SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 155995/2012
OLD REPUBLIC INSURANCE COMPANY
vs.
UNITED NATIONAL INSURANCE
SEQUENCE NUMBER : 010
MOTION FOR REARGUMENT/RECONSIDERATION

INDEX NO. 155995/2012
MOTION DATE 11/30/2017
MOTION SEQ. NO. 10

The following papers, numbered 1 to ____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 266 - 277
Answering Affidavits — Exhibits _____ No(s). 279 - 286
Replying Affidavits _____ No(s). 287 - 290

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 4/9/18

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

OLD REPUBLIC INSURANCE COMPANY, directly and as Subrogee of STS Steel, Inc.,

Index No.: 155995/2012

Plaintiff,

DECISION & ORDER

-against-

UNITED NATIONAL INSURANCE COMPANY,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant United National Insurance Company (United) moves, pursuant to CPLR 2221(d) and (e), for leave to reargue and renew its motion to dismiss the amended complaint, which the court denied by order dated April 19, 2017 (the Prior Decision). *See* Dkt. 260.[1] Plaintiff Old Republic Insurance Company (Republic) opposes. The motion is granted in part and denied in part for the reasons that follow.

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." CPLR 2221(d)(2); *Mazinov v Rella*, 79 AD3d 979, 980 (2d Dept 2010); *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979) (reargument is addressed to court's discretion and designed to afford party opportunity to establish court overlooked or misapprehended relevant facts or misapplied controlling law). Reargument "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."

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

Mazanov, 79 AD3d at 980 (internal quotation marks omitted).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2), (3); *Naomi S. v Steven E.*, 147 AD3d 568 (1st Dept 2017) (motion to renew requires showing of new facts "which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew"), citing *Foley*, 68 AD2d at 568. "If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination." CPLR 2221(f).

The court assumes familiarity with the Prior Decision and the facts and procedural history of this case. On its prior motion, United argued that dismissal of the sole remaining cause of action for ineffective disclaimer of coverage pursuant to Insurance Law § 3420(d) was warranted because that statute does not apply to a claim for contractual indemnification, which, it alleged, was the only remaining third-party claim against Republic's subrogor, STS Steel, Inc. (STS), at the time that the underlying personal injury action settled. The Prior Decision held that the factual predicate for United's motion was demonstrably false because there remained an unresolved common law indemnification claim against STS when the underlying action settled, and, absent the settlement, the jury could have found STS negligent and returned a verdict imposing liability on the common law claim. Because a claim for common law indemnification falls within the notice provisions of § 3420(d), the court denied dismissal of Republic's cause of action for ineffective disclaimer. Prior Decision at 8.

The Prior Decision also stated that, in arguing for the inapplicability of § 3420(d) to contractual indemnity claims, United misstated the holding of the principal authority on which it

relied, *Preserver Ins. Co. v Ryba*, 10 NY3d 635 (2008), with respect to such claims. The court explained that *Ryba* held § 3420(d) inapplicable to breach of contract claims, but did not hold the same with respect to claims for contractual indemnity. *Id.*, citing 10 NY3d at 642.

United argues that renewal should be granted based on allegedly new evidence, consisting of recently obtained transcripts from the underlying personal injury action, which demonstrate that, contrary to the holding of the Prior Decision, the jury in the underlying action could not have returned a verdict finding STS liable for common law indemnity because the only issues presented to the jury concerned the calculation of damages. Accordingly, United contends, the court must now address the merits of its contractual indemnification argument. In that regard, United seeks leave to reargue the determination that it misinterpreted *Ryba*'s contractual indemnification holding, asserting that its interpretation of *Ryba* is the same as that adopted by a federal district court in a case titled *Johnson v Atl. Cas. Ins. Co.*, No. 13-CV-1002S, 2015 WL 5021953 (WDNY Aug. 23, 2015).

With respect to the motion to renew, the newly submitted transcripts on which United relies are public records that were available before the Prior Decision issued, and are thus not a proper basis for renewal. *See Elder v Elder*, 21 AD3d 1055, 1055 (2d Dept 2005) ("'[t]o the extent that the new materials were matters of public record available before the court issued its decision . . . they could not serve as a proper basis for a motion to renew'"), quoting *Welch Foods v Wilson*, 247 AD2d 830, 831 (4th Dept 1998). United plainly did not act with due diligence to obtain and present these records, which predate the prior motion by more than four years.[2] *See Queens Unit Venture, LLC.v Tyson Court Owners Corp.*, 111 AD3d 552, 552 (1st

[2] United's counsel states that he first attempted to obtain the trial transcripts from the underlying action in either September 2012 or January 2013, but was told by the Records Office of the

Dept 2013) ("'A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.'"), quoting *Sobin v Tylutki*, 59 AD3d 701, 702 (2d Dept 2009). Nor does it now offer a reasonable justification for its failure to do so.[3] *See Illinois Nat'l. Ins. Co. v Zurich Am. Ins. Co.*, 107 AD3d 608, 609–10 (1st Dept 2013) (affirming denial of renewal motion where movant "failed to proffer a reasonable excuse for not presenting the allegedly new facts on the initial motions.").

Nevertheless, the court exercises its discretion and accepts the "new" information so as not to "defeat substantive fairness." *See Tishman Const. Corp. of N.Y. v City of N.Y.*, 280 AD2d 374, 376-77 (1st Dept 2001) ("[E]ven if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to 'defeat substantive fairness.'"), quoting *Metcalfe v City of New York*, 223 AD2d 410, 411 (1st Dept 1996). United's newly submitted transcripts demonstrate that no liability issues were presented to the jury, which was only asked to determine the question of damages. Dkt. 269 (1/23/12 Tr.) at 35-36 (jury instructed that "you will decide only the question of damages . . . the question of liability has already been decided");

Supreme Court for Westchester County that the transcripts "were not available or could not be obtained." Dkt. 267 (Westlye Aff.) ¶ 10. However, when, in preparation for the present motion, counsel again attempted to obtain the transcripts, he was apparently able to do so in just a matter of weeks, requesting the transcripts on April 28, 2017 and filing them as exhibits to the present motion on May 15, 2017. ¶ 11; Dkt. 266 (Notice of Mot.).

[3] The court rejects United's suggestion that the need for these transcripts did not become apparent until after the Prior Decision was issued. The issue of whether the common law indemnification claim against STS remained unresolved when the underlying action settled was implicitly raised by United's assertion on the prior motion that the only claim then remaining against STS was for contractual indemnity. And even were that not the case, as noted in the Prior Decision, the issue was explicitly raised by Republic in its opposition to the prior motion. *See* Prior Decision at 8 ("Republic rightly disputes this, pointing out that the fourth third-party claim for common law indemnification/apportionment against STS was unresolved when the underlying action was settled.").

see generally id. at 70-80, 89-95 (opening statements limited to question of damages). The transcripts show that, as a practical matter, and contrary to the court's determination in the Prior Decision, there was no possibility of a jury verdict imposing liability for the common law indemnification claim against STS in the underlying action.

The conclusion that STS's liability for common law indemnity was no longer at issue when the underlying action settled is further bolstered by a pair of orders, of which the court may take judicial notice, that United submits for the first time on the present motion. The first order, dated September 24, 2010, granted conditional summary judgment to STS on its cross-claim for contractual indemnification against its subcontractor, Conception Bay, Inc. (Conception), to the extent that STS might in the future be found liable to the third-party plaintiff, The Rye City School District (Rye), due to Conception's negligence (which it was).[4] Dkt. 271 (9/24/10 Order) at 2. The second order, dated January 20, 2012, similarly determined that STS was entitled to contractual indemnification from Conception. Dkt. 273 (1/20/12 Order) at 1-2. A party seeking contractual indemnification must prove itself free from negligence, because to the extent that its own negligence contributed to the accident at issue, it cannot be indemnified therefor. *See Rodriguez v Heritage Hills Soc., Ltd.*, 141 AD3d 482, 483 (1st Dept 2016), citing General Obligations Law § 5-322.1. Consequently, although the expanded record still does not prove that the common law indemnification claim against STS was *expressly* resolved prior to the settlement, the court in the underlying action was plainly satisfied that there were no issues of

[4] The order states that Conception failed to demonstrate any negligence by STS, and cites to *George v Marshalls of MA, Inc.*, which held that "[a] court may render a conditional judgment on the issue of indemnity pending determination of the primary action . . . provided that there are no issues of fact concerning the indemnitee's active negligence." Dkt. 271 at 2, citing 61 AD3d 931, 932 (2d Dept 2009).

fact to be put to the jury regarding STS's negligence, and thus impliedly disposed of the claim.

This conclusion requires that, upon renewal, the court reach the merits of United's argument concerning the inapplicability of § 3420(d) to contractual indemnity claims. Because that argument overlaps substantially, if not entirely, with the substance of United's motion to reargue, the Court addresses both arguments in tandem.

United fails to provide a valid basis for reargument of the court's determination that it misinterpreted *Ryba*'s holding with respect to contractual indemnification. The arguments now presented were either raised or could have been raised on the prior motion, making them improperly proffered on a motion to reargue. *See Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 (1st Dept 2016) ("'Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted.'"), quoting *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992). Moreover, the belated citation to *Johnson*, a non-binding, federal court decision that United neglected to cite on its prior motion, does not demonstrate that the court misapprehended *Ryba*'s contractual indemnity holding.

Ryba was a coverage dispute concerning third-party claims in an underlying personal injury action. *See* 10 NY3d at 638-39. As relevant here, the *Ryba* Court held that § 3420(d) did not bar the plaintiff insurer from disclaiming coverage, based on a policy exclusion, for contractual indemnity and breach of contract claims because the insurance policy at issue "was neither actually 'delivered' nor 'issued for delivery' in New York."[5] *Id.* at 642. Having

[5] The version of § 3420(d) considered in *Ryba* applied to liability policies "delivered or issued for delivery" in New York. That language has been simplified to "issued or delivered" in New York. 2008 NY Laws ch. 388, § 6 (effective Jan. 17, 2009).

determined that § 3420(d) did not apply to the governing insurance policy, the Court held that, "since the policy explicitly excludes coverage for any liability assumed under a contract, [the insurer] must neither defend nor indemnify [its insured] for the contractual indemnification or breach of contract causes of action." *Id.* The Court then stated:

> [E]ven if the policy were "issued for delivery" in New York, [the insurer] still would not be barred from denying coverage for [the] breach of contract claim since Insurance Law § 3420(d) requires timely disclaimer only for denials of coverage "for death or bodily injury."

Id.

Consistent with the understanding urged by United, the *Johnson* court, without explanation or analysis, interpreted this language as holding § 3420(d) inapplicable to both breach of contract and contractual indemnification claims.[6] *Johnson*, 2015 WL 5021953 at *5. However, this interpretation is at odds with a straight-forward reading of *Ryba*. *Ryba*'s ruling on contractual indemnification was simply that, absent a viable claim for ineffective disclaimer pursuant to § 3420(d)—because the statute did not apply to the policy in question—coverage for that claim was barred by a policy exclusion, which further barred coverage for the breach of contract claim. The Court ruled that, even if § 3420(d) were applicable to the policy at issue, there would still be no bar to disclaiming coverage for the breach of contract claim, because such claims are beyond the statute's scope. Hence, contrary to the *Johnson* (and United) interpretation, *Ryba* is, at the very least, conspicuously silent as to the applicability of § 3420(d) to claims for contractual indemnity.

However, a close reading of *Ryba* implies that § 3420(d) *actually is* applicable to such

[6] *Ryba* is cited just once in the *Johnson* decision, accompanied by a parenthetical explaining that *Ryba* found § 3420(d) inapplicable to contractual indemnification and breach of contract claims. *See Johnson*, 2015 WL 5021953 at *5.

claims. Initially, following its determination that § 3420(d) did not apply to the insurance policy at issue, *Ryba* discusses the contractual indemnification and breach of contract claims together. But when the analysis shifts to consider the viability of these claims "even if the policy were 'issued for delivery' in New York," [thereby subject to § 3420(d)], the decision distinguishes between the two claims, identifying only the breach of contract cause of action as beyond the statute's scope. The implication of this distinction is that, unlike the breach of contract claim, were the insurance policy at issue subject to § 3420(d), the statute would apply to the contractual indemnification cause of action.

This interpretation finds further support in the fact that, as Republic correctly points out, the parties to the *Ryba* appeal all agreed that § 3420(d) was applicable to contractual indemnity claims, stating so explicitly in their appellate briefs. *See, e.g.*, Dkt. 282 (*Ryba* Appellant's Reply Br.) at 10 ("[Appellee] merely seeks to distinguish [the breach of contract] claim from Almeida's contractual indemnification claim, *to which § 3420(d) admittedly applies*.") (emphasis added). That position was in keeping with the decisions of numerous New York courts applying the statute to claims for contractual indemnity prior to *Ryba*. *See, e.g.*, *Lancer Ins. Co. v Philadelphia Indem. Ins. Co.*, 12 AD3d 641, 642-44 (2d Dept 2004) (failure to comply with § 3420(d) barred defendant-insurer from disclaiming coverage for contractual indemnification claim against its insured); *State v General Star Indem. Co.*, 299 AD2d 537, 538-39 (2d Dept 2002) (same); *Squires v Robert Marini Builders Inc.*, 293 AD2d 808, 808-10 (3d Dept 2002) (same). Given this context, one would expect that, had the Court of Appeals intended to hold § 3420(d) inapplicable to claims for contractual indemnity, it would have done so explicitly, as it did with respect to breach of contract. That the Court refrained from doing so implies that, unlike breach of contract, it did not consider contractual indemnity claims to be categorically

beyond the statute's scope.

Furthermore, *Johnson*'s interpretation of *Ryba* has not been adopted by the courts of this state, which continue to apply § 3420(d) to contractual indemnification claims that arise directly from an underlying personal injury action. *See, e.g.*, *Endurance Am. Specialty Ins. Co. v Utica First Ins. Co.*, 132 AD3d 434, 434-36 (1st Dept 2015) (applying § 3420(d) to contractual indemnity claim); *Key Fat Corp. v Rutgers Cas. Ins. Co.*, 120 AD3d 1195, 1196-97 (2d Dept 2014) (same); *RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1409-12 (4th Dept 2012) (same). At oral argument, United cited the then-recently issued decision in *New Hampshire Ins. Co. v JVA Industries Inc.*, an unpublished slip opinion holding § 3420(d) inapplicable to a contractual indemnity claim. *See* 57 Misc.3d 1209(A), 2017 WL 4581671 at *3 (NY Sup Ct Oct. 12, 2017). However, like *Johnson*, that decision is not binding. Moreover, its holding with respect to contractual indemnification rests entirely on a single citation to *Johnson*, with no analysis. *Id.* United cites no other decision from a New York court holding § 3420(d) inapplicable to claims for contractual indemnity.

Nor is the court convinced by United's assertion that § 3420(d) is applicable exclusively to tort liabilities. The Court of Appeals has held that § 3420(d) applies in "insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy." *KeySpan Gas E. Corp. v Munich Reinsurance Am., Inc.*, 23 NY3d 583, 590 (2014). "'Where . . . the *underlying* claim does not *arise out of* an accident involving bodily injury or death, the notice of disclaimer provisions set forth in Insurance Law § 3420(d) are inapplicable.'" *Id.*, quoting *Vecchiarelli v Continental Ins. Co.*, 277 AD2d 992, 993 (4th Dept 2000) (emphasis added). Indeed, appellate courts have regularly applied § 3420(d) to contractual indemnity claims that arise out of an underlying personal injury action. *See, e.g.*,

Endurance, 132 AD3d at 434-36; *Key Fat*, 120 AD3d at 1196-97; *Smiedala*, 96 AD3d at 1409-12; *Lancer*, 12 AD3d at 642-44; *General Star*, 299 AD2d at 538-39; *Squires*, 293 AD2d at 808-10; *see also Star Ins. Co. v Hazardous Elimination Corp.*, No. 05-4762, 2007 WL 316569 at *9-11 (EDNY Jan. 30, 2007) (rejecting argument that contractual indemnity claim was for economic damages rather than "bodily injury," and thus beyond scope of § 3420(d), where claim arose from underlying personal injury action).

Additionally, United's reasoning is at odds with the distinction drawn in *Ryba* between the contractual indemnity and breach of contract claims. Were all contractual obligations categorically beyond the scope of the statute, as United contends, there would be no reason for *Ryba* to limit its holding with respect to the applicability of § 3420(d) to breach of contract. That limitation is understood if one considers whether the claims "arise out of an accident involving bodily injury or death." *KeySpan*, 23 NY3d at 590 (internal quotation marks omitted). Contractual indemnity in *Ryba* was sought for the claims asserted in the underlying personal injury action against the third-party plaintiff, and, therefore, arose directly from that action. Without the personal injury claims there would be no basis for indemnification. By contrast, the breach of contract claim arose from the third-party defendant's failure to procure insurance benefiting the third-party plaintiff. *Ryba*, 10 NY3d at 638-39. Though the primary injury claims might have gone to the issue of damages sustained by the breach of contract, the failure to procure insurance constituted a breach even absent the underlying personal injury action.

For all these reasons, United fails to demonstrate that the court misapprehended the law in rejecting its interpretation of *Ryba*, or that, upon renewal, the court should depart from its determination on the original motion.

The court declines to address United's remaining arguments, which are either recycled

from its prior motion, *see Setters*, 139 AD3d at 492, or address dicta in the Prior Decision that did not bear on the court's ultimate determination.[7] Accordingly, it is

ORDERED that United's motion for leave to reargue is denied; and it is further

ORDERED that United's motion for leave to renew is granted, and upon renewal, the court adheres to its prior determination denying United's motion to dismiss the amended complaint; and it is further

ORDERED that the parties shall call chambers for a status conference on April 19, 2018 at 3:00 pm.

Dated: April 9, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

[7] Several pages of United's brief on the present motion address dicta in the final paragraph of the Prior Decision and an accompanying footnote stating that, though it was unnecessary, and likely not possible, to decide the issue, were United's motion based on documentary evidence, its argument that § 3420(d) does not apply to contractual indemnification claims would be waived. *See* Prior Decision at 8-9 & n.5; Dkt. 276 (United Br.) at 20-22.