

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BYRON A. CROWE,)
)
 Plaintiff)
)
 v.) Civil No. 01-260-P-DMC
)
 J.P. BOLDUC,)
)
 Defendant)

ORDER ON MOTION FOR PREJUDGMENT INTEREST

Plaintiff Byron A. Crowe moves pursuant to Federal Rule of Civil Procedure 60(a) to correct the underlying judgment in this case to include an award of \$3,437.44. See Plaintiff’s Rule 60(a) Motion To Correct Judgment To Include Prejudgment Interest (“Motion”) (Docket No. 53). In so doing, Crowe relies upon this court’s decision in *Mirra Co. v. Maine Sch. Admin. Dist. No. 35*, No. 01-165-P-DMC, 2003 WL 21026786 (D. Me. May 6, 2003), which in turn relies upon *Aubin v. Fudala*, 782 F.2d 287 (1st Cir. 1986). See *id.*

Defendant J.P. Bolduc opposes the Motion primarily on the ground that the Supreme Court abrogated *Aubin*’s construction of Rule 60(a) in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), effectively obliterating that rule as a vehicle through which to seek prejudgment interest in circumstances such as these. See Defendant’s Objection to Plaintiff’s Rule 60(a) Motion To Correct Judgment To Include

Prejudgment Interest, etc. (“Objection”) (Docket No. 57). He argues that in the wake of *Osterneck*, litigants such as Crowe may seek to amend a judgment to add prejudgment interest solely through the vehicle of Federal Rule of Civil Procedure 59(e). *See id.* He reasons that inasmuch as a Rule 59(e) motion must be brought within ten days of issuance of a judgment, and Crowe has missed that deadline by a mile, the Motion should be denied. I am unpersuaded.¹

“In a diversity action, such as the present one, state law must be applied in determining whether and how much pre-judgment interest should be awarded.” *Saint-Gobain Indus. Ceramics Inc. v. Wellons, Inc.*, 246 F.3d 64, 69 n.1 (1st Cir. 2001) (citation and internal quotation marks omitted). What is at issue here is so-called “mandatory” prejudgment interest. *See* 14 M.R.S.A. § 1502-D (as amended effective July 1, 2003 by P.L. 2003, ch. 460) (“The clerk shall set costs under section 1502-B and interest under section 1602-B to the extent they appear from the record.”).

The Supreme Court in *Osterneck* held that “a postjudgment motion for discretionary prejudgment interest is a Rule 59(e) motion[.]” *Osterneck*, 489 U.S. at 177. The Court stated in dictum, in a footnote: “We do not believe the result should be different where prejudgment interest is available as a matter of right.” *Id.* at 176 n.3. *Osterneck* accordingly does not itself abrogate that portion of *Aubin* upon which I relied in *Mirra* and Crowe relies in pressing the instant Motion. Nor has the First Circuit subsequently abrogated it either on the strength of *Osterneck* or for any other reason. To the contrary, in an “unpublished” opinion decided as recently as 2000, the First Circuit signaled the continuing vitality of the *Aubin* rule. *See Trustmark Ins. Co. v. Gallucci*, No. 99-1386, 2000 WL 1160443 (1st Cir. Jul. 14,

¹ Bolduc opposes the Motion on a second basis – that it is procedurally defective inasmuch as it seeks amendment of the initial judgment dated September 19, 2002 rather than the operative amended judgment dated November 12, 2002. *See* Objection at 2 n.2. I decline to deny the Motion on this basis. Crowe plausibly explains that his citation to the initial judgment was a mistake. *See* Plaintiff’s Reply to Defendant’s Objection to Plaintiff’s Motion To Correct Judgment To (*continued on next page*)

2000) (holding that district court had not erred in failing to grant prejudgment interest pursuant to Rule 60; noting that “[w]hile Rule 60(a) has sometimes been used to correct an omission of mandatory prejudgment interest, those cases are factually distinguishable from this one. Here, the computation of the amount of prejudgment interest to which Trustmark would be entitled under the statute was not ‘simple, clear and mechanical.’ *Compare Aubin v. Fudala*, 782 F.2d 287, 289 (1st Cir. 1986)”).

Inasmuch as the portion of *Osterneck* upon which Bolduc relies is dictum, it is for the First Circuit, rather than this court, to decree *Aubin* overruled. *See Ross v. State of Alabama*, 15 F. Supp.2d 1173, 1191 n.10 (M.D. Ala. 1998) (“It is not the province of this court to expand the Supreme Court’s [narrow] holding to cover issues squarely addressed by the Eleventh Circuit.”); *Donald H. Hartvig, Inc. v. Kellas (In re Kellas)*, 113 B.R. 673, 677-78 (D. Or. 1990) (finding “persuasive” Bankruptcy Court’s logic that “even if US West is correct that *Mackey [v. Lanier]*, 486 U.S. 825 (1988) impliedly overrules *Daniel [v. Security Pac. Nat’l Bank (In re Daniel)]*, 771 F.2d 1352 (9th Cir. 1985)”, it is not the role of the Bankruptcy Court to reverse the Ninth Circuit. *Daniel* remains good law until the Ninth Circuit or the Supreme Court overrule it. Dicta are not enough.”).

This case being indistinguishable in all material respects from *Aubin* and *Mirra*, the Motion, as construed to apply to the amended judgment dated November 12, 2002, is granted.²

SO ORDERED.

Include Prejudgment Interest (Docket No. 60). I therefore construe the Motion to refer to the amended judgment.

² Crowe seeks prejudgment interest in accordance with applicable Maine state law as construed in *Mirra*. *See generally* Motion. Effective July 1, 2003 the Maine legislature amended the state’s prejudgment- and postjudgment-interest laws to clarify “the proper methodology for calculating prejudgment and post-judgment interest[.]” An Act To Simplify Calculation of Legal Interest, P.L. 2003, ch. 460 (emergency preamble). While the amendments apply only to judgments entered on or after July 1, 2003, *see id.* § 13, they would have directed application of the same calculation formula used in *Mirra* if applicable in this case, *compare id.* § 6 (enacting 14 M.R.S.A. § 1602-B(7)) *with Mirra*, 2003 WL 21026786, at *2-*3.

Dated this 3rd day of September, 2003.

David M. Cohen
United States Magistrate Judge

Plaintiff

BYRON A CROWE

represented by **JOHN M.R. PATERSON**
BERNSTEIN, SHUR, SAWYER, &
NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

JENNIFER D. SAWYER
BERNSTEIN, SHUR, SAWYER &
NELSON
146 CAPITOL STREET
P.O. BOX 5057
AUGUSTA, ME 04332-5057
207-623-1596

V.

Defendant

J P BOLDUC

represented by **MICHAEL JOSEPH GARTLAND**
MARCUS, CLEGG & MISTRETТА,
P.A.
100 MIDDLE STREET

EAST TOWER, 4TH FLOOR
PORTLAND, ME 04101-4102
(207) 828-8000
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

REGAN M. HORNEY
MARCUS, CLEGG & MISTRETTO,
P.A.
100 MIDDLE STREET
EAST TOWER, 4TH FLOOR
PORTLAND, ME 04101-4102
(207) 828-8000