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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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LISA MAYER, DEBRA MAYER, DABA, INC. & ABBA, INC.,

Index No. 603234/04

DECISION & ORDER

Plaintiffs,

-against-

ALBERTO VILAR, GARY TANAKA, AMERINDO INVESTMENT ADVISORS, INC. (U.S.), AMERINDO INVESTMENT ADVISERS, INC. (PANAMA),

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequences 009 and 010 are consolidated for disposition.

Motions before the Court

Defendant Gary Tanaka moves (Seq 009) to vacate or modify a judgment entered on October 31, 2011 (Judgment) in the amount of $11,224,936.46, with interest at 9% per annum from January 1, 2004. Doc 40.[1] Defendant Alberto Vilar (collectively, with Tanaka, Defendant-Movants) also moves (Seq 010) to modify the Judgment. Both motions were filed in 2014, more than two years after the Judgment was entered.

The grounds for the motions are that: 1) plaintiffs concealed payments they received from defendant Amerindo[2] between January 2004 and January 2005, totaling $1,460,728.74; and 2) interest was improperly awarded because Vilar and Tanaka were not in control of funds with which to pay plaintiffs from May 26, 2005 to the present, due to the seizure of their assets by the

[1] "Doc" refers to the New York State Electronic Filing System number.
[2] "Amerindo" refers to Amerindo Investment Advisors, Inc. (U.S.) and Amerindo Investment Advisors, Inc. (Panama).

federal government. Tanaka's motion adds the additional ground that: 1) he was not served with the motion that led to the Judgment; and 2) that plaintiffs agreed to a settlement.

Plaintiffs oppose and cross-move for an award of attorneys' fees, costs, and/or sanctions, on the ground that the motions are frivolous as defined in 22 NYCRR 130-1.1.

Factual Background

The facts relating to this action and the Judgment entered thereon are set forth fully in this court's decision and order, dated August 4, 2011 (Decision), with which the reader's familiarity is assumed. Briefly, plaintiffs brought this action to recover, *inter alia*, for breach of contract relating to a Guaranteed Fixed Rate Deposit Account (Deposit Account), the first cause of action in the amended complaint. Doc 3. The Deposit Account was a fixed-term investment fund, with a guaranteed interest rate, that was issued by Amerindo and guaranteed by all of the defendants. In 2001, plaintiffs renewed their investment in the principal sum of $11,066,713.44 for three years, with an interest rate of eleven percent and a maturity date of December 31, 2003 (Maturity Date). Amerindo began defaulting on interest payments in October 2002. On November 7, 2003, plaintiffs notified Amerindo that they would redeem the Deposit Account on the Maturity Date. Amerindo refused to return their money.

As a result of the failure of the Deposit Account investment vehicle, in 2008, Vilar and Tanaka were convicted of, *inter alia*, federal securities violations, which included allegations concerning the Mayer plaintiffs in this action.[3] Defendant-Movants were sentenced to prison. They also were sued in a civil action by the Securities and Exchange Commission (SEC) and were subjected to forfeiture proceedings.

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[3] The plaintiffs Daba, Inc. and Aba, Inc., are entities established by the Mayers, which received payments from Amerindo.

In June, 2010, Tanaka's attorneys, DePeteris & Bachrach, LLP, moved to be relieved as counsel. Doc 16. The notice of motion listed Tanaka's address as a federal correctional institution in San Pedro, California.[4] The motion was granted on the condition that the outgoing attorneys were to serve upon Tanaka a copy of the order with notice of entry and a notice to obtain substitute counsel. Doc 21. Unfortunately, Tanaka's attorneys did not address the notice of entry to the San Pedro Address. Docs 22-26. The affidavit of service says it was mailed to San Francisco. Doc 24. Other than naming the wrong City, the address was the same as the San Pedro Address, including the zip code (San Francisco Address). Compare Docs 16 & 25.

On November 3, 2010, plaintiffs moved for summary judgment on, *inter alia*, the first cause of action. Doc 28. The affirmation of service says that on November 3, 2010, the papers in support of the motion were mailed to Tanaka at the San Francisco Address, and to the attorneys for Vilar and Amerindo. Doc 32. In his moving affidavit, Tanaka averred that he was incarcerated from "2010 to October 2012", that he "did not receive Mayers court papers" during that time, although he looked at some of the papers during a year when he was out on bail, and that in 2011, while incarcerated, he learned that the Mayers "had taken steps to get a judgment". 1/26/14 Affidavit of Gary Tanaka (Tanaka Aff), ¶¶ 31 & 48.[5] Tanaka never explicitly says in his moving affidavit that he was not served with the motion for summary judgment made on November 3, 2010 or that he was incarcerated on that date. However, in his reply affidavit, for

[4] The full address was: Gary Tanaka, No. 57819-054, FCI Terminal Island, Federal Correctional Institution, P.O. Box 3007, San Pedro, CA 90731 (San Pedro Address).

[5] Tanka submitted his motion pro se and has not consented to e-filing. However, he admitted that Vivian Shevitz, Esq., an attorney, helped him with his moving affidavit. Tanaka Aff, ¶35, Subsequently, Ms. Shevitz appeared for him at oral argument and e-filed an affirmation on his behalf. Doc 105 (4/1/14 Tr), p 31 & Doc 111.

the first time, he squarely denies receipt. 2/12/14 Tanaka Reply Affidavit (Tanaka Reply), ¶¶ 9-11.

In her affidavit in support of the motion for summary judgment, Lisa Mayer averred:

> In August 2004, Amerindo issued a Statement of Account which confirmed that it owed us $11,224,936.46 on our Guaranteed Deposit as of June 30, 2004 (Exhibit Q). This statement understates the unpaid interest that had accrued on the Guaranteed Deposit. Specifically, the Guaranteed Deposit earned interest at 11% per annum, which is $1,217,338.00 per year, and $3,652,014.00 for the three-year term of the Deposit. Amerindo paid us $1,107,777.97 in each of 2001 and 2002, and only $530,260.57 in 2003, for a total of $2,745,816.51, leaving unpaid interest in the amount of $906,197.49. Therefore, the total amount Amerindo owed us as of January 1, 2004 was $11,972,910.93 ($11,066,713.44 + $906,197.49)....
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> The only money we have received from Amerindo since January 1, 2004 are: interest payments in 2004 totaling $1,003,867.26; and $150,000 that was distributed to us in 2009 as part of an agreement that our attorneys and the government's attorneys negotiated as part of the criminal trial. This $150,000 payment was an "advance" against the restitution that the court in the criminal action was about to order.

Doc 29, ¶¶ 25 & 26 & Ex Q. Lisa Mayer did not say that any payments were made by Amerindo in 2005. The difference between plaintiffs' calculation of damages and the Amerindo Statement was $747,974.47. The Decision noted plaintiffs' disagreement with Amerindo's August 2004 statement (Amerindo Statement) and that the Mayer's received an additional $150,000 in advance restitution. Doc 33, pp 3-4 & fn 1.

The motion for summary judgment on the first cause of action relating to the Deposit Account was granted on default by the Decision, dated August 4, 2011 and e-filed the next day. Doc 33. The Decision directed that the amount of the judgment to be entered was the value of the Deposit Account as of June 30,2004 and admitted to be due on the Amerindo Statement, not the higher amount sought by plaintiffs, with interest at the statutory rate from January 1, 2004,

i.e., after the Maturity Date. *Id.* & Doc 29, Ex Q. The court did not order interest from the date of the alleged default in paying interest, i.e., October of 2002.

On September 2, 2011, plaintiffs' attorneys served the Decision with notice of entry by mail on Vilar's attorneys and on Tanaka at the San Pedro Address, but without his prisoner number. Doc 35. The Judgment was e-filed on October 31, 2011. Doc 40. Execution of the Judgment was stayed until final distribution of the monies held in a restitution fund in the criminal case, which still has not occurred. *Id.*

Notice of entry of the Judgment was not e-filed until February 10, 2014. Doc 75. It was e-filed as an exhibit to plaintiffs' current opposition and cross-motion for sanctions. However the affirmation of service of the Judgment with notice of entry states that it was served by mail on October 31, 2011, on the attorneys for Amerindo and Vilar, and on Tanaka at the San Pedro Address, again without the prisoner number. *Id.* Neither Vilar nor Tanaka appealed. Tanaka does not deny that he was served with the Judgment with notice of entry.

Tanaka and Vilar moved to vacate or modify the Judgment in January, 2014. The motions were prompted by a declaration of Neal Jacobson, dated November 22, 2013, filed in the SEC civil case.[6] Doc 69, Ex 2 ((Jacobson Declaration). Mr. Jacobson is an attorney for the SEC. The Jacobson Declaration states that between January 2004 and January 2005, Amerindo paid the Mayers $1,310,728.74 in nine separate payments. *Id*, ¶9 & Ex F thereto. Annexed to the Jacobson Declaration are nine wire transfer orders for payments to the Mayers, seven of which are signed by Tanaka as Vice President of Amerindo (collectively, Wire Transfers). *Id,*

[6] *SEC v Amerindo Investment Advisors Inc.*, 05 Civ 5231 (RJS) (SDNY).

Ex F. Mr. Jaocobson does not say whether the nine Wire Transfers represented principal or interest.

The difference between the Wire Transfers and the $1,003,867.26 in interest paid in 2004, as alleged in Lisa Mayer's affidavit is $306,861.48. The difference is approximately the amount of the one 2005 payment, $306,846.48. *Id.* In addition, two of the Wire Transfers, totaling $503,882.30, were made prior to the Amerindo Statement, on January 23 and June 23, 2004. *Id.* Excluding those payments, the Jacobson Declaration is proof that Amerindo paid the Mayers $806,846.48, less than interest sought by plaintiffs on the motion for summary judgment. However, as previously noted, the Judgment was based solely on the amount of the Amerindo Statement.

The alleged settlement agreement on which Tanaka relies consists of a letter, dated February 2, 2004 (Settlement Proposal), from his wife, Renata Tanaka (Renata) to Debra, Lisa and Dr. Mayer (their father). Tanaka Aff, ¶¶ 28-40 & Ex 6. There is no writing subscribed by plaintiffs agreeing to its terms, or an open court transcript, that memorialized the alleged settlement. The Settlement Proposal offered to redeem the Deposit Account over five years. *Id.* Tanaka says that at his criminal trial, Lisa Mayer admitted that she agreed to accept $50,000 per month. However, the transcript reflects that she said that she agreed to accept that amount as "a temporary solution". Further, Tanaka admits that the payments set forth in the Settlement Proposal were not made, although he blames the federal government's seizure of Amerindo's assets. Tanaka Aff, ¶40; Tanaka Reply, ¶33.

Discussion

A. Vilar's Motion

CPLR 5015(a) provides that a court may relieve a party from a judgment upon the grounds of, *inter alia*:

> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
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> 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
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> 3. fraud, misrepresentation, or other misconduct of an adverse party; or
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> 4. lack of jurisdiction to render the judgment or order.

In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice. *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 (2003).Vilar's motion is premised upon 5015(a)(2) and (3), i.e., newly discovered evidence and Lisa Mayers' alleged fraud, misrepresentation or misconduct. The Jacobson Declaration is not newly discovered evidence. It was based upon Amerindo's records from 2004 and 2005.

In addition, the alleged new evidence would not change the result, as required by 5015(a)(2). In awarding plaintiffs the full amount of the Amerindo Statement, plus interest, the court considered the advance restitution payment and the additional interest sought by the plaintiffs. Consequently, the court concluded that it was fairest to the defendants to award what they admitted was due on the Amerindo Statement as of June 30, 2004, with interest at the statutory rate from the date the Deposit Account should have been redeemed in full by Amerindo, i.e., the Maturity Date. Nothing offered on this motion would change the result because the Amerindo Statement was an admission of what was due, there was no dispute as to the Maturity Date, and it was a reasonable estimation of damages to consider the unpaid interest

and the restitution of $150,000 as a wash. *Dubiner's Bootery, Inc. v General Outdoor Advertising Co.*, 10 AD2d 923 (1st Dept 1960)(compensatory damages need not be calculated with mathematical certainty); *Dunkel v McDonald*, 272 AD 267 (1st Dept 1947), *aff'd* ,298 NY 586 (1948)(standard for computing damages is reasonable certainty); *Duane Jones Co. v Burke*, 306 NY 172, 188, 192 (1954)(damages may be estimated). The 11% interest claimed by plaintiffs was more than the $150,000, and, indeed, more than the 9% statutory interest, so there was no prejudice to defendants.

Further, there was no fraud, misrepresentation or other misconduct by plaintiffs that influenced the amount of the Judgment. Lisa Mayers disclosed that plaintiffs had received an advance restitution payment of $150,000 in 2009 from the federal court, and $1,003,867.26 in interest in 2004. As previously noted, the Wire Transfers reflect eight payments in 2004, plus one payment in 2005 in the amount of $306,846.48. As Amerindo's records, including the Wire Transfers, were unavailable to Tanaka and Vilar, due to the 2005 seizure of records by the federal government, they were unavailable to plaintiffs too. Most importantly, the principal amount of the Judgment was based on the Amerindo Statement, an admission. Therefore, the Judgment was not the product of anything Lisa Mayer said.

In addition, a motion to vacate a judgment on the ground of fraud, misrepresentation or other misconduct must be made within a reasonable time. *Bank of NY v Stradford*, 55 AD3d 765 (2d Dept 2008). Two years after entry of the judgment is not reasonable. *Id.* Here, Vilar's motion was filed more than two years after it was entered in October of 2011 and after his time to appeal had expired.

It was proper to award interest at the statutory rate of nine percent. The cases cited by Vilar stand for the proposition that interest is awarded to compensate the plaintiff for the loss of use of money. *Mohassel v Fenwick*, 5 NY3d 44, 51 (2005)("an award of interest is simply a means of indemnifying an aggrieved person"). CPLR 5001(a) provides that prejudgment interest is recoverable in an action for breach of contract. Subsection (b) provides that interest shall be computed from when the cause of action accrues, which is the date of breach in an action for breach of contract. *Village of Ilion v County of Herkimer*, 2014 NY LEXIS 902, 2014 NY Slip Op 2973 (Court of Appeals, May 1, 2014) (nor), citing CPLR 213(3). Where the contract contains no provision for a default interest rate, the statutory rate of nine percent is appropriate. *Brady v Zambrana*, 221 AD2d 171, 172 (1st Dept 1995); *Bruce Supply Corp. v D & M Plumbing & Heating Corp.*, 291 AD2d 525, 526 (2d Dept 2002); CPLR 5004. The Deposit Account had no default rate of interest.

Nor does the court agree with the argument that it is inequitable to award interest because Amerindo's assets were seized by the federal government. The seizure occurred because the defendants committed crimes against the Mayers and others. The inability to pay was brought about by the wrongdoing of Vilar and Tanaka. The inequity is that the Mayers have been waiting since 2004 for the money they invested in the Deposit Account because they were victims of the defendants' crimes.

The court is not persuaded that the Judgment should be vacated because other victims are entitled to restitution and the Judgment may give preference to the Mayers. The issue of how to distribute the funds available for restitution is not before me. The Judgment provides that it will

be reduced by the amount of restitution awarded to the Mayers by the federal Court. This court will not vacate a Judgment validly obtained to influence proceedings pending in federal court.

B. Tanaka's Motion

The arguments by Tanaka that mirror Vilar's are decided in the same way. Tanaka was served with notice of entry of the Judgment, did not appeal, and his time to appeal has expired. However, it is necessary to address his additional arguments that there was a settlement and that he was not served with the notice of motion.

The Settlement Proposal in Renata's letter is not enforceable. Tanaka admits that the alleged agreement was oral. Doc 111, ¶ 11. CPLR 2104 provides that a settlement is binding only when it is signed by the parties or their attorneys or put on the record in open court and then filed. An oral settlement agreement is not enforceable. *Medallion Chemical Corp. v Chemical Resources, Inc.*, 58 AD2d 808 (2d Dept 1977); *Gonyea v Avis Rent A Car System, Inc.*, 82 AD2d 1011 (3d Dept 1981). Here, there is no evidence that plaintiffs agreed to it. Nor was it carried out. While Tanaka points to some payments made after the Maturity Date, it is undisputed that defendants failed to make all of the payments in the Settlement Proposal.

Tanaka denies receipt of the motion papers that led to the Judgment. A motion that is not properly served must be denied. *Mitelman & Son Meat Processing, Inc. v Meat Packers & Butchers Supply Co.*, 272 AD2d 531 (2d Dept 2000). However, Tanaka failed to move to vacate the default within one-year of service upon him of a copy of the Judgment with notice of entry. CPLR 5015(a)(1). Although Tanaka's default may have been excusable, he waited more than two years to make the motion, which is an unreasonable delay. *Bank of NY v Stradford*, *supra*.

Tanaka also urges that the court lacked jurisdiction because of the lack of service of the motion. The court disagrees. Jurisdiction refers to the power of the court to rule on the subject matter before it. *Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203 (2013). This court had the power to rule on a motion for summary judgment in an action for breach of contract. CPLR 3212.

Plaintiffs' Cross-Motion for Sanctions

Under 22 NYCRR §130-1.1(a), "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . ." Conduct is frivolous under 22 NYCRR §130-1.1(c)(1) if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or if it is intended to harass. *644 BRDY Realty v 684 Owners Corp.*, 216 AD2d 43 (1st Dept 1995); *McErlean v Mendelson*, 259 AD2d 528 (2d Dept 1999).

Here, sanctions are not appropriate. Vilar and Tanaka had a legitimate point that the Wire Transfers set forth in the Jacobson Declaration were not before the court on the motion for summary judgment. It was not frivolous to argue that the Judgment should be recalculated. In addition, Tanaka raised a valid point concerning service of the motion papers. Accordingly, it is

ORDERED that the motion by Gary Tanaka (Motion Seq 009) to vacate or modify the judgment entered in this action is denied; and it is further

ORDERED that is denied; and it is further

ORDERED that the cross-motion by plaintiffs for sanctions is denied.

Dated: May 20, 2014

ENTER:

J.S.C.