

**Curbean v Kibel**

2007 NY Slip Op 32314(U)

July 23, 2007

Supreme Court, New York County

Docket Number: 0107258/1998

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN  
*Justice*

PART 1

Curbeam

INDEX NO. 107258/98

- v -

Kibel

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 084

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

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

**FILED**  
JUL 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 23, 2007

MARTIN SHULMAN *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: PART 1

-----X  
DAISY CURBEAN, SANDU DIENG, ALIOUNE  
DIENG and ISSACHAR DIENG, an infant under  
the age of fourteen (14) years, by her mother  
and natural guardian, DAISY CURBEAN,

Index No: 107258/98

Decision and Order

Plaintiffs,

-against-

H. KIBEL, THE KIBEL COMPANY and  
WETHERHOLE APARTMENTS,

Defendants.  
-----X

**FILED**  
JUL 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**Hon. Martin Shulman, J.S.C.:**

Defendants H. Kibel, The Kibel Company and Wetherhole Apartments (collectively "defendants"), move by order to show cause ("OSC") for an order pursuant to CPLR §5519 staying enforcement of a money judgment entered against defendants on May 3, 2007 (the "judgment")<sup>1</sup> pursuant to a jury verdict rendered on April 18, 2007. Defendants' motion also seeks an order pursuant to CPLR §5240 granting a protective order vacating all restraining orders and/or notices which plaintiffs Daisy Curbean, Sandu Dieng, Alioune Dieng and Issachar Dieng, an infant under the age of fourteen (14) years, by her mother and natural guardian, Daisy Curbean (collectively "plaintiffs") have served in their efforts to enforce the judgment.

The judgment entered in plaintiffs' favor against defendants totals \$2,081,324.05 and includes interest through the date of entry. On May 16, 2007, defendants filed their notice of appeal from the judgment. Brill Aff. at Exh. A. On May 18, 2007, defendants

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<sup>1</sup> A copy of the judgment is included with defendants' notice of appeal. Brill Aff. at Exh. A.

osf

filed an undertaking on appeal in the form of a Supersedeas Bond in the amount of \$1,426,600.76 (the "first bond") and served plaintiffs' counsel with notice of filing of same. Brill Aff. at Exh. D. The first bond was posted by defendants' insurance carrier pursuant to CPLR §5519(b) and represents the \$1,000,000.00 policy limit plus interest. On May 29, 2007, defendants filed an additional Supersedeas and Cost Bond in the amount of \$654,723.29 (the "second bond") pursuant to CPLR §5519(b)(3) and (a)(2), representing the balance of the judgment as docketed. Brill Aff. at Exh. E. Defendants contend that since the judgment is now fully secured an order should be issued pursuant to CPLR §5240 vacating all post judgment enforcement devices including, but not limited to, two restraining notices plaintiffs served on Bank of America and JP Morgan Chase Bank and a deposition notice plaintiffs served on defendants.<sup>2</sup> Brill Aff. at Exh. F.

Plaintiffs vigorously oppose the OSC on the grounds that *inter alia* the posting of an undertaking in the exact judgment amount of \$2,081,324.05 is insufficient to secure the judgment and to obtain a stay of enforcement of the judgment pending appeal. Plaintiffs note that statutory interest is accruing on the judgment in the amount of approximately \$15,610.00 per month. Thus, plaintiffs argue that defendants should be required to post additional sums representing interest that will accrue pending the

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<sup>2</sup> Upon signing defendants' OSC the court granted defendants a temporary restraining order ("TRO") staying plaintiffs "from taking any steps to enforce the Judgment in this action" and vacating all restraining orders and notices pending the hearing of the OSC.

determination of the appeal and plaintiffs' cross-appeal.<sup>3</sup> Further, plaintiffs claim that various inconsistencies<sup>4</sup> with respect to the restraining notices served on Bank of America and JP Morgan Chase indicate that fraudulent conduct is likely to result, curtailing plaintiffs from enforcing the judgment, especially if the appeal and cross-appeal are determined in plaintiffs' favor (and to the extent that significant amounts of interest are likely to accrue during the lengthy appellate process).

### Analysis

CPLR §5519(a)(2) provides that a stay of execution of a money judgment is available, without a court order, if:

the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given, that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed . . .

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<sup>3</sup> Plaintiffs suggest that the appellate process could conceivably take two years and as such, an additional \$374,638.34 must be posted in order to stay enforcement of the judgment.

<sup>4</sup> Specifically, defendants' counsel alleges in his affirmation in support of the OSC that: 1) defendants maintain their bank accounts at Bank of America (Brill Aff. at ¶4); and 2) a protective order is needed to prevent plaintiffs from levying against defendants' bank accounts and preventing defendants from operating their business (Brill Aff. at ¶11). Defendants' counsel further stated to the court on the OSC's initial return date that defendants' employees needed to be paid, thus intimating that defendants' business operations had effectively been shut down or would be shut down due to plaintiffs' service of the restraining notices. However, in opposition to the OSC, plaintiffs' counsel attaches the banks' responses to the restraining notices, wherein Bank of America responded that defendants had no accounts with Bank of America and JP Morgan Chase responded that it maintained a checking account in the name of Henry Kibel which had a balance of one penny. Bernstein Opp. Aff. at Exh. A. While defendants' counsel expresses outrage at plaintiffs' accusations of fraud both in his reply affirmation (Brill Reply Aff. at ¶18) and in subsequent correspondence to the court, he offers no explanation why, if defendants maintain their bank accounts at Bank of America as he represented, Bank of America responded that no such accounts exist.

