

**Certain Underwriters at Lloyd's London v North
Shore Signature Homes, Inc.**

2013 NY Slip Op 32876(U)

April 29, 2013

Sup Ct, Nassau County

Docket Number: 007877-09

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

CERTAIN UNDERWRITERS AT LLOYD'S
LONDON, SUBSCRIBING TO POLICY
NUMBER APH 0100472 A/S/O TAL AND
AHARON PHILIPSON,

Plaintiffs,

-against-

NORTH SHORE SIGNATURE HOMES, INC.
and RICHARD WISCHHUSEN,

Defendants.

STATE FARM INSURANCE COMPANY, as
Subrogee of MARILYN N. SALIERNO,

Plaintiff,

-against-

NORTH SHORE SIGNATURE HOMES, INC.,
and RICHARD WISCHHUSEN,

Defendants.

RICHARD WISCHHUSEN,

Third-Party Plaintiff,

-against-

AHARON PHILIPSON and TAL PHILIPSON,

Third-Party Defendant.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 007877-09
ACTION NO. 1

MOTION SUBMISSION
DATE: 3-19-13

MOTION SEQUENCE
NOS. 010, 11

INDEX NO. 4639-10
ACTION NO. 2

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Memorandum of Law (Deft. Wischhusen)	X
Reply Affirmation in Support of Deft's Motion to Reargue	X
Notice of Cross-Motion, Affirmation, and Exhibits	X
Memorandum of Law in Support of Cross Motion	X
Reply Affirmation (Deft. North Shore)	X
Affirmation in Opposition to Deft's Motion to Reargue	X
Plaintiff's Memorandum of Law	X
Plaintiff's Proposed Order	X

The defendant, Richard Wischhusen, moves pursuant to CPLR§2221[d] for an order granting leave to reargue a portion of said defendant's cross motion dated, June 29, 2012, and upon such re-argument granting the following relief: an order compelling the plaintiff to produce for a deposition, a witness employed by the Lloyd's Syndicate [hereinafter Lloyd's] with knowledge of the coverage decisions made regarding the claim submitted by the plaintiff's subrogors, Tal and Aharon Philipson, and; an order denying the protective order previously issued in favor of Lloyd's insofar as it precludes the taking of the deposition herein requested (Sequence #10).

The defendant, North Shore Signature Homes, Inc [hereinafter North Shore], cross moves for an order pursuant to CPLR§2221[d], granting leave to reargue its previously interposed cross motion dated, July 10, 2012, and upon such re-argument issuing an order granting the following relief: an order compelling the plaintiff to produce a full and complete copy of its coverage and claims file maintained by Lloyd's, rather than its United States agents; an order compelling the plaintiff to produce a witness employed by Lloyd's with knowledge of the coverage decisions made regarding the plaintiff's subrogors, Tal and Aharon Philipson, or; *in the alternative*, for an order

precluding the plaintiff from either opposing or producing evidence with respect to the voluntary nature of its decision to pay its subrogors' claims. North Shore additionally requests that upon re-argument, this Court deny the protective order previously issued in favor of Lloyd's insofar as it precludes Lloyd's from producing a full and complete copy of its claims file, as well as an employee for a deposition (Sequence #11).

The determinations rendered herein are premised upon the facts as they were set forth in this Court's decision dated, October 15, 2012.

By application submitted August 21, 2012, Lloyd's sought various forms of relief including a protective order in relation to several discovery demands respectively served by defendants, North Shore and Wischhusen, including a Notice served by the latter demanding the deposition of an individual from Lloyd's "who had the authority to make coverage determinations in regard to the claim" submitted by Tal and Aharon Philipson. Simultaneously therewith, defendants, Wischhusen and North Shore, respectively cross moved for certain relief, including the following: an order compelling Lloyd's to produce a witness employed thereby with knowledge of the coverage decisions made regarding the subrogors' claim, and; for an order compelling Lloyd's to produce a full and complete copy of the claims file it maintains, as opposed to that maintained by its United States agents. Alternatively, Wischhusen and North Shore each cross moved for an order precluding Lloyd's from either opposing or producing evidence with respect to the voluntary nature of its choice to pay the claim filed by Tal and Aharon Philipson.

By Short Form Order dated, October 15, 2012, this Court granted the plaintiff's application for a protective order and denied the defendants' request for an order compelling Lloyd's to produce an employee for a deposition, as well as for an order compelling Lloyd's to produce a full and complete copy of its claims file. In so deciding, this Court held that based upon its prior decision dated, May 24, 2011, "the discoverability of Lloyd's claim file was previously entertained and determined" and as a result, the doctrine of law of the case precluded re-litigating those matters pertaining thereto.

In moving for re-argument, counsel for Wischhusen posits that as this Court's May 24, 2011 decision never addressed Wischhusen's request for an order compelling Lloyd's to produce an employee with knowledge of the coverage decisions pertinent herein, the doctrine of law of the case did not preclude the Court from issuing a ruling on that limited question (see Defendant's Memorandum of Law at pp. 3,5-6,8). Counsel asserts that to date, Lloyd's has only produced witnesses from its third party adjustors, all of whom testified that Lloyd's had the ultimate responsibility with respect to rendering a coverage determination, and as such it is necessary to depose an employee from Lloyd's to obtain relevant information regarding same (*id.* at pp.7,8). Counsel further contends that as Lloyd's itself invoked the jurisdiction of the New York courts by filing the within subrogation action, it must be compelled to produce a witness in New York or be precluded from offering any evidence pertaining to the voluntary nature of its payment of the underlying insurance claim (*id.* at pp.6-8).

With respect to defendant North Shore, counsel echoes those arguments articulated above and adds that as the Court's decision dated, May 24, 2011, did not reach the issue as to whether the complete claims file maintained by Lloyd's was produced, the doctrine of law of the case was inapplicable and should not have precluded an order compelling the production thereof (see Defendant's Memorandum of Law at pp.3-8).

The defendants' applications are opposed in their entirety by counsel for Lloyd's (see Matty Affirmation in Opposition; Plaintiff's Memorandum of Law).

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Ito v 324 East 9th Street Corp.*, 49 AD3d 816 [2d Dept 2008]; *Viola v City of New York*, 13 AD3d 439 [2d Dept 2004]; *Carrillo v PM Realty Group*, 16 AD3d 611[2d Dept 2005]). A motion to reargue is not to afford an unsuccessful party with additional opportunities to reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated (*McGill v Goldman*, 261 AD2d 593 [2d Dept 1999]; *Woody's Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 [2d Dept 2005]).

In determining the defendants' respective applications, the Court has carefully reviewed the record including the decisions dated, October 15, 2012 and May 24, 2011, and based thereon finds that leave to reargue is warranted to a limited extent (*Ito v 324*

East 9th Street Corp., supra; Viola v City of New York, supra; Carrillo v PM Realty Group, supra). Herein, while this Court's decision dated, May 24, 2011, unequivocally determined the demand for relief which sought an order "compelling the production of the entire unredacted file of Lloyd's Subscribing Policy No. APH 0100472 A/S/O Tal and Aharon Philipson * * *, including the coverage file and the underwriting file", it did not entertain an application for an order compelling Lloyd's to produce an employee with knowledge of the coverage decision made as to its subrogors (*id.*). Moreover, as the testimony adduced from the plaintiff's third party adjustors indeed establishes that the ultimate responsibility for making coverage determinations resided exclusively with Lloyd's, a deposition of an individual employed by the plaintiff is both material and necessary to the defense of the underlying action (CPLR §3101[a]).

Accordingly, it is hereby

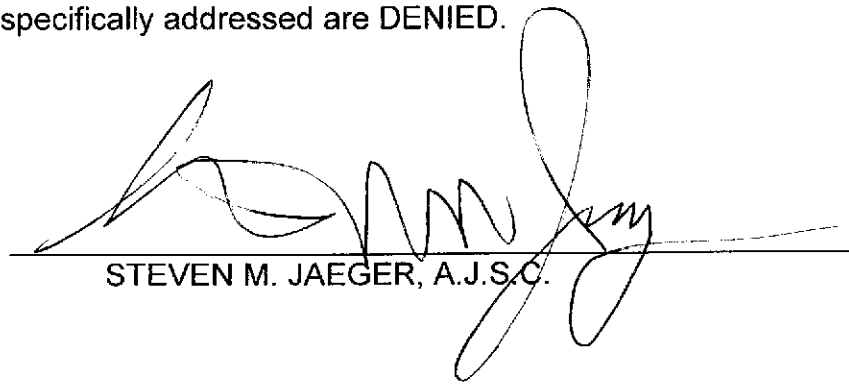
ORDERED, that the application interposed by defendant, Richard Wischhusen, for an order granting leave to reargue a portion of said defendant's cross motion noticed, June 29, 2012, is hereby GRANTED and upon such re-argument, this Court hereby directs Lloyd's to produce for a deposition, a witness employed thereby who is possessed with knowledge of the coverage decisions made regarding the claim submitted by Tal and Aharon Philipson. In accordance therewith, that branch of the defendant's application, which seeks an order denying the protective order previously issued in favor of Lloyd's insofar as it precludes the taking of said deposition, is hereby GRANTED (Sequence #10); and it is further

ORDERED, that the application interposed by defendant, North Shore Signature Homes, Inc., for an order granting leave to reargue its previously interposed cross motion noticed, July 10, 2012, is hereby GRANTED to the extent that upon re-argument, this Court directs Lloyd's to produce for a deposition, a witness employed thereby who is possessed with knowledge of the coverage decisions made regarding the claim submitted by Tal and Aharon Philipson. Consonant therewith, that branch of the defendant's application, which seeks an order denying the protective order previously issued in favor of Lloyd's insofar as it precludes the taking of said deposition, is hereby GRANTED. In all other respects the defendant's application is DENIED (Sequence #11).

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are DENIED.

Dated: April 29, 2013



STEVEN M. JAEGER, A.J.S.C.

ENTERED

MAY 01 2013

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**