

Matter of Rodman

2018 NY Slip Op 34552(U)

August 3, 2018

Surrogate's Court, Bronx County

Docket Number: File No. 2008-947/G

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

August 3, 2018

ESTATE OF HARRY RODMAN, Deceased
File No.: 2008-947/G

The court, sua sponte, recalls its decision dated April 25, 2017 (Matter of Rodman, NYLJ, July 21, 2017, at 24, col 3 [Surr Ct, Bronx County 2017]) and replaces same with the following:

In this SCPA 2103 turnover proceeding the petitioner, the co-executor, seeks repayment of monies due to the estate from the respondents, the decedent's stepson Alan Bronstein and Aurora Gems Inc., based upon a promissory note signed by Alan on behalf of himself and Aurora Gems on October 6, 2006 in the amount of \$1,784,167, accruing interest at 5% per annum. As per the note terms, repayment in full was due on October 16, 2016, or sooner if certain precious gems known as the "Aurora Collection" securing the note were sold. The petitioner seeks interest at the rate of 5% from February 24, 2008 (the date of decedent's death) to February 24, 2011 on \$1,674,167, the amount petitioner alleges was owed on the date of death, and an additional amount of interest totaling \$251,157.30 for the 36 months following the date of death, for a total alleged

sum owed of \$1,925,324.30. In addition, the petitioner seeks prejudgment interest at 9% per annum from February 24, 2011 until the date of repayment or entry of judgment. Alan opposes the imposition of prejudgment interest at the statutory rate and asserts that the only interest owed is the 5% rate in the note asserting that the petitioner should be equitably estopped from seeking damages on an instrument that the petitioner sought to rescind in the prior proceeding. He avers in opposition to the application that after the Appellate Division affirmed the decree in April, 2014 dismissing the turnover proceeding, he proposed immediate payment of the outstanding interest provided the petitioner agree to an immediate distribution to the beneficiaries, but this proposal was rejected. As such, he argues having rejected his attempts to pay outstanding interest, the petitioner's request for additional prejudgment interest should be denied.

The parties stipulated to a determination upon written submissions in lieu of a hearing. To that end, the parties entered into two stipulations pertinent to the court's disposition, which are both now properly before the court. By agreement dated January 21, 2015 the parties stipulated to the following summarized facts: 1) Aurora Gems is to be credited with a \$50,000 payment toward principal on October 6, 2006 reducing the note principal to \$1,734,167; 2) three payments, to wit, \$10,000 on October 17, 2006, \$50,000 on June 16, 2007 and \$50,000 on July 25, 2007 were made reducing the note principal to \$1,693,250.71; and 3) no payments were made after last payment on July 25, 2007 resulting in the

total amount of interest due on the note of \$634,847.15 as follows: i) interest payments for 2007 - \$36,880.05; ii) annual interest payments of \$84,662.54 for the years 2007-2014, inclusive; and iii) interest of \$4,871 for the period 1/1/15 to 1/21/15. The parties dispute whether the petitioner is entitled to its claim for additional prejudgment interest on the aforesaid interest amounts.

Thereafter, the parties executed a second stipulation dated March 11, 2015, acknowledging the following: 1) petitioner received the total sum of \$612,193.31 on February 17, 2015 in partial satisfaction of the total interest due of \$634,847.15 through January 21, 2015, leaving a balance of \$22,653.84; 2) on February 24, 2015 an additional payment of \$60,370.94 was made, resulting in a surplus of \$37,717.10. Thus the issue the court must decide is whether prejudgment interest is due, and if so, how the surplus amount is to be applied.

The court extensively detailed the history of this estate in its decision after a bench trial upholding the shareholder agreement and the note in question (see *Matter of Rodman*, NYLJ, Jan 14, 2003, at 22 col 2 [Sur Ct, Bronx County] aff'd 116 AD3d 422 [1st Dept 2014] lv denied 24 NY3d 909 [2014]).

A creditor is entitled to prejudgment interest on unpaid interest and principal from the date each payment was due under the terms of a promissory note to the date of liability (see CPLR 5001 [a]; *Spodek v Park Property Development Associates*, 96 NY2d 577 [2001]). “CPLR 5001 (a)

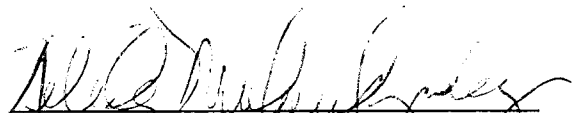
permits a creditor to recover prejudgment interest on unpaid interest and principal payments awarded from the date each payment became due under the terms of the promissory note to the date liability is established” (Spodek v Park Property Development Associates, 96 NY2d at 581 [2001]).

First, there is no dispute, as agreed to by the parties that accrued interest totaling \$634,847.15 was due and owing, which amount has been paid in full. Although Alan argues that the petitioner should be equitably estopped from seeking CPLR 5001 prejudgment interest because he sought to nullify the shareholder agreement and promissory note in the original SCPA 2103 proceeding, citing *W. 54-7 LLC v Sheldon Farber*, 62 AD3d 485 (1st Dept 2009) and *Grossman v Pendant Realty Corp*, 221 AD2d 240 (1st Dept 1995), and alternatively, that he was rebuffed by the petitioner after the Appellate Division affirmance, these arguments are belied by the law and the facts. The decisions cited by Alan are inapplicable here insofar as in those cases, the noteholder rejected payment or refused to accept payment. Here, Alan consistently maintained the validity of the notes and as such should have made payment in accord with the note’s terms, while the decedent was alive, and after death to the duly appointed fiduciary. If he was rebuffed by the petitioner, as he avers, he ideally should have tendered the money to his counsel to be held in escrow, or alternatively, could have deposited the same with the court. The decedent’s death did not free Alan from his responsibility to make payments and the estate is entitled to be made whole. As the Court stated in *Spodek* 96 NY2d at 581 (2001):

we reasoned that a debtor 'who has actually had the use of the money, has presumably used the money to its benefit and consequently, has realized some profit, tangible or otherwise, from having it in hand during the pendency of the litigation. There is thus nothing unfair about requiring the defendant to pay over this 'profit' in the form of interest to the plaintiff, the party who was entitled to the funds from the date the defendant's liability was fixed.

Thus the petitioner is entitled to prejudgment interest at the statutory rate totaling \$597,130.05 from the period July 25, 2007 through January 21, 2015 which is derived by subtracting the \$37,717.10 overage from the \$634,847.15 sum contained in the parties second stipulation. Accordingly, petitioner may settle a decree in the sum of \$597,130.05 plus additional statutory interest from January 21, 2015 to the date of this decision, i.e., the date liability has been established (see *Spodek v Park Property Development Associates*, 96 NY2d at 581 [2001]).

Settle decree.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE