

Asset Acceptance, LLC v. Otis, No. 544-9-06 Wncv (Teachout, J., Apr. 9, 2007)

[The text of this Vermont trial court opinion is unofficial. It has been reformatted from the original. The accuracy of the text and the accompanying data included in the Vermont trial court opinion database is not guaranteed.]

**STATE OF VERMONT
WASHINGTON COUNTY**

ASSET ACCEPTANCE, LLC,)	
Plaintiff,)	Washington Superior Court
)	Docket No. 544-9-06 Wncv
v.)	
)	
LINDA L. OTIS,)	
Defendant.)	

ENTRY ORDER

In this collection case, Plaintiff filed a complaint seeking \$6,423.65 in principal, together with pre-judgment interest, costs of filing the case, and reasonable attorney’s fees. Defendant Linda Otis filed an Answer acknowledging the debt in the principal amount of \$6,423.65 and requesting to pay in installments. Specifically, she wrote, “If you could write back to me with a monthly payment and a address to send it to, I (Linda Otis) will be willing to pay it all back.”

On November 13, 2006, Plaintiff’s attorney filed with the court a Stipulation to Judgment and proposed Judgment Order. The Stipulation to Judgment was signed by Linda Otis, and stipulated to a judgment of \$9,255.10, consisting of principal of \$6,423.65, costs of \$263.40, and pre-judgment interest of \$2,568.05.

It further provided in paragraph 2: “Defendant shall pay the Plaintiff said Judgment amount at the rate of \$65.00 per month beginning November 20, 2006, and shall continue each and every month thereafter until said agreed upon amount has been paid in full.”

The proposed Judgment Order includes the following provision: “This Judgment is based upon a stipulated payment agreement. Execution may be stayed so long as the payments as described in the underlying Stipulation are made in accordance with the agreement. . . .”

Paragraph 4 of the Stipulation provides: “That Plaintiff may review the Defendant’s financial status in six (6) months to determine if monthly payments can be increased.”

Because the meaning of paragraph 4 is not clear from its language, the court scheduled a hearing to review the terms of the stipulation. Both parties were sent a Notice of Hearing identifying that its purpose was “a review of the stipulation filed with the court.”

The hearing was held on February 12, 2007. Attorney Alan Bjerke was present on behalf of Plaintiff. Defendant Linda Otis did not appear. The court identified its concerns about the terms of the stipulation.

Attorney Bjerke readily acknowledged that Plaintiff’s understanding of paragraph 4 is that Plaintiff can unilaterally increase the amount of the monthly payments that Defendant is required to pay to stay execution of the judgment, without returning to court for a modification of the Judgment. Attorney Bjerke stated his belief that Defendant understands the paragraph to have this meaning also. Attorney Bjerke uses this form of stipulation for a large number of similar collection cases. He made several arguments in support of his request that the court enter judgment based on the stipulation using the proposed form of judgment, which had been sent by mail to Defendant with the stipulation.

Attorney Bjerke acknowledged that unless payments were increased over \$65.00, Defendant would never pay off the debt, as monthly interest exceeds \$65.00. He also acknowledged that if Plaintiff unilaterally increased the amount due, it could seek to freeze a bank account through trustee process, without a prior court hearing, for failure to pay the higher amount, even if Defendant made regular monthly payments at the \$65.00 level.

After hearing the arguments, the court took the matter under advisement.

Unlike an ordinary settlement agreement and voluntary dismissal, a consent judgment “embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as[] a judicial decree that is subject to the rules generally applicable to other judgments and decrees.” *Long v. State of Maryland*, 807 A.2d 1, 7 (Md. 2002) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 368 (1992)). “[A] consent judgment is a judgment and an order of court. Its only distinction is that it is a judgment that a court enters at the request of the parties.” *Jones v. Hubbard*, 356 Md. 513, 528, 740 A.2d 1004, 1013 (1999). “In order to have a consent judgment, a party must clearly and unmistakably give consent.” 46 Am. Jur. 2d Judgments § 211, at 539. This court has reviewed the proposed judgment under this standard.

There are several reasons why this court cannot approve the stipulation. First, the terms of paragraph 4 are not clear enough to show a meeting of the minds. While

Attorney Bjerke understands paragraph 4 to mean that Plaintiff can unilaterally decide to increase the monthly payments, the actual language does not unambiguously say that. It suggests that Ms. Otis agrees to let Plaintiff review her financial status (without specifying what that consists of) in six months, but it does not state that Ms. Otis agrees that Plaintiff can make its own decision about what the payment should be after such review.

The court cannot conclude that the language is specific enough to show Ms. Otis's consent to the unilateral increase of monthly payments. Moreover, the overall agreement suggests that as long as Ms. Otis pays \$65.00 per month, Plaintiff will not take other enforcement action, but Plaintiff is clear that it believes it has the right to increase payments and proceed to execution for failure to make payments in the increased amount. It would be unfair and unreasonable for the court to put its stamp of approval on the proposed judgment, knowing that Plaintiff believes that its language permits it to increase payments unilaterally and proceed to execution if the higher payment is not made, when the language Ms. Otis agreed to does not unambiguously support that interpretation. The reasonable interpretation she would have from the language is that execution will be stayed as long as she pays \$65.00 per month.

Additionally, monthly interest on the principal plus costs is \$66.87 ($\$6,423.65 + \$263.40 = \$6,687.05 \times 12\% \div 12 = \66.87). Ms. Otis's Answer states that it is her desire to enter into a payment plan whereby she would "pay it all back." There is nothing in the stipulation that has been filed that shows she is aware that, under these terms, she would never be able to pay it all back, and that, on the contrary, the debt would simply continue to grow, despite regular monthly payments of \$65.00.

The court is mindful of Attorney Bjerke's argument that Plaintiff's proposal offers Defendant greater protection than she might have if the parties simply stipulated to an amount of judgment alone, as under that scenario, Plaintiff could proceed to execution at any time. That is for Ms. Otis to consider, however, assuming she has a clear understanding of the terms of Plaintiff's proposal. The language is not clear enough for the court to conclude that she understood its terms in the same way that Plaintiff does. The court is not obliged to approve a stipulation that is unreasonable for the reason that there are worse alternatives.

The showing of Ms. Otis's consent consists exclusively in her signature on the ambiguously worded Stipulation to Judgment. As described above, however, Plaintiff included a term on the proposed Judgment Order as well. Nothing in the record suggests Ms. Otis's consent to the additional language in the Judgment Order other than Attorney Bjerke's representation that Defendant received a copy of it with the Stipulation.¹ That is not sufficient in the circumstances of this case.

¹ Moreover, the language on the proposed judgment order is not clear. At first blush, it implies that execution *will* be stayed so long as Ms. Otis makes payments according to the agreement. However, it says execution *may* be stayed so long as payments are made, implying that Plaintiff retains complete discretion to execute regardless of payments complying with the agreement.

Having concluded that it will not approve the stipulation as filed, the court will provide additional time for a new agreement to be reached.

While the court may either approve or deny the issuance of a consent decree, generally it is not entitled to change the terms of the agreement stipulated to by the parties If the court discerns a problem with a stipulated agreement, it should advise the parties of its concern and allow them an opportunity to revise the agreement.

United States v. Colorado, 937 F.2d 505, 509 (10th Cir. 1991) (citations omitted), quoted in *Long*, 807 A.2d at 10.

The court therefore now provides the parties with an opportunity to submit a revised stipulation and related proposed judgment order that does not include the unclear language of paragraph 4 and other identified ambiguities. If none is submitted by May 1, 2007, the court will schedule a final hearing on the merits.

Dated at Montpelier, Vermont this ___ day of April 2007.

Mary Miles Teachout
Superior Court Judge