STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE STATE OF NEW YORK,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 4295-13
(RJI NO. 01-13-111745)

GURLEEN CONSTRUCTION CORP. and UTICA FIRST INSURANCE COMPANY,

Defendants.

Supreme Court Albany County All Purpose Term, April 2, 2014
Assigned to Justice Joseph C. Teresi, Presiding)

APPEARANCES:
Hon. Eric T. Schneiderman
Attorney General of New York State
Attorney for Plaintiff
(Joan Matalavage, Assistant Attorney General)
Department of Law
The Capitol
Albany, New York 12224

Farber Brocks & Zane, LLP
Attorneys for Defendant Utica First Insurance Company
(Sherri N. Pavloff, Esq., of Counsel)
400 Garden City Plaza, Suite 100
Garden City, New York 11530

TERESI, J.:

Defendant Utica First Insurance Company ("Utica First") moves pursuant to CPLR 2221(e) and (d) for leave to renew and to reargue and on renewal and reargument to vacate the Court's decision of January 30, 2013 which determined that discrepancies in the documents presented by Utica First in support of its motion raised triable issues precluding dismissal of the action pursuant to CPLR 3211(a)(1) and (7) or CPLR 3211(c).

On a motion for leave to reargue a prior order, a party has the opportunity to establish that the Court overlooked or misapprehended the relevant facts or misapplied a controlling principle of law. A motion for leave to reargue is addressed to the sound discretion of the Court and may be granted only upon a showing that the Court overlooked, misapplied, or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision (CPLR 2221[d][2]; Adderley v State, 35 AD3d 1043, 1043-1044 [3d Dept 2006]; In re Ida Q., 11 AD3d 785, 786 [3d Dept 2004]; Spa Realty Associates v Springs Associates, 213 AD2d 781, 783 [3d Dept 1995]; Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]). CPLR 2221 motions are not intended to afford unsuccessful parties repetitive opportunities to reargue issues previously decided or, as is the case here, to adjust their old arguments and/or present new arguments that were not previously asserted (Haque v Daddazio, 84 AD3d 940, 922 [2d Dept 2011]; Gellert & Rodner v Gem Community Mgt, Inc., 20 AD3d 388, 388 [2d Dept 2005]; Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]; Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]). The scope of the motion is limited to the arguments contained in the original moving papers (Haque v Daddazio, 84 AD3d 940, 922 [2d Dept 2011]; Gellert & Rodner v Gem Community Mgt, Inc., 20 AD3d 388, 388 [2d Dept 2005]; Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]; Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]).

The Court rejects Utica First's counsel's conclusory allegation that the Court erred by "finding questions of fact that were not raised by the parties and which did not impact in any

way the applicability of the Employee Exclusion." Utica First's prior motion relied on documents. Discrepancies in the documents upon which Utica First based its prior motion were pointed out by Plaintiff's counsel in paragraph 5 of Plaintiff's brief opposition to the prior motion. Thus, Utica First's counsel's initial statement that the Court erred by finding questions of fact that were not raised is either nonfactual or misleading. Utica First's counsel is therefore also incorrect in claiming that Utica First had no opportunity to present the affidavit of Shawn Kain explaining why the discrepancies make no difference.

CPLR 2221 motions are not intended to afford unsuccessful parties repetitive opportunities to reargue issues previously decided or, as is the case here, to readjust their old arguments and/or present new arguments and evidence that was not previously asserted and presented (Haque v Daddazio, 84 AD3d 940, 922 [2d Dept 2011]; Gellert & Rodner v Gem Community Mgt, Inc., 20 AD3d 388, 388 [2d Dept 2005]; Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3d Dept 1993]; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]; Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]). Inasmuch as Utica First has failed to demonstrate that the Court overlooked, misapplied, or misapprehended anything that Utica First submitted on the prior motion, Utica First's motion does not qualify as a motion to reargue (Spa Realty Associates v Springs Associates, 213 AD2d 781, 783 [3d Dept 1995]) and is denied without any reconsideration of any of Utica First's arguments, new or old.

A motion to renew must be based upon relevant facts not offered on the prior motion or upon a demonstration that there has been a change in the law that would change the prior determination (CPLR 2221[e][2]; Adderley v State, 35 AD3d 1043, 1043-1044 [3d Dept 2006]; Spa Realty Associates v Springs Associates, 213 AD2d 781, 783 [3d Dept 1995]; Grassel v

Albany Medical Center, 223 AD2d 803, 804 [3d Dept 1996]; Wagman v Village of Catskill, 213 AD2d 775, 775-776 [3d Dept 1995]; Matter of Estate of Saxton v Manufacturers and Traders Trust Co., 245 AD2d 733, 734 [3d Dept 1997]). Before the Court may consider the new facts and arguments that Utica First makes in support of its motion to renew, the Court must first determine whether Utica First has demonstrated a reasonable justification for not placing such new facts before the Court on the original application (CPLR 2221[e][3]; Hoffman v Pelletier, 6 AD3d 889, 890 [3d Dept 2004]; Spa Realty Associates v Springs Associates, 213 AD2d 781, 783-784 [3d Dept 1995]; Grassel v Albany Medical Center, 223 AD2d 803, 804 [3d Dept 1996]). Even before CPLR 2221 was amended in 1999 to specifically require movants to justify their failure to provide information at the time of the prior motion, it was well established that renewal motions were not a "second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Wagman v Village of Catskill, 213 AD2d 775, 776 [3d Dept 1995]). Utica First has failed to present any justification for its failure to present its new evidence and make its new arguments.

Accordingly, Defendant's motion to renew and reargue is denied.

All papers including this Decision and Order are returned to the attorney for Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

So Ordered.

Dated: Albany, New York
May 6, 2014

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated March 11, 2014;
2. Affirmation of Sherri N. Pavloff, Esq. dated March 11, 2014, with exhibits annexed;
3. Affidavit of Shawn Kain dated March 11, 2014, with exhibits annexed;
4. Affidavit of Joan Matalavage, Esq. dated March 24, 2014, with exhibits annexed;
5. Affirmation of Sherri N. Pavloff, Esq. dated March 28, 2014.