

Zuckerman v Goldstein

2009 NY Slip Op 32239(U)

September 28, 2009

Supreme Court, New York County

Docket Number: 113633/2007

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**
Justice

PART 35

Index Number : 113633/2007
ZUCKERMAN, MYRON
vs.
GOLDSTEIN, SYDELL
SEQUENCE NUMBER : 011
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

FILED
SEP 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED the motion by plaintiff Myron Zuckerman for leave to reargue and renew this Court's August 18, 2009 Order, is granted; and it is further

ORDERED that upon reargument, the branch of defendants' motion to reargue this Court's June 29, 2009 Order granting statutory interest is denied, and the branch of the August 18, 2009 Order referring to the Special Referee the issue regarding what amount of interest should be awarded plaintiff is vacated; and it is further

ORDERED that upon renewal, the branch of defendants' motion to reargue this Court's June 29, 2009 order to replace the Judgment herein with an Order to an escrow agent, is denied, and that branch of the August 18, 2009 Order referring to the Special Referee the issue of whether the Court should vacate the judgment and instead direct an escrow agent to release the funds in escrow to the plaintiff or instead, issue a judgment against plaintiff, is vacated; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9/28/09 
HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
MYRON ZUCKERMAN,

Index No. 113633/07

Plaintiff,

-against-

SYDELL GOLDSTEIN, AUDREY SILLER,
BARBARA ZUCKERMAN, LANCE LANDERS,
SAM-FAY REALTY, CORP.,

Defendants.

-----X
HON. CAROL EDMEAD, J.S.C.

FILED
SEP 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Plaintiff Myron Zuckerman ("plaintiff") moves for leave to reargue this Court's August 18, 2009 Order, and upon reargument, to vacate the Order and deny defendants' motion to renew and reargue, on the ground that the Court overlooked and misapprehended matters of fact and law. Plaintiff also moves for leave to renew defendants' motion for reargument, and upon renewal, to deny that motion with respect to the issue of replacing the Judgment herein with an Order to an escrow agent, on the ground that such part of the motion is moot by reason of a Satisfaction of Judgment that had been filed.

Factual Background

In January 2006, defendants Sydell Goldstein ("Sydell"), Audrey Siller ("Audrey"), and Barbara Zuckerman ("Barbara") (collectively, the "sisters") commenced an action (Index No. 600054/06) for, *inter alia*, an order dissolving defendant Sam-Fay Realty, Corp. ("Sam-Fay"), and directing the sale of the corporate-owned property located at 515 West 29th Street, New York, New York (the "29th Street Property").

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After the 29th Street Property was sold in September 2007, plaintiff brought this action for breach of fiduciary duty against the sisters to recover a judgment for his *pro-rata* share of the proceeds of the sale.¹ According to plaintiff's Complaint, the sisters,² as majority shareholders of Sam-Fay, voted in August 2007 to distribute their *pro-rata* shares to themselves, but not to distribute plaintiff's shares to him. In response to the Complaint herein, defendants asserted counterclaims against plaintiff.

Thereafter, plaintiff moved for partial summary judgment against defendants plus statutory interest, pursuant to CPLR 5001 for his *pro-rata* share. By Order dated June 29, 2009, this Court granted plaintiff's motion, noting, *inter alia*, that defendants did not dispute plaintiff's right to prejudgment interest, or the August 30, 2007 date from which he sought prejudgment interest.

Then, defendants moved to reargue the Court's June 29, 2009 Order. Defendants' pointed out, *inter alia*, that plaintiff's request for prejudgment interest under CPLR 5001 was raised for the first time in his reply papers, and did not even appear in his Complaint; the dissolution action was still pending; and as plaintiff's *pro-rata* share of the proceeds from the sale were being held in escrow in an interest bearing account thereunder, the Order should direct that such funds as found to be due be distributed to plaintiff, with interest awarded being the amount actually earned; or alternatively, amend the Order to require solely that the funds held in

¹ Plaintiff alleges that at a meeting of the shareholders on August 30, 2007, the sisters voted to distribute 25% of the available proceeds of the sale of the 29th Street Property to each of the shareholders of Sam-Fay, with the exception of plaintiff. This constituted a breach of their fiduciary duty as majority shareholders to plaintiff, as minority shareholder.

² The 29th St. Property sold for approximately \$12 million. Defendant Lance Landers ("Landers") was the managing agent for the 29th Street Property, and is Sydel and Audrey's attorney.

escrow, in the amount the Court found due, with the interest earned thereon, be ordered distributed by the escrow agent. Defendants also sought, in the alternative, an Order directing the Clerk to enter a satisfaction of judgment.

The Court granted reargument for misapprehending CPLR 5001, on the grounds that the Complaint did not seek interest in any form, plaintiff's motion sought "interest" instead, pursuant to CPLR 5001 for the first time in reply, and defendants did not have opportunity to address CPLR 5001. The Court noted that defendants requested to place the funds from the sale into an escrow account, and that the "equitable distribution" of funds resulting from the sale did not rise to the level of a breach of contract or "unlawful interference" with plaintiff's enjoyment of funds under CPLR 5001. Therefore, the Court denied statutory interest as "unwarranted, at this juncture." The Court then referred two issues to a Special Referee to hear and report: (1) what amount of interest should be awarded plaintiff and (2) whether the Court should vacate the judgment and instead direct an escrow agent to release the funds in escrow to the plaintiff or instead, issue a judgment against plaintiffs.

Motion

Now on reargument, plaintiff contends that prejudgment interest was recoverable as a matter of right, there is no requirement that prejudgment interest be demanded in the Complaint, defendants never opposed the request for such interest, the Complaint contains no demand for equitable relief or equitable distribution, which deals with allocating assets in a divorce proceeding, and whether defendants derived any benefit from the use of the funds was irrelevant. Plaintiff points out that by Order dated June 23, 2008, the Court directed defendants to pay the funds to plaintiff to the extent they were withheld based on "the pre-October 17, 2002 claims."

Defendants disregarded the Order, and filed a new set of claims, which the Court later found lacked merit. Thus, defendants should at least pay statutory interest from June 23, 2008.

As to the issue regarding the escrow agent, plaintiff argues that defendants improperly raised such argument for the first time on reargument, there was no legal basis for this request, defendants failed to identify any matters overlooked or misapprehended, there was no evidence of an escrow agent, and the Court lacked jurisdiction to issue the Order because the escrow agent was not a party to this action.

In support of renewal, plaintiff argues that the Satisfaction of Judgment filed on July 22, 2009, but not disclosed in defendants' previous reargument papers, renders defendants' request to replace the judgment with an order moot. Plaintiff also points out that defendants sought the alternative relief that the Clerk be directed to enter a satisfaction of the judgment.

Opposition

Plaintiff's counsel submitted an affirmation, wherein he acknowledged that this action is "essentially a continuation of the dissolution proceeding which has been effectively stayed while the issues raised herein were determined" Thus, plaintiff's *pro-rata* share of the proceeds were held in escrow or trust, subject to a determination of any set-offs owed defendants. When the setoffs were determined, there was no need for a judgement, but a directive for the escrow agent to release the funds.

As soon as was possible after the shareholder and director vote, defendants came to the Court for instructions with regard to the disbursement of the funds. The Court scheduled a hearing on the application to reinstate the dissolution proceeding and for an instruction on the handling of the funds. At an in-court conference, plaintiff did not object to the handling of the

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funds in this manner, and thus, has waived any objection. Plaintiff was fully aware that the funds were being held in escrow in an interest bearing account. The application to the Court for instruction regarding the funds, was akin to an interpleader action (CPLR 2601), which authorizes payment of funds into Court, discharges the party from any liability with respect thereto, and allows the Court to direct the further transfer of such funds. The application by defendants was clearly authorized by the nature of the dissolution proceeding and the CPLR.

Plaintiff's request for "interest" was properly taken as interest those funds were earning. And, arguing for interest at the statutory rate for the first time in reply was improper. Under these circumstances, statutory interest is unwarranted.

Further, the impropriety of the judgment is clear, in that Lance Landers' name was added to the judgment though at no time was any evidence ever introduced of his liability for the funds. There was no adverse finding as to any defendant; only a finding as to the amount that could be set off, and therefore, not disbursed. As a continuation of the dissolution proceeding, an order directing the disbursement of funds was the proper outcome.

And, the fact that the judgment was satisfied is irrelevant if the judgment never should have been entered at all.

The funds were released as soon as the Court determined the amount to release.

Reply

Plaintiff adds that CPLR 5001 does not require that defendants' act or omission be "unlawful" and the caselaw cited by the Court and defendants is inapplicable. Further, defendants' refusal to pay the funds to plaintiff as Court-directed was an omission that deprived plaintiff of possession or enjoyment of his property. As the damages awarded are not equitable

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in nature, the Court lacks discretion to impose a rate different from that required by the CPLR.

Analysis

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, *lv. dismissed* 71 NY2d 994, 529 NYS2d 277).

A motion for leave to reargue under CPLR 2221, on the other hand, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

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In light of the arguments raised by plaintiff and submission of the Satisfaction of Judgment, the Court grants reargument and renewal.

Upon reargument, the court the Court finds that prejudgment interest was recoverable by plaintiff as a matter of right, and that the reference of the two issues to a Special Referee as to (1) what amount of interest should be awarded plaintiff and (2) whether the Court should vacate the judgment and instead direct an escrow agent to release the funds in escrow to the plaintiff or instead, issue a judgment against plaintiffs, was unwarranted.

CPLR 5001(a) provides:

Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

(Emphasis added).

In the June 29, 2009 Order, the Court granted plaintiff prejudgment interest, which plaintiff sought pursuant to CPLR 5001 for the first time in his reply papers. Plaintiff sought partial summary judgment based on a Complaint alleging that defendants' withholding of his *pro-rata* share constituted a breach of fiduciary duty.

Originally, the Court's June 29, 2009 Order granting judgment and prejudgement interest against defendants found, *inter alia*, that defendants "failed to demonstrate any basis for withholding Myron's share of the proceeds of the sale based upon the Spreading Machine note." The Court also concluded that defendants' claim that "the mortgage payments made on the West 29th Street Property after October 17, 2002 are not covered by the Release, and [that] Myron is responsible for reimbursing Sam-Fay for those amounts" lacked merit. Defendants failed

demonstrate “how paying the mortgage constituted corporate waste, and [that] any claim premised on Myron's causing Sam-Fay to pay its mortgage obligation is without merit.” Also, defendants failed to demonstrate “any basis upon which Myron should be held more accountable than his sisters with respect to any possible judgment” against them and in favor of Thales Management Corporation, which commenced an action against Sam-Fay, Myron, and Myron's sisters for fraudulent misrepresentations in connection with the space that it leased from Sam-Fay; since “no funds were withheld from Myron's sisters, his funds cannot be withheld.” Finally, with respect to defendants' claim that Myron caused Sam-Fay to pay union dues and welfare payments to benefit himself and his son rather than for the benefit of the corporation, the Court found that “even if defendants are correct about the union fees, the amount involved is small (totaling \$15,883), and does not justify withholding Myron's \$2 million share of the distribution.”

Thus, the Court granted plaintiff's motion

“to the extent that *plaintiff is awarded* a portion of his pro rata share of the sale in 2007 of the property owned by defendant Sam-Fay Realty Corp., and *the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$ 2,010,953.94* (\$2,037, 499.64, less \$26,545.70 in disputed amounts), together with interest as prayed for allowable by law at the rate of 9% per annum from the date of August 30, 2007, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate

It has been held that a breach of fiduciary duty action qualifies for the recovery of prejudgment interest under CPLR 5001 (*Andersen v Weinroth*, 13 Misc 3d 1204, 824 NYS2d 752 [Sup Ct New York County 2006] citing *Gibbs v Breed, Abbott & Morgan*, 181 Misc 2d 346, 354 [Sup Ct 1999] reversed on other grounds 279 AD2d 887 [1st Dept 2001]). Also, prejudgment interest may be awarded where it is found that defendants “wrongly withheld plaintiff's money”

(see *Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 701 NYS2d 427 [1st Dept 2000] [stating that the “IAS court's award of prejudgment interest would nonetheless have been proper in light of the circumstance that defendants wrongly withheld plaintiff's money”]). The act or omission by defendants, through their withholding of plaintiff's *pro rata* share of the proceeds of the sale of the 29th Street Property, on grounds this court found as lacking in merit, deprived plaintiff of and interfered with his possession and enjoyment of the funds. Plaintiff, having prevailed on his Complaint, which sought money damages for breach of fiduciary duty, has a right to prejudgment interest. Further, upon review of plaintiff's Complaint, it is clear that plaintiff does not demand equitable relief, or equitable distribution, but money damages based on defendants' alleged breach of fiduciary duty. Therefore, although this action was related to the pending dissolution action, plaintiff's instant action is one for breach of fiduciary duty, which seeks money damages. Therefore, the exception in CPLR permitting this Court to award interest in its discretion in an action equitable in nature, does not apply.

Further, plaintiff's failure to demand prejudgment interest in his Complaint does not preclude such relief in his favor (*Flamm v Noble*, 296 NY 262 [1947] [permitting prejudgment interest notwithstanding that the “complaint contained no specific demand for interest; the plaintiff made no request that his right to interest be declared by the jury; nor did he give notice of his present motion for a recovery of interest until after expiration of the term at which this case was tried”]; *Mallis v Bankers*, 717 F2d 683 [2d Cir 1983] [indicating that New York courts have held that a plaintiff's failure to pursue his request for prejudgment interest during the trial or even to demand such interest in his complaint does not amount to a waiver of his right to interest]).

Although defendants failed to oppose plaintiff's request for such interest, such failure is

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the direct result of plaintiff's failure to request statutory interest in his Complaint or motion. However, upon reargument, plaintiff has demonstrated that he is entitled to prejudgment interest as a matter of right, notwithstanding his failure to allege same in his Complaint and motion.

Upon reconsideration of *Manufacturer's & Traders Trust Co. v Reliance Ins. Co.* (8 NY3d 583, 838 NYS2d 806 [2007]), the Court finds that *Manufacturer's* is distinguishable from the instant matter, but instructive. In *Manufacturer's*, a general contractor and its subcontractor agreed to deposit approximately \$5.3 million with an escrow agent until June 1999, during which time, the subcontractor would attempt to negotiate settlements with its sub-subcontractors, with any balance left over in escrow to be paid to the general contractor. When one of the sub-subcontractors requested the escrow agent to withhold further payouts, the escrow agent commenced an impleader action to discharge it from all liability over the disputed funds; the Court directed the escrow agent to deposit the escrowed money with the court clerk. After it was ultimately held that the funds should be returned to the general contractor, the general contractor moved for entry of judgment against the subcontractor and sub-subcontractor in an amount equal to interest at the statutory rate for the time during which the funds were deposited in court. On appeal of the First Department's affirmance of the Supreme Court's grant of prejudgment interest, the Court of Appeals held that prejudgment interest was unwarranted.

The Court of Appeals acknowledged that interpleader actions were equitable, and that CPLR 5001(a) permits interest awards in all equitable actions. However, CPLR 5001(a) authorizes interest "upon a sum awarded" which implied "that the interest must be paid by the party against whom the sum was awarded"; since there was no "sum awarded" against the subcontractor or sub-subcontractor, there was no predicate for an award of interest against them.

The Court of Appeals then proceeded to explain the purpose of prejudgment interest: to require a person who owes money to pay compensation *for the advantage received from the use of that money over a period of time.* (Emphasis added). Since the money was held by the clerk of the court, and the subcontractor and sub-subcontractor had no more had the use of the funds than the general contractor did, to award interest against the subcontractor and sub-subcontractor “would be to penalize them for a delay that brought them no benefit.” Thus, prejudgment interest was also deemed unjustified.

Furthermore, there was “also a more fundamental objection” in that the subcontractor and sub-subcontractor had not been found to have breached any contract *or to have interfered unlawfully with the possession or enjoyment of any property.* The Court noted that no court found that the subcontractor and sub-subcontractor’s claims “were frivolous, that their conduct in the litigation was vexatious, or that they acted solely to cause delay.” Since they were not found to have committed any “act or omission” that can be a basis for liability, the “possession or enjoyment” clause of CPLR 5001(a) did not apply.

Here however, plaintiff sought partial summary judgment for monetary damages, and a sum *was awarded against defendants.* Although defendants did not receive any advantage from the funds deposited in escrow, and had no use of the money any more than did the plaintiff, a sum *was awarded against defendants* because their bases for withholding plaintiff’s share of the proceeds were found lacking in merit. Since the Court’s decision found no justification for withholding plaintiff’s *pro-rata* share (except for a small disputed amount), defendants’ withholding was therefore, in a sense “unlawful” because it was unsupported by any law. Essentially, the defendants’ actions were unjustified. The Court also notes that in

Manufacturer's, the general contractor, who sued the subcontractor and sub-subcontractor for prejudgment interest, had previously agreed with the subcontractor to place the funds in escrow. Here, plaintiff never assented to the placement of the funds in escrow. Nor did defendants commence any impleader action; their related action is one for dissolution of Sam-Fay and defendants in this action simply alleged counterclaims against plaintiff for, *inter alia*, corporate waste.

Nor have defendants offered any legal support for their claim that plaintiff waived his right to statutory interest.

Therefore, since plaintiff was entitled to a monetary judgment against defendants for the amount noted, and awarded a sum certain against defendants, plaintiff is entitled to prejudgment interest at the statutory rate of nine percent.

As to the date from which interest is to be computed, CPLR 5001(b) provides:

Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

Plaintiff claims that Audrey, Sydell and Barbara voted on August 30, 2007 to withhold his *pro rata* share of the proceeds of the sale of the 29th Street Property and defendants still offer no alternative date from which to calculate interest. Therefore, plaintiff shall be awarded interest from August 30, 2007 as originally sought and granted.

As to the issue of whether the Court may direct the escrow agent to release the funds to plaintiff *in lieu* of a judgment against defendants, the Court grants renewal of the branch of defendants' motion that sought an order directing the escrow agent to release the funds and

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vacate the judgment against them. In light of the Satisfaction of Judgement, and the alternative relief defendants sought in their own reargument motion, that branch of defendants' motion was moot, and is now denied. Further, the Court lacked jurisdiction to grant such relief because the escrow agent was not a party to this action (*see Argersinger's Dept. Store, Inc. v Shapiro Bros. Co., Inc.*, 115 Misc 2d 850, 454 NYS2d 813 [Sup Ct Fulton County 1982] [stating that "[w]ithout jurisdiction over the escrow agent no relief against him [to release funds] can be granted even if the motion could be converted to an action or special proceeding under CPLR 103 (subd. [c]).

Conclusion

Based on the above, it is hereby

ORDERED the motion by plaintiff Myron Zuckerman for leave to reargue and renew this Court's August 18, 2009 Order, is granted; and it is further

ORDERED that upon reargument, the branch of defendants' motion to reargue this Court's June 29, 2009 Order granting statutory interest is denied, and the branch of the August 18, 2009 Order referring to the Special Referee the issue regarding what amount of interest should be awarded plaintiff is vacated; and it is further


ORDERED that upon renewal, the branch of defendants' motion to reargue this Court's June 29, 2009 order to replace the Judgment herein with an Order to an escrow agent, is denied, and that branch of the August 18, 2009 Order referring to the Special Referee the issue of whether the Court should vacate the judgment and instead direct an escrow agent to release the

funds in escrow to the plaintiff or instead, issue a judgment against plaintiff, is vacated; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 28, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

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