SHORT FORM ORDER

NEW YORK STATE-SUPREME COURT-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X **PART 6**

LOUISE SPADARO, as Executrix of the Estate of JEFFERY L. SIEGEL,

Plaintiff,

-against-

INDEX NO. 11114/09

XXX

MOTION DATE: 03/29/12

SEQUENCE NO. 06

PARKING SYSTEMS PLUS, INC., ISLAND VALET SERVICE INC., S&K RESTURANT CORP., MATTEO'S OF BELLMORE INC., MATTEO'S OF HOWARD BEACH INC., MATTEO'S LONG BEACH INC., MATTEO'S RESTAURANT MANAGEMENT GROUP, LLC, MATTEO'S, INC., MAYER SADIAN and DALIA DAVOUDI,

Defendants.

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Notice of Motion(Seq.06)..... 1
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Upon the foregoing papers, plaintiff's motion for leave to renew the prior motions and cross-motions, which resulted in the Order of this Court dated June 1, 2011, pursuant to CPLR §2221, is denied.

A motion for renewal is one which is based upon new facts which were previously unavailable or which were not known to the party seeking renewal. (*Bulis v. DiLorenzo*, 142 A.D.2d 707, 531 N.Y.S.2d 107 (2d Dept. 1988); *Matter of Fahey v. Whalen*, 54 A.D.2d 1097, 388 N.Y.S.2d 960 (4th Dept. 1976), *lv. dismissed.*, 41 N.Y.2d 900, 362 N.E.2d 641 (1977); *Johnson v. Marquez*, 2 A.D.3d 786, 770 N.Y.S.2d 377 (2d Dept. 2003)). "It is well settled that a

motion for leave to renew must be supported by new or additional 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.'" (*Gorman v. Ochoa*, 2 A.D.3d 582, 768 N.Y.S.2d 364 (2d Dept. 2003); *quoting,* CPLR §2221(e)(2); *see also, Rizzotto v. Allstate Ins. Co.*, 300 A.D.2d 562, 752 N.Y.S.2d 538 (2d Dept. 2002); *Williams v. Fitzsimmons*, 295 A.D.2d 342, 742 N.Y.S.2d 907 (2d Dept. 2002)).

Plaintiff contends that the present motion is based upon new facts which were unavailable to the parties and to the Court at the time the earlier motions were decided, specifically the deposition testimony of defendant Mayer Sadian, who was the driver of the vehicle which struck the decedent, as well as the affidavit of Robert Genna, an accident reconstructionist. Plaintiff further contends that said evidence "leaves no doubt that questions of fact exist in this case which mandate the denial of defendants' summary judgment motion[s]."

To begin, the Court notes that plaintiff's "new" expert evidence could have been presented in opposition to the prior motions, as the expert, Robert Genna, previously served as a witness for the prosecution in the criminal action against defendant Mayer Sadian. Plaintiff has offered no reasonable justification for failing to present said evidence at the time the motions he seeks to renew were made. Plaintiff's expert, Mr. Genna, admits that in addition to the "new" testimony of Mayer Sadian, his affidavit is based upon his review of, "among other things," the police case report, the scene examination report, photographs of the scene, photos of Mr. Sadian's Honda motor vehicle, photos of the plaintiff's decedent, the police incident scene diagram, the total station download, the Medical Examiner's report, the vehicle inspection report for Mr. Sadian's vehicle, and the trial testimony of Chris Tsarsi, the manager of Matteo's Restaurant who was an eyewitness to the accident. Accordingly, the affidavit of this "expert" could have been presented in opposition to the original motions and is not "new" evidence which was previously unavailable or unknown to the plaintiff. Further, the Court's review of Mr. Genna's affidavit reveals that it is conclusory, speculative and "devoid of references to scientific data." (*Abalola v. Flower Hospital*, 44 A.D.3d 522, 843 N.Y.S.2d 614 (1st Dept. 2007); *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 784 N.E.2d 68 (2002)(where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be

given no probative force and is insufficient to withstand summary judgment); *See also, Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 571 N.E.2d 645 (1991)).

In addition, with respect to the deposition testimony of defendant Mayer Sadian, which was not available at the time that the prior motions were made, said testimony fails to change the prior determination of this Court. Defendant Sadian testified at his deposition, held on September 12, 2011, that he traveled in the left northbound lane on Mineola Boulevard as he passed the cars which were double parked in the right lane in front of Matteo's Restaurant. He further testified that after passing said double parked cars, he changed lanes from the left lane into the right northbound lane, where he struck plaintiff's decedent who had nearly finished crossing the four lane roadway from the opposite side of the street. Defendant Sadian testified unequivocally that the impact occurred in the right northbound lane on Mineola Boulevard. Defendant Sadian never saw the decedent as the decedent crossed the two southbound lanes of travel and the left northbound lane of travel, and testified that he only saw the decedent for the first time "a split second" before the accident occurred, when the decedent was toward the right side of the right northbound lane.

Accordingly, there remains insufficient evidence before this Court that the existence of double parked cars in front of Matteo's restaurant was a proximate cause of the accident. (See, *Remy v. City of New York*, 36 A.D.3d 602, 828 N.Y.S.2d 451 (2d Dept. 2007)(actions of city workers in stopping their truck in the right lane of an expressway to remove graffiti, allegedly obstructing a motorist's view, were not a proximate cause of a motor vehicle accident, but rather, merely furnished the condition for the occurrence of the accident); *Wechter v. Kelner*, 40 A.D.3d 747, 853 N.Y.S.2d 653 (2d Dept. 2007)(defendant's conduct in stopping his car while waiting for a parking space merely furnished the condition or occasion for the accident and was not a proximate cause of the plaintiff's injuries); *Dauber v. Stone*, 76 A.D.3d 699, 907 N.Y.S.2d 291 (2d Dept. 2010)(even assuming that the delivery truck was double parked, defendants were entitlted to summary judgment where they demonstrated that the location of the double parked vehicle was not a proximate cause of the accident); *Gerrity v. Muthana*, 7 N.Y.3d 834, 824 N.Y.S.2d 206 (2006)(location of bus in the traffic lane at the time of the accident resulted from negligence, but was not a proximate cause of plaintiff's injuries). Liability may not be imposed

upon a party who merely furnished the condition or occasion for the occurrence of the event, but was not one of its causes. (*Sheehan v. City of New York*, 40 N.Y2d 496, 387 N.Y.S.2d 92 (1976); *Wechter v. Kelner*, 40 A.D.3d 747, 835 N.Y.S.2d 653 (2d Dept. 2007)).

As such, the Court adheres to its original decision dated June 1, 2011.

This constitutes the decision and Order of this Court.

Dated: May 24, 2012

Anthony L. Parga, J.S.C.

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