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

PRESENT: PAUL G. FEINMAN J.S.C. PART 7

0403087/2002

BROOKLYN UNION GAS CO.

VS

AMERICAN HOME ASSURANCE CO.

DEX NO. 403087/02

TION DATE 11-8-04

TION SEQ. NO. 009

ION CAL. NO. 19

SEQ 9

REARGUMENT/RECONSIDERATION

TI ...numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed memorandum decision & order.

FILED

JAN 3 1 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-24-2005

Paul G. Feinman
J.S.C.

IN ACCORDANCE WITH JUSTICE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

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BROOKLYN UNION GAS COMPANY, INC.,
Plaintiff,

against

CENTURY INDEMNITY COMPANY, CERTAIN UNDERWRITERS OF LLOYD'S LONDON, LONDON MARKET INSURANCE COMPANIES, and HOME INSURANCE COMPANY,
Defendants.

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Index Number	403087/2002
Motion Seq. Nos.	009
Submission Date	11-8-2004
Rm. 130 Cal. No.	19

DECISION AND ORDER

For Brooklyn Union Gas/KeySpan:
Jamila Z. Hoard, Esq.
Dickstein Shapiro Morin & Oshinsky LLP
1177 Avenue of the Americas
New York NY 10036
(212) 835-1400

For the London Defendants:
Joseph J. Winowiecki, Esq.
Mendes & Mount, LLP
750 Seventh Ave.
New York NY 10019-8000
(212) 261-8000

Papers considered in review of this motion to renew and reargue:

Papers	Numbered
Notice of Motion, Affidavits	1
Memo in Opp, Affirmation	2,3

PAUL G. FEINMAN, J.:

After an *in camera* review, defendants Certain Underwriters of Lloyd's London and London Market Insurance Companies (the London defendants) were directed to produce certain disputed documents to plaintiff Brooklyn Union Gas (*see,* Amended Decision and Order dated 9/15/2004, Feinman, J.).[1] In that decision, the court noted that as the London defendants had not provided any affidavits from someone with actual knowledge, it was not possible to determine when litigation was actually anticipated, and they had not established that certain of the

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[1]A supplemental decision and order, dated November 1, 2004, directed defendants to produce one other document which the court had previously overlooked (Index No. 603405/2001, Decision & Order 11/1/04 [Feinman, J.]).

documents were made other than in the regular course of the insurance business. Anticipating that the parties might seek leave to renew or reargue, the court indicated that any such motion must be supported by first-person affidavits and citations to relevant case law.

The London defendants now move for leave to renew and reargue the prior motions.[2] In general, a motion for leave to renew under CPLR 2221(e) is based on new facts not offered in the prior motion and should include reason for the failure to include such facts (*Castillo v Zimmerly*, 260 AD2d 243 [1st Dept. 1999]). In contrast, CPLR 2221(d) permits a party to reargue if the party believes the court has misapplied the facts or law in rendering a decision (see *Pro Brokerage, Inc. v Home Ins. Co., Inc.*, 99 AD2d 971 [1st Dept.], *app dismissed*, 64 NY2d 646 [1984]). Pursuant to the statute, where a motion is a combined motion to renew and reargue, each item of relief must be separately identified and supported.

The defendants' motion papers consist of affidavits from Mark Powell and Linda T. Salter, specialists with Equitas Management Services Ltd. and Specialist Claims Unit, representing certain of the London insurance companies, along with an affirmation by defendants' counsel and certain correspondence.[3] Defendants have not separately identified the parts of their motion for leave to renew and for leave to reargue, nor have they provided an explanation as concerns the portion of the motion that is for leave to renew as to why any new

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[2]The London defendants are producing two of the documents as directed, but seek to renew and reargue the decision concerning the remaining documents (Winowiecki Aff. ¶ 30).

[3]Defendants attempt to "incorporate by reference" the November 3, 2002 affirmation of Richard Apiscopa, Esq., in support of the current motion, but do not include a copy of that affirmation in their motion papers. It is not in the motion jacket now before the court. The moving party is to furnish to the court all the papers necessary to the consideration of the questions involved (CPLR 2214[c]), and the affirmation has therefore not been considered by the court in the instant motion.

information was not included in its earlier motion. Because there is new proof, or at least further explanation offered in the form of the first-person affidavits, the court will consider defendants' motion as one to renew (*see*, Siegel, McKinney's Cons. Laws, Book 7B, Practice Commentaries, CPLR 2221:7, p. 182 [1991]). In addition, although certain appellate courts have held that a motion to renew must be denied where the movant fails to provide an explanation concerning why the information was not previously included (*see, e.g., Greene v New York City Hous. Auth.*, 283 AD2d 458 [2d Dept. 2001]), the First Department continues to allow the court to exercise discretion to grant a motion for leave to renew in the interest of justice (*Poag v Atkins*, 2004 NY Slip Op 50524U; 3 Misc. 3d 1109A [Sup. Ct., NY County 2004], citing among others *Trinidad v Lantigua*, 2 AD3d 163 [1st Dept. 2003]). Thus, although the defendants do not offer an explanation as to why they failed to provide first-person affidavits and are not moving based on facts not previously known to them, given the nature of the action and the complexity and sensitive nature of the documents at issue, the court grants defendants' motion to renew the motion in the interest of justice.

On the original motion, the defendants argued that the documents at issue were attorney work product, attorney-client communications, or created in anticipation of litigation. The use of such designations is of course never conclusive in the court's analysis (*Graf v Aldrich*, 94 AD2d 823 [3rd Dept. 1983]; *Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London*, 176 Misc 2d 605, 609 [Sup. Ct., New York County 1998]).

Defendants now provide further explanation and case law, along with the supporting affidavits. However, with certain exceptions noted below, upon renewal the court adheres to its earlier decision and order directing that the documents be produced. Despite Mark Powell's

affirmation that Mendes & Mount was hired as legal counsel for the London defendants and that had he as claims handler wanted to retain adjusters or investigators he would have retained different professionals (Not. of Mot. Ex. B, Powell Aff. ¶ 5), Mendes & Mount's correspondence of January 31, 1994 to Brooklyn Union reveals the dual nature of its role, as the letter states that Mendes & Mount would be "represent[ing]" the London defendants and would "*commence [its] investigation*" of Brooklyn Union's claims by requesting copies of the policy documentation and details of the sites at issue (Not. of Mot. Ex. E, emphasis added). The court has therefore examined the motion papers, as it had the documents themselves, with that duality in mind.

Case law holds that materials prepared in the regular course of business to aid an insurance carrier in deciding whether to allow or reject a claim are discoverable (*see, Bertalo's Restaurant, Inc. v Exchange Ins. Co.*, 240 AD2d 452 [2d Dept. 1997], *app dismissed* 91 NY2d 848 [1997]). Reports of insurance investigators or adjusters prepared before a claim is rejected are discoverable as having been made in the regular course of the insurance company's business (*Karta Indus., Inc. v Insurance Co. of the State of Penn.*, 258 AD2d 375 [1st Dept. 1999]). This is because the payment or rejection of claims is part of the regular business of an insurance company and the investigation reports aid in the process of decision making (*Millen Indus. v American Mut. Liab. Ins. Co.*, 37 AD2d 817 [1st Dept. 1971]). The mere fact that an investigation was undertaken by an attorney or that an attorney made a report based upon examination of a claim, does not sufficiently shield the communication from production when it was made before the date the insurer had reasonable grounds to reject the claim (*Bertalo's Restaurant, Inc.*, 240 AD2d at 455).

Defendants argue that they anticipated litigation from an early date, noting that the

January 31, 1994 letter to Brooklyn Union, in addition to requesting policy information, states that pending completion of the investigations, they reserved their rights to contest coverage. They point to no case law establishing that a reservation of rights should be understood as anticipating litigation, rather than a boilerplate clause. Therefore, the court relies instead on case law holding that where an insurance company does not express an intent to deny coverage nor hint at impending litigation, reports are not work product nor done in anticipation of litigation (*Westhampton Adult Home Inc. v National Union Fire Ins. Co. of Pittsburgh*, 105 AD2d 627, 628 [1st Dept. 1984]); *Chemical Bank v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 70 AD2d 837 [1st Dept. 1979]; *E. B. Metal Industries v State*, 138 Misc 2d 698 , 701 [Ct. Claims 1988]). In addition, where an insurer fails to disclose when a decision to disclaim was reached, the documents developed prior to the litigation will be deemed "multi-motivated" and will not be immune from discovery based on the anticipation of litigation (*Chemical Bank v National Fire Ins. Co.*, 70 AD2d at 838).

Defendants attempt to establish through the affidavit by Mark Powell, employed at Equitas in the relevant years, a company which handled certain of the London insurance companies' claims including those of Brooklyn Union, that Mendes & Mount was retained no later than January 1994 because defendants already anticipated litigation, given the existence of other suits against Underwriters at Lloyd's London brought by various utility companies seeking environmental pollution coverage arising from former manufactured gas plants (Not. of Mot. Ex. B, Powell Aff. ¶¶ 4-6). As pointed out by Brooklyn Union, such a stance by an insurer taken prior to any investigation on behalf of its insured, would violate the insurer's duty to investigate claims in good faith. It is unfair to the insured whose claims should be addressed on the strength

of their individual merits or lack thereof.

The *in camera* review distinguished between the Mendes & Mount reports done for the London defendants in the course of their ordinary business, and attorney-client communications or other attorney work products. Communications between the attorney and client in which the communication either integrates facts and the lawyer's legal advice or is of a primarily or predominantly legal nature or, if from the client, requests legal assistance, are privileged under CPLR 4503(a), even when the client is an insurance company (*Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London*, 176 Misc 2d at 609; *see also Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 593 [1989]). However, nothing in the defendants' motion to renew persuades the court that the year-end updates are, once redacted as previously directed, legal rather than business-oriented in nature. Similarly, certain other of the communications, for example LDN 101256-101260, which are of a mixed character, can have the legal portions of the documents redacted. Reports also of an insurance business nature are the annual site reports, despite counsel's characterization of them as attorney-client communications containing mental impressions and thought processes (Not. of Mot. Winowiecki Aff. ¶ 29), and the July 21, 1995 letter from Mendes & Mount to Mark Powell (LDN 101139-101142). In addition, the court adheres to its November 1, 2004 supplemental decision and order finding that LDN 100940-100945, the Site Analysis Matrix, is not a document subject to privilege. These reports were all prepared to assist defendants in determining whether to accept or reject Brooklyn Union's claim and to evaluate the extent of potential liability, all of which is in the ordinary course of business of an insurance company (*Westhampton Adult Home, Inc. v National Union Fire Ins. Co.*, 105 AD2d at 628).

However, after consideration of defendants' motion papers and the affidavit of Linda Salter in particular (Not. of Mot. Ex. C), the court modifies its previous decision and order to hold that document LDN 101323-101327 should be withheld as a document made for settlement or negotiation purposes, and that LDN 101365-101369, LDN 101374-101390, LDN 101391-101405, and LDN 101406 are privileged as attorney-client communications.[4] Accordingly, it is

ORDERED that the motion to renew is granted; and it is further

ORDERED that upon renewal the court adheres to its September 15, 2004 decision and order except to the following extent:

(1) The decision and order are modified to reflect that the documents stamped LDN 101323-101327; LDN 101365-101369; LDN 101374-101390; LDN 101391-101405, and LDN 101406 should not be produced;

(2) The documents previously directed to be produced by the London defendants to plaintiff Brooklyn Union shall be produced within twenty (20) days of service upon the defendants of a copy of this decision and order with notice of entry.

This constitutes the decision and order of the court. Courtesy copies have been mailed to counsel on the motion.

Dated: January 24, 2005
New York, New York

Paul G. Feinman
J.S.C.

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[4]The court also adheres to its November 1, 2004 supplemental decision and order and holds that LDN 101647 is an attorney-client communication and accordingly privileged.