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At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of January, 2018.

P R E S E N T:

HON. BERNARD J. GRAHAM,
Justice.

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MOSHE PILLER AND TOBY PILLER,

PLAINTIFFS,

- AGAINST-

INDEX NO. 500064/12

OTSEGO MUTUAL FIRE INSURANCE COMPANY AND DAVID FOLLMAN INSURANCE BROKERAGE, INC.,

DEFENDANTS.

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Plaintiffs' Memorandum of Law; Plaintiffs' Reply Memorandum of Law; Defendants' Surreply	4, 5, 6

Upon the foregoing papers, plaintiffs Moshe Piller and Toby Piller (plaintiffs) move for an order granting reargument and/or vacatur of this court's order, dated January 8, 2016, which granted the motion of defendant Otsego Mutual Fire Insurance Company (Otsego Mutual) for summary judgment on Otsego Mutual's counterclaim seeking a declaratory

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judgment that the insurance contract between it and plaintiffs is null and void ab initio and that it is not obligated to plaintiffs regarding their claims, and for dismissal of the complaint, and denied plaintiffs' cross motion for summary judgment on the issue of liability on their claims against Otsego Mutual for breach of contract.

This is an action in which plaintiffs seek damages for breach of an insurance contract issued by defendant Otsego Mutual. The facts are set forth in the court's January 8, 2016 decision and order as follows:[1]

> "In 2002, plaintiffs purchased a single family townhouse located at 80 Saddle River Park, in Monsey, New York. In June, 2002, plaintiffs applied for homeowners' insurance on the townhouse by submitting an 'Application for Homeowners' Insurance Coverage' to Otsego Mutual through insurance broker, defendant David Follman Insurance Brokerage, Inc., who submitted it to Albert B. Liell, an agent for Otsego Mutual. In this application, by checking off boxes in response to questions, plaintiffs represented, among other things, that the townhouse was their primary dwelling, that it was occupied daily by the owner, and that they did not own, occupy or rent any other residences."
>
> "Based upon the application, Otsego Mutual issued a homeowners' insurance policy to the named insured: 'Moshe & Toby Piller, 80 Saddle River Park, Monsey, NY 10952' with a policy period from '6/25/02 to 6/25/05.' As relevant here, the declarations page, which is part of the policy, provides in red ink that: '*(a) the described residence is not seasonal; (b) no business activities are conducted on the described premises; (c) the described premises is the only premises you maintain for residential purposes other than business properties*' (emphasis added).

[1]The footnotes in the decision are also included.

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"In early October, 2011, plaintiffs submitted a claim to Otsego Mutual asserting that the subject townhouse had suffered water damage on or about October 1, 2011. The policy, which had been renewed three times,[2] was in full force and effect at that time. However, upon investigation of the claim, the claims adjustor assigned to the claim learned that plaintiffs had never resided in the townhouse."

"By letter dated November 10, 2011, Otsego Mutual informed plaintiffs that it was disclaiming coverage and voiding the policy because, among other things, plaintiffs made material misrepresentations by failing to disclose that: the townhouse was not their primary residence, the townhouse was not owner-occupied, and that they owned, occupied, or rented a separate residence."

"Plaintiffs subsequently commenced this action against Otsego Mutual to recover damages for breach of the policy, and against defendant Follman, their insurance broker, for breach of contract, negligence and negligent misrepresentation. Defendant Follman defaulted. Otsego Mutual answered, asserted affirmative defenses, and asserted a counterclaim alleging that the policy was void ab initio as a result of plaintiffs' material misrepresentations that, among other things, they occupied the premises on a daily basis and that the townhouse was their primary residence."

"Thereafter, Otsego Mutual made the instant motion for a judgment declaring that the insurance policy was void ab initio, and for dismissal of the complaint, arguing that it had shown that plaintiffs had made material misrepresentations on the insurance application. In support, Otsego Mutual annexes, among other things, a copy of the insurance application; a copy of the subject insurance policy with the declarations page; copies of the deposition transcripts of plaintiff-owners; a copy of the Otsego Mutual Fire Insurance Co. Underwriting

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[2]The original policy was renewed from June 25, 2005 to June 25, 2008; from June 25, 2008 to June 25, 2011, and from June 25, 2011 to June 25, 2014.

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Information in effect as of March 15, 2001, and in effect in June, 2002; and two Underwriting Bulletins (95-3 and 97-1). In addition, Otsego Mutual annexes the sworn affidavit of Terry Gras, its Corporate Secretary, who avers that defendant would never have underwritten the subject insurance policy or accepted the risk had plaintiffs disclosed that the townhouse was not their only and primary residential premises and dwelling, that they were not going to reside in the premises, or that the premises was not going to be owner-occupied, and that Otsego Mutual "does not now, and has not during the greater than twenty-five year term of my employment with the Company, knowingly issued *Homeowners'* Policies to premises that are not owner occupied."

