

Matter of Rombom v Razzaq
2020 NY Slip Op 35003(U)
August 19, 2020
Supreme Court, Queens County
Docket Number: Index No. 701709/2020
Judge: Pam Jackman Brown
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NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Short Form Order

Present: Hon. Pam Jackman Brown, JSC

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In the Matter of

Index No.: 701709/2020

**DR. HOWARD M. ROMBOM a/a/o LINDA
BANKS; CHAR-KEM MEDICAL DIAGNOSTIC
TTR, P.C. a/a/o PREMWATTIE BISSONDAYAL
and AIR PLUS SURGICAL SUPPLY, INC. a/a/o
TERRIEL VADEN,**

Motion Date: 7/20/2020

Mot. Seq. No.: 001

FILED

Petitioners,

8/20/2020

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-against-

**ALIA RAZZAQ, Clerk of the Civil Court of the
City of New York**

**COUNTY CLERK
QUEENS COUNTY**

Respondent.

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The following numbered papers read on this application by petitioners in an Article 78 proceeding to compel respondent to enter judgments in the form proposed, including a calculation of compound prejudgment interest, in three cases previously commenced in the Civil Court of the City of New York, Queens County.

	<u>PAPERS E-FILE NUMBERED</u>	
	Papers	Exhibits
Notice of Petition-Petition-Affidavits-Exhibits Annexed	1 - 3	4 - 19
Answer-Affidavits-Exhibits	20	21 - 29

Upon the foregoing papers it is adjudged that the petition is denied, and the proceeding is dismissed.

Petitioners Dr. Howard M. Rombom a/a/o Linda Banks (Rombom), Char-Kem Medical Diagnostic TTR, P.C. a/a/o Premwattie Bissondayal (Char-Kem), and Air Plus Surgical Supply, Inc. a/a/o Terriel Vaden (Air Plus) accepted assignment for charges for medical care rendered or supplies provided to their assignors for injuries resulting from motor vehicle accidents and directly billed the insurance companies responsible for payment of the assignors' no-fault benefits. Following the insurers' failure to make payment within 30 days of the submission of the bills, petitioners each commenced an action pursuant to Insurance Law § 5106(a) against the particular responsible insurer to recover the amount of the overdue bills owed to that assignee together with interest calculated at the rate of two percent per month. The three actions were commenced in the New York City Civil Court, Queens County from 1995 to 2002 and the plaintiffs therein obtained index numbers as follows: Rombom, 22849/95; Char-Kem, 66148/02; and Air Plus, 76066/01.

This Article 78 proceeding in the nature of mandamus arises out of the separate attempts by petitioners to have judgments entered by the clerk of the Civil Court in connection with the aforementioned actions. With regard to the actions brought by Rombom and Air Plus, the proposed judgments submitted were based upon purported settlements of the respective actions, while the application by Char-Kem was premised on the defendant insurer's default at the trial of the action. Petitioners contend that the clerk improperly rejected the proposed judgments, arguing that they were entitled to the entry of judgment pursuant to CPLR 5003-a and the calculation of interest pursuant to CPLR 5002.

In her answer to the petition, respondent has raised as an affirmative defense the objection in point of law that the proceeding is time-barred. (CPLR 7804[f].) A proceeding in the nature of mandamus to compel pursuant to CPLR Article 78 is governed by a four-month statute of limitations which begins to run "after the respondent's refusal, upon the demand of the petitioner . . . to perform its duty." (CPLR 217[1]; see *Matter of Thomas v. New York City Employees' Retirement Sys.*, 183 AD3d 898 [2d Dept 2020].) The proposed judgment submitted by Rombom was rejected by the clerk on February 14, 2017. The submission by Char-Kem was rejected on September 4, 2013. The clerk rejected the proposed judgment submitted by Air Plus on July 24, 2017. Inasmuch as this proceeding was not commenced until January 30, 2020, it is barred by the applicable statute of limitations. (*Id.*)

Furthermore, as also asserted as an affirmative defense by respondent (CPLR 7804[f]), the claim Char-Kem asserts based upon the clerk's action in 2013 has been

rendered moot by the clerk's acceptance of a subsequently submitted proposed judgment and the entry of judgment in Char-Kem's action on June 24, 2014.

In any event, the extraordinary remedy of mandamus would not be available here because petitioners have failed to establish a clear legal right to the relief sought or that the relief sought involves the performance of purely ministerial acts. (*See Matter of Legal Aid Socy. of Sullivan County v. Scheinman*, 53 NY2d 12, 16 [1981]; *Matter of Futia v. Town of N. Castle*, ___ AD3d ___, 2020 NY Slip Op 04476 [2d Dept 2020]; *Matter of Berger v Cohen*, ___ AD3d ___, 2020 NY Slip Op 4159 [2d Dept 2020].) Petitioner Rombom was not entitled to entry of judgment by the clerk since his Civil court action had been terminated by the filing of a stipulation of discontinuance on March 9, 1998, so that there was no pending action in which judgment could be entered. (*See Estate of Abrams & Seaview Assn. of Fire Is. N.Y., Inc.*, 151 AD3d 809 [2d Dept 2017]; *Galasso, Langione & Botter, LLP v. Liotti*, 127 AD3d 688 [2d Dept 2015]; *Matter of Serpico*, 62 AD3d 887 [2d Dept 2009]; *Moshe v. Town of Ramapo*, 54 AD3d 1030 [2d Dept 2008].) Nor do petitioners Rombom and Air Plus have a clear right under CPLR 5003-a to the clerk's entry of judgment against the insurers in the amount of purported settlement agreements with the insurers in the absence of proof of the terms of those settlements.

Under the statutory scheme of CPLR 5003-a, if in a settling defendant fails to pay all sums due to a settling plaintiff within 21 days of tender by the plaintiff to the defendant of a duly executed release and a stipulation discontinuing the action executed on behalf of the settling plaintiff, the plaintiff may, without further notice, pursue the entry of a judgment in the amount of the settlement, plus interest, costs, and disbursements. (CPLR 5003-a [a], [e].) A judgment predicated upon a defendant's failure to make timely payment under this provision may not be entered, however, where the settling plaintiff has tendered a defective general release or a defective stipulation of discontinuance following the settlement. (*See Kumar v. Demasi*, 170 AD3d 986, 988 [2d Dept 2019].) The determination as to whether the documents tendered by plaintiff comply with the requirements of CPLR 5003-a cannot be made without reference to the terms of the agreement. (*Id.*) Furthermore, to be enforceable against a party, a settlement agreement must be in writing and signed by that party or the party's attorney or made between counsel in open court. (CPLR 2104; *see Bonette v. Long Is. Coll. Hosp.*, 3 NY3d 281 [2004]; *Headley v. City of New York*, 115 AD3d 804 [2d Dept 2014].) Thus, petitioners were required to provide the documentation requested by the clerk to be entitled to entry of judgment. (*See Kumar*, 170 AD3d at 988; 10 NY Civ. Prac: CPLR ¶¶ 5003-a.01, 5003-a.04.)

Furthermore, inasmuch as Char-Kem's application was based not upon a settlement but a default in appearing for trial, entry of judgment was not governed by CPLR 5003-a but by CPLR 3215. As such, Char-Kem had no clear right to the entry of

judgment without submitting the proof required by CPLR 3215(f) as directed by the clerk. (CPLR 3215[a].)

Finally, petitioners have not demonstrated that the part of their application that is to compel the clerk to calculate prejudgment interest as compound interest involves the performance of a purely ministerial act. While it is the clerk’s duty to calculate interest and include it in the judgment (CPLR 5002), and the interest rate for actions governed by Insurance Law § 5106 is fixed by that statutory provision at two percent per month, the calculation of interest as compound interest in these cases is not clearly required by statute or by the regulations promulgated to enforce the statute. (*Cf. Kiker v. Nassau County*, 85 NY2d 879, 881 [1995].) The controlling regulation, in effect since April 2, 2002, provides that the interest to be awarded in a judgment pursuant to section 5106 shall be calculated as simple interest. (11 NYCRR § 65-3.9[a].) Petitioners’ demand that the clerk apply a predecessor regulation (11 NYCRR § 65.15[h][1]) which was in effect at the time of their assignors’ accidents to include a calculation of compound prejudgment interest, in the absence of a court order to do so, would require a legal analysis and an exercise of judgment or discretion by the clerk, not the performance of a ministerial duty. (*See generally Matter of Meyer v. Hogan*, 84 AD3d 1383 [2d Dept 2011].)

Accordingly, the petition is denied, and this proceeding is dismissed.

Dated: August 19, 2020
Jamaica, New York



HON. PAM JACKMAN BROWN, J.S.C

FILED

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**COUNTY CLERK
QUEENS COUNTY**