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LAW CURRENTS An informational newsletter from
Richard A. Klass, Esq.

A home improvement contractor sued a homeowner for breach of contract. The plaintiff-contractor alleged that it agreed to perform renovation and construction services for the defendant-homeowner, performed the labor and furnished all materials, and was not paid for the job. A jury trial was held where the jury determined that the defendant breached the contract and owed the plaintiff $40,000. Post-trial motions were made before the trial judge to challenge the jury verdict. The judge sustained the verdict. However, the judge's order did not contain a directive to submit the judgment by a certain date.

Fixing the date for computing interest

Unfortunately, the trial judge did not fix the date from which interest on the verdict amount should be computed. Four years after the trial, the contractor retained **Richard A. Klass, Esq.,** *Your Court Street Lawyer,* to request that the newly assigned judge fix the date for computing interest as per CPLR 5001.[1] It was argued that interest should be awarded from the

[1] Civil Practice Law and Rules ("CPLR") 5001 provides:

§ 5001. Interest to verdict, report or decision.

(a) 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 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.

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the

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"earliest ascertainable date," which, in this case, should be when the contractor completed the work on the homeowner's property. *See, Matter of Kummer*, 93 AD2d 135, 184 [2d Dept 1983] ("predecision interest is to run from the earliest ascertainable date upon which the plaintiff's cause of action existed."); *Ogletree, Deakins, Nash, Smoak & Stewart P.C. v Albany Steel Inc.,* 243 AD2d 877, 880 [3d Dept 1997] ("CPLR 5001(b) requires that prejudgment interest be computed from the earliest ascertainable date on which the prevailing party's cause of action existed "and if that date cannot be ascertained with precision, the computation shall be from the earliest time at which it may be said the cause of action accrued" (*Govern & McDowell v. McDowell & Walker,* 75 A.D.2d 979, 980, 428 N.Y.S.2d 367).").

There is a longstanding legal principle that, "[a] plaintiff in a breach of contract case is entitled to interest from the earliest ascertainable date the cause of action accrued (*see,* CPLR 5001[b]; *M.C.D. Carbone v. Town of Bedford,* 98 A.D.2d 714, 469 N.Y.S.2d 117). The award of interest is founded on the theory that there has been a deprivation of use of money or its equivalent and that the sole function of interest is to make whole the party aggrieved." *Kaiser v Fishman*, 187 AD2d 623, 627 [2d Dept 1992]; *see also*, *Kaiser v Fishman*, 187 AD2d 623, 628 [2d Dept 1992] ("interest is simply the cost of having the use of another person's money for a specified period [and] [i]t is intended to indemnify successful plaintiffs for the nonpayment of what is due them"); *Sokolik v Pateman*, 114 AD3d 839, 841 [2d Dept 2014] ("the Supreme Court erred in failing to award the plaintiff statutory prejudgment interest pursuant to CPLR 5001(a), which requires that such interest be recovered upon a sum awarded because of a breach of contract.").

60-day rule under Uniform Rule 202.48 wasn't "triggered"

There is a rule that requires a party to submit a proposed order or judgment to the judge for signature within 60 days after a decision has been made on a motion.[2] In this case, the trial judge determined the post-trial motions regarding the jury verdict four years earlier.

The defendant argued that no prejudgment interest should be awarded since there was an unexplained 4-year delay in seeking to enter judgment. The plaintiff responded that, despite the passage of four years since the jury verdict, the application for entry of judgment was not untimely. *See, Donovan v DiPietro*, 195 AD2d 589, 590-91 [2d Dept 1993] ("Consequently, a jury verdict, or even a dispositive ruling from the bench during or after trial where the court does not direct submission of a paper for its signature, will not trigger the application of the rule [22 NYCRR 202.48] *(see, Winckel v Atlantic Rentals & Sales,* 195 AD2d 599). In cases such as this, entry of judgment on a verdict may be accomplished by way of a clerk's judgment, as provided by statute *(see,* CPLR 5016)." *See also, Funk v Barry*, 89 NY2d 364, 366 [1996] ("Plaintiffs rely on precedent emanating from the First and Second Departments which holds generally that the 60–day

court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

[2] Section 202.48 Submission of orders, judgments and decrees for signature.

(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.

(b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown.

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time limit is not triggered unless the Judge's decision directs that the judgment be submitted for the court's signature.")[3]

Relying on the holding in *Funk v Barry*, the judge rejected the defendant's argument regarding undue delay, finding it to be without merit. The judge noted that the defendant could have sought entry of judgment and not waited for the plaintiff to act.

Concerning prejudgment interest, the judge could not ascertain the date of breach of contract since it was unclear what date was proven at trial. However, the judge decided to fix prejudgment interest as of the date of commencement of the action since that was a determinable date for purposes of the statute.

— *Richard A. Klass, Esq.*

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court St., 28th Fl., Brooklyn, NY. He may be reached at (718)COURT●ST or RichKlass@courtstreetlaw.com with questions. Prior results do not guarantee a similar outcome.

Ten Years in a Row: Richard A. Klass selected for New York Metro Super Lawyers *List*

We are pleased to announce that Richard Klass has been selected to the 2024 New York Metro *Super Lawyers* list. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor. Super Lawyers, part of Thomson Reuters, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer reviews by practice area. The result is a credible, comprehensive and diverse listing of exceptional attorneys. The Super Lawyers lists are published nationwide in Super Lawyers magazines and in leading city and regional magazines and newspapers across the country. Super Lawyers magazines also feature editorial profiles of attorneys who embody excellence in the practice of law. For more information about Super Lawyers, visit SuperLawyers.com.

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[3] In *Funk v Barry,* 89 NY2d 364, 368 [1996], the NYS Court of Appeals held:

That section 202.48 is silent with respect to decisions that do not contain a submit or settle directive is not surprising, given that the rule serves primarily to address delays in judicial dispositions occasioned by a party's failure to comply with a court's directive to draw and submit a proposed order or judgment (*see, Donovan v DiPietro,* 195 AD2d 589, 590, *supra).* Thus, the 60-day rule logically applies only where further court involvement in the drafting process is contemplated before entry. Additionally, by its language, the 60-day time limitation does not purport to govern the flow of the entry process, which is a ministerial recording function that is separate and distinct from the procedure of obtaining the court's signature on a proposed judgment (*see, Helfant v Sobkowski,* 174 AD2d 340, 341, *supra; see also,* Siegel, NY Prac, *op. cit.,* 1996 Pocket Part, § 250, at 49). Significantly, the Legislature has chosen not to place a time restriction on the completion of entry (*see,* CPLR 5016).*

* As a practical matter, there is little incentive to enact a specific time period within which a party must complete the entry process. First, "[f]ailure by the prevailing party to expeditiously submit a judgment for entry carries its own sanctions, including the inability to execute on the judgment (CPLR 5230) and the indefinite extension of the losing party's time in which to take an appeal (CPLR 5513 [a])" (*Helfant v Sobkowski,* 174 AD2d 340, 341, *supra; see also,* Siegel, NY Prac § 250, at 377-378; § 418, at 637-638 [2d ed]). Additionally, a losing party who feels aggrieved by the prevailing party's failure to seek entry may have the judgment entered and need not wait for the prevailing party to act (*see,* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5016, at 642). Finally, because the entry function generally involves action by the clerk with no further judicial oversight, there is little concern that delayed entry will tie up judicial resources.