STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MARK A. BASKIN,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 906715-16
RJI No.: 01-17-124882

MABCO TRANSIT, INC., RUSSEL BORTHWICK, and GREGORY J. BAUMGARTNER,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

In this action for declaratory relief and seeking monetary damages for breach of contract, conversion, violation of New York's General Business Law § 349 and under 42 U.S.C. § 1983 in connection with an alleged improper sale of items of personal property, plaintiff Mark A. Baskin

("plaintiff" or "Baskin") moves, pursuant to CPLR 2221, for leave to reargue the Court's October 19, 2018 Decision and Order/Judgment, denying his motion for partial summary judgment on the issue of liability as to the causes of action alleged in the complaint and granting defendants Mabco Transit, Inc.'s ("Mabey's") and Gregory J. Baumgartner's ("Baumgartner") cross motions for summary judgment dismissing plaintiff's complaint against them, and upon reargument, seeks an order of the Court granting his motion for partial summary judgment and denying Mabey's and Baumgartner's cross motions for summary judgment. Mabey's and Baumgartner (collectively "defendants") oppose the motion. Plaintiff has replied to the opposition.

The Court begins by noting that a motion to reargue, pursuant to CPLR 2221, is addressed to the sound discretion of the trial court (*see Peak v. Northway Travel Trailers Inc.*, 260 A.D.2d 840, 842 [3d Dep't 1999]), and may be granted only upon a showing that the court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Adderley v. State*, 35 A.D.3d 1043, 1043-1044 [3d Dep't 2006][internal quotation marks and citation omitted]; *see* CPLR 2221[d][2]; *In re Ida Q.*, 11 A.D.3d 785, 786 [3d Dep't 2004]; *Matter of Smith v. Town of Plattekill*, 274 A.D.2d 900 [3d Dep't 2000]), "or for some reason mistakenly arrived at its earlier decision" (*Matter of Mayer v. Nat'l Arts Club*, 192 A.D.2d 863, 865 [3d Dep't 1993]; *see Gonzalez v. Arya*, 140 A.D.3d 928, 929 [2d Dep't 2016]). The application "shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]), and it is not intended to offer the unsuccessful party successive opportunities to argue the very questions previously decided by the court and/or to raise new arguments that were not previously advanced (*see Haque v. Daddazio*, 84 A.D.3d 940, 942 [2d Dep't 2011]; *Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 A.D.3d 388, 388 [2d Dep't 2005]; *Matter of Mayer v. Nat'l Arts Club*, 192 A.D.2d at 865; *Mangine v. Keller*, 182 A.D.2d 476, 477 [1st Dep't 1992]; *Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dep't

1979]).

Here, Baskin has failed to demonstrate that the Court overlooked or misapprehended any material facts, misapplied any controlling principle of law, or mistakenly arrived at its earlier decision. Instead, he asserts the same unavailing arguments raised in his motion, and improperly raises new arguments not previously advanced. Contrary to plaintiff's contention, the Court specifically addressed the issue of Mabey's compliance with the notice requirement of Lien Law § 182(7). In that regard, the Court found that "the notices contained all of the information required under Lien Law § 182(7)," and that "the record establish[ed] . . . such notices were sent to Baskin by certified mail, return receipt requested to the forwarding address provided by the United States Postal Service after prior mailings to Baskin at the "604 Connor Court, Niskayuna, New York 12309" address were returned to Mabey's as undeliverable." The Court stated "[t]he fact that such notices were '[r]eturn[ed] to sender/[n]ot [d]eliverable as [a]ddressed/[u]nable to [f]orward' does not establish that Mabey's failed to comply with the notice requirements of Lien Law § 182(7)."

Furthermore, the Court rejected Baskin's argument that the notice provisions of § 182(7) require actual "receipt." The Court noted that "[n]othing in that section requires actual receipt of notice for the notice requirement to have been effectively complied with," and that "[a] reading of the language of § 182(7) leads to the conclusion that reference to 'receipt' is intended for purposes of determining when a sale can occur." The Court also "[did] not read the occupancy agreements signed by Baskin as requiring actual receipt of notice as both agreements clearly provide that notices . . . shall be deemed given when deposited in the United States Mail.'" Moreover, the Court found the notice procedures employed by Mabey's to be reasonably calculated to give Baskin notice of its lien enforcement and, as such, satisfied due process.

Contrary to Baskin's assertion, the Court did not overlook the fact that Mabey's notices to

him at the Washington, D.C. address were returned as undeliverable. The record establishes that the Washington, D.C. address was obtained by Mabey's as a forwarding address when notices to Baskin at the "604 Connor Court, Niskayuna, New York 12309" address set forth in the occupancy agreements were returned to Mabey's as undeliverable. Even if the Court overlooked the fact that a "2/20/2016" mailing to the Washington, D.C. address was returned on February 27, 2016, there were two additional mailings of past due notices to Baskin sent by Mabey's on "2/11/2016" and "3/3/2016" which, on the proof submitted, were not returned.

Moreover, the record amply established Mabey's various attempts to place Baskin on notice of the enforcement of its lien before Baskin's personal property was ultimately sold. As noted by the Court in the October 19, 2018 Decision and Order/Judgment:

> Mabey's first attempted to contact Baskin at the address provided on his occupancy agreements to notify him of the expiration of his credit card, and when the letter was returned, utilized the forwarding address provided by the U.S. Postal Service to resend that letter and to forward all subsequent mailings, some of which do not appear on this record to have been returned. Mabey's also made multiple attempts to reach Baskin at both his business telephone number, leaving at least one message, and on his cell phone number to no avail, and published the notice of sale in the newspaper before the sale occurred.

On the other hand, Baskin made no attempt to update his address with Mabey's, as he was required to do by both occupancy agreements, and failed to provide Mabey's with new credit card information, after the card he initially provided expired. Additionally, Baskin admitted that he did not reach out to Mabey's to inquire about the failure to charge his credit card for his storage units until more than nine months after the last credit card payment was made on his accounts, despite multiple address changes beginning in September 2014. While Baskin provided an email address with his storage application in connection with his second occupancy agreement, nothing in the language of that agreement or in Lien Law § 182 required notice of enforcement of Mabey's lien to be provided to him via an email address, and the record indicated that the parties did not

customarily communicate via email.

The Court is not persuaded that it misapprehended the law of certified mailing, and finds Baskin's reliance on *Metropolitan Life Ins. Co. v. Young* (157 Misc.2d 452 [NY City Civ. Ct. 1993]), *State of New York v. Int'l Fid. Ins. Co.*, 181 Misc.2d 595 [Sup Ct., Albany County 1999]), and *Daniele v. Clover Lanes*, 48 Misc.3d 1219(A), 2014 Slip Op. 51944 [Sup. Ct., Monroe County 2014]), among other cases, wholly misplaced and inapplicable in these circumstances. Finally, in the October 19, 2018 determination, the Court clearly stated that "[a]ny remaining arguments not specifically addressed [t]herein have been considered and found unpersuasive, or need not be reached in light of th[at] determination." Although not specifically discussed in the decision, Baskin's assertion that Mabey's failed to comply with its due process obligation to afford him an opportunity for a hearing before his property was sold was considered by the Court and found unpersuasive.

For all of these reasons, Baskin's motion is denied. Any remaining arguments not specifically addressed herein have been reviewed and found to be lacking in merit, or need not be reached in light of this decision.

Accordingly, it is hereby

ORDERED, that Baskin's motion for leave to reargue this Court's October 19, 2018 Decision and Order/Judgment is denied.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the attorneys for Mabey's. A copy of this Decision and Order together with all papers on the motion are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the Albany County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the

applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: April 18, 2019
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion to Reargue, dated December 19, 2018; Affirmation Support Reargument of Rudolph J. Meola, Esq., dated December 19, 2018, with Exhibits 1-4 annexed;
2. Affirmation of Christopher A. Priore Esq. in Opposition to Plaintiff's Motion to Reargue, dated January 4, 2019; Defendant Mabco Transit's Opposition to Plaintiff's Motion to Reargue, dated January 4, 2010;
3. Reply Affirmation of Rudolph J. Meola, Esq., dated January 9, 2019, with Exhibit 1 annexed; *and*
4. Attorney Affirmation in Opposition of John R. Seebold, Esq., dated January 7, 2019.