

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>BURNAM LITCHFIELD and</b>	)	
<b>JOHN LAMBIE,</b>	)	
	)	
<b>Plaintiffs</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 99-97-B</b>
	)	
<b>THE BANK OF NEW YORK,</b>	)	
	)	
<b>Defendant</b>	)	

**ORDER MODIFYING THE RECOMMENDED DECISION  
OF THE MAGISTRATE JUDGE**

The United States Magistrate Judge filed with the Court on June 1, 2000, her Recommended Decision on Defendant’s Partial Motion for Summary Judgment and Plaintiffs’ Cross Motion for Partial Summary Judgment. Plaintiffs and Defendant have filed their objections to the Recommended Decision. Having reviewed and considered the Magistrate Judge’s Recommended Decision and the parties’ objections, together with the entire record, the Court has made a *de novo* determination of all matters adjudicated by the Magistrate Judge’s Recommended Decision. In accordance with this *de novo* review, the Court offers the following by way of explanation and modification:

1. Despite Plaintiffs’ objections, the Court finds that the Magistrate’s decision to award nine percent interest is fair, reasonable, and in accordance with New York law. See N.Y. CPLR 5004 (McKinney 2000); Rodriguez v. New York City Housing Auth., 689 N.E.2d 903, 906 (N.Y. 1997) (noting that “the Legislature has set 9%

as the rate of interest to be generally imposed so that amount is presumptively fair and reasonable, notwithstanding any contemporaneous grant of judicial discretion to impose a lesser amount”). In this case, a lower interest rate is not warranted. To the extent Plaintiffs argue that, on the facts presented, New York law provides an entirely different measure of damages, the Court finds Plaintiffs’ objections without merit.

2. Defendant’s sole objection is that damages should be calculated using simple rather than compound interest. Where a trustee breaches its duty to the trust, the New York Court of Appeals has explained that “[w]hether interest is awarded, and at what rate, is a matter within the discretion of the trial court.” In re Estate of Janes, 90 N.Y.2d 41, 55 (1997). Nonetheless, in New York, an award of compound interest against a fiduciary is usually reserved for cases involving egregious breaches of trust. See In re Estate of Revson, 447 N.Y.S.2d 297, 302 (N.Y. App. Div. 1982) (“Compound interest may be awarded, but only where the trustee has been guilty of bad faith.”); In re Schuster’s Will, 3 N.Y.S.2d 702, 703 (N.Y. Surr. Ct. 1938) (“Compound interest at some rate is sometimes allowed against trustees who have been guilty of bad faith or some other wrong to the beneficiaries of the trust.”) (quoting as dictum Brown v. Knapp, 79 N.Y. 136 (1879)). See also 72 N.Y. Jur.2d Interest & Usury § 37 (1988) (“Where a fiduciary, such as an administrator or executor, a guardian or trustee, has been guilty of gross negligence or willful misconduct in the administration of the estate, he will be held liable for compound interest.”).

In this case, Defendant BNY, in its role as trustee, failed to comply with the plain language of the Trust Agreement for a period of ten years. Admirably, the Defendant trustee eventually discovered the error, returned the overcharged amounts, and alerted the

beneficiaries. However, BNY's inadvertent overcharging, which mysteriously began in 1988 and continued until August 1997, when a review of the trust was conducted, exhibited an inexcusable indifference to its fiduciary duties. As a result of this breach of fiduciary duty, BNY took \$17,081.29 as commissions to which it was not entitled. Of this amount, \$16,206.39 was trust income belonging to Plaintiff beneficiaries and \$874.90 was taken from the trust principal.

Under these circumstances, the Court finds that the award of compound interest should be limited to the amount the Defendant took from the trust corpus on May 1990. An award of simple interest on the remaining income owed to the Plaintiff beneficiaries is warranted because all parties admit that the beneficiaries used the quarterly income distributions for ongoing expenses. See Def. Statement of Material Facts ¶ 17 (Doc # 21).

Comparatively, an award of compound interest on the trust principal is justified for two reasons. First, but for BNY's erroneous commission charge in May 1990, the \$874.90 of trust principal, unlike the income distributions, would have continued to grow and generate income. See Pl. Statement of Additional Material Facts ¶ 25 (Doc # 23). Second, BNY had no authority to deduct its commissions from the trust corpus.<sup>1</sup> Therefore, the Court affirms the portion of the Magistrate's Recommended Decision awarding compound interest on the \$874.90 of trust principal. On the remaining \$16,206.39, the Court orders the Defendant to pay simple interest at the rate of nine percent per annum. This interest shall be calculated based on the amount of the

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<sup>1</sup> Pursuant to Article Nine of the Trust Agreement, trustee compensation was to be "paid out of any income of the trust." See Def. Ex. 1 (Doc #20). The only time that trustee compensation could have come from the trust principal was upon distribution of the principal. See id. None of the evidence submitted suggests that there was a distribution of trust principal in May 1990. Therefore, there was no reason for BNY to deduct its commission from the trust principal.

overcharge and the date the overcharge incurred.<sup>2</sup> See N.Y. C.P.L.R. 5001 & 5004 (McKinney 1999).

But for these modifications, the Court finds that the objections of both parties are without merit. The Court concurs with the recommendations of the Magistrate Judge for the reasons set forth above as well as those reasons set forth in her Recommended Decision, and determines that no further proceeding is necessary.

1. It is therefore ORDERED that the Recommended Decision of the Magistrate Judge is hereby AFFIRMED as MODIFIED.

2. It is further ORDERED that the Defendant's Motion for Summary Judgment as to Count I is GRANTED in part and DENIED in part and that Plaintiffs' Motion for Summary Judgment is DENIED.

3. It is further ORDERED in connection with these rulings that, under Count I, Plaintiffs shall recover an award of compound interest at nine percent per annum on the amount wrongly taken from the trust corpus (\$874.90) from May 1, 1990 until August 1, 1997 as well as simple interest at nine percent per annum on the various overcharges to the trust income totaling \$16,206.39. This simple interest award shall be calculated using the above-described formula with interest continuing until the date upon which the Defendant pays Plaintiffs all of the interest owed under this Order. The Court further ORDERS Defendant to provide Plaintiffs with an explanation of its calculation of the interest award under this formula.

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<sup>2</sup> See Def. Ex. 2 (Doc #20). Defendant shall calculate the interest pursuant to this exhibit laying out the date and amount of each overcharge. Thus, the Defendant would pay nine percent per annum on \$1,074.82 beginning May 1, 1988, and nine percent per annum on \$1,152.30 beginning May 1, 1989, etc.

SO ORDERED.

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George Z. Singal  
District Judge

Dated this 8th day of August, 2000.

BURNHAM R LITCHFIELD  
plaintiff

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[COR LD NTC]  
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JOHN LAMBIE  
plaintiff

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GERALD E. RUDMAN  
(See above)  
[COR]  
C. LEIGH MCCARTHY, ESQ.  
(See above)  
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v.

BANK OF NEW YORK  
defendant

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