Energy Savers, Inc. v. McKelvy, No. 192-4-04 Wrcv (Eaton, J., Mar. 31, 2009)

STATE OF VERMONT
WINDSOR COUNTY

ENERGY SAVERS, INC.	)	
d/b/a Energy Shield	)	**Windsor Superior Court**
	)	**Docket No. 192-4-04 Wrcv**
v.	)	
	)	
DOUG McKELVY	)	
and BARBARA McKELVY	)	

DECISION
Defendant's Motion for Partial Relief from Judgment (MPR #49)
Defendant's Motion for Permission to Deposit Funds (MPR #50)

The present matters before the court are two post-judgment motions filed by defendants Barbara and Doug McKelvy. The first motion seeks relief from a provision in the final judgment awarding plaintiff Energy Savers a penalty for wrongful withholding in the amount of one percent per month under 9 V.S.A. § 4007(b). The second motion seeks permission to deposit the principal amount of the arbitration award with the court in order to stop the accrual of post-judgment interest and the accrual of penalties for wrongful withholding. Both motions were filed on February 18, 2009—five days after the McKelvys filed a notice of appeal from the final judgment. The court considers each motion in turn.

In the first motion, the McKelvys seek partial relief from a provision in the final judgment that awarded Energy Savers a withholding penalty of one percent per month until payment is made. V.R.C.P. 60(b). They argue that under the applicable statute, 9 V.S.A. § 4007(b), the withholding penalty should have been awarded as an ascertained amount rather than as an ongoing penalty.

The terms of the final judgment order were taken directly from the final arbitration award, which, in pertinent part, required the McKelvys to pay the "one percent per month penalty" until "payment is made" on the principal amount of the award. Thus, granting relief from the terms of the withholding penalty is not as simple as correcting a mistake in the final judgment order. See *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 149 Vt. 365, 368–69 (1988) (correcting interest calculation). Instead, the Rule 60(b) motion amounts to a request for substantive reconsideration of the merits of the final arbitration award. Given the filing of the notice of appeal, and the extensive proceedings

that have already been devoted to the question of whether or not the final arbitration award should be confirmed, modified, or vacated, this court does not have any jurisdiction to entertain the Rule 60(b) motion at this juncture. See *Kotz v. Kotz*, 134 Vt. 36, 38 (1975) (explaining that the filing of a notice of appeal divests the trial court of jurisdiction over matters within the scope of the appeal). The motion for partial relief from final judgment is accordingly *denied*.

The second motion seeks permission under Rule 67 to deposit the principal sum of the arbitration award with the court in order to stop the accrual of post-judgment interest and withholding penalties. Although the text of Rule 67 says nothing about whether such deposits into court have the effect of tolling either the accrual of post-judgment interest or statutory penalties, the McKelvys contend that the possibility of such tolling was recognized by an evenly-divided court in *Abbiati v. Buttura & Sons, Inc.*, 161 Vt. 314, 327 (1994), and endorsed by the South Carolina Supreme Court in *Russo v. Sutton*, 454 S.E.2d 895 (S.C. 1995).

Federal Practice and Procedure describes Rule 67 as a "rather unimportant" rule that permits parties or trustees an opportunity to deposit money with the court when the money represents all or part of a sum in dispute. 12 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2991. Its purpose is to provide "a place of safekeeping for disputed funds pending the resolution of a legal dispute," *LTV Corp. v. Gulf States Steel, Inc. of Alabama*, 969 F.2d 1050, 1063 (D.C. Cir. 1992) (Wald, J.) (citation omitted), or in other words, "to relieve the depositor of responsibility for a fund in dispute." 12 Federal Practice and Procedure, *supra*, § 2991. Though the rule may be useful in other circumstances, its primary use is "to permit a stakeholder who disclaims all interest in the action to pay or deliver the money or thing in suit into court." V.R.C.P. 67, Reporter's Notes.

Since nothing in the text of Rule 67 suggests that it was also meant to toll the accrual of post-judgment interest, the court is not persuaded that the rule should be interpreted to permit appellants to take risk-free appeals. (That would be the consequence of appellant's proposal in this case: to deposit the principal amount of the arbitration award into court and thereby toll the accrual of penalties and interest during the pendency of the appeal, without making the principal amount available to the judgment creditor). Such an interpretation would change a "rather unimportant" rule into a very important one.

Moreover, the proposed interpretation of Rule 67 would have unhappy consequences for the judgment creditor, who would not enjoy any benefit from the risk-free appeal other than the promise that a portion of the judgment might someday be available, *sans* interest. Indeed, the effect of the proposed deposit would be to reduce the post-judgment interest rate from 12% (which is imposed by statute) to whatever market rate is applicable to deposits in federally-insured banks. It would likewise completely eliminate the accrual of withholding penalties as authorized by the final arbitration award, even though the money would remain withheld and unpaid from the perspective of the judgment creditor. Neither of these consequences are fair, and both are contrary to

the ordinary principle that the Rules of Civil Procedure shall not be construed so as to "abridge, enlarge, or modify any substantive rights of person provided by law." 12 V.S.A. § 1; see also V.R.C.P. 1 (explaining that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"). In short, Rule 67 should not be used as a means of altering the legal obligations between the parties. *LTV Corp.*, 969 F.2d at 1063.

Research reveals some examples of cases where courts have found equitable circumstances justifying the tolling of post-judgment interest—as when an appellee/judgment debtor seeks to deposit the amount of the judgment with the court during the pendency of an appeal taken by the judgment creditor. *Cajun Elec. Power Co-op., Inc. v. Riley Stoker Corp.*, 901 F.2d 441, 444–445 (5th Cir. 1990); *Kotsopoulous v. Asturia Shipping Co.*, 467 F.2d 91, 94 (2d Cir. 1972). But under the circumstances presented here, where the appeal has been taken by the judgment debtor, the equitable way of preventing the running of further post-judgment interest and withholding penalties would be for the McKelvys to pay the principal amount directly to Energy Savers.

For the foregoing reasons, the motion for permission to deposit funds is *denied*. The court understands that the primary reason for filing the motion was to prevent the running of post-judgment interest and penalties, and that no purpose would be served by granting permission to deposit funds if interest and penalties were not tolled. If the McKelvys do seek simply a "place of safekeeping" for some or all of the funds, they may file a renewed motion.

ORDER

(1) Defendant's Motion for Partial Relief from Final Judgment (MPR #49) is ***denied***; and

(2) Defendant's Motion for Permission to Deposit Funds (MPR #50) is ***denied***.

Dated at Woodstock, Vermont this ____ day of _____, 2009.

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Hon. Harold E. Eaton, Jr.
Superior Court Judge