

<b>Gilliam v Uni Holdings, LLC</b>
2020 NY Slip Op 34595(U)
July 15, 2020
Supreme Court, Bronx County
Docket Number: Index No. 25956/2018
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART: 11 - DCM

GILLIAM, JEKEYA

Index No. 0025956/2018E

-against-

Hon. LAURA DOUGLAS,

UNI HOLDINGS, LLC

Justice Supreme Court

The following papers numbered 1 to 4 Read on this motion, (Seq. No. 6) for  
**STRIKE COMPLAINT**, noticed on **September 20 2019**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). (1) (2)
Answering Affidavit and Exhibits	No(s). (3)
Replying Affidavit and Exhibits	No(s). (4)

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

by defendant University Holding, LLC and  
cross-motion by plaintiff are decided  
in accordance with the attached  
memorandum Decision / Order.

Motion is Respectfully Referred to Justice:  
Dated:

Dated: 7-15-20

Hon. [Signature]  
LAURA DOUGLAS, J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
PART 11 - DCM

Index No. 25956/2018

JEKEYA GILLIAM,

Plaintiff,

**DECISION/ORDER**

-against-

**Present:**

**Hon. Laura G. Douglas  
J.S.C.**

UNI HOLDINGS, LLC and UNIVERSITY HOLDING, LLC,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to dismiss complaint and related relief and cross-motion to renew, restore action to trial calendar, and impose sanctions:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion by Defendant University Holding, LLC, Good Faith Affirmation of Andrew Thebaud, Esq. dated August 20, 2019, Affirmation of Andrew Thebaud, Esq. dated August 20, 2019 in Support of Motion, and Exhibits (“A” through “L”).....</b>	<b>1</b>
<b>Plaintiff’s Notice of Cross-Motion, Affirmation of Jared B. Dubin, Esq. dated October 4, 2019 in Support of Cross-Motion and in Opposition to Motion, and Exhibits (“1” and “2”).....</b>	<b>2</b>
<b>Reply Affirmation of Andrew Thebaud, Esq. dated October 23, 2019.....</b>	<b>3</b>
<b>Affirmation of Andrew Thebaud, Esq. dated October 23, 2019 in Opposition to Cross-Motion and Exhibit (“A”).....</b>	<b>4</b>

*This motion and cross-motion are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as follows:*

Defendant University Holding, LLC (“University”) seeks an order penalizing the plaintiff for her purported spoliation of evidence by dismissing her complaint or, alternatively, imposing other spoliation sanctions. The plaintiff cross-moves for an order renewing University’s prior motion to vacate the

plaintiff's note of issue and, upon renewal, restoring this action to the trial calendar, and imposing sanctions under 22 NYCRR Part 130 against University's counsel for its purportedly frivolous motion practice. The motion is granted solely as ordered below and is denied in all other respects. The cross-motion is denied in its entirety.

The plaintiff seeks monetary damages for personal injuries allegedly sustained on June 25, 2017 when a portion of the bathroom ceiling in an apartment fell on her. University owned the building.

In her verified bill of particulars dated August 9, 2018, the plaintiff alleged that she sustained a bulging disc at L4-L5, among other injuries. She was deposed on January 7, 2019. This Court's Preliminary Conference Order dated August 8, 2018 and Compliance Conference Order dated October 26, 2018 both directed that the plaintiff undergo a physical examination. By notice dated February 6, 2019, University requested that the plaintiff submit to a CPLR § 3121 physical examination on March 6, 2019 with Daniel Feuer, M.D ("Feuer"). The plaintiff does not deny receipt of this notice, but did not appear for that examination. University then wrote a letter dated March 11, 2019 to plaintiff's counsel advising that the plaintiff had failed to appear and requesting convenient dates that the plaintiff's schedule would accommodate for this examination. The plaintiff did not respond. University then served a second designation notice dated April 3, 2019 for a physical examination with Dr. Feuer to be held on May 15, 2019. On or about April 9, 2019, the plaintiff served a supplemental bill of particulars setting forth that she underwent surgery to her lumbar spine on April 2, 2019 as a result of the underlying accident. By letter dated May 14, 2019, University advised the plaintiff about her failure to appear for previously scheduled physical examinations and her failure to notify University before undergoing the surgery. University also reserved its rights to re-depose the plaintiff and seek spoliation sanctions. The plaintiff did finally appear for a physical examination on May 15, 2019.

A party seeking sanctions for spoliation must demonstrate that the party controlling the evidence had a duty to preserve it at the time of its alteration or destruction, that the evidence was corrupted or destroyed with a culpable state of mind, and that a factfinder could find that the evidence could have supported the party's claim (*Pegasus Aviation I, Inc. v. Varig Logistica, S.A.*, 26 NY3d 543 [Ct App 2015]). In a personal injury action, the injured plaintiff's physical condition is clearly evidence. Whether and to what extent a certain body part is injured is an integral part of a personal injury plaintiff's burden of proof. Expert medical witnesses in trials of personal injury actions use anatomical models, diagnostic films, and body movements to replicate body parts in attempting to prove or disprove essential

facts. Adversaries battle over the nature and extent of a decreased functioning of body parts. The preservation of these body parts in an intact state available to all parties for review is essential. Therefore, parts of an injured plaintiff's body fit comfortably into the type of evidence that can be spoliated. The plaintiff does not dispute that her lumbar spine has been altered from its pre-surgery condition. Here, the condition of the plaintiff's L5-S1 lumbar spine was crucial evidence in determining the extent to which it was damaged as a result of the underlying accident, a task left to Dr. Feuer on University's behalf.

While it was affirmed on other grounds, the trial court's decision in *Mangione v. Jacobs*, 121 AD3d 953 [2<sup>nd</sup> Dept 2014]) remains instructive on this issue. Justice Markey thoroughly reviewed the application of spoliation theory to the body parts at issue in personal injury actions in jurisdictions across the nation. Citing to a number of cases (*see Clark v E.I. DuPont de Nemours and Co.*, 2001 WL 1482831 [Del. Super. 2001] [Peggy L. Ableman, J.], *aff'd on the opinion below*, 795 A.2d 667 [Table], 2002 WL 392423 [Del. Sup. 2002], *cert. denied*, 537 US 941 [2002], and subsequent order in *Clark v. Corporate Interiors of Delaware*, 2004 WL 2419159, slip op. at 1 & n.2 [Del. Super. 2004] [Ableman, J.], *aff'd on the opinion below*, 871 A.2d 1127 [Table], 2005 WL 277925 [Del. Sup. 2005]), Justice Markey concluded that a plaintiff who submits to non-emergency and non-life-threatening surgery prior to a court-ordered physical examination has committed spoliation of evidence (*see Mangione v. Jacobs*, 37 Misc3d 711, 723 [S Ct, Queens Cty 2012]).

A thoughtful exposition of this issue was also given by Justice John R. Higgitt in *Martinez v. Nelson*, 2019 NY Slip Op 29158 [S Ct Bronx Cty 2019]. Justice Higgitt also found that spoliation sanctions may be imposed on a plaintiff who fails to submit to a physical examination prior to undergoing surgery on a body part that the plaintiff claims was injured by the defendant's tortious conduct. However, no penalties were imposed because no medical evidence and other discovery on the issue had been submitted on the motion to allow the court to determine whether and to what degree the surgery compromised the physical examination.

Having found that the plaintiff's lumbar spine was evidence that could be spoliated, the next threshold for the imposition of sanctions is whether the plaintiff was obligated to preserve the condition of her lumbar spine at the time of her surgery. Here, it is clear that the plaintiff was under such an obligation by virtue of this Court's discovery scheduling orders and University's designation notice served some 60 days prior to the surgery.

The next element that University must establish is that the plaintiff altered her lumbar spine with a culpable state of mind. Here, the plaintiff acted with gross negligence, which is defined as the failure to use even slight care or conduct that is so careless as to show complete disregard for the rights of others (*see* PJI 2:10A). At the time of her surgery, the plaintiff had been aware for two months of University's desire to conduct a physical examination. She provides no explanation for her failure to submit to a physical examination within this ample period. In addition, the plaintiff failed to respond to University's attempt at rescheduling an examination at her convenience. Even a simple acknowledgment of the upcoming surgery would have placed the burden on University to accommodate the plaintiff's schedule. The plaintiff made no mention of possible surgery at her deposition. In fact, she testified that she was working 8-hour daily shifts as a laborer for the NYC Department of Sanitation. That the plaintiff proceeded with the surgery despite several notices and court orders that a physical examination was required, yet notified University about the surgery almost immediately thereafter evinces an eagerness to increase her potential monetary recovery with a careless disregard for University's rights to defend itself. The plaintiff does not submit an affidavit setting forth any extenuating circumstances to consider in her favor. Since the plaintiff was grossly negligent in altering the evidence, the relevancy of her lumbar spine to University's defense is presumed and has not been rebutted by the plaintiff (*see Siras Partners LLC v. Activity Kuafu Hudson Yards LLC*, 171 AD3d 680 [1<sup>st</sup> Dept 2019]).

At a minimum, the plaintiff acted with ordinary negligence in going forward with the surgery. It was not reasonable to submit to non-emergency surgery on an allegedly injured body part for which damages were sought without affording University an opportunity to complete its expressed desire to examine the plaintiff. The plaintiff does not submit an affidavit from herself or from her physician setting forth that her surgery was an emergency measure or treated a life-threatening condition. Ordinary negligence constitutes a culpable state of mind in this context (*see Voom HD Holdings LLC v. Echostar Satellite L.L.C.*, 93 AD3d 33 [1<sup>st</sup> Dept 2012]).

If the plaintiff was guilty only of ordinary negligence, University must establish that the plaintiff's altered lumbar spine was relevant to University's defense. Unlike the defendant in *Martinez*, University has submitted an affidavit from a medical expert revealing that the plaintiff's surgery hindered his ability to perform a meaningful examination of the plaintiff's lumbar spine. Dr. Feuer states that the plaintiff's medical records do not indicate her surgery was suddenly necessary. He avers that the

plaintiff's surgery prevented him from determining the nature, extent, and cause of the injuries set forth in the plaintiff's bill of particulars. Dr. Feuer states that he was prevented from determining whether the surgery was even necessary and/or related to the underlying accident. University is now faced with defending an injury claim with significantly higher potential damages due to the surgery, while having no ability to challenge the need for the surgery.

In opposition to the motion, plaintiff's counsel simply asserts that the plaintiff did not seek to intentionally tamper with evidence, but underwent the surgery to alleviate ongoing and serious pain that she suffered every moment after the accident. Glaringly absent is an affidavit from someone with personal knowledge, such as the plaintiff or her surgeon, attesting to the emergency nature of her surgery.

While it is clear that the plaintiff is subject to sanctions for spoliation of evidence, dismissal would be too harsh a remedy. The plaintiff makes claims of injuries to other body parts that were not mentioned by Dr. Feuer as being compromised by the surgery. The plaintiff may be able to sustain her burden to recover damages for these injuries. More appropriate is precluding the plaintiff from recovering damages for the compromised injury. This remedy appropriately deters spoliation by placing the limited consequences on the offending party and relieves her adversary of exposure to increased damages.

Since this Court is granting relief to University, its motion cannot be said to have been frivolous and the branch of the plaintiff's cross-motion seeking an award of sanctions is denied. The remainder of the plaintiff's cross-motion is also denied. By Order dated August 8, 2019, this Court vacated the plaintiff's note of issue and set forth a list of disclosure that the plaintiff was to complete, including providing several authorizations for the release of records and a deposition.

A motion seeking leave to renew must demonstrate that there has been a change in law or there are new facts not offered on the prior motion that would change the prior determination and a reasonable justification for the failure to present such facts previously (*see* CPLR 2221(e)). Here, the plaintiff simply contends that she actively sought to complete all discovery, that she had notified the defendants of her lumbar surgery by way of a supplemental bill of particulars, and that completion of the plaintiff's further deposition and physical examination was solely at the defendants' discretion. All of this was known at the time of the original motion. These contentions do not set forth new facts or law and, in any event, are not accompanied by an explanation as to why they were not presented on the original motion. Moreover, CPLR Rule 3043(b) allows a party to exercise all rights of discovery related to


claims set forth in a supplemental bill of particulars. In light of the extensive discovery remaining at the time of that motion, this case was not ready for trial and discovery had not been completed as stated by the certificate of readiness that accompanied the plaintiff's note of issue. Therefore, leave to renew is denied.

Accordingly, it is hereby

ORDERED that the plaintiff is precluded from offering any evidence regarding an injury or surgery to her L4-L5 disc or recovering any damages for said injury or surgery..

The foregoing constitutes the Decision/Order of this Court.

DATED: July 15, 2020  
Bronx, New York

  
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HON. LAURA G. DOUGLAS  
J.S.C.