2014 WL 2624312 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

John HUBER, Plaintiff - Appellee,
v.
Elizabeth O'CONNELL, Defendant -Appellant.

No. 2014-P-0677.
June 2, 2014.

On Appeal from a Judgment of the Middlesex Probate & Family Court

Brief of John Huber

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STATEMENT OF THE CASE

This is an appeal from a judgment of civil contempt of the Middlesex Probate & Family Court dated February 6, 2014. (A.4.)

The Complaint filed by John Huber on December 2, 2013 alleges failure to make payments of $350.00 per month as required by a Modification Judgment dated November 21, 2005, which Judgment incorporated the parties' stipulation of the same date. (See 2005 Judgment and Stipulation at A.6-10.)

The matter was heard on February 6, 2014 by argument of counsel. Relevant documents presented at the hearing were a chart by Mr. Huber summarizing payments made and missed (A.11), the parties' financial statements (A.15 and A.25, and an attested motion for counsel fees requesting $1,425.00 (A.13.)

***2** The Judgment dated February 6, 2014 contains three provisions relevant to this appeal:

a) The judge found that Ms. O'Connell owed $15,400, the amount prayed for in the complaint, but the judge did not find her in contempt;

b) The judge awarded no interest, and particularly no pre-judgment interest;

c) The judge reduced the award of counsel fees and costs from $1,425.00 to $500.00.

Mr. Huber filed his Notice of Appeal on March 3, 2014. Notice of Assembly of the Record On Appeal was given April 28, 2014, and this case was docketed in the Appeals Court on May 1, 2014.

STATEMENT OF FACTS

John Huber is the former husband of Elizabeth O'Connell (The parties are referred to herein as “Husband” and “Wife,” respectively.) Husband is retired and collects social security, which is his exclusive source of his income (A.25.) As part and parcel of his social security status, there is an “auxiliary benefit” to assist in the support of the ***3** parties' minor child, which at the time of the hearing was $902.50 per month. (A.30 and 31.) On November 21, 2005, the parties agreed by stipulation (A.7), (incorporated into a Modification Judgment (A.4)) that Husband (a) waived past, present, and future alimony and that (b) he would receive from Wife each month $350.00 of the child's monthly auxiliary benefit which came to her from the Social security Administration.

Early in 2010, Wife ceased making her regular payments to Husband. She acknowledged in an e-mail dated January 8, 2010 that she owed Husband $2,450.00 (A.11, A.32 and 33.) She then made sporadic payments, five in all, over the next 4 years (A.11-12.) After accounting for all Wife's payments, she owed $15,400.00 at the time of the hearing. (A.11-12.)

Husband's counsel spent 5.9 hours working on the matter and submitted a verified motion to that effect. (A.11.)

The judge had before him as exhibits the parties' financial statements, Husband's chart of payments made and missed, and Husband's Motion for Counsel Fees.

***4 ARGUMENT**

I. THE LOWER COURT COMMITTED ERROR IN FAILING TO FIND WIFE IN CONTEMPT OF COURT.

The decision whether to find Wife in contempt was in the sound discretion of the trial judge. *Freidus v. Hartwell*, 80 Mass. App. Ct. 496, 504 (2011). The applicable standard of review is whether the judge abused his discretion. *Steeves v. Berit,* 64 Mass. App. Ct. 265, 271 (2005). “An abuse of discretion consists of judicial action that no conscientious judge, acting intelligently, could honestly have taken.” *L.F. v. L.J.*, 71 Mass. App. Ct. 813, 821 (2008). Judicial discretion is not unlimited, however. Even where probate judges are be charged with weighing numerous and complicated factors in order to divide property, for example, Judges must make express findings showing they considered each of the appropriate statutory factors, and a judgment that is “plainly wrong and excessive” cannot stand. *Caccia v. Caccia,* 40 Mass. App. Ct. 376,380 (1996). Likewise custody determinations, likely the pinnacle of discretionary acts of a probate court judge, must be the product ***5** of consideration of all relevant factors bearing on the best interest of the child. *S.T. v. E.M.*, 80 Mass. App. Ct. 423, 431 (2011).

In order to hold a party in contempt, the judge must find “a clear and undoubted disobedience of a clear and unequivocal command.” *The Judge Rotenberg Educational Center, Inc., & Others vs. Commissioner Of The Department Of Mental Retardation (No. 1),* 424 Mass. 430, 443 (1997) (citations omitted.) The burden of proof in a contempt action is on the complainant to prove its case by clear and convincing evidence. *In Re Birchall,* 454 Mass. 837, 852-853 (2009). “In addition, the defendant must be found to have the ability to pay at the time the contempt judgment enters.” *Caveney v. Caveney,* 81 Mass. App.Ct. 102,117 (2012)(citation omitted.) “At the hearing of a complaint for civil contempt, the defendant shall have the burden of proving his or her inability to comply with the pre-existing order or judgment of which the complaint alleges violation.” G.L. c.215, §34.

The civil contempt hearing proceeded upon oral representations of counsel, with the aforementioned ***6** exhibits, though both parties were sworn. This is appropriate when there is tacit agreement of the parties and the absence of objection. *Mahoney v. Mahoney,* 65 Mass. App. Ct. 537, 540-541 (2006) (citations omitted).

The Modification Judgment of 2005, by way of incorporated stipulation --- the Judgment claimed to have been violated -- provided that Wife was to pay Husband $350.00 per month. Husband's chart of the amounts paid and payments missed by Wife was uncontested, and the judge found that the very amount claimed to be owing was, in fact, owing.

The Judge failed, however, to find Wife in contempt because, "The Court does not find contumacious conduct." "Contumacious" is defined as being "stubbornly and incorrigibly disobedient; insubordinate; rebellious." Standard College Dictionary, (Harcourt, Brace & Co., 1963.) Although the word has been used in the context of contempt, it is used to describe disrespectful conduct in the courtroom which, if observed by the judge, may constitute "summary contempt." "Trial judges have the inherent power to deal with ***7** contumacious conduct in the courtroom in order to preserve the dignity, order, and decorum of the proceedings". *Com. v. Wilson,* 81 Mass. App. Ct. 464, 473 (2012). The word also been used to describe conduct that constitutes a contempt of court: "Where a party's conduct in a litigation constitutes contempt of court, however, a court has discretion to award attorney's fees against the contumacious party. *Police Commissioner Of Boston V. Gows,* 429 Mass. 14, 17 (1999) (police department's failure to reinstate plaintiff after court order.) Thus the law reflects that conduct that is a contempt of court is contumacious by definition. To make out a prima facie case of contempt, it is *not* necessary to prove incorrigible disobedience or rebelliousness above and beyond disobedience of a clear court order.

The trial judge was told by counsel for Wife that there was a verbal agreement between the parties on or about January 2010 that she would discontinue her monthly payments and he would not be responsible for college fees in the future. (A.33,40.) Although the trial judge might be correct that if the Wife was relying on some agreement, her conduct did not ***8** evidence any special rebelliousness, this does not furnish a reason to avoid a finding of contempt. Assuming Wife believed this agreement existed [1], (which Husband denied A.34) the agreement was verbal, it was not entered as a court order at any time, and no evidence of such agreement was presented. (A.34.) The Judge stated that the existence of any such agreement concerning college was "a separate issue," that could be addressed by a modification action. (A.35.) He agreed that it did not bear on the merits of the contempt. (A.38.)

Wife's argument to the lower court amounts to the fact that she claims to have relied upon "self help," in eliminating or reducing her payments to Husband. This conduct has been rejected for decades in Massachusetts as a defense to contempt. In *Heistand v. Heistand,* 384 Mass. 20, (1981) defendant in a contempt action attempted to avoid a finding of contempt because he offset a portion of his child support payments in reliance on a written agreement that was incorporated into a judgment of the court concerning the parties' respective income tax ***9** liabilities. Although the reviewing Court stated it agreed with Husband's calculation, the finding of contempt was upheld on appeal.

> We conclude the defendant was correct on the merits of his argument that the plaintiff owed him $757. However, he inappropriately resorted to self-help, unilaterally reducing the support payments and thereby flouting a valid order of the court.

Id. at 29-13.

In *Heistand,* there is no question that the husband, in reducing his support, acted in good faith, and in accordance with a written agreement which became a court order. Nevertheless, his failure to pay the support order as written constituted a contempt of court.

A more recent court said as follows:

> An obligor who is unclear about the extent of his or her obligation but does not seek clarification, runs the risk of being found in contempt and responsible for attorneys' fees and interest on any unpaid amounts.

***10** *Tatar v. Schuker,* 70 Mass. App. Ct. 436 at 452 fn19(2007). [2]

was a clear, unequivocal order and a disobedience of that order. (A.34.) Once the judge made these determinations, he was not at liberty to insert another requirement to the prima facie case --- namely that there be proven some additional rebellious or, as he put it, "contumacious" conduct.

As for the last element of contempt, Wife clearly had the ability to pay the judgment, and the judge, by implication, found it to be so. She had the burden to prove that she was unable to pay, as stated earlier, and she offered no evidence on that issue. Her financial statement shows that she earns in excess of $125,000 per year, she has an automobile with $21,000 equity, and a pension worth at least $311,000, by her own reckoning. (A. ***11** 15,19,21.) She should have been found to be in contempt. "Ability to pay" does not mean the alleged contemnor "is able to write a check for the entire amount owed." It is enough if that person is able to make payments towards the obligation.

Poras v. Pauling, 70 Mass. App. Ct. 535, 542 (2007) (Citations omitted.)

Since there was a clear and unequivocal order and an undoubted disobedience, coupled with the ability to pay, Wife should have been found in contempt. It should be noted that whether or not Ms. O'Connell is found in contempt is not a purely theoretical issue. It will likely have an effect upon the counsel fee award and upon the interest properly due on the judgment.

II. THE COURT ERRED IN FAILING TO ORDER PRE-JUDGMENT INTEREST.

In Husband's chart, he calculated the interest on each and every missed payment over the four years, between January 8, 2010 and November 2013. (A.11). The judge awarded no interest for that time period. To avoid confusion, it is helpful to call this amount "prejudgment interest," because ***12** it is prior to the judgment sought by the contempt action, and because this is the label used in the case law. (As to the 2005 Judgment establishing the payments, it is post-judgment interest.)

It has been said about the function of prejudgment interest as follows:
Prejudgment interest "compensates the prevailing party for loss of the use of money that party, as determined by the judgment, should have had in the first place and not been obliged to chase." *City Coal Co. of Springfield v. Noonan, 434 Mass. 709,* 716 (2001), quoting *Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302*, 320-321 (1987).

Connecticut Valley San., v. Zielinski, 436 Mass. 263, 270-271 (2002). *Nowhere* is this policy more important than in contempt proceeding, where the cause of the loss of use of money is that a party has failed to obey a prior court order.

As a matter of public policy, the Commonwealth has previously approved the award of prejudgment interest on delinquent support payments. G.L. c. 119a, §6 authorizes the Department of Revenue to assess interest on such missed payments. The Department has done so pursuant to that statute in 830CMR §119A.6.1 at the rate of .5% per month. (See ***13** Addendum.) There is no discretion. In every case in the Department's jurisdiction, interest is to be assessed according to the regulation. Putting aside for the moment the question whether the payments to Husband in the case at bar can be characterized as child support and therefore clearly within the penumbra of that statute, the essential unfairness of permitting someone to disobey a court order and benefit by having the use of the money over a potentially long period seems contrary to the public policy utilized by the Department.

It is fully appropriate that Husband be given prejudgment interest in his contempt action pursuant to G.L. c.235, §8. That statue provides, in pertinent part, as follows:

> Every judgment for the payment of money shall bear interest from the day of its entry at the same rate per annum as provided for prejudgment interest in such award, report, verdict or finding.

This statute was applied in *Karellas v. Karellas,* 54 Mass.App.Ct.469 (2002). In that case, a judgment of divorce nisi ordered that $100,000 be paid to the wife for child support, uninsured medical expenses, and the wife's share of marital assets. The

***14** Husband appealed and was granted a stay of payment. When the Husband's appeal was dismissed, he was ordered to pay the judgment with accrued interest until the judgment be paid in full. Wife moved for an execution upon her judgment. The lower court ordered that husband be required to pay interest on the $100,000 from the time the order to pay was entered. That order was affirmed on appeal.

First, the *Karellas* Court found that the judgment of divorce nisi was a final adjudication of the rights of the parties and constituted "a judgment for the payment of money." Therefore, the court reasoned, it bore interest from the date of its entry. *Id.* at 471-472.

The Court emphasized that G.L. c.235, §8 provides "interest over any period of delayed payment. To hold otherwise would ignore clear legislative intent in enacting that statute and fly in the face of strong public policy supporting the inclusion of interest on money judgments." Id. at 474. The ***15** appellate court let stand the award of interest from entry of the judgment nisi. [3]

It is the interest on the delayed payment of the court order, coupled with ongoing interest once the complaint for contempt is filed, that will make Husband whole in the case at bar. If making a party whole were not the rule, those who owe support payments in divorce cases will be incentivized to delay compliance with court orders as long as possible, knowing they can invest the money for their own benefit or otherwise use the money. This should not be the case.

No Massachusetts case has squarely dealt with the issue whether periodic payments should come under the umbrella of G.L. c.235, §8. In *Halpern v. Rabb*, 75 Mass. App. Ct. 331(2009), a mother was denied such "prejudgment interest" for unpaid child support that accrued prior to the filing of a contempt complaint. Apparently, she relied upon G.L.c. 215,§34A, which provides interest only "from the date of filing the complaint," and G.L. c.231, §6C, which deals only with contractual obligations. Her ***16** reliance on those statutes was said to be mistaken. On the one hand, §34A is quite specific concerning the date interest begins; on the other hand, the child support obligation merged into the judgment of divorce, so there was no "contractual obligation" that remained. The Court in that case did not consider the application of G.L. c.235, §8.

Similarly, in *Poras v. Pauling*, 70 Mass. App. Ct. 535 (2007), the wife relied exclusively on G.L. c.215A, §34A for the award of interest that accrued prior to filing her complaint for contempt. The decision of the lower court that denied interest pursuant to that statue held wife to her theory. That view was affirmed on appeal. *Id.* at 546.

There are several good reasons to read G.L. c.235, §8 to mean that periodic payments of alimony or child support, and other periodic payments are "judgment [s] for the payment of money." First, failing to recognize this creates at least one significant anomaly. We have seen, above, that when the Department of Revenue collects and enforces child support payments, it adds interest at the rate of .5% per month. That means that when the DOR files a complaint for contempt on behalf of a ***17** custodial parent seeking arrears in child support, there is an award of "prejudgment interest" in the context of the contempt; but if the same person files his/her own contempt without the assistance of DOR, there would be no award of prejudgment interest on the overdue amounts unless G.L.c.235, §8 applies.

Second, our legislature has employed nearly the identical language of G.L. c.235, §8 in referring to periodic payments of support. G.L. c.215, sec. 34A governs, among other things, the award of legal fees in contempt actions where support has not been paid. In section (a), par. 4 of that statute, (See Addendum) the legislature uses the phrase "an order or judgment for monetary payment" to signify orders or judgments for periodic support payments. The terms, "judgment for the payment of money," as used in G.L. c.235, §8 and "judgment for monetary payment," as used in G.L. c.215, §34A are as close as our language allows. If periodic payments are "judgments for the payment of money" in one instance, they should be so regarded in the other.

Finally, In *Karellas, supra,* a single payment was ordered to be made pursuant to a divorce judgment.That was deemed, "a judgment for the payment of ***18** money." What if two payments were ordered? Would an order to make two payments be a judgment for the payment of money? What about three payments? The point is, the fact that a judgment requires many payments does not deprive it of being essentially a judgment for the payment of money.

The *Karellas* Court pointed out that wife could have brought contempt action instead of asking for an execution on her divorce judgment as she did. Had she done so, the result should not have been different. It is unreasonable to say that as a result of the form of her action alone, she would not have been entitled to the interest she attained by requesting an execution on her divorce judgment. Such distinctions in form should not override the simple and powerful proposition that an obligor should pay interest so as to make the deprived party whole.

Finally, the two statutes, G.L. c.215, § 34A and G.L. c. 238, §5, do not cover the same ground nor do they have the same purpose. Neither should be regarded as an exclusive remedy for the award of interest in contempt action, but they should be ***19** interpreted so as to work in synergy. G.L. c.215, § 34A "is not a substitute for statutory interest upon a money judgment. Interest in connection with a finding of contempt serves a coercive function because it is awarded at a higher rate than the judgment rate." *Karrellas*, supra at 474. Also, interest pursuant to §34A is available only beginning from the time the complaint is filed.

III. THE LOWER COURT SHOULD HAVE AWARDED INTEREST FROM THE TIME OF THE FILING OF THE COMPLAINT TO THE TIME THE MONEY IS PAID IN FULL.

Assuming Wife should have been found in contempt, there should have been an award of interest beginning from the filing of the complaint at twelve per cent per annum. G.L. c.215, §34A. The statute does not indicate that interest stops at the date of the judgment. It should continue to accrue after the judgment is entered until it is fully paid. *See Halpern v. Rabb,* 75 Mass. App. Ct. 331, 338-339 (2009). The judge made no calculation of such interest. Even if the judge properly failed to find wife in contempt, the judgment should carry post-judgment interest at six percent per annum, in accordance with G.L. c.235, §8. Such post judgment ***20** interest is the only way to "recognize fully the cost of the delay in receiving money to which the plaintiff was entitled." *Connecticut Valley San., v. Zielinski,* 436 Mass. 263, 270-271 (2002). Any post award interest should be calculated on the entire amount of the award, including principal and interest. *Id.*

It is worth noting that the money being paid to Husband most resembles child support, despite the fact that he is not designated as primary custodian of the parties' child. It is certainly not denoted a division of property. (The parties' divorce occurred in 2001, five years before the agreement to pay a portion of the auxiliary benefit.) The money paid to Husband is also not alimony. As a part of the 2005 stipulation, he waived any right to alimony, past, present, and future. (A7, par.1) The funds come from the auxiliary social security benefit meant to assist parents in caring for a child. As such, it is part and parcel of child support. The fact that each party partakes in the auxiliary benefit means that each is receiving assistance to care for the child. This further ***21** supports an award of post-judgment interest on each missed payment.

IV. THE LOWER COURT SHOULD HAVE ORDERED PAYMENT TO HUSBAND AS A LUMP SUM OR SHOULD AT LEAST HAVE ORDERED A MUCH MORE ATTENUATED PAYMENT PLAN.

The lower court, in deciding whether there was contempt, was obligated to determine Wife's ability to pay the amount due. *Caveney v. Caveney,* 81 Mass.App.Ct. 102,117 (2012). Both parties' financial statements were before him. (A.15,25.) Having reviewed Wife's financial statement, the Probate Judge ordered her to repay the $15,400 he adjudged for husband at the rate of $500.00 per month. At that rate, repayment would take 21/2 years and would end as Husband approached 76 years of age.

The judge could have and should have noticed the following:

> Wife earns in excess of $125,000 per year. She deposits $264.59 per week to her retirement plan. She spends $40.00 per week on entertainment and $57.00 per week on vacations. She spends $48.00 per week on gifts for her family. Total: $409.00 per week in discretionary spending. (A.16,17) In ***22** addition, she has an automobile worth $21,000 with no loan and a pension worth in excess of $311,000. (A. 19,21.) Husband lives on his social security check alone, while paying for some of his son's activities. (A.25,25a.)

The judge should have ordered payment of at least $400.00 per week, so that the debt would be extinguished within the year, even had interest been assessed. Wife could pay that by merely cutting discretionary spending. Moreover, she has valuable assets from which she can borrow. It was up to Wife to arrange her finances over the last several years to pay Husband the $350.00 per month he was due. She failed to make the payments. There is no explanation from the judge as to why Husband should suffer in his **elder** years while Wife invests the money she owes Husband in her pension plan, takes vacations, and entertains herself.

Husband is unaware of any cases mandating any particular payment plan or lump sum upon finding that one owes money to another, whether contempt is adjudged or not. At the same time, it seems to Husband an abuse of any reasonable discretion when the debtor who violated a clear court order to pay ***23** and who has had the benefit of the money for years, is encouraged to maintain her nice lifestyle while the creditor is denied, once more, prompt payment. Our courts have ordered the conversion of assets into cash to make support payments:

> Neither the court nor the aggrieved obligee should be required to map in detail the method by which the contemnor will transform an asset into cash. The law does not require that an obligor be allowed to enjoy an asset - such as a valuable home or the beneficial interest in a spendthrift trust - while he **neglects** to provide for those persons whom he is legally required to support.

Krokyn v. Krokyn, 378 Mass. 206 (1979).

The Appeals Court, having the financial statements before it, is in as good a position as the trial judge to make an order that the moneys owed Husband be repaid rapidly.

V. THE LOWER COURT ERRED IN FAILING TO AWARD THE FULL MEASURE OF HUSBAND'S LEGAL FEES.

This argument depends upon Husband's prior assertion that Wife should have been adjudicated in contempt. If the reviewing court disagrees, and there is no finding of contempt, then Husband waives ***24** this argument and concedes that there has been no abuse of discretion in the awarding of counsel fees.

Counsel requested in his attested motion, the sum of $1,425.00, which he stated did not include time spent on the day of the hearing (A13,apr.3), and which represented 5.9 hours of his work at $250.00 per hour. Husband says that the court erred in not including all of his fees in the award.

G.L.c.215, §34A provides, in pertinent part, that "in entering a judgment of contempt for failure to comply with an order for monetary payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant all of his reasonable attorney's fees and expenses relating to the attempted resolution, initiation and prosecution of the complaint for contempt.

There are important policy reasons why all of the reasonable fees should be awarded:
We indicated in *Olmstead v. Murphy, 21 Mass. App. Ct. at 666*, our understanding of the statutory presumption as a reflection of "the Legislature's concern that the ***25** statute be an effective goad to compliance with support payments." If attorneys are to be willing to undertake efforts to obtain enforcement of support orders, they need to know they will be fairly compensated. This is all the more so, the more recalcitrant or obstructionist the defaulting spouse. If attorneys had to look to their clients for compensation, realistically, the limited support ordered by the court would be reduced. A defaulting spouse should know that noncompliance can be costly.

Kennedy v. Kennedy 23 Mass.App.Ct. 176, 181 (1987)

In the case at bar, counsel pointed out to the Court that Wife was an intransigent defendant. She claimed multiple times not to have been served with process; not to have been served with requests for her financial statement (See attested motion A13), requiring additional correspondence and re-service of documents. (There were three separate requests for her financial statement (A.42.) There was examination of e-mails to determine the start date of the arrears and amount, and the creation of the chart for the Court with the calculation of interest, as well as the appearance to argue the matter. Although it is admitted that the Court has discretion in terms of determining the quality of ***26** the work product and the hours reasonably required in the case, "the governing principal is to award all of the fees." *Allen v. Allen*, 23 Mass. App.Ct. 515, 524-525 (1987).

The Court does not explain why it reduced the fee by more than half. The presumption under 34A can be overcome only by specific findings supporting a reduction in a request for reasonable fees. G.L. c.215, §34A, *Kennedy v. Kennedy* 23 Mass.App.Ct. 176, 181 (1987).On the facts of this case, where the complete transcript and all submissions are before the Appeals Court, it is appropriate for this Court to make the revision in the fee award, rather than remanding the matter for further proceedings. *Olmstead v. Murphy*, 21 Mass. App. Ct. 664, 667 (1986)

CONCLUSION:

For the foregoing reasons, Husband requests the following relief:
a) reversal of the lower court's determination that Wife is not in contempt;

***27** b) An award of "prejudgment interest" on the missed support payments in the amount of $1,925;

c) Order simple interest at the rate of 12% per annum on the contempt judgment from the time the complaint was filed to the date of Judgment; thereafter interest at the same rate on the remaining balance until fully paid;

d) An Order that the entire amount that is due be paid within 60 days.

Footnotes

1 Contrary to Wife's assertion that a verbal agreement on or about January 2010 relieved her of further payments to Husband, she, in fact, made further payments in both 2010 and 2011, and the total of those payments goes beyond what she owed Husband ($2,450) in January 2010. See A.11.)

2 *The Judge Rotenberg Educational Center, Inc., & Others v. Commissioner Of The Department Of Mental Retardation (No. 1).* 424 Mass. 430, 443-444 (1997) is not contrary.There, one of the parties was required by court order to comply in good faith with a settlement agreement. The question, therefore, as to whether in the context of a contempt he did act in good faith was owing to the unique circumstances of that case and not to any prima facie requirement of proving or disproving good faith in a contempt action.

3 There was no prejudgment interest specified in the Judgment Nisi, so the *Karellas* Court used "the six percent standard statutory rate found in G.L. c. 231,§6. That should also be the rate here.