

<b>City of Mount Vernon v Vallejo</b>
2018 NY Slip Op 33546(U)
October 26, 2018
Supreme Court, Westchester County
Docket Number: 59259/2016
Judge: Joan B. Lefkowitz
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To commence the statutory time period  
for appeals as of right (CPLR 5513[a]),  
you are advised to serve a copy of this  
order, with notice of entry, upon all  
parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER : COMPLIANCE CONFERENCE PART

-----X  
CITY OF MOUNT VERNON,

*Plaintiff,*

- against -

Action No. 1<sup>1</sup>  
Index No. 59259/2016

MARIO VALLEJO and XAVIER VALLEJO,

*Defendants.*

-----X  
MARIO VALLEJO and XAVIER VALLEJO,

*Third-Party Plaintiffs,*

- against -

DECISION & ORDER  
Motion Date: 9/26/18  
Motion Seq. Nos.4

RALPH UZZI,

*Third-Party Defendant.*

-----X  
MARIO VALLEJO,

*Plaintiff,*

- against -

Action No. 2  
Index No. 50853/2018

RALPH UZZI and CITY OF MOUNT VERNON,

*Defendants.*

-----X  
XAVIER VALLEJO,

*Plaintiff,*

- against -

Action No. 3  
Index No. 60400/2017

RALPH UZZI, CITY OF MOUNT VERNON and MARIO  
VALLEJO,

*Defendants.*

-----X

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<sup>1</sup>By order dated October 16, 2017, these matters were joined for purposes of discovery and trial (Lefkowitz, J.).

LEFKOWITZ, J.

The following papers were read on motion sequence no. 4 under index no. 60400/2017 (action no. 3) by plaintiff for an order: (1) pursuant to CPLR §2221(d) to reargue the Decision and Order of this Court dated June 13, 2018; (2) vacating the Court's order of July 6, 2018, wherein the Court dismissed plaintiff's complaint; (3) restoring the defendant's order to show cause of April 13, 2018, and this case, to the Court's calendar; (4) denying the defendants' motion to dismiss in its entirety; (5) awarding costs to plaintiff's counsel; (6) imposing sanctions against defense counsel for Ralph Uzzi and City of Mount Vernon pursuant to 22 NYCRR Part 130; and (7) for such other, further and different relief as this Court may deem just and proper.

Notice of Motion, Affirmation, Exhibits A-F  
Affirmation in Opposition, Exhibits A-R  
Memorandum of Law in Opposition

Upon the foregoing papers, this motion is determined as follows:

Previously, defendants, Ralph Uzzi and City of Mount Vernon moved for an order pursuant to CPLR 3042 and 3126 striking the pleadings of plaintiff, Xavier Vallejo (hereinafter "plaintiff") and dismissing his complaint for his failure to comply with discovery demands and court orders, or in the alternative, precluding plaintiff from offering any evidence at trial concerning plaintiff's medical or employment records. Defendant Mario Vallejo (hereinafter "defendant Vallejo") moved for the same relief.

On June 13, 2018, this court issued a conditional order striking plaintiff's complaint in the event he did not cure his default in providing the outstanding discovery (the "June 13 Order"). Plaintiff failed to comply with the conditional order and accordingly, by order entered on July 6, 2018, plaintiff's complaint was dismissed (the "July 6 Order").

Plaintiff now seeks to reargue the June 13 Order, vacate the July 6 Order; restore the defendant's order to show cause of April 13, 2018, and this case, to the Court's calendar; deny the defendants' motion to dismiss in its entirety; award costs to plaintiff's counsel; and impose sanctions against defense counsel for Ralph Uzzi and City of Mount Vernon.

### Analysis

A motion for leave to reargue "shall be 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][2]; see *Matter of Carter v Carter*, 81 AD3d 819 [2d Dept 2011]). Re-argument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Dinstber v Fludd*, 2 AD3d 670 [2d Dept 2003]). The determination to grant leave to reargue a prior

motion lies within the sound discretion of the court that decided it (*see Barnett v Smith*, 64 AD3d 669 [2d Dept 2009]). A motion for leave to renew must be based on new facts, not offered on the prior motion, that would change the prior determination and the movant must show a reasonable justification for the failure to present such facts on the original motion (CPLR 2221[e][2][3]; *Aronov v Shimonov*, 105 AD3d 787 [2d Dept 2013]; *Commisso v Orshan*, 85 AD3d 845 [2d Dept 2011]).

Leave to reargue the June 13 Order is denied because plaintiff proffers no issue of law or fact that this Court allegedly misapprehended or overlooked in issuing the conditional dismissal order (*see* CPLR 2221[d][2]). The June 13 Order correctly determined that plaintiff had failed to comply with this Court's previous orders which directed plaintiff to provide outstanding discovery and provided plaintiff one more opportunity to cure his default. However, as set forth in defendants' affirmation of noncompliance, plaintiff failed once again to comply with this Court's orders and produce the outstanding discovery.

A court may vacate a dismissal upon the plaintiff's showing of both reasonable excuse for the default and the existence of a potentially meritorious cause of action (*see* CPLR 5015[a][1]; *Wright v City of Poughkeepsie*, 136 AD3d 809 [2d Dept 2016]; *Marrero v Crystal Nails*, 77 AD3d 798 [2d Dept 2010]). The determination of what constitutes a reasonable excuse for a default generally lies within the sound discretion of the court (*see Hageman v Home Depot U.S.A., Inc.*, 25 AD3d 760 [2d Dept 2006]). Law office failure may constitute a reasonable excuse for a default, but the defaulting party must provide detailed allegations of fact that explain the failure (*see Matter of Esposito*, 57 AD3d 894 [2d Dept 2008]; *Goldstein v Meadows Redevelopment Co. Owners Corp.*, 46 AD3d 509 [2d Dept 2007]).

Based on the foregoing, plaintiff's motion is denied. Plaintiff's papers fail to set forth any cognizable basis to vacate the dismissal. Plaintiff's motion papers merely rehash the conduct of discovery prior to the issuance of the June 13 Order and the July 6 Order – arguments that this Court rejected in issuing these Orders. Moreover, this Court notes defendants' contention that the discovery that this Court required plaintiff to tender *still* has not been provided – and plaintiff's motion papers are not to the contrary.

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

“As we made clear in *Brill*, and underscore here, statutory time frames--like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored” (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726–727 [2004] [internal citations omitted]).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

“As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with

deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity'" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted]).

Although this Court favors the disposition of matters on the merits, plaintiff's wilful and contumacious conduct can not be countenanced.

In view of the foregoing, the remaining branches of plaintiff's motion are without merit. All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

Accordingly it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that counsel for defendants shall serve this Decision and Order, with Notice of Entry, on plaintiff within five days hereof; and it is further

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
October 24, 2018.

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HON. JOAN B. LEFKOWITZ, J.S.C.

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