

Interest on Distributive Awards

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Interest on distributive awards is an important ‘ and at times overlooked ‘ aspect of matrimonial practice. When a matrimonial action becomes protracted, an award of prejudgment interest, measured from the date of commencement of the action, may be substantial, especially if the award is at the statutory rate of 9%. Similarly, when a court directs a distributive award to be paid out over a period of years, then an award of post-judgment interest on the unpaid balance will substantially increase the ultimate amount paid out over time. Therefore, an understanding of the various statutes and case law applicable to the concept of interest on distributive awards is crucial for family law practitioners.

Prejudgment Interest

Each state handles the issue of prejudgment interest in its own way. In New York, the statutory provision applicable to awards of prejudgment interest is Civil Practice Law and Rules (CPLR) ‘ 5001. CPLR ‘ 5001(a) provides as follows:

Actions in which recoverable. Interest shall be recovered 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, 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.

A matrimonial action involving equitable distribution is a proceeding of an "equitable nature."

Therefore, pursuant to CPLR § 5001(a), whether to award prejudgment interest, as well as the rate of interest and the date from which it is computed, are matters within the court's discretion. *See Madonna v. Madonna*, 265 AD2d 455 (2nd Dept. 1999).

In *Selinger v. Selinger*, 232 AD2d 471 (2nd Dept. 1996), the appellate court, citing the Court of Appeals (New York's highest court) decision in *Love v. State of New York*, 78 NY2d 540 (1991), explained the basis for an award of prejudgment interest in a matrimonial action, stating as follows:

The plaintiff is entitled to prejudgment interest on the distributive award. 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 (*see, Love v. State of New York*, 78 NY2d 540, 544, 577 NYS2d 359, 583 N.E.2d 1296). Since marital assets in this case were valued as of the date of commencement of the action, the plaintiff is entitled to interest from that date (*see, Povosky v. Povosky*, 124 AD2d 1068, 1070, 508 NYS.2d 722).

Pursuant to the holding in *Selinger*, where marital assets are valued as of the date of commencement of an action, the court may, as a matter of discretion, award prejudgment interest from that date. *See, e.g., Baron v. Baron*, 71 AD3d 807 (2nd Dept. 2010); *Gurbacki v. Gurbacki*, 270 AD2d 807 (4th Dept. 2000). Furthermore, under *Selinger*, an award of prejudgment interest is not viewed as a penalty, but rather a means of indemnifying the non-titled spouse for being deprived of his or her share of marital assets during the pendency of the action.

Considerations in Awarding Prejudgment Interest

Notwithstanding the *Selinger* holding, courts have in fact recognized misconduct as a factor to be considered in awarding prejudgment interest. For example, in *Lipsky v. Lipsky*, 276 AD2d 753 (2nd Dept. 2000), the appellate division affirmed the trial court's imposition of prejudgment interest on the wife's distributive award representing 50% of the value of the husband's enhanced earning capacity and 10% of the value of his medical practice. The appellate division found that the award of prejudgment interest was appropriate because the husband had failed to provide certain financial records, causing his medical practice to be substantially undervalued.

In *Largiader v. Largiader*, 151 AD2d 724 (2nd Dept. 1989), the appellate division held that, in view of the inordinate delay in reaching the trial of the action (seven years from the date of commencement of the action), the wife was entitled to prejudgment interest at the statutory rate on her interest in the husband's pension funds, which were valued as of the date of commencement of the action. The appellate court noted that the husband had engaged in a "significant amount of stonewalling."

Conversely, courts have also cited the lack of misconduct of the titled spouse as a basis for denying prejudgment interest. For example, in *Rubin v. Rubin*, 1 AD3d 220 (1st Dept. 2003), the appellate court held that the wife was not entitled to an award of prejudgment interest on her distributive award in the absence of evidence that misconduct on the husband's part deprived the wife of marital property.

In *Schwartz v. Schwartz*, 54 AD3d 400 (2nd Dept. 2008), the appellate division held that an award of prejudgment interest on the wife's share of the husband's interest in his law practice was not appropriate where there was no evidence of misconduct by the husband that deprived the wife of her use or share of marital property.

In light of the foregoing cases, it is apparent that the misconduct (or lack thereof) of the titled spouse is a factor that may be taken into consideration by a court in determining whether to exercise its discretion in awarding prejudgment interest, notwithstanding the statement by New York's Court of Appeals, in *Love v. New York State*, *supra*, that prejudgment interest is not to be imposed as a penalty.

Another factor that may be taken into account by the court in deciding to award prejudgment interest on a distributive award is the nature of the asset upon which the distributive award is based. Where the asset is intangible in nature, such as the enhanced earning capacity attributable to a license or advanced degree, an award of prejudgment interest on a distributive award based on the value of such asset may not be appropriate.

For example, in *Jayaram v. Jayaram*, 62 AD3d 951 (2nd Dept. 2009), the appellate division held that the trial court abused its discretion in awarding the wife prejudgment interest on her distributive award, which was comprised mostly of the wife's interest in the husband's enhanced earning capacity attributable to his MBA degree and securities licenses. The court held that prejudgment interest was not appropriate because the enhanced earning capacity was "not a tangible asset which the wife was deprived the use of during the pendency of the litigation." *See also Ritz v. Ritz*, 166 AD2d 568 (2nd Dept. 1990).

In *Haymes v. Haymes*, 298 AD2d 117 (1st Dept. 2002), the appellate court found that the trial court properly denied the wife's application for prejudgment interest on her share of certain commercial property that was valued as of the date of commencement of the action pursuant to stipulation of the parties. The appellate court found that, because prospective income was utilized in determining the value of the property, an award of prejudgment interest for the loss of such prospective income would be duplicative.

Post-Judgment Interest

The statutory basis often cited for an award of post-judgment interest on a distributive award which is to be paid out over time is found in CPLR 5003. *See, e.g., Klein v. Klein*, 296 AD2d 533 (2nd Dept. 2002). CPLR ‘ 5003 provides as follows:

Every money judgment shall 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.

Unlike CPLR ‘ 5001, which confers upon the court discretion over whether to award prejudgment interest and to determine the rate, CPLR ‘ 5003 provides, as stated above, that every “money judgment shall bear interest from the date of its entry.” Therefore, pursuant to the explicit language of the statute, interest on a money judgment is mandatory.

Inasmuch as the courts have relied upon CPLR ‘ 5003 as the basis for post-judgment interest on a distributive award, it would appear that the courts should be without the discretion to decline to impose interest on a distributive award paid out over time. Some courts have adopted this view. For example, in *Aloi v. Simoni*, 82 AD3d 683 (2nd Dept. 2011), the appellate court held that the supreme court (the trial court in New York State) “erred” (as opposed to “abused its discretion”) in failing to award interest on the wife’s distributive award from the date of the decision until the entry of the judgment and, citing CPLR ‘ 5003, from the entry of the judgment to payment. This holding, which indicates that the trial court erred as a matter of law in failing to award interest, is consistent with the statutory language set forth above. *See also Markel v. Markel*, 197 AD2d 934 (4th Dept. 1993).

A Matter of Discretion

Other courts have viewed an award of post-judgment interest as a matter of discretion. In *DeWitt v. Sheiness*, 42 AD3d 776 (3rd Dept. 2007), the Appellate Division, Third Department, held that the trial court did not abuse its discretion in permitting the husband to pay a distributive award to

the wife over a period of three years, without interest. The court found that the three-year interest-free pay-out was a proper exercise of the trial court's discretion in view of the husband's lack of liquid assets and limited income. A similar conclusion was reached by the Appellate Division, Second Department, in *Rosenberg v. Rosenberg*, 126 AD2d 537 (2nd Dept. 1987), in which the court held that the trial court's failure to award interest on a distributive award was not an abuse of discretion, considering the amount of the distributive award (\$150,000) and the fact that the husband's financial ability to pay interest on the award was questionable.

The cases above, which hold that an award of post-judgment interest is a matter of discretion, are inconsistent with the explicit language of CPLR § 5003. However, unless and until the New York Court of Appeals takes up the issue, it will remain unsettled.

Rate of Interest

The rate of interest to be applied in matrimonial cases is governed by CPLR § 5004, which provides that “[i]nterest shall be at the rate of nine percent per annum, except where otherwise provided by statute.” With respect to prejudgment interest, CPLR § 5001(a) expressly authorizes the court to deviate from the legal rate of 9% in awarding prejudgment interest in actions which are equitable in nature. Consequently, there is no question that the court may award prejudgment interest at less than the statutory rate of 9%. See *Litman v. Litman*, 280 AD2d 520 (2nd Dept. 2001); *Madonna v. Madonna*, 265 AD2d 455 (2nd Dept. 1999); *Selinger v. Selinger*, 250 AD2d 752 (2nd Dept. 1998).

With respect to post-judgment interest, it would appear that interest at the rate of 9% is mandatory. That is because there is no statutory provision equivalent to CPLR § 5001(a) (which pertains to prejudgment interest) that would permit a court to deviate from the statutory rate fixed by CPLR § 5004 in awarding post-judgment interest. Consistent with the foregoing, in *Verdrager v. Verdrager*, 230 AD2d 786 (2nd Dept. 1996), the Appellate Division, Second Department, held that the trial court erred in ordering interest on the wife's distributive award to accrue at the prime rate rather than the statutory rate set forth in CPLR § 5004. The appellate

court stated that, unless otherwise provided by statute, interest on a judgment is to accrue at the statutory rate. It also noted that CPLR § 5001(a) merely permits the discretionary award of interest on an equitable claim prior to the time of verdict, report or decision.

Notwithstanding the unequivocal language of CPLR § 5004, some courts have deviated from the statutory rate of interest in granting post-judgment interest. For example, in *Hamroff v. Hamroff*, 35 AD3d 365 (2nd Dept. 2006), the Second Department, while citing CPLR § 5004 and *Madonna v. Madonna, supra* (a case dealing with prejudgment interest), affirmed an award of post-judgment interest at the rate of 3%, finding that the rate of interest was a proper exercise of discretion. *See also Powers v. Wilson*, 56 AD3d 639 (2nd Dept. 2008) (interest at the rate of 6% per annum on a counsel fee award deemed a proper exercise of discretion). The cases that have awarded post-judgment interest at other than the statutory rate are contrary to the unequivocal language of CPLR § 5004, which mandates that interest be set at the rate of 9% unless otherwise provided by statute.

Conclusion

In light of the fact that an award of interest may have a substantial financial impact on the resolution of a contested matrimonial action, it is important for the matrimonial practitioner to have an understanding of the statutory bases for an award of interest in the state in which he or she practices, as well as the various state cases, including the conflicting holdings, that have interpreted these statutes.

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