



**GRANTED
IN PART**

The moving party is hereby **ORDERED** to provide a copy of this Order to any pro se parties who have entered an appearance in this action within 10 days from the date of this order.

**Charles M. Pratt
District Court Judge**

DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, ARAPAHOE COUNTY

STATE OF COLORADO

Arapahoe County Justice Center
7325 South Potomac Street
Centennial, Colorado 80112

Plaintiff:

████████████████████

v.

Defendant:

████████████████████

Counsel for Defendant:

Eric H. Schunk, Esq.
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Case No.: ██████████
Division: 404

MOTION TO MODIFY ENTRY OF JUDGMENT

COMES NOW, Defendant, ██████████ by and through his attorneys, Eric H. Schunk, Esq. of Schunk & Associates, LLC, respectfully timely moves this Court to modify the judgment under Colorado Rules of Civil Procedure (hereinafter "C.R.C.P.") Rule 60(a) and/or (b) with respect to interest. As grounds therefore, Defendant states as follows:

RELEVANT FACTUAL PREDICATE

1. On or about September 7, 2010, Plaintiff moved for entry of judgment based on Defendant's default of his payment obligations under the promissory note, a copy of which is attached as Exhibit "A" and incorporated by reference herein. In said motion, Plaintiff additionally claimed interest, which the Court granted same on or about October 10, 2010.
2. On November 4, 2010, Graham had filed for bankruptcy, which automatically stayed all litigation pursuant to 11. U.S.C. 362(b).
3. On September 21, 2011, the Bankruptcy Court lifted ██████████ from the protections of the automatic stay so as to allow Plaintiff to pursue collection activities against him. See Bankruptcy

Order dated September 21, 2011, attached hereto as Exhibit “B” and incorporated by reference herein.

4. Graham timely moves within 60 days of the September 21, 2011 Bankruptcy Order under CRCP Rule 60 for modification of the District Court Order to remove the provisions with respect to interest.

LEGAL ARGUMENT

I. INTEREST IS CONSIDERED A CLERICAL MISTAKE UNDER C.R.C.P. RULE 60(a).

It is well recognized that a court’s failure to include interest or an incorrect calculation of interest falls squarely within C.R.C.P. Rule 60(a) and the moving for or the correction of interest is not subject to the strictures of the 60 day time constraint listed in C.R.C.P. Rule 60(b). *See generally, Brooks v. Jackson*, 813 P.2d 847 (Colo. App. 1991); *Crosby v. Kroeger*, 330 P.2d 958 (Colo. 1958). Logically and legally, the inadvertent inclusion of interest by a Court in the case *sub judice* is also subject to the provisions of C.R.C.P. Rule 60(a).

In Plaintiff’s Motion for Entry of Judgment, filed on September 7, 2010, Musich references C.R.S. § 13-21-101(1) as his basis for entitlement of interest, but such statutory reference is error as the terms of the Promissory Note control, which expressly do not provide for interest.

The Promissory Note (Exhibit A), **drafted by [REDACTED] attorneys, as well as reviewed and approved by [REDACTED] attorneys**, explicitly does not provide for the recovery of interest. It is well established in Colorado by electing to settle a claim and not providing for interest, such interest is forfeited in the exchange of certainty of the settlement. *See, Martinez v. Jesik*, 703 P.2d 638 (Colo. App. 1985); *Kussman v. City and County of Denver*, 671 P.2d 1000 (Colo. App. 1983).

Accordingly, Defendant [REDACTED] respectfully contends that the Court's award of interest in October 2010 was clerical error and requests the modification of the judgment to reflect the removal of such interest.

II. INTEREST AWARDED IN THE OCTOBER 10, 2010 JUDGMENT WAS ERROR UNDER C.R.C.P. 60(b)(1)

Alternatively, under C.R.C.P. Rule 60(b)(1), [REDACTED] is obligated to timely move within 60 days of the Order to revisit the issues raised by this Motion. Simply stated, contesting the entry of judgment before the removal of the automatic stay would have been a violation of same. As [REDACTED] was subject to the strictures of 11 U.S.C. 362(b) until September 21, 2011, said motion is timely as it falls within the 60-day mandate of C.R.C.P. Rule 60(b)(1).

The removal of interest is clearly a meritorious defense and consistent with the equities in the case, as the Promissory Note explicitly does not provide for same, the terms of which were negotiated by the parties' attorneys. *See generally*, Goodman Associates, LLC v. WP Mountain Properties, LLC, 222 P.3d 310 (Colo. 2010).

WHEREFORE, Defendant, [REDACTED] respectfully requests that the Court remove all terms and provisions of interest from its Order of October 10, 2010, which were inadvertently awarded by this Court.

Dated: November 18, 2011.

SCHUNK & ASSOCIATES, LLC

/s/ Eric H. Schunk
Eric H. Schunk, Esq.
Attorney for [REDACTED]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of November, 2011, a true and correct copy of the foregoing **Motion for Modification with Exhibits** was electronically filed with the Court and served to the following parties via *Lexis/Nexis*:

Craig A. Sargent, Esq.
Patrick A. Singer, Esq.
Lauren E. Sykes, Esq.
Pryor Johnson Carney Karr Nixon, P.C.
5619 DTC Parkway, Suite 1200
Greenwood Village, Colorado 80111-3061

/s/ Eric H. Schunk
Eric H. Schunk

Court: CO Arapahoe County District Court 18th JD

Judge: Charles M Pratt

**File & Serve
Transaction ID:** 40968414

Current Date: Dec 29, 2011

Case Number: [REDACTED]

Case Name: [REDACTED]

**Court Authorizer
Comments:**

The motion to amend the judgment to eliminate the provision for interest assumes that the Court retains jurisdiction to modify the judgment to conform to the terms and conditions of the underlying settlement documentation, which does not provide for interest, but does provide for an award of attorney's fees and costs. If the Court retains the authority to modify the judgment to withdraw the award of interest, the Court also retains the authority to modify the judgment to award attorney's fees and costs. Both parties agree that the Court retains such jurisdiction. The Plaintiff shall file a proposed order that excludes the interest, and the Plaintiff shall file a request for attorney's fees and costs, to which the Defendant may respond within 15 days of filing.

/s/ Judge Charles M Pratt