| **East Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.** |
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| 2016 NY Slip Op 32797(U) |
| November 28, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 01113/2007 |
| Judge: Jerry Garguilo |
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[* 1]

SHORT FORM ORDER PUBLISH INDEX NO. 01113/2007

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

**PRESENT:**
**HON. JERRY GARGUILO**
**SUPREME COURT JUSTICE**

EAST HAMPTON UNION FREE SCHOOL DISTRICT,

Plaintiff,

-against-

SANDPEBBLE BUILDERS, INC.,

Defendant.

**ORIG. RETURN DATE: 10/5/16**
**FINAL SUBMITTED DATE: 10/12/16**
**MOTION SEQ#013 #015**
**MOTION: #013 MD #015 WDN duplicate of #013**

**PLAINTIFF'S ATTORNEY:**
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**DEFENDANT'S ATTORNEY:**
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The Plaintiff, East Hampton Union Free School District (East Hampton) Petitions the Court by way of motion for the following relief: (1) An Order determining that the pre-verdict rate of interest of 0% per annum should be applied to the Judgment as set forth in the jury's verdict on May 25, 2016 ("Judgment") or; (2) An Order that the pre-verdict rate of interest of 4.6 per annum should be applied to the Judgment; and (3) An Order determining that the post-verdict and post-judgment rate of interest of 2.8% should be applied to the Judgment. The Defendant, Sandpebble Builders, Inc., (Sandpebble) opposes the application and Petitions the Court to apply the "presumptive rate of 9% interest" to the pre-and post judgment and post judgment interest on the jury's award of damages in the amount of Seven Hundred Fifty Five Thousand Seven Hundred Sixty Seven Dollars and Forty One Cents ($755,767.41).

In making its determination, the Court has considered the following:

1. Plaintiff's Notice of Motion To Determine Rate of Interest on Judgment, an Affirmation by Steven Pinks, inclusive of Exhibits A through D with the Expert Witness Report of Ernest Patrick Smith, CPA/ABV/CFF, CVA, CFE

filed as Exhibit B;

2. Defendant's Affidavit of Stephen R. Angel, inclusive of Exhibits A through D, Affidavit of George M. Spino with Exhibits A through G, Memorandum of Law Regarding Pre and Post Judgment Interest and Reply Memorandum of Law In Opposition To the District's Motion To Fix The Interest Rate; and
3. Plaintiff's Reply Affirmation In Opposition To Defendant Sandpebble Builders, Inc.'s Motion To Determine Pre and Post Judgment Interest.

The CPLR generally mandates a 9% interest rate, "except where otherwise provided by statute." N.Y.C.P.L.R. § 5004. One such statutory exception relates to judgments against municipal corporations, including cities. See N.Y. General Municipal Law § 3-a(3). New York General Municipal Law § 3-a(1) provides that "the rate of interest to be paid by a municipal corporation upon any judgment or accrued claim against the municipal corporation shall not exceed 9 percentum per annum." N.Y. General Municipal Law § 3-a(1). Using nearly identical language, New York State Finance Law § 16 provides that "the rate of interest to be paid by the state upon any judgment or accrued claim against the state shall not exceed 9 percentum per annum." N.Y. State Finance Law § 16. The New York Court of Appeals has explained that the burden is on the municipal defendant to rebut the presumption that the 9% statutory prejudgment interest rate is reasonable. *See Denio v. State of New York*, 7 N.Y.3d 159, 168 (2006). "To rebut the presumption of reasonableness... a party seeking a reduction bears the burden of proffering substantial evidence that rates of return on both public and private investments during the relevant period are below 9%..." *id.* (*citations omitted*). If and when the defendant rebuts this presumption, the proponent of the presumptive rate "has the burden of coming forward with evidence tending to show that a higher rate, up to the statutory maximum is reasonable." *American Underground Engineering, Inc., v. The City of Syracuse*, 2012 WL 3202853.

Section 3-a of the General Municipal Law at ¶ 1 notes the following:

> 1. Except as provided in subdivisions two, four and five of this section, the rate of interest to be paid by a municipal corporation upon any judgment or accrued claim against the municipal corporation shall not exceed nine per centum per annum.

It is informative to note the logic and rationale supporting an interest rate of 9%. It stems from an Advisory Committee on Civil Practice report issued in 1981 in support of a rate increase from 6% to 9%. The report pointed out that the use of delaying tactics permitted defendants to take advantage of the economic situation:

> "The Committee has had reported to it many examples of a party's litigation conduct apparently motivated by the low interest rate contained in CPLR 5004. When the sums involved in the case are large, it is self-evident that the longer the defendant delays the case—assuming that the plaintiff will ultimately prevail—the longer the defendant will be able to keep money at a six percent rate that he *166 would have to pay two, three or even four times more for on the money market. Instances have been reported to us of patently unmeritorious appeals taken in commercial cases merely to obtain the delay, and of tort appeals, where possible in bifurcated trials, of liability findings just to postpone the trial of the damages issue" (1981 McKinney's Session Laws of NY, at 2658)..

The Court of Appeals commented on the same in the case of *Denio v. State of New York*, 7 N.Y.3d 159, 851 N.E.2d 1153, 818 N.Y.S. 2d 802, 2006 N.Y. Slip Opinion 04454:

> It was further recognized that the low statutory interest rates gave public entities "no incentive whatsoever to enter into reasonable negotiations" aimed at settlement. Significantly, however, the Legislature chose to leave in place the "shall not exceed" qualifying language when it amended Public Housing Law § 157(5), State Finance Law § 16, General Municipal Law § 3–a and Unconsolidated Laws § 2501.

In *Rodriguez v. City of New York Housing Authority*, (91 N.Y.2d 76 [1997]) the Court of Appeals described the 9% rate as "presumptively fair and reasonable." In the *Rodriguez* case, similar to the posture of East Hampton in this matter, it asked this Court to limit interest based upon "reasonably safe investment protocol." The presumption being that the successful plaintiff... a reasonable plaintiff would've placed the verdict or judgment amount in such investment vehicles.

Relevant precedent notes that "the most logical approach when attempting to persuade a trial court to apply a lower rate would be to demonstrate that an array of reasonable and balanced investment alternatives produces a return lower than 9%. *Denio v. State*, *infra* at 168. Furthermore, to rebut the presumption of reasonableness accorded the 9% rate the petitioner bears the burden of proffering substantial evidence that the rates of return on both public and private investments during the relevant period are below 9% (see *In the Matter of Metropolitan Transportation Authority v. American Pen Corp.*, 94 N.Y.2d 154, 158 n1[1999]. Substantial evidence "consists of proof within the whole record of such quality

and quantity as to generate conviction in and persuade a fair and detached factfinder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably--probatively and logically" *FMC Corp.* (*citation omitted*) Once a presumption has been rebutted, the claimant has the burden of coming forward with evidence tending to show that a higher rate, up to the statutory maximum, is reasonable.

Perhaps most tellingly is a language found in *Rodriguez*, "the fact that another interest computation may also be 'reasonable' does not mandate the selection of that rate in an exercise of discretion." (*Rodriguez*, 91 N.Y.2d at 81). Only where the Petitioner goes so far as to establish that the ceiling rate is unreasonable would the selection of that rate amount to an abuse of discretion, because a court may not apply an unreasonable rate.

Upon consideration of all submissions, the Court is not persuaded to depart from the presumptive rate of 9% on pre and post judgment interest.

Defendant shall submit judgment consistent with this Order.

The foregoing constitutes the decision and **ORDER** of the Court.

**Dated: November 28, 2016**

**HON. JERRY GARGUILO, JSC**