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Outside Counsel

The Nine Percent Solution- Applying The Interest Rate Rule

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WHILE MUCH has been written about CPLR Articles 50 A & 50 B, the structured judgment provisions, there has been little commentary about a recent change in the application of CPLR 5004 with respect to the determination of the appropriate interest rate for a judgment against a municipality. This change, which affects the manner in which attorneys will enter their judgments against municipal entities, was wrought by the Court of Appeals in *Rodriguez v. New York City Housing Authority*, 91 N.Y. 2d 76, 666 N.Y.S.2d 1009 (1997), and can significantly effect the amount of compensation your client will receive.

Before the Court's decision in *Rodriguez*, and assuming the judgment did not require structuring, the prevailing party would prepare a Judgment and Bill of Costs, bring these and all necessary supporting papers to the County Clerk, who would compute and apply the statutory interest rate to the verdict in order to enter and file the judgment. When entering judgments against municipal entities usually meant applying CPLR 5004, and computing the amount due based on an interest rate of 9 percent per annum. In other words, usually the clerk performed a ministerial duty and automatically applied the statutory interest rate. The trial judge usually played no role in the entering of the judgment.

In *Rodriguez v. New York City Housing Authority*, Id., at 80, 666 N.Y.S.2d 1011, the Court held that:

The clear implication of the statutory text, as read in conjunction with our precedents, is that 9 percent is a not-to-be-exceeded maximum, instead of a statutorily fixed, rate of interest to be imposed on judgments against the Housing Authority. Thus, contrary to the ruling of the Appellate Division, a court may, in its discretion, impose a rate of interest lower than 9 percent pursuant to Public Housing Law Sec. 157(5). Such discretion should be exercised upon remittal.

While *Rodriguez*, dealt with the Public Housing Law, it applies to all municipal entities that are governed by similarly worded statutes, such as General Municipal Law Sec. 3-a.

In post-*Rodriguez* cases, the plaintiff's lawyer should request that the trial court exercise its discretion and award the maximum amount of interest permitted by statute. The failure of the trial court to exercise its discretion and select an appropriate interest rate will result in an appellate court remanding the judgment for a discretionary determination of the appropriate interest rate and, if necessary, for a re-computation of interest on the award. *Gonzalez v. Iocovello*,–A.D.2d–, 672 N.Y.S.2d 293, 294 (1st Dept. 1998); *Gotoy v. City of New York*,–A.D.2d–, 670 N.Y.S.2d 592, 594 (2nd Dept. 1998).

To avoid an unnecessary appeal on this issue, counsel should have the trial judge determine the appropriate interest for the judgment either by making such a request orally on the record after the verdict is rendered, in post-trial motion papers, or by submitting a proposed judgment with notice of settlement.

The clerk will now have a limited role in the entering of judgments. While *Rodriguez* did not change the statutes regarding the entry of judgments, it did change the practice of how judgments are routinely entered and filed.

This decision also may affect settlement negotiations and the likelihood of appeals. Before *Rodriguez*, a municipality had incentive to settle a case after a verdict. Now, if the trial court determines that an interest rate of less than 9 percent will be used, the municipality will have virtually nothing to lose by appealing the verdict and foregoing an attempt to settle.

In *Rodriguez*, the Court of Appeals noted the legislative intent in setting the interest rates high enough so that municipal defendants would not be encouraged to engage in delaying tactics:

The 1981 Report of the Advisory Committee on Civil Practice noted reports where defendants had exploited the system by investing and accruing interest on funds which would otherwise have been used to pay judgment creditors (1981 McKinney's Session Laws of N.Y., at 148).*Rodriguez*, supra, at 79, 666 N.Y.S.2d 904-905.

As stated in the Sponsors' Memorandum, businesses and individuals that have legitimate claims against public entities have been placed in a tremendously unfair position in terms of being compensated in any sort of reasonable or just way for interest incurred or lost due to nonpayment or non-settlement of just claims (Mem. of Assemblyman Walsh in Support, 1982 N.Y. Legis. Ann., at 227).

Rodriguez, supra, at 80, 666 N.Y.S.2d 1011.

If the defendant municipality can invest its money and earn more interest than the rate of a judgment against it, then it has more to gain by engaging in unnecessary and protracted litigation than by paying the judgment.

The Court's decision to allow an interest rate below the statutory rate does not mean that plaintiff's counsel have no options. In *Rodriguez*, the Court of Appeals also held that:

the Legislature has set 9 percent as the rate of interest to be generally imposed so that amount is presumptively fair and reasonable, *notwithstanding any contemporaneous grant of*

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judicial discretion to impose a lesser amount (cf., *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 266, 321 N.Y.S.2d 345, 269 N.E. 2d 895 [we have consistently viewed the statutory rate (for the payment of interest) as presumptively reasonable]). The fact that another interest computation may also be reasonable does not mandate the selection of that rate in an exercise of discretion.

Rodriguez v. New York City Housing Authority, supra, at 81, 666 N.Y.S.2d 1012 (1997) (emphasis added).

In *Rodriguez*, the defendant argued that the interest rate should be based on the assumption that a reasonable plaintiff would have placed the verdict or judgment in a relatively safe investment, such as a Treasury security. supra, at 80-81, 666 N.Y.S.2d 1012. The defendant specifically claimed that the interest rate should be based on the average 52-week Treasury Bill rate established by the market for the 12-month period preceding the verdict. Rodriguez, supra, at 78, 666 N.Y.S.2d 1010. The Courts' rejection of this approach was unequivocal: We decline to endorse such reasoning and limit the court's discretion upon remittal. supra, at 81, 666 N.Y.S.2d 1012.

In the first case to apply *Rodriguez*, the court found that:

Considering the range of investment choices the claimants were deprived of, by reason of not having use of their compensation due ... *a nine percent rate of interest ... is neither excessive, an unreasonable burden on the public, nor unjustly enriching of the claimants.* While the rate of return should be what a prudent investor would receive on investments, it is not prudent to accept the lowest possible return for the least possible risk, if one can receive a better return for a reasonable amount of risk (*United States v. 429.49 Acres of Land*, 612 F.D. 459, 464-65). In sum, ESD (a public benefit corporation) had failed to persuade or overcome the presumption that the nine percent rate of interest, set forth by statute, is unreasonable.

Matter of 42nd Street Development Project, N.Y.L.J. March 27, 1998, P. 28 Col. 3, 4, 1998 WL 270595 P. 2 (Sup. N.Y.) (emphasis added).

In *Matter of 42nd Street Development Project*, Id., a commercial case, the defendant public benefit corporation was seeking a lower interest rate. There, the court rejected this request, which was based on the decline of the following: the Federal funds rate at which banks charge other banks for loans; the prime rate at which major banks lend money to their most favored customers; and the rate on United States Government obligations; e.g. three-month Treasury Bills, six-month Treasury Bills, and the rate at which the corporation earned interest in its own bank account.

The court noted that a range of investment choices were available, all of which would have produced a higher rate of return.

Similarly, in the first case applying *Rodriguez*, to a personal injury action, the court determined that nine percent was the appropriate interest rate. *Pay v. State,–Misc. 2d–*, 672 N.Y.S.2d 987 (Ct. Claims, 1998). The Court in Pay, supra, said that [I]t is clear from the *Rodriguez* decision that 9 percent is a presumptively fair and reasonable rate. (emphasis added).

In *Pay*, the court rejected the defendant's claim for a lower interest rate and noted that nothing in those statutes or the Rodriguez opinion supports defendant's suggestion that interest be calculated annually using rates based on auctions of 52-week Treasury bills occurring nearest to the anniversary of the liability determination. Pay, supra, at 989. The court noted that short-term rates were not appropriate for these cases. Id.

The court also noted that claimant's economist averred that a reasonable person seeking to place the amount awarded to claimant in risk free investment would *not* select 52 week Treasury bills. In support of his opinion, the expert referred to an issue of The Wall Street Journal that showed the availability of Treasury bonds and notes with a range of maturities providing an average yield of 8.5 percent. Additionally, his analysis of returns on conservative stock investments suggested that funds so invested could have produced a 15.66 percent average annual rate of return. Pay, supra, at 989.

In another personal injury case, *Molinari v. City of New York*, __ Misc. 2d __, 672 N.Y.S.2d 662 (Sup. Kings 1998), the Court similarly rejected the defendant's contention that the Court base the interest rate on the assumption that the plaintiff would have placed the verdict amount in short-term Treasury securities. In doing so, the court found that assumption to be unreasonable in the midst of the biggest bull market in the history of the United States stock markets. Here, too, the court found the application of the 9 percent rate entirely appropriate.

Thus, in the only reported cases applying *Rodriguez*, the courts have unanimously applied the presumptivley fair and reasonable statutory maximum interest rate.

A Court may take judicial notice of the facts relied on in the above mentioned cases. *Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp.*, 100 A.D.2d 901, 474 N.Y.S.2d 786, app. dis., 62 N.Y.2d 941, 479 N.Y.S.2d 215, app. den., 64 N.Y.2d 602, 485 N.Y.S.2d 1026, aff'd, 64 N.Y. 2d 1107, 490 N.Y.S.2d 185 (1985). Judicial notice may be taken sua sponte, without notice and after trial. *Rothstein v. City University of New York*, 194 A.D.2d 533, 534, 599 N.Y.S.2d 39 (2nd Dept. 1993); *People v. Langlois*, 122 Misc. 2d 1018, 1021, 472 N.Y.S.2d 297 (Sup. Suffolk 1984); *Wertling v. Manufacturers Hanover Trust*, 118 Misc. 2d 722, 726, 461 N.Y.S.2d 157 (Sup. Kings 1983).

Moreover, a Court may take judicial notice of economic facts, such as interest rates and government inflation statistics, rates listed in newspapers, and common knowledge. *Boyar v. City of New York*, 89 Misc. 2d 607, 392 N.Y.S.2d 356 (Sup. Kings 1977); *Sommers v. Sommers*, 203 A.D.2d 975, 611 N.Y.S.2d 971 (4th Dept. 1994); In re Manhattan Civic Centre Area, 57 Misc. 2d 156, 291 N.Y.S.2d 656, aff'd, 32 A.D.2d 530, 299 N.Y.S.2d 675 (1st Dept. 1969), aff'd, 27 N.Y.2d 518, 312 N.Y.S.2d 995 (1970); *Junar Constr. Co. v. Town Bd.*, 57 Misc. 2d 727, 293 N.Y.S.2d 358 (Sup. Nassau 1968).

While expert testimony is not required, it may behoove plaintiff's counsel to pick up a copy of The New York Times, Wall Street Journal or other reputable publication to support the argument in favor of the application of the statutory interest rate. See, *Caruso v. Russell P. LeFrois Builders, Inc.*, 217 A.D.2d 256, 260, 635 N.Y.S.2d 367, 369-370 (4th Dept. 1995); *Bermeo v. Atakent*, 241 A.D.2d 235, __, 671 N.Y.S.2d 727, 734 (1st Dept. 1998) (judicial notice taken of The New York Times financial data for purpose of determining appropriate discount rate in structured judgment without hearing or expert affidavit).

Length of Litigaton

An additonal factor to be considered by the trial court in determining the appropriate interest rate is the lengthiness of the entire litigation process. The plaintiff will not see his money, the sum that will compensate him for his injuries, for a very long time. Proceedings against municipalities tend to be protracted, and the delay from the determination of liability to the time of actual payment may be considerable. The delay in a bifurcated trial is even greater.

The realities of the hectic day-to-day practice of law are that post-trial motions frequently are adjourned by counsel, and it

is not unusual to wait for a significant amount of time for an overworked and understaffed judge to render a decision that may analyze and decide complex issues concerning substantial sums of money.

After the decision and order is filed and notice of entry is served, the defendant generally has 30 days to file a notice of appeal. CPLR 5513. Depending on which Appellate Division the case is being appealed to, the appellant generally has another six to nine months to perfect its appeal. See, 22 N.Y.C.R.R. 600.11(a)(2) [1st Dept.], 670.8(e) [2nd Dept.], 800.12 [3rd Dept.], 1000.2(b) [4th Dept.]. Then the various appellate briefs and responses must be drafted and filed, the case argued, and an appellate decision rendered.

Frequently there are extensions and delays along the way. Many years can go by from the time the liability is decided until payment is made. A short term interest rate, particularly based on Treasury bills, is clearly inappropriate. *Pay v. State*, supra, at 672 N.Y.S.2d 989.

To illustrate the significance of the choice of interest rate, assume that upon the trial of a matter, a verdict of $1 million is obtained. Further assume that from the time of the verdict to the time the judgment is paid that two years elapse. If the statutory interest rate of 9 percent is employed, the total amount of interest would be $180,000. If a lesser rate is used, such as the 5.235 percent rate proposed by the defendant in Pay, the total amount of interest would be $104,700, a difference of $ 75,300. Obviously if the amount of the judgment is higher or the time from verdict to payment is longer, the loss to the plaintiff is even greater if the statutory rate is not used. In Pay, the difference resulting from the application of the statutory interest rate rather than the interest rate propounded by the defendant was at least $1 million. See, Spencer, Maximum Interest Awarded In Judgment Against State, NYLJ April 23, 1998, P. 1 Col. 5.

A trial court faced with having to use its discretion to decide the proper interest rate for a judgment against a municipality should consider all of the factors discussed above in making its determination.

Motion to Vacate

If judgment was previously entered the old fashioned way, the defendant will probably make an application to vacate the judgment. Counsel for plaintiff should be aware that CPLR 5015 (a) is the only permissible basis for a motion to vacate a judgment.

CPLR 5015(a) states that the court may vacate the judgment, by motion made on notice directed by the court; in other words, an Order to Show Cause is required. See, McKinney's CPLR Commentaries, C5015:2; *Evans v. City of New York*, Index # 110780-94, Sup. N.Y., J. Solomon, decided May 8, 1997.

To vacate the judgment, defendant must sustain its burden of proving that pursuant to CPLR 5015, a basis for vacating the judgment exists, and that the judgment should be vacated. *National Hotel Management Corp. v. Shelton Towers Associates*, 111 A.D.2d 154, 488 N.Y.S.2d 786 (2nd Dept. 1985), app. dis., 65 N.Y.2d 1053, 494 N.Y.S.2d 1061 (1985).

The power to grant relief from a judgment is not plenary, and should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, suprise or excusable neglect. *Pjetri v. NYCHHC*, 169 A.D.2d 100, 103-104, 571 N.Y.S.2d 934 (1st Dept. 1991), mot. for lv. to app. dis., 79 N.Y.2d 915, 581 N.Y.S.2d 667 (1992).

In Pjetri, supra, the Appellate Division, First Department, affirmed Justice Harold Tompkins' decision to decline to vacate a judgment because of the municipality's claim that the wrong interest rate was applied to the judgment. 169 A.D.2d at 103, aff'g, 147 Misc. 2d 636.

Counsel should consider whether preventing the vacatur is the appropriate action under all of the circumstances. Assuming the municipal defendant has filed a notice of appeal on the judgment, having the trial judge deny the motion to vacate the judgment may be a Pyrrhic victory. The municipality will invariably perfect its appeal, and the Appellate Division will remand the case for a judicial determination of the applicable interest rate. *Gonzalez v. Iocovello*, 672 N.Y.S.2d 294; *Gotoy v. City of New York*, 670 N.Y.S.2d 594. See also, *Kiker v. Nassau County*, 85 N.Y.2d 879, 626 N.Y.S.2d 55 (1995). Opposition to the motion to vacate the judgment may serve only to give the defendant more time to invest your client's money.

Under this scenario, counsel should cross-move or otherwise request that the Court determine nunc pro tunc that the presumptively reasonable statutory interest rate of 9 percent be applied to the judgment. See, CPLR 2004, 2001 and 104. Having the trial court exercise its discretion in such a manner may thereby avoid an unnecessary appeal on this limited issue.

If the Court does not amend the judgment nunc pro tunc, but instead vacates the judgment, the net result is further delay. A new judgment must then be prepared and entered, and the municipal defendant will then file and a serve a notice of appeal on this new judgment. This do over restarts the time frame within which the defendant-appellant must perfect its appeal, and effectively lengthens the appellate process.

If however, the lower court has already exercised its discretion and determined that the interest rate for the judgment should be 9 percent, then counsel should strenuously oppose the motion to vacate the judgment.

Conclusion

Thus far, the courts have applied the presumptively reasonable maximum statutory interest rate in judgments against municipalities. Clearly it would not be an abuse of judicial discretion to apply such an interest rate. Based upon economic realities and fairness, the maximum statutory interest rates should be applied. However, all of this analysis and discussion may become moot if the legislature reduces the statutory interest rates for municipalities. See, Spencer, Lower Interest rate Sought For Awards Against Cities, N.Y.L.J. May 27, 1998, P. 1 Col. 1.

While the current legislative session has ended without the passage of such a measure, the days of the 9 percent solution may be numbered.