

<b>Sakow v Trilobite, LLC</b>
2014 NY Slip Op 33664(U)
September 2, 2014
Supreme Court, New York County
Docket Number: 114103/09
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**HON. KATHRYN FREED**  
**PRESENT: JUSTICE OF SUPREME COURT**  
*Justice*

PART 5

*Sakow, Marion*  
-v-  
*City of New York*

INDEX NO. 114103/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 05

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

RECEIVED  
SEP 09 2014  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

**FILED**  
SEP 09 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9-2-14  
SEP - 2 2014

  
\_\_\_\_\_, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

1974-1975  
1976-1977

1978-1979  
1980-1981

1982-1983  
1984-1985

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
MARION SAKOW and WALTER SAKOW,

Plaintiffs,

DECISION/ORDER  
Index No. 114103/09  
Seq. No. 005

-against-

TRILOBITE, LLC, BLUE STAR PROPERTIES, LLC,  
CITY OF NEW YORK, and N.Y.C. DEPARTMENT OF  
TRANSPORTATION,

Defendants.

-----X  
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THESE MOTIONS:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1.(Exs. 1-8).
ANSWERING AFFIDAVIT.....	.....2.....
REPLYING AFFIDAVIT.....	.....3.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THESE MOTIONS IS AS FOLLOWS:

Defendants Trilobite, LLC (“Trilobite”) and Blue Star Properties, LLC (“Blue Star”) move, pursuant to CPLR 2221(d), for an order granting reargument of their motion, under Sequence 003, to vacate the note of issue and to compel discovery, and of their motion, under Sequence 004, for an extension of time in which to move for summary judgment. Plaintiff opposes the motion. After oral argument, and after a review of the parties’ motion papers and the relevant statutes and case law, the motion is **denied**.

**FILED**  
SEP 09 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

**Factual and Procedural Background:**

Plaintiff Marion Sakow was allegedly injured on August 28, 2008 when she tripped and fell on a broken sidewalk adjacent to a building located at 210 East 29<sup>th</sup> Street in Manhattan. On or about October 6, 2009, the plaintiff commenced a personal injury action against Trilobite, the City of New York (“the City”), the New York City Department of Transportation (“DOT”), and Thuesen Management Corp. Ex. 1 (A).<sup>1</sup> Plaintiff’s husband, plaintiff Walter Sakow (“Mr. Sakow”), asserted a derivative claim. Ex. 1 (A). The claim against Thuesen has been discontinued. On or about November 19, 2009, plaintiffs amended the complaint to name Blue Star as a defendant. Ex. 1 (A). Plaintiffs alleged that Trilobite and Blue Star, respectively, owned and managed the building, and that the City and DOT failed to properly repair and maintain the sidewalk. Ex. 1 (A).

On or about October 14, 2010, plaintiffs served a verified bill of particulars as against Trilobite, Bluestar, the City, and the DOT. Ex. 1 (C). In the bill of particulars, plaintiffs alleged that, as a result of the accident, plaintiff sustained, inter alia, fractures of the left humerus (arm) and triquetrum (wrist). Ex. 1 (C). Plaintiff did not assert a claim for loss of enjoyment of life.

On or about August 11, 2011, plaintiffs commenced a separate action against Bluestar Management Corp. and Blue Star Properties, Inc. Ex. 1 (D). On or about June 7, 2012, plaintiffs moved to consolidate the two actions and to discontinue all claims against Thuesen. By so-ordered stipulation dated March 5, 2013, the actions were consolidated under the caption and index number above. Ex. 1 (H).

The depositions of plaintiffs, Trilobite, Thuesen, and Blue Star were conducted between

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<sup>1</sup>Unless otherwise noted, all references are to the exhibits submitted in support of the instant motion.

April, 2012 and March, 2013.

On June 18, 2012, following plaintiff's deposition, Trilobite and Blue Star served her with a discovery demand seeking, inter alia, information concerning an ankle injury which, she testified at her deposition, she had sustained in 2005, three years prior to the alleged incident. Ex. 1 (E). Plaintiffs' counsel objected to the demands on June 27, 2012 on the ground that they were irrelevant to this matter. Ex. 1 (F). By letters sent in August and November of 2012, counsel for Trilobite and Blue Star requested that plaintiff respond to the June 18 demand but plaintiffs did not respond to these letters. Ex. 1 (F).

A compliance conference was conducted in this matter on October 23, 2012. By so-ordered stipulation on that date, this Court (Jaffe, J.) ordered, inter alia, that "[a]ll non-City parties [were] to respond to outstanding discovery within 45 days." Ex. 1 (G).

A further compliance conference was held on March 5, 2013. Ex. 1 (H). By so-ordered stipulation on that date, plaintiff agreed to respond to the August, 2012 letter by counsel for Trilobite and Blue Star seeking post-deposition discovery in accordance with their June 18, 2012 demand for the same. Ex. 1 (H). Trilobite and Blue Star reserved their rights to move to compel such discovery if it were not provided within 30 days. The order extended the note of issue filing deadline until June 28, 2013. Ex. 1 (H).

The final compliance conference in this matter occurred on May 7, 2013. Ex. 1 (I). By so-ordered stipulation on that date, plaintiffs' counsel was again directed to respond, within 30 days, to the letter sent to him by counsel for Trilobite and Blue Star in August, 2012 regarding their post-deposition discovery demand dated June 18, 2012. Ex. 1 (I). Again, Trilobite and Blue Star reserved their rights to move to compel a response to the demand if one were not provided. Ex. 1 (I).

On June 6, 2013, plaintiffs filed a note of issue and certificate of readiness attesting to the

fact that this case was ready for trial. Ex. 1 (J). On June 25, 2013, Trilobite and Blue Star moved, pursuant to 22 NYCRR 202.21(e) and under Sequence 004, to strike the note of issue, and, upon the striking of the note of issue, pursuant to CPLR 3124, to compel discovery regarding the plaintiff's 2005 injuries. Ex. 1.

On or about October 1, 2013, Trilobite and Blue Star moved, by order to show cause, pursuant to CPLR 3212(a), and under Sequence 004, for leave to file a motion for summary judgment beyond the statutory 120-day deadline, and within 90 days after entry of the order deciding their motion to vacate the note of issue and to compel discovery. Ex. 4.

By order entered January 23, 2014, this Court denied plaintiffs' motions. Ex. 7. The motion to vacate the note of issue and to compel discovery was denied on the ground that the evidence sought by Trilobite and Blue Star was neither material nor necessary to the defense of those parties. In holding that records relating to plaintiff's prior (2005) ankle injury were irrelevant herein, this Court reasoned that Trilobite and Blue Star failed to annex plaintiff's deposition transcript to their motion and, in any event, failed to cite any testimony by plaintiff reflecting that the 2005 injury caused or contributed in any way to her 2008 accident. Additionally, reasoned this Court, neither the complaint nor the bill of particulars alleged that plaintiff sustained a loss of enjoyment of life as a result of the alleged accident.

In denying the motion to extend the time to move for summary judgment, this Court held that Trilobite and Blue Star failed to demonstrate good cause why such an extension should be granted. Specifically, this Court held that those defendants failed to establish why they could not have moved for summary judgment without information regarding plaintiff's 2005 accident.

Trilobite and Blue Star now move, pursuant to CPLR 2221(d) for reargument of their motions to vacate the note of issue and to extend the time to move for summary judgment and, upon

reargument, for the granting of the said motions. Plaintiff opposes the motion.

**Positions of the Parties:**

In support of their motion, Trilobite and Blue Star argue that this Court overlooked or misapprehended the facts and law in denying their motion to vacate the note of issue and in refusing to direct plaintiff to provide discovery regarding plaintiff's 2005 ankle injury. The movants claim that records regarding plaintiff's 2005 ankle injury "are material and necessary to the defense of this matter" even though they do not allege that a "prior infirmity was a factor" in the alleged incident since such records could have revealed that the prior injury caused or contributed to the 2008 injury alleged in this action. Movants' Aff. In Support, at par. 32. The movants also argue that the 2005 medical records are also relevant regarding whether plaintiff took proper precautions regarding her previous left ankle injury since the failure to do so could have caused her 2008 fall. They further assert that the 2005 medical records are relevant to Mr. Sakow's loss of consortium claim since they relate to plaintiff's ability to support and provide services for him.

Trilobite and Blue Star further maintain that this Court overlooked the facts and the law in denying their motion to extend the time to file a motion for summary judgment. Specifically, they claim that this Court erred in holding that the movants did not need plaintiff's 2005 medical records in order to move for summary judgment, since "the feasibility of a summary judgment motion based on liability could not be fully apparent until the prior records requested in the [motion to vacate the note of issue] had been received." Movants' Aff. In Support, at par. 46. They further assert that they did not move for summary judgment within the statutory period since they "wished to avoid burdening this court with multiple motions, and to eliminate the risk of inconsistent [findings]." Movants' Aff. In Support, at par. 48.

In opposition to the motion, plaintiffs argue that this Court properly denied the motions by Trilobite and Blue Star. They maintain that the medical records regarding plaintiff's 2005 accident are irrelevant to the issues of liability and damages in this matter and that this Court properly determined that the movants had failed to identify any evidence, including plaintiff's own deposition testimony or medical records relating to the 2008 accident, even suggesting that the 2005 accident caused or contributed to her accident. Plaintiffs claim that the movants' argument that the 2005 medical records are somehow relevant to liability is based upon mere speculation.

Plaintiffs further assert that this Court properly denied the movants' motion to extend the time in which to move for summary judgment. They contend that, since there is nothing more than speculation that the 2005 records are relevant to liability or damages, the movants failed to establish "good cause" for extending their time to move for summary judgment.

In a reply affirmation in further support of their motion, Trilobite and Blue Star reiterate their argument that the 2005 records are relevant regarding liability since they would reflect plaintiff's ability to walk as of the date of her 2008 accident and thus indicate whether she fell due to the negligence of the defendants or because of a prior condition. The movants further assert that such records are relevant regarding damages, including any reduction of damages for plaintiff's comparative negligence, as well as Mr. Sakow's loss of consortium claim. Finally, they assert that they had good cause for an extension of time to move for summary judgment since they had not received the records pertaining to plaintiff's 2005 accident, which could have been relevant to liability.

### **Conclusions of Law:**

A motion for leave to reargue “shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion.” CPLR 2221(d)(2). Such motion “is addressed to the sound discretion of the court.” *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1<sup>st</sup> Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1<sup>st</sup> Dept. 1984]), or to present arguments different from those originally asserted. *William P. Pahl Equip. Corp. v. Kassis*, *supra* at 27; *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374 (2d Dept. 2004). On reargument, the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1<sup>st</sup> Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5<sup>th</sup> ed) succinctly instructs that a motion to reargue “is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind.”

Here, the motion by Trilobite and Blue Star to reargue is denied since the movants have failed to establish that this Court overlooked or misconstrued the facts or law in deciding their motions.

First, this Court did not err in denying the movants’ motion to vacate the note of issue. CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Evidence is “material” if sought “in good faith for possible use as evidence-in-chief or rebuttal for cross-examination.” *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 (1968) (*citation omitted*). Here, this Court properly determined that

plaintiff's 2005 medical records, relating to a prior ankle injury, are irrelevant in this action, in which plaintiff alleges injuries to her arm and wrist.

In their underlying papers, the movants admitted that plaintiff appeared for a deposition in this matter. However, they failed to annex her deposition transcript to their motion and cited to no testimony by her that the condition of her ankle due to her 2005 injury caused or contributed in any way to the 2008 accident in which she claims she injured her arm and hand. Nor did the movants submit any medical records relating to the 2008 injuries which established, or even alluded to, the fact that plaintiff had residual injuries from her 2005 accident which may have caused or contributed to the 2008 accident. The movants merely speculated that plaintiff's prior ankle injury "may have affected her ability to walk." Ex. 1, at par. 22. Given the foregoing, as well as the fact that plaintiff did not allege that a condition arising from her 2005 accident may have caused or contributed to the subject incident, records pertaining to the 2005 accident are not material and necessary to the defense of this action on liability grounds. *Cf., Schechter v 210 E. 90<sup>th</sup> St. Owners, Inc.*, 271 AD2d 224 (1<sup>st</sup> Dept 2000)(discovery regarding prior medical condition permitted where plaintiff alleged that the condition may have been a contributing cause of her accident).

The movants' contention that the 2005 records are relevant regarding liability "[t]o the extent [plaintiff] had failed to take proper precautions, considering the condition of her left ankle" (Movants' Aff. In Support, at par. 35) is improperly argued in their motion since movants failed to raise this argument in their original papers. *See 85-10 34<sup>th</sup> Ave. Apt. Corp. v Nationwide Mut. Insur. Co.*, 283 AD2d 604, 605 (2d Dept 2001).

With respect to damages, since neither the complaint nor the bill of particulars contained any allegation that plaintiff sustained a loss of enjoyment of life as a result of the subject accident, the nature and severity of any injuries caused by the plaintiff's 2005 accident cannot impact the amount

of damages for such a claim. Additionally, the movants' argument that plaintiff's 2005 records are relevant to her ability to provide support and services to Mr. Sakow, who asserts a derivative claim, is not properly before this Court since it was not raised in their initial moving papers. *See 85-10 34<sup>th</sup> Ave. Apt. Corp. v Nationwide Mut. Insur. Co.*, *supra* at 605.

In asserting that they are entitled to discovery regarding plaintiff's 2005 ankle injury, the movants rely on *Orlando v Richmond Precast, Inc.*, 53 AD3d 534 (2d Dept 2008) and *Vanalst v City of New York*, 276 AD2d 789 (2d Dept 2000), both of which are inapposite herein. In both of those cases, defendants were permitted to obtain discovery regarding a plaintiff's prior injuries because it had a potential bearing upon plaintiff's claim for loss of enjoyment of life. However, as noted above, no such claim was asserted by plaintiff in this matter and the movants are thus not entitled to discovery regarding plaintiff's 2005 ankle injury.

Nor did this Court overlook any law or facts in determining that Trilobite and Blue Star were not entitled to an extension of time in which to move for summary judgment. CPLR 3212(a) requires a party to move for summary judgment within 120 days after the filing of a note of issue unless the court sets a shorter deadline for doing so, and this deadline cannot be extended "except with leave of court on good cause shown." In this case, the movants failed to demonstrate good cause why they should be permitted to extend this deadline. *See* CPLR 3212(a); *Brill v City of New York*, 2 NY3d 648, (2004); *Isolabella v Sapir*, 96 AD3d 427 (1<sup>st</sup> Dept 2012). In the absence of a showing of good cause, a court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment. *See Brill, supra* at 652.

The allegedly outstanding discovery claimed by the movants does not constitute good cause for them to move for summary judgment past the 120-day deadline since the information sought regarding plaintiff's 2005 accident is "neither relevant nor necessary to the motion for summary

judgment.” *The Bruno Maschi v City of New York*, 110 AD3d 460 (1<sup>st</sup> Dept 2013) (*citations omitted*). As noted above, the movants failed to establish any connection between the accident alleged in this case and plaintiff’s 2005 injuries. Their argument that discovery regarding plaintiff’s 2005 accident is relevant to causation is based upon sheer speculation. This is evident from their underlying moving papers, in which they asserted, without any substantiation whatsoever, that the 2005 injuries “very likely had a material effect on her ability to ambulate at the time of the August 22, 2008 incident giving rise to this action.” Ex. 4, at par. 23.

Since the movants claim that their summary judgment motion would be based upon an absence of causation, and since the discovery which they claim they were owed at the time of the filing of the note of issue clearly concerned damages, “it dos not avail defendants to argue that the reason they did not move for summary judgment within 120 days of the filing of the note of issue was because disclosure was not complete.” *Diaz v Altman*, 298 AD2d 126 (1<sup>st</sup> Dept 2002). The movants have failed to show that their inability to obtain information regarding plaintiff’s 2005 injuries prevented them in any way from moving for summary judgment. *See Martorello v Consolidated Edison Co. of New York, Inc.*, 260 AD2d 317 (1<sup>st</sup> Dept 1999). Therefore, the movants’ motion to extend their time to move for summary judgment was properly denied.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for reargument by defendants Trilobite LLC and Blue Star Properties, LLC is denied; and it is further,

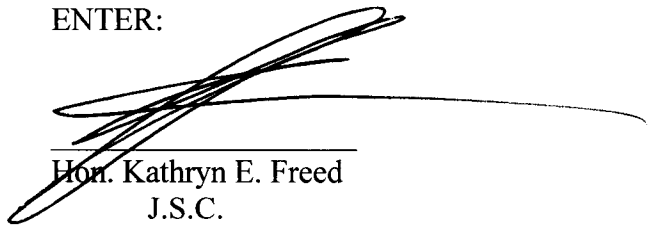
ORDERED that defendants Trilobite LLC and Blue Star Properties, LLC are to serve a copy of this order, with notice of entry, upon all parties to this action within 30 days hereof; and it is further,

ORDERED that the parties are to appear for a settlement conference on October 21, 2014 at 2:30 p.m. at 80 Centre Street, Room 280; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: September 2, 2014

ENTER:



Hon. Kathryn E. Freed  
J.S.C.

**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**

**FILED**  
SEP 02 2014  
NEW YORK  
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