

**Howell v City of New York**

2015 NY Slip Op 30212(U)

January 23, 2015

Supreme Court, Bronx County

Docket Number: 16006/2006

Judge: Mary Ann Brigantti

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1-30-2015

PART 15

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

JAY HOWELL, et als.,

Index No. 16006/2006

-against-

Hon. MARY ANN BRIGANTTI

CITY OF NEW YORK, et als.

The following papers numbered 1 to 6 Read on this motion, RENEW/REARGUE/RESETTLE  
Noticed on September 10, 2014 and duly submitted on the Motion Calendar of October 10, 2014

	PAPERS NUMBERED	
Notice of Motion- Exhibits and Affidavits Annexed	1,2	
Answering Affidavit and Exhibits (aff., cross-motion, exh)	3,4	
Replying Affidavit and Exhibits	5,6	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, the defendants City of New York and New York City Department of Transportation (the "City Defendants") seek an order (1) granting leave to reargue their previous motion to vacate a Judgment, which had been denied without prejudice, with leave to renew following resolution of the appeal pending in this matter, and upon reargument, (2) vacating the Judgment entered in this case against the City Defendants on January 24, 2014. Plaintiffs Jay Howell, an infant, by his Parents and Natural Guardians, James Howell and Carolyn Lane, and James Howell and Carolyn Lane, individually ("Plaintiffs") oppose the motion.

I. Background

This matter involves a series of events that followed the settlement of Plaintiffs' personal injury action against the City of New York and New York City Department of Transportation. The City Defendants previously moved for an Order vacating the judgment entered against them on January 24, 2014, because it was prematurely and erroneously filed, arguing (1) the General Release was defective and thus the

Respectfully Referred to: \_\_\_\_\_  
Dated: \_\_\_\_\_

90-day payment period under CPLR 5003-a was not triggered on October 25, 2013, (2) the Stipulation of Settlement contemplated the provision of final settlement papers before CPLR 5003-a even applied, (3) a settlement involving periodic payments pursuant to an annuity requires definite, essential and material terms to effectuate a proper structured settlement under General Obligations Law §5-1702, (4) complete settlement papers including a duly executed release and terms for the structured settlement were not received by the City Defendants until November 22, 2013, therefore payment of the structured settlement on January 23, 2014 was made within 90 days and timely under CPLR 5003-a. In the alternative, should this Court find that only a Stipulation of Discontinuance and a General Release were required under CPLR 5003-a, those documents were not received until October 25, 2013, and therefore the City Defendants' payment of the settlement monies on January 23, 2014 was timely. Plaintiffs opposed the motion and cross-move for an Order (1) lifting the stay of enforcement/execution of the judgment which occurred by operation of law upon Defendants' filing of a Notice of Appeal, (2) denying the motion to vacate, and (3) granting Plaintiff's right to enforce/execute the judgment as entered on January 24, 2014 against the defendants. The City Defendants opposed the cross-motion.

On July 1, 2014, this Court issued a Decision and Order denying the motion and cross-motion, without prejudice. In so holding, this Court found that the City Defendants' appeal from the Judgment automatically stayed the proceedings, pursuant to CPLR 5519(a)(1), and this Court was without the power to lift the stay pending a determination by the Appellate Division.

The City Defendants now seek reargument of their prior motion, and upon reargument, an Order vacating the January 24, 2014 Judgment. The City Defendants argue that this Court has the authority to decide whether to vacate the Judgment notwithstanding the appeal (citing, among other things, CPLR 5517). Plaintiffs oppose the motion, arguing that this Court made no error in applying the law in rendering its previous decision.

## II. Standard of Review

A motion for leave to reargue is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d]. *see Foley v. Roche*, 68 AD2d 558, 567 [1st Dep't 1979]). Whether to grant reargument is discretionary with the court in the interests of justice (*Sheridan v. Very, Ltd.*, 56 A.D.3d 305 [1st Dept. 2008], citing *Sciasca v. Nevins*, 130 A.D.2d 649, 650 [2nd Dept. 1987]).

## II. Applicable Law and Analysis

After review, this Court grants the City's motion to reargue its previous motion to vacate the Judgment entered on January 24, 2014. Any stay that resulted from the City's appeal only stayed enforcement of that judgment, and not the entire proceedings ( *see Siegel - NYPRAC §535; Ocasio ex rel.*

*Perez v. City of New York*, 13 Misc.3d 161 [Bx. Cty., 2006]). Further, the Court issuing an Order or Judgment generally retains the power to entertain and decide motions, even when the outcome of such motion practice may impact the pending appeal (*see Rospigliosi v. Abbate*, 31 A.D.3d 648 [2nd Dept. 2006]; *Town of North Elba v. Grimditch*, 96 A.D.3d 1300 [3rd Dept. 2012]; CPLR 2221, 5015).

Having granted reargument, the Court now turns to the substance of the City's previous motion<sup>1</sup>. Contrary to Plaintiff's arguments in opposition, the Court has the power to vacate the judgment under these circumstances (*see White v. New York City Housing Authority*, 16 Misc.3d 598 [Sup. Ct., Kings. Co., 2007]). As affirmed by the Court of Appeals, "the drafters of CPLR 5015 did not envision that such section would provide an exhaustive list of the grounds for vacatur" (*see Goldman v. Cotter*, 10 A.D.3d 289 [1st Dept. 2004], citing *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68 [2003]). Pursuant to CPLR 5003-a, interest is not awardable on judgments that have been filed prematurely, as the City alleges here (*see Cunha v. Shapiro*, 42 A.D.3d 95 [2<sup>nd</sup> Dept. 2007]; *Johnson v. Karavassilis*, 2 Misc.3d 341 [Sup. Ct., Kings. Co., 2003]).

The relevant series of events in this action are as follows, in chronological order: The underlying personal injury lawsuit settled on October 22, 2013 for a total of \$5,025,000, with Defendant paying \$5,000,000 and co-defendant paying \$25,000. The settlement was placed on the record in open court. All counsel then executed a Stipulation of Settlement, which was so-ordered on that same date. The Stipulation provided that "[u]pon tender of all required settlement papers, payment of the settlement shall be made in accordance with CPLR 5003-a(b)." Later that day, Defendant sent its standard settlement papers to Plaintiff's counsel via e-mail. The next day, on October 23, 2013, Plaintiff's counsel responded that he would complete the documentation within a week and again stated that he was going to structure the settlement.

On October 25, 2013, Plaintiffs' counsel hand-delivered to the Central Disposition Unit of the New York City Law Department: (1) a standard General Release, signed by Plaintiff, (2) a Stipulation of Discontinuance, (3) a Plaintiff's Affidavit of status of liens, (4) and Affidavit of Status of Attorney's liens.

On November 22, 2013, Plaintiff and Plaintiff's counsel provided the executed structure paperwork including a Settlement Agreement & Release, Qualified Assignments and Hold Harmless Agreement. Those documents contained the details of the annuities, the amount of the future periodic payments, the terms of such payments and total benefits of the structure. Plaintiff expressly allowed the City to assign its liability to make payments to Assignee Insurance Companies (BHG Structured Settlements, Inc. and American General Annuity Service Corp.). By so doing, the plaintiff agreed and completely released and discharged the City from any future liability with respect to the payment or non-payment of such periodic

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<sup>1</sup>The Court takes judicial notice of the previously-filed notice of motion, cross-motion/opposition, and reply papers.

payments by the assignee.

On January 23, 2014, the City Defendants mailed a check representing the lump sum cash portion of the settlement, \$1,495,000, to Plaintiff's counsel. On that same day, Defendant mailed two annuity premium checks to the Defendant's structure broker in Colorado.

On that same date (January 23, 2014), Plaintiff presented a judgment for entry to the Bronx County Clerk. It was received by the Clerk on the 23<sup>rd</sup>, an entered on January 24, 2014, in the amount of \$116,380.26, representing interest from October 22, 2013 until January 24, 2014. Pursuant to the accompanying Notice of Entry, additional interest in the amount of \$7,500 was also claimed, representing interest at a per diem rate of \$1,250 for the period, January 25, 2014 through and including January 31, 2014, the date "full payment was completed." The total amount of interest that Plaintiff seeks is \$123,880.26.

The City Defendants now seeks an Order vacating the Judgment, entered January 24, 2014. The Defendants argue, *inter alia*, that the Stipulation of October 22, 2013 and General Release dated October 25, 2013 did not trigger the 90-day period because they neither acknowledged payment of the settlement with a structure nor released the Defendant from its obligation to make the periodic payments after it had executed a Qualified Assignment. Such a release was not provided until November 22, 2013. In any event, and alternatively, Defendant argues that the entry of judgment on January 23, 2014 was premature (the 90<sup>th</sup> day after October 25, 2013).

In opposition and in support of the cross-motion, Plaintiffs argue, *inter alia*, that the collective "stipulation of settlement" and open court allocation amply satisfied the statutory requirements of CPLR §5003-a(b), requiring payment by January 20, 2014. There was never any implied or expressed condition precedent that a structure (periodic payments) of a portion of the settlement would in any way alter the 90-day prompt payment period as provided under CPLR §5003-a(b).

#### *Discussion*

CPLR 5003-a(b) states, "[w]hen an action to recover damages has been settled and the settling defendant is a municipality or any subdivision thereof, or any public corporation that is not indemnified by the state, it shall pay all sums due to any settling plaintiff within ninety days of tender, by the settling plaintiff to it, of duty executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff."

Plaintiffs argue that their October 22, 2013 settlement and allocation in open court included not only a settlement of the action, but a general release and stipulation of discontinuance, therefore complying with CPLR 5003-a and commencing the 90-day period within which the City was to remit payment. This Court disagrees, and finds that the express language of CPLR 5003-a(b) requires a "tender" of specific documents: a stipulation of discontinuance and a general release. "Tender" is separately defined by CPLR 5003-a(g) as


the personal delivery or mailing, by registered or certified mail, of the release and stipulation. Indeed, where these documents were not provided, it has been held that 5003-a was not triggered, despite the parties' settlement (*see Ribacoff v. Chubb Group of Ins. Co.*, 2 A.D.3d 153, 155 [1<sup>st</sup> Dept. 2003]). This Court finds nothing in the statute that substitutes an oral, open-court allocution and settlement of an action for the specific "tender" of documents. An analysis of the statute and relevant caselaw, to the contrary, reveals that the "settlement" of an action, in itself, is not sufficient to trigger the provisions of CPLR 5003-a. Rather, a "settlement" of an action triggers the plaintiff's obligation to tender "closing papers" in the form of a general release and stipulation of discontinuance to the defendants, and then wait the statutory period for payment before entering a judgment with interest (*see Cunha v. Shapiro*, 42 A.D.3d 95,104 [2<sup>nd</sup> Dept. 2007], *citing Ribacoff v. Chubb Group of Ins. Co.*, 2 A.D.3d 153, 155; *Batista v. Elite Ambulette Service, Inc.*, 281 A.D.2d 196, 197 [1<sup>st</sup> Dept. 2001]; *see also Sealey v. Jamaica Buses, Inc.*, 39 A.D.3d 526 [2<sup>nd</sup> Dept. 2007])[cited by Plaintiffs herein, where the Court noted that the plaintiff submitted proof that she tendered a duty executed release and stipulation of discontinuance "*following the settlement entered into by the parties on the record in open court.*"]. Consequently, Plaintiffs' contentions that the parties' settlement on October 22, 2013 was binding and enforceable do not lead to the further conclusion that the 90-day statutory period commenced on that date.

The 90-day statutory period, rather, did not commence until October 25, 2013, the date the required documents were hand-delivered to the City Defendants' counsel<sup>2</sup>. The City Defendants thereafter mailed the settlement checks on January 23, 2014, the 90<sup>th</sup> day after October 25, 2013. The oft-cited matter of *O'Reilly v. State*, 164 Misc.2d 477 (Ct. Cl., N.Y. Cty., 1995) determined that "payment" under the statute is measured upon mailing, and not upon receipt. The Court in *O'Reilly* reasoned that, in enacting the statute, "...what concerned the legislature was the failure of defendants to act promptly and not that funds be available to claimants within [the time period]..." (*Id.* at 479). Accordingly, the City timely made a payment, in accordance with the parties' settlement agreement, within 90 days of October 25, 2013. Plaintiff's dispute as to the date the checks were mailed is overly speculative and therefore unavailing.

In light of the foregoing, Plaintiffs' entry of a judgment against the City Defendants on January 24, 2014, with interest, was premature and must be vacated (*see e.g. Cunha v. Shapiro, supra*). The City's motion is therefore granted, and the Plaintiffs' cross-motion denied.

Settle Order on Notice.

Dated: 1/23, 2014~~5~~

  
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 Hon. Mary Ann Brigantti, J.S.C.

<sup>2</sup>In so holding, the Court agrees with Plaintiffs that it was unnecessary for the terms of the structured settlement to be finalized before the 90-day period commenced.