

Lekic v Herrera

2025 NY Slip Op 34524(U)

November 25, 2025

Supreme Court, New York County

Docket Number: Index No. 155296/2019

Judge: James G. Clynes

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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. JAMES G. CLYNES PART 22

Justice

-----X **INDEX NO. 155296/2019**

ESAD LEKIC,

Plaintiff,

- v -

FELIX HERRERA, MAYDA YVETTE DECOLA

Defendant.

**MOTION DATE 11/29/2023,
12/15/2023,
01/16/2024**

MOTION SEQ. NO. 002 003 004

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 54, 55, 56, 66, 67, 68, 69, 70, 77

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 71, 72, 73, 74, 75, 76, 78, 83, 85, 88

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 57, 58, 59, 60, 61, 62, 63, 64, 65, 79, 80, 81, 82, 84, 86, 87

were read on this motion to/for EXTEND - TIME.

Upon the foregoing documents, Plaintiff’s motion to reargue this Court’s September 5, 2023 Order (Seq. 2) is denied, Plaintiff’s motion to Strike the Defendants’ Answer (Seq. 3) is denied and Plaintiff’s motion to extend time to serve the September 5, 2023 Order (Seq. 4) is granted in part.

This personal injury matter concerns a September 23, 2016 accident that occurred at the intersection of West 96th Street and Central Park West, when a motor vehicle, owned by Defendant Felix Herrera and operated by Defendant Mayda Yvette Decola, collided with the Plaintiff, who was riding a bicycle.

Plaintiff's Motion to Reargue

Plaintiff seeks to reargue this Court's September 5, 2023 Order, which denied Plaintiff's motion for summary judgment. (NYSCEF Doc. 37).

Per CPLR 2221(d), a motion to reargue shall be made within 30 days following the service of a copy of the order at issue with written notice of its entry. The September 5, 2023 Order specifically directs Plaintiff to serve the Order with notice of entry within 30 days, which would have been by October 5, 2023. (NYSCEF Doc. 37). Plaintiff did not comply with the Order as the Order was not served with Notice of Entry within 30 days, or at any time thereafter. If Plaintiff had timely served the Order with Notice of Entry, the motion to reargue would have been due no later than November 6, 2023. Instead, Plaintiff filed the within motion to reargue on November 29, 2023. As Plaintiff should not be able to benefit from his own failure to adhere to this Court's directives, the motion is untimely. However, as this Court can reconsider its own prior orders, (*Aridas v. Caserta*, 41 N.Y.2d 1059, 364 N.E.2d 835 [1977]) and in light of New York State's strong policy of litigating matters on the merits (*see Peg Bandwidth, LLC v Optical Commc'ns*, 150 A.D.3d 625 [1st Dept 2017]), Plaintiff's motion to reargue will be considered on its merits.

Pursuant to CPLR 2221 (d), a motion to reargue a prior decision is granted only upon a showing that the court overlooked or misapprehended the facts or the law or mistakenly arrived at its earlier decision (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Plaintiff has not met this burden as Plaintiff has not established that the Court overlooked the facts or misapprehended the law.

Plaintiff's initial motion for summary judgment was only supported with an unsigned copy of his deposition transcript and a copy of the Verified Bill of Particulars. (NYSCEF Doc. 23 and 24). As Plaintiff did not rely upon the uncertified police report in his initial motion, and as it is

uncertified, this Court will not consider the police report now. This Court previously held that Plaintiff did not establish negligence on the part of the Defendants, and specifically found that Plaintiff did not show that his alleged injuries were caused by the actions of the Defendants. Contrary to Plaintiff's contention in the motion to reargue, this Court did not find as a matter of law that Plaintiff had a green light at the time of this accident, nor did the Court find that Plaintiff suffered from amnesia, or similar condition, resulting in his inability to recall the accident.

Although a plaintiff may be entitled to a lesser degree of proof when suffering from amnesia caused by the accident at issue, a plaintiff still must establish their *prima facie* burden by showing that the defendant's negligence was a substantial cause of their alleged injury. (See *Lynn v Lynn*, 216 A.D.2d 194, 628 N.Y.S.2d 667 [1st Dept 1995]; see also *Varona v Brooks Shopping Centers LLC*, 151 A.D.3d 459, 56 N.Y.S.3d 87 [1st Dept 2017]). No such showing was made here. Plaintiff seeks to avail himself of this lesser burden, but has not shown with admissible evidence that he suffered from amnesia, memory loss, or similar condition as a result of the subject accident. At his deposition, when asked if he was claiming memory loss, Plaintiff responded that he did not know (NYSCEF Doc. 24, pg. 51), Plaintiff's bill of particulars does not appear to assert any claim for amnesia, memory loss or similar condition, and no medical records supporting such a claim were submitted.

Moreover, Plaintiff's argument that the prior preclusion order prevents him from making his *prima facie* case is not persuasive. Plaintiff was well within his rights to conduct an investigation, obtain a certified copy of the police report and depose responding police officers or EMS responders in connection to the subject accident. It does not appear that Plaintiff availed himself of such investigation.

Finally, Plaintiff's argument that the Defendants are not permitted to submit any opposition is also unfounded as this Court's prior order did not restrict the filing of opposition, only that Defendants could submit an affidavit in opposition. Regardless, as Plaintiff never shifted the burden to the Defendant, Defendant's opposition is immaterial.

Accordingly, Plaintiff's motion to reargue is denied.

Plaintiff's Motion to Strike the Defendants' Answer

It is within the discretion of the court to impose an appropriate penalty for a party's failure to comply with discovery. (*See Beach v Touradji Cap. Mgmt., LP*, 179 AD3d 474 [1st Dept 2020]). This Court previously precluded Defendants from testifying as to liability at the time of trial or submitting an affidavit in connection with a dispositive motion due to Defendants' failure to appear for deposition. (NYSCEF Doc. 29). The drastic relief requested by Plaintiff herein, to strike the Defendants' Answer, is not warranted as Plaintiff has not "conclusively demonstrated that the non-disclosure was willful, contumacious or due to bad faith." (*Beach*, 179 AD3d at 477).

If Plaintiff is asserting that the Defendants failed or refused to participate in discovery other than failing to appear for their respective depositions, same is not borne out in the motion and would be undermined by the fact that Plaintiff did not identify any outstanding discovery when filing the note of issue on September 18, 2023. (NYSCEF Doc. 38).

Accordingly, Plaintiff's motion to strike the Defendants' Answer is denied.

Plaintiff's Motion to Extend Time to File the September 5, 2023 Order with Notice of Entry

Plaintiff seeks the Court's permission to file the September 5, 2023 Order with Notice of Entry late (Mtn. Seq. 4). Although Plaintiff has not established good cause for failing to file the Order with Notice of Entry timely, in the interest of justice and pursuant to CPLR §2004, this

Court will grant the application solely to permit the filing of the September 5, 2023 Order by the Plaintiff, as previously directed, but now directs Plaintiff to file the Order with Notice of Entry within 7 days. However, as Plaintiff has already filed a motion to reargue the September 5, 2023 Order, decided herein, this Court will not entertain a further motion by Plaintiff to reargue its September 5, 2023 Order.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to reargue pursuant to CPLR §2221(d), (Seq. 2) is denied; and it is further


ORDERED that Plaintiff's motion to strike the Defendants' Answer, (Seq. 3) is denied; and it is further

ORDERED that Plaintiff's motion to file the September 5, 2023 Order late (Seq. 4), is granted in part and Plaintiff is directed to file the Order with Notice of Entry with seven days; and it is further

ORDERED that within 20 days from the entry of this Order, Plaintiff shall serve a copy of this Order with Notice of Entry upon all parties, and on the Clerk of the Court and the Clerk of the General Clerk's Office in accordance with e-filing procedures, who are directed to mark the court's records.

This constitutes the Decision and Order of the Court.

11/25/2025
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE