337

New York County Clerk's Index No. 650142/14

Court of Appeals

of the

State of New York

JIN MING CHEN,

Plaintiff-Appellant,

– against –

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant-Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
STATE OF NEW YORK

JIN MING CHEN Plaintiff-Appellant, - against - INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Defendant-Respondent.	Index No. 650142/2014 **CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)**

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Defendant-Respondent Insurance Company of the State of Pennsylvania ("ICSOP") certifies that ICSOP is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

Dated: West Hartford, Connecticut
April 18, 2019

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COURT OF APPEALS
STATE OF NEW YORK

JIN MING CHEN Plaintiff-Appellant, - against - INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Defendant-Respondent.	Index No. 650142/2014 **AFFIRMATION IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**

ELIZABETH F. AHLSTRAND, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

I am a Partner of the law firm of Seiger Gfeller Laurie LLP, attorneys for defendant-respondent The Insurance Company of the State of Pennsylvania ("ICSOP"), in the above-captioned action. I am familiar with the facts and prior proceedings by virtue of my review of the file maintained by this office and prior counsel in the defense of this action. I submit this Affirmation in opposition to plaintiff-appellant Jin Ming Chen's ("Plaintiff") motion for leave to appeal to the Court of Appeals ("Motion"), dated April 1, 2019.

PRELIMINARY STATEMENT

This insurance coverage dispute stems from Plaintiff's misguided attempt to hold excess carrier ICSOP liable for all damages and interest awarded in the underlying action, including damages and interest covered by the underlying primary policy. The

trial court properly rejected Plaintiff's position as inconsistent with New York law, the clear language of the policies, and the well-established purpose of excess insurance and interest, and issued an order adjudging ICSOP liable only for that portion of the damages award in excess of the primary limits, pre-judgment interest previously accrued on that amount, plus interest and costs from the date of its order. ICSOP promptly paid the resulting Judgment and on October 30, 2018, the First Department, Appellate Division ("First Department") unanimously affirmed the trial court's order. The present Motion follows the First Department's denial of Plaintiff's motion to reargue and/or for leave to appeal.

It is well established that leave to appeal is warranted only when there are novel questions of law, matters of public importance, or decisions conflicting with prior precedent from the Court of Appeals or the Appellate Division. *See* N.Y. Ct. R. § 500.22(b)(4). None of those criteria exist here. Indeed, as was the case below, Plaintiff does not even attempt to put forth a legitimate basis for leave to appeal. Rather, Plaintiff simply rehashes the very same arguments addressed by the trial court and raised in his Appellant briefs, at oral argument before the First Department, and in his motion to reargue and/or for leave to appeal. As such, Plaintiff's motion must be denied.

RELEVANT BACKGROUND[1]

ICSOP's insured, Kam Cheung Construction, Inc. ("Kam Cheung"), was hired to renovate a building located at 61 Chrystie Street, New York, New York. On October 3, 2007, Plaintiff allegedly struck a brick while working with a masonry hammer, causing a piece of brick to injure his eye (the "Incident"). [Plaintiff's Appendix 23].

The Underlying Action

In February 2008, Plaintiff filed suit against Kam Cheung for common-law negligence and violations of Labor Law Sections 200 and 241(6) (the "Underlying Action"). On December 8, 2011, the trial court granted summary judgment in favor of Plaintiff on the Section 241(6) claim. [Plaintiff's Appendix 112-123, 142-145].

On September 24, 2013, the trial court awarded Plaintiff damages in the amount of $2,330,000.00 (the "Underlying Award of Damages"). The court further held that interest ran from December 8, 2011, the date summary judgment was granted. [Plaintiff's Appendix 155-165]. On October 29, 2013, the county clerk entered Judgment in favor of Plaintiff in the amount of $2,330,000 plus $396,993.70 in interest, for a total of $2,726,993.70 (the "Underlying Judgment"). [Plaintiff's Appendix 164-165].

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[1] For a complete recitation of the relevant facts underlying this appeal, ICSOP directs the Court to its Brief dated August 8, 2018. For purposes of brevity, ICSOP recites only the key background information relevant to Plaintiff's Motion.

The Applicable Insurance Policies

At the time of the Incident, Kam Cheung was insured under a primary commercial general liability policy issued by Arch Specialty Insurance Company ("Arch") bearing policy no. DPC0022451-00, for the policy period July 9, 2007 to July 9, 2008 and with limits of $1,000,000.00 per occurrence (the "Arch Policy"). *See* Arch Policy [Plaintiff's Appendix 395-459].

As is relevant here, the Arch Policy provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

Arch Policy, p. 1 [Plaintiff's Appendix 398].

The Arch Policy further provides:

> SUPPLEMENTARY PAYMENTS
>
> 1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
>
> . . .
>
> f. *Prejudgment interest awarded against the insured on that part of the judgment we pay.* If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
>
> g. *All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid,* offered to pay, or deposited in the court the part of the judgment that is within the applicable limit of insurance.
>
> These payments *will not* reduce the limits of insurance.

Id. at p. 14 (emphasis added)[Plaintiff's Appendix 411].

Thus, the Arch Policy expressly affords coverage for pre- and post-judgment interest which is in addition to and does not reduce its $1,000,000.00 per occurrence limit. *Id.*

Arch initially provided Kam Cheung with a defense to the Underlying Action, subject to a full reservation of its rights to disclaim coverage. Arch filed a separate declaratory judgment action to rescind its policy due to material misrepresentations by Kam Cheung in its insurance application. *See Arch Specialty Ins. Co. v. Kam Cheung Const. Inc.*, No. 2009-601961 (N.Y.Sup.). On July 23, 2012, judgment was entered in favor of Arch, and this judgment was upheld on appeal. *See Arch Specialty Ins. Co. v. Kam Cheung Const. Inc.*, 961 N.Y.S. 2d 443 (1st Dept. 2013). Thereafter, Arch withdrew its defense of Kam Cheung in the Underlying Action. [Plaintiff's Appendix 149].

At the time of the Incident, Kam Cheung was also insured under an excess liability insurance policy issued by ICSOP, bearing policy no. 5686710, for the policy period July 8, 2007 to July 8, 2008 and with a $4,000,000.00 limit per occurrence (the "ICSOP Excess Policy"). *See* ICSOP Excess Policy [Plaintiff's Appendix 80-110].

The ICSOP Excess Policy provides:

I. Coverage

A. We will pay on your behalf Ultimate Net Loss *in excess of the Underlying Insurance* as shown in Item 4 of the Declarations, but only up to an amount not exceeding our Limits of Insurance as shown in Item 3 of the Declarations. Except for the terms, definitions, conditions and exclusions of this policy, the coverage provided by this policy shall follow the terms, definitions, conditions and exclusions of the First Underlying Insurance Policy as shown in Item 4 of the Declarations.

. . .

C. Maintenance of Underlying Insurance.

The limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations shall be maintained in full effect during the period of this policy except for any reduction or exhaustion of aggregate limits contained therein solely by the payment of the damages for accidents or occurrences, whichever is applicable, that take place during each annual period of this policy and that are insured by this policy.

If you fail to comply with this requirement, we will only be liable to the same extent that we would have had you fully complied with this requirement.

See ICSOP Excess Policy, at Form 60225 (10/04), p. 2 (emphasis added) [Plaintiff's Appendix 82]. Item 4 of the Declarations identifies the Arch Policy as the applicable Underlying Insurance.

"Ultimate Net Loss" is defined as "the amount payable in settlement of the liability of the insured after making deductions for all recoveries and for other valid and collectible insurance, excepting however the Underlying Insurance shown in Item 4 of the Declarations." [Plaintiff's Appendix 82].

Additionally, the ICSOP Excess policy states:

> Your bankruptcy, insolvency or inability to pay or the bankruptcy, insolvency or inability to pay of any of your underlying insurers will not relieve us from the payment of any claim covered by this policy.
>
> *But under no circumstances will such bankruptcy, insolvency or inability to pay require us to drop down and replace the Underlying Insurance or assume any obligation within the Underlying Insurance area.*

See ICSOP Excess Policy, at Form 60225 (10/04), p. 3 (emphasis added) [Plaintiff's Appendix 84].

The Present Action

After Kam Cheung failed to satisfy the Underlying Judgment, Plaintiff commenced this direct action against ICSOP under Insurance Law Section 3420. [Plaintiff's Appendix 67-221].

On May 21, 2015, Plaintiff filed a Motion for Summary Judgment, seeking an order directing ICSOP to "satisfy the judgment awarding $2,330,000.00, plus interest." [Plaintiff's Appendix 20-308]. In its Opposition to Plaintiff's Motion for Summary Judgment, ICSOP argued, among other things, that Plaintiff was not entitled to the "full amount of the judgment" from ICSOP, that the ICSOP Excess Policy does not "drop down or otherwise satisfy the limit of the Arch Policy," and that ICSOP is "liable only to the extent that it would have been had Kam Cheung maintained the underlying insurance." [Plaintiff's Appendix 322, 331, 332].

Oral argument on Plaintiff's Motion for Summary Judgment was held before the trial court (Rakower, J.) on May 2, 2016. ICSOP argued that the most it could be held liable for under the ICSOP

Excess Policy was $1,330,000.00, together with any pre-judgment interest accrued on that $1,330,000.00. [Plaintiff's Appendix 851-852]. Plaintiff did not respond to ICSOP's position, but rather maintained that he was entitled to collect the entire Underlying Judgment from ICSOP.

The trial court agreed with ICSOP, ruling from the bench: "I do agree that there is no drop down of coverage and that the first million dollars that the excess carrier contracted for a certain premium with the idea that there was a first layer of coverage which included the representation and the first million... you are entitled to the benefit of that. However, with respect to the balance of the judgment, ICSOP must satisfy that judgment." [Plaintiff's Appendix 17-19, 872-873, 865-866].

On May 10, 2016, Plaintiff filed a proposed judgment with the county clerk which would have permitted Plaintiff to recover from ICSOP all interest accrued and accruing on the entire $2,330,000.00 Underlying Award of Damages, including the $1,000,000.00 the trial court expressly held Plaintiff was not entitled to collect from ICSOP. [Plaintiff's Appendix 875-889]. More specifically, Plaintiff's proposed judgment stated that pursuant to the decision rendered by Judge Rakower on May 2, 2016, ICSOP:

> [M]ust satisfy the judgment filed with the Court on the 29th day of October . . . for the amount of TWO MILLION SEVEN HUNDRED TWENTY-SIX THOUSAND NINE HUNDRED NINETY-THREE DOLLARS AND SEVENTY CENTS ($2,726,993.70) plus interest from the time of the prior judgment and costs

> of this action, except for a ONE MILLION DOLLAR ($1,000,000.00) credit from the total amount owed at the time of satisfaction of the remainder of the judgment as determined by the Court.

Id.

ICSOP filed a motion to resettle Plaintiff's proposed judgment or in the alternative for leave to reargue the issue of whether and to what extent ICSOP is liable for pre- and/or post-judgment interest that would have been covered under the Arch Policy - i.e. interest accrued on the first $1,000,000.00 of the Underlying Award of Damages and all post-judgment interest. [Plaintiff's Appendix 825-890]. ICSOP argued that resettlement or reargument was necessary because Plaintiff's proposed judgment was inconsistent with the court's holding that the ICSOP Excess Policy does not drop down to cover sums that would have been covered under the rescinded Arch Policy.

By way of an order and decision dated February 1, 2017,[2] the trial court granted ICSOP leave to reargue "for the very purpose

[2] The trial court initially denied ICSOP leave to reargue. [Plaintiff's Appendix 932]. The court did not, however, address ICSOP's request for resettlement or otherwise clarify whether and/or to what extent ICSOP is liable for pre- and/or post-judgment interest. Consequently, ICSOP filed a second motion requesting that the court issue an order clarifying whether and to what extent Plaintiff is entitled to collect pre- and/or post-judgment interest from ICSOP and granting any other and further relief that the court deemed appropriate. [Plaintiff's Appendix 933-945]. ICSOP also filed its own proposed judgment, limiting Plaintiff's recovery to $1,330,000.00 together with pre-judgment interest accrued on that amount between December 8, 2011 and October 29, 2013 (the period between summary judgment and entry of judgment in the Underlying Action), or $1,526,938.00, with costs and interest from the date of the order granting summary judgment in part to Plaintiff in this action, on May 2, 2016. [Plaintiff's Appendix 1007-1009].

of enabling the parties to address the interest issue." [Plaintiff's Appendix 1010-1011].

Following the submission of supplemental briefs, the trial court heard oral argument on June 20, 2017. Notably, in response to Plaintiff's argument that ICSOP waived any argument with respect to interest, the trial court stated unequivocally, "[j]ust so we are clear, I granted re-argument because I didn't think I addressed the interest issue sufficiently in my prior decision." [Plaintiff's Appendix 1132]. Thereafter, the trial court (Rakower, J.) clarified, by executing ICSOP's proposed judgment, that Plaintiff was not entitled to collect from ICSOP any interest that would have been covered under the Arch Policy. *See* 6/20/17 Order and Decision [Plaintiff's Appendix 1146-1149]; 6/20/17 Transcript [Plaintiff's Appendix 1122-1145].

On June 30, 2017, the county clerk's office filed the judgment, which calculated interest in the amount of $159,638.23, rendering the total amount of judgment $1,686,576.23.[3] [Plaintiff's Appendix 14-15]. ICSOP served Notice of Entry of Judgment upon Plaintiff and promptly satisfied the judgment. [Plaintiff's

[3] More specifically, Plaintiff was awarded $1,330,000.00 (the $2,330,000 Underlying Award of Damages less the $1,000,000.00 Arch Policy limits), together with the pre-judgment interest accrued on that amount between December 8, 2011 and October 29, 2013 (the period between summary judgment and entry of judgment in the Underlying Action) which totaled $1,526,938.00, as well as costs and interest from the date of the order granting summary judgment in part to Plaintiff in this action, on May 2, 2016, in the amount of $159,638.23 for a total amount of $1,686,576.23.

Appendix 13-15].

The Appellate Division's Decision and Order

Plaintiff's appeal to the First Department followed, and Plaintiff argued that pursuant to Judge Rakower's May 2, 2016 order, he was entitled to interest on the entire Underlying Award of Damages. In particular, Plaintiff argued that ICSOP waived any argument with regard to pre-judgment and post-judgment interest, and, as such, the trial court erred in granting ICSOP reargument and improperly made changes to the May 2, 2016 "final order." Plaintiff also argued that pursuant to the express language of the Arch and ICSOP Policies, as well as "controlling" New York case law (including *Ragins v. Hospitals Ins. Co., Inc.*, 22 N.Y.3d 1019 (2013) and *Welsh v. Peerless Cas. Co.*, 187 N.Y.S. 2d 842 (1st Dept. 1959)), ICSOP was responsible for all post-judgment interest. *See generally,* Plaintiff's Appellant Brief.

In response, ICSOP argued that the trial court record is clear and Judge Rakower's May 2, 2016 Order should be affirmed - Judge Rakower never awarded Plaintiff interest on the entire Underlying Award of Damages; ICSOP consistently argued that ICSOP is not liable for any sums covered by the Arch Policy; and, recovery of the interest claimed by Plaintiff is prohibited by the clear language of the ICSOP and Arch policies, as well as the established purpose of excess insurance and interest.

The parties appeared for oral argument before the First Department on October 10, 2018 during which Plaintiff argued that the trial court improperly granted reargument, that ICSOP waived the issue of interest, and that, even if ICSOP had not waived the issue, this Court's decision in *Ragins* required the court to hold ICSOP liable for all interest on the underlying judgment.

On October 30, 2018, the First Department unanimously affirmed the trial court's judgment. *See* Decision and Order of the Supreme Court, Appellate Division, First Department (hereinafter "10/30/18 Order"), attached to Plaintiff's Motion as Exhibit B. In particular, the court held that the specific interest-related questions at issue did not become clear until after the May 2, 2016 order, and that, as such, ICSOP did not waive its right to contest Plaintiff's interest calculation. The First Department also found that ICSOP's interest-related arguments were permissible under CPLR 2221(d) since the trial court specifically granted leave to reargue for the purpose of having the parties address the interest issue.

With respect to Plaintiff's substantive arguments, the First Department rejected Plaintiff's proposed interpretation of the "follow form" provision in the ICSOP policy and held that neither *Ragins* nor *Welsh* supported Plaintiff's position due to "key distinctions in the policy language at issue in those cases." 10/30/18 Order, p. 5.

On November 30, 2018, Plaintiff filed a motion for reargument and/or for leave to appeal. Plaintiff argued that the First Department should permit reargument for the following reasons: (i) the trial court and the First Department's 10/30/18 Order incorrectly applied the doctrine of waiver and/or "carved out a new rule for waiver because this issue involved statutory interest;" and (ii) the First Department's Order, holding that the ICSOP Policy's coverage was triggered upon the primary carrier's payment of "supplemental payments" in addition to the primary limit of $1,000,000, was contrary to the plain meaning of the ICSOP Policy and in conflict with *Ragins*. *See* Plaintiff's Motion to Reargue and/or Leave to Appeal to the Court of Appeals, pp. 18, 26, and 27, dated November 30, 2018, attached to Plaintiff's Motion as Exhibit D.

In the alternative, Plaintiff sought leave to appeal to the Court of Appeals on the following grounds: (i) the First Department's decision improperly held that the trial's court order granting ICSOP's motion to reargue was permissible under CPLR 2221(d) because a "final judgment" cannot be subject to a motion to reargue; and (ii) the First Department's decision is contrary to the terms of the ICSOP Policy and is in conflict with *Ragins* and *Welsh*.

On February 28, 2019, the First Department denied Plaintiff's motion in its entirety.

ARGUMENT

I. LEGAL STANDARD

The Court of Appeals and the appellate rules recognize that leave to appeal should be granted only in limited circumstances, such as when there are novel questions of law, matters of public importance, decisions conflicting with prior precedent from the Court of Appeals, or conflicting decisions from the Departments of the Appellate Division which derive from the decision sought to be appealed further. *See* N.Y. Ct. R. § 500.22(b)(4).

II. PLAINTIFF HAS NOT IDENTIFIED ANY LEGITIMATE BASIS WARRANTING LEAVE TO APPEAL

Plaintiff seeks leave to appeal to the Court of Appeals on the following grounds: (i) the First Department's 10/30/18 Order "sets a new standard for waiving issues when opposing motions;" (ii) the First Department improperly held that the trial court's order granting ICSOP's motion to reargue was permissible under CPLR 2221(d) because it permitted ICSOP to argue issues that were not previously raised prior to entry of the final order, and permitted CPLR 2221(d) to be used as a "vehicle to make changes to a final order in violation of CPLR 5019[A];" (iii) the First Department's Order holding that ICSOP did not have to pay post-judgment and pre-judgment interest on the first $1,000,000, and that the ICSOP Policy's coverage was triggered upon the primary carrier's payment of "supplemental payments" in addition to the

primary limit of $1,000,000, was contrary to the plain meaning of the Arch and ICSOP Policies; and (iv) the First Department's decision conflicts with *Ragins* and *Welsh*. Substantively, these arguments do not pass muster. Moreover, they are neither novel nor of public import, and as detailed below, the First Department properly held that *Ragins* and *Welsh* are inapposite.

A. Waiver Was Properly Rejected by the First Department

Despite Plaintiff's bald contention that the First Department's 10/30/18 Order presents an issue worthy of further appeal because it sets forth a "new standard for waiving issues due to a litigant's failure to oppose and/or address issues asserted in connection with motions made on notice," none of the cases cited in Plaintiff's Motion support Plaintiff's position. Plaintiff's Motion, Point I, pp. 25-32. Rather, the cases simply restate the established law on waiver from which the First Department did not deviate, are inapposite and/or support ICSOP's position and the First Department's holding.[4]

[4] *See*, Plaintiff's Motion, pp. 28-30, *citing, e.g., MacMaster v. City of Rochester*, No. 05-CV-6509, 2008 WL 11363388, at *3 (W.D.N.Y. Sept. 10, 2008)(granting plaintiff's post-judgment application for prejudgment interest after the City did not file opposition papers and the court confirmed with defense counsel at oral argument that it did not oppose plaintiff's application for or calculation of prejudgment interest); *Philips Lighting Co. v. Schneider*, No. 05-CV-4820, 2014 WL 4919047, at *2 (E.D.N.Y. Sept. 30, 2014) (on remand, amended the judgment to include prejudgment interest because defendant never opposed the award of prejudgment interest); *Terkildsen v. Waters*, 481 F.2d 201 (2d Cir. 1973) (Second Circuit refused to consider issue of whether prejudgment interest was properly awarded by the district court where defendant raised the issue for the first time on appeal, and never once raised the issue to the trial court, even after the trial court issued an opinion directing that prejudgment interest be included in plaintiff's recovery); *Publishers Press, Inc. v. Technology Funding, Inc.*, No. 07-48, 2008 WL 4937603, at *2 (W.D. Ky Nov. 17,

Moreover, Plaintiff's Motion misrepresents the First Department's holding and overlooks the procedural history of this litigation. The First Department did not "set a new standard for waiving issues;" instead, the court held that the specific interest-related questions at issue here (i.e., whether there was coverage under the ICSOP Policy for the entire $2,330,000 Underlying Award, plus interest) did not become clear until after the trial court's May 2, 2016 order granting Plaintiff partial summary judgment. As such, the First Department reasonably concluded that ICSOP could not have intentionally relinquished its arguments as to same. 10/30/18 Order, pp. 27-28.

In sum, the record is clear that ICSOP timely raised the interest-related issue following the trial court's May 2, 2016 order, and that the First Department properly considered and rejected Plaintiff's waiver issue in holding that ICSOP (1) timely stated its position on the issue of interest, (2) properly sought and was granted reargument following Plaintiff's filing of the proposed judgment, and (3) did not intentionally relinquish a known right. As such, Plaintiff's Motion does not identify any legitimate basis for leave to appeal the issue of waiver.

2008)(granting plaintiff's post-judgment motion for prejudgment interest upon finding defendant failed to oppose plaintiff's motion and because plaintiff was entitled to prejudgment interest on the merits); *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993) (affirming district court's holding that defendant waived argument that *pro se* plaintiffs were not entitled to attorneys fees where defendant did not oppose plaintiffs' post-judgment application for attorneys' fees).

B. The First Department Properly Held that ICSOP's Interest-Related Arguments Were Permissible Under CPLR 2221(d) and that the Scope of the Trial Court's Authority Under CPLR 5019(a) is Not Relevant

Plaintiff contends that the First Department's decision, holding that the trial court's order granting ICSOP's motion to reargue was permissible under CPLR 2221(d), presents a leave-worthy issue because the interest-related issues were purportedly not previously raised by ICSOP, and because a "final judgment" cannot be subject to a motion to reargue. Plaintiff's Motion, Points II and II, pp. 33, 38. Critically, Plaintiff has not even attempted to argue that a novel question of law or matter of public importance is implicated. Plaintiff simply argues, without any compelling authority, that the First Department's holding is contrary to the meaning of CPLR § 2221[d] and the "decisional law of this court."[5] As such, Plaintiff's Motion must be denied. *Id.*

The First Department properly held that the interest-related arguments were permissible under CPLR § 2221(d), "since the Supreme

[5] In a misguided effort to support his argument for leave to appeal, Plaintiff cites to a plethora of cases that restate established principles of law in an inapposite context, and argues that these cases support his position that the trial court improperly granted reargument because it could not reconsider a "final order." Plaintiff's argument is nonsensical and belies the express authority provided by CPLR 2221(a) and (d). Moreover, none of the cases cited by Plaintiff support his argument, as the cases either involve highly distinct motions to reargue issues decided after trial, involve foreclosure orders and subsequent notice pendency procedures/statutory requirements under CPLR Article 65, and/or are so wholly unrelated to the issue presented here that Plaintiff's reliance on the same is preposterous. *See, e.g., Kiker v. Nassau Cty.*, 85 N.Y.2d 879 (1995) (holding that a clerk's ministerial error in calculating interest on a final judgment may be corrected by the trial court pursuant to § 5019(a)); *Herpe v. Herpe*, 225 N.Y. 323 (1919); *Able v. Able*, 619 N.Y.S. 2d 461 (4th Dept. 1994); *Long Island Sav. Bank v. Mihalios*, 269 A.D.2d 502, 503 (2d Dept. 2000); *Matter of Coulbourn v. Burns*, 143 N.Y.S. 2d 675 (1955).

Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue," and that, since the trial court did not grant relief under CPLR § 5019(a), "[P]laintiff's arguments about the scope of the court's authority under that statute are not relevant here." 10/30/18 Order.

It is well settled that a motion for leave to reargue pursuant to CPLR § 2221 is addressed to the sound discretion of the trial court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision. *See Weiss v. Bretton Woods Condominium II*, 58 N.Y.S. 3d 61 (2d Dept. 2017). Applying that standard here, it is clear that the trial court felt it had overlooked the issue of whether and/or to what extent Plaintiff is entitled to collect pre- and/or post-judgment interest from ICSOP. [Plaintiff's Appendix 1132]. Indeed, as the First Department recognized, the trial court said just that at oral argument. 6/20/17 Transcript [Plaintiff's Appendix 1122-1145]. Consequently, the trial court properly granted reargument, and after consideration of same, ordered that Plaintiff was not entitled to recover from ICSOP interest covered by the Arch Policy by executing ICSOP's proposed judgment. The First Department aptly agreed that the trial court was within its discretion to grant leave to reargue for the very purpose of permitting the parties to address and brief the interest-related issues. Moreover, there is nothing novel, of

public import or inconsistent with New York precedent about the court's decision; Plaintiff is simply unhappy with the First Department's application of well-established practice rules.

Accordingly, Plaintiff's CPLR-based arguments do not demonstrate any legitimate legal basis for this Court to permit leave to appeal.

C. The First Department Properly Considered and Rejected Plaintiff's Proffered Interpretation of the Arch and ICSOP Policies

Plaintiff contends that leave to appeal is also warranted because the First Department's decision improperly "absolved the excess insurer … of paying any post-judgment and pre-judgment interest on the first $1 million," and incorrectly held that ICSOP's Policy was triggered upon the Arch Policy's payment of "supplemental payments." Plaintiff's Motion, Points IV and V, pp. 40 and 49. In support of these arguments, Plaintiff simply rehashes the very same arguments set forth in his appellate briefs and made at oral argument. However, Plaintiff's arguments, which identify no novel question of law, matter of public importance, or conflict with prior precedent, fail to transform this straightforward insurance coverage dispute, involving well-established contract interpretation principles, into a matter warranting leave to appeal.

Moreover, Plaintiff's strained interpretation of the ICSOP Policy is fatally flawed in multiple respects. First, as the First

Department aptly recognized, Plaintiff fails to appreciate that pursuant to the Arch Policy's Supplementary Payments provision, Arch expressly agreed to provide coverage for interest *in addition* to its $1,000,000 each occurrence limit. In rejecting Plaintiff's policy interpretation, the First Department held: "[t]he language of the policies do not support [Plaintiff's] interpretation, and instead support ICSOP's position that its coverage obligations were meant to be excess to all aspects of coverage afforded by the primary policy - that is, not only the $1 million in coverage per occurrence, but also the Supplementary Payments, which by their terms, did not reduce the Arch policy's insurance limits." 10/30/18 Order, p. 30.

Second, the express language of the Arch and ICSOP Policies does not support Plaintiff's contention that the "Maintenance of Underlying Insurance" and "Ultimate Net Loss" provisions only contemplated underlying coverage in the amount of the Arch Policy's $1,000,000 per occurrence limit. ICSOP did not simply agree to pay Ultimate Net Loss in excess of $1,000,000, but rather, in excess of the Arch Policy, which expressly provides coverage for interest.

Third, the ICSOP Excess Policy only incorporates the terms of the Arch Policy to the extent that they are consistent with its own "terms, definitions, conditions and exclusions," all of which control. *See* ICSOP Excess Policy, p. 3 [Plaintiff's Appendix 82]. Thus, it is of no import that the ICSOP Excess Policy "follows

form" to the Arch Policy in some respects; its maintenance provision remains in full force and full effect. *See* ICSOP Excess Policy, p. 3.

Finally, the Arch Policy is clear that where, such as here, there is an excess judgment, Arch shall be responsible for pre-judgment interest on its limits and post-judgment interest on the entire judgment until such time as its limits are paid. *See* Arch Policy, p. 14 [Plaintiff's Appendix 411]. Accordingly, because the Arch Policy would have provided coverage for pre-judgment interest accrued on the first $1,000,000, as well as all post-judgment interest, ICSOP cannot be liable for the same. That Plaintiff is or may be unable to collect those monies does not justify re-writing the ICSOP Excess Policy and forcing ICSOP to drop down and cover liabilities assumed initially by Arch, and now borne by Kam Cheung.

Given that Plaintiff fails to present any valid basis for this Court to permit leave to appeal regarding Plaintiff's oft-repeated and flawed interpretation of the Arch and ICSOP Policies, Plaintiff's Motion must be denied.

D. Plaintiff Fails to Demonstrate How the First Department's Decision, Rejecting Plaintiff's Reading of *Ragins* and *Welsh*, Warrants Leave to Appeal

Plaintiff argues that leave is required because the First Department's decision conflicts with *Ragins* and *Welsh*. Plaintiff's Motion, p. 55. Beyond this bald statement, Plaintiff fails to

articulate any valid basis as to why leave is warranted. In fact, no such basis exists. There is no conflict among the Appellate Divisions, and as detailed below, this Court's decision in *Ragins* and the First Department's decision in *Welsh* are inapposite. Accordingly, Plaintiff's Motion must be denied.

As the First Department reasonably noted, Plaintiff fails to appreciate that *Ragins* is not controlling due to "key distinctions in the policy language at issue…." 10/30/18 Order, p. 5. In *Ragins*, this Court held that under the plain language of the primary and excess policies, the payment of the primary policy's $1,000,000 liability limit triggered the excess policy's duty to pay all remaining amounts in connection with the judgment, including interest. However, two factors were critical to this Court's decision in *Ragins*, and *neither* of those factors are present here. First, the liquidator of the insolvent primary policy paid the primary limits, thereby cutting off primary coverage for post-judgment interest. *Id.* at 1022. Second, the primary policy in *Ragins* "[did] not expressly cover interest above the [primary] policy's limit[s]." *Id.* at 1024. Unlike the liquidator in *Ragins*, Kam Cheung has yet to fulfill Arch's obligation under the primary policy by paying $1,000,000 to Plaintiff, and the Arch Policy expressly provides coverage for interest in addition to the $1,000,000 each occurrence limit. *See* Arch Policy, p. 14 [Plaintiff's Appendix 411]. As such, *Ragins* is inapposite and does

not constitute "conflicting precedent" that would warrant granting Plaintiff leave to appeal.

Similarly, the nearly sixty-year old, sparsely cited decision by the First Department in *Welsh*, is likewise inapposite. In *Welsh*, the insured by way of a self-insured retention assumed the primary layer of liability up to a maximum of $10,000 and the excess insurer agreed to pay ultimate net loss in excess of $10,000, up to $40,000. This relationship is in direct contrast to the relationship between Arch and ICSOP. Unlike the insured in *Welsh*, Arch expressly agreed to provide coverage for interest *in addition* to its $1,000,000 each occurrence limit. Further, unlike the excess insurer in *Welsh*, ICSOP did not agree to pay Ultimate Net Loss in excess of $1,000,000, but rather in excess of the Arch Policy, which expressly provides coverage for interest. The difference in the policy language renders the court's holding in *Welsh* irrelevant.[6]

Consequently, given that this Court's decision in *Ragins* and the First Department's decision in *Welsh* are inapposite, and since Plaintiff does not identify a conflict among the Appellate Divisions, Plaintiff's Motion must be denied.

CONCLUSION

Plaintiff's Motion falls far short of establishing the

[6] Indeed, given that the Arch Policy clearly distinguishes coverage for damages from coverage for interest, the trial court could not reasonably consider interest as damages. The language at issue in *Welsh* was not nearly as precise.

requisite standards for this Court to grant leave to appeal. Accordingly, Plaintiff's Motion must be denied.

Dated: West Hartford, Connecticut
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Yours, etc.,

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