As outlined above, plaintiffs and defendants dispute whether the undertaking must include post-judgment interest. In response to plaintiffs' argument that defendants' undertaking in the docketed judgment amount is insufficient to invoke the stay provisions of CPLR §5519, defendants assert that CPLR §5519 includes no provision for the inclusion of post-judgment interest.

Although the statute is silent with respect to this issue and case law is scant, the court is persuaded by the reasoning set forth in *HGCD Retail Services, LLC v. 44-45 Broadway Realty Co.*, 12 Misc.3d 1166(A), 820 N.Y.S.2d 843 (Sup. Ct., NY Co., 2006). As in the case at bar, the defendant-appellant in *HGCD* posted an undertaking pursuant to CPLR §5519(a)(2) in the exact amount of the judgment. That court (Ramos, J.), agreed with plaintiff-respondent's argument, identical to that of the plaintiffs here, that post-judgment interest should be secured pending appeal. To that end, the court in *HGCD* granted plaintiff-respondent's motion pursuant to CPLR §2508 and CPLR §5519(c) and directed the defendant-appellant to procure and file an amendment to the existing bond to provide for all post-judgment statutory interest that accrued as of the date of the decision, stating:

While pending appeal, interest accrues on the plaintiff's judgment. See CPLR 5003. "It is well settled that post judgment interest is awarded as a penalty for delayed payment of a judgment." *ERHAL Holding Corp. v. Rusin*, 252 A.D.2d 473, 474 (2nd Dept 1998). Thus, it is clear that plaintiff is entitled to post-judgment interest should this Court's order and judgment be affirmed by the Appellate Division, First Department.

The undertaking must provide sufficient collateral to pay the judgment, and that would require taking into consideration the interest on such judgment. It is in this Court's discretion to order defendants to procure and file an amendment to the existing bond to provide for such interest. Plaintiff is entitled to have victory secured so that [if] the stay of

enforcement resulting from the appeal is vacated by affirmance, a ready fund with which to satisfy the judgment shall be available. *Robert Stigwood Organisation, Inc. v. Devon Company*, 91 Misc.2d 723, 723-724 (Sup Ct, New York County 1977). Therefore, the court finds that the undertaking should provide for all interest that shall accrue on appeal. See *Dwyer v. Nicholson*, 154 Misc.2d 123 (Sup Ct Kings County 1991).

Accordingly, this court agrees that the undertaking should be increased to account for the accumulation of post-judgment interest pending appeal. Pursuant to CPLR §5519(c), this court “may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision . . .” Given the foregoing broad discretion, this court concludes that the undertaking should be increased by the sum of \$187,319.16, representing one year of statutory interest on the judgment amount for the period May 4, 2007 through May 3, 2008. The foregoing is without prejudice to plaintiffs’ right to move to increase the undertaking in the event that the appeal is not determined by May 3, 2008.

Upon defendants timely posting the foregoing additional undertaking as directed below, enforcement of the judgment shall be stayed pending appeal. However, given the unexplained inconsistencies detailed in footnote 4, *infra*, in this court’s discretion pursuant to CPLR §5519(c) and/or CPLR §5240, the stay imposed shall be limited to the extent of permitting plaintiffs, if they so choose, to avail themselves of the information gathering enforcement devices provided for in CPLR §5223 (disclosure) and CPLR 5224 (subpoenas). See, e.g., *Raji v. Bank Sepah-Iran*, 139 Misc.2d 1026, 529 N.Y.S.2d 420 (Sup. Ct., NY Co., 1988). Under the circumstances, delaying plaintiffs’ ability to determine the whereabouts of defendants’ assets could ultimately result in prejudice to plaintiffs. Conversely, defendants will suffer no prejudice since

plaintiffs will be unable during the period of the stay to restrain or otherwise force a turnover of defendants' assets. The court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, it is

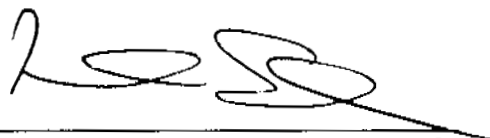
ORDERED that, conditioned upon defendants' procurement and filing of an additional bond in the amount of \$187,319.16 or an amendment to the existing second bond to increase same by \$187,319.16, within 30 days from the service of a copy of this Decision and Order with notice of entry, defendants' OSC is granted to the extent that all efforts by plaintiffs to enforce the judgment pending appeal are stayed and all restraints upon defendants' assets are vacated, except as provided herein above; and it is further

ORDERED that, in the interim, the TRO previously issued by the court shall remain in effect until such time as defendants post the additional undertaking directed above, or, in the event that defendants do not timely post such additional undertaking, the TRO shall expire automatically on the 31<sup>st</sup> day after service of this Decision and Order with notice of entry upon defendants' counsel; and it is further

ORDERED that defendants' OSC is denied to the extent that plaintiffs are permitted to proceed with post-judgment information gathering regarding defendants' assets to the extent set forth above.

This constitutes this court's Decision and Order. Courtesy copies of same have been faxed to counsel for the parties.

DATED: New York, New York  
July 23, 2007



HON. MARTIN SHULMAN, J.S.C.

**FILED**  
JUL 26 2007  
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