

**Andersen v Young and Rubicam, Inc.**

2013 NY Slip Op 31532(U)

June 28, 2013

Sup Ct, New York County

Docket Number: 113140/2004

Judge: Lucy Billings

Republished from New York State Unified Court System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS  
J.S.C. Justice

PART 46

KELVIN ANDERSON

INDEX NO. 113140/2004

-v-

MOTION DATE \_\_\_\_\_

YOUNG and RUBICAM, INC.

MOTION SEQ. NO. 003

The following papers, numbered 1 to 2, were read on this motion to/for vacate the judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 2

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court denies plaintiff's motion to vacate the judgment entered 8/1/08 pursuant to the accompanying decision. C.P.L.R. § 5015(a).

# FILED

JUL 16 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/28/13

Lucy Billings, J.S.C.  
LUCY BILLINGS

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

KELVIN ANDERSEN,

Index No. 113140/2004

Plaintiff

- against -

DECISION AND ORDER

YOUNG and RUBICAM, INC.,

Defendant

-----x

**FILED**

JUL 16 2013

APPEARANCES:

For Plaintiff

Noah A. Kinigstein Esq.  
315 Broadway, New York, NY 10007

COUNTY CLERK'S OFFICE  
NEW YORK

For Defendant

Maureen McLoughlin Esq. and Cheryl Plambeck Esq.  
Davis & Gilbert LLP  
1740 Broadway, New York, NY 10019

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sued defendant, his former employer, to recover damages for age discrimination in terminating his employment. At the conclusion of a trial March 26, 2008, the jury rendered a verdict in favor of defendant. Plaintiff moved to set aside the verdict by a notice of motion dated April 7, 2008. While the motion was pending, defendant filed and the clerk entered the judgment on the verdict August 1, 2008. The court (Tolub, J.) denied plaintiff's motion in an order entered September 29, 2008, which the Appellate Division, First Department, affirmed.

Anderson v. Young & Rubicam, 68 A.D.3d 430 (2009). The Court of Appeals dismissed plaintiff's subsequent appeal of the order

affirming the denial of the motion to set aside the verdict on the ground the Appellate Division's order was not a final, appealable determination. Anderson v. Young & Rubicam, 14 N.Y.3d 909 (2010).

Plaintiff now moves to vacate the judgment defendant entered on the verdict. For the reasons explained below, the court denies plaintiff's motion.

## II. VACATING THE JUDGMENT ENTERED AUGUST 1, 2008

### A. Plaintiff's Failure to Meet the Applicable Standards

Plaintiff claims the judgment precludes him from appealing the denial of his motion to set aside the verdict to the Court of Appeals. None of the statutory grounds for vacating the judgment applies. C.P.L.R. § 5015(a). Insofar as plaintiff claims an excusable default, defendant's service of the judgment August 4, 2008, renders plaintiff's motion to set aside the verdict, served in October 2010, untimely. C.P.L.R. § 5015(a)(1); Pina v. Jobar U.S.A. LLC, 104 A.D.3d 544, 545 (1st Dep't 2013); Aaron v. Greenberg & Reicher, LLP, 68 A.D.3d 533, 534 (1st Dep't 2009). While the court also may vacate its judgment in the interests of substantial justice, Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 68 (2003); Goldman v. Cotter, 10 N.Y.3d 289, 293 (1st Dep't 2004); Appalachian Ins. Co. v. General Elec. Co., 8 A.D.3d 109 (1st Dep't 2004); Bay Crest Assn., Inc. v. Paar, 99 A.D.3d 744, 746 (2d Dep't 2012), plaintiff has failed to demonstrate a sufficient reason for vacating the judgment in the interests of justice, such as nonconformity between the verdict and the

judgment, see Town of Warwick v. Black Bear Campgrounds, 95 A.D.3d 1002 (2d Dep't 2012); fraudulent inducement of plaintiff, Wells Fargo Bank v. Hodge, 92 A.D.3d 775, 776 (2d Dep't 2012); or the court's noncompliance with procedural requirements. Stasiak v. Forlenza, 84 A.D.3d 1214, 1217 (2d Dep't 2011).

