

**B.D. Cooke & Partners Limited v Nationwide Mutual
Insurance Company**

2005 NY Slip Op 30327(U)

December 7, 2005

Supreme Court, New York County

Docket Number: 600655/02

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 56

Index Number : 600655/2002 (VE, III)

B.D.COOKE & PARTNERS LTD.

vs

NATIONWIDE MUTUAL INSURANCE

Sequence Number : 010

MONEY JUDGMENT

INDEX NO. _____

MOTION DATE 2/8/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 13 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/7/05

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
B.D. COOKE & PARTNERS LIMITED AS ASSIGNEE
OF CITIZENS CASUALTY COMPANY OF
NEW YORK (IN LIQUIDATION),

Plaintiff,

Index No. 600655/02

- against -

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.
-----X

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Hon. Richard B. Lowe, III:

Plaintiff has been awarded summary judgment on its complaint and defendant's counterclaims have all been dismissed. Plaintiff now moves for an order determining the amount that plaintiff shall recover from defendant, setting the dates from which the Clerk shall compute prejudgment interest on the amount recoverable, determining the rights and obligations of the parties as prayed for in the complaint, and directing entry of its proposed final judgment. Defendant cross-moves for an order staying execution on any judgment until 30 days after defendant's leave to appeal has been determined. The court denied defendant's cross motion during oral argument.

The roots of this case go back to the 1996 liquidation of a non-party insurance company, Citizens Casualty Company of New York (Citizens). Defendant and Citizens belonged to a pool of insurers that reinsured each other and other insurers. At the time of Citizens' liquidation, it owed money to those it had reinsured, such as plaintiff, and it was owed money by those that had reinsured it, such as defendant. The liquidator arranged for Citizens' estate to continue to collect

money owed it and to pay its debts. In return for plaintiff not receiving any disbursement under the liquidation, the liquidator assigned it all of Citizens' and the liquidator's rights under the contract between Citizens and defendant. The assignment gave plaintiff the right to be paid the monies that defendant owed Citizens and would come to owe Citizens in the future if not for the liquidation. This court and the First Department (*B.D. Cooke & Partners Ltd. v Nationwide Mut. Ins. Co.*, 16 AD3d 208 [1st Dept 2005]) have determined that the assignment is valid.

Each party and the liquidator contracted separately with non-party Reinsurance Management Company, Inc., referred to as ROM in the proposed judgment. ROM administered the pool to which defendant and Citizens belonged. In 1992, ROM and defendant entered into a contract providing that ROM was defendant's agent with authority to settle, adjust, and pay insurance claims in defendant's name. ROM and the liquidator contracted for ROM to administer Citizens' estate, determine how much was owed to Citizens, and invoice the debtors. ROM and plaintiff contracted for ROM to prepare accounts of and collect the monies assigned to plaintiff. Their contract provides that ROM is an independent contractor and not an agent of plaintiff.

Plaintiff seeks payment on the invoices that ROM prepared pursuant to the assignment and sent to defendant. Defendant does not object to the invoiced sums, which total \$2,698,629.07. Defendant objects to the language in the proposed final judgment relating to the calculation of amounts that come due in the future, and the interest to be added to said amounts.

The proposed final judgment provides:

that (A) defendant is obligated to pay all amounts that have or shall become due from Nationwide after May 4, 2005, as a result of Nationwide's reinsurance of Citizens ... including, without limitation, all such reinsurance amounts as invoiced

by ROM ... to Nationwide *or as reflected in or as calculable from the records of ROM* in respect of claims accepted for payment by ROM and (B) simple *interest at the rate of 9% per annum shall be added* to any such invoiced amounts not paid by Nationwide within twenty-one (21) days of the date the invoice was sent

(Notice of motion, Ex. G [emphasis added]).

The emphasized language in part (A) of the proposed judgment would allow plaintiff to use ROM's records to determine how much is due from defendant. Defendant objects to plaintiff so doing for the following reasons. Defendant claims that its debt to Citizens should be fixed only by the invoices that ROM issues. Otherwise, part (A) would require defendant to pay money billed by anyone as long as the amount was calculable from ROM's records. Also, defendant argues, under part (A), the calculation could be based on criteria that the parties have not agreed upon. All in all, part (A) is likely to foment more disputes between the parties.

Plaintiff points out that defendant is ROM's principal and a member of ROM's board of directors. Plaintiff alleges that defendant could prevent ROM from sending invoices to defendant. Therefore, plaintiff contends that it cannot rely only on the invoices that ROM generates, but must be able to calculate the amounts owed itself based on its own review of ROM's records.

Whatever rights the liquidator had in Citizens' estate were assigned to plaintiff. Presumably, the liquidator had the power to examine ROM's records and make determinations as to how much defendant owed. There is no allegation to the contrary. Although the liquidator gave ROM the authority to bill Citizens' debtors, there is no reason that plaintiff may not do the same. In the event of a discrepancy between ROM's and plaintiff's calculations that the parties cannot resolve, they may resort to the court. For both ROM and plaintiff to make the

calculations and invoices is probably not the most efficient way to proceed. Nonetheless, this court has no basis on which to decree that only ROM can make calculations or bill defendant.

Discussion turns to part (B) of the proposed judgment concerning the interest on defendant's future payments. The emphasized part provides that interest will be added to amounts that come due (pursuant to the statutory rate provided in CPLR 5004) and are not paid within 21 days of the invoice being sent. The provision is partly based on defendant's agreement with ROM, whereby defendant must pay invoices within approximately 21 days of the invoice being mailed (McNamara Affidavit, Ex. 1, ¶ 7). However, defendant's contract with ROM does not provide for any interest or penalty to be added to late payments. Nor is there a claim that the liquidator made a different arrangement that would bind defendant. Defendant correctly asserts that interest should not be added to late payments. In the event that defendant makes a late payment, the only way for plaintiff to collect interest is to successfully sue defendant for the payment. Plaintiff can then collect interest based on the CPLR.

The next question concerns the dates from which the Clerk should compute prejudgment interest on the amount recoverable in this case. CPLR 5001 governs prejudgment interest. It provides for interest from the time that the cause of action accrues to the time of the verdict or decision. Interest upon damages incurred thereafter shall be computed from the date incurred. Where damages are incurred at different times, interest must be computed from the date that each item of damage is incurred. Prejudgment interest stops accumulating on the date of the verdict or decision. Afterwards, as CPLR 5002 provides, interest must be added to the total sum awarded, meaning damages and prejudgment interest, to the date of entry of final judgment.

As defendant's contract with ROM provides, after 21 days pass, an invoice is past due. Therefore, plaintiff's cause of action for payment of an invoice accrues 21 days after the invoice date. Prejudgment interest shall be added to each invoice beginning 21 days after its date. It must end on the date that defendant's liability was established (*see Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581 [2001]; *Love v State of New York*, 78 NY2d 540, 544 [1991] [interest is calculated from the accrual of the cause of action until defendant's liability is "fixed in law"]). Where liability has been determined by a summary judgment order, interest ends on the date that the order is entered, even if the order was appealed (*see Hayes v City of New York*, 264 AD2d 610, 611 [1st Dept 1999]).

Here, this court established defendant's liability by its decision entered on October 15, 2003. The First Department modified the decision to the extent of determining that defendant was not entitled to any offsets, and otherwise affirmed it. Defendant's liability under the assignment, as the summary judgment decision determined it, was not otherwise disturbed. This means that defendant's liability was fixed on October 15, 2003, and that prejudgment interest must be computed on the past due amounts from 21 days after the invoice date to October 15, 2003.

Plaintiff calculates prejudgment interest as extending to the date of the instant motion. As already indicated, this is incorrect. Plaintiff shall submit to the court for signature a modified form of its proposed final judgment: 1) that excludes the interest in part (B); 2) that attaches the same list of invoices as attached to the instant motion, showing the amount due on each invoice, its date, and the date that is 21 days after the invoice date, except that the interest calculations should be omitted; 3) that states that the Clerk shall calculate prejudgment interest on each

invoice from the 21st day after the date of each invoice to October 15, 2003; and 4) that states that the Clerk shall calculate postjudgment interest and interest on the final judgment, as provided in CPLR 5002 and 5003.

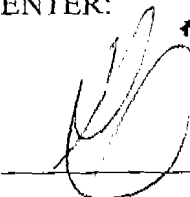
To conclude, it is

ORDERED that plaintiff's motion is granted in part and denied in part, and that plaintiff shall submit to the court a modified form of its proposed final judgment as indicated in this decision, within 10 days of filing this decision with notice of entry, which plaintiff shall file within five days of receiving this decision; and it is further

ORDERED that defendant's cross motion is denied.

Date: December 7, 2005

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HON. RICHARD B. LOWE, III