

**Weltman v Struck**

2013 NY Slip Op 32845(U)

November 4, 2013

Supreme Court, New York County

Docket Number: 107910/11

Judge: Cynthia S. Kern

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

PRESENT: \_\_\_\_\_  
Justice \_\_\_\_\_

PART \_\_\_\_\_

Index Number : 107910/2011  
WELTMAN, JOHN J.  
vs  
STRUCK, HARRY  
Sequence Number : 005  
SUMMARY JUDGMENT

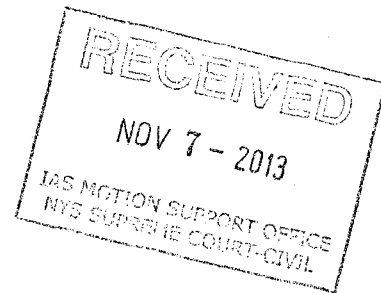
INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) _____
Answering Affidavits — Exhibits _____	No(s) _____
Replying Affidavits _____	No(s) _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.



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

Dated: 11/4/13

[Signature], J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

S/D

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
JOHN J. WELTMAN and JAMES C. ATKINS, JR.,

Plaintiffs,

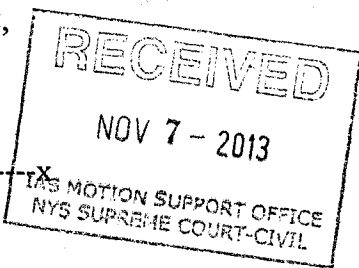
Index No. 107910/2011

-against-

**DECISION/ORDER**

HARRY STRUCK and FRIEDBERG PINKAS PLLC,

Defendants.



-----x  
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiffs commenced the instant action to recover \$155,000 held in an escrow account, which was advanced as a down payment on the purchase of a condominium apartment owned by defendant Harry Struck ("Struck"). By Decision/Order dated July 26, 2013 (the "July Decision"), this court granted plaintiffs summary judgment and ordered that defendant Friedberg Pinkas PLLC, as escrow agent, turn-over to plaintiffs the \$155,000, including any applicable interest that had accrued to date. Plaintiffs now move for an Order awarding them prejudgment interest as their prior motion and this court's July Decision did not address this issue. For the reasons set forth below, plaintiffs' motion is granted.

The relevant facts are as follows. On May 16, 2011, the parties entered into a written contract of sale (the "Contract") in which defendant Harry Struck ("Struck"), as seller, agreed to sell to plaintiffs John J. Weltman ("Weltman") and James C. Atkins, Jr. ("Atkins"), as purchasers, the condominium unit located at 350 West 42<sup>nd</sup> Street, Unit 41G, New York, New York (the "Property") at a price of \$1,550,000.00. Upon the execution of the Contract and pursuant to its terms, plaintiff tendered to defendants a down payment in the amount of \$155,000.00 (the "down payment"). Specifically, the down payment was tendered to defendant Friedberg Pinkas PLLC ("Friedberg"), to place in an interest bearing escrow account.

By letter dated June 28, 2011, plaintiffs notified defendants that they were canceling the Contract pursuant to paragraph 22(e) of the Contract and demanded a return of the down payment. Struck refused to allow the escrow agent to release the down payment to plaintiffs and plaintiffs commenced the instant action asserting, inter alia, a cause of action for breach of contract. In the July Decision, this court determined that plaintiffs' cancellation was valid under the Contract and that defendants were in breach of the Contract by failing to return the down payment to plaintiffs. Plaintiffs now move for an order awarding them prejudgment interest on the ground that such interest is mandatory in a breach of contract action and this issue was not addressed in the July Decision. Struck opposes the motion on the ground that plaintiffs agreed when they entered into the Contract that the down payment would be the only damages available upon breach. Thus, Struck argues, plaintiffs waived their right to an award of prejudgment interest.

It is well settled that the plain language of CPLR § 5001(a) mandates an award of prejudgment interest in breach of contract cases. *E.g., J. D'Addario & Co., Inc. v. Embassy*

*Industries, Inc.*, 20 N.Y.3d 113, 117 (2012). However, in *J. D'Addario*, the Court of Appeals held that parties may contract around this statutory requirement as “parties to a civil dispute are free to charge their own course and, unless public policy is affronted, they may fashion . . . how damages are to be computed without interference by the courts.” *Id.* (quoting *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 54 (1996)). Accordingly, under *J. D'Addario*, when parties clearly and expressly agree to waive their right to prejudgment interest and provide for an alternative or exclusive remedy in the case of a breach, they are free to do so and the court will enforce the contract as written. *Id.*; see also *Katzman v. Helen of Troy Texas Co.*, 2013 WL 1496952 (S.D.N.Y. 2013) (analyzing *J. D'Addario*). For example, in *J. D'Addario*, the court declined to award prejudgment interest as the parties had agreed at the time of contract formation that the “sole remedy” for defendant and the “sole obligation” of plaintiff in the event of plaintiff’s default would be an award of the down payment. Moreover, the parties agreed that the defendant would have “no further rights” against the plaintiff once the down payment was paid as “liquidated damages.” *Id.*

In the present case, plaintiffs’ motion for an award of prejudgment interest is granted as plaintiffs never expressly agreed to waive their right to prejudgment interest in the event of Struck’s breach of the Contract. In the Contract at issue herein, there is no language that would establish that the parties had clearly agreed to “chart their own course” and forego an award of mandatory prejudgment interest in the event that Struck breached the Contract. Indeed, nowhere in the Contract do the parties agree to any “sole remedy” or “sole obligation” in the event of Struck’s Breach. Struck’s argument that Section 16 of the Contract clearly evidences the intent of the parties that the sole remedy for a breach under the contract is “damages” in the form of the