Nor has plaintiff demonstrated defendant's misconduct in entering the judgment when plaintiff's motion to set aside the verdict was pending so as to warrant vacatur of the judgment under the interests of justice standard. Matter of Alayon, 86 A.D.3d 644, 645 (2d Dep't 2011); Matter of Adelson, 84 A.D.3d 952, 953 (2d Dep't 2011). Plaintiff has shown no bar against or impropriety in entering a judgment when a motion to set aside the verdict is pending. To preclude entry of a judgment pending such a motion, moreover, would contradict C.P.L.R. § 4404's provisions for motions to set aside a verdict or judgment after a trial and § 4405's provisions requiring such post-trial motions within 15 days after the decision, verdict, or jury's discharge and authorizing the court to grant such motions until "submission of an appeal from the final judgment."

B. Plaintiff's Remedy from the Absence of a Final Determination

Because the denial of a motion to set aside a verdict or the affirmance of that denial is not a final determination of an action, but only of the motion, Cuadrado v. New York City Tr. Auth., 14 N.Y.3d 748 (2010); Longo v. Tafaro, 72 N.Y.2d 884 (1988), the Court of Appeals, responding to plaintiff's appeal, notified plaintiff April 29, 2010, that the order affirming the

denial of his motion to set aside the verdict was not final and therefore not appealable to the Court of Appeals. Although the Court of Appeals invited a reply and contrary documentation, plaintiff presented none. The Court of Appeals then dismissed plaintiff's appeal on the ground that the order affirming the denial of his motion to set aside the verdict does not finally determine the action. Anderson v. Young & Rubicam, 14 N.Y.3d 909.

Since nothing barred defendant from entering a judgment on the verdict, plaintiff's remedy was to appeal the judgment on the verdict, which also would have brought up for review the denial of his motion to set aside the verdict. C.P.L.R. § 5501(a)(2). Plaintiff's time to appeal from the judgment expired 30 days after defendant's service August 4, 2008, of the judgment with notice of entry. C.P.L.R. § 5513(b). That deadline may be extended only when alternate appeal methods are used, the appealing party's attorney becomes disabled, parties are substituted, or a party files a timely but defective appeal: circumstances inapplicable here. C.P.L.R. §§ 1022, 5514. The court similarly may extend the time to appeal if the appealing party timely files a notice of appeal, but fails to satisfy a companion requirement due to mistake or excusable neglect. C.P.L.R. § 5520(a); M Entertainment, Inc. v. Leydier, 13 N.Y.3d 827, 828 (2009); Matter of Steven S., 234 A.D.2d 13, 14 (1st Dep't 1996). Since plaintiff never filed a notice of appeal from the judgment, no accompanying mistake or excusable neglect

impaired his appeal. Nor has he otherwise presented a reasonable explanation for failing to pursue his available remedies as might demonstrate that a vacatur of the judgment would serve substantial justice. See Goldman v. Cotter, 10 A.D.3d at 291; Appalachian Ins. Co. v. General Elec. Co., 8 A.D.3d at 109-110.

C. The Judgment Roll

For the first time in reply, which the court ordinarily may not consider, plaintiff raises the failure to prepare and file a judgment roll as required by C.P.L.R. § 5017(a). Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012). Even if the court considers this belatedly raised issue, C.P.L.R. § 5017(a) imposes no penalty for a failure to prepare and file a judgment roll. A failure to prepare a judgment roll may undermine the effectiveness of entry of judgment only when accompanied by a more fundamental deficiency in the judgment itself. See C.P.L.R. § 5016(a); Firststar Equip. Fin. v. Jonathan Travel & Tours, 292 A.D.2d 275 (1st Dep't 2002). More importantly here, a judgment roll was prepared and filed, as plaintiff ultimately conceded to defendant and the court October 12, 2012.

III. CONCLUSION

For all the above reasons, the court denies plaintiff's motion to vacate the judgment entered August 1, 2008. C.P.L.R. § 5015(a). This decision constitutes the court's order.

DATED: June 28, 2013

*Lucy Billings*  
\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.

**FILED**  
JUL 16 2013  
COUNTY CLERK'S OFFICE  
NEW YORK