SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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UNION MUTUAL FIRE INSURANCE COMPANY,

Plaintiff,

- v -

RUDOLF KLEIN, DEVORA KLEIN, BENGAL CONTRACTING, CO. D/B/A RAFIQUL ANWAR, RAFIQUAL ANWAR, ARCH INSURANCE COMPANY, SHUKHRAT ESHONKULOV

Defendant.

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INDEX NO. 655979/2016

MOTION DATE 06/04/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Defendants Rudolf Klein and Devora Kleins' (the "Klein defendants") motion to renew is denied.

On or about February 11, 2016, the Klein defendants entered into a homeowner insurance policy contract with plaintiff Union Mutual Fire Insurance Company ("Union"). This policy excluded coverage for injuries resulting from home improvement work under the Independent or Sub-Contractors Conditions Endorsement and the exclusion for Designated Ongoing Operations. Shortly thereafter, the Klein defendants entered into a home improvement contract with Bengal Contracting (the "Bengal/Klein contract"). Bengal Contracting had an insurance policy with Arch Insurance Company ("Arch"). Although the Bengal/Klein contract had a line item for "insurance," the Bengal/Klein contract does not require that the Klein defendants be named as an "additional insured" in Bengal's policy with Arch. The Arch policy has a blanket additional

insured endorsement that states that additional insured persons are those "who are required under a written contract with you to be named as an additional insured."

One of Bengal's employees was injured in the Klein defendants' home during the construction and commenced an action in Supreme Court, Kings County entitled *Shukhrat Eshonkulov v. Anwar Rafiqul, Bengal Contracting, Co., Rudolf Klein, and Devora Klein*, Index number 505668/2016 (the "underlying action").

The Klein defendants submitted an insurance claim to Union. Union disclaimed coverage and commenced this action, seeking declarations that it was not responsible for coverage under the insurance contract it had with the Klein defendants and declaring that Arch was obligated to defend and indemnify the Klein defendants in the underlying action as additional insureds under Bengal's policy with Arch. The Klein defendants answered, counterclaimed against Union seeking a declaration of entitlement to coverage, and crossclaims against Arch seeking a declaration of entitlement to coverage as an additional insured.

Initially, Arch moved to dismiss Union's declaratory claim that Arch was required to cover the Klein defendants, the Union and Klein defendants opposed. This Court initially denied the motion by decision and order dated June 16, 2017, finding Union's pleadings were legally sufficient.

Arch then moved to reargue and Union cross-moved for summary judgment. In January 2018, the parties held a conference call in this matter, and it was agreed that the Klein defendants would be permitted to file late opposition. On March 12, 2018, this Court granted Arch's motion for leave to reargue and, upon re-argument, after it analyzed the Bengal/Klein contract and the insurance policies, found that the Klein defendants were not entitled to coverage from Arch as additional insureds on Bengal's policy, and granted Arch's motion to dismiss all claims against

Arch. This Court also granted Union's motion for summary judgment on its claims that it was not obligated to provide coverage to the Klein defendants.

Following the January 2018 conference call but before this Court rendered its decision, the Klein defendants commenced a new action in Supreme Court, Kings County (Index No.: 500523/2018) against Bengal only, seeking reformation of the Bengal/Klein contract (the "reformation action") to provide that Bengal was required to provide liability insurance coverage to the Klein defendants as additional insureds under the Bengal/Klein contract. The affidavit of service of the Summons and Complaint in the reformation action states that service of process was effectuated on February 3, 2018. Although the reformation action had been filed (and served) prior to the Klein defendants filing their opposition Arch's pending motion to reargue in this action, the Klein defendants did not advise this Court of the filing of the reformation action, although it likely would have impacted this Court's analysis of Arch's motion.

Bengal failed to appear in the reformation action. Although this Court dismissed this action on March 12, 2018, eight months elapsed following this Court's dismissal before the Klein defendants filed their motion for a default judgment in the reformation action. When moving for the default judgment, the Klein defendants did not check the box in the Request for Judicial Intervention ("RJI") to indicate that there were related cases, nor did they list the instant coverage action or the underlying action as related cases. The Klein defendants default judgment motion was granted on default on December 18, 2018 and the contract was ordered reformed.

On June 4, 2019, the Klein defendants filed the instant motion to renew based upon new evidence -- namely the newly reformed Bengal/Klein contract which now obligates Arch to provide coverage to the Klein defendants as additional insureds under the reformed contract.

Arch and Union assert that the motion to renew must be denied as: (1) there are no new facts, (2) this Court's decision in March 2018 is res judicata with respect to interpretation of the Bengal/Klein contract and the insurance policies, precluding the Klein defendants from relitigating their coverage claims under the contract and policies, and (3) the Klein defendants had a full and fair opportunity to raise a counterclaim for reformation in this action and their failure to do so bars them from effectively doing so at this junction.

The Klein defendants argue that there is a new fact -- the now reformed contract -- and that they were not required to seek reformation in this action as this Court's equitable jurisdiction had not been invoked through proper allegations in pleadings. Further, this Court must grant renewal, as it must accept the newly reformed contract as it is based upon a final order from Kings County Supreme Court, which is res judicata as between the Klein defendants and Bengal.

As a threshold matter, this Court agrees that the Order of reformation constitutes a new fact that was not in existence when this Court issued its decision in March 2018. The insurance companies nevertheless argue that res judicata bars the Klein defendants from relitigating the interpretation of the Bengal/Klein contract in this Court.

> Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (*see O'Connell v. Corcoran,* 1 N.Y.3d 179, 184–185, 770 N.Y.S.2d 673, 802 N.E.2d 1071 [2003]; *Gramatan Home Invs. Corp. v. Lopez,* 46 N.Y.2d 481, 485, 414 N.Y.S.2d 308, 386 N.E.2d 1328 [1979]). Additionally, under New York's transactional analysis approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" .... "*Res judicata* is designed to provide finality in the resolution of disputes," recognizing that "[c]onsiderations of judicial economy as well as fairness to the parties mandate, at some point, an end to

litigation"

In re Hunter, 4 NY3d 260, 269 [2005]. Here, the insurance companies assert that the Klein defendants could have brought the reformation cause of action as a counterclaim in this action and as everything arises out of the same facts and transaction, should be barred.

Generally speaking, New York is a permissive counterclaim jurisdiction (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 141 AD3d 464 [1st Dept 2016], *affd*, 31 NY3d 64 [2018]). This means that under normal circumstances, a defendant may bring a claim in a subsequent lawsuit, even though it could have brought the claim as a counterclaim and did not. Although New York is a permissive counterclaim jurisdiction, it does not, however, permit a party to remain silent in the first action and then bring a second one on the basis of a preexisting claim for relief that would impair the rights or interests established in the first action (*Henry Modell and Co., Inc. v Minister, Elders and Deacons of Refm. Prot. Dutch Church of City of New York*, 68 NY2d 456 [1986]). If a party defendant in a first action remains silent and then brings a second suit on the basis of a pre-existing claim for relief that would impair the rights or interests established in the first action, the second action is barred by res judicata (*Classic Automobiles, Inc. v Oxford Resources, Corp.*, 204 AD2d 209 [1st Dept 1994]). The permissive counterclaim allowance is inapplicable in the instance where if a plaintiff is successful on the causes of action it asserts in the second action, it would impair the rights that were established in the prior court proceedings (*Wax ex rel. Wax v 716 Realty, LLC*, 151 AD3d 902 [2d Dept 2017]).[1]

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[1] In addition, although New York is generally a permissive counterclaim jurisdiction, it would seem to be against the principles discussed in *In re Hunter* (4 NY3d 260 [2005]) to apply the general rule in an instance where a party brings one counterclaim, but not another counterclaim and now seeks to commence a separate action based upon the not-brought counterclaim. Based on the underlying reasons for the doctrine of res judicata, once a defendant decides to pursue a

Here, this Court has rendered a final determination of the interpretation of the Bengal/Klein contract and insurance policies with respect to the additional insured coverage issue. Revisiting the Klein defendants' counterclaim at this time, would impair the rights that were established previously in this action, and is therefore barred.

As to the Klein defendants argument that their equitable counterclaim should now be granted because this Court does not have "the power to undo a matter decided by the Kings County Supreme Court," this Court cannot sanction an outcome that rewards the Klein defendants for failing to timely inform Union, Arch, and this Court of the reformation action, and failing to advise the Kings County Supreme Court of the two related actions - this action and the underlying action. Further, this Court will not in equity and good conscience, sanction an outcome that rewards the Klein defendants for bringing a separate reformation action, in a manner which impaired the rights of Union and Arch, after having counterclaimed in this action for a declaration of coverage, but having failed to raise reformation as a counterclaim in this action. As this Court has already rendered a final determination, interpreting the Bengal/Klein contract and the insurance policies as not providing addition insured coverage, any reformation of that very contract is barred by res judicata.

Accordingly, the Klein defendants' motion for renewal is denied, and it is hereby

ORDERED that the motion for renewal is denied; and it is further

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counterclaim, he should be required to pursue all available counterclaims. Here, the Klein defendants brought a counterclaim seeking that the contract and policies be enforced as written. To permit them to subsequently bring another action seeking to reform the same contract would permit the exact scenario that the doctrine of res judicata seeks to avoid (*see Steinbach v Relief Fire Ins. Co.*, 77 NY 498 [1879][*holding* that dismissal was appropriate pursuant to the doctrine of res judicata when a litigant brought a second action seeking reformation of a contract after said litigant sought in the first action to have the contract enforced as written and was defeated]).

ORDERED that all claims and crossclaims against defendant Arch are dismissed; and it is further

ORDERED that the Klein defendants' counterclaim against Union is dismissed; and it is further

ORDERED the plaintiff Union shall, within 20 days of the date of this order, submit a proposed judgment to the Court by e-filing, consistent with this ruling granting Union the declaratory relief sought by Union in the Complaint as against the Klein defendants.

5/8/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

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