

Klar v Markowitz

2026 NY Slip Op 31442(U)

April 8, 2026

Supreme Court, Kings County

Docket Number: Index No. 514263/2021

Judge: Anne J. Swern

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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 8th day of April 2026.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

=====
LEAH KLAR,

Plaintiff,

-against-

ZALMEN MARKOWITZ AND ESTHER MARKOWITZ,

Defendants.
=====

DECISION & ORDER

Index No.: 514263/2021

Return Date: 2/26/2026

Motion Seq.: 10

<i>Recitation of the following papers as required by CPLR 2219 (a):</i>	NYSCEF
	Papers Numbered
Notice of Motion and Supporting Documentation.....	165
Affirmation in Opposition and Exhibit.....	174-175
Reply Affirmation.....	184

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

Background

This action arises out of a motor vehicle accident on 12/8/2020 on the upper level of the George Washington Bridge. Plaintiff was a passenger in defendants' vehicle when it struck another vehicle in the rear. By an order dated 10/1/2022, the Court granted plaintiff's motion for summary judgment on liability. Thereafter, plaintiff moved this Court for a protective order per CPLR § 3103 striking defendants' Notice for Discovery and Inspection dated 5/21/2025 seeking the full name, address and telephone number for Toby Berger, the person plaintiff spoke to

immediately after the accident (NYSCEF 146).¹ Defendants served the notice following plaintiff's deposition. Plaintiff testified that after the accident, she went to Chai Urgent Care. Plaintiff then admitted that when the staff asked her what happened, she responded: "*Well, the story goes my sister-in-law's sister [Toby Berger] called me up while we were still in the car and she told me please don't say anything that happened because I really don't want us to get into trouble. Just say you fell.*" (NYSCEF 147, p.: 41, lines: 21-25). Defendants did not serve a cross-motion to compel a response to their discovery demand.

By an order dated 11/5/2025, the Court granted plaintiff's motion for a protective order, holding that since the Court had already granted summary judgment on liability, it is undisputed that plaintiff was involved in a motor vehicle. Therefore, as to the relevance of the foregoing statements concerning plaintiff's credibility on damages, the Court further held that, "*Any ruling whether plaintiff may be cross-examined on this issue at the damages trial is referred to the trial court.*"

Defendants have now moved this Court for an order per CPLR § 2221 granting leave to reargue the order dated 11/5/2025 and, upon reargument, deny plaintiff's motion for a protective order. In support of the motion, defendants argue that the Court misapplied the law and misapprehended the facts.

It is well established a motion for leave to reargue is addressed to the sound discretion of the court and affords the moving party an opportunity to show that the court overlooked or misapprehended matters of fact or the law, or for some reason mistakenly arrived at its earlier decision (see CPLR §2221 [d] [2]; *JPMorgan Chase Bank, N.A. v Novis*, 157 AD3d 776, 778 [2d Dept. 2018]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891 [2d Dept. 2015]). Such a motion

¹ The other issues raised in the motion are now moot. The only remaining issue for determination by this Court is the propriety of the defendants' 5/21/2025 Notice for Discovery and Inspection.

“shall not include any matters of fact not offered on the prior motion” (*Williams v Abiomed, Inc.*, 173 AD3d 1115, 1116 [2d Dept. 2019] [internal citations omitted]; CPLR § 2221 [d] [2]). Such a motion is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (*Williams v Abiomed, Inc.*, 173 AD3d 1116).

The Court grants defendants leave to reargue the order dated 11/5/2025 and, upon reargument, adheres to its initial determination.

In this motion to reargue, defendants raise the argument for the first time that they are “entitled to explore the entirety of the conversation between plaintiff and Toby Berger” because plaintiff provided only her version of the conversation. However, defendants summarily argued in opposition to the underlying motion that the witness was relevant concerning plaintiff’s credibility on damages and did not provide a complete copy of plaintiff’s deposition transcript to demonstrate the extent of her testimony.

Defendants continue to argue that the witness’s testimony is relevant as to the “cause” of the damages. However, the causal connection between the accident and plaintiff’s injuries does not turn on this non-party witness’s testimony considering summary judgment on liability has been granted. It turns on plaintiff’s credibility concerning the injuries claimed (PJI 1:22 Falsus In Uno) and both parties’ medical evidence presented at trial. Since defendants are foreclosed from arguing that plaintiff was not involved in a motor vehicle accident, they have not demonstrated that “there is a substantial likelihood that [Toby Berger] possesses information which is material and necessary” to defend concerning the causation of damages (*see Steinberg v Bais Yaakov Council, Inc.*, 237 AD3d 1131, 1133 [2d Dept 2025]). Thus, this testimony would constitute prejudice against the plaintiff if defendants were permitted to present evidence which

implies to a jury that a motor vehicle accident did not occur on 12/8/2020 or that plaintiff was not involved in it (*id.*).

Therefore, since a motion to reargue is not an opportunity to further expound on an argument rejected by the Court, the motion to vacate the protective order is denied (*Williams v Abiomed, Inc.*, 173 AD3d 1116).

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

Accordingly, it is hereby

ORDERED that defendants' motion for an order per CPLR § 2221 granting leave to reargue the order dated 11/5/2025 is granted, and it is further

ORDERED that upon reargument, that branch of defendants' motion to vacate the Order of this Court dated 11/5/2025 is DENIED (MS 10).

This constitutes the decision and order of the Court.

E N T E R:



Hon. Anne J. Swern, J.S.C.

Dated: April 8, 2026