

Vatalaro v County of Suffolk

2017 NY Slip Op 33004(U)

April 12, 2017

Supreme Court, Suffolk County

Docket Number: 12002/2008

Judge: Joseph Farneti

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ORIGINAL

SHORT FORM ORDER

INDEX NO. 12002/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

TERESA VATALARO, as the Administratrix of
 the Estate of JENNA ALLYSE VATALARO,
 deceased, and TERESA VATALARO,
 individually, ~

Plaintiffs,

-against-

THE COUNTY OF SUFFOLK, SUFFOLK
 BUS CORP., and WILLIAM R. DORTCH,

Defendants.

ORIG. RETURN DATE: JULY 21, 2016
 FINAL SUBMISSION DATE: SEPTEMBER 8, 2016
 MTN. SEQ. #: 010
 MOTION: MD

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 6 read on this motion _____
TO TOLL STATUTORY INTEREST

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers
4, 5; Reply Affirmation 6; it is,

ORDERED that this motion (seq. #010) by defendants THE
 COUNTY OF SUFFOLK, SUFFOLK BUS CORP. and WILLIAM R. DORTCH
 (collectively "defendants") for an Order staying and tolling statutory interest in this
 action, is hereby **DENIED** for the reasons set forth hereinafter. The Court has
 received opposition to this application from plaintiffs TERESA VATALARO, as the
 Administratrix of the Estate of JENNA ALLYSE VATALARO, deceased, and
 TERESA VATALARO, individually.

This is an action commenced by plaintiff TERESA VATALARO
 alleging conscious pain and suffering and wrongful death of her daughter JENNA
 VATALARO as a result of a motor vehicle accident that occurred on May 21,
 2007.

There was a liability trial and verdict conducted before Hon. Peter H. Mayer. The liability verdict was rendered on February 3, 2014. Thereafter, there was a motion to set aside the liability verdict. A decision was issued by Justice Mayer dated October 6, 2015. Justice Mayer's decision was served with Notice of Entry on October 9, 2015.

Thereafter, there was a trial before Honorable Joseph Farneti and a verdict as to damages rendered on February 29, 2014. Thereafter, Justice Farneti issued a decision with regard to the post-trial motions dated March 4, 2016, which was served with Notice of Entry on or about April 25, 2016. To date, no judgment has been entered. On May 25, 2016, plaintiffs served a Notice of Appeal. Defendants cross-appealed.

In addition, an Order to Show Cause was brought on by petitioners George Diamantakis and Emmanuel Diamantakis against the Administratrix, Teresa Vatalaro. That petition was decided by Justice Farneti by Order dated March 11, 2016, which was served with Notice of Entry. That decision and Order provided the following:

VATALARO and the COUNTY are hereby restrained from making any payments or distribution of the award in the wrongful death action until the rights of the petitioner/judgment creditors have been adjudicated.

Thereafter, defendant THE COUNTY OF SUFFOLK issued a tender of judgment to the plaintiffs offering to pay the full remittitur in the amount of \$620,000.

A Notice of Appeal was served on behalf of defendants with regard to Justice Mayer's post-trial decision on liability. Plaintiffs' filed a Notice of Appeal with regard to Justice Farneti's post-trial decision on the post-trial motion regarding damages. Defendants cross-appealed.

The defendants contend that as a result of their tender offer to pay the plaintiffs the conditional amounts awarded by this Court on the motion to set aside the verdict, the post-judgment interest payable should be tolled at least to the extent of the amount proffered. The additional factor of a non-party judgment against the individual plaintiff and this Court's resultant restraining order limiting

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both plaintiffs' and defendant's ability to make any payment or distribution is an additional complication. The Court finds no reported case containing all of the concomitant variables found herein.

The analysis undertaken in the suspension of the accumulation of interest cases centers on the conduct of the respective parties. In a recent consideration of the issue, the Second Department began with CPLR 5003 finding:

"[e]very money judgment shall bear interest from the date of its entry. Every order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing." "The statute does not explicitly dictate when interest ceases to accrue, but generally '[o]nce a money claim has been reduced to judgment, it carries interest until it is paid' " (*Matter of Matra Bldg. Corp. v Kucker*, 19 AD3d 496, 496, 796 NYS2d 709 [2005], quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5003)

(*Zavelin v Greenberg*, 117 AD3d 726, 726-727 [2d Dept 2014]).

The case of *Matter of Matra Bldg. Corp v Kucker*, 19 AD3d 496 (2d Dept 2005), cites to the cases relied upon by both plaintiffs and defendants in their submissions to the Court. An examination of those cases yields a basis for analysis of the current query. The holdings examine the conduct of the parties using equitable principles such as dilatory conduct. Examining those citations provides guidance.

In *Purpura v Purpura*, 261 AD2d 595 (2d Dept 1999), the court focused on the conduct of the parties and the efforts made in relation to the payment or substitutes in the nature of offer, proffer or tender of payment. Again, the Court began with the precepts set forth in Article 50 of the CPLR.

By law, interest was accruing on the plaintiff's distributive award at the statutory rate of 9% (see CPLR 5004, 5003). The accrual of this interest was not tolled

when the defendant posted an undertaking in order to secure a stay pending appeal (see CPLR 5519 [a]). There is no statutory exemption of interest for money placed in escrow in order to obtain a stay of execution of the judgment pending appeal (see CPLR 5519; see also *Persons v Gardner*, 122 App Div 167, 170-171; *Steinback v Diepenbrock*, 5 App Div 208, 211-212). Hence, in the absence of a tender or payment of a special deposit (see *Meilak v Atlantic Cement Co.*, 30 AD2d 254, 256; *Moscow Fire Ins. Co. v Hecksher & Gottlieb*, 260 App Div 646, 651, *affd* 285 NY 674), interest on a money judgment continues to accrue at the statutory rate until the judgment is satisfied, barring any inequitable or dilatory conduct on the part of the judgment creditor (see *ERHAL Holding Corp. v Rusin*, 252 AD2d 473; *Feldman v Brodsky*, 12 AD2d 347, 349-351, *affd* 11 NY2d 692). Here, notwithstanding that the plaintiff also cross-appealed from the original judgment and subsequent orders in an attempt to receive a greater equitable distribution, she is still entitled to earn interest upon the moneys which were awarded to her and affirmed on appeal (*cf. Pollock v Collipp*, 138 AD2d 584)

(*Purpura*, 261 AD2d 595, 597).

The conclusion is an appeal or cross-appeal has no affect whatsoever upon the accrual and computation of interest. The result of the appeal may ultimately impact the final judgment upon which Article 50 will be applied, but there is no holding in the Second Department of which this Court is aware which tolls the computation based solely upon either party's exercise of their appellate rights.

There are cases which hold that the payment of monies into escrow in an attempt to stem the accumulation of interest is of no effect.

At the time that it took its appeal, the City deposited funds representing the award due with the court in an

attempt to stop the running of interest. By decision dated September 19, 2007, this court held that depositing the condemnation award, plus interest, into the court did not serve to toll the accrual of interest and granted claimant a judgment declaring that statutory interest continued to run on the award at the rate of 6% per year, compounded annually, from the vesting of title on February 29, 1996 until such time as the date of availability of payment, or until further order of this court or of the Appellate Division, Second Department, otherwise directs

(Matter of City of New York, 24 Misc 3d 1251[A] [Sup Ct, Queens County 2009].

The Court does find some support in the case law for the proposition that a tender of payment or actual payment will affect the computation as it concerns interest.

“The holder of the judgment may be estopped by equitable considerations, or by his own acts, from enforcing the interest which the statute gives him. But the cases which lay down this rule rest on principles of estoppel which are closely prescribed in scope and which ought not be applied to the defendant in this case during the period here in dispute.”

“One is by a tender from the judgment debtor which does not result in a satisfaction of the judgment because the judgment creditor refuses it; the other is the payment of a special deposit into court, recourse to which is absolute on the occurrence of a condition and which may be treated in the nature of a satisfaction. Judge Dore, writing in *Moscow Fire Ins. Co. v Heckscher & Gottlieb* (260 App Div 646), was of opinion these were the main exceptions.”

And at page 351 of said opinion, in response to plaintiff's argument that defendant lost its right to

interest during the time of plaintiff's appeal, because defendant failed to demand payment from the depositor, the court said: "But an estoppel did not arise because the defendant did nothing while the plaintiff pursued the appeal to the Court of Appeals. Interest is not cut off by the statute because the judgment is not enforced. Interest may be cut off because of some action by the judgment creditor which would make it inequitable or oppressive that he get interest on his judgment, e.g., his refusal to accept a tender, *and perhaps*, as the Special Term held as to part of the interest not disputed here, *by himself taking an appeal*"

(*Lanni v Spallina*, 39 Misc 2d 639 [Sup Ct, Monroe County 1963] [italics in original]).¹

Also the imposition of a restraint upon payment by the court is a factor to be considered. The decision in *Wheelock v Tanner*, 39 NY 481 (1868), which is occasionally cited, did not involve interest on a judgment, but turned on the result of a tender of performance of a contract. What was actually before the court and decided in *Moscow Fire Insurance Company* was that the directions of section 481 of the Civil Practice Act did not require interest on a judgment where the debtor is restrained from payment by an injunction not caused by the debtor's own act or omission (*see Feldman v Brodsky*, 12 AD2d 347 [1st Dept 1961]).

Certainly this Court's imposition of a restraint, having absolutely nothing to do with the County's conduct, coupled with the tender offer of the County at least as to the conditional amounts, as set forth in this Court's setting aside of the jury verdict, may very well impact upon the computation of interest once the appeal and cross-appeal have been decided. The Court is reluctant at this time to make such a finding until the matter has been finally adjudicated and a judgment presented.

WHEREFORE, defendants' application is **DENIED** as premature, subject to renewal upon the decision and order of the Appellate Division and the

¹ While somewhat dated, the analysis of Judge Gerges therein is still on point.

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presentation of judgment thereupon in the appropriate court as the circumstances then existing dictate.

The foregoing constitutes the decision and Order of the Court.

Dated: April 12, 2017



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION