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United States District Court,
M.D. Alabama,
Northern Division.

Johnny REYNOLDS, et al., Plaintiffs,
v.
ALABAMA DEPARTMENT OF TRANSPORTATION, et al., Defendants.

Civil Action No. 2:85cv665-MHT.
|
Oct. 27, 2006.

Attorneys and Law Firms

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OPINION AND ORDER

MYRON H. THOMPSON, District Judge.

***1** After an independent and de novo review of the record, it is the ORDER, JUDGEMENT and DECREE of the court as follows:

(1) The defendants' objections (doc. no. 8053) are overruled.

(2) Special Master Carlos González recommendation (doc. no. 8042) is adopted.

(3) The plaintiffs' motion to recover funds (doc. no. 7752) is granted.

(4) It is DECLARED that the appropriate interest rate to apply to the grievance and contempt settlements is 3.5 %. Therefore, the plaintiffs are entitled to $ 74,552.95 in interest improperly deducted from the grievance settlement for an alleged overpayment of interest on the contempt settlement. The plaintiffs are also entitled to $ 55,250.23 in interest under the grievance settlement. Finally, the plaintiffs are also entitled to interest from April 28, 2004, at the rate of 3.5 % on the unpaid sum of $ 129, 803.18 ($ 74, 552.95 + $ 55,250.23).

(5) The defendants' motion for summary judgement (doc. no. 7932) is denied as moot.

* * *

The court adds these comments: The defendants argue that the interest rate at issue here should be governed by 28 U.S.C. § 1961. 28 U.S.C. § 1961(a) provides that, "Interest shall be allowed on any money judgment in a civil case recovered in a district court." The statute further

provides that the appropriate interest rate is fixed to the treasury bond rate, *id.*, which was 2.6 % at all times relevant here. The defendants do not appear to be arguing that plaintiffs and defendants agreed to apply § 1961(a) as the interest rate; instead, the defendants appear to be contending that the court must resolve the ambiguity by looking to § 1961(a).

The defendants' argument is flawed because § 1961 does not apply to settlements. Although the case law on this point is sparse, the only cases the court has found on point all hold that § 1961 does not apply to settlements approved by the court. *In re Ivan Boesky Securities Litigation,* 913 F.Supp. 256, 260 (S.D.N.Y.1996); *Kincaide v. General Tire and Rubber Co.,* 540 F.Supp. 115 (W.D.Tex.1982), *rev'd on other grounds,* 716 F.2d 319 (5th Cir.1983); *In re Connaught Properties,* 176 B.R. 678, 685 (Bankr.D.Conn.1995). *Kincaide* is representative and provides a concise explanation, based on principles of statutory construction, of why this is so:

> "[Section 1961] extends only to 'money judgments' that are 'recovered' in a district court. Although court-approved settlement agreements may often involve the payment of money, court-approved settlement agreements, though reduced to judgment in some cases, represent not the court's own judgment or that of a jury, but rather the parties' compromise of the lawsuit put in writing. Nor can an amount of money paid according to the terms of a court-approved settlement agreement reasonably be considered to have been 'recovered' in a district court, since no adjudication of the suit culminating in recovery occurs in a settlement situation. In sum, it is this Court's view that § 1961 is intended to allow postjudgment interest on money awarded by a judge or jury after litigation. Thus, the Court holds that § 1961 was not intended to apply and will not be interpreted to extend to court-approved settlement agreements."

***2** 540 F.Supp. at 121. The court finds this reasoning persuasive, and the defendants have offered no compelling reason to conclude otherwise.

The defendants nonetheless attempt to distinguish these cases because all involved the determination that a party could not use § 1961 to force another party to pay interest on a settlement award, and do not address what interest rate should apply if the parties merely agree that interest should accrue on a settlement but do not specify the rate. This argument is plainly illogical. Section 1961 either applies to settlements or does not. These courts held that § 1961 cannot be invoked to force a party to pay interest on a settlement because § 1961 does not apply to settlement agreements; the interest provision the defendants invoke is part of § 1961 and the instant case involves a settlement. Therefore, these cases are directly on point, standing for the proposition that § 1961 does not apply to this settlement. A necessary corollary of this conclusion is that the settlement can include interest payments at a rate outside that mandated by § 1961.

Not only is the defendants' position contrary to the natural and plain reading of § 1961, but their attempt to stretch § 1961 to reach settlement agreements also runs afoul of the basic principles of contract, which govern settlement agreements. It is axiomatic that "parties may contract as they wish, and courts will enforce their agreements without passing on their substance." Restatement Second of Contracts, Chapter 8, Introductory Note. The defendants acknowledge that interest was a bargained-for provision of the settlement agreement, but that the rate was not specified. Thus, they implicitly concede that the parties could have agreed not to include interest as part of the settlement.

Yet, § 1961 is mandatory in its language, ("Interest shall be allowed ..."). There are strong policy grounds for requiring interest on judgments awarded after litigation: If a jury or judge imposes a judgment against a party, it would be inequitable not to award interest to the prevailing party because failure to do so would reward the other party for wrongfully withholding payment. Indeed, this likely explains why the Eleventh Circuit has expanded § 1961 to require pre-judgment interest, not just post-judgment interest. *See McKelvy v. Metal Container Corp.,* 854 F.2d 448, 453 (11th Cir.1988).

A settlement, however, is different because it is a compromise between the parties. The parties may settle for less or pay more in settlement than they believe they should, often because of the uncertainties of litigation, concerns over weaknesses in their case, or a desire to end the matter quickly. Among the factors that may be bargained for in settlement are interest; the settlement process involves negotiations and compromise, and each party has an opportunity to advocate for interest to be included or not in the final settlement. Thus, it is illogical to allow a party to use § 1961 to recover interest on a

settlement: If § 1961 governed settlements, a party could negotiate the settlement, not seek interest, and then come in after the fact and try to force the other party to pay beyond what was bargained for.

***3** Accordingly, the court concludes that it would be inconsistent with the policies underlying contract, namely the principle of freedom to contract, to apply § 1961 to settlement agreements. To be sure, some contract provisions may be voided as contrary to public policy, Restatement Second of Contracts, Chapter 8, Introductory Note ("Sometimes, however, a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy."), but this court has no difficulty concluding that bargaining not to include interest in a settlement or bargaining to use an interest rate other than the federal treasury bond rate (which is itself an arbitrary figure) for interest on a settlement does not rise to the level of being an agreement that is contrary to public policy. *See generally* 15 Corbin on Contracts, chs. 79-89 (2003 ed.) (descriptions of the recognized categories of contracts contrary to public policy).

Based on the relevant case law, the plain meaning of § 1961, and principles of contract law, the court concludes that the parties can agree, in settlements, to include or to not include interest on any payment and can agree to use any rate of interest should interest be included, including but not limited to the rate of interest specified in § 1961. Accordingly, the ambiguity as to the rate of interest to be applied in the contempt and grievance settlements is not automatically to be resolved by reference to § 1961.

The defendants also object that the special master's recommendation was inappropriately based on parole evidence. However, the special master appropriately found that the agreement between the parties was ambiguous as to the rate of interest, and did not err in looking to the subsequent conduct of the parties. Restatement Second of Contracts § 203(b) (noting that subsequent conduct is given greater weight in interpreting an agreement than anything but the express terms of the agreement).

The defendants further argue that no one with authority to authorize the payment of a 3.5 % rate of interest approved that rate. The defendants submit affidavits from three individuals with the authority to make this decision, all of whom indicate that they did not approve this rate of payment. However, the Assistant Director or Finance's deposition indicates that the ultimate payment (including the interest at the 3.5 % rate) could not have been made if one of them did not approve it. Nonetheless, a check, including a payment of a 3.5 % rate of interest, was issued. Thus, someone with the authority to approve the payment must have at least implicitly approved the payment of a 3.5 % rate of interest.

Finally, the defendants contend that the Special master's recommendation inappropriately relies on estoppel, which cannot be applied against a government defendant. Even if this is so, the general rule is that estoppel may not prohibit a government defendant from correcting a "mistake of law." *First Nat'l Bank of Montgomery v. United States*, 176 F.Supp. 768, 772 (M.D.Ala.1959), *aff'd,* 285 F.2d 123 (5th Cir.1961). However, the mistake here was not a mistake of law. Instead, the mistake was simply the defendants' failure to pay the proper rate of interest of 3.5 %.

C.A. GONZÁLEZ, Special Master.

REPORT AND RECOMMENDATION

I

***4** This case is again before the Special Master on the Plaintiffs' Motion to Recover Funds (Docket N° 7752). An earlier Report and Recommendation on the Plaintiffs' Motion recommended that the Motion be denied. Docket N° 7878. That recommendation was not adopted by the Court and instead the matter was referred back to the Special Master so that additional evidence on the Plaintiffs' Motion could be submitted and considered that was not initially presented to the Special Master. Docket N° 7878 at 1.

Following the re-referral, the Defendants and the Plaintiffs engaged in a period of discovery. After the end of discovery, the Defendants moved for summary judgment on the Plaintiffs' Motion. Docket N° 7932. Following the filing of the Motion for Summary Judgment, and at the request of the Special Master, the parties consented to having the merits of the Motion considered on the evidentiary record and pleadings submitted. Accordingly, this Report and Recommendation is on the merits of the Plaintiffs' Motion to Recover Funds.

II

The Motion to Recover Funds arises out of a dispute about the appropriate interest rate to be applied to portions of the January 2001 Settlement Agreement. Docket N° 4700. According to the Plaintiffs, the Settlement Agreement provided "four categories of payments to the plaintiff class: (1) $40,000,000 in back pay, compensatory damages, and interest; (2) $4,600,000 for the defendants' contempt of the consent decree, (3) an amount equal to the amount paid to the Adams Intervenors in settlement of their claims relating to defendants' contempt of the consent decree; and (4) an amount for settlement of certain plaintiff class members' grievances equal to the amount paid to the Adams intervenors in settlement of Adams intervenor class members' grievances." Docket N° 7953 at 1-2. This dispute over interest involves the last two categories.

In September 2001, the Intervenors received $2.4M to settle their contempt claims and $1.450M to settle their grievance claims. Upon the receipt of these payments by the Intervenors, the Defendants' obligation to pay equivalent sums to the Plaintiffs was triggered. For reasons that are not clear from the record, the Defendants did not immediately pay the Plaintiffs a sum equal to that paid to the Intervenors. On April 24, 2003, the Court intervened in the issue and entered an order on the joint motion of the Defendants and the Plaintiffs requiring the Defendants to pay the amounts due the Plaintiffs under the Settlement Agreement "plus interest from the date the equivalent sum was paid to the Adams Intervenors ... pursuant to [the] Settlement Agreement." Docket N° 6642 at 2-3. The Order was silent on the interest rate to be used.

On August 18, 2003, the Defendants tendered to the Plaintiffs a State warrant for $2,594,310. Docket N° 7953 at Exhibit 5. This payment consisted of the $2.4M owed the Plaintiffs by virtue of the Intervenors' settlement of their contempt claims, and $194,310 in interest calculated at a rate of 3.5%. *See generally* Docket N° 7953 at 2-5. Plaintiffs' counsel subsequently distributed the proceeds of the warrant to the eligible class members.

***5** The grievance settlement check was also prepared on August 18, 2003, using a 3.5% interest rate but for reasons unrelated to the interest rate dispute was never tendered to the Plaintiffs. Deposition of Bill Flowers, Docket N° 7933, Exhibit C at 52, (hereinafter "Flowers Deposition")("The cancellation of [the grievance] check did not have anything to do with the interest rate calculation that was used, did it? A. Not that I recall").

