

**Hess v Fabrize**

2023 NY Slip Op 32858(U)

August 18, 2023

Supreme Court, New York County

Docket Number: Index No. 155232/2019

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. JUDY H. KIM **PART** **05RCP**

*Justice*

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GEORGE HESS,

Plaintiff,

- v -

P.O. THOMAS P. FABRIZE, HUZAIFA AKRAM, THE CITY  
OF NEW YORK, THE NEW YORK CITY POLICE  
DEPARTMENT, CHELSEA CAB CORP.,

Defendants.

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**INDEX NO.** 155232/2019

**MOTION DATE** 10/20/2022

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, plaintiff's motion for reargument is denied.

Plaintiff commenced the instant action to recover for injuries he sustained on September 7, 2018, when a motor vehicle owned by defendant New York City Police Department and operated by defendant P.O. Thomas P. Fabrize collided with the car owned by defendant Chelsea Cab Corp. and operated by defendant Huzaifa Akram, in which plaintiff was a passenger (NYSCEF Doc. No. 1 [Compl. at ¶¶22-24, 27]). In his Bill of Particulars, plaintiff alleged various injuries including, inter alia: tears in his left knee, soft tissue injuries to his cervical spine and lumbar spine, abrasion of left shoulder, and right temporal lobe encephalomalacia (NYSCEF Doc. No. 19 [Bill of Particulars at ¶10]).

In motion sequence 001, defendants Huzaifa Akram and Chelsea Cab Corp. moved for summary judgment dismissing the complaint as against them, on the grounds that plaintiff did not sustain a serious injury under Insurance Law §5102(d). In support, they submitted the affirmation

of Dr. Richard Semble—who performed an orthopedic medical evaluation of plaintiff on November 16, 2021 and concluded that any sprain or strain to plaintiff’s cervical spine, lumbar spine, left shoulder and left knee were fully resolved (NYSCEF Doc. No. 20 [Semple Affirm.])—and the affirmation of Dr. Scott Springer, an independent medical examiner, who reviewed lumbar spine, brain, left shoulder, and left knee MRIs performed between October 4, 2018 and November 13, 2018, and concluded that the conditions documented in these MRIs were chronic and degenerative and therefore could not have been caused by the automobile accident (NYSCEF Doc. No. 21 [Springer Aff.]).

In opposition, plaintiff submitted the affirmation of Dr. Mark S. McMahon, who attested that he performed a physical examination of plaintiff on January 27, 2022 and found objective limitations of range of motion in plaintiff’s left shoulder, left knee, and lumbar spine (NYSCEF Doc. No. 42 [McMahon Affirm. at ¶¶20-24]). Dr. McMahon asserted, without further detail, that these limitations resulted from the September 7, 2018 accident (Id. at ¶25). In a decision and order dated August 24, 2022 (the “Prior Decision”) the Court granted defendants’ motion and dismissed this action as against all defendants (NYSCEF Doc. No. 62).

Plaintiff now moves, pursuant to CPLR §2221, to reargue the Prior Decision, on the basis that: (1) defendants’ motion papers misstated that plaintiff’s prior lumbar injury took place in 2017 when, in fact, this injury occurred at least fifteen years prior; (2) the Court erred in concluding that defendants established that the injuries to plaintiff’s cervical spine were not a serious injury because Dr. Springer did not address plaintiff’s cervical spine in his report; (3) the Court overlooked the fact that Dr. McMahon’s range of motion findings directly contradicted Dr. Semble’s range of motion findings, creating a triable issue of fact; and (5) discovery was

incomplete at the time the motion was filed and therefore grant of summary judgment was premature.

Defendants oppose the motion.

### DISCUSSION

A motion to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion ...” (CPLR §2221[d][2]). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted” (Setters v AI Properties and Developments (USA) Corp., 139 AD3d 492, 492 [1st Dept 2016] [internal citations and quotations omitted]). Here, plaintiff has failed to establish that the Court overlooked or misapprehended any matters of fact or law.

As an initial matter, defendants’ misstatement of the date of plaintiff’s prior accident in their motion papers did not influence the Court’s reasoning in the Prior Decision; indeed the Prior Decision references plaintiff’s GML §50-h testimony as to the date of his prior injury.

Neither did the contradiction between Dr. McMahon and Dr. Semble’s range of motion findings present a bar to summary judgment; the Court’s conclusion was not based on the range of motion findings of either doctor but instead based on plaintiff’s failure to rebut Dr. Springer’s conclusion that plaintiff’s MRIs revealed degenerative damage rather than damage that could have resulted from the automobile collision. To the extent plaintiff denied the existence of any physical limitation or issue caused by that prior accident, this self-assessment from plaintiff does not provide the requisite objective medical proof to rebut Dr. Springer’s conclusion.

Similarly, while plaintiff makes much of Dr. Springer’s failure to address plaintiff’s cervical spine, defendants established a lack of serious injury to the cervical spine through Dr.

Semble's conclusion, after his November 16, 2021 examination of plaintiff, that any prior cervical spine injury had resolved. Dr. Semble's conclusion was not rebutted by Dr. McMahon's report, which stated only that the September 20, 2018 x-ray of plaintiff's cervical spine revealed a "moderate reduction in the disc space height at C5-C6 and C6-C7. Bilateral foraminal impingement due to unciniate joint hypertrophy. Straightening of the cervical lordosis indicative of muscle spasm" but did not otherwise address the cervical spine in the Diagnoses and Causation sections of his report, where Dr. McMahon set forth plaintiff's current injuries that he believed occurred as a result of the motor vehicle accident.

Finally, to the extent that plaintiff now argues that the motion should have been denied as premature, he failed to make this argument in opposition to the underlying motion and may not raise it now (See Setters v AI Properties and Developments (USA) Corp., 139 AD3d 492 [1st Dept 2016]). In any event, the outstanding discovery referenced by plaintiff—depositions of the drivers involved in the collision and other witnesses to the collision—has no bearing on the question of serious injury at issue in the summary judgment motion.

Accordingly, it is

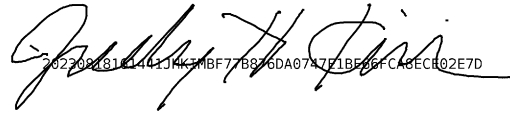
**ORDERED** that plaintiff's motion is denied in its entirety; and it is further

**ORDERED** that counsel for Huzaiifa Akram and Chelsea Cab Corp. shall serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten days of the date of this decision and order; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E filing” page on this court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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8/18/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: