

<b>Bell v United Parcel Serv., Inc.</b>
2015 NY Slip Op 32691(U)
February 3, 2015
Supreme Court, Nassau County
Docket Number: 0016033/11
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 12

\_\_\_\_\_  
VINSON L. BELL,

X

Plaintiff,

Index No.: 0016033/11  
Motion Sequence...04  
Motion Date...12/23/14  
**XXX**

-against-

UNITED PARCEL SERVICE, INC. and JOHN  
DOE,

Defendants.

\_\_\_\_\_  
X

Papers Submitted:  
Notice of Motion.....X  
Affirmation in Opposition.....X  
Reply Affirmation.....X

Upon the foregoing papers, the motion, pursuant to CPLR § 2221 (d), by the Plaintiff, Vinson L. Bell, seeking reargument of the Plaintiff's prior motion which sought an order restoring the action to the active trial calendar and extending the time to file his Note of Issue, which resulted in an order of this Court, dated October 2, 2014, denying the motion, is determined as provided herein.

By prior Order dated October 2, 2014, this Court denied the Plaintiff's motion seeking to restore this matter to the active trial calendar and upon restoration, extending the Plaintiff's time to file the Note of Issue, on the grounds that the Plaintiff failed to

demonstrate a reasonable excuse for the delay in filing the Note of Issue.

Specifically, the Court noted that the Plaintiff's counsel's excuse of "law office failure" in an attempt to explain his failure to obtain a copy of Justice Phelan's Order which extended the Plaintiff's time to file the Note of Issue was conclusory and perfunctory and did not constitute a reasonable excuse. This Court further stated: "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."

The Plaintiff's counsel now moves for reargument, asserting that this Court "perhaps overlooked or misapprehended some mitigating factors". He asserts that there is no proof that the June 3, 2014 Order of Justice Phelan was ever mailed to him, as there is no Notice of Entry. Counsel also argues that since the Defendant's counsel failed to attach proof that he received Justice Phelan's Order, "defendants never received a copy of the order from the Court either because it was not mailed out." (*See* Affirmation of George Batchvarov, Esq., dated 11/13/14 at ¶ 13) He also asserts that because he prepared a proposed Note of Issue, dated June 3, 2014, in anticipation of the action being restored, it serves as proof that he always intended to file the Note of Issue.

The Plaintiff's counsel avers that the standard by which the Court should have

applied to the Plaintiff disobeying Justice Phelan's Order was a "willful and contumacious" standard applicable to CPLR § 3126 dismissals. Inasmuch as counsel argues the failure to file the Note of Issue was unintentional, his failure to file the Note of Issue did not rise to the level of willful and contumacious conduct and dismissal is too harsh a sanction. Plaintiff's counsel further argues that once Justice Phelan issued his Order restoring the action, there no longer was a 90-day Notice pursuant to CPLR § 3216. As such, the Plaintiff's default did not meet the CPLR § 3126 "willful, contumacious, or in bad faith" conduct required for a dismissal in CPLR § 3126.

The Defendants oppose the instant motion initially asserting that the Plaintiff's motion fails to identify any matter of fact or law that the Court overlooked or misapprehended, the legal standard in motions to reargue pursuant to CPLR § 2221. The Defendants' counsel points out that the Plaintiff's counsel attempts to shift the burden to the Defendants to prove that Justice Phelan's Order was in fact mailed. The Defendants' counsel also indicates that this Court's October 2, 2014 Order pointed out that counsel for the Plaintiff never explained why he did not avail himself of any of the online resources available to lawyers to obtain a copy of Justice Phelan's Order.

In regard to the Plaintiff's counsel's argument that Justice Phelan's Order did not constitute a "90-day Notice" pursuant to CPLR § 3216, the Defendants' counsel avers that this argument was not raised by the Plaintiff's counsel in the prior motion and cannot do so in a motion to reargue. Additionally, the Defendants' counsel argues that Justice Phelan's

June 3, 2014 Order did not vacate the Certification Conference Order, it merely conditioned vacating the dismissal on the directive that the Plaintiff file the Note of Issue within 20 days. Thus, when the Plaintiff failed to file the Note of Issue within the additional time provided by Justice Phelan's Order, it served as a continued violation of the Certification Order.

In his Reply Affirmation, the Plaintiff's counsel asserts that the dismissal of this action should be vacated in the interests of Justice. He reiterates his reliance on the criteria to dismiss an action pursuant to CPLR § 3126 and claims that the actions which resulted in his failure to timely file the Note of Issue were not willful and contumacious. Again, the Plaintiff's counsel asserts that the Plaintiff was unable to file the Note of Issue pursuant to the Certification Conference Order as there was outstanding discovery.

It is settled that motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision. (*See generally, Grimm v. Bailey*, 105 A.D.3d 703 (2nd Dept. 2013); *Frenchman v. Lynch*, 97 A.D.3d 632, 633 (2nd Dept. 2012); *Anthony J. Carter, DDS, P.C. v. Carter*, 81 A.D.3d 819, 820 (2nd Dept. 2011); *Hill v. New York City Transit Authority*, 68 A.D.3d 866, 867 (2nd Dept. 2009); CPLR § 2221 [d] [2]) However, the remedy "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *McGill v. Goldman*, 261 A.D.2d 593, 594 (2nd Dept. 1999) ( *See also Foley v.*

*Roche*, 68 A.D.2d 558, 567 (1st Dept. 1979; *Haque v. Daddazio*, 84 A.D.3d 940, 942 (2nd Dept. 2011); *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2nd Dept. 2010); *V. Veeraswamy Realty v. Yenom Corp.*, 71 A.D.3d 874 (2nd Dept. 2010))

In the this Court's Order dated October 2, 2014, it stated:

"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."

Nowhere in the Plaintiff's counsel's prior motion, current motion and Reply Affirmation does he address his failure to have utilized any online resources to have obtained a copy of Justice Phelan's June 3, 2014 Order, if in fact he never received it in the mail. Furthermore, his argument that the Court should have applied a CPLR § 3126 willful and contumacious criteria in determining if his conduct in failing to obey Justice Phelan's Order is unsupported and unavailing. Justice Phelan's Order merely extended the time provided in the Certification Conference Order to have filed a Note of Issue and conditioned the vacating of the dismissal upon the Plaintiff filing a Note of Issue within 20 days of the date

of the said Order. It is incumbent upon counsel to follow for decisions of the Court. A courtesy copy sent to counsel by the Court, whether or not received, does not excuse counsel's failure to closely follow for said decision and to utilize the online resources available, many of which are free. This Court did not misapprehend any facts or law in rendering its prior decision. Unfortunately, counsel for the Plaintiff simply failed to provide this Court with an adequate excuse for his failures.

Accordingly, it is hereby

**ORDERED**, that this motion brought pursuant to CPLR § 2221 by the Plaintiff seeking leave to reargue the prior motion to vacate the dismissal of this action, is **DENIED**.

This constitutes the decision and order of this court.

DATED: Mineola, New York  
February 3, 2015



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

**ENTERED**

FEB 04 2015

NASSAU COUNTY  
COUNTY CLERK'S OFFICE