SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

1515 BROADWAY FEE OWNER LLC and
SL GREEN REALTY CORP.,
Plaintiffs,

- v -

SENECA INSURANCE COMPANY, INC.,
Defendant.

Index No.: 603461/08
Motion Date: 10/18/11
Motion Seq. No.: 02
Motion Cal. No.: _____

The following papers, numbered 1 to 7 were read on this motion for reargument.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5 -7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

In this declaratory judgment action, plaintiffs move for leave to reargue a portion of the court's earlier decision, and defendant cross-moves for the same relief. For the following reasons both motions are denied, and the cross-motion is denied.

Plaintiff 1515 Broadway Fee Owner LLC (1515 BFO), a foreign limited liability corporation licensed to do business in New York, is the owner of a building (the building) located at 1515 Broadway in the County, City and State of New York. Plaintiff SL Green Realty Corp. (SLG), also a foreign corporation licensed to do business in New York (and at whose premises 1515 BFO maintains

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

its offices), has been described in this action as an "affiliated entity" of 1515 BFO, and as the building's "landlord." Defendant Seneca Insurance Company, Inc., (Seneca) is a New York State licensed insurance company.

On December 10, 2006, non-party SLG employee Miguel Torres (Torres), who was injured at the building, commenced a personal injury/negligence action against 1515 BFO and SLG in the Supreme Court of the State of New York, Bronx County, under Index No. 302485/07 (the Torres action). 1515 BFO and SLG thereafter contacted Seneca to request that it provide them with a defense and indemnification in the Torres action, pursuant to the general commercial property and liability insurance policy that they had purchased from Seneca (the Seneca policy). However Seneca eventually declined to do so. Plaintiffs then commenced this action on November 25, 2008 by filing a complaint that sought a declaratory judgment that Seneca must defend and indemnify plaintiffs in the Torres action and sought damages from Seneca for breach of contract for failing to defend and indemnify plaintiffs pursuant to the Seneca policy. Seneca answered, and then moved for a declaration that the Seneca policy did not obligate it to either defend or indemnify plaintiffs in the Torres action, while plaintiffs cross-moved for a contrary declaration, for an additional declaration that Seneca's coverage was primary, and for a hearing to determine the amount of defense

costs it had expended in the Torres action (collectively, motion sequence number 001)

On February 25, 2011, this court entered a decision that resolved those motions by: 1) awarding plaintiffs a declaration that Seneca was obligated to provide them with a defense in the Torres action; 2) denied, as premature, both parties' requests for declaratory judgments on the issue of indemnification in the Torres action; and 3) declined to reach the issues of whether Seneca's coverage was primary or whether to hold a hearing on plaintiffs' accrued defense costs.

On December 6, 2011, the Appellate Division, First Department, issued a decision that upheld those portions of this court's February 25, 2011 order that had declared Seneca obligated to defend plaintiffs in the Torres action and had declined to hold a defense costs hearing, and modified the remainder of that decision to enter declarations: 1) that Seneca is obligated to indemnify plaintiffs in the Torres action; and 2) that Seneca's coverage is primary. 1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc., 90 AD3d 436 (1st Dept 2011). In the interim, however, plaintiffs had served the instant motion for leave to reargue the portions of the February 25, 2011 decision that had denied plaintiffs' previous applications for declaratory judgments on the issues of indemnification and primacy of coverage and declined to hold a hearing on defense costs; and

Seneca had cross moved for leave to reargue that portion of the same decision that declared that it was obligated to defend plaintiffs in the Torres action (collectively, motion sequence number 002).

Pursuant to CPLR 2221, a motion for leave to reargue 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 (1st Dept 1992), quoting Schneider v Solowey, 141 AD2d 813 (2d Dept 1988). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." Id. at 27, citing Pro Brokerage v Home Ins. Co., 99 AD2d 971 (1st Dept 1984). Nor does a reargument motion provide a party "'an opportunity to advance arguments different from those tendered on the original application.'" Rubinstein v Goldman, 225 AD2d 328, 328 (1st Dept 1996), quoting Foley v Roche, 68 AD2d 558, 568 (1st Dept 1979). Here, as will be discussed, the parties' competing motions for leave to reargue have been rendered largely moot by the First Department's December 6, 2011 decision. Nevertheless, several minor matters remain to be addressed.

In their instant motion, plaintiffs request leave to reargue those portions of this court's February 25, 2011 decision that, they claim: 1) denied plaintiffs' application for a declaration

that Seneca's coverage was primary; 2) overlooked plaintiffs' application for a declaration on defense expenditures in the Torres action; 3) denied, as abandoned, plaintiffs' application for a hearing on defense expenditures in the Torres action; 4) mistakenly referred to SLG as 1515 BFO's managing agent; 5) overlooked plaintiffs' "insured contract" argument; and 6) overlooked plaintiffs' waiver argument. Clearly, the first, fifth and sixth points are now moot, since the First Department's recent decision granted plaintiffs' applications for declaratory judgments that Seneca is obligated to both defend and indemnify, and that Seneca's coverage is primary. The fourth point is also of no moment since, as previously noted, both parties have agreed that the court's mistaken reference to SLG as 1515 BFO's managing agent was a de minimis error. Plaintiffs' two remaining applications for reargument center on its previous demand for a declaratory judgment and hearing on the amounts that they have heretofore expended in defending the Torres action. However, the First Department's decision specifically found that:

> Because plaintiffs failed to address why an immediate hearing was required to determine past defense costs pursuant to CPLR 3212(c), the motion court did not improvidently exercise its discretion in declining to grant such a request.

1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc., 90 AD3d at 436. Therefore, it is plain that the First Department's decision renders plaintiffs' arguments regarding defense expenditures moot

as well. In any event, the court notes that plaintiffs' current motion papers, too, are devoid of any argument as to why such an immediate hearing is required. Accordingly, the court finds that plaintiffs' motion should be denied.

In its cross-motion, Seneca seeks leave to reargue the portion of this court's February 25, 2011 decision that granted plaintiffs a declaratory judgment that Seneca was required to defend plaintiffs in the Torres action. Seneca argues that "the court misinterpreted the Additional Insured Endorsement by failing to look to the underlying lease agreement to determine the scope of coverage offered by the Seneca policy." Plaintiffs respond that Seneca raised this very same argument in the original summary judgment motion and, as such, that raising it again now in the context of a motion to reargue is improper. Plaintiffs are correct. As was previously noted, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equip. Corp. v Kassis, 182 AD2d at 27 (1st Dept 1992). Further the First Department's December 6, 2011 decision included the following specific finding:

> At issue is whether the stairwell area where the underlying accident occurred is covered by the additional insured clause in the policy procured by the underlying plaintiff's employer from Seneca. The clause extends coverage to plaintiffs herein, the employer's landlord and the managing agent of the building. Coverage exists because the underlying claim arose out of the "maintenance or use" of the leased premises, within the

occurred in the course of an activity necessarily incidental to the operation of the space leased by the employer. Furthermore, the accident happened in a part of the premises that was used for access in and out of the leased space when the freight elevator was not in service. This result is consistent with the lease, which required the employer to procure insurance against any liabilities "on or about the demised premises or any appurtenances thereto." Accordingly, a duty to defend has been triggered and we need not address plaintiffs' argument that the disclaimer was inadequate.

1515 Broadway Fee Owner, LLC v Seneca Ins. Co., Inc., 90 AD3d at 436 (internal citations omitted). Thus, Seneca's argument is unsupportable in the context of the current cross motion, and has also been rejected on appeal. Accordingly, the court finds that Seneca's cross-motion should be denied.

Accordingly, it is hereby

ORDERED that the motion, pursuant to CPLR 2221, of plaintiffs 1515 Broadway Fee Owner LLC and SL Green Realty Corp. is denied; and it is further

ORDERED that the cross-motion, pursuant to CPLR 2221, of defendant Seneca Insurance Company, Inc. is denied; and it is further

ORDERED that the balance of this action shall continue.

This is the decision and order of the court.

Dated: February 22, 2012 ENTER:

DEBRA A. JAMES J.S.C.