

**Mahopac Improvements, LLC v Double Tee-Kay
Diner Corp.**

2016 NY Slip Op 30098(U)

January 21, 2016

Supreme Court, Putnam County

Docket Number: 3030/10

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

Dispo

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X
MAHOPAC IMPROVEMENTS, LLC, successor-
in-interest to MAHOPAC CENTER ASSOCIATES,
L.P.,

Plaintiff,

-against -

DOUBLE TEE-KAY DINER CORP. and ZORBA
DINER, INC., trading as OLYMPIC DINER,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 3030/10

Sequence Nos. 6
Motion Date 11/2/16

The following papers were considered in connection with this motion by plaintiff for an Order (a) confirming the Report of Referee Francis A. Nicolai, dated August 14, 2015; (b) awarding plaintiff judgment in the amount set forth in the report for the period October 1, 2004 through April 30, 2015, including prejudgment interest as calculated by the Referee; (c) pursuant to CPLR 5002, granting to plaintiff prejudgment interest on the total amount set forth in the report from the August 14, 2015 date of the report to the date of entry of the final judgment in this matter; (d) directing the entry of judgment in plaintiff's favor as aforesaid; and (e) awarding to plaintiff costs and such further relief as the Court may deem proper:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVIT/EXHIBITS A-F	1
AFFIDAVIT IN OPPOSITION/EXHIBITS A-N	2
REPLY MEMORANDUM IN SUPPORT	3

On February 23, 2014, the Court granted plaintiff's motion for summary judgment as to liability on plaintiff's first cause of action for breach of contract. Therein, the Court referred the issue of damages to a referee (the "Referee") to hear and determine upon examination of a "long accounting" and ruled that any judgment

rendered in favor of plaintiff and against defendants shall include pre-judgment interest on any unpaid sums as provided by CPLR §5001(b) which provides in relevant part:

. . . 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.

Issues left for the Referee upon this "long accounting" included, but were not limited to, what amounts, if any, were due to plaintiff and from what date or dates, whether plaintiff used the same or different methodologies of calculation and whether there were duplicate entries, mathematical errors and the like. Upon such findings, the Court ruled that prejudgment interest would be appropriate to the extent section 5001 allows.

Thereafter and by virtue of the parties' Stipulation of April 7, 2015, the matter was converted from a reference to hear and determine to one to hear and report. In accord with the parties' post-reference stipulation of August 25, 2015, "the transcript of the testimony before Referee Francis Nicolai at the reference conducted August 3, 4 and 10, 2015 and the Exhibits introduced into evidence . . . do not have to be filed with the Report of the Referee", and have not been so filed.

Plaintiff now moves for an Order: (a) confirming the Report of Referee Francis Nicolai, dated August 14, 2015 (the "Report"); (b) awarding plaintiff judgment in the amount set forth in the report for the period October 1, 2004 through April 30, 2015, including prejudgment interest as calculated by the Referee, i.e., \$220,008.40 which includes prejudgment interest as calculated; (c) pursuant to CPLR 5002, granting to plaintiff prejudgment interest on the total amount set forth in the report from the August 14, 2015 date of the report to the date of entry of the final judgment in this matter; and (d) directing the entry of judgment in plaintiff's favor as aforesaid.

The Referee's Report reads in pertinent part:

After the conclusion of the hearing, I advised the attorneys that the amounts claimed by the plaintiff needed to be adjusted to

reflect the testimony of the witnesses . . .

Both parties recalculated the amount due and although the final calculations were relatively close, a settlement could not be reached. The defendants rejected the pre-judgment interest of 9% which this Honorable Court previously addressed, as unjust and unconscionable in light of the interest market in recent years.

I find that the undisputed amount owed by defendants to the plaintiff, for the period October 1, 2004 to April 30, 2015 is \$142,774.81. Although this calculation by defendants differed slightly from plaintiff's calculations, it was accepted by plaintiff as the correct amount.

I find further that the amount of interest due on the amount owed is \$77,233.59. The total due plaintiff[] from defendants, as of April 30, 2015, is \$220,008.40.

