

Bell v United Parcel Serv., Inc.
2014 NY Slip Op 33866(U)
October 2, 2014
Supreme Court, Nassau County
Docket Number: 016033/11
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 13

VINSON L. BELL,

X

Plaintiff,

Index No.: 1016033/11
Motion Sequence...03
Motion Date...09/09/14
XXX

-against-

UNITED PARCEL SERVICE, INC. and JOHN DOE,

Defendants.

X

Papers Submitted:

Order to Show Cause.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the Order to Show Cause by the Plaintiff, VINSON L. BELL, seeking an Order restoring the action to the active trial calendar and extending the time to file his note of issue, is determined as hereinafter provided.

The Plaintiff commenced the instant personal injury action by filing a Summons and Complaint in the Office of the Nassau County Clerk on November 10, 2011. The action arose out of an alleged accident, which occurred on November 26, 2008, when the Defendant, United Parcel Service's driver collided with the vehicle driven by the Plaintiff. The Plaintiff allegedly suffered injuries as a result of the accident.

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On April 17, 2013 this matter was certified ready for trial by the Order of the Honorable Thomas P. Phelan, dated April 17, 2013. A Note of Issue was to be filed within 90 days of said Order. It is undisputed that the Plaintiff failed to file the Note of Issue within 90 days of the date of said Order and to date, has not filed same. On October 2, 2013, some 78 days after the Note of Issue was to be filed, the case was marked dismissed by the Clerk of the Court due to the Plaintiff's failure to file the Note of Issue within 90 days of the date of the Certification Order. The Plaintiff served a motion, dated February 10, 2014, and made returnable on March 10, 2014, seeking to, *inter alia*, restore the matter to the active trial calendar and extend his time to file the Note of Issue. (See Motion Seq. 02 annexed to the Notice of Motion [Mot. Seq. 03] as Exhibit "E")

The Plaintiff's motion was granted by an the Order of Justice Phelan dated June 3, 2014 and entered on June 4, 2014. Justice Phelan found that the Plaintiff's reliance on *Cadichon v. Facelle*, 18 N.Y.3d 230 (2010) was misplaced in that "the certification order, dated April 17, 2013, which directed the plaintiff to file a note of issue within 90 days and warned that the action would be deemed dismissed without further order of the Court if plaintiff failed to comply, had the same effect as a valid 90-day notice pursuant to CPLR 3216." (See Order [Phelan, J.] dated June 3, 2014 annexed to the Notice of Motion as Exhibit "F") Justice Phelan found that although the Plaintiff did not set forth a justifiable excuse for failing to comply with the Certification Order nor for the delay in moving to vacate the dismissal, his failure to file the Note of Issue amounted to law office failure. (*Id.*)

Justice Phelan further found that the certified deposition transcript submitted with the Plaintiff's motion was sufficient to establish a meritorious cause of action. (*Id.*) Accordingly, Justice Phelan granted the Plaintiff's motion and directed the Plaintiff to serve and file the Note of Issue within twenty days from the date of his Order. (*Id.*)

The Plaintiff failed to serve and file the Note of Issue pursuant to Justice Phelan's Order. The Plaintiff filed the instant Order to Show Cause on August 19, 2014, which was 57 days past the date the Note of Issue was to be filed pursuant to Justice Phelan's June 3, 2014 Order.

CPLR § 3216 (a) provides that the court on its own motion or a motion by a party may dismiss an action for failure to prosecute by the plaintiff. (*Chase v. Scavuzzo*, 87 N.Y.2d 228 [1995]) The statute provides that the plaintiff must be served with a ninety (90) day notice to prosecute the action. An order of the court, entered into at a certification conference, is sufficient to meet the ninety (90) day requirement when all parties sign the order. (*Betty v. City of New York*, 12 A.D.3d 472 [2d Dept. 2004]; *Vinkour v. Jamaica Hospital*, 2 A.D.3d 518 [2d Dept. 2003]) Here, the parties entered into a Certification Order on April 17, 2013, which was signed by all parties. Said Order states in the first paragraph that "This matter is hereby certified for trial and plaintiff(s) is directed to file a Note of Issue within 90 days. If plaintiff does not file a Note of Issue within 90 days this action is dismissed without further order of the court. (CPLR 3216)". The Court finds that the Plaintiff's reliance on *Cadichon v. Facelle*, *supra*. is again misplaced and that the

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certification order shall be deemed a ninety (90) day notice.

In support of the instant application, the Plaintiff's counsel states that its failure, for the second time, to timely file the Note of Issue was due to law office failure. The Plaintiff's counsel states that his office never received a copy of the June 3, 2014 Order and that he was unaware of the deadline to file the Note of Issue. The Plaintiff's counsel further states that the instant application was made immediately upon learning that the action had once again been disposed.

In opposition, the Defendant's counsel argues that the Plaintiff has failed to tender an adequate excuse for his failure to have filed the Note of Issue that is sufficient to satisfy the statutory requirement. The Defendant's counsel argues that Justice Phelan's Order, dated June 3, 2014, was mailed to both parties, as can be seen from page (4) of the Order. The Defendant's counsel argues that nowhere in the Plaintiff's Order to Show Cause does Plaintiff's counsel allege that he changed his address or moved offices. The Defendant's counsel further argues that the Plaintiff's counsel has a standard obligation to check E-Courts and other online resources for decisions in their cases and cannot merely claim law office failure for failing to do so. The Court agrees with the Defendant's counsel.

While a court has discretion to excuse a default based upon law office failure pursuant to CPLR § 2005, it should not routinely excuse defaults, especially where no mitigating factors have been set forth. (*Midolo v. Horner*, 131 A.D.2d 825 [2d Dept. 1987])
“Although the court has the discretion to accept law office failure as a reasonable excuse, a

claim of law office failure should be supported by a detailed and credible explanation of the default at issue.” (*Lugauer v. Forest City Ratner Co.*, 44 A.D.3d 829 [2d Dept. 2007])


The Court finds that the Plaintiff’s excuse of law office failure is conclusory and perfunctory and does not constitute a reasonable excuse. Here, the Plaintiff’s counsel submits that the excuse for not filing the Note of Issue in a timely manner, for the second time, was “law office failure”. The Plaintiff’s counsel merely states that his office was not aware of Justice Phelan’s Order and the deadline it set for filing the Note of Issue. The Court finds that the Plaintiff’s counsel’s argument is without merit. The June 3, 2014 Order was mailed to the Plaintiff’s counsel and was available on the New York State Unified Court System’s website from June 4, 2014, the date the Order was entered by the County Clerk. The Plaintiff’s counsel offers no reasonable excuse why his office was not aware of the decision or why he did not take any action for over 76 days from the date that the Order was entered.

Accordingly, it is hereby

ORDERED, that the Plaintiff’s motion (Mot. Seq. 03) seeking to restore this matter to the Calendar and extend his time to file the Note of Issue is **DENIED**.

This decision constitutes the Order of the court.

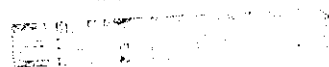
DATED: Mineola, New York
October 2, 2014



Hon. Randy Sue Marber, J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE