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| Fornaro v Manplaisir |
| 2020 NY Slip Op 30644(U) |
| January 17, 2020 |
| Supreme Court, Bronx County |
| Docket Number: 27797/2017E |
| Judge: John R. Higgitt |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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CARMINE FORNARO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 27797/2017E

KENOL MANPLAISIR and OPO TRANSIT INC.,

Defendants.
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John R. Higgitt, J.

Upon the order to show cause signed December 2, 2019 and the affirmation and exhibits submitted in support thereof; there being no opposition to the application; and due deliberation; plaintiff's motion for leave to enter judgment against defendants, to compel defendants' payment of a settlement and to grant plaintiff interest, costs and disbursements is granted in part.

Plaintiff asserts that defendants have failed to timely tender the settlement amount of \$35,000.00, which was permitted to be paid in seven bi-weekly installments of \$5,000.00, the final installment to be paid on October 30, 2019.¹ On or about July 9, 2019, plaintiff mailed a release and stipulation of discontinuance to defendants. Defendants paid only the first installment, on or about August 5, 2019, and made no other payments.

Pursuant to CPLR 5003-a(a), a settling defendant "shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing the action executed on behalf of the settling plaintiff." Payment must be timely *made*, but not necessarily *received*, within the statutory time (*see In re Zeeshan v Brown*, 2001 NY Slip Op 40249[U] [App Term 1st Dept 2001]). Should the settling defendant fail to timely pay all sums due, plaintiff may enter judgment against the

¹ Neither plaintiff nor defendants submit the agreement; however, they do not dispute the terms of the agreement.

settling defendant, without notice, “for the amount set forth in the release, together with costs and lawful disbursements, and interest on the amount set forth in the release from the date that the release and stipulation discontinuing action were tendered” (CPLR 5003-a[e]).

The only exclusions to the applicability of CPLR 5003-a are settlements subject to article seventy-four of the insurance law and future installment payments to be paid pursuant to a structured settlement agreement (*see* CPLR 5003-a[f]). Accordingly, CPLR 5003-a applies to the installment-payment settlement at issue here (*see Kimmel v State of N.Y.*, 29 NY3d 386, 394 [2017] [“Where the legislature has addressed a subject and provided specific exceptions to a general rule -- as it has done here -- the maxim *expressio unius est exclusio alterius* applies”]; *Matter of Mayfield v Evans*, 93 AD3d 98, 106 [1st Dept 2012] [“An enumerated list warrants an irrefutable inference that omitted items were intentionally excluded”]). Furthermore, the parties did not purport to exclude their agreement from the reach of CPLR 5003-a (*see Cunha v Shapiro*, 42 AD3d 95 [2d Dept 2007]).

Defendants do not contest their failure to timely pay the settlement amount or plaintiff’s entitlement, in the abstract, to the entry of judgment therefor.

CPLR 5003-a does not appear to contemplate a settlement to be paid in installments, and decisional law does not offer much guidance as to when it is appropriate to enter judgment upon unpaid installments. Nevertheless, the language of the statute is unqualified, and appears to permit entry of judgment immediately upon untimely payment.

Although CPLR 5003-a(3) permits entry of judgment in the full settlement amount of \$35,000.00 as stated in the release, there is authority that judgment may be entered on the unpaid amount (*see Pruss v Infiniti of Manhattan, Inc.*, 2020 NY Slip Op 00229 [1st Dept 2020]), and plaintiff’s counsel has requested same in the motion. Acceptance of partial payment does not

preclude plaintiff from entering judgment pursuant to CPLR 5003-a (*see Hadier v Remington Place Assocs., LLC*, 302 AD2d 428 [2d Dept 2003]), and from collecting interest on the full settlement amount (*see Mann v All Waste Sys.*, 293 AD2d 656 [2d Dept 2002], *lv den* 98 NY2d 610 [2002]) as per the statute.

The primary issue is the date from when interest should be calculated. Defendants assert that because they missed the payments due on and after August 21, 2019, interest should be calculated not from July 9, 2019, the date plaintiff mailed the release and stipulation of discontinuance, but from September 11, 2019, 21 days after the first missed payment. CPLR 5003-a(e) permits collection of interest “from the date that the release and stipulation discontinuing action were tendered,” and defendants provide no legal authority for their suggestion that interest may be calculated differently, even where the settlement contemplates payment in installments.

“Tender,” for purposes of CPLR 5003-a, means “to personally deliver or to mail, by registered or certified mail, return receipt requested” (CPLR 5003-a[g]). “Where, as here, the release and stipulation of discontinuance are tendered by [certified] mail, the 21-day period is measured from receipt of the documents” (*Klee v Americas Best Bottling Co., Inc.*, 76 AD3d 544, 545 [2d Dept 2010]; *see also Leipold v Arnot Ogden Med. Ctr.*, 46 AD3d 1299 [3rd Dept 2007]). The motion record does not disclose when defendants received the release and stipulation; however, both plaintiff and defendants confirmed by email to the chambers of the undersigned on January 15, 2020 that the certified mailing containing the release and stipulation was received on July 12, 2019. Accordingly, interest shall be calculated from that date.

Defendants also oppose those aspects of the motion seeking recovery of costs, disbursements and legal fees. CPLR 5003-a(e) permits plaintiff to recover costs and lawful

disbursements, but nothing in CPLR 5003-a permits plaintiff to recover attorney's fees (*see Abulayua v City of N.Y.*, 2019 NY Slip Op 30935[U] [Sup Ct, N.Y. County 2019]), which are incidents of litigation and not recoverable unless authorized by agreement, statute or court rule (*see A. G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1 [1986]). Plaintiff cites no authority warranting an award of counsel fees.

Because plaintiff also moves to compel defendants' payment of the outstanding settlement amount, entry of judgment is granted in the alternative.

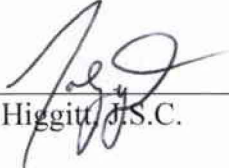
Accordingly, it is

ORDERED, that plaintiff's motion for leave to enter judgment against defendants, to compel defendants' payment of a settlement and to grant plaintiff interest, costs and disbursements is granted solely to the extent that if defendants do not tender to plaintiff the unpaid balance within 30 days after service of a copy of this order with written notice of its entry, plaintiff may enter judgment in accordance with CPLR 5003-a(e) in the amount of \$30,000.00 plus costs in the amount of \$400.00 (*see* CPLR 8201), disbursements in the amount as set forth in the schedule annexed to the motion at Exhibit 3 (*see* CPLR 8301[a]), and interest from July 12, 2019; and it is further

ORDERED, that the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: January 17, 2020



John R. Higgitt, J.S.C.