

Funn-Manigault v New York City Tr. Auth.
2024 NY Slip Op 35318(U)
January 8, 2024
Supreme Court, Bronx County
Docket Number: Index No. 810253/2021E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3-----X
CORNELIA FUNN-MANIGAULT

Index №. 810253/2021E

-against-

Hon. Mitchell J. DanzigerTHE NEW YORK CITY TRANSIT AUTHORITY,
MABSTOA, MTA, THE MTA BUS COMPANY,
MOHAMMED D. KHAN, SOULEYMANE
DIALLO, AMERICAN UNITED
TRANSPORTATION and "JOHN DOE"

Justice Supreme Court

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The following papers were read on this motion (Seq. No. 4) for **renew/reargue** noticed for September 15, 2023, and submitted on October 20, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 121-134
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The following papers were read on this motion (Seq. No. 5) for **renew/reargue** noticed for December 15, 2022, and submitted on October 20, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 135-147
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 150-151
Reply Affirmation	NYSCEF Doc. # 152

Defendants, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, Metropolitan Transportation Authority, and MTA Bus Company (collectively, "the Transit defendants"), move (Seq. No. 4) for an order, pursuant to CPLR §2221, to reargue and renew the decision and order of this Court dated July 5, 2023 (deciding Seq. Nos. 2 and 3), which denied the Transit defendants' cross-motion for summary judgment dismissing the complaint and all cross claims asserted against them. The defendants, Mohammed D. Khan ("Khan") and Souleymane Diallo ("Diallo") move (Seq. No. 5), by separate notice of motion, for an order, pursuant to CPLR §2221, to reargue and renew the decision and order of this Court dated July 5, 2023 (deciding Seq. Nos. 2 and 3), which denied Khan's and Diallo's motion for summary judgment dismissing the complaint and all cross claims asserted against them. For purposes of judicial economy, these motions are resolved pursuant to this single decision and order.

Plaintiff commenced this action following a motor vehicle accident that occurred on August 12, 2020, while Plaintiff's vehicle was stopped for a red traffic light at the intersection of Webster Avenue and East 167th Street, in the Bronx. While stopped at the red traffic light, the vehicle in which Plaintiff was a passenger, was struck in the rear. A review of the earlier Decision and Order reveals the Court found an issue of fact as to whose

vehicle struck Plaintiff's vehicle in the rear.

A motion for leave to reargue pursuant to CPLR 2221 (d) "is committed to the sound discretion of the court" (*Rostant v Swersky*, 79 A.D.3d 456 [1st Dept 2010], citing *William P. Pahl Equip. Corp. v Kassis*, 182 A.D.2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in part* 80 N.Y.2d 1005 [1992]). The movant bears the burden of demonstrating that the court "'overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*Sachar v Columbia Pictures Indus.*, 129 A.D.3d 420 [1st Dept 2015], quoting *William P.*, 182 A.D.2d at 27). "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'" (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 A.D.3d 492 [1st Dept 2016], quoting *William P.*, 182 A.D.2d at 27).

A motion for leave to renew pursuant to CPLR 2221 (e) must be based upon "new facts" that were "unknown [or unavailable] to the party seeking renewal when briefing the previous motions (*Avail 1 LLC v Acquafredda Enters. LLC*, 184 A.D.3d 476 [1st Dept 2020] [internal quotations and citations omitted]; *U.S. Bank Trust, N.A. v Board of Mgrs. of the Devon Condominium*, 187 A.D.3d 656, 657 [1st Dept 2020]). The motion must also demonstrate a "reasonable excuse for not presenting the new facts on the prior motion and... show that the new facts would have changed the prior determination" (*Stoner v Atlantic Realty Apts., LLC*, 154 A.D.3d 552, 553 [1st Dept 2017] [citations omitted]). "Renewal is granted sparingly...; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Henry v Peguero*, 72 A.D.3d 600, 602 [1st Dept 2010], quoting *Matter of Weinberg*, 132 A.D.2d 190 [1987], *lv dismissed* 71 N.Y.2d 994 [1988]).

I. Khan's and Diallo's Motion (Seq. No. 5)

In support of the motion, Khan and Diallo submitted an identical Diallo affidavit as submitted in support of the original motion (*see* NYSCEF Doc Nos. 70 and 146). In the Decision and Order dated July 5, 2023, this Court held Diallo's affidavit "fails to state with specificity who or what vehicle struck his vehicle, bearing license plate number T652325C, in the car as he was stopped at a red traffic light." Diallo's affidavit submitted in support of the instant motion fails to correct this issue. Rather, the moving papers assert the certified police accident report is sufficient to identify whose vehicle struck Diallo's vehicle in the rear. However, the moving papers fail to consider that the vehicle which allegedly struck Diallo's vehicle in the rear fled the scene, and the police officer's description of the accident states that such a fleeing occurred. Diallo's statement in the police accident report – telling a police officer the license plate number of the vehicle that struck him in the rear – is hearsay. If Diallo was able to tell a police officer the license plate number of the vehicle that struck him in the rear, Diallo can also tell the Court in a sworn statement the license plate number of the vehicle that struck him in the rear.

Based upon the above submissions and arguments, the Court concludes that granting reargument is not

appropriate as it did not overlook or misapprehend the facts or the law or for some reason mistakenly arrived at its earlier decision. The Court also concludes that granting renewal is not appropriate as neither Khan or Diallo submitted new facts that were unknown or unavailable to them when briefing their original motion.

II. The Transit Defendants' Motion (Seq. No. 4)

Relating to the issue of reargument, the Transit Defendants argue that “regardless of the proof submitted by the” Transit Defendants, Diallo admitted ownership of the vehicle bearing license plate number T652325C, and co-Defendant American United Transportation (“AUT”) admitted ownership of the vehicle bearing license plate number T663730C (NYSCEF Doc No. 122, ¶3). As a result, the Transit Defendants conclude that they did not own either vehicle involved in this action. However, as discussed above, the Court does not find on the submitted papers any admissible evidence that the vehicle allegedly bearing license plate number T663730C was involved in this motor vehicle accident. The Court concludes that granting reargument is not appropriate as it did not overlook or misapprehend the facts or the law or for some reason mistakenly arrived at its earlier decision.

Relating to the issue of renewal, the Court provides this breakdown in advance for ease of the reader:

- Plaintiff’s complaint alleges the Transit Defendants owned the vehicle bearing license plate number **T663730C** (NYSCEF Doc No. 1, ¶¶16-19).
- Plaintiff’s notice of claim alleges the Transit Defendants owned the vehicle bearing license plate number **T652325C** (NYSCEF Doc No. 133).
- Ronald Roberts’s affidavit (submitted in support of the Transit Defendants’ original motion) discusses only the vehicle bearing license plate number **T652325C**.

The Transit Defendants now submit Plaintiff’s notice of claim – not previously submitted with the original motion. The Transit Defendants argue Plaintiff’s notice of claim states the Transit Defendants only owned the vehicle bearing license plate number T652325C. There is no allegation in Plaintiff’s notice of claim that the Transit Defendants owned the vehicle bearing license plate number T663730C – despite Plaintiff’s complaint stating otherwise. As a result, according to the Transit Defendants, “Plaintiff can only proceed against the Transit [Defendants] to the extent that they owned the vehicle bearing license plate #T652325C” (NYSCEF Doc No. 122, ¶31). The Transit Defendants’ proffered reasonable excuses for not presenting Plaintiff’s notice of claim with their original motion is that (1) “such document was not necessary to be submitted by the Transit [Defendants] to prevail on their cross-motion for summary judgment,” and (2) that the Transit Defendants “had no obligation to come forward with anything other than the pleadings to prove they did not own any of the two vehicles involved in the subject accident” (NYSCEF Doc No. 122, ¶¶4, 14). The Transit Defendants do not provide any case law, authority, or sound argument for their excuses, and thus, the Court disagrees with such assertions.

The Transit Defendants’ third argument for a reasonable excuse is that Plaintiff’s complaint contained a “drafting mistake[]” and they “verily believed that since Plaintiff was only claiming in her complaint that the

Transit [Defendants] are liable as the owner of the vehicle bearing license plate #T652325C, all that was needed to be submitted by the Transit [Defendants] to prove its lack of ownership of the vehicle bearing license plate #T652325C was the answer of [Khan], the admitted owner of such vehicle” (NYSCEF Doc No. 122, ¶¶3, 29-30).¹ Even assuming the new facts submitted, *i.e.*, Plaintiff’s notice of claim, may have changed the original determination, this alone is not dispositive for whether to grant renewal (*see Wade v Giacobbe*, 176 A.D.3d 641 [1st Dept 2019] [“Renewal is granted sparingly and is not a second chance freely given to parties who have failed to exercise due diligence in making their first factual presentation”]). The Transit Defendants have admitted that although they were in possession of Plaintiff’s notice of claim they did not submit it with their original motion. In other words, the Transit Defendants were privy to information that “Plaintiff’s complaint contained a typographical error,” but this Court was not (NYSCEF Doc No. 122, ¶16). Here, the Transit Defendants “failed to submit new facts... that existed but were unknown to [them] at the time defendants made their motions” (*Mehler v Jones*, 181 A.D.3d 535 [1st Dept 2020], citing *Matter of Naomi S. v Steven E.*, 147 A.D.3d 568 [1st Dept 2017]). This Court does not conclude that the Transit Defendants “reasonably believed that it was unnecessary to submit on [their] original motion” Plaintiff’s notice of claim (*compare Rivera v Corrections Officer L. Banks*, 135 A.D.3d 621, 622 [1st Dept 2016], citing CPLR 2221 [e] [3]), because the Transit Defendants argue, on the one hand, that they were aware of Plaintiff’s complaint containing a clerical error relating to the vehicles’ license plate numbers, but on the other hand, the Transit Defendants provided to the Court an affidavit from Roberts in support of their original motion discussing an entirely different license plate number, without explaining to the Court such discrepancy. The Court concludes that granting renewal is not appropriate as the Transit Defendants did not submit new facts that were unknown or unavailable to them when briefing their original motion, the Court finds the proffered reasonable excuse insufficient, and renewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.

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¹ This quoted statement is a mistake on the part of the Transit Defendants. Plaintiff’s complaint alleges the Transit Defendants owned the vehicle bearing license plate number T663730C.

Accordingly, it is hereby,

ORDERED, that Khan and Diallo's motion to reargue and renew (Seq. No. 5) is denied, and it is further,

ORDERED, that the Transit Defendants' motion to reargue and renew (Seq. No. 4) is denied, and it is further,

ORDERED, that upon the completion of discovery, the filing of the Note of Issue, and payment of the requisite fee, this matter shall proceed in due course to trial, if warranted, and it is further,

ORDERED, that the movant of each motion shall serve a copy of this Order with Notice of Entry upon all parties within thirty days of the upload of this Order in NYSCEF.

This constitutes the Decision and Order of this Court.

Dated: 1/3/24

Hon. 

Mitchell J. Danziger, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION Seq. No. 4 IS..... | ☐ GRANTED | ☒ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. MOTION Seq. No. 5 IS..... | ☐ GRANTED | ☒ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 4. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER | ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |