

Shmueli v NRT N.Y., Inc.
2012 NY Slip Op 31455(U)
May 22, 2012
Sup Ct, NY County
Docket Number: 104824/03
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

SARIT SHMUELI,
Plaintiff,

INDEX NO. 104824/03

- against -

MOTION SEQ. NO. 032

NRT NEW YORK, INC. d/b/a
THE CORCORAN GROUP,
Defendant.

The following papers, numbered 1 to 4 were read on this motion by defendant.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1

FILED

Cross-Motion: Yes No

MAY 31 2012

Motion Sequences 032 and 031 are hereby consolidated for purposes of disposition.

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In Motion Sequence 032, NRT New York, Inc. d/b/a The Corcoran Group (defendant) moves for the following relief: (1) pursuant to CPLR 5519, to reduce the amount of the appeal bond to reflect the decision of the Appellate Division, First Department which modified the judgment entered against the defendant in this action by vacating the \$1.2 million punitive damage award (*see Shmueli v NRT N.Y., Inc.*, 68 AD3d 479 [1st Dept 2009], *lv denied* 15 NY3d 702 [2010]); and (2) pursuant to CPLR 5003, to eliminate the post judgment statutory interest after August 17, 2010, the date that defendant offered to pay Sarit Shmueli (plaintiff) in partial satisfaction of the judgment (*see* Notice of Motion, exhibit E). Plaintiff, *pro se*, files an affidavit in opposition to defendant's motion. The law firm of Morris, Duffy, Alonso & Faley (Morris Duffy) former attorneys of record for plaintiff takes no position on the reduction of the bond, but files in opposition to the portion of defendant's motion seeking to eliminate the post judgment statutory interest from August 17, 2010 to the current date. Morris Duffy argues that their outstanding 1/3 fee payment should include the statutory interest to date, on the basis that

defendant's offer to pay letter, dated August 17, 2010, was defective and because plaintiff's appeal of their fee dispute issue was not completed until May 2011 (*see Shmueli v NRT N.Y., Inc.*, 78 AD3d 595 [1st Dept 2010], *lv denied* 16 NY3d 712 [2011]).

In Motion Sequence 031, Morris Duffy moves by Order to Show Cause seeking to lift the stay of the remainder of the balance of the judgment proceeds, which equals the sum of \$24,838.98 in disbursements and 33 1/3 percent of the total judgment proceeds, plus interest. Morris Duffy also seeks an order directing the Clerk of the Court to release said monies as duly owed attorneys fees and disbursements. Plaintiff and defendant submit opposition to Morris Duffy's motion.

Motion Sequence 032

In July of 2009, the defendant posted an appeal bond in the amount of \$2.375 million dollars. Subsequently, in a decision and order dated December 8, 2009, the Appellate Division, First Department modified the judgment awarded to plaintiff to the extent that it vacated the \$1.2 million dollar award of punitive damages (*see Shmueli v NRT N.Y., Inc.*, 68 AD3d 479 [1st Dept 2009], *lv denied* 15 NY3d 702 [2010], *supra*). Currently before the Court is defendant's motion seeking to reduce the amount of the appeal bond in accordance with the vacatur of the punitive damages award. It is appropriate for the Court to reduce the amount of the bond so as to reflect the decision of the Appellate Division, First Department, and as such this portion of defendant's motion is granted (*see* CPLR 5519).

The portion of defendant's motion, pursuant to CPLR 5003, seeking to eliminate the post judgment statutory interest subsequent to the date that defendant offered to pay plaintiff her portion of the judgment, is granted. "It is well settled that 'interest is not a penalty. Rather it is simply the cost of having the use of another person's money for a specified period,' and 'is intended to indemnify successful plaintiffs 'for the nonpayment of what is due to them'" (*Colgate v Broadwall Mgt. Corp.*, 51 AD3d 437, 437-38 [1st Dept 2008], citing *Love v State of New York*,

78 NY2d 540, 544 [1991]). A money judgment bears interest from its date of entry and continues to accrue at the statutory rate until it is satisfied unless the judgment creditor engages in dilatory or inequitable conduct (*see Colgate*, 51 AD3d at 438; CPLR 5003).

"Equitable considerations may result in an estoppel which can toll the accrual of interest" (*Matra Bldg. Corp. v Kucker*, 19 AD3d 496, 496 [2d Dept 2005]; *see also Feldman v Brodsky*, 12 AD2d 347, 351 [1st Dept 1961], *affd* 11 NY2d 692 [1962] ["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. . . by himself taking an appeal"]).

Defendant attempted to tender payment to plaintiff by letter in partial satisfaction of the judgment on August 17, 2010, and plaintiff refused (*see* Notice of Motion, exhibit E). Plaintiff's refusal of tender when defendant has been ready and willing to pay resulted in an estoppel, tolling the accrual of interest as defendant has not been responsible for the delay (*see e.g. ERHAL Holding Corp. v Rusin*, 252 AD2d 473 [2d Dept 1998]).

The Court observes that defendant has filed the herein motion without compliance with the requirement of Rule 130 of the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR §130-1.1-a). Again, the Court hereby places all parties on notice that if they file papers or file a motion, the parties must adhere to the Rules of the Chief Administrator. Failure to comply with the terms of this order will subject the parties to penalties of Rules of the Chief Administrator § 130-1.1.

Motion Sequence 031

Morris Duffy's motion seeking to lift the stay of the remaining balance of the judgment proceeds and order payment of the remainder of the balance of the judgment proceeds, which equals the sum of \$24,838.98 in disbursements and 33 1/3 percent of the total judgment proceeds, plus interest, is granted as follows. In support of its motion, Morris Duffy cites to the

Appellate Division, First Department decision which affirmed Special Referee Crespo's determination that Morris Duffy is entitled to a charging lien fixed at 33 1/3 percent upon the judgment proceeds in the herein action, consistent with Morris Duffy's retainer agreement with plaintiff (see *Shmueli v NRT N.Y., Inc.*, 78 AD3d 595 [1st Dept 2010], *lv denied* 16 NY3d 712). As the Court has already determined that defendant must pay interest from the date of judgment until August 17, 2010, Morris Duffy is entitled to \$24,838.98 in disbursements, as well as 33 1/3 percent of the judgment proceeds with interest at the statutory rate until August 17, 2010.

Upon the foregoing papers, it is,

ORDERED that the portion of defendant's motion (Motion Sequence 032) to reduce the amount of the appeal bond to reflect the decision of the Appellate Division, First Department is granted; and further,

ORDERED that the portion of defendant's motion (Motion Sequence 032) pursuant to CPLR 5003 eliminating the post judgment statutory interest from August 17, 2010 to date is granted; and it is further,

ORDERED that the portion of Morris Duffy's motion (Motion Sequence 031) lifting the stay on the remainder of the balance of the judgment proceeds is granted; and it is further,

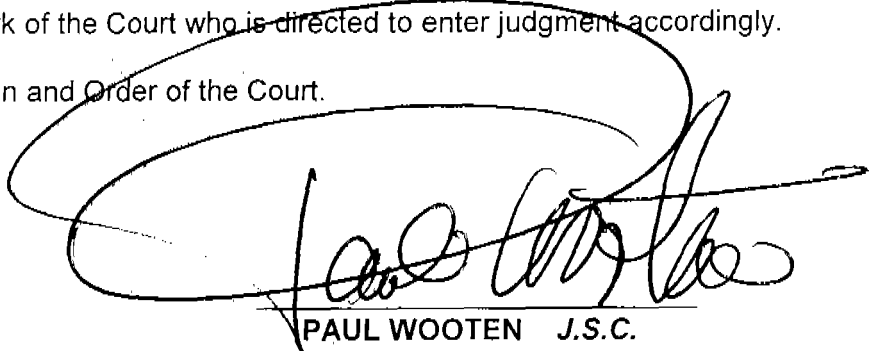
ORDERED that the portion of Morris Duffy's motion (Motion Sequence 031) seeking an order directing the Clerk of the Court to release the sum of \$24,838.98 in disbursements plus 33 1/3 percent of the total judgment proceeds, plus statutory interest is granted to the extent that Morris Duffy is granted the total sum of \$24,838.98 in disbursements plus 33 1/3 percent of the total judgment proceeds together with interest at the statutory rate from the date of judgment until August 17, 2010, as calculated by the Clerk of the Court, and the Clerk of the Court is directed to release said monies to Morris Duffy; and it is further,

ORDERED that the parties are directed to comply with Rule 130-1.1-a of the Rules of

Chief Administrator, and failure to do so will subject the parties to penalties of Rule 130-1.1, including an order of dismissal; and it is further,

ORDERED that Morris Duffy is directed to service a copy of this Order with Notice of Entry upon all parties, and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



Dated: 5-22-2010

PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED

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