This Court has already made a finding of liability in favor of plaintiff and against defendants; thus, the reference to compute. In addition, the Referee has accepted defendants' calculation of damages over that of plaintiff's "slightly" different calculation. Furthermore, although there is a challenge to plaintiff's entitlement to interest (see infra), there is no challenge to the manner or method of calculation of statutory interest.

The only issue to be decided by the Court is whether plaintiff is entitled to statutory interest at all. In accord with the Court's earlier rulings, the Court answers the question in the affirmative.

The law in this area is well summarized as follows:

In breach of contract cases where parties do not specify the exclusive remedy, CPLR 5001 (a) requires that statutory interest be paid. CPLR 5001 (a) states that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract" (emphasis added). The plain language of CPLR 5001 (a) "mandates the award of interest to verdict in breach of contract actions" (Spodek v. Park

Prop. Dev. Assoc., 96 NY2d 577, 581 [2001]). There is no requirement that the breaching party obtain some benefit from the wronged party's money for statutory interest to be paid. The principle behind prejudgment interest is that the breaching party should compensate the wronged party for the loss of use of the money (see NML Capital v. Republic of Argentina, 17 NY3d 250, 266 [2011]). We have previously stated that "interest is not a penalty" (Love v. State of New York, 78 NY2d 540, 544 [1991]). . .

(J. D'Addario & Co., Inc. v. Embassy Indus., Inc., 20 NY3d 113, 117 18 [2012]). As further articulated in Love v. State (78 NY2d 540, 545 [1991]) with respect to interest applicable to a bifurcated personal injury action:

Indeed, inasmuch as [a] defendant was not entitled to the use of the money from the moment that liability was established, a rule that would permit the defendant to retain the cost of using the money (i.e., interest) would provide the defendant with a windfall. Such a result is unacceptable irrespective of which party causes the delay [in the assessment of plaintiff's damages]. Regardless of who is responsible, the fact remains that the plaintiff has been deprived of the use of money to which he or she was entitled from the moment that liability was determined. That is a loss for which the plaintiff should be compensated . . .

The reasoning is equally applicable to interest assessed pursuant to CPLR §5001(b) and this Court has not been presented with any persuasive legal authority upon which to deviate therefrom. The appropriateness of the statutory interest rate, 9 percent, is a legislative matter and not a judicial issue, as currently presented.

Finally, plaintiff's application for a further award of interest from the August 14, 2015 date of the Report to the date of entry of the final judgment in this matter is denied.

When, as here, a court orders a special referee to hear and report with recommendations, interest pursuant to CPLR

5002 runs from the date the court confirms the Referee's report, not the date of the report (see Matter of East Riv. Land Co., 206 N.Y. 545, 549, 100 N.E. 421 [1912]; Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 5002.03 [2d ed. 2014]). Theophilova v. Dentchev, 111 A.D.3d 463, 976 N.Y.S.2d 19 (1st Dept.2013)

(Bd. of Managers of 25th Charles St. Condominium v. Seligson, 126 AD3d 547, 548 49 [1st Dept 2015]). In addition, since by check dated September 22, 2015, defendants have already tendered payment of the principal admittedly owed, \$142,774.80, said sum shall be taken into account upon the calculation of post-confirmation interest to the date of the entry of judgment which calculation shall be made by the Clerk.

Based upon the foregoing, the Court finds that the Referee's findings are supported by the record and, accordingly, it is hereby

ORDERED, that, the Report of Referee Francis A. Nicolai, dated August 14, 2015, is confirmed; and it is further,

ORDERED, that, the Clerk is directed to enter judgment in the amount of \$220,008.40, which is inclusive of pre-judgment interest on damages incurred at the various times specified in Exhibit "D" to the Affidavit of Paul A. Feigenbaum, Esq. submitted in Support of Motion to Confirm Report of Referee, sworn to September 1, 2015), as calculated from October 1, 2004 through April 30, 2015; and it is further,

ORDERED, that, further interest shall be added thereto by the Clerk as may be permitted by CPLR 5002 from the date of this Decision & Order confirming the Referee's Report to the date of the entry of judgment.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: Carmel, New York
January 21, 2016

S/

HON. LEWIS J. LUBELL, J.S.C.

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