SUPREME COURT OF THE STATE OF NEW YORK **Index No. 101241/08**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 2**

MICHAEL MANCUSI

Plaintiff

against

THE NEW YORK CITY TRANSIT AUTHORITY

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion to vacate Order

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff's motion to renew and reargue is denied. The plaintiff has moved to reargue this court's Decision and Order dated February 5, 2010 denying his motion to consolidate the following actions: *Michael Mancusi v. Rajesh Goudar*, Index Number 101048/2008; *Michael Mancusi v. The New York City Transit Authority*, Index Number 101241/2008; and *Michael Mancusi and Shannon R. Daniell v. Elissa Rothman and Elissa Brodsky*, Index Number 104338/2008.

Facts

In each of three separate and successive accidents, the plaintiff, Michael Mancusi, claims injuries for which he claims the defendants are each liable.

On January 6, 2007, the plaintiff asserts that a car he was operating was struck in the rear by a vehicle driven by Rajesh Goudar. On January 9, 2007, Mr. Mancusi claims he was involved in an accident when the motor vehicle was struck in some manner by a New York City Transit Authority bus making a left hand turn. The plaintiff claims his vehicle was struck in the rear on June 30, 2008. Mr. Mancusi was operating the vehicle for this last claimed incident and Shannon Daniell was a passenger. In this last episode, the defendants are Elissa Rothman and Elissa Brodsky.

The plaintiff claims that injuries suffered as a consequence to all three incidents include injuries to the neck, back, knees and heart. Further, the plaintiff asserts that he underwent multiple surgical procedures including open heart surgery. Plaintiff's counsel moves to renew and reargue a previously denied motion to consolidate, and to vacate the order refusing consolidation.

Procedural History

The Court denied a motion to consolidate these cases on February 9, 2010. This motion to reargue was filed on September 9, 2010.

Discussion

This motion to reargue and renew fails on procedural grounds. "A motion for leave to reargue ... 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion ... and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."[1] "A motion for leave to renew ... 2. Shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and 3. shall contain reasonable justification for the failure to present such facts on the prior motion."[2] "A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination."[3] The Appellate Division, Second Department holds that a motion to reargue or renew has two branches.[4]

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[1]New York Civil Practice Law and Rules (CPLR) § 2221 (d) (2) and (3).

[2]CPLR § 2221 (e) (2) and (3).

[3]CPLR § 2221 (f).

[4]*Nunez v Cortegiano*, 63 AD 3d 704, 705 [Second Department 2009].

Here, the branch to reargue is procedurally deficient in that the motion was made more than thirty days after service of a copy determining the prior motion and written notice of its entry. It is possible to seek an extension of time unless expressly proscribed by law and if the terms are "just and upon good cause shown."[5] The plaintiff's counsel provides several examples of granting late motions to reargue and renew.[6] Those circumstances under which late motions were accepted are distinct from this action. It is at the discretion of the court, whether to evaluate a motion to reargue beyond the thirty day time limit.[7] Here, the court exercises its discretion and declines to extend the time. The motion to reargue must be based on law overlooked or misapprehended by the court. No particularized misapprehension of law, or of overlooked law, is specified by the plaintiff. The branch pertaining to a motion to renew must be based upon new facts or a change in the law. The plaintiff avers no new facts and no new law, and therefore the branch that relies upon the motion to renew fails. Additionally, while the absence of prejudice to other parties is a requirement to granting a late motion to reargue or to renew, the conditions precedent are new law, new facts or a correction of the court's misapprehension of the law.

The branch pertaining to a motion to reargue relies upon law that is overlooked or misapprehended. This is not found here. The motion to reargue is late and not within a recognized exception. The branch pertaining to the motion to renew must be based upon new facts or law. No new facts or law are presented here. Therefore, the motion to reargue and renew fails on procedural grounds for both of its branches.

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[5]CPLR § 2004.

[6]*Structures v Waldbaum*, 282 AD 2d 434, 436 [Second Dept 2001] *where a late motion to renew was granted when facts were known but not earlier presented*; *Daniel Perla Assoc. v Ginsberg*, 256 AD 2d 303, [Second Dept 1998] *in which a triable issue of fact precluded summary judgment a late motion was granted*; *Karlin v Bridges*, 172 AD 2d 644 [Second Dept 1991] *in which a motion to renew was mislabeled a motion to reargue and the facts presented were new*; *and Oremland v Miller Minutemen Constr. Co.*, 133 AD 2d 816, 817-818 [Second Dept 1987], *in which the court itself mislabeled a motion to renew as a motion to reargue and failed to be flexible in applying a standard for facts*.

[7]*Terio v Spodek*, 63 AD 3d 719, 720 [Second Dept 2009].

It is within the court's discretion to deny a motion to reargue,[8] and the court has denied reargument of this motion to consolidate. Assuming the court permitted reargument, this application would fail on substantive grounds as well as failing on procedural grounds. While the span of time between the actions is not an absolute bar to consolidation, there must be common questions of law or fact.[9] Even though an interval between injuries was almost a year, actions have been consolidated when there was injury to the same body part, that was treated by the same physicians.[10] "In granting a joint trial, it is not required that all questions of law or fact be common to the various actions."[11] Exacerbation of an earlier injury may be adequate to unite distinct actions if there is no prejudice to the defendants' substantial rights.[12] Where separate injuries treated by the same physician and each resulted in disturbance of gait, two actions were consolidated to avoid jury confusion.[13] The plaintiff's counsel notes further examples of consolidating actions where issues of fact or law are shared.[14]

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[8]*Progressive Northeastern Ins. Co. v North State Autobahn, Inc.*, 71 AD 3d 657, 658 [Second Department 2010]; *and Beerman v Morhaim*, 17 AD 3d 302, 303 [Second Department 2005].

[9]CPLR § 602(a).

[10]*Mackey v County of Suffolk*, 67 AD 3d 973, 974 [Second Dept 2009].

[11]*Kupferschmid v Hennessy*, 221 AD 2d 225, 226 [First Dept 1995]; *quoting Gage v Travel Time & Tide*, 161 AD 2d 276, 277 [First Dept 1990]; *itself quoting Thayer v Collett*, 41 AD 2d 581 [Third Dept 1973].

[12]*Heck v Waldbaum's Supermarkets, Inc.*, 134 AD 2d 568, 569 [Second Dept 1987].

[13]*Richardson v Uess Leasing Corp.*, 191 AD 2d 394 [First Dept 1993].

[14]*Fries v Sid Tool Co.*, 90 AD 2d 512 [Second Dept 1982] *in which there were factual and legal questions that were virtually identical*; *Kupferschmid v Hennessy*, 221 AD 2d at 226, *and Witherspoon v New York Housing Authority*, 238 AD 2d 276 [First Dept 1997] *in both of which it was argued that the same injury suffered in a preceding accident was subsequently exacerbated by another accident*.

There is no offering by the plaintiff's counsel that there are shared issues of either fact or law that unite any of the different accidents in any combination. Actions may be consolidated to avert injustice by preventing divergent decisions based upon the same facts.[15] Because the facts in these three actions are dissimilar, the combination of three completely dissimilar actions into a single proceeding is more likely to result in jury confusion than not. In this action, there are alleged injuries to Mr. Mancusi's neck, back, knees and heart. There is no correlation drawn between any one given injury or specific combination of injuries to any combination of accidents. The same lack of specific correlation exists in relating Mr. Mancusi's surgical procedures to any combination of accidents. Further, it is not stated that the same physician or physicians treated Mr. Mancusi for injuries resulting from more than one accident. Thus, commonality is not demonstrated. Furthermore, the third action unites the plaintiff Shannon R. Daniell in interest to Mr. Mancusi. Therefore, that action which unites Ms. Daniell in interest to Mr. Mancusi does not have a commonality of law and fact with the defendants in the other two actions. Since there is no stated commonality of fact or law that unites any combination of accidents, consolidation would be improper. Even if the court were to consider the motion to consolidate, it would fail on substantive grounds.

Therefore the motion to reargue and renew the plaintiff's motion to consolidate fails on both procedural as well as substantive grounds.

Accordingly, it is hereby:

ORDERED, that the motion, made by the plaintiff, Michael Mancusi, to renew and reargue the motion to consolidate, is denied in the entirety, and it is further

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[15] *Best Price Jewelers.com, Inc. v Internet Data Storage & Systems, Inc.*, 51 AD 3d 839 [Second Dept 2008].

ORDERED, that all parties return to DCM Part 3 for respective Compliance Conferences on **Monday, December 13, 2010.**

ENTER,

DATED: November 30, 2010

Joseph J. Maltese
Justice of the Supreme Court