

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3879

Summary Calendar

HIBERNIA NATIONAL BANK,

Plaintiff-Appellee,

v.

JOHN WILLIAM CARNER,

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Louisiana
(CA-90-263-B-M1)

(July 27, 1994)

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

John W. Carner appeals the district court's judgment which awarded post-judgment interest at the Louisiana legal rate, pursuant to article 2000 of the Louisiana Civil Code, instead of at the federal legal rate, pursuant to 28 U.S.C. § 1961. We reverse the judgment of the district court.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

In March 1990, Hibernia National Bank (Hibernia) filed suit in the United States District Court for the Middle District of Louisiana against John W. Carner for the deficiency remaining on a debt owed Hibernia by the Jefferson Hills Partnership, of which Carner was one of eight partners. The district court eventually granted Hibernia's motion for summary judgment, concluding that Carner was liable to Hibernia but reserving its decision on the amount of damages. After a trial on the issue of damages, the court rendered a judgment on July 24, 1992, against Carner

for one-eighth of the outstanding principal deficiency of the Jefferson Hills Partnership . . . [plus] interest as provided for under the 30 promissory notes . . . [plus] legal interest as provided for by Louisiana law, on the total sum of the principal and interest awarded above, from the date of judicial demand (March 26, 1990) until this Judgment is paid in full.

Carner appealed the district court's judgment to this court, and we affirmed in part, reversed in part, and remanded the case for entry of judgment consistent with our opinion. See Hibernia Nat'l Bank v. Carner, 997 F.2d 94 (5th Cir. 1993). On remand, Hibernia and Carter could not agree on a stipulated judgment. Hibernia then submitted a judgment to the district court, which the court signed on October 20, 1993. On October 29, 1993, Carner filed a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. On December 21, 1993, the district court denied Carner's motion and entered judgment against Carner in the principal amount of \$272,532.68 plus accumulated interest through October 1, 1993, of \$105,579.58

and a per diem thereafter for the year 1993 in the amount of \$52.27, and for each year thereafter at a per diem rate based on Louisiana legal interest. Carner now appeals from the December 21, 1993, judgment.

II.

Carner argues that Hibernia was entitled to post-judgment interest at the federal legal rate pursuant to 28 U.S.C. § 1961 and not at the Louisiana legal rate. This court reviews issues of law de novo. SEC v. AMX, Int'l, Inc., 7 F.3d 71, 73 (5th Cir. 1993). We must thus determine whether the district court applied the relevant law.

Section 1961 provides in pertinent part that

[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the day of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Court shall distribute notice of that rate and any changes in it to all Federal judges.

28 U.S.C. § 1961(a). This statute thus governs the awarding of post-judgment interest in federal civil cases, even in diversity cases. Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 622 (5th Cir. 1988); see Brown v. Petrolite, 965 F.2d 38, 51 (5th Cir. 1992). Hence, this statute governs the award of post-judgment interest in the instant case.

Hibernia, however, contends that in the instant appeal Carner should be judicially estopped from asserting that § 1961

is the applicable law. Hibernia points out that in the original appeal, Carner argued that the "legal interest" applicable in his case should be determined pursuant to Louisiana law, specifically article 2000 of the Louisiana Civil Code, and that Carner made no distinction between pre-judgment and post-judgment legal interest.

In his original appeal, Carner argued that Hibernia was not entitled to both conventional interest and legal interest under Louisiana law. Carner asserted that the district court had awarded both conventional interest from the date of default until the principal amount was paid and legal interest from the date of judicial demand and contended that under Louisiana law, specifically article 2000 of the Louisiana Civil Code, Hibernia was not entitled to both. Hibernia agreed, as did this court:

The parties agree that the district court's award of both forms of interest is duplicative and precluded by article 2000 of the Louisiana Civil Code and relevant jurisprudence. . . . Accordingly, we conclude that, when altering its award of interest on remand, the district court may award Hibernia interest from the date of judicial demand pursuant to article 2000.

Hibernia Nat'l Bank, 997 F.2d at 104.

Hibernia now asserts that because Carner (1) argued before this court that "legal interest" should be determined under Louisiana law and (2) failed to clarify this court's ruling with respect to our instruction that the district court award Hibernia "interest" pursuant to article 2000, he should be judicially estopped from arguing that our ruling pertained only to pre-judgment interest and not also to post-judgment interest.

Carner, on the other hand, asserts that in making his argument concerning "legal interest" in the original appeal, he was not implicating post-judgment interest because such interest is, as a matter of law, controlled by § 1961. Thus, he contends that his present position is not inconsistent with his prior position and that he has not led this court astray such that he should be precluded from proceeding with the instant appeal because of the doctrine of judicial estoppel. We agree.

Judicial estoppel is a common law doctrine which prevents a party that has taken one position in litigating an issue from later reversing its position when it is to its advantage to do so. See United States for use of American Bank v. C.I.T. Constr. Inc. of Tex., 944 F.2d 253, 258 (5th Cir. 1991); Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988). "It is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories," Levinson v. United States, 969 F.2d 260, 264 (7th Cir.), cert. denied, 113 S. Ct. 505 (1992); see Brandon, 858 F.2d at 268, litigants who play "fast and loose" with the courts.

It is clear to us that the facts of this case do not rise to the level at which judicial estoppel is applicable. Because the doctrine of judicial estoppel is used to protect the integrity of the judicial process, Carner's conduct here does not approach "the level of culpability that would justify application of the doctrine." See Brandon, 858 F.2d at 268. Although Carner's arguments before us in the original appeal were couched in

general terms of "legal interest," we cannot say that Carner has taken inconsistent positions before us or has "played fast and loose" with this court. Because post-judgment interest in a federal civil case is, as a matter of law, controlled by § 1961, the district court should have awarded post-judgment interest accordingly.

III.

For the foregoing reasons, we REVERSE the judgment of the district court with respect to its award of post-judgment interest and REMAND with instructions to award post-judgment interest in accord with 28 U.S.C. § 1961.