

**Metwaly v International Bus. Machines Corp.**

2011 NY Slip Op 32332(U)

August 26, 2011

Supreme Court, New York County

Docket Number: 600671/2010

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 600671/2010

METWALY, FARID

vs  
INTERNATIONAL BUSINESS

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE 5/18/11

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**  
PAPER NUMBERED  
AUG 29 2011

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion *is decided by*  
*the annexed Memorandum decision and order.*

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

Dated: 8/26/11

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

FARID METWALY,

Index No. 600671/2010

Plaintiff,

DECISION and ORDER

-against-

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

**FILED**

Defendant.

AUG 29 2011

-----X

JANE S. SOLOMON, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant International Business Machines Corporation

(IBM) moves to reargue a prior motion to dismiss in this action by plaintiff Farid Metwaly (Metwaly) to recover interest on a sum of money owed to him in 2002 but not paid until 2009. Before the lawsuit was commenced, IBM paid Metwaly the principal amount due to him.

In a decision and order dated February 17, 2011 (Prior Order), IBM's motion to dismiss was granted to the extent of dismissing Metwaly's claim under Labor Law § 193.

The facts are discussed in some detail in the Prior Order. Stated briefly, Metwaly worked for IBM from 2000 through 2002. He was a Canadian resident assigned to work in Dubai. Pursuant to a written agreement, IBM withheld money from his salary to cover potential United States tax liability, with a promise to return any excess as calculated by an accountant. IBM kept this money pending a "final tax reconciliation". In March

2009, IBM paid Metwaly \$116,685 for the withheld tax, plus \$85,565 on account of other unspecified errors, for a total payment of \$202,250. Metwaly commenced this action in September 2010 claiming entitlement to interest on the withheld sum. He also sought to recover under Labor Law § 193, which provides that employers will make deductions from wages.

In the Prior Order, the Labor Law § 193 claim was dismissed on statute of limitations grounds. This part of the decision is not challenged. The denial of that part of IBM's motion seeking to dismiss the breach of contract claim is at issue here. IBM had argued that this claim also was barred by the six year statute of limitations for breach of contract claims (*Bulova Watch Co. v. Celotex Corp.*, 46 NY2d 606, 612 [1979]). Metwaly argued that since IBM acknowledged the obligation to pay him in 2009, General Obligations Law § 17-101 permits his claim even though interest was not mentioned at the time.

IBM argues that while it acknowledged it owed Metwaly the wages withheld between 2000 and 2002, it never acknowledged that it owed any interest on that debt, so the claim for interest runs afoul of the statute of limitations.

Metwaly counters that he is not seeking the interest under a contract theory. However, the complaint is clear that Metwaly's seeks recovery for breach of an employment agreement.

IBM cites to *In re Estate of Bock*, 38 Misc2d 195, 197

(NY Surr Ct., 1963), wherein the claimant made a \$5,000 loan in 1929. The debtor orally promised to pay interest. The debtor did not begin repayment until 1950, and paid until her death in 1958. The majority of the loan remained unpaid. The court determined that there was evidence to establish that the payments included interest as well as principal, but limited the recovery of interest to 1950, the date of the first payment--i.e. the acknowledgment of the debt--because there was no evidence of an intent for interest to run from 1929. The court, citing a 1945 appellate division decision, held that "where interest is claimed upon the principal sum, the claimant has the burden of establishing such facts as to justify the implication of a promise to pay the interest, as well as the principal obligation" (*Bock*, 38 Misc2d at 197 [citing *Matter of Fitch*, 270 AD 227 [4<sup>th</sup> Dept., 1945]]).

Metwaly first argues that *Bock* should not apply because it dealt with a loan, not withheld earnings. This argument is unpersuasive; both cases deal with whether and when a debtor acknowledged interest on a debt. Metwaly next argues that *Bock* is inapplicable because it deals with a plaintiff who sought interest that accrued prior to accrual of the claim. This reading is incomplete. *Inter alia*, *Bock* sought interest accrued on a 1929 debt that was acknowledged in 1950. It is the court's focus on the 1950 acknowledgment of the debt that is of

importance here. It found evidence that the payments beginning in 1950 acknowledged that interest was due from that date. No evidence was presented of any acknowledgment to repay interest that may have arisen prior to 1950.

Here, IBM had no contractual duty to pay interest, and never acknowledged an intent to do so when it acknowledged and paid the principal debt. Notably, had IBM not acknowledged or paid the principal debt, Metwaly would have been barred by the statute of limitations from bringing a claim for it in 2010--only the acknowledgment preserved the claim. The claim for interest was brought eight years after it accrued, was not acknowledged, and is barred by the statute of limitations.

Accordingly, it hereby is

ORDERED that the motion of Defendant IBM for leave to reargue its motion to dismiss is granted and, upon reargument, the order of the Court, dated February 17, 2011, is recalled and vacated; and it further is

ORDERED that the motion is granted and the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: 8/26, 2011

**FILED**  
ENTER: [Signature] AUG 29 2011  
NEW YORK  
COUNTY CLERK'S OFFICE  
2ND FLOOR