On April 28, 2004, a second grievance settlement check was processed, but instead of using a 3.5% interest rate, the Defendants calculated the interest using the then federal post-judgment interest rate of 2.6%. The 2.6% interest rate was calculated on a principal of $1.450M. Docket N° 7953 at Exhibit 8. In addition to using a 2.6% interest rate on the grievance settlement, the Defendants also recalculated the interest payment on the $2.4M contempt settlement using a 2.6% rate. The Defendants calculated that the dollar difference between using an interest rate of 2.6% instead of the 3.5% actually used on the already-paid contempt settlement was $74,552.95. *Id.*, *see also* Flowers Deposition at 66.

The Defendants' April 28, 2004 grievance settlement check reflected the principal due under the Settlement Agreement of $1.450M with an interest rate calculated at 2.6% ($99,865.55) for a total of $1,549,865.55. From this amount, the Defendants deducted the $74,552.95 allegedly "overpaid" as interest on the earlier contempt settlement. Docket N° 7953 at Exhibit 8. Therefore, the Defendants tendered a grievance settlement payment of $1,475,312.60 consisting of $1.450M in principal, $99,865.55 in interest, less the $74,552.95 in alleged interest over payment on the contempt settlement.

The Plaintiffs note in their brief that:

> Because the amount tendered by the defendants using the 2.6% interest rate and withholding the additional [$74, 552.95] was not a valid tender, ... plaintiffs did not accept the tendered amount. On May 19, 2004, plaintiffs notified defendants of their objection to the tendered amount, and requested immediate tender of the full amount as required under the Settlement Agreement, this Court's Consent Order, and the parties' agreement. After a period of attempted negotiations, on April 21, 2005, plaintiffs accepted the tender of $1.475 million, but reserved the right to seek, through the Court, payment of following sums:
>
> (a) the allegedly "overpaid" amount of $74,552.95;
>
> (b) the additional amount that would have been paid to the plaintiffs had the interest rate of 3.5% been used to calculate interest on the $1.45 million grievance settlement funds ($55,250.23);
>
> (c) the interest accrued since the date of tender;
>
> (d) future accrued interest on the contested sums.

Docket N° 7953 at 6.

Exclusive of future interest on the contested sums, the Plaintiffs seek an additional payment of $129,803.18, ($74,552.95 + $55,250.23), the amount generated by the difference in interest between the 3.5% sought by the Plaintiffs and the 2.6% used by the Defendants in calculating the interest due on the contempt and grievance

settlements.

III

A

***6** There is no question but that the parties agreed to use a 3.5% interest rate when calculating the interest due on the $2.4M contempt settlement. Mr. Flowers, the ALDOT Assistant Director of Finance, and the individual at ALDOT responsible for insuring that the amounts owed the Plaintiffs under the Settlement Agreement were properly calculated, testified by deposition that his understanding was that there was no disagreement within ALDOT about using a 3.5% interest rate when calculating the interest to be paid on the $2.4M contempt settlement. He further noted that it would have been either ALDOT's Transportation Director or its Assistant Transportation Director who would have given final approval of the payout to the Plaintiffs. Mr. Flowers testifies as follows regarding the interest calculation for the contempt settlement:

> Q. My question was 'was there any disagreement with the [3.5%]'?
>
> A. Not that I recall.
>
> Ms. York: Object to the form.
>
> Q. And you spoke with Mr. McDavid [Mr. Flower's supervisor] about using the [3.5%] interest rate, correct?
>
> A. I spoke with Mr. McDavid to inform him of the methodology and the calculations that were used to calculate the interest rate. That's correct.
>
> Q. Who ... at ALDOT ... had the authority to give final approval for the issuance of this check?
>
> A. It would have been either the director or the assistant director.
>
> Q. Okay. And when I say this check, I'm talking specifically about the check for the contempt settlement. Is that the director or the assistant director?
>
> A. We-in issues dealing with legal issues, we would work through our counsel and through the director or the assistant director at their direction to process payments for anything dealing with these legal issues.
>
> Q. Was the [3.5%] interest rate calculation a legal issue?
>
> Ms. York: Object to the form.
>
> A. In this matter it was.
>
> Q. Do you know who at ALDOT had the final authority to agree to that [3.5%] interest rate?
>
> Ms. York: Object to the form.
>
> A. On this particular interest, I don't recall who, but it would have been either the director or the assistant director.

Flowers Deposition at 36-38.

As previously noted, the State warrant for the contempt settlement with interest calculated at 3.5% was released to the Plaintiffs in August 2003. The warrant was cashed and the proceeds distributed to class members. Not until several months later when the Defendants were preparing the second grievance settlement warrant did they decide that they had applied the wrong interest rate to the contempt settlement amount, and consequently, paid the Plaintiffs almost $75,000 more in interest than they were allegedly entitled to receive.

At the time the contempt settlement funds were conveyed to the Plaintiffs the evidence establishes that it had been approved by either the Director or Assistant Director of ALDOT. At the time the contempt settlement was paid, there was no dispute between the parties on the appropriate interest rate to apply. While the Settlement Agreement (Docket N° 4700) and the Court's April 2003 Order (Docket N° 6642) were silent on the interest rate to use, the parties' conduct clearly reflects that there was an agreement to use an interest rate of 3.5% for the contempt settlement.

***7** Mr. Flowers, and Jim Binnings, an in-house accountant for Plaintiffs' counsel's law firm, had a discussion and exchanged documents regarding the appropriate interest rate calculation. Docket N° 7953 Exhibit 1. Those discussions were premised on the use of an interest rate of 3.5% to calculate the appropriate payment for the contempt settlement (and grievance settlement). Once calculated, Mr. Flowers reviewed the calculation with his immediate supervisor and then either with Dan Morris, ALDOT Assistant Director or Jim Ippolito, in-house counsel for ALDOT. Flowers Deposition at 25-26.

There is no indication that anyone within ALDOT's senior management ever raised any question with respect to the 3.5% interest rate used in calculating the final payment due the Plaintiffs for the contempt settlement. Indeed, the logical inferences from the deposition testimony of Mr. Flowers is just the opposite.

When a contract does not set forth a condition or term thereby rendering the contract ambiguous, the court can look to the parties' conduct to determine their intention with respect to the ambiguity. *See Charles H. McCauley Associates v. Snook*, 339 So.2d 1011 (Ala.1976)("the courts may look to the conduct of the parties, the provisions of the contract and its subject matter in construing the contract to ascertain the intent of the parties ... [ ]") *see also Flagg-Utica Corp. V. City of Florence*, 275 Ala. 475, 156 So.2d 338, 343 (Ala.1963)(the [d]ealings of [the] parties subsequent to the written contract are important ... to show construction by [the] parties themselves while friendly"). The parties' conduct in this matter clearly shows that with respect to the contempt settlement-and grievance settlement-the parties agreed to apply a 3.5% interest rate.

The Plaintiffs are entitled to a return of $74,552.95 in interest on the contempt settlement-the difference in using a 3.5% interest rate verses a 2.6% rate. It was improper for the Defendants to deduct this amount from the grievance settlement.

B

The interest calculation on the grievance settlement should also be set at 3.5% and not the 2.6% interest rate used by the Defendants. The evidence establishes that at the time Defendants prepared the first State warrant for the grievance settlement on August 18, 2003-the same day the State warrant on the contempt settlement was prepared-that ALDOT used an interest rate of 3.5%. *See* Docket N° 7953 Exhibit 5 (copy of cancelled grievance settlement State warrant reflecting interest calculated at 3.5%). The grievance-settlement warrant was never sent to the Plaintiffs for reasons unrelated to the current interest rate controversy. Flowers Deposition at 51-52.

There can be no serious dispute that the parties agreed as late at August 2003 that the appropriate interest rate for both the grievance settlement and the contempt settlement was 3.5% and that this rate had been authorized by either the Director or the Assistant Director of ALDOT. *See* Flowers Deposition at 37-38. The parties' course of conduct compels no other conclusion. It was only when the Defendants reissued the grievance-settlement warrant on April 28, 2004, that the Defendants unilaterally changed the rate of interest from the previously used 3.5% to 2.6% and then applied the new interest rate not only to the grievance settlement but retroactively to the contempt settlement as well.

***8** The Defendants point to a letter from Mr. Wiggins to Mr. Boyd dated April 8, 2003 (Docket N° 7953 at Exhibit 10) to which Mr. Wiggins attached a proposed order and joint motion related to the payment owed the Plaintiffs as a result of the grievance and contempt settlements previously paid the Intervenors. Mr. Wiggins' letter, the joint motion, and the proposed order were all silent on the appropriate interest rate to use. Approximately one month earlier, however, Mr. Adams had sent the Defendants documents that specifically included the use of a 3.5% interest rate. Docket N° 7932 at 3. Because the joint motion attached to Mr. Wiggins' letter was filed with the Court (Docket N° 6634), the Defendants argue that the parties had abandoned their earlier understanding as to the use of the 3.5% interest rate. According to the Defendants "[w]hile Mr. Adams' initial draft may have included specific proposals regarding interest, Mr. Wiggins' subsequent proposal withdrew that offer. "At the time the joint motion was filed and the consent order signed, the parties had agreed to Mr. Wiggins' proposal, which did not include the 3.5% [interest] rate." Docket N° 7932 at 3-4.

The problem with the Defendants argument is that the Defendants own conduct subsequent to the Court's order and the parties joint motion clearly reflects their agreement to use a 3.5% interest rate. The contempt settlement warrant and the first grievance settlement warrant were prepared four months *after* the submission of the joint motion and the Court's order directing payment, and *both* warrants were initially prepared using the agreed-to 3.5% interest rate. Clearly Mr. Wiggins' failure to mention a specific interest rate in the joint motion did not affect the Defendants' use of a use a 3.5% interest rate to calculate the amounts owed.

C.

The Defendants have presented no credible evidence from which it can be concluded the parties agreed to use a 2.6% interest rate to calculate the final amount owed the Plaintiffs. All of the evidence is to the contrary. The parties' conduct and the Defendants' actions in preparing the initial warrants establishes that the agreed-to rate was

3.5%.

Moreover, no evidence has been produced which would show that between the preparation of the initial payment warrants and the reissuance of the grievance settlement warrant that the parties ever discussed or that the Plaintiffs ever agreed to lower the interest rate from 3.5% to 2.6%.

D.

Because the Defendants unilaterally altered the amount of paid interest under the grievance settlement by applying an interest rate less than the rate agreed to; and because the Defendants deducted from the grievance settlement the amount they determined had been overpaid on the contempt settlement, there was not a valid tender of the grievance settlement on April 28, 2004. The tender was short $129,803.18.

IV

ACCORDINGLY, it is RECOMMENDED that the Plaintiffs' Motion to Recover Funds (Docket N° 7752) be GRANTED and that the appropriate interest rate to apply to the grievance and contempt settlements is 3.5%. It is further RECOMMENDED that the Plaintiffs be returned the $74,552.95 in interest improperly deducted from the grievance settlement for an alleged "overpayment" of interest on the contempt settlement and that an additional $55,250.23 in interest be awarded the Plaintiffs under the grievance settlement. The Plaintiffs should recover interest from April 28, 2004, at the rate of 3.5% on the unpaid sum of $129,803.18. The Defendants' Motion for Summary Judgment (Docket N° 7932) should be DENIED as MOOT.

***9** Objections to this Report and Recommendation must be filed with the Clerk of Court by May 31, 2006. Failure to file objections in a timely manner constitutes a waiver of the right to review by the District Court.

IT IS SO RECOMMENDED this 15th day of May 2006.

All Citations

Not Reported in F.Supp.2d, 2006 WL 3063463