

**Spann v City of New York**

2015 NY Slip Op 32648(U)

January 28, 2015

Supreme Court, Richmond County

Docket Number: 104355/11

Judge: Thomas P. Aliotta

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----X  
CAROLYN SPANN,

*Plaintiff,*

*-against-*

THE CITY OF NEW YORK, MV TRANSPORTATION INC.,  
THE NEW YORK CITY TRANSIT AUTHORITY,  
JOSE CASANOVA, and FARRAH FICCO,

*Defendants.*  
-----X

BETTY JOHNSON,

*Plaintiff,*

*-against-*

NEW YORK CITY TRANSIT AUTHORITY d/b/a  
ACCESS-A-RIDE, MY PUBLIC TRANSPORTATION INC.,  
individually and d/b/a ACCESS-A-RIDE,  
JOSE CASANOVA, and FARRAH C. FICCO

*Defendants.*  
-----X

The following papers numbered 1 to 4 were marked fully submitted on the 3<sup>rd</sup> day of December, 2014:

	Pages Numbered
Notice of Motion for Leave to Renew and Reargue by Plaintiff Carolyn Spann, with Supporting Papers and Exhibits (dated September 19, 2014).....	1
Affirmation in Opposition by Defendants the City of New York, MV Transportation, Inc., the New York City Transit Authority and Jose Casanova, (dated October 15, 2014).....	2
Affirmation in Opposition by Defendant Farrah Ficco (dated October 20, 2014).....	3
Reply Affirmation by Plaintiff Carolyn Spann (dated November 10, 2014).....	4

PART C-2  
Present:  
Hon. Thomas P. Aliotta

**DECISION AND ORDER**

Index No. 104355/11  
Motion No. 3102-007

Index No. 100332/12

2015 JUL 20 P 4: 42  
RICHMOND COUNTY CLERK  
FILED COURT DESK

Upon the foregoing papers, the motion is decided as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on March 4, 2011. Plaintiff Carolyn Spann (hereinafter "plaintiff") was a passenger in defendant MV Transportation Inc.'s Access-A-Ride vehicle which was owned by defendant New York City Transit Authority and operated by defendant Jose Casanova, when it was struck by a vehicle operated by defendant Farrah Ficco.

Presently before the Court is plaintiff's motion for leave to renew and reargue this Court's prior determination granting defendants' motion for summary judgment on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d). Annexed to plaintiff's motion is a previously omitted chiropractor's affidavit by Salvatore Germino, D.C. dated September 17, 2014. In his affidavit, Dr. Germino attests that he initially examined plaintiff on March 7, 2011, three days after the subject accident, and recommended that she pursue a course of treatment involving physical therapy and chiropractic treatment. Plaintiff thereafter attended physical therapy sessions thrice a week for 11 months, after which Dr. Germino determined that any "[c]ontinued treatment would be merely therapeutic or palliative in nature" (*id.* at 2, 4). Dr. Germino opined that plaintiff's "lumbar and cervical disc injuries were causally related to the accident of August 3, 2011" and further concluded "to a reasonable degree of medical certainty that [plaintiff] demonstrates the permanent loss of use, permanent consequential limitation and significant limitation [of use] of her neck and back" (*id.* at 5).

In further support of the motion, plaintiff asserts that this Court overlooked the affirmation of her medical expert, Dr. Kenneth Chapman, who attested that he reviewed Dr. Germino's medical records when making his determination with respect the nature, significance and duration of Plaintiff's injury (*see* Physician's Affirmation of Dr. Kenneth B. Chapman dated April 23, 2014, para 2). Moreover, it is claimed that "[d]efendant's [sic] were aware that plaintiff treated with Dr. Germino immediately after the accident" as his medical bills were attached to her discovery

responses (*see* Affirmation of Gavin C. Fields, Esq., para 14).

A motion for leave to renew shall be based upon new facts not offered on the prior motion which would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion (CPLR 2221[e]; *see Barnett v. Smith*, 64 AD3d 669 [2<sup>nd</sup> Dept 2009]). Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (CPLR 2221[d]; *id.* at 671).

Plaintiff's motion for leave to renew is granted, and upon renewal, the Court adheres to its prior determination granting defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury. The previous omission of a sworn statement from Dr. Germino, plaintiff's chiropractor, is unexplained, while the affidavit submitted in support of renewal fails to specify, *e.g.*, the purported decrease in range of motion of plaintiff's lumbar and cervical spine, or the objective tests which he performed in reaching his conclusions (*cf. Brightly v. Dong Liu*, 77 AD3d 874 [2<sup>nd</sup> Dept 2010]; *Acosta v. Rubin*, 2 AD3d 657 [2<sup>nd</sup> Dept 2003]). These purported measurements appear only in Dr. Germino's unsworn report dated May 12, 2011, upon which Dr. Chapman appears to have relied in formulating a diagnosis. It is well settled that the party opposing a motion for summary judgment must submit sufficient evidence, in admissible form, to establish the existence of a triable issue, or explain why a proper tender of proof has not been made (*see Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]; *Johnson v. Phillips*, 261 AD2d 269, 270 [1<sup>st</sup> Dept 1999]). Here, plaintiff has provided no explanation for her failure to submit a chiropractor's affidavit in opposition to the prior motion.

Viewed as a motion for leave to reargue, plaintiff has failed to show that the Court overlooked or misapprehended any pertinent law or fact in reaching its prior determination (*see Orridge v. Barry*, 109 AD3d 644 [2<sup>nd</sup> Dept 2013]). Dr. Chapman's 2014 affirmation is based, at

least in part, on the unsworn EMG and MRI reports of Drs. Germino, Naik and DeNise, thereby rendering his conclusions speculative and insufficient to raise a triable issue of fact (see *Kreimerman v. Stunis*, 74 AD3d 753, 755 [2<sup>nd</sup> Dept 2010]; *Irizarry v. Lindor*, 110 AD3d 846, 847 [2<sup>nd</sup> Dept 2013]).

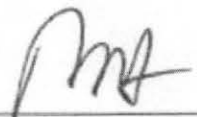
Accordingly, it is

ORDERED that the motion for leave to renew is granted; and it is further

ORDERED that upon renewal, the Court adheres to its prior determination; and it is further

ORDERED that the balance of Plaintiff's motion is denied.

ENTER,



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HON. THOMAS P. ALIOTTA  
JUSTICE OF THE SUPREME COURT

DATED: JAN 28 2015

GRANTED  
JUL 14 2015  
STEPHEN J. FIALA