SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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NEW YORK CITY HOUSING AUTHORITY, TRINITY WEST HARLEM PHASE ONE LIMITED PARTNERSHIP, TRINITY WEST HARLEM PHASE ONE HOUSING DEVELOPMENT FUND CORPORATION, MEGA CONTRACTING GROUP LLC,ARCH SPECIALTY INSURANCE COMPANY

Plaintiff,

- v -

SCOTTSDALE INSURANCE COMPANY, SHAWN CONSTRUCTION, INC.,

Defendant.

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INDEX NO. 155714/2016

MOTION DATE 02/25/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 123, 124

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

In this declaratory judgment action, defendant Scottsdale Insurance Company ("Scottsdale") moves, pursuant to CPLR 2221, to reargue and/or renew its prior motion, which sought, pursuant to CPLR 3211(a)(3) and (7), dismissal of the second cause of action in the amended complaint of plaintiffs New York City Housing Authority, Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation, Mega Contracting Group LLC and Arch Specialty Insurance Company (collectively "plaintiffs") (Doc. 108-118). Plaintiffs oppose the motion (Docs. 121-122). After oral argument, as well as a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this matter are set forth in detail in the decision and order of this Court entered July 24, 2019 ("the 7/24/19 order"), which denied Scottsdale's motion to dismiss the second cause of action in plaintiffs' amended complaint seeking a declaration, pursuant to CPLR 3001, that Scottsdale's disclaimer to its named insured, defendant Shawn Construction Inc. ("Shawn"), was untimely and invalid and that, due to its failure to timely disclaim coverage, Scottsdale was required to indemnify and defend Shawn in the underlying action (Docs. 112 ¶ 49-50; 114). In denying the motion, this Court reasoned, *inter alia*, that plaintiffs' failure to comply with New York Insurance Law § 3420(a)(2) did not deprive plaintiffs of standing to seek relief from Scottsdale on behalf of Shawn (Doc. 114). (Doc. 114). Other relevant facts are set forth below. Scottsdale filed the 7/24/19 order with notice of entry on July 31, 2019 and, on August 9, 2019, it filed a notice of appeal in the Appellate Division, First Department (Docs. 105, 107). The instant motion was filed on August 22, 2019 (Doc. 108).

Scottsdale argues, *inter alia*, that this Court erred in denying its motion to dismiss because plaintiffs were not entitled to bring a direct action against Scottsdale on behalf of Shawn without first satisfying the requirements of New York Insurance Law § 3420 (Doc. 109 at 4-8). The crux of its argument is that this Court misapprehended the facts of *Southwest Mar. & Gen. Ins. Co. v Preferred Constr. Ins. Co.*, 54 Misc 3d 1205(A) (Sup Ct, NY County, 2016) (Reed, J.) when it stated that the Southwest plaintiffs were allowed to seek a declaration of the named insured's rights under the insurance policy without first establishing their additional insured status (Doc. 109 at 7-8).

In support of this argument, Scottsdale submits, *inter alia*, the amended complaint filed in *Southwest* (Doc. 117), as well as the memorandum of law that defendant Preferred Contractors

Insurance Company Risk Retention Group, LLC ("PCIC") provided in that action in support of its motion to dismiss (Doc. 118). As relevant here, in the fourth cause of action of the amended complaint, entitled "Breach of Contract – Contractual Liability," the Southwest plaintiffs alleged that they were entitled to compensatory and consequential damages due to PCIC's refusal to provide the named insured with contractual liability coverage in accordance with the PCIC policy and the named insured's subcontract (Doc. 117 ¶ 69-79). In the fifth cause of action, brought pursuant to Insurance Law § 3420, the Southwest plaintiffs alleged that they could recover directly as against PCIC based on the default judgment that they obtained in the underlying action against the named insured and, thus, that they were entitled to enforce a right of contribution/indemnification against PCIC (Doc. 117 ¶ 80-84). Scottsdale argues that, based on these materials, it is apparent that plaintiffs' second cause of action, which seeks to challenge the disclaimer issued to Shawn, is analogous to the fifth cause of action in *Southwest*, which was dismissed based on the Southwest plaintiffs' failure to satisfy the prerequisites of Insurance Law § 3420 (Doc. 109 at 7).

In opposition, plaintiffs argue, *inter alia*, that Scottsdale's motion should be denied since it relies on proof that could have been provided in the prior motion (Doc. 121 ¶ 3-6). They further represent that the facts of *Southwest* were not misapprehended by this Court insofar as their second cause of action for a declaratory judgment is akin to the fourth cause of action in *Southwest*, the breach of contract claim, which was upheld as valid given the Southwest plaintiffs' standing as potential named additional insureds under the PCIC policy (Doc. 121 ¶ 10-11). Moreover, plaintiffs assert that they set forth a viable claim because the requirements of New York Insurance Law § 3420(a)(2), which applies to "strangers" to the insurance policy, are inapplicable here since

they are additional insureds or, in the very least, claim to be additional insureds under the policy (Doc. 121 ¶ 14-15).

LEGAL CONCLUSIONS:

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992] [internal quotation marks and citation omitted], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; *see* CPLR 2221 [d] [2]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). It is well settled that "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted" (*Matter of Setters v Al Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citation omitted]). Further, on a motion to renew, a movant must demonstrate that there are "new facts not offered on the prior motion that would change the prior determination or . . . [that] there has been a change in the law that would change the prior determination" and there must be a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Ezzard v One E. Riv. Place Realty Co., LLC*, 137 AD3d 648, 649 [1st Dept 2016]).

Scottsdale asserts that the newly submitted proof would change this Court's prior determination and, this Court will, in its discretion, consider such proof with regard to Scottsdale's motion to renew (*see generally Gomez v Needham Capital Group, Inc.*, 7 AD3d 568, 569 [2d Dept

2004]; *Framapac Delicatessen v Aetna Cas. & Sur. Co.*, 249 AD2d 36, 36-37 [1st Dept 1998]).[1] However, upon review of the proof, this Court nevertheless adheres to its prior determination (*see* CPLR 2221 [f]; *Old Republic Ins. Co. v United Natl. Ins. Co.*, 2018 NY Slip Op 30643[U], 2018 NY Misc LEXIS 1338, *13 [Sup Ct, NY County 2018]).

Here, plaintiffs, in their second cause of action, are not seeking to enforce a judgment against Scottsdale or to "step into the shoes" of its named insured but, rather, seek a declaration of Shawn's rights under the Scottsdale policy (Doc. 121 ¶ 12). Thus, Scottsdale's contention that this claim is analogous to the fifth cause of action in *Southwest*, which set forth a direct claim for contribution/indemnification against PCIC based on an underlying default judgment against the named insured, is without merit. Since the Court of Appeals has previously held that "parties to an insurance contract - the issuer, a named insured or a person claiming to be an insured under the policy - may bring a declaratory judgment action against each other when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract" (*Lang v Hanover Ins.*, 3 NY3d 350, 353 [2004]; *see Bierzo Construction Corporation, LLC v Everest National Insurance Company*, 2009 NY Slip Op 30826[U], 2009 NY Misc LEXIS 5332, *21-22 [Sup Ct, NY County 2009]), this Court finds no reason to alter its prior determination.

Based on the foregoing, *Southwest* supports this Court's prior determination that plaintiffs had standing to maintain their second cause of action. Thus, since no facts in *Southwest* were misapprehended by this Court, that branch of Scottsdale's motion seeking reargument is denied.

[1] This Court is persuaded that Scottsdale has set forth a reasonable excuse for not submitting this proof in the prior motion, arguing that submission of such proof only became relevant given this Court's reliance on *Southwest* in the 7/24/19 order (Doc. 124 ¶ 9).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendant Scottsdale Insurance Company's motion to renew, pursuant to CPLR 2221 (e), is granted and, upon renewal, this Court adheres to its prior determination; and it is further

ORDERED that defendant Scottsdale Insurance Company's motion to reargue, pursuant to CPLR 2221 (d), is denied; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order with notice of entry upon all parties within 30 days of entry; and it is further

ORDERED that the parties shall appear for a status conference in this matter on September 8, 2020, at 80 Centre Street, New York, New York, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

4/23/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE