At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 9th day of June 2025

PRESENT: HON. ANNE J. SWERN, J.S.C.

BHIM SHRESTHA,

Plaintiffs,

-against-

TRICAR TRANSPORTATION, LLC and JESUS PALOMO RODRIGUEZ,

Defendants.

DECISION & ORDER
Index No.: 512508/2022

Calendar No.: 31

Motion Seq.: 004 and 005

Recitation of the following papers as required by CPLR 2219(a):

	Papers Numbered
Defendants' Notice of Motion, Affirmation, Affidavits and Exhibits (NYSCEF 92-101)	1, 2
Notice of Cross-Motion, Affirmation in Support and in Opposition to Motion to Reargue (NYSCEF 103-107)	3, 4

Upon the foregoing papers and after oral argument, the decision and order of this Court is as follows:

This is an action for personal injuries sustained by plaintiff in an automobile accident on 1/6/2022.

Defendants have now moved this Court for an Order pursuant to CPLR § 2221 [d] and [e] granting leave to renew and reargue this Court's Order dated 1/30/2025 that granted plaintiff's cross-motion for sanctions to the extent that defendants shall pay plaintiff's attorneys costs in the amount of $200 (MS 003; $155 in attorneys' fees and the $45 fee for the cross-motion).

PROCEDURAL HISTORY

Defendants previously served a motion for an order pursuant to CPLR § 3025 [b] to amend their answer to include a counterclaim and affirmative defenses of fraud based on unsubstantiated allegations that based on their "investigation into this claim, it has been determined that plaintiff is committing a fraud by claiming to be involved in an accident that did not occur" (MS 002; NYSCEF 64, ¶6). In the prior motion, defendants alleged without specificity that "many of plaintiff's medical providers are either defendants in RICO suits presently pending or will be defendants in upcoming RICO suits based upon fraud" (*id.* ¶7). In opposition, plaintiff's attorney submitted a dash cam video of the accident (MS 002, NYSCEF 74) that was previously exchanged in discovery (MS 002, NYSCEF 73, ¶8). Defendants do not deny that the video was exchanged prior to the filing of their motion.

In response to the prior motion, plaintiff's cross-moved an order awarding sanctions for filing a frivolous, meritless and defective motion. On 1/29/2025 (the day before oral argument), defendants e-filed a letter withdrawing their motion (MS 002, NYSCEF 75). However, plaintiff objected to this withdrawal stating that the motion should be withdrawn with prejudice to prevent defendants from harassing plaintiff with [further] frivolous motion practice (MS 002, NYSCEF 76). In response to plaintiff's letter, defendants filed opposition to the cross-motion at 8:40 a.m. on 1/30/2025 (the return date) (MS 002, NYSCEF 77-82). Defendants failed to appear for oral argument to request an adjournment based on the late service of the opposition. Therefore, THE Court rejected defendants' opposition as late. The Court held that the opposition was a reply in disguise to cure the deficiencies in their initial motion papers. The Court noted in its decision that defendants' opposition consistently refers to a fraudulent scheme between the medical providers and plaintiff's attorneys "Gorayeb & Associates" (MS 002, NYSCEF 77, ¶¶9, 14, 16;

17 and 24). However, plaintiff's counsel is Elefterakis, Elefterakis & Panek. The Court also found that defendants consistently submitted form affirmations without regard to the facts of this case.

By an order dated 1/30/2025 (NYSCEF 84 and 85), the Court denied defendants' motion based on its failure to put forth admissible and meritorious evidence to establish that the happening of plaintiff's accident was (1) fraudulent and (2) part of a fraudulent scheme (*See Linares v City of New York*, 233 AD3d 479 [1st Dept 2024]). Defendants did not establish that either plaintiff or his attorneys are part of the alleged RICO enterprise or included as either named defendants or alleged non-party co-conspirators in the RICO complaints. Moreover, "the unproven allegations of fraud against plaintiff's medical providers in the RICO complaints do not, without more," establish affirmative defenses and counterclaims for fraud (*Linares v City of New York, supra*). The question of whether defendants may cross-examine the plaintiff and his treating physicians at trial concerning the facts alleged in the RICO complaints was referred to the trial court.

In the same order, the Court granted plaintiff's cross-motion for sanctions to the extent that defendants were to pay plaintiff's attorneys costs in the amount of $200, *i.e.*, $45 to file the cross-motion and $155 for time expended in opposition to defendants' motion. The balance of plaintiff's cross-motion for discovery was denied as moot.

The Court grants defendants' motion for an order pursuant to CPLR § 2221 to reargue that portion of the Court's 1/30/2025 order granting plaintiff's cross-motion and upon reargument, the Court clarifies and adheres to its initial determination.

Defendants' Motion to Reargue (MS 004)

a) **Fraud**

A party must establish all the elements of New York common law fraud cause of action by detailing the misconduct that constitutes the wrong (CPLR § 3016; *Scifo v Taibi*, 126 AD3d 777, 778 [2d Dept 2015]). The elements of fraud are 1) a representation of material fact, 2) the falsity of that representation, 3) knowledge by the party who made the representation that it was false when made, 4) justifiable reliance by the claimant, and 5) a resulting injury (*id.*). However, allegations of "a mere conspiracy to commit a tort is never of itself a cause of action" (*Alexander & Alexander, Inc. v Fritzen*, 68 NY2d 968, 969 [1986]). Unlike a federal RICO cause of action that is a creature of statute (*see* The United States Racketeer Influenced and Corrupt Organizations Act ["RICO"], 18 U.S.C. §§ 1961, 1962 [c], and 1964 [c]), allegations of a fraudulent conspiracy merely provide the predicate basis for an otherwise actionable tort or contract claim but do not constitute a "freestanding claim for conspiracy" under New York common law (*Carlson v American International Group, Inc.*, 30 NY3d 288, 310 [2017]),

Defendants and their insurance carrier cannot establish affirmative defenses or independent counterclaims for fraud under New York common law (*Breton v Dishi*, 234 AD3d 432 [1st Dept 2025]; *see also Broughton v 553 Marcy Avenue Owners LLC*, __ AD3d __, 2025 NY Slip Op 02992, *3-4 [1st Dept 2025] [The Court rejected defendants' proposed amendment based on unproven allegations of fraud in two federal civil RICO actions, that plaintiff may have conspired with his counsel and medical providers "to fabricate his accident and file false insurance and personal injury claims."]; *Anguisaca-Morales v St. Paul & St. Andrew United Methodist Church*, __ AD3d __, 2025 NY Slip Op 02712, *2 [1st Dept. 2025] ["The unproven allegations of fraud against plaintiff's counsel are insufficient to support a claim for fraud against

plaintiff."]; *Linares v City of New York*, 233 AD3d 479, 480 [1st Dept 2024] ["The unproven allegations of fraud against plaintiff's attorney and medical providers in the RICO complaint do not, without more, warrant a counterclaim for fraud against plaintiff himself."]).

Here, defendant's proposed answer alleges, *inter alia*, that plaintiff pursued a course of medical treatment to address "non-existent" or "preexisting unrelated degenerative conditions" to induce defendants' reliance in a fraudulent personal injury claim against defendants (NYSCEF 65, ¶¶27-34). However, any such misrepresentations were not made to either the named defendants or their insurance carriers. Under these facts, defendants have not alleged and cannot prove that defendants and their insurance carrier justifiably relied on the alleged misrepresentations and incurred damages as they have denied the allegations in their complaint and continue to defend this action (*Breton v Dishi*, 234 AD3d 433; *Anguisaca-Morales v St. Paul & St. Andrew United Methodist Church*, 2025 NY Slip Op 02712, *2). Any potential claim of fraud belongs to the no-fault or health carrier who rendered payments to plaintiffs' doctors named in the RICO litigation. If plaintiffs' claims are proven to be fraudulent, defendants' remedy is to seek sanctions under CPLR § 8303-a (*Breton v Dishi*, 234 AD3d 433).

Finally, "there is no necessary logical correspondence between the allegations contained in a RICO complaint…and the actual facts of [plaintiffs'] accident" because neither plaintiffs nor their counsel are named or mentioned in the RICO action pending in the United States District Court. Thus, defendants' purported "good faith basis" for believing plaintiffs' accident or injuries are fraudulent does not logically follow." (*Luna v Carthage 124 L.P.*, 2025 NY Slip Op 30561[U] [Cohen, J., Kings County]).

Accordingly, defendants could not establish all the elements constituting a New York claim for fraud (*Alexander & Alexander, Inc. v Fritzen*, 68 NY2d 969 and *Carlson v American*

International Group, Inc., 30 NY3d 310). The proposed amendments were palpably improper and devoid of merit (*Breton v. Dishi*, 234 AD3d 432 and *Linares v City of New York*, 233 AD3d 480).

a) **Defense Counsel's Statements in MS 002**

The Court now clarifies its decision dated 1/30/2025 concerning defense counsel's statements in the underlying motion to amend the answer. The decision was not based on the Court's belief that defense counsel made a "bold-faced lie" that the accident never occurred (NYSCEF 93,¶18). The attorney who has submitted an affirmation in support of the current motion is not the attorney who did so in the underlying motion. In the underlying motion, the attorney affirmed that, "In Defendants' investigation of this claim, it has been determined that the Plaintiff is committing fraud by claiming to be involved in an accident that did not occur" (NYSCEF 64, ¶6). It was the Court's belief that the prior attorney overlooked the video in the file. The decision to impose sanctions was based, in part, upon the fact that once it was pointed out by plaintiff's counsel, defense counsel refused to withdraw the motion.

b) **The Court's Reliance on *Linares v City of the New York***

The Court further clarifies that it did not rely on *Linares v The City of New York* when imposing sanctions in the form of reasonable attorneys' fees. Although defendants may have had a legitimate interest in defending itself, the attorneys' conduct in failing to respond to plaintiff and then waiting until the day before the return date to withdraw the motion to amend the answer. Moreover, instead requesting an adjournment of the cross-motion in writing or at the calendar to serve opposition, defendants filed opposition on the morning of the return date at 8:40 a.m. before oral argument and then failed to appear (NYSCEF 77).

The Court noted in the 1/30/2025 Order that this affirmation was actually a reply to the motion to amend. This finding was based on the fact that despite previously withdrawing the motion, the attorney continued to argue the validity of the withdrawn motion and in the "Wherefore" clause, requested that "defendants motion be *granted* in its entirety and plaintiff's cross-motion denied in all respects" (NYSCEF 77, p. 8).

Per the Part 75 Motion Rules publicly available on the www.nycourts.gov, the Court conducted a first calendar call at 10:00 a.m. and a second call at 11:30 a.m. Defendants failed to appear at either call to request an adjournment or request that the Court accept the late filing over plaintiff's objection and orally argue the motion, requiring plaintiff to wait until after the 11:30 a.m. before the Court would mark the motion submitted.

Based on the foregoing, the sanction of $200 was imposed based on defense counsel's disregard for the accuracy of his affirmations, the CPLR, the Part 75 Rules and plaintiff's time.

Plaintiff's Motion for Sanctions (MS 005)

Plaintiff has once again cross-moved for sanctions asserting that defendants' motion to reargue is frivolous and the several misstatements of facts concerning the underlying motions. In sum, plaintiff argues that "Instead of admitting their own mistake, Defendants double-downed on their error and attempt to claim they never stated that accident did not occur" (NYSCEF 104, ¶53). Additionally, the attorney who submitted the affirmation in the underlying motions has recently been sanctioned $8,262.65 for engaging in similar litigation tactics (NYSCEF 105). Therefore, this pattern of conduct is intentional.

At this time, the Court is declining to impose sanctions against the attorney in the current motion who set forth certain inaccurate statements concerning the underlying motions. However, the attorney and law firm are warned that should this pattern of conduct occur in the

future, the Court will impose further and more substantial economic sanctions against the lawyers and law firm.

The Court has considered the parties' remaining arguments and finds same to be without merit.

Accordingly, it is hereby

ORDERED that defendants' motion an order pursuant to CPLR § 2221 granting renewal and reargument of this Court's Order dated 1/30/2025 and denying plaintiff's cross-motion for sanctions is denied (MS 004), and it is further

ORDERED that plaintiff's cross-motion for additional sanctions is denied (MS 005).

This constitutes the decision and order of the Court.

ENTER:

Hon. Anne J. Swern, J.S.C.
Dated: 6/9/2025

For Clerks use only:
MG ____
MD X
Motion seq. # 4,5

KINGS COUNTY CLERK
FILED
2025 JUN 11 A 10:19