

May, 2005

Interest on a Distributive Award

By Bari Brandes Corbin

Although banks and financial institutions are currently paying interest on savings at about 4% per year, the statutory rate of interest on judgments is 9% per year, except where otherwise provided by statute. Civil Practice Law and Rules (CPLR) § 5004. In today's economy, with financial institutions paying low interest rates, the 9% statutory rate on the payment of a distributive award is a good investment for the recipient spouse, if he or she can get it, and an incentive for the obligor spouse to pay the award promptly.

It is common for a judgment of dissolution not to provide for the accrual of statutory interest on payments of a distributive award. If interest is awarded on such payments, it usually starts to run from the date of entry of the judgment, not from the date of the decision awarding the payments.

The first time you attend a settlement conference on a new case, do not forget to ask for interest on the pay-out of the property settlement. It appears that the reason many attorneys fail to obtain interest payments for their clients is that the trial of an equitable case is so complex and overwhelming, with so many important issues, that asking for interest (perceived as a relatively minor issue) gets lost in the shuffle. Another reason may be that matrimonial attorneys are conditioned to make a motion for a money judgment, pursuant to Domestic Relations Law (DRL) § 244, whenever there are arrears of any payments due pursuant to a judgment or order granted in a matrimonial action or family court proceeding. When such motions are made, the award of interest is discretionary with the court, unless the default was willful.

The four Appellate Divisions have not expressed unanimity on this issue; the Fourth Department (*see Povosky v. Povosky*, 124 AD2d 1068, 508 NYS2d 722 (4th Dept., 1986); *Markel v. Markel* 197 A.D.2d 934, 602 N.Y.S.2d 477 (4th Dept., 1993)) and the Second Department (*Miklos v. Miklos*, 9 A.D.3d 397, 780 N.Y.S.2d 622 (2d Dept., 2004)) have clearly established that interest should be awarded on such payments. The First Department appears to agree with them, but the Third Department has not yet spoken on the matter.

Pre-Decision Interest

The authority of the Supreme Court to award interest on sums of money awarded in a matrimonial action, including a distributive award, is governed by the provisions of the CPLR. Whether to award interest for the period up to the date of the court's decision and the rate and date from which it is to be computed is discretionary with the trial court. (CPLR § 5001 provides that the court shall award pre-decision interest only upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.) Prejudgment interest has been awarded where the misconduct of one party rises to the level of depriving the other of the use of marital property. *See Grunfeld v. Grunfeld*, 94

N.Y.2d 696, 707 (failure to make timely payments); *see also Arany v. Arany*, 282 A.D.2d 389 (diversion to personal use of over \$500,000 from corporation); *Maharam v. Maharam*, 245 A.D.2d 94 (egregious economic misconduct prevented the court from making an equitable determination).

The Second Department, in holding that a plaintiff was entitled to prejudgment interest on the distributive award, stated that such interest is not a penalty. Rather, it is simply the cost of having the use of another person's money for a specified period. It is intended to indemnify successful plaintiffs for the nonpayment of what is due to them, and it is not meant to punish defendants for delaying the final resolution of the litigation. Since marital assets in that case were valued as of the date of commencement of the action, the plaintiff was entitled to interest from that date. *Selinger v. Selinger*, 232 A.D.2d 471 (2d Dept.1996).

In another Second Department case, the trial court awarded the plaintiff a distributive award in the sum of \$300,000, directed him to pay the distributive award either in one lump sum or in equal installments over 3 years, awarded prejudgment interest on the distributive award at the rate of 9% from the date of commencement of the action, and awarded post-judgment interest on the distributive award at the statutory rate of 9% from the date of entry of the judgment of divorce until final payment. The Second Department held that the trial court properly awarded the plaintiff prejudgment interest on the distributive award, noting that an award of prejudgment interest on a distributive award is within the sound discretion of the trial court. *See Trivedi v. Trivedi*, 222 A.D.2d 499; *Largiader v. Largiader*, 151 A.D.2d 724. In *Lipsky v. Lipsky*, 276 A.D.2d 753 (2d Dept. 2000), the Second Department found the trial court providently exercised its discretion in providing for interest on the distributive award, especially where, as here, the defendant, in failing to provide certain financial documents, caused his medical practice to be substantially undervalued. It also held that under the facts of the case, it was a provident exercise of discretion for the trial court to award post-judgment interest at the statutory rate of 9% on the distributive award from the date of entry of the judgment of divorce to the date of final payment.

Post-Decision Interest

While an award of pre-decision interest is discretionary with the court, the CPLR requires interest to be awarded, upon the total sum awarded, from the date of the decision to the date the judgment is entered.

CPLR § 5003 also requires every money judgment to bear interest from the date of its entry: "Every order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing to the date that it is satisfied." CPLR 5004 requires that a judgment bear interest from date it is docketed. While a cursory reading of the statutes seems to require that 9% interest should be awarded on payments of a distributive award from the date of the decision, in actual practice interest is usually not awarded until a money judgment for arrears of the distributive award is entered upon motion made pursuant to DRL § 244.

Post-Judgment Interest

Almost 20 years ago, in *Povosky v. Povosky, supra*, the Fourth Department held that CPLR 5002 requires interest to be paid on the distributive award from the date of the decision. The wife, in her appeal, contended that she was entitled to interest on the amounts awarded to her and that she should be entitled to a judgment incorporating those awards. The Appellate Division held that CPLR 5001 provides that the court may, in its discretion, fix the date from which interest is computed. Since the wife's share of the savings and investment plan was to be computed as of Sept. 1, 1981, the appellate court held that she should receive interest at the legal rate from that date to the date of the court's decision. It also held that the wife was entitled to a judgment for the amounts awarded by the court in its decision dated Nov. 4, 1983 and to interest on those awards from the date of that decision until the entry of the judgment (*see* CPLR 5002). In addition, in *Markel v. Markel, supra*, the Fourth Department, citing *Povosky*, held that the lower court erred in failing to order post-judgment interest at the statutory rate on the distributive award. (*See also* CPLR 5003, 5004).

Until its decision in *Haymes v. Haymes*, 298 A.D.2d 117 (1st Dept. 2002), the First Department had never held that an award of post-decision interest was mandatory. In *Haymes* the Appellate Division modified the award on the law, to award plaintiff interest on the distributive award post judgment. It held that Supreme Court did not improvidently exercise its discretion in declining to award prejudgment interest because the equitable distribution of the marital estate is not a breach of contract, nor is it tantamount to "interfering with title to, or possession or enjoyment of, property." The only language in CPLR 5001 that the First Department found remotely pertinent to a matrimonial proceeding is the general principle that the award of interest is entrusted to the sound discretion of the court "in an action of an equitable nature." It noted that plaintiff had provided no authority to suggest that in enacting CPLR 5001 the legislature intended it to be applicable to matrimonial actions. However, the court did hold that the plaintiff was entitled to interest from the date of the decision to the entry of judgment, citing CPLR 5002, and modified accordingly.

In *Gober v. Gober*, 4 A.D.3d 175 (1st Dept., 2004), the First Department noted that the trial court held that plaintiff should receive a distributive cash award exceeding \$13 million, to be paid out over a period of 7 years, and it modified the judgment to award interest on that sum. Citing *Maharam v. Maharam, supra*, it held that until defendant has made full payment, he is availing himself of plaintiff's money, for which he should be compelled to pay interest inasmuch as the distributive award is not a future award but a current one.

In *Gold v Gold*, 276 A.D.2d 590 (2d Dept. 2000), the Second Department held that the defendant was entitled to interest on the distributive award from the date of the decision until the entry of judgment, and from the entry of judgment to the date of payment. The court stated that this right is unaffected by the direction of the Supreme Court that the judgment be paid in installments. In *Miklos v. Miklos, supra*, the Second Department held that while Supreme Court providently exercised its discretion in denying pre-judgment interest on the plaintiff's distributive award, the plaintiff was entitled to interest on the distributive award from the date of entry of the judgment of divorce to the date of final payment.

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