To commence the 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 WESTCHESTER - COMPLIANCE PART

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BIANCA RODRIGUEZ,

Plaintiff,

-against-

DEPARTMENT OF PUBLIC WORKS, THE CITY OF YONKERS and THOMAS DELPRETE,

Defendants.

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**DECISION AND ORDER**
Index No.: 66971/2016
Motion Date: Mar. 22, 2018
Motion Seq.: 2

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 2221 granting leave to renew/reargue or clarify the Compliance Conference Referee Report dated December 11, 2017, and so-ordered by this Court (Scheinkman, J.), to the extent of removing therefrom certain preclusion language issued pursuant to the Decision and Order of this Court (Lefkowitz, J.) dated November 13, 2017:

Notice of Motion, Aff. in Support, Exhs. 1-8
Affirmation in Opposition, Exh. A
Affirmation in Reply

Upon the foregoing papers, the motion is determined as follows:

As this Court (Lefkowitz, J.) most recently enumerated in its Decision and Order dated November 13, 2017 (hereinafter "Underlying Order"), plaintiff commenced this action by Summons and Complaint on or about November 11, 2016, alleging personal injuries arising from a motor vehicle accident on December 21, 2015, in Yonkers, New York. The Underlying Order held that plaintiff had engaged in what this Court concluded was a pattern of "willful and contumacious" violations of this Court's discovery orders. Accordingly, the Underlying Order granted defendants' CPLR 3126 motion to dismiss this action to the extent of requiring plaintiff to tender by November 30, 2017, certain discovery there enumerated including a sufficient Bill of Particulars, and upon plaintiff's failure to comply, directing defendants to upload by December 7, 2017, an affirmation of noncompliance and proposed Order with Notice of Settlement upon which this Court would dismiss this action (NYSCEF Doc. 28). Defendants served on plaintiff the Underlying Order with Notice of Entry on November 14, 2017 (NYSCEF Docs. 29-30).

Pursuant thereto, on December 6, 2017, defendants uploaded to NYSCEF an affirmation of noncompliance and proposed Order with Notice of Settlement dismissing this action pursuant

to CPLR 3126 (NYSCEF Doc. 32, 35). Plaintiff followed with an affirmation in opposition (NYSCEF Doc. 36). As relevant here, the parties contested whether, in derogation of the Underlying Order, plaintiff failed to timely supplement plaintiff's Bill of Particulars in relation to special damages. At Compliance Conference held on December 11, 2017, the Court Attorney Referee appointed to hear and report pursuant to CPLR 3104 recommended that the Court, in lieu of dismissal, should direct the lesser-included CPLR 3126 remedy of precluding plaintiff from "adducing evidence of special damages at trial or otherwise as a consequence of plaintiff's failure to comply with the [Underlying] Order in relation thereto" (NYSCEF Doc. 38). This Court (Scheinkman, J.) so-ordered the Court Attorney Referee's report (*id.*) on December 12, 2017.

The parties next appeared before this Court six weeks later, on January 25, 2018, at which time plaintiff orally objected to this Court's preclusion order. The referee's report from that day, which this Court (Lefkowitz, J.) so-ordered on January 29, 2018 (hereinafter the "Challenged Order"), reads in pertinent part as follows:

> "Plaintiff having failed to appeal from the Decision and Order of this Court (Lefkowitz, J.) dated November 13, 2017, which granted defendants a conditional preclusion order; and plaintiff having failed to seek relief from the further Order of this Court (Scheinkman, J.) dated December 11, 2017, precluding plaintiff from adducing evidence of special damages upon defendants' affirmation of plaintiff's noncompliance, the Court Attorney Referee denied plaintiff's oral objection thereto stated at this Conference."

The parties further appeared for a Compliance Conference on February 14, 2018, and a further Compliance Conference Order was issued that day in relation to post-deposition discovery demands and independent medical examinations (NYSCEF Doc. 40). Only thereafter, on February 22, 2018 – fully 10 weeks after the preclusion order – did plaintiff serve its Notice of Entry on defendants for the Challenged Order NYSCEF Doc. 41). The next day, February 23, 2018, plaintiff filed the instant Notice of Motion seeking an order (a) "granting plaintiff leave to reargue/renew, pursuant to CPLR 2221, the Compliance Conference Referee Report and Order so Ordered on December 12, 1017, and e-filed with the Court on December 12, 2017; and upon reargument, deleting from the Compliance Conference Referee Report & Order the language "*Upon defendant's [sic] affirmation of noncompliance and the Decision and Order of this Court (Lefkowitz, J.) dated 11/13/17, plaintiff is precluded from adducing evidence of special damages, at trial or otherwise[,] as a consequence of plaintiff's failure to comply with the Order in relation thereto*"; or (b) "reconsidering and clarifying" such Order to delete such language.

Plaintiff styles her motion to seek relief against the Challenged Order, not any Decision and Order of this Court. As the judge who issued the Challenged Order is not able to hear this motion,[1] this application is referred to the undersigned for determination (see CPLR 2221[a]).

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[1]Since the date of the Challenged Order, Justice Scheinkman was appointed Presiding Justice of the Appellate Division, Second Department.

**Analysis**

A motion for leave 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" (CPLR 2221[d][2]; *see Matter of Carter v Carter*, 81 AD3d 819 [2d Dept 2011]). Re-argument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Dinstber v Fludd*, 2 AD3d 670 [2d Dept 2003]). The determination to grant leave to reargue a prior motion lies within the sound discretion of the court that decided it (*see Barnett v Smith*, 64 AD3d 669 [2d Dept 2009]). A motion for leave to renew must be based on new facts, not offered on the prior motion, that would change the prior determination and the movant must show a reasonable justification for the failure to present such facts on the original motion (CPLR 2221[e][2][3]; *Aronov v Shimonov,* 105 AD3d 787 [2d Dept 2013]*; Commisso v Orshan*, 85 AD3d 845 [2d Dept 2011]). A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. In determining a combined motion for leave to reargue and leave to renew, this Court must "decide each part of the motion as if it were separately made" (CPLR 2221[f]).

Leave to reargue the Challenged Order is denied because plaintiff proffers no issue of law or fact that this Court allegedly misapprehended or overlooked in issuing the preclusion order (*see* CPLR 2221[d][2]). The Challenged Order correctly determined that plaintiff's supplemental Bill of Particulars failed to comply with this Court's Underlying Order, which directed plaintiff to respond appropriately to defendants' good faith letter regarding the deficient Bill of Particulars by November 30, 2017. Defendants' affirmation of noncompliance (NYSCEF Doc. 32) attested that defendants received no response to such good faith letter and no remedy to the inadequacies in the Bill of Particulars, which included the number of times plaintiff allegedly was attended by physicians (Demand #13), the total amount of money claimed for medicines and medical care (*id.*), the total amount claimed as special damages for hospital expenses and radiology and to whom paid (Demand #15), and the total additional special damages claimed (Demand #17). In response, plaintiff attested that plaintiff had served a supplemental Bill of Particulars[2] on November 27, 2017. However, this filing again failed to explicate plaintiff's claims of special damages in response to defendants' demands with reasonable particularity. It did not explicate precise figures for hospital and radiological expenses claimed as special damages, but rather stated only "approximate" round numbers, and it provided no statement to whom such expenses allegedly were paid. Plaintiff offers no authority that this supplementation was sufficient, and plaintiff's single offered case is inapposite: *Fortunato v Personal Woman's Care, P.C.* (31 AD3d 370 [2d Dept 2006]) related to whether a supplemental bill of particulars was invalid for stating a new cause of action, not whether it reasonably particularized damages. Moreover, unlike in *Fortunato*, here plaintiff's ongoing failure reasonably to particularize special damages prejudices

[2]While plaintiff styles this pleading as an "amended" Bill of Particulars, such pleading more accurately is a "supplemental" Bill of Particulars inasmuch as it pleads no additional cause of action or theory of liability.

the defense of this action. Thus, the Challenged Order – rather than dismiss the action as defendants sought – properly directed the lesser remedy of precluded plaintiff from adducing evidence of the special damages that plaintiff repeatedly failed to particularize (*see* CPLR 3042[d], CPLR 3126).

Plaintiff's further contrary arguments are without merit. That CPLR 3043(b) allows a party to supplement bills of particulars as to special damages without leave up to 30 days from trial does not relieve this plaintiff of the duty to supplement as the Underlying Order directed. Plaintiff offers no authority to the contrary. Moreover, plaintiff's argument that plaintiff engaged in no "willful and contumacious" conduct is misplaced. The Underlying Order held that plaintiff had engaged in "willful and contumacious" discovery violations, and plaintiff did not seek to reargue, renew or stay enforcement of that Underlying Order. Thus, it remains the law of the case that plaintiff engaged in "willful and contumacious" violations. For the foregoing reasons, leave to reargue the Challenged Order's preclusion remedy is denied.

Leave to renew the Challenged Order also is denied. CPLR 2221(e) requires that a movant for leave to renew must offer new facts not offered on the prior application that would have changed the determination, with a reasonable justification for the failure to present such facts on the prior motion. Plaintiff offers neither. Accordingly, leave to renew is denied.

In denying this motion, this Court notes that plaintiff again failed to proceed diligently in this matter. Though plaintiff pleads aggrievement from the Challenged Order of December 12, 2017, plaintiff's counsel offers no reason why plaintiff waited over two months, until February 14, 2018, to bring this motion.[3] Plaintiff is reminded again to proceed diligently with this action. Accordingly it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that counsel for defendants shall serve this Decision and Order, with Notice of Entry, on plaintiff within five days hereof; and it is further

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[3]A motion for leave to reargue a motion is untimely after 30 days (*see* CPLR 2221[d][3]), and a motion to reject a referee report is untimely after 15 days (22 NYCRR [Uniform Rules of Trial Courts] § 202.44[a]). Because service of such an order or motion triggers this calculation of time, and here plaintiff delayed filing notice of entry of the Challenged Order until February 22, 2018, this motion is not untimely. However, the two-month delay – which plaintiff's papers do not explain – appears prejudicial to defendants because during the interim, the parties were deposed with the preclusion order in effect and no application for relief against it. Thus, granting plaintiff's motion at this hour either would deprive defendants of a reasonable chance to adduce discovery of special damages or would require re-opening depositions. This two-month delay also departs from the spirit of Chief Judge DiFiore's "Excellence Initiative," which seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on "Standards and Goals" as the benchmark for the timely resolution of cases, so that the courts can deliver timely and efficient justice in all cases. An unexplained and unnecessary multi-month delay in this kind of discovery motion risks unnecessary delays, which inure to the detriment of the justice system itself.

ORDERED that counsel for all parties will appear in the Compliance Part, Room 800 of this Courthouse, at 9:30 a.m. on April 12, 2018, as previously directed by the Compliance Conference Order dated February 14, 2018 (NYSCEF Doc. 40). If the discovery directed therein has been completed, this Court contemplates certifying this action as trial ready at that time.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 9, 2018

HON. JOAN B. LEFKOWITZ, J.S.C.

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