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| <b>Matos v Mt. Sinai St. Luke's</b>  |
| 2019 NY Slip Op 33526(U)   |
| November 26, 2019  |
| Supreme Court, New York County   |
| Docket Number: 805370/17   |
| Judge: Martin Shulman  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

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DORCA BRITO MATOS,

Plaintiff,

Index No. 805370/17

-against-

**Decision & Order**

MT. SINAI ST. LUKE'S and FREDERICK  
CLARE, M.D.,

Defendants.

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**Hon. Martin Shulman:**

Plaintiff moves pursuant to CPLR 2221 to reargue this court's decision and order dated April 5, 2019 ("prior decision") and upon granting reargument, denying the portions of defendants' underlying motion pertaining to plaintiff's bladder injury. Alternatively, plaintiff seeks leave of court to serve an amended bill of particulars. Defendants oppose the motion.

The complaint herein alleges medical malpractice and lack of informed consent arising from plaintiff's vaginal hysterectomy performed by defendant Dr. Frederick Clare at co-defendant St. Luke's Roosevelt Hospital Center, s/h/a and d/b/a Mt. Sinai St. Luke's. Among plaintiff's claims is that she sustained injuries to her bowel and bladder during the procedure.

Plaintiff served a Verified Bill of Particulars dated January 10, 2018 ("BP") and thereafter served a Second Supplemental Bill of Particulars dated October 10, 2018 ("Supp. BP"). Thereafter, defendants alleged that plaintiff's Supp. BP was insufficient and brought the underlying motion to dismiss the complaint or compel compliance.

Plaintiff's opposition thereto included a Third Supplemental Bill of Particulars dated January 16, 2019 ("3<sup>rd</sup> Supp. BP").

After the underlying motion was marked submitted, defense counsel electronically filed a letter dated March 12, 2019 ("Formosa letter") addressed to opposing counsel and the court. The Formosa letter included objections to the 3<sup>rd</sup> Supp. BP which were not included in defendants' reply papers. Specifically, defendants argued for the first time that the 3<sup>rd</sup> Supp. BP was actually a second amended bill of particulars since it contained new claims of liability relating to plaintiff's bladder. The Formosa letter also claimed that upon further review, the Supp. BP was actually an amended bill of particulars. As plaintiff is entitled to amend her bill of particulars once without leave of court, defendants concluded that the 3<sup>rd</sup> Supp. BP required leave to amend.

The Formosa letter concluded by asking whether the court would consider the arguments therein in connection with the then pending underlying motion, or whether it would be necessary for defendants to file a new motion. Not having received any objection from plaintiff's counsel, this court advised counsel for the parties by e-mail on April 2, 2019 that the issues raised in the Formosa letter would be considered along with the motion. Although procedurally unusual, this court's goal in considering the issues addressed in the Formosa letter was to conserve judicial resources and enable discovery, which had come to a stand still, to progress. In response to the court's e-mail, plaintiff's counsel submitted a letter dated April 3, 2019 objecting to the Formosa letter.

This court issued the prior decision on April 5, 2019.<sup>1</sup> In relevant part, the prior decision found that plaintiff's allegations pertaining to her bladder injury raised new claims of liability and directed plaintiff to "[r]emove all references to plaintiff's bladder injury and repair in her responses to demands 2, 5 and 30".

### Reargument

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v Roche*, 68 AD2d 558 (1st Dept 1979). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept 1992).

Plaintiff's motion for reargument is granted and the prior decision's first decretal paragraph quoted above is stricken for the foregoing reasons. Defendants incorrectly argue that the Supp. BP is an amended bill of particulars. The claims regarding plaintiff's bladder were not included for the first time in the Supp. BP. Rather, paragraph 17 of the BP includes "bladder laceration requiring cystotomy" as an injury. Defendants are correct that the 3<sup>rd</sup> Supp. BP is an amended pleading. While plaintiff's BP and Supp. BP allege injuries to both her bladder and bowel arising from the

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<sup>1</sup> Contrary to plaintiff's counsel's claim in this motion, this court considered her letter in rendering the prior decision. The document was inadvertently omitted from the prior decision's recitation of documents read in connection with the motion.

the hysterectomy, plaintiff alleges for the first time in the 3<sup>rd</sup> Supp. BP that defendants performed the subsequent repair of her bladder in a negligent manner. This new allegation renders the 3<sup>rd</sup> Supp. BP an amended pleading. It is properly interposed because plaintiff is permitted to amend her bill of particulars once as of right pursuant to CPLR 3042(b).

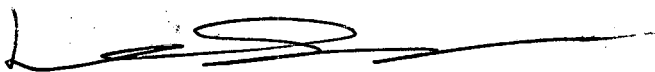
For the foregoing reasons it is

ORDERED that plaintiff's motion to reargue is granted, and upon granting reargument the prior decision is modified at page 2 to delete the first decretal paragraph; and it is further

ORDERED that within 20 days of the electronic filing of this decision and order, plaintiff shall serve a new pleading, to be designated an amended bill of particulars, in conformity with the prior decision's remaining decretal paragraphs and the instant decision and order.

Counsel for the parties are directed to appear for a status conference on January 7, 2020, at 9:30 a.m., at Part 1MMSP, 60 Centre St., Room 325, New York, NY

Dated: November 26, 2019



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Hon. Martin Shulman, J.S.C.