"In opposition to defendant's motion, plaintiffs cross-move for summary judgment to recover damages for breach of the policy. In support of their motion, plaintiffs argue that they did not make any material misrepresentations because when the insurance policy application was submitted, all the information in it was true. Specifically, Mr. Piller and his daughter Chaya Israel assert in their respective affirmations that at the time the application was submitted, plaintiffs were planning to move from their Brooklyn home into the subject townhouse, but changed their mind, and that instead, plaintiff's daughter, her daughter's husband, and her children have resided at the townhouse since that time. Plaintiffs also assert that had they moved into the townhouse, it would have been their 'only and primary residential premises and dwelling.'"

"In further opposition to defendant's motion, plaintiffs suggest, in effect, that the application caused them to misrepresent their living status because the box marked 'Occupied' only gave them the choice to select either 'Owner' or 'Tenant,' and that they checked 'Owner' as their best option; that the term 'owner-occupied' on the application is not defined in the policy and that in any event, it is ambiguous; that after the application was submitted, defendant failed to investigate the status of the premises, including its occupants, and did not require them to

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> fill out any further documents upon renewal of the policy;[3] that they were under no duty to advise defendant of any changes with respect to the policy (*see H.B. Singer, Inc. v Mission Nat'l Ins. Co.*, 223 AD2d 372, 372 [1st Dept 1996] ["even assuming materiality, nondisclosure of a fact concerning which the applicant has not been asked does not ordinarily void an insurance policy absent an intent to defraud"]); that based upon the definition of 'Insured" in the policy ('you and, if residents of your household, your relatives, and any other person under the age of 21 in your care or in the care of your resident relatives'), the term 'owner-occupied' includes plaintiffs' daughter and her family; and that they have continually occupied the townhouse (and the townhouse has been 'owner-occupied') since 2002 through their daughter and her family, who have never paid them rent.
>
> "In support of their cross motion, plaintiffs argue that the insurance policy should be reformed to include Chaya Israel and her husband as the named insureds because the character and location of the intended premises to be insured were accurately described in the policy. In particular, plaintiffs assert that they never concealed any facts with the intent to deceive but instead simply forgot to inform defendant that they decided not to move into the townhouse. Plaintiffs contend that upon reformation of the policy, they are entitled to summary judgment because they have set forth a claim that clearly falls within its coverage."

Based upon the affidavit of Moshe Piller, the depositions of Moshe Piller and Toby Piller, the affidavit of Mr. Gras, the relevant portion of defendant's underwriting guidelines in effect at the time of the inception of the policy, the 2002 application and the 2002-2005

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[3]When asked at his deposition what defendant did "to ensure the truth of the information that was submitted in connection with application," Mr. Gras replied that defendant relied on plaintiff's signature (presumably that of Moshe Piller) and did a drive-by, "cursory" inspection to make sure the townhouse "was a semi-attached frame home, a certain distance from the fire hydrant, [that] there was no[] [] fireworks manufacturer or something else crazy [nearby]." Plaintiffs also note that seven months before the loss, on February 24th, 2011, defendant had reinspected the townhouse, commenting in its report that there were "[n]o problems noted."

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policy, and the declarations page of the policy, the court found that Otsego Mutual had made a prima facie showing that the insurance policy plaintiffs obtained from it was void ab initio because plaintiffs had made material misrepresentations in their application when securing the policy, namely that their residence would be a primary dwelling; occupied by them on a daily basis; was a single-family home; and that they had no other residence owned, occupied or rented, and that in opposition, plaintiffs' had failed to raise a material issue of fact warranting denial of defendant's motion. Subsequently, plaintiffs made the instant motion for reargument and/or vacatur of the court's order, which is presently before the court for disposition.

Discussion

"'A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion"'" (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014], *lv dismissed* 25 NY3d 964 [2015], quoting *Grimm v Bailey*, 105 AD3d 703, 704 [2d Dept 2013], quoting CPLR 2221 [d] [2]). Further, "'[w]hile the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented'" (*id.*, quoting *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011] [citations and internal quotations omitted]).

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In support of their motion, plaintiffs contend that by relying upon the 2002 application and the 2002-2005 policy - as opposed to the 2011 application, and the 2011-2014 renewal policy in effect when the water damage occurred - Otsego Mutual failed to produce the correct application and the correct policy and, therefore, failed to make a prima facie showing that plaintiffs obtained the 2011-2014 renewal policy through material misrepresentations. In particular, plaintiffs maintain that Otsego Mutual misled the court by quoting the 2002-2005 policy as if it were the 2011-2014 renewal policy and that as a consequence, the court incorrectly relied upon the representations made in the 2002 application and the language of the 2002-2005 policy in making its determination.

Plaintiffs, however, failed to raise this argument in their opposition and in support of their cross motion, and thus may not present it now (*id.*). In any event, plaintiffs have failed to establish that the court overlooked any matters of fact or law in determining the prior motion. In this regard, "[i]n order to establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she *secured the policy*" (*Estate of Gen Yee Chu v Otsego Mut. Fire Ins. Co.*, 148 AD3d 677, 678 [2d Dept 2017], *lv denied* 29 NY3d 911 [2017] [emphasis added]; *see also Joseph v Interboro Ins. Co.*, 144 AD3d 1105, 1106 [2d Dept 2016] [same]). Thus, in *Morales* (125 AD3d 947 [2d Dept 2015]), relied upon by the court in its decision, where the insurance policy had been renewed for years after submission of the application for the policy, the court granted the motion of the insurer for summary judgment because, as in this case, "*the*

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application for insurance contained a misrepresentation regarding whether the premises would be owner-occupied and that this misrepresentation was material" (*id.* at 948) (emphasis added). As Otsego Mutual argues, it is clear from the *Morales* decision that the application was submitted and that the policy was issued before the loss and before the renewed policy which was in effect on the date of the loss.[4]

While plaintiffs assert that the court was misled because Otsego Mutual failed to submit a 2011 application, they failed to demonstrate its existence, and in fact conceded in their cross motion that "there are no other documents besides the original application that Otsego Mutual requires its insureds to fill out upon renewal" (Plaintiffs' Motion to Reargue, Exh. F at ¶34). Moreover, despite plaintiffs' claims to the contrary, as indicated in its decision, the court was aware that the initial policy was dated 2002-2005, and that it had been renewed three times. In fact, apart from noting that the most recent renewal contained a different policy number than the 2002-2005 policy (*id.* at ¶6), plaintiffs made no distinction between the 2002-2005 and the renewal policies, merely referring to the insurance policy issued to them by Otsego Mutual as "the policy" (*id.* at ¶¶ 7, 13, 18, 25, 38, 43, 44), nor did

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[4]The court held that:

> "Contrary to the plaintiff's contention, the defendant established that the material misrepresentation is attributable to him since, even if the application for insurance had been submitted without his actual or apparent authority, he ratified the representations contained in the application by accepting the policy for owner-occupied premises and *permitting it to be renewed for years thereafter on the same terms*" (*id.*) (emphasis added).

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they assert that the terms of the 2011-2014 renewal policy differed from the 2002-2005 policy.

Further, inasmuch as *Morales,* as well as the other decisions noted above, found that the respective insurance policies were void based upon the misrepresentations made in the original (and only) insurance application, any purported reliance by Otsego Mutual and the court upon the 2002-2005 policy, as opposed to the 2011-2014 renewal policy, was immaterial.

In any event, since the policy was void from its inception, the subsequent renewals were also void. As such, it was immaterial whether or not Otsego Mutual provided the court with the most recent renewal policy (*cf. Meah v A. Aleem Constr., Inc.*, 105 AD3d 1017, 1020 [2d Dept 2013] [since insurer sought rescission and it had been determined that the policy was void ab initio, the general contractor could not be an additional insured because there was no valid existing policy]). Stated plainly, the issue presented is whether plaintiffs made material misrepresentations when they first applied for the policy. Here, Otsego Mutual demonstrated in support of its motion that the material misrepresentations made by plaintiffs as an inducement for it to issue the subject policy were made in the only application for insurance they submitted, namely the 2002 application, warranting rescission of the policy (*see also Estate of Gen Yee Chu,* 148 AD3d at 678 [court properly granted insurer's CPLR 4404 motion for judgment as a matter of law where insurer rescinded policy in 2011 based upon a material misrepresentation made by plaintiffs in their 2006 insurance

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application]; *James v Tower Ins. Co. of NY*, 112 AD3d 786, 787 [2d Dept 2013], *lv denied* 23 NY3d 901 [2014] [insurers demonstrated prima facie entitlement to judgment as a matter of law by submitting evidence establishing that the plaintiff-insured made a material misrepresentation by showing in an affidavit from their underwriting manager and relevant portions of their underwriting manual that they would not have issued the same policy *if the application had disclosed that the subject premises would not be owner occupied*"] [emphasis added]; *McLaughlin v Nationwide Mut. Fire Ins. Co.*, 8 AD3d 739, 740-741 [3d Dept 2004] [material misrepresentations made by plaintiff in original 1990 application for homeowner's policy made prima facie showing supporting insurer's motion to rescind policy after dwelling destroyed by fire in 1996]).

In their reply, plaintiffs contend that while they did not argue about "the absence of an application or policy" explicitly, they drew the court's attention to this issue by stating that the 2011 renewal policy should not be rescinded because Otsego Mutual did not investigate whether they occupied the premises after the application was submitted, and did not require them to fill out further documents upon renewal of the policy (Plaintiff's Motion to Reargue, Exh. F at ¶34). Even had plaintiffs referenced the 2011 renewal policy in making this argument, it did not apprise the court of their current claim.

Plaintiffs also assert in their reply that they did not need to explicitly make their current argument in their cross motion because they asserted that Otsego Mutual had failed to make a prima facie showing. However, their arguments were based upon the application

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and the policy, not on the failure of Otsego Mutual to provide a 2011 application and 2011-2014 renewal policy.

Plaintiffs further argue in their reply that Otsego Mutual "obscured" that it provided the 2002-2005 policy; that the court relied upon Otsego Mutual's "subterfuge;" that the court in its decision referenced what it believed to be the 2011-2014 renewal policy and the application for that policy. However, as noted, the court was aware that the application to which Otsego Mutual referred was submitted when the plaintiffs were attempting to secure the policy.

Plaintiffs next reiterate in their reply that Otsego Mutual's failure to submit a copy of the policy it seeks to void constitutes a fundamental defect in its prima facie case. However, as noted above, the relevant inquiry is whether plaintiffs made a material misrepresentation in their application. As such, that the 2011-2014 renewal policy was not provided by Otsego Mutual in support of its motion was immaterial to the court's determination (*Morales,* 125 AD3d at 948; *Estate of Gen Yee Chu,* 148 AD3d at 678; *James,* 112 AD3d at 787; *McLaughlin,* 8 AD3d at 740-741).

Plaintiffs next argue in their reply that because Otsego Mutual had the absolute right to terminate the policy at the end of the term, the 2011-2014 renewal policy - which Otsego Mutual did not produce in support of its motion - is considered a new policy, and therefore Otsego Mutual cannot rely upon the 2002 application in order to void the 2011-2014 renewal policy. Plaintiffs cite several cases which provide that New York law is clear that "[w]here

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an insurer has the absolute right to terminate a policy on its anniversary date . . . each renewal of the policy is deemed the issuance of a new policy" (*Moore v Metro. Life Ins. Co.*, 75 Misc 2d 168 [Sup Ct, NY County 1972] [internal citations and quotation marks omitted], *affd* 41 AD2d 601 [1973], *affd* 33 NY2d 304 [1973]).

As an initial matter, plaintiffs failed to raise this argument in their underlying cross motion. Even assuming this argument was properly made in response to Otsego Mutual's opposition to their motion to reargue, and not to provide a different rationale and/or amplification of their claim that Otsego Mutual failed to produce the 2011-2014 renewal policy, the claim is without merit. As Otsego Mutual asserts, based upon Insurance Law § 3425, it did not have an absolute right not to renew the policy. In this regard, Insurance Law § 3425 (d) (1), which governs the subject "personal lines insurance" policy (CPLR 3425 [a][2]), and its renewal and cancellation provisions, provides in relevant part that:

> "Unless the insurer, at least forty-five but not more than sixty days in advance of the end of the policy period, mails or delivers to the named insured . . . a written notice of its intention not to renew a covered policy . . . the named insured shall be entitled to renew the policy upon timely payment of the premium . . ." (Insurance Law § 3425 [d] [1]).

Insurance Law § 3425 (e) provides that any notice of nonrenewal of personal lines insurance policies must be "based upon a ground for which the policy could have been cancelled." Further, Insurance Law § 3425 (c) (2) (A-F) provides that personal lines insurance policies may only be cancelled for six reasons, including non-payment of premium (providing the insurer apprises the insured of the amount due), and discovery of fraud or misrepresentation

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in obtaining the policy or the presentation of a claim under the policy etc. Inasmuch as Otsego Mutual only had a qualified right to cancel the policy, plaintiffs' argument that the 2011-2014 renewal policy is a new policy, which Otsego Mutual was required to provide to make its prima facie showing, has no merit. The cases relied upon by plaintiffs to support their argument are misplaced because they do not involve personal lines insurance policies and/or involve insurers which had an absolute right to terminate their respective insurance policies. Similarly, plaintiffs provide no support for their additional claim that Otsego Mutual could not rely upon the 2002 application to void the 2011-2014 renewal policy because Otsego Mutual failed to inquire whether the information in the 2002 application was still correct in 2011 when the policy was renewed.

Finally, plaintiffs' contention that *Morales* is distinguishable from this matter is rejected based upon the analysis set forth above.

In sum, plaintiffs' motion to reargue and/or vacate the court's January 8, 2016 order is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. BERNARD J. GRAHAM