

**Carter v Carter**

2009 NY Slip Op 31710(U)

July 30, 2009

Supreme Court, Richmond County

Docket Number: 08491/94

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No. 08491/94  
Motion No.:014**

**ANTHONY J. CARTER,**

*Petitioner,*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**ROBERT W. CARTER,**

*Respondent.*

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The following items were considered in the review of the following motion to reargue.

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Robert W. Carter, moves to reargue the decision and order of this court dated February 9, 2009 that denied his motion to reduce the interest accrued on a judgment taken against him. The respondent's motion is granted and that upon reargument the amount of interest is reduced.

**Facts**

After seven years of litigation the judgment of James A. Dollard, Esq. acting as a referee, was entered on April 6, 2001 that awarded Anthony J. Carter the sum of \$114,383.09. Subsequent to that award the respondent appealed that judgment. On June 24, 2002 the Appellate Division, Second Department remitted the matter to the Supreme Court, Richmond County, for Referee Dollard to set forth “. . . findings of fact and conclusions of law that formed the basis for his award . . .”<sup>1</sup>

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<sup>1</sup> *In re Carter*, 295 AD2d 617, [2d Dep't 2002].

On March 10, 2003 Referee Dollard served Howard Bernstein, Esq., the attorney for the petitioner, and John Z. Marangos, Esq., the attorney for the respondent with findings of fact pursuant to the direction of the Appellate Division, Second Department. Subsequently, on June 23, 2003 Mr. Marangos served a supplemental brief in connection with the appeal. Shortly thereafter on July 16, 2003 Robert A. Mulhall, Esq., the petitioner's successor attorney, served a supplemental brief on behalf of the petitioner. On December 29, 2003 the Appellate Division, Second Department affirmed the judgement of Referee Dollard, and stated in the decision that “. . . the petitioner failed to appeal from the judgment . . .”<sup>2</sup>

The respondent now moves to reargue the decision and order of this court dated February 5, 2009 that denied his application to relieve him of interest. In so moving, Robert Carter argues he is entitled to a reduction in interest based on letters faxed to his attorney indicating that he wished to settle the matter after the December 29, 2003 decision of the Appellate Division, Second Department. In support, Robert Carter submits the affirmation of his former attorney John Z. Marangos, Esq., wherein he states that he no longer has Robert Carter's file in his possession. However, Mr. Marangos affirms that his practice is to communicate any offer of settlement by his client.

In stark contrast, Robert A. Mulhall, Anthony Carter's attorney denies ever receiving any offer of settlement. Notwithstanding Mr. Marangos' affirmation concerning his practice, Robert Carter fails to produce sufficient evidence that he tendered payment to Anthony Carter, which would have tolled the time to accrue interest.

### **Discussion**

Motions to reargue pursuant to *CPLR* § 2221 are addressed to the discretion of the court. A motion to reargue is properly granted upon a showing that the court overlooked or

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<sup>2</sup> *Id.*

misapprehended the facts and /or the law or mistakenly arrived at its earlier decision. Even in situations in which the criteria for granting a reconsideration motion are not technically met, the court retains flexibility to grant such a motion when it is deemed appropriate.<sup>3</sup> In this case given the public policy position that courts determine controversies on the merits, this court will overlook the procedural defects contained in Robert W. Carter's motion and grant reargument.

It is important to note at the outset that the payment of interest on a judgment is not meant to be punitive, nor is it a penalty, rather it is “. . . simply the cost of having the use of another person's money for a specified period,” and ‘is intended to indemnify successful plaintiffs ‘for the nonpayment of what is due to them’ . . .”<sup>4</sup> The *CPLR* states that “[e]very money judgment shall bear interest from the date of its entry.”<sup>5</sup> However, “. . . equitable considerations may result in an estoppel which can toll the accrual of interest . . .”<sup>6</sup>

In this case, Robert Carter argues that he should be relieved of a portion of the interest charged to him based on three grounds: 1) letters to the his attorney indicating his willingness to settle the matter in 2004; 2) the filing a notice of cross-appeal by Robert Mulhall; and 3) due to Referee Dollard's delay in responding to the direction of the Appellate Division, Second Department.

The Appellate Division, Second Department held in *Purpura v. Purpura*, that “. . . in the absence of a tender or payment of a special deposit . . . interest on a money judgment continues to accrue at the statutory rate until the judgment is satisfied, barring any inequitable or dilatory

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<sup>3</sup> *Loris v. S & W. Realty Corp.*, 16 AD3d 729, [3d Dep't 2005], *See also, Pinto v. Pinto*, 120 AD2d 337, [1<sup>st</sup> Dep't 1986].

<sup>4</sup> *Colgate v. Broadwall Mgt. Corp.*, 51 AD3d 437, [1<sup>st</sup> Dep't 2008].

<sup>5</sup> *CPLR* § 5003.

<sup>6</sup> *Matter of Matra Bldg. Corp. v. Kucker*, 19 AD3d 496 [2d Dep't 2005].

conduct on the part of the judgment creditor.”<sup>7</sup> In this case there is no evidence before the court of any tender or payment of a special deposit on the part of Robert Carter. While Mr. Marangos’s affirmation speaks to his practice for over twenty-five years of communicating offers of settlement to his adversaries, his adversary denies ever seeing an offer of settlement. In addition, Robert Carter offers no evidence that he, in fact, tendered a payment to Anthony Carter, or paid a special deposit. Absent such proof of tender or a payment of a special deposit this court cannot suspend the accrual of interest.

While a notice of cross appeal was filed by Robert A. Mulhall in connection with the March 10, 2003 findings of fact filed by Referee Dollard that appeal was apparently not perfected. An appeal, even one that is extended by extensions in the time to perfect, does not toll the collection of interest on a judgment.<sup>8</sup> Therefore, Robert Carter’s contention that interest should be reduced based on the filing of a notice of cross appeal is without merit.

The court now turns its attention to the delay of Referee James Dollard in filing his findings of fact with the Appellate Division, Second Department pursuant to the 2002 decision. In *Juracka v. Ferrara*, the Appellate Division, Third Department, held that defendants should not “. . . suffer the ‘penalty’ of paying interest pursuant to *CPLR* 5003 for a delay not caused by their own acts or omissions . . .”<sup>9</sup> In *Juracka*, the defendant showed he stood ready willing and able to satisfy the settlement amount, but that it was the actions of the plaintiff’s attorneys that prevented him from paying the settlement.

While the court in *Juracka*, did not impose a “penalty” on the defendant for the actions of the plaintiff, this court will not impose a “penalty” in the form of interest due to the delay of the court appointed referee. In this case, the Appellate Division, Second Department determined that

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<sup>7</sup> 261 AD2d 595, [2d Dep’t, 1999].

<sup>8</sup> *Liberatore v. Olivieri*, 303 AD2d 954, [4<sup>th</sup> Dep’t, 2003].

<sup>9</sup> 120 AD2d 822, [3d Dep’t, 1986](internal citations omitted).

the April 6, 2001, judgment submitted by Referee James Dollard was defective in that it did not comply with the requirements of *CPLR* § 4319 by failing to include a statement of facts.<sup>10</sup> Since Mr. Dollard's judgment failed to meet the statutory requirements until he served the statement of facts as ordered by the Appellate Division, Second Department on March 10, 2003 the judgment could not be considered "entered" until that date. As such, Robert Carter shall be relieved of all post judgment interest accruing between April 6, 2001 and March 10, 2003.

### **Conclusion**

This court finds that Referee James Dollard's judgment was not deemed entered until the statements of facts was served on the parties pursuant to the order of the Appellate Division, Second Department on March 10, 2003. Consequently, the respondent does not owe interest on the judgment prior to March 10, 2003, but does owe the interest accrued after that date.

Accordingly, it is hereby:

ORDERED, that Robert W. Carter's motion for reargument is granted and that upon reargument the decision and order of this court dated February 5, 2009 is vacated; and it is further

ORDERED, that the Clerk of the Court is directed to amend the prior judgment in favor of the petitioner, Anthony J. Carter, against the respondent, Robert W. Carter for the sum of \$114,383.09 with interest to commence March 10, 2003 and it is further

ORDERED, that in the event that the existing \$114,383.09 judgement with interest commencing on April 6, 2001 has been paid, then in that event the Clerk is directed to enter a

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<sup>10</sup> *In re Carter*, 295 AD2d 617, [2d Dep't, 2002]; *See also*, *CPLR* §§ 4319, 4213(b).

judgment in favor of the respondent, Robert W. Carter, against the petitioner, Anthony J. Carter in a sum equal to the 9% court interest accrued on the \$114,383.09 judgment from April 6, 2001 until March 10, 2003 said sum of interest only is calculated to be \$19,758.00 without costs.

ENTER,

DATED: July 30, 2009

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Joseph J. Maltese  
Justice of the Supreme Court