To be Argued by:
PAUL KOVNER
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – First Department

Case No.: 2019-04601

34-06 73, LLC, BUD MEDIA, LLC and COORS MEDIA, LLC,

Plaintiffs-Respondents,

- against -

SENECA INSURANCE COMPANY,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant-Appellant, Seneca Insurance Company, Inc. ("Seneca"), appeals from the decision of the Trial Court, (Melissa A. Crane, J.S.C.), which denied Seneca's post-trial motion to set aside the verdict in favor of Plaintiffs-Respondents ("plaintiffs") on the issue of reformation and direct that judgment be entered in favor of Seneca as a matter of law. Seneca also appeals from the subsequent judgment of approximately $4.5 million for damages to plaintiffs as a result of a fire at their premises under an insurance policy issued by Seneca.

Seneca submits that the judgment must be reversed because the Trial Court erred, as a matter of law, when it held that plaintiffs' reformation claim, asserted for the first time at trial, related back to their original breach of contract claim in the complaint filed eight years earlier. Courts have long recognized that a cause of action for breach of contract is distinct from a cause of action for reformation and they do not arise out of the same transactions or occurrences. Thus, the original breach of contract claim did not give Seneca notice of the reformation claim.

There was no factual or legal basis for the Trial Court's assertion that the evidence used by plaintiffs to support their reformation claim was the same as the evidence used to support the original breach of contract claim. The Trial Court was simply wrong in its assertion that plaintiffs contended from day one that the Protective Safeguard Endorsement ("PSE"), which required plaintiffs to maintain an

automatic sprinkler system at the premises, was in the policy by mistake and, therefore, unenforceable. On the contrary, throughout the litigation, plaintiffs acknowledged that the policy issued by Seneca contained the PSE, and argued that plaintiffs either complied with the PSE, or Seneca waived its right to rely on a breach of the PSE because it knew that the sprinkler system in the premises was not working, but did not cancel the policy.

It is important to note that Mohammed Malik ("Malik"), plaintiffs' principal, was represented during Seneca's pre-litigation investigation by the same law firm which represented plaintiffs when the complaint was filed, throughout the litigation, and at trial. It is undisputed that the policy was delivered to Malik prior to the fire and he is presumed to have consented to its terms, including the PSE.

Furthermore, Seneca's April 13, 2011 letter to plaintiffs which denied their claim quoted the PSE and stated there was no coverage because plaintiffs failed to maintain the sprinkler system in the premises in compete working order. Clearly, therefore, plaintiffs' attorney knew the basis for the denial before he prepared the summons and complaint. If, as Malik testified for the first time at trial, there were any truth to Malik's assertion that it was a mistake to include the PSE in the policy, the attorney would have included a cause of action for reformation in the complaint. Instead, the complaint included only a cause of action for breach of contract and

alleged that plaintiffs complied with all policy conditions, which necessarily included the PSE.

In June 2017, after completion of pre-trial discovery, plaintiffs moved to dismiss Seneca's fourth affirmative defense, which was based on the alleged breach of the PSE. Plaintiffs did not assert that the PSE was included in the policy by mistake, or move to amend the complaint to plead a cause of action for reformation. Instead, plaintiffs' attorney admitted in the memorandum of law that the PSE was properly included in the policy, as follows:

> [t]he Subject Policy contained a Protective Safeguards Endorsement... R. 2553.[1]
>
> The Subject Premises is "Prem. No. 10" for the Subject Policy and thus, was required under the Protective Safeguards Endorsement to have an "Automatic Sprinkler System" in working order. R. 2554.
>
> Plaintiffs allege that the fire sprinkler system at the Subject Premises was in working order at the time of the fire loss. Notwithstanding, Plaintiffs assert that if it is determined that the fire sprinkler system was not in service, Defendant waived its right to assert a breach of the Protective Safeguards Endorsement because of its "knowledge" that the sprinkler system was not in working order and yet Defendant still made the decision to accept and deposit the premium with respect to the Subject Policy. R. 2556.

Seneca simultaneously moved for summary judgment based upon plaintiffs' breach of the PSE. In the opposition papers, plaintiffs' attorney again admitted that

[1] References preceded by R. refer to the pages in the Record on Appeal.

the policy contained a PSE. R. 2584, 2586. The Court held that the issues of whether plaintiffs breached the PSE and whether Seneca waived its right to rely on the breach of the PSE presented questions of fact for the jury to resolve at trial. R. 2602-2612.

For the first time at trial, plaintiffs' trial attorney asserted that reformation was appropriate because it was a mistake to include the PSE in the policy. Plaintiffs' belated reformation claim did not relate back to their breach of contract claim and was barred by the Statute of Limitations. Moreover, Seneca was unquestionably prejudiced by plaintiffs' lengthy delay in arguing reformation at trial. Thus, the Trial Court's decision to grant plaintiffs' motion to conform the pleadings to the proof at trial, and to deny Seneca's post-trial motion, constituted reversible error. R. 28-31.

In the verdict, the jury unanimously concluded that plaintiffs had breached the PSE and that Seneca had not waived its right to enforce the PSE. R. 2133; 2135. Five out of six jurors agreed that Seneca should not be estopped from relying on the PSE. R. 2134. But five out of six jurors also agreed that the PSE was included in the policy by mutual mistake. R. 2132. Thus, the policy was reformed and judgment was ultimately entered for plaintiffs. R. 3-27.

Clearly, in light of the jury's answers to the other questions on the verdict sheet, if this Court agrees that the Trial Court erred as a matter of law in submitting the

issue of reformation to the jury and denying Seneca's post-trial motion, the judgment must be vacated and judgment entered in favor of Seneca.

QUESTIONS PRESENTED

1. Was there a factual and legal basis for the Trial Court to conclude that plaintiffs' reformation claim related back their breach of contract claim?

   No. The Trial Court erred as a matter of law in allowing plaintiffs to amend the complaint to conform the pleadings to the proof and in denying Seneca's post-trial motion. Plaintiffs' original complaint, which alleged that they complied with all conditions precedent to coverage, including the PSE, but Seneca breached the contract by not paying the claim, did not put Seneca on notice that plaintiffs would allege, for the first time at trial eight years later, that the policy should be reformed because it was a mistake to include the PSE.

2. Was Seneca prejudiced by plaintiffs' belated assertion of a reformation claim?

   Yes. The Trial Court erred as a matter of law in holding that reformation was merely a variation on the theory of breach of contract and Seneca could not claim unfair surprise or prejudice.

STATEMENT OF FACTS

Seneca issued an insurance policy to plaintiffs which covered certain properties or vacant land, including a vacant commercial warehouse at 50-09 27th Street, Long Island City, New York ("the premises") effective April 1, 2009. On September 8, 2009, a fire substantially destroyed the premises, causing damages of approximately $2.4 million. Plaintiffs submitted a claim to Seneca, which conducted an extensive investigation.

During the investigation, Malik submitted to an examination under oath pursuant to the provisions of the policy. He did not testify that the PSE was included in the policy by mistake. Malik was represented at the examination under oath by the same law firm which represented plaintiffs when the complaint was filed, throughout the litigation, and at trial. R. 424.

Seneca denied the claim by letter dated April 13, 2011. Seneca quoted the language of the PSE in the policy and asserted *inter alia* that plaintiffs breached the PSE by failing to maintain an automatic sprinkler in complete working order in the premises at the time of the fire. R. 2487-2492. Thus, plaintiffs and their attorney unquestionably knew the basis of Seneca's denial prior to the commencement of litigation.

The Complaint and Relevant Pre-Trial Proceedings

In a summons and complaint dated September 1, 2011, plaintiffs alleged that Seneca issued a policy which was in full force and effect on the date of the fire, that plaintiffs complied with all conditions precedent to coverage, including the PSE,[2] and that Seneca's failure to pay for the damages constituted a breach of contract. R. 2493-2496. If there were any truth to Malik's testimony at trial that it was a mistake to include the PSE in the policy, plaintiffs' attorney would have pleaded a cause of action for reformation in the alternative in the complaint. Notably, however, plaintiffs did not plead a cause of action for reformation of the policy, either based upon mistake by plaintiffs accompanied by fraud by Seneca, or based upon mutual mistake.

In its answer, Seneca denied the material allegations of the complaint and asserted several affirmative defenses. R. 2497-2504. The fourth affirmative defense quoted the language of the PSE and asserted that the policy did not provide coverage for the fire loss because plaintiffs failed to maintain an automatic sprinkler system in the premises, as required by the PSE. R. 2499-2500.

[2] The PSE is a condition precedent to coverage. Illinois Union Ins. Co. v. Grandview Palace Condominiums Assn., 155 A.D.3d 459 (1st Dept. 2017).

Pre-trial discovery revealed that Seneca retained a company to perform loss control inspections of the properties covered under the policy, including the premises. The report of the inspection of the premises, dated April 27, 2009, indicated that the automatic sprinkler system was out of service. R. 1801-1812. By letter dated April 30, 2009, Seneca advised Malik of the recommendations with respect to the premises. R. 2525-2527. Seneca issued similar recommendation letters to Malik with regard to the inspections of the other properties. R. 2047-2060. Although Seneca followed up with respect to some of the recommendations, it never followed up to determine if plaintiffs had taken any steps to put the automatic sprinkler system at the premises back in service. R. 2061. Nonetheless, Seneca elected not to cancel the policy because the premium was good, it had a good relationship with plaintiffs' insurance broker, Seneca had the protection of the PSE and believed the insured would comply with recommendations. R. 781.

On February 3, 2015, Malik was deposed. R. 445. Malik testified that he hired a company to inspect and maintain the automatic sprinkler system in the premises, as required by the PSE. R. 444-446. He never testified that the PSE was in the policy by mistake.

Seneca produced a copy of its underwriting file in April 2016. R. 2705. On November 28, 2016, plaintiffs served a Notice to Admit in which Seneca was asked to admit that it knew that the sprinkler system at the premises was not working and

had the right to cancel the policy, but failed to do so. R. 2508-2527. In its response, Seneca admitted that it learned that the sprinkler system in the premises was not working, but did not cancel the policy. R. 2528-2532.

In response to plaintiffs' demand, Seneca provided the last known address for Bob Guardino, the underwriter who had agreed to issue the policy and plaintiffs subpoenaed Guardino. R. 2694-2695. However, by letter dated October 5, 2016, Guardino's physician advised that Guardino had multiple health issues and could not submit to deposition. R. 2707-2708. Guardino also provided plaintiffs' attorney with a letter from the Social Security Administration which indicated that he had been found to be disabled as of November 2013. R. 2709. Seneca then offered to submit Carol Muller, a Vice President in the Underwriting Department, for a deposition. R. 2533-2535.

On April 5, 2017, plaintiffs' attorney deposed Muller. R. 670. She was questioned about the documents in the underwriting file and the reasons why Seneca elected not to cancel the policy, even though Seneca knew that the automatic sprinkler system at the premises was not working. Plaintiffs' attorney asked no questions about the possibility that the PSE was included in the policy by mistake. Indeed, Muller was extensively cross-examined at trial and there was no question

put to Muller about any testimony at her deposition about the possibility that a mistake had been made.[3]

On June 12, 2017, plaintiffs moved to dismiss Seneca's fourth affirmative defense on the ground that Seneca knew that the sprinkler system at the premises was out of service and had the right to cancel the policy, but failed to do so. R. 2547-2580. Plaintiffs did not assert that the PSE was included in the policy by mistake, or move to amend the complaint to plead a cause of action for reformation. Instead, plaintiffs' attorney admitted that the PSE was properly included in the policy. R. 2553-2556.

If there were any truth to Malik's testimony, offered for the first time at trial, that it had been a mistake to include the PSE in the policy, why would his attorney have argued that Seneca waived its right to rely on plaintiffs' breach of the PSE?

Simultaneously, Seneca moved for summary judgment on the ground that the testimony of retired New York City Fire Department Battalion Chief John Gleason established that the automatic sprinkler system on the premises was not working at the time of the fire and, therefore, plaintiffs breached the PSE. R. 2605-2606. In opposition, plaintiffs raised questions about Gleason's testimony and marshalled

[3] This is further proof of the unfair surprise and prejudice to Seneca because reformation was raised for the first time at trial.

other evidence which they alleged raised a question of fact as to whether plaintiffs breached the PSE. R. 2581-2601. Once again, however, plaintiffs never argued that the PSE was in the policy by mistake. R. 2581-2601.

The Court held that the issues of whether plaintiffs breached the PSE and whether Seneca waived its right to rely on the breach of the PSE presented questions of fact for the jury to resolve at trial. R. 2602-2612.

Clearly, therefore, it cannot reasonably be disputed that prior to trial, plaintiffs never asserted that the policy should be reformed because the PSE was in the policy by reason of a mutual mistake, or a mistake by plaintiffs accompanied by fraud by Seneca.

The Trial

Based upon the opening statement of plaintiffs' experienced and able trial attorney, as well as testimony he elicited from Malik, it became apparent to Seneca's attorney that plaintiffs were changing their theory of the case from breach of contract to reformation. Therefore, Seneca objected to the anticipated testimony of Muller relating to the reformation claim before she was called as a witness. R. 513-514; 519; 526-527; 538-539. The Court asked plaintiffs' attorney if he was changing his theory and the attorney replied "No, Judge," even though the attorney was clearly being disingenuous. R. 514. Unfortunately, the Trial Court apparently was

persuaded and overruled Seneca's objection to testimony from Muller on the new theory, stating "… I think [the reformation claim] is part and parcel of the whole thing." R. 514.

During trial, plaintiffs' attorney initially argued that the policy should be reformed because the PSE was included by reason of a mistake by Malik accompanied by fraud by Seneca. The attorney said:

> We contend [Seneca] slipped [the PSE] in after the policy was bound." R. 784.

Malik testified that he did not want to maintain a sprinkler in the premises and it was not his intent to obtain a policy which contained a PSE. R. 336;433. Thus, according to Malik, he did not know why the PSE would have ended up in the policy. R. 351.

Malik admitted that he received the policy prior to the fire, but asserted that he did not read it. R. 440, 776. Even if that were true, it is undisputed that Malik received Seneca's denial letter which quoted the PSE and stated that there was no coverage for the claim because plaintiffs had breached the PSE by failing to maintain the sprinkler system in the premises in complete working order at the time of the fire. R. 427-429; 431-433; 2487-2492.

Furthermore, it is also undisputed that plaintiffs' insurance broker also received the policy prior to the fire and did read the policy. R. 2620. Indeed, the

broker noted several mistakes, requested that Seneca correct them and Seneca did so. R. 2618-2622. At no time did the broker suggest that the PSE should not be in the policy.

Although Malik testified at trial that he told the broker that he did not want a PSE in the policy, R. 433-434, the broker never asked Seneca to delete the PSE. R. 2618-2621. Moreover, Malik understood that the broker had a duty to procure the policy Malik requested, but plaintiffs never made a claim against the broker in all the years since Seneca denied plaintiffs' claim. R.435-436. As this Court is aware, errors and omissions claims are common in situations when there is a *bona fide* belief that an insurance broker made a mistake or was negligent in the procurement of a policy and the insured has been damaged.

Seneca objected to any testimony from Muller with respect to reformation because that was a new claim advanced for the first time at trial, but the Court allowed such testimony. R. R. 513-514; 519; 526-527; 538-539. Muller testified that the PSE was in the policy to protect Seneca. R. 78; 783; 829. She also testified that the underwriting file did not contain an original quote letter to the broker, or a route sheet prior to the effective date of the policy which noted that the PSE was included in the policy, even though the file should have contained those documents. R. 855. Furthermore, she testified that the quote letter in the file did not contain the pertinent information. R. 775. However, Muller also testified that there was a quote

letter in the file, dated four days after the policy effective date, which did contain the pertinent information, including policy limits, policy endorsements and exclusions, which would enable a broker and an underwriter to agree upon the coverage and that document did include a reference to the PSE. R. 773-776. After repeatedly being asked, Muller then testified that inclusion of the PSE may have been a mistake. R. 831; 834-835; 854.

It bears repeating that the policy included the PSE and was delivered to plaintiffs and their insurance broker. R. 440; 2618-2620. The broker subsequently raised several issues with Seneca, but never said it was a mistake to include the PSE in the policy. R. 2618-2622. Furthermore, plaintiffs' attorney knew that Seneca had denied the claim *inter alia* on the ground that plaintiffs had breached the PSE by failing to maintain an automatic sprinkler system in complete working order in the premises at the time of the fire. R. 2487-2497. However, the complaint did not contain a cause of action for reformation, based on mutual mistake, or unilateral mistake by Malik accompanied by fraud by Seneca. R. 2493-2496.

Nevertheless, the Judge gave the jury a missing document charge which allowed the jury to draw the strongest possible inference against Seneca by reason of the absence of the quote letter or routing sheet. R. 1553-1554. However, the missing documents from the underwriting file were a red herring; if it were truly a mistake to include the PSE in the policy, plaintiffs' attorney had the requisite

knowledge and would have pleaded reformation in the complaint. Seneca would have then conducted discovery with respect to reformation.

During the charge conference, the Judge overruled Seneca's objection and decided to include a charge on reformation. R. 1305; 1311-1312. The verdict sheet included four questions for the jury to answer with respect to Seneca's potential liability, including whether the PSE was included in the policy by mistake, whether Seneca waived its right to enforce the PSE, whether Seneca should be estopped from relying on the PSE, and whether plaintiffs failed to maintain an automatic sprinkler system, in breach of the PSE. R. 2131-2135.

During summation, plaintiffs' attorney argued that it was important for the jury to answer all of the questions on the verdict sheet and that if the jury answered any of the questions as he would later propose, plaintiffs would win the case. R. 1455-1537. The attorney then discussed the individual fact issues which the jury had to resolve. He initially focused on the assertion that plaintiffs had exercised due diligence to maintain the automatic sprinkler system in the premises and, therefore, had not breached the PSE. R. 1465-1503. Only later in the summation did plaintiffs' attorney discuss the other issues which the jury had to resolve, including reformation. R. 1504-1521.

The jury unanimously concluded that plaintiffs had breached the PSE and that Seneca had not waived its right to enforce the PSE. R. 2133; 2135. Five out of six jurors agreed that Seneca should not be estopped from relying on the PSE. R. 2134. Conversely, five out of six jurors also agreed that it was a mistake to include the PSE in the policy. R. 2132. Thus, the policy was reformed to delete the PSE and judgment was ultimately entered in favor of plaintiffs.

Upon hearing the jury's answers to the questions posed on the verdict sheet, the Trial Court expressed its concern that reversible error had been committed in an off-the-record comment, but expressed the same concern on the record at the post-trial motion argument, as follows:

> "I don't know if I told you this at the trial, but, you know, the worst possible jury verdict we could have gotten for me getting reversed is what happened, actually, in terms of, you know, just cleanness and everything. So I do want to think about this very carefully." R. 1601-1602.

The Denial of Seneca's Post-Trial Motion

A careful review and analysis of the decision denying Seneca's post-trial motion to set aside the verdict in favor of plaintiffs on the issue of reformation and direct that judgment be entered in favor of Seneca as a matter of law clearly demonstrates that the Trial Court misunderstood the relevant facts and procedural history of the case and misconstrued the applicable legal principles. R. 28-31.

The Trial Court began by noting, as follows:

> The jury was asked three questions. In answer to the first question: "did plaintiff prove by clear and convincing evidence that the parties' true agreement was a Policy without a Protective Safeguard Endorsement, and that it was a mistake to include the Protective Safeguard Endorsement in the Policy," the jury answered "Yes." The jury answered "no" to questions two and three about Seneca's waiver and estoppel respectively. R. 29.

However, the Trial Court ignored that the jury was asked a fourth question as to whether plaintiffs had proven that they exercised due diligence in maintaining an automatic sprinkler system in the premises at the time of the fire. R. 2135. The jury unanimously answered that plaintiffs did not, which meant that plaintiffs had breached the PSE. R. 2135.

The Trial Court then noted, as follows:

> Plaintiff's reformation claim relates back to its original breach of contract claim. R.29.

However, and as demonstrated below, that is a misstatement of the applicable law. The original complaint, which pled a cause of action for breach of contract and alleged that plaintiffs had complied with all policy conditions, including the PSE, did not put Seneca on notice that plaintiffs would allege, for the first time at trial eight years later, that the policy should be reformed to delete the PSE because it was included in the policy by mistake. Therefore, plaintiffs' reformation claim did not relate back to their original breach of contract claim.

The Trial Court then noted, after marshaling some of the evidence, as follows:

> Defendant's underwriting files and the trial testimony demonstrated that the damaged premises did not have functioning sprinklers, that defendant was aware of this circumstance, but took no action. Given this evidence, the jury could have easily concluded that the PSE wound up in the policy by mistake. R. 30.

Those facts do not support the conclusion that the PSE was included in the policy by mistake. On the contrary, those facts support the argument that Seneca waived or should be estopped from relying on plaintiffs' alleged breach of the PSE. That is precisely the position plaintiffs took throughout the litigation and, in particular, on their motion to dismiss the affirmative defense in Seneca's answer that plaintiffs had breached the PSE. The Court below denied plaintiffs' motion to dismiss, holding that the issue of whether Seneca waived the right to enforce the PSE presented a question of fact for the jury to resolve at trial. R. 26012-2612. The jury found in its verdict that plaintiffs breached the PSE and that Seneca did not waive the PSE and should not be estopped from relying on the breach. R. 2133-2134.

The Trial Court then noted, as follows:

> This evidence was the same as that plaintiff used to support the original breach of contract claim. Plaintiff has contended from day one that the PSE was unenforceable. R. 30.

But this is simply wrong and reflects a fundamental misunderstanding of the litigation prior to trial. Throughout the litigation, plaintiffs acknowledged that the policy contained a PSE and alleged that they either complied with the PSE, or Seneca waived its right to enforce the PSE. To say that this means that plaintiffs contended that the PSE was unenforceable is sophistry.

Plaintiffs changed their position at trial to assert that the PSE was in the policy by mistake. Contrary to the Trial Court's decision, that is not the same as saying the PSE was properly included in the policy, but is unenforceable because of waiver or estoppel.

The Trial Court then noted, as follows:

> Essentially, reformation was a variation on the theory of breach of contract and was one, given the evidence, that fit the facts the best. Having litigated the case since 2010, defendant can claim no unfair surprise or prejudice from charging the jury to make a finding on mutual mistake. R. 30.

Once again, however, that is a misstatement of the applicable law. As noted below, a claim of reformation of an insurance policy is different than, and distinct from, a claim for breach of the policy. A claim of reformation is based upon a mistake in accurately setting forth the provisions of the policy. By contrast, a claim of breach of contract is based upon an acknowledgment that the policy accurately reflected the intent of the parties, but that one party failed to perform one of the policy provisions.

Furthermore, the Trial Court's misapprehension of the fundamental difference between claims of reformation and breach of contract undoubtedly explains the astounding assertion that Seneca can claim no unfair surprise or prejudice from the Trial Court's decision to charge the jury on mutual mistake, to support a claim of reformation. The Trial Court's assertion flies in the face of reality.

Finally, the Trial Court noted, as follows:

> Moreover, defendant can hardly complain about statute of limitations when it failed to turn over its underwriting file until 2016, even though plaintiff filed its complaint in 2011. R. 30.

This is a red herring. If, as Malik testified for the first time at trial, it was actually a mistake to include the PSE in the policy, plaintiffs would have pleaded a cause of action for reformation in the alternative in the complaint. Furthermore, even after plaintiffs received the underwriting file and deposed Muller, they did not seek to amend the complaint to assert a cause of action for reformation. Instead, plaintiffs moved to dismiss the affirmative defense relating to the PSE and argued that plaintiffs either complied with the PSE or Seneca waived its right to rely on their breach of the PSE.

ARGUMENT

THE TRIAL COURT ERRED IN SUBMITTING REFORMATION TO THE JURY AND DENYING SENECA'S POST-TRIAL MOTION

The Standard of Review

In reviewing discretionary decisions of the trial court, the Appellate Division has discretion to review the trial court's factual and legal decisions. Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 39 N.Y.2d 376 (1976); O'Connor v. Papertsian, 309 N.Y. 465 (1956); Rabouin v. Metropolitan Life Ins. Co., 25 A.D.3d 349 (1st Dept. 2006); Small v. Lorillard Tobacco Co., 94 N.Y.2d 43 (1st Dept. 1999). This Court has the power to decide whether the Trial Court providently exercised its discretion. Lariviere v. New York City Tr. Auth., 131 A.D.3d 1130 (2nd Dept. 2017).

Thus, this Court has discretion to review the factual and legal bases of the Trial Court's decisions to submit the issue of reformation to the jury and to deny Seneca's post-trial motion.

Seneca's post-trial motion presented the issues of whether plaintiffs' reformation claim related back to their breach of contract claim and whether plaintiffs' motion to amend the complaint to conform the pleadings to the proof should have been denied because the reformation claim was time barred, or because

Seneca had been prejudiced by the eight-year delay in seeking to plead and prove reformation.

The decision denying Seneca's motion must be reversed because it was based upon a fundamental misunderstanding of the relevant facts and legal principles and the few cases cited by the Trial Court are easily distinguishable.

Malik Received the Policy and is Presumed to have Consented to its Terms

It is a well-settled that an insured has an obligation to read the insurance policy and is presumed to have consented to its terms as a matter of law. Metzger v. Aetna Ins. Co., 227 N.Y. 411 (1920); Katz v. Am. Mayflower Life Ins. Co., 14 A.D.3d 195 (1st Dep't 2004); L.C.E.L. Collectibles v. American Ins. Co., 18 A.D.2d 196 (1st Dep't 1996); Mirabelli v. Merchants Ins. Co. of N.H., 55 A.D.3d 884 (2d Dep't 2008); Ciaramella v. State Farm Ins. Co., 273 A.D.2d 831 (4th Dep't 2000).

In I.C. ex rel. Solovsky v. Delta Galil USA, 135 F.Supp.3d 196 (S.D.N.Y. 2015), the Court found that since plaintiff did not assert in the complaint that there had been fraud or mutual mistake in the formation of the agreement, it was conclusively presumed that plaintiff had assented to the terms of the agreement.

Similarly, the Court in Mirabelli v. Merchants Ins. Co. of N.H., 2007 N.Y. Misc. LEXIS 9469 (Suff. Co. 2007), affd., 55 A.D.3d 884 (2d Dep't 2008), held that "[o]nce plaintiffs received the policy, they were presumed to have known its

contents, including its Protective Safeguards Endorsement, and to have assented to them."

Here, it is undisputed that Malik received the policy prior to the fire. "Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations." Ciaramella, supra, 273 A.D.2d at 832. Therefore, Malik is presumed to have read the Seneca policy and to have consented to its terms, including, specifically, the PSE. As noted, plaintiffs' broker also read the policy and pointed out several mistakes, but never said the PSE was included in the policy by mistake. Furthermore, plaintiffs' attorney also knew that Seneca had asserted in its denial of the claim that plaintiffs had breached the PSE by failing to maintain an automatic sprinkler system in complete working order in the premises at the time of the fire. However, the complaint drafted by the attorney asserted that plaintiffs had complied with all policy conditions, which necessarily included the PSE.

Plaintiffs' Reformation Claim Was Time-Barred

Under New York CPLR 213(6), a claim for mistake is governed by a six-year Statute of Limitations. A claim for reformation based on mutual mistake is also governed by a six-year Statute of Limitations. Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995).

An action to reform a contract based on mutual mistake accrues on the date the mistake was made. Wallace, *supra*; 1414 APF, LLC v. Deer Stags, Inc., 39

A.D.3d 329 (1st Dept. 2007); National Amusements v. South Bronx, 253 A.D.2d 358 (1st Dept. 1998).

Thus, the cause of action accrued when the alleged mistake was made – on or prior to April 1, 2009 - when the policy including the PSE was issued and delivered to plaintiffs. The Statute of Limitations expired on or about April 1, 2015 and the reformation claim was barred. Malik never moved to amend the complaint prior to April 1, 2015; indeed, Malik continued to litigate the case based only upon a cause of action for breach of contract and the allegation that plaintiffs complied with all policy conditions, including the PSE, at least until trial began in March 2019.

In denying Seneca's post-trial motion, the Trial Court said that Seneca "can hardly complain about statute of limitations when it failed to turn over the underwriting file until 2016, even though plaintiff filed its complaint in 2011." R. 29-30. Incredibly, the Judge ignored the fact that if there were any truth to Malik's trial testimony that it was a mistake to include the PSE in the policy, plaintiffs could have pleaded reformation in the complaint. Therefore, any delay in producing the underwriting file was irrelevant to the timeliness of plaintiffs' reformation claim.

Even after receiving the underwriting file, plaintiffs never questioned Muller at her deposition about whether the PSE was included in the policy by mistake. Moreover, plaintiffs never moved for leave to amend the complaint to add

reformation after receiving the underwriting file and deposing Muller. This is further proof that plaintiffs asserted a new claim at trial and that Seneca was prejudiced thereby.

The Relation Back Doctrine Does Not Apply

Plaintiffs' complaint pleaded a single cause of action for breach of contract. In order to establish breach of contract, plaintiffs are required to prove: (1) the existence of a binding contract; (2) that plaintiffs complied with all contractual conditions; (3) that defendant breached the contract; and (4) damages that result from the breach. Harris v. Seward Park Hous. Corp., 79 A.D. 3d 425 (1st Dept. 2010).

By contrast, a cause of action for reformation of a contract occurs when the written instrument fails to conform to the agreement between the parties as a consequence of the mutual mistake of the parties, or the mistake of one party and fraud of the other. Chimart Associates v. Paul, 66 N.Y. 2d 570 (1986); Albany City Sav. Institution v. Burdick, 87 N.Y. 40 (1881). Reformation based upon mutual mistake is appropriate where the parties reached an oral agreement, but unknown to either, the signed writing does not express that agreement. In a case of fraud, the parties have reached an agreement and, unknown to one party but known to the other, who misled the first, the subsequent writing does not properly express the agreement. Chimart Associates, supra.

It is well settled that a claim for breach of contract and a claim for reformation do not arise out of the same transactions or occurrences. Davis v. Davis, 95 A.D.2d 674 (1st Dept. 1983). The breach of contract claim relates to performance under the contract, while the reformation claim relates to the negotiation and articulation of the agreement made between the parties prior to execution of the contract. SCM Corp. v. Fisher Park Lane Co., 40 N.Y. 2d 788 (1976).

CPLR 203(f) is the codification of the relation back doctrine and provides that a claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading were interposed, unless the original pleading did not give notice of the transactions or occurrences underlying the new claim. The relation back doctrine enables a plaintiff to correct a pleading error by adding a new claim after the Statute of Limitations has expired and gives the Court discretion to not enforce the Statute of Limitations if the defendant will not be prejudiced. Buran v. Coupal, 87 N.Y. 2d 173 (1995).

However, the relation back doctrine is inapplicable if the facts alleged in the original complaint fail to give notice of the facts necessary to support the allegations in the amended complaint. Lang-Salgado v. Mount Sinai Med. Ctr., Inc., 157 A.D.3d 532 (1st Dept. 2018); Martin v. City of New York, 153 A.D.3d 693 (2nd Dept. 2017); Jolly v. Russell, 203 A.D.2d 527 (2nd Dept. 2004); Infurna v. City of New York, 270 A.D.2d 24 (1st Dept. 2000).

In Levy v. Kendricks, 170 A.D.2d 387 (1st Dept. 1991), this Court held that plaintiff's claim related to its right to performance under the terms of an agreement and a counterclaim arising out of the negotiations leading up to the execution of the agreement did not arise out of the same occurrence or transaction. See also, 182 Franklin St. Holding Corp. v. Franklin Pierrepont Assocs., 217 A.D.2d 508 (1st Dept. 1995) (a party which is not seeking to enforce any right under the same agreement, but rather seeking to reform the agreement, is not entitled to amend the complaint).

In Prospect Group, Inc. v. Kirby, 1992 U.S. Dist. LEXIS 19898 (SDNY 1992), the tenant brought a claim for specific performance under the contract and the landlord moved to amend its counterclaims to include an allegation of reformation after the Statute of Limitations had expired. The Court denied the motion and held:

> "[Landlord's] claim for reformation …does not seek a recovery-back predicated on some act or fact growing out of the matter constituting the cause or ground of the action brought, but is instead a set-off--a separate and distinct claim in favor of the landlord. . . . The tenant's claim relates to performance under the contract; the landlord's relates to the negotiation and articulation of the agreement made between the parties prior to its execution. While in a most general sense both might be said to be associated with the lease … the claims do not arise out of the same transactions or occurrences."

Prospect Group, Inc. v. Kirby, 1992 U.S. Dist. LEXIS 19898, *32

In New York Univ. v. Factory Mut. Ins. Co., 2018 U.S. Dist. LEXIS 53418 (S.D.N.Y. 2018), plaintiff's original complaint alleged that defendant wrongfully denied coverage under a provision of the insurance policy, which constituted a breach of contract. After over a year of litigation, plaintiff moved to amend the complaint to assert a claim for reformation, which was time-barred. The Court denied the motion and held that the insurance company's denial of coverage and the reformation claim involved unrelated facts involving the representations made prior to the policy being created.

The Court in First Nat'l Bank v. Volpe, 217 A.D.2d 967 (4th Dept. 1995) found that the original complaint, which alleged that the defendants breached their obligations under the notes and guarantees, did not give notice of the same transaction or occurrence sought to be proved by the proposed amendment, which alleged a mistake in the formation or articulation of the contract.

Similarly, when the proposed cause of action in the amended complaint does not arise out of the same transaction or occurrence as the cause of action in the original complaint, the motion to amend should be denied. In Lang-Salgado, supra, this Court held that the original complaint, which alleged negligence by an X-ray technician, did not give notice of the transaction or occurrence to be proved with respect to the proposed cause of action alleging negligent hiring and supervision. In Infurna, supra, this Court held that a claim of negligence in the original complaint

did not give defendant notice of the proposed amended claim of negligent hiring and supervision.

In Martin, supra, the Court held that the allegations in the original complaint that plaintiff was falsely arrested and imprisoned did not give notice of the transaction or occurrences to be proven with respect to the proposed cause of action for malicious prosecution. In Jolly, supra, the Court held that the claim of negligence in the original complaint did not give defendant notice of the claim of lack of informed consent in the proposed amended complaint since they are distinct causes of action.

Here, the Trial Court ignored these controlling precedents and held that plaintiffs' reformation claim related back to their original breach of contract claim, citing three cases, each of which is readily distinguishable. In O'Halloran v. Metropolitan Transp. Auth., 154 A.D.3d 83 (1st Dept. 2017), plaintiff's original complaint alleged discrimination on the basis of gender, while the amended complaint alleged discrimination on the basis of sexual orientation. This Court held that it was proper to allow the amendment because the original pleading gave defendants notice of the occurrences plaintiff sought to prove in her amended complaint. It made no legal difference if the basis of the discrimination was because plaintiff was a woman, or because she was a lesbian.

In Cheperuk v. Liberty Mut. Fire Ins. Co., 263 A.D.2d 748 (3rd Dept. 1999), plaintiff's homeowner's insurance policy listed the mortgagee, but when the mortgage was assigned to a new lender, the policy was not amended to reflect the change. Plaintiff's home was destroyed by fire, but defendant denied plaintiff's claim because the mortgagee was not listed on the policy. Plaintiff filed suit and subsequently filed an amended complaint in which he sought to reform the policy to reflect the correct mortgagee. The Court held that reformation was appropriate to correct an obvious inadvertent mistake because the facts supporting the amended cause of action were specifically included in the original complaint. Thus, the original complaint put the defendant on notice that both parties intended that the policy was to include the mortgagee.

Abrams v. Maryland Casualty Co., 300 N.Y. 80 (1949) was a convoluted litigation. Eventually, the Court of Appeals held that the claim in the amended complaint was essentially the same as the claim in the original complaint for Statute of Limitations purposes because both claims asserted that the employee of the truck driver who caused the accident was covered under the policy issued by defendant, which was at all times apprised of the nature of plaintiff's claim.

Here, by contrast, plaintiffs' complaint and all pre-trial proceedings over eight years were based upon a claim of breach of contract and compliance with all policy conditions, including the PSE. Until trial began, plaintiffs never asserted that the

PSE was included in the policy by mistake. Rather, plaintiffs asserted that they either complied with the PSE, or that Seneca waived its right to rely on the breach of the PSE, because it learned that the sprinkler system was not working shortly after policy inception, never followed up to determine if plaintiffs had repaired the system, and did not cancel the policy. R. 2547-2601. Plaintiffs' assertions throughout the litigation directly contradict their reformation claim advanced for the first time at trial.

Clearly, the allegations in the original complaint did not give Seneca notice that plaintiffs would allege at trial that the PSE was included in the policy by mistake and the policy should be reformed. Therefore, the Trial Court erred when it submitted reformation to the jury and when it denied Seneca's post-trial motion based upon the relation back doctrine.

Seneca was Irreversibly Prejudiced by Plaintiffs'
Eight Year Delay in Pleading Reformation

Courts have recognized that a party is prejudiced when a case is decided on a theory which the opposing party presents for the first time at trial. See e.g., D'Angelo v. D'Angelo, 109 A.D.2d 773 (2nd Dept. 1985); Xavier v. Grunberg, 67 A.D.2d 632 (1st Dept. 1979).

In the decision denying Seneca's post-trial motion, the Trial Court did not even directly address the obvious prejudice to Seneca as a result of plaintiffs' lengthy delay in seeking to plead reformation. R. 28-31. Instead, the Trial Court merely asserted that the evidence as to reformation was the same as that used to support plaintiffs' original breach of contract claim and that plaintiffs had contended from day one that the PSE was unenforceable. Thus, the Trial Court held that having litigated the case since 2010, Seneca cannot claim unfair surprise or prejudice from her decision to charge the jury on reformation. R. 28-31.

Incredibly, the Trial Court totally misunderstood the different facts underlying plaintiffs' claim for breach of contract from the facts underlying the reformation claim. Plaintiffs did not initially contend that the PSE was unenforceable. R. 2493-2496. Rather, plaintiffs acknowledged that the PSE was properly in the policy and contended that they complied with all conditions precedent to coverage, including the PSE, or that Seneca waived its right to rely on a breach of the PSE. R. 2547-2601. Plaintiffs' contention prior to trial is the direct opposite of what the Trial Court incorrectly believed.

Equally incredibly, the Trial Court also ignored the applicable legal principles. Contrary to the Trial Court's holding, a claim for reformation is not a variation on a claim for breach of contract. As noted above, these claims do not arise out of the same transactions or occurrences. A claim of breach of contract relates to

performance of the contract, while a claim of reformation relates to the negotiations for the contract and asserts that there was a mistake in the formation of the contract.

Furthermore, the Trial Court also ignored the fact that a claim of reformation may be based upon mutual mistake, or unilateral mistake by one party and fraud of the other party. If, as Malik testified for the first time at trial, he truly believed that it was a mistake to include the PSE in the policy, plaintiffs could have pleaded a cause of action for reformation in the alternative in the complaint.

The prejudice to Seneca must be viewed in the context of the steps Seneca would have taken to defend against plaintiffs' reformation claim had reformation been pleaded in the alternative in the complaint. Seneca would have questioned Malik at his deposition about his allegation that it was a mistake to include the PSE and about his communications with his insurance brokers with respect to the alleged mistake.

Seneca would have sought all communications between plaintiffs' insurance brokers and Seneca's underwriter, Bob Guardino, about the alleged mistake in including the PSE. Seneca would have also deposed Denise Frayman and Fran Solomon of JFA, plaintiffs' brokers, and Guardino – the two parties who negotiated and agreed to the policy and who allegedly included the PSE by mistake. Clearly, however, Seneca had no reason to question Guardino or plaintiffs' brokers about

whether the PSE was included in the policy by mistake, so as to support a claim of reformation, since the only cause of action in the complaint was for breach of contract.

A review of the evidence and the verdict demonstrates the extent to which Seneca was prejudiced by the new reformation claim and the new facts relating to mistake at trial. By the verdict, the jury concluded that plaintiffs had failed to prove that they complied with the PSE and that plaintiffs also failed to prove that Seneca waived its right to enforce the PSE, or should be estopped from doing so.

As to the reformation claim, the only testimonial evidence that Seneca made a mistake by including the PSE in the policy came from Carol Muller, who initially said that she "would have no idea if [Bob Guardino] made a mistake [by including the PSE], but subsequently said it was possible that "could [including the PSE] have been a mistake? I guess so." R. 2648.

Anything is possible, but such speculation is not evidence. Thus, it is highly likely, if not a virtual certainty, that the basis of the jury verdict that the PSE was included in the policy by reason of mutual mistake had to have been the adverse inference which the jury was entitled to draw against Seneca under the missing document charge relating to the quote letter and route sheet which were not in the underwriting file. R. 1325-1333.

Had reformation been included in the original complaint, Seneca would have obtained the communications between plaintiffs' insurance brokers, Frayman and Solomon, and Guardino, Seneca's underwriter, and deposed them about the inclusion of the PSE in the policy. Importantly, the quote letter, dated April 5, 2013 included all of the terms which the brokers would have needed to review in order to determine if they should accept the policy on behalf of plaintiffs. Plaintiffs' attorney argued that Seneca snuck in the PSE in that document and it was of no consequence because it was dated several days after the effective date of the policy. Plaintiffs' brokers or Guardino could have explained all of the negotiations relating to the terms and conditions to be included in the policy and the importance of that document.

Guardino was still employed by Seneca when the complaint was filed in September of 2011. His last day with Seneca was March 1, 2013. Thus, had plaintiffs originally pleaded a claim for reformation, or sought to amend the complaint to plead reformation prior to March 1, 2013, Seneca could have interviewed Guardino about his communications with plaintiffs' broker and whether or not the PSE was supposed to be included in the policy. Seneca could have also questioned Guardino about the quote letter and route sheet which were missing from the underwriting file when Seneca later produced it. Guardino may have had copies of those documents, or an innocent explanation as to why they were not in the underwriting file, or he may have recalled conversations with the broker on that

issue. Seneca could also have questioned the brokers about these issues and subpoenaed their records.

During trial, the Court recognized the prejudice to Seneca because Guardino was the only potential Seneca witness with first-hand knowledge about whether the PSE was supposed to be included in the policy, but he did not testify. R. 1321. But Guardino could not have testified at trial in 2019 with respect to communications with the brokers about a policy which went into effect in 2009 in light of the multiple serious health issues which led plaintiffs' attorney to depose Muller in 2017 instead of Guardino. R. 2706 - 2709.

Clearly, therefore, if Malik's trial testimony that it was a mistake to include the PSE were true, Seneca was irreversibly prejudiced because it was deprived of an opportunity to develop the potential defenses to plaintiffs' claim for reformation when the claim should have been made – in the complaint filed in 2011. By the time the reformation claim was belatedly asserted at trial in 2019, Seneca had no opportunity to defend against the claim. This is crucial.

The Trial Court cited only one case - Cheperuk v. Liberty Mut. Fire Ins. Co., 263 A.D. 2d 748 (3rd Dept. 1990) - to support its holding that Seneca cannot claim prejudice, but that case is readily distinguishable. As noted above, Cheperuk merely involved an innocent mistake in failing to amend an insurance policy, which

originally included a mortgagee, to reflect the name of the new mortgagee. Thus, the insurance company could not conceivably claim prejudice because of a ministerial error since it always intended to include the mortgagee in the policy. Since there was no prejudice, reformation was appropriate.

Here, by contrast, the facts supporting plaintiffs' breach of contract claim were totally different than the facts supporting plaintiffs' reformation claim. Thus, the complaint did not put Seneca on notice of a reformation claim. Clearly, therefore, Seneca was substantially and irreversibly prejudiced by plaintiffs' lengthy delay in seeking to plead reformation.

CONCLUSION

Throughout the eight years of litigation prior to trial, the case proceeded on plaintiffs' breach of contract claim. Thus, plaintiffs acknowledged that they complied with all policy conditions, including the PSE, but that Seneca waived its right to enforce the PSE because Seneca knew that the automatic sprinkler system at the premises was not in complete working order at the time of the fire, but failed to cancel the policy.

For the first time at trial, plaintiffs asserted that it had been a mistake to include the PSE in the policy. The Trial Court decision to grant plaintiffs' motion to amend the complaint to conform the pleadings to the proof and to submit the issue of mutual mistake to the jury, as well as the decision denying Seneca's post-trial motion, were made under the mistaken belief that the reformation claim related back to the breach of contract claim and was not time-barred and that Seneca was not prejudiced by the eight - year delay in making the reformation claim. The Trial Court misunderstood the facts and misapprehended the controlling legal principles.

Accordingly, Seneca Insurance Company respectfully submits that the Trial Court's decision to submit the issue of mutual mistake to the jury and its denial of Seneca's post-trial motion to set aside the verdict constituted reversible error as a matter of law. In light of the jury verdict that plaintiffs breached the PSE, that

Seneca did not waive the right to enforce the PSE and should not be estopped from doing so, judgment should be entered in favor of Seneca.

Dated: New York, New York
July 23, 2020

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

Supreme Court of the State of New York
Appellate Division – First Department

34-06 73, LLC, BUD MEDIA, LLC and
COORS MEDIA, LLC,

Plaintiffs-Respondents,

- against -

SENECA INSURANCE COMPANY,

Defendant-Appellant.

1. The index number of the case in the court below is 652422/2011.

2. The full names of the original parties are set forth above. There have been no changes.

3. This action was commenced in Supreme Court of the State of New York, New York County.

4. The action was commenced on or about September 1, 2011 by filing of a Summons and Complaint. Issue was then joined on or about October 5, 2011 by service of an Answer.

5. This is an action by an insurance coverage dispute.

6. The appeal is from the Final Judgment of the Honorable Melissa A. Crane, dated and entered December 4, 2019.

7. The appeal is being perfected on a full reproduced record.