when he testified.

***3** On the statute of limitations issue, the contract provided that no action "arising out of or in connection with the transactions covered by this Agreement" could be brought more than two years after the "cause of action has accrued." Affinitec's position was that the undisclosed customer claim accrued only when the contract expired in 1998, while Siemens' view was that these claims accrued as it paid monthly or quarterly invoices (during the first and second three year periods, respectively). The trial judge agreed with Affinitec and gave the following instruction: "Statutes of limitations do not accrue in a breach of contract case until the contract has expired. A party to a contract can endure numerous breaches and either waive the breaches or sue for breach of contract at the time the contract expires."

The jury returned a series of general verdicts in favor of Affinitec on each cause of action. It awarded $3,854,136.48 on the undisclosed customer claim, $146,219.66 on the second cause of action (the last payment due under the three year contract that expired in February 1998), and $240,000 on the third cause of action (the final payment under one year renewal), for a total of $4,240,356.14. Affinitec requested prejudgment interest, and the trial judge allowed interest on each cause of action, totaling $743,956.05.

I

Siemens argues prejudgment interest on the first and second causes of action, $710,639.50 and $18,587.91 respectively, was unjustified because damages were unliquidated. Affinitec disagrees, but argues that if damages are unliquidated, we should remand to allow the trial court to consider whether to make a discretionary award of interest available on unliquidated contract claims. We agree with Siemens that interest on the first cause of action was mistaken, and agree with Affinitec that remand to consider its alternative claim is appropriate.

Civil Code, section 3287 sets out two rules on prejudgment interest.[FN2] Subdivision (a) covers what we shall refer to as liquidated damage claims; it provides that one who is entitled to recover "damages certain, or capable of being made certain by calculation" as of a particular day is also entitled to prejudgment interest from that date. Subdivision (b) deals with unliquidated claims: Where a party recovers damages on "a cause of action in contract where the claim was unliquidated," the trial court has discretion to award prejudgment interest from any date beginning with the filing of the action.

FN2. All further statutory references are to the Civil Code.

Affinitec sought prejudgment interest under both subdivisions of section 3287. On its first cause of action, it requested $669,458.23 under subdivision (a), as interest from August 1, 1997 (the date it billed Siemens for the customers disclosed on the Ryan list) through the verdict, plus a per diem rate from verdict to judgment. Alternatively, it claimed $448,770.25 under subdivision (b), representing interest from the filing of the complaint. On the second cause of action, Affinitec only sought interest from the filing of the complaint, $17,025.57 through verdict plus a per diem to judgment. It requested this as a matter of right under subdivision (a), or as a discretionary award under subdivision (b).

***4** The judgment awarded Affinitec the sums mentioned above, $710,639 .50 on the first cause of action and $18,587.91 on the second. The record is si-

lent on the trial judge's reasoning, no statement of decision or transcript of the hearing having been included. However, the size of the award on the first cause of action suggests it was pursuant to section 3287, subdivision (a).

A

[1] To recover prejudgment interest under section 3287, subdivision (a), it must be shown that defendant actually knew the amount due, or could have computed it from reasonably available information. The necessary information may be supplied by the plaintiff, such as a statement of damages with supporting data from which the defendant can compute damages. (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 391, 42 Cal.Rptr.2d 286.) The theory is that it is unfair to have expected the defendant to pay a sum he could not have ascertained prior to a trial. (*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 689-690, 48 Cal.Rptr. 901.)

In order to come within this rule, the calculation must have been a relatively simple matter, such as multiplying the number of board-feet of lumber hauled by the average weight of lumber per board-foot (*West v. Holstrom* (1968) 261 Cal.App.2d 89, 97, 67 Cal.Rptr. 831), or calculating the amount due under an expense report that listed all items claimed and attached supporting vouchers. (*Charlton v. Pan American World Airways* (1953) 116 Cal.App.2d 550, 554-555, 254 P.2d 128.) Interest is generally denied where more is required, as where an accounting was needed to determine the sum due (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 908, 197 Cal.Rptr. 348), or where plaintiff itself arrived at several different tabulations of the amount owing. (*Conderback, Inc. v. Standard Oil Co., supra,* 239 Cal.App.2d at pp. 690-691, 48 Cal.Rptr. 901.)

On the first cause of action (undisclosed customers), Siemens could not easily compute damages, so Affinitec was not entitled to prejudgment interest under Civil Code, section 3287, subdivision (a). Affinitec concedes "Siemens' records were in ... shambles," so bad that the software company did not believe them, and Affinitec "only used Siemens' records it found reliable and then only as a corroboration source."Instead, Affinitec relied on its own computer database that contained a record of each customer call, from which McGaughey extracted information to create the spreadsheet. If Affinitec could not arrive at its damages from Siemens' data, we see nothing to suggest Siemens could do any better.

Nor is this a case where the defendant could calculate damages from data provided by the plaintiff. McGaughey described the spreadsheet as "a continuing, evolving work product for a number of months."Although he sent Siemens an initial version several months prior to trial, McGaughey expected it had some errors, which he planned on having to correct. By Siemens' count, its accountant reviewed eight versions of the spreadsheet in all, in which the damages claimed ranged from a low of $1 million to a high of $5 million. Moreover, it took McGaughey two days to explain the final version to the jury. This hardly bespeaks of damages so easily determined that the defendant in equity ought to have paid them.

***5** Affinitec suggests this case is analogous to *West v. Holstrom, supra,* 261 Cal.App.2d 89, 67 Cal.Rptr. 831, but it is mistaken. *West* was one of those cases where the calculus was simple, quite unlike the present matter. There, plaintiff sued for hauling defendant's lumber, defendant knew the quantity of lumber it had shipped, and the only disputed item was how much the wood weighed per board-foot. The court held that the weight of lumber per board-foot was as readily measurable as market value, so the defendant knew easily enough what it owed. (*Id.* at p. 97, 67 Cal.Rptr. 831.) That situation is distinguishable from the present case.

[2][3] Affinitec's second cause of action is a different matter. There, Siemens knew what was owing, so the interest award on this claim is unassailable.

Siemens was ready to pay Affinitec $133,000 in February 1998, in satisfaction of the last invoice sent under the contract due to expire that month, but it withheld the payment when Affinitec commenced the instant action.

Siemens argues the disparity between the claim ($200,000) and the verdict ($146, 219.66) shows damages were not readily computed. But it never disavows the $133,000 check, nor does it suggest the difference between that sum and the verdict was a mystery, so the argument fails. Where a defendant can easily tally up damages from its own records, the mere fact that plaintiff sought more than the jury awarded is not grounds to deny prejudgment interest. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 811, 194 Cal.Rptr. 617.)

The upshot is that the award of $710,639.50 in prejudgment interest on the first cause of action was unwarranted. For that reason, and that reason alone, the judgment must be reversed.

B

Affinitec argues that if we conclude its damages were unliquidated, the matter should be remanded to determine if it is entitled to prejudgment interest under section 3287, subdivision (b). It raised this issue below as an altenative argument, and there is no indication it was considered by the trial judge. Siemens' only response seems to be that the judge *would* have been justified in declining such an award, but that is beside the point. The issue is one for the trial judge in the first instance. We remand to allow the trial court to exercise its discretion whether to award Affinitec prejudgment interest on the unliquidated contract claim in its first cause of action, pursuant to section 3287, subdivision (b).

II

[4] Siemens challenges the evidence of damages on two counts. First, it argues McGaughey's calculations are based on mistaken assumptions so serious that his conclusions do not amount to substantial evidence. Second, there was no evidence to support the jury's interpretation of a contract term in Affinitec's favor, so the judgment must be reduced by $151,412. Neither point is well taken.

Siemens argues McGaughey made three fatal mistakes. First, he assumed that any Siemens customer who had a support contract had it for the entire period between 1992 and 1998. Siemens says this affected three customers, but it does not state how much the error overstated damages. Second, McGaughey assumed that any customer who purchased more than one item of Affinitec software installed all products on the same date. Siemens asserts the installation date triggered warranty and software contracts, and this error overstated their duration, but it only points to one affected customer. Third, McGaughey misinterpreted references in Siemens' documents to customers who had "contracts." He assumed this meant the customer had a warranty and/or service contract for all Affinitec software sold by Siemens, but sometimes the reference was to a contract covering Siemens' hardware, not Affinitec's software. Siemens points out one instance of this mistake, but again offers no numbers.

***6** This argument really goes nowhere. It appears to be based on the testimony of the Siemens' accountant who reviewed McGaughey's spreadsheet (Knudsen), who said-not surprisingly-that Affinitec's numbers were too high. The accountant opined that after adjusting for these (and other) mistakes, Affinitec's damages were approximately $1 million. While this testimony might have supported a verdict in that amount, it hardly renders Affinitec's evidence insufficient. To prevail on a substantial evidence challenge, an appellant must lay out all of the evidence *against* him, and then demonstrate why it is insufficient. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362.) This Siemens fails to do.

Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 234 Cal.Rptr. 630, and like cases relied upon by Siemens, are readily distinguishable. There, the court reversed a condemnation award for insufficient evidence because *all* of the assumptions made by Zuckerman's expert appraiser were "riddled with error," such as failing to consider comparable properties, including in the valuation items not condemned, and disregarding standard inflation indicators in favor of his own index that was purely speculative. (*Id.* at pp. 1128, 1136, 234 Cal.Rptr. 630.) Nothing of that magnitude appears here.

[5] Siemens' second damage argument is that the contract, properly interpreted, did not allow Affinitec a fee for software configuration done by Siemens or the customer. It contends there was no evidence to support the contrary interpretation urged by Affinitec, so damages of $151,412 awarded for such work must be eliminated. We cannot agree.

The contract provision in question states that "Affinitec has sole responsibility for the software configuration of the applications...." Affinitec's theory, articulated by McGaughey and Cunningham (its chief financial officer) was that all configuration was supposed to be done by Affinitec, and the parties meant to allow it a fee even if the work was done by the customer or Siemens, because Affinitec was required to be available to perform this task.

This interpretation question was left to the jury, and the verdict for Affinitec requires us to assume the jury accepted its view of the contract. The verdict is supported by the evidence. The jury heard various witness testify as to the parties' intent on this issue. Among them were two Siemens' employees who could be understood to back up Affinitec's interpretation. Ed Lichte was the manager of Siemens' technical center computer systems throughout the period of the contract. He testified that in 1992, after the contract was signed, he was told by his supervisor that "Affinitec would be involved in every [software] installation."Robert Cheney, a Siemens manager responsible for supporting Affinitec's software prior to the contract, was told about the deal by his boss. The latter explained that his goal was to have Affinitec handle all of the software support. The boss did not want Siemens employees doing this work because "we were paying Affinitec to do the work [and] it would not make good business sense" for Siemens to do the same thing.

*7 Siemens points to testimony in its favor, and the fact that neither Lichte nor Cheney was involved in negotiating the contract. But the acts and conduct of the parties with knowledge of the contract's terms is relevant on the question of intent (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242, 88 Cal.Rptr.2d 777), and weighing the evidence was for the jury. It found for Affinitec, and there is sufficient evidence to support that finding.[FN3]

FN3. We also note that Siemens fails to point to anything in the record that establishes Affinitec recovered $151,412 for the work in question-the record references it provides do not support the assertion. This fails to carry the appellant's burden of demonstrating error.

III

[6][7] Siemens' statute of limitations argument is puzzling. What the company says is that Affinitec's cause of action accrued as Siemens paid the software company's periodic invoices over the years between 1992 and 1998. Under the two year limitations period of the contract, recovery for work billed prior to 1996 was precluded. But this is hard to fathom, since Affinitec was suing to recover for work done for *undisclosed* customers, which it first discovered and billed for in 1997.

Perhaps the argument is that the cause of action accrued as the work was done. But that would put Affinitec in an untenable position, since the statute would run on many claims before they were even discovered. When the trial judge ruled that the

cause of action accrued when the contract expired in 1998, he applied a well-established rule that avoids this harsh result, and correctly so.

The general rule is that a statute of limitations begins to run when a cause of action accrues. But "[s]ince 'cause of action' is so uncertain and variable a concept, serious injustice may be done unless the court uses judicial discretion in applying such a statute in the case of 'partial' breaches of a single contract."(4 Corbin on Contracts, § 951, pp. 823-824.) The paradigm example is anticipatory repudiation of a contract, which permits the aggrieved party to sue immediately. Yet "it is reasonable for the injured party to continue to demand performance and to hold open an opportunity for retraction of the repudiation. In such a case the statutory period is held not to begin to run until the day set for the actual performance promised or until the injured party has definitely expressed his intention to regard the repudiation as a breach."(*Id.* at p. 824, 88 Cal.Rptr.2d 777; accord, 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 492; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489, 59 Cal.Rptr.2d 20, 926 P.2d 1114.)

Where there are continuing contractual relations between the parties, and the injured party elects to continue with the contract despite the partial breach, a like rule applies. "[W]hen there are ongoing contractual obligations the plaintiff may elect to rely on the contract despite a breach, and the statute of limitations does not begin to run until the plaintiff has elected to treat the breach as terminating the contract. [Citation.]"*Romano v. Rockwell Internat., Inc., supra,* 14 Cal.4th at p. 489, 59 Cal.Rptr.2d 20, 926 P.2d 1114.)

The trial court applied the ongoing contract rule, in effect, when it instructed the jury that "a party to a contract can endure numerous breaches and either waive the breaches or sue for breach of contract at the time the contract expires."This avoided the harsh and unreasonable result of barring Affinitec's cause of action before Affinitec knew it existed. It was appropriate.

***8** Siemens argues the facts more closely approximate installment contract and rent cases, where the rule is the statute of limitations accrues as to each payment as it becomes due. (See, e.g. *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 67 Cal.Rptr.2d 726 [commercial lease]; *White v. Moriarty* (1993) 15 Cal.App.4th 1290, 19 Cal.Rptr.2d 200 [installment payments under note].) We do not see it that way. Here, Affinitec *did not know anything was due* for undisclosed customers as it sent periodic invoices prior to 1997 (when it received the Ryan list), and the invoices obviously did not include such customers. In this situation, it would be a serious injustice to hold that a cause of action accrues as each partial breach occurs, even where the injured party is unaware of the breach and continues performing the contract. That is not the law. There was no error in the statute of limitations instruction given by the trial court.

Since there was sufficient evidence of damages, and no error in the statute of limitations instruction, the jury verdict is unassailable. But it was a mistake to award Affinitec $710,639.50 in prejudgment interest on the theory that its damages on the first cause of action were liquidated.

The judgment is affirmed save for the award of prejudgment interest on the first cause of action, in the amount of $710,639.50, which is reversed. The matter is remanded to the trial court with directions to consider a motion by Affinitec for prejudgment interest under Civil Code, section 3287, subdivision (b), should one be made. Appellant is entitled to costs on appeal.

WE CONCUR: O'LEARY, and ARONSON, JJ.
Cal.App. 4 Dist.,2002.
Affinitec Corp. v. Siemens Business Communication Systems, Inc.
Not Reported in Cal.Rptr.2d, 2002 WL 453626 (Cal.App. 4 Dist.)

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