To commence the 30-day 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 DUTCHESS

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MAURICIO SIBAJA PEREZ,

Plaintiff,

-against-

A BETTER PAVING CO., INC., BRIGGS PAVING, INC., and BETTER WELDING, LLC,

Defendants.

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DECISION AND ORDER

Index No.: 2018-52095

ACKER J.S.C.

The following papers were read in connection with Plaintiff Mauricio Sibaja Perez's ("Plaintiff") motion for an Order pursuant to CPLR §2221(2)(d) and (e) for leave to Renew and Reargue this Court's December 3, 2019 Decision and Order which granted the motion of Defendants A Better Paving Co., Inc. and Better Welding, LLC (hereinafter referred to as "Better Paving" and "Better Welding" respectively, or "Defendants" collectively[1]) pursuant to CPLR §3211(a)(7) and CPLR §3126 and dismissed Plaintiff's Complaint:

Notice of Motion-Affirmation of Keetick L. Sanchez, Esq.-
Exhibits A-F 1-8
Affirmation in Opposition of Thomas M. Gambino, Esq.-Exhibit A.....9-10
Reply Affirmation of Casey Fundaro, Esq. 11

The instant motion seeks leave to renew and reargue this Court's Decision and Order

[1] By Decision and Order dated December 18, 2018, the Court dismissed the Complaint against Defendant Briggs Paving, Inc.

granting Defendants' motion to dismiss, issued on the record on December 3, 2019. Plaintiff posits that the Court "may have misapprehended the facts in this case regarding both the grounds of the Court's judgment, the first being a failure to state a claim, the second, discovery violations made with contumacious disregard of the Court's authority...." Notably, Plaintiff then acknowledges that the "misapprehension is the result of inadequate explanation and argument" by Plaintiff's counsel.

Litigation History

In the instant matter, the litigation history was a significant consideration underlying this Court's decision and was, in fact, detailed on the record on December 3, 2019. It is uncontested that Plaintiff's counsel has done very little to litigate this case. In fact, when Defendants originally moved to dismiss the case against all Defendants in 2018, Plaintiff's counsel failed to oppose said motion. As a result of that motion, the Complaint was dismissed against Defendant Briggs Paving, who was Plaintiff's employer. Defendants' motion was denied as to the other two Defendants and discovery was to proceed.

A Preliminary Conference Order was proposed by the parties and signed by the Court on January 31, 2019. That Order required depositions by May 31, 2019 and the filing of a Note of Issue by July 15, 2019. A compliance conference was scheduled for March 28, 2019. At that appearance, a further discovery order was entered, which indicated that a Bill of Particulars was "waived," but Plaintiff was to provide employment and medical authorizations and a response to demands by April 15, 2019, with depositions to be held on or before June 14, 2019. A further compliance conference was scheduled for June 19, 2019, at which Plaintiff's counsel failed to

appear.[2] At that conference, Defendants' counsel advised the Court that Plaintiff had not provided any of the documents that were required by the March 28, 2019 Order and subsequently moved to dismiss pursuant to CPLR §3211(a)(7) and to strike the Complaint pursuant to CPLR §3126.

After Defendants filed said motion, Plaintiff electronically filed a response to Defendants' discovery demands, as well as Plaintiff's own discovery demands, both of which were rejected as untimely by Defendants' counsel. Plaintiff's counsel ultimately filed opposition to Defendants' motion to dismiss, which argued, in sum and substance, that more discovery was needed to oppose the motion. As demonstrated by electronically filed Court notices, a conference was scheduled to discuss the issues raised in the motion (see Doc. #50 and #52).

On December 3, 2019, on the first call of the case, Plaintiff's counsel failed to appear and the case was second called. When Plaintiff's counsel appeared, the matter was first conferenced off the record. As demonstrated by the transcript, Plaintiff's counsel was then given the opportunity to orally argue in opposition to Defendants' pending motion on the record. Counsel argued only that Plaintiff be given an opportunity to comply with discovery, proceed with depositions and prosecute the case on the merits. When asked if counsel had anything else to add, the response was "No, Your Honor."

After hearing argument from both sides and based upon the submissions, the Court granted Defendants' motion, noting that Plaintiff's opposition to the motion to dismiss was entirely reliant on Plaintiff's need to conduct discovery. The Court further noted that Plaintiff's

[2] Plaintiff's firm sent per diem counsel to the prior two Court appearances.

counsel failed to appear at the most recent court appearance, when this alleged lack of discovery could have been addressed. Moreover, Plaintiff's counsel, off the record, had indicated that the liability against the remaining Defendants was premised on the fact that Defendant Better Paving owned the property in question, which is something that should have been well known to the Plaintiff at the commencement of the litigation. The Court concluded that since Plaintiff's only substantive response in opposition was that further discovery was needed and Plaintiff had been given plenty of time to do so, Defendants' motion was granted.

Plaintiff now moves to renew and reargue this decision. As an initial matter, although the Notice of Motion indicates that Plaintiff seeks an Order pursuant to CPLR §2221(e) granting Plaintiff an opportunity to renew Defendants' prior motion, the affirmation in opposition makes no arguments related to this request for relief. Such a motion "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR §2221(e)(2) and (3). "A court lacks discretion to grant the motion where the moving party omits a reasonable justification for failing to present the new facts on the original motion." *Feurderer v. Vassar Bros. Med. Ctr.*, 185 AD3d 789 [2d Dept. 2020]. As Plaintiff has not made any of these showings, his request for an Order for leave to renew pursuant to CPLR §2221(e) is denied.

Plaintiff's request for an Order for leave to reargue fares no better. CPLR §2221(d)(2) provides that a motion 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." "While the determination to grant leave to

reargue lies within the sound discretion of the court [citations omitted], a motion for leave to reargue '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.'" *Jaspar Holdings, LLC v. Gotham Trading Partners # 1, LLC*, 186 AD3d 582 [2d Dept. 2020], *citing McGill v. Goldman*, 261 AD2d 593, 594 [2d Dept. 1999].

With respect to Defendants' motion to dismiss pursuant to CPLR §3211(a)(7), Plaintiff now argues that the Complaint sufficiently states a claim for Labor Law §241(6).[3] The motion to reargue provides case law and lengthy arguments to support this allegation, however, these arguments were never raised in the original opposition.[4] Although paragraph 7 of the original affirmation in opposition cites Labor Law §241(6), said opposition fails to identify how such a claim has been sufficiently pled in the Complaint. Indeed, other than quoting the text of Labor Law §241(6), counsel provided no legal argument or factual allegations demonstrating that the Complaint sufficiently stated such a claim. Instead, counsel relied exclusively on the fact that more discovery was needed in order to prove its case against the remaining Defendants.

The Court was constrained to evaluate the original motion based upon the papers submitted and the arguments presented on the record on December 3, 2019. The arguments now offered in Plaintiff's motion to reargue were never put forth by Plaintiff's counsel in either the prior written submissions or at oral argument. The transcript makes clear that Plaintiff's counsel was given the opportunity, both on and off the record, to expound on his written opposition, yet Plaintiff never argued that the Complaint sufficiently stated a cause of action

[3] It appears that Plaintiff concedes that he has not stated a cause of action for Labor Law §200, as the motion to reargue does not address this cause of action.
[4] Perhaps the most glaring omission from the original opposition is an affidavit from Plaintiff himself, even though Defendants submitted an affidavit from David Briggs in support of the motion.

under Labor Law §241(6).

As such, Plaintiff's current application merely advances arguments that were not presented in the previous motion and makes "no effort to demonstrate to the court in what manner [the Court] had either overlooked or misapprehended the relevant facts or law." *V. Veeraswamy Realty v. Yenom Corp.*, 71 AD3d 874 [2d Dept. 2010]. In fact, Plaintiff's counsel concedes that the firm failed to provide the Court with a detailed account of the facts of this case regarding the alleged labor law violations and that the Court's "misapprehension" was the result of inadequate explanation and argument by counsel. *See* Sanchez Affirmation, ¶3 and footnote 1. As the "facts" and law alleged to have been misapprehended were not raised by Plaintiff in opposition, Plaintiff has "failed to show that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law, and the plaintiff's submissions improperly presented arguments not previously advanced on the original motion." *Degraw Constr. Grp., Inc. v. McGowan Builders, Inc.*, 178 AD3d 772, 773 [2d Dept. 2019]. Accordingly, Plaintiff's application for leave to reargue Defendants' motion to dismiss pursuant to CPLR 3211(a)(7) is denied.

Plaintiff has also failed to demonstrate that the Court overlooked or misapprehended the facts or law as to Defendants' motion to strike pursuant to CPLR §3126. The record is clear that Plaintiff failed to oppose Defendants' first motion to dismiss and then did not comply with either the January 31, 2019 Preliminary Conference Order or the March 28, 2019 Short Form Order. No explanation has been provided as to these failures. Moreover, Plaintiff's counsel did not appear at the June 19, 2019 compliance conference and did not provide any discovery until after Defendants had made their motion. And then, in opposition to the motion to dismiss,

Plaintiff argued that discovery was required in order to oppose said motion.

"Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply or a failure to comply with court-ordered discovery over an extended period of time." *Empire Enterprises I.J.J.A., Inc. v. Daimler Buses of N. Am., Inc.*, 172 AD3d 819, 820 [2d Dept. 2019]; *see also Ewa v. City of New York*, --- A.D.3d ---, 127 NYS3d 911, 912 (2d Dept. 2020). In the instant matter, the record clearly demonstrates Plaintiff's repeated failure to comply with discovery, as well as counsel's inability to provide adequate explanations for the firm's failure to do so. These omissions, coupled with the lack of opposition to the original motion to dismiss and failure to appear at a compliance conference, demonstrate willful and contumacious conduct sufficient to warrant the dismissal of Plaintiff's complaint.

In support of the motion for leave to reargue on this issue, Plaintiff's counsel suggests there has been no contumacious disregard of the Court's authority which prejudiced the Defendants because Defendants admitted they did not need any discovery and counsel "provided partial discovery albeit late." Counsel also admits to missing a Court appearance, "but that was not an effort to delay or obfuscate." Although it is asserted that appearing counsel was "contrite and candid" with the Court at the December 3, 2019 appearance, this does not adequately explain the prior failures to comply with discovery or the failure to appear for a compliance conference. Ultimately, the arguments now proffered by Plaintiff's counsel do not demonstrate that the Court misapprehended the law or facts on Defendants' motion pursuant to

CPLR §3126 and Plaintiff's motion for leave to reargue is denied.[5]

Finally, although Plaintiff's current application provides the Court with meaningful opposition to Defendants' original motion, every argument and factual allegation now proffered was available at the time Plaintiff opposed the underlying motion but was not presented. The instant application is devoid of any legitimate explanation for Plaintiff's failure to provide these arguments and/or facts when originally opposing Defendants' motion. The fact that Plaintiff may have had valid legal arguments available to defend the underlying motion does not form the basis for a motion for leave to reargue, when the dismissal was the result of Plaintiff's own failure to raise these arguments below and not the Court's misapprehension of the facts or the law.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for leave to renew and reargue is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
October 5, 2020

CHRISTI J. ACKER, J.S.C.

To: All Counsel via ECF

[5] Plaintiff indicates that if the order of dismissal is vacated, Plaintiff is prepared to file the Note of Issue immediately. Sanchez Affirmation, ¶15. Notably, Plaintiff's counsel already filed the Note of Issue on November 22, 2019 and asserted that the Bill of Particulars was exchanged and that a physical examination had been conducted, though neither had been done. Moreover, Plaintiff's Affirmation of Compliance then goes on to state that "EBTs and other discovery matters remain outstanding."