

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

MOHAMED A. EL-TABECH,	)	
	)	4:04CV3231
Plaintiff,	)	
	)	
v.	)	MEMORANDUM AND ORDER
	)	
HAROLD W. CLARKE, et al.,	)	
	)	
Defendants.	)	
_____	)	

This matter is before the court on plaintiff's motion for relief under Fed. R. Civ. P. 69 or 70, Filing No. [212](#).<sup>1</sup> On May 5, 2008, this court entered judgment in favor of plaintiff for attorneys' fees and costs in the amount of \$204,856.28. Filing No. [203](#) at 2-4. Under federal law, post-judgment interest accrues on that judgment at the rate set under [28 U.S.C. § 1961](#). Plaintiff seeks an order directing the defendants to immediately issue a warrant payable to plaintiff's counsel to satisfy the May 5, 2008, judgment and also seeks an increase in the amount of post-judgment interest payable the judgment to a rate deemed appropriate to insure the defendants' compliance with the court's order.

In support of its motion, the plaintiff has shown that the defendants will not pay the judgment unless and until the plaintiff files a claim with the Nebraska State Claims Board, the Board approves the claim, and the Unicameral agrees to appropriate money to fund

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<sup>1</sup>Rule 69 provides for enforcement of money judgments by a writ of execution and states that "[t]he procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). Rule 70 provides:

If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court.

Fed. R. Civ. P. 70(a). Rule 70 also provides that "[t]he court may also hold the disobedient party in contempt." Fed. R. Civ. P. 70 (d).

the defendants' payment in accordance with Neb. Rev. Stat. § 25-1806 and the State Miscellaneous Claims Act, Neb. Rev. Stat. § 81-8,294.<sup>2</sup> Filing No. [213](#), Index of Evidence, Affidavit ("Aff.") of Gene Summerlin at 4, Exhibit C, e-mail correspondence. Under the procedure, acceptance of the payment would operate as "a complete release by the claimant of any claim against the state and against the employee of the state whose act or omission gave rise to the claim by reason of the same subject matter." Neb. Rev. Stat. § 81-8,301. The plaintiff has also shown that the law firm of Ogborn, Summerlin & Ogborn, P.C., maintains an operating line of credit that exceeds the amount of the attorneys' fees judgment and has done so continually since May 5, 2008. *Id.*, Summerlin Aff. at 4. Interest accrues on the outstanding balance of the operating line at 5.0% per year. *Id.* at 5. The daily interest that accrues on that portion of the operating line attributable to the defendants' failure to pay the judgment is \$28.47. *Id.* The plaintiff has shown that his attorneys' firm has incurred interest obligations in the amount of \$4,839.90 from the date of judgment to the date his motion was filed, October 21, 2008, and has incurred interest of \$28.47 per day since then.

In response to the motion, the defendants assert that "[t]he Defendants, the Department of Correctional Services, and the State of Nebraska are not refusing to pay the judgment awarded by this court," but seek only to follow state procedures. Filing No. [220](#), Defendants' Brief at 4. They contend that "[t]o allow Plaintiff's attorneys to circumvent the

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<sup>2</sup>A miscellaneous claim as used in the State Miscellaneous Claims Act means "any claim against the state for which there is no other specific provision of law for the resolution of such claim." Neb. Rev. Stat. § 81-8,294. Under the Miscellaneous Claims Act, the State Claims Board has the "power and authority to receive, investigate, and otherwise carry out its duties with regard to (1) all claims under the State Miscellaneous Claims Act, (2) all claims under sections 25-1802 to 25-1807, (3) all claims under the State Contract Claims Act, (4) all requests on behalf of any department, board, or commission of the state for waiver or cancellation of money or charges when necessary for fiscal or accounting procedures, and (5) all claims filed under section 66-1531." Neb. Rev. Stat. § 81-8,297.

system would expose the State of Nebraska to potential indebtedness greater than that allowed by its constitution. Instead, the procedures put in place through the Miscellaneous Claims Act assure that proper funds will be allocated so that the State does not fall below the Constitutionally allowed deficit.” *Id.*; see also Filing No. [221](#), Index of Evid., Ex. 2, Aff. of Laura Petersen.

Under the Federal Rules, “a money judgment is enforced by a writ of execution, unless the court directs otherwise” and “the procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.” Fed. R. Civ. P. 69 (a). Proceedings in aid of execution are governed by Neb. Rev. Stat. § 25-1564 to 25-1580. Nebraska law also provides that “fees and expenses awarded by a federal court or pursuant to sections 25-1802 to 25-1805 shall be paid in the manner provided in the State Miscellaneous Claims Act” and claims for such fees and expenses shall be filed with the State Claims Board in the manner provided in the Act. Neb. Rev. Stat. § 25-1807. That provision, however, applies only to “a civil action brought by the state or an action for judicial review brought against the state pursuant to the Administrative Procedure Act.” Moreover, to the extent that the Nebraska claims process that requires legislative approval and appropriation prior to the State’s payment of a federal court judgment conflicts with the purposes underlying § 1983 (to compensate victims and deter future deprivations of federal constitutional rights), it is preempted by federal law. See [Hankins v. Finnel, 964 F.2d 853, 860-61 \(8th Cir. 1992\)](#).

The court finds the defendants’ position is untenable. The defendants’ contention that Rule 69, which governs execution, requires compliance with Neb. Rev. Stat. § 25-

1,807 and the Miscellaneous Claims Act is misplaced. The defendants confuse “execution on a judgment” with presentation of a claim. To “execute” means “to enforce or collect on a money judgment.” Black’s Law Dictionary (8th ed. 2004). A claim, on the other hand, is “the aggregate of operative facts giving rise to a right enforceable by a court” or “a demand for money, property, or a legal remedy to which one asserts a right.” *Id.* The plaintiff has been awarded a fully enforceable judgment for attorneys’ fees and can execute on that judgment in accordance with Nebraska law. The State Board of Claims has no authority to approve, disapprove, or modify that judgment. See [Gates v. Collier, 616 F.2d 1268, 5th Cir. 1980](#)) (“stating “it is now beyond dispute that a federal district court has the authority to order that attorneys' fees be paid out of a state's treasury.”). Also, the State of Nebraska indemnifies its officials and employees “for money damages and reasonable costs incurred as a result of an act or omission occurring in the course and scope of employment of such official or employee.” Neb. Rev. Stat. § 81-8,239.05.

In considering a motion for relief under Fed. R. Civ. P. 69 or 70, “[a] district court may take any reasonable action to secure compliance with its orders.” [Association for Retarded Citizens of North Dakota v. Olson, 713 F.2d 1384, 1396 \(8th Cir. 1983\)](#) (quoting [Gates v. Collier, 616 F.2d 1268, 1271 \(5th Cir. 1980\)](#)) (noting that the Court of Appeals will intervene only when “the district court's response is so inappropriate as to amount to an abuse of discretion”). As an alternative to a finding of contempt, the Eighth Circuit Court of Appeals approves retroactive compensatory awards to reimburse plaintiffs for interest paid on their loans during the time the State does not pay a judgment, as well as increasing the interest on an unpaid judgment. See *id.* at 1396. The Eighth Circuit views a

post-adjudication order for interest a "reasonable action to secure compliance with [the trial court's] orders. . . ." *Id.*

Under federal law, post-judgment interest is assessed at "a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." [28 U.S.C. § 1961\(a\)](#). The plaintiff has shown that his attorneys are being assessed interest on their operating line of credit at a higher rate. The state "may not successfully hide behind state procedural shields to avoid the consequences of a valid district court judgment effectuating an appropriate 1988 award." [Collins v. Thomas, 649 F.2d 1203, 1206 \(5th Cir. 1981\)](#). The defendants' invocation of its lengthy claims procedure should not operate to the financial detriment of the plaintiff's attorneys. Accordingly, the court finds it appropriate to compensate plaintiff's counsel for interest payments they incurred as a result of the defendants' delay in payment. Prospectively, the court finds the rate of interest should be increased to ensure compliance with the court's order.

IT IS ORDERED that:

1. Plaintiff's motion for relief under Fed. R. Civ. P. 69 or 70 (Filing No. [212](#)) is granted.

2. Judgment is entered for interest in the amount of \$4,839.90 for the period from May 5, 2008, to October 21, 2008, and for \$3,017.82 for the period from October 21, 2008, to the date of this order.

3. Interest at the rate of 14% shall accrue on any outstanding judgment from the date of this order.

DATED this 4<sup>th</sup> day of February, 2009.

BY THE COURT:

s/ Joseph F. Bataillon  
Chief District Judge