SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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

Plaintiffs-Respondents,

against

SENECA INSURANCE COMPANY,

Defendant-Appellant.

--X

Appellate Division Case No. 2019-04601

New York County Clerk's Index No. 652422/11

AFFIRMATION IN SUPPORT OF MOTION FOR REARGUMENT OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

CHRISTOPHER R. CARROLL, 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 pursuant to CPLR § 2106:

1. I am a member of the law firm Kennedys CMK LLP, attorneys for Defendant-Appellant, Seneca Insurance Company ("Seneca") and, as such, I am fully familiar with the facts and circumstances surrounding this matter, with the source of my knowledge being the records and files received by my office in the course of handling this matter.

2. I respectfully submit this Affirmation in support of Seneca's Motion for Reargument of this Court's January 28, 2021 Decision and Order affirming the Trial Court's decision dated October 18, 2019, and final judgment entered on December

4, 2019 or, in the alternative, granting Seneca leave to appeal to the New York State Court of Appeals.

I. PRELIMINARY STATEMENT

3. When the Plaintiffs, 34-06 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs"), filed this action, they asserted one count—breach of contract.

4. In the Complaint, Plaintiffs alleged that five months after Seneca issued a policy to them, they submitted a fire loss claim to Seneca and that, despite allegedly complying with all of the conditions precedent and subsequent in the policy, Seneca refused to pay the claim in breach of the policy. Noticeably absent from the three-page Complaint are any allegations related to what took place leading up to the issuance of the Policy. Plaintiffs never amended their Complaint throughout the course of discovery to add any additional facts or causes of action. Instead, after resting at trial, Plaintiffs sought to amend their Complaint to assert a reformation claim for the very first time.

5. CPLR § 3025(c) does not permit amendment where, as here, Plaintiffs never pleaded any of the facts necessary to support the reformation claim. Seneca was never put on notice that Plaintiffs planned to pursue a reformation claim. As such, Seneca was necessarily prejudiced because it could not properly defend the claim raised for the first time at trial, in part given that such a defense relies upon

the memories of witnesses which naturally fade over time (in this case, over ten years). Moreover, under well-established New York law, the reformation claim was time barred because the statute of limitations on that claim ran from when the mistake allegedly occurred – April 1, 2009 (the date the policy was issued). When Seneca produced the underwriting file in connection with this action is irrelevant to the question of timeliness because, while that file may have been necessary to prove the reformation claim, it was not necessary to assert the claim. Plaintiffs had sufficient information to assert a reformation claim before commencing this action and clearly failed to act diligently in asserting that a mistake had been made. The reformation claim is not saved by the relation back doctrine because it involves transactions or occurrences that are distinct from the only claim raised in the Complaint—breach of contract.

6. Nonetheless, this Court affirmed the Trial Court's decision to allow the amendment eight years after this lawsuit was instituted and to enter judgment against Seneca on the reformation claim. In coming to its Decision, respectfully, this Court conflated CPLR § 3025(c) and CPLR § 203(f), improperly finding that CPLR § 3025(c) was satisfied because the reformation claim related back to the Complaint pursuant to CPLR § 203(f). This Court should have engaged in separate analyses of CPLR § 3025(c) and CPLR § 203(f) and, if it did so, it would not have had to go beyond CPLR § 3025 because although amendment is to be freely given, it is not to

be given when the claim sought to be added at trial is based upon facts not previously pled. Here, Plaintiffs failed to plead any facts that would give notice to Seneca that Plaintiffs ever had any intention of pursuing a reformation claim.

7. Moreover, if Mr. Malik was testifying on behalf of Plaintiffs truthfully at trial: (a) that he never intended to insure the premises as a sprinklered building; (b) that he communicated this to his broker; (c) that he believed the broker communicated this to Seneca; and (d) that the policy still contained the Protective Safeguards Endorsement ("PSE"), Plaintiffs had all of the "facts" necessary to assert a reformation claim when they first filed the Complaint. New York law does not permit waiting to assert a claim until after resting at trial when the information necessary to assert the claim is in the possession of the plaintiffs long before trial. By affirming the Trial Court's decision to allow the amendment, the Plaintiffs have improperly been rewarded for their gamesmanship in waiting until trial to ask the key questions related to a new legal theory they had in their back pocket the entire litigation. This is the exact type of surprise that this Court should forbid.

8. Even if an analysis of the relation back doctrine was necessary, it is respectfully submitted that this Court misapprehended and/or overlooked New York law establishing that reformation claims do not, by their very nature, relate back to breach of contract claims. In fact, this Court's decision was inconsistent with the Court of Appeals' decision in Matter of SCM Corp. (Fischer Park Lane Co.), 40

N.Y.2d 788 (1976), which established that reformation claims do not relate back to breach of contract claims, and which consistently has been cited by this Court for that proposition in more recent years. Reformation claims are distinct claims which must be pled separately, in a timely manner, and arise out of distinct transactions or occurrences. There is simply no support for finding that Seneca should have been on notice that Plaintiffs might pursue a reformation claim when the Complaint did not contain any allegations related to the procurement and issuance of the policy let alone allegations of a potential mistake. Moreover, Plaintiffs never asserted any facts that supported their reformation claim in any subsequent pleading, motion, or pre-trial submissions.

9. Accordingly, this Court should permit reargument of its Decision and Order and, upon doing so, reverse the Trial Court's decision allowing the amendment to assert a reformation claim, and enter judgment in favor of Seneca because reformation was the only claim on which the jury found against Seneca, despite considering each of the other claims (breach of contract, waiver, and estoppel) independently as instructed. To the extent that this Court denies Seneca's Motion to Reargue, Seneca seeks permission to appeal this Court's Decision and Order to the Court of Appeals.

II. STATEMENT OF FACTS

A. THE POLICY

10. Seneca issued a commercial policy to Plaintiffs, policy number FTZ 1000661, with effective dates of April 1, 2009 to April 1, 2010 (the "Policy"). (R. 1642.) The Policy contains a Commercial Property Coverage Part, which provides, among other things, building coverage for 50-09 27th Street, Long Island City, New York 11101 (the "Premises") in the amount of $4,000,000. (R. 1656-1657.)

11. The Policy undisputedly did, at all times, contain a PSE, which is specifically applicable to the Commercial Property Coverage Part. (R. 1650.) The PSE provides, in relevant part:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROTECTIVE SAFEGUARDS

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
FARM COVERAGE PART

SCHEDULE*

Prem. No.	Bldg. No.	Protective Safeguards Symbols Applicable
1, 3, 6-11, 13	1	"P-1" & "P-9"

Describe any "P-9": Heating System

* Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.

A. The following is added to the:

Commercial Property Conditions

***

PROTECTIVE SAFEGUARDS

1. As a condition of this insurance, you are required to maintain the protective devices or services listed in the Schedule above.

2. The protective safeguards to which this endorsement applies are identified by the following symbols:

"P-1" Automatic Sprinkler System, including related supervisory services.

Automatic Sprinkler System means:

a. Any automatic fire protective or extinguishing system, including connected:

(1) Sprinklers and discharge nozzles;

(2) Ducts, pipes, valves and fittings;

(3) Tanks, their component parts and supports; and

(4) Pumps and private fire protection mains.

b. When supplied from an automatic fire protective system:

(1) Non-automatic fire protective systems; and

(2) Hydrants, standpipes and outlets.

***

"P-9" The protective system described in the Schedule.

B. The following is added to the EXCLUSIONS section of:

CAUSES OF LOSS – BASIC FORM

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We will not pay for loss or damage caused by or resulting from fire if, prior to the fire you:

1. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify us of that fact; or

2. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

If part of an Automatic Sprinkler System is shut off due to breakage, leakage, freezing conditions or opening of sprinkler heads, notification to us will not be necessary if you can restore full protection within 48 hours.

(R. 1650-1651.)

B. THE FIRE AND SENECA'S DISCLAIMER

12. On or about September 8, 2009, a fire occurred at the Premises. (R. 2494.) Plaintiffs submitted a claim to Seneca in connection with damages sustained as a result of the fire.

13. Seneca investigated the claim and during its investigation, learned that the building did not contain an operational sprinkler system at the time of the fire,

notwithstanding a recommendation provided by Seneca five months earlier that the Plaintiffs should have the sprinkler system checked. (R. 2487, 2492.)

14. After completing its investigation, on April 13, 2011, Seneca advised Plaintiffs that there was no coverage for the claim. (R. 2487-2492.) In the April 13, 2011 disclaimer letter, Seneca quoted the PSE, among other policy terms, and stated that "Seneca will not pay for any loss or damage caused by fire because you did not maintain the sprinkler system 'in complete working order[,]'" as required by the PSE. (R. 2492.)

C. THE PLEADINGS

15. On or about September 1, 2011, Plaintiffs instituted the instant matter by filing a Complaint against Seneca in the Supreme Court of the State of New York County of New York under Index No. 652422/2011. (R. 2493.)

16. Plaintiffs alleged that the fire loss "was a peril insured against under the Policy" and that they "sustained a covered loss in the amount to be determined but believed to exceed $2,481,395.63." (R. 2492.) They further alleged that "[a]lthough Plaintiffs timely submitted a claim to Defendant for its property damage in connection with its September 8, 2009 loss, Defendant to date has failed to pay the aforesaid claim." (Id.) Plaintiffs alleged that they "complied with all of the conditions precedent and subsequent pursuant to the terms of the subject policy of insurance." (Id.) Plaintiffs then alleged that Seneca's "failure to indemnify

Plaintiffs for its loss constitutes a breach of contract." (Id.) As a result of the alleged breach, Plaintiffs claimed to have suffered property damages in excess of $2,481,395.63. (Id.)

17. The Complaint is solely focused on what took place after the fire loss on September 8, 2009. The Complaint does not contain any factual allegations related to interactions between Seneca and Plaintiffs at any time prior to or on April 1, 2009, the date the Policy went into effect. The Complaint is devoid of any allegations related to the negotiation or issuance of the Policy.

18. On or about October 5, 2011, Seneca filed its Answer to the Complaint. (R. 2497.) The Fourth Affirmative Defense in the Answer quotes the PSE and states that "Plaintiffs, and/or their agents failed to maintain an 'Automatic Sprinkler System' as required by the Policy and thus, the Policy does not provide coverage to plaintiffs." (R. 2500.)

19. The Complaint and Seneca's Answer remained the operative pleadings for the entirety of the case and are what guided discovery and preparation for trial.

D. PRE-TRIAL DISCOVERY AND MOTION PRACTICE

20. 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 company inspected the Premises on April 27, 2009 (after the Policy was issued with a PSE) and the inspection revealed that the automatic sprinkler

system was out of service. (R. 1801.) Based upon the report, on August 30, 2009, Seneca sent a letter to Mr. Malik which set forth a list of recommendations, including to "[m]ake the [*sic*] insurer aware that the fire sprinkler system is currently out of service." (R. 2526.)

21. Seneca was under no obligation to either do the inspection post-policy issuance or to follow up with Plaintiffs with respect to the sprinkler system recommendation, largely because Seneca had the protection of the PSE, but believed the insured would comply with the recommendations. (R. 781.)

22. Mr. Malik was deposed on February 3, 2015. (R. 445.) Mr. Malik testified at his deposition that he retained a company to perform inspections of the automatic sprinkler system because of the requirement in the PSE that he had to maintain an automatic sprinkler system at the Premises. (R. 446.) Mr. Malik did not reveal in written discovery or at his deposition that it was his position that the PSE should not have been in the Policy (indeed, Plaintiffs have never claimed that they raised this position at any time prior to trial).

23. On April 28, 2016, Seneca produced a copy of its underwriting file to Plaintiffs. (R. 2705.)

24. On August 31, 2016, the Plaintiffs subpoenaed the deposition of Robert Guardino, the Seneca underwriter who was responsible for issuing the Policy. (R.

2694.) Given certain health issues, Mr. Guardino was unable to be deposed. (R. 2707-2709.)

25. As a result, Seneca offered and the Plaintiffs chose to proceed with the deposition of Carol Muller, a Vice President in the Underwriting Department, on April 5, 2017. (R. 2533-545; R. 670.) Plaintiffs had access to the underwriting file at the time of Ms. Muller's deposition and were able to question her regarding anything contained therein or anything they thought might be missing. Plaintiffs did not ask any questions that went to the issue of whether it may have been a mistake to include the PSE in the Policy (nor have Plaintiffs claimed they ever broached the subject with Ms. Muller (or anyone else at Seneca) prior to trial).

26. On June 12, 2017, the Plaintiffs moved to dismiss Seneca's Fourth Affirmative Defense (that the PSE bars coverage for Plaintiffs' claim) on the basis that Seneca waived its right to enforce the PSE. (R. 2547-2566.) In their memorandum of law in support, the Plaintiffs argued that the Motion Court should dismiss the Fourth Affirmative Defense because Seneca "waived its right to disclaim coverage on [the basis of the PSE] when, despite its 'knowledge' of Plaintiffs' alleged non-compliance, it chose not to exercise its ***right*** [to] cancel Plaintiffs' policy of insurance and instead accepted the premium from Plaintiffs." (R. 2551.) (Emphasis added.)

27. Plaintiffs stated that the evidence of waiver was the following:

- [T]hrough the Notice to Admit propounded by Plaintiffs, Defendant admits that it was aware that the fire sprinkler system was not in working order during the first sixty (60) days of the policy period and that it was aware of its right to cancel the policy within that period. Nevertheless, Defendant continued to provide insurance to Plaintiffs and accept the nice-sized premium for the policy.

- At her deposition, Carol Muller, on behalf of Defendant, testified that even though Defendant was aware of its right to cancel the policy under New York Insurance Law, it only sent out a recommendation letter to Plaintiffs that included the recommendation to restore the fire sprinkler system to working order, did not follow up to ensure that the recommendations at the property at issue were complied with and accepted the premium from Plaintiffs.

(R. 2551-2552; R. 2557-2558.)

28. Plaintiffs admitted that the Policy contained a PSE. (R. 2553.) Plaintiffs also admitted that they were "***required*** under the Protective Safeguards Endorsement to have an 'Automatic Sprinkler System,' in working order." (R. 2554.) (Emphasis added.)

29. Plaintiffs went on to assert 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.)

30. In their reply memorandum of law, Plaintiffs contended that "Defendant's Opposition further supports Plaintiffs' position that Defendant knowingly, voluntarily and intentionally abandoned ***its right to decline coverage based upon the Protective Safeguards Endorsement in the policy***" and that "[i]t is uncontroverted that Defendant was aware of Plaintiffs' alleged noncompliance with the Protective Safeguards Endorsement ***requirement*** that Plaintiffs maintain a working fire sprinkler system at the property at issue . . ." (R. 2570.) (Emphasis added.)

31. Plaintiffs admitted, throughout their moving and reply papers, that the PSE was properly in the Policy; that the PSE required them to maintain a functioning sprinkler system; and that had Seneca cancelled the Policy after learning the sprinkler system was not in working order, Seneca would have been entitled to do so. (R. 2547-2579.)

32. In connection with their motion, Plaintiffs presented absolutely no facts or arguments with respect to the negotiation and issuance of the Policy. Plaintiffs did not assert or even allude to the possibility that the PSE may have been included in the Policy by mistake.

33. In their moving and reply papers, Plaintiffs did <u>not</u> state that ***prior*** to the issuance of the Policy, Seneca was made aware that the Premises did not have a functioning sprinkler system or that Plaintiffs did not want to insure the Premises as

a sprinklered building. The entirety of the facts and arguments presented by Plaintiffs in support of their motion was how Seneca reacted ***after*** it was informed that the Premises did not have a functioning sprinkler system nearly a month ***after*** the Policy was issued. At the very most, this was probative evidence on the issue of waiver and estoppel, and the jury rejected those claims.

34. At the same time that Plaintiffs moved for dismissal of the Fourth Affirmative Defense, Seneca moved for summary judgment as to that defense. In opposing Seneca's motion, Plaintiffs again stated that the PSE "***required*** Plaintiffs to maintain an automatic fire sprinkler system in working order." (R. 2584.) (Emphasis added.) Plaintiffs contended that summary judgment would be improper because "the record reflects a disputed issue of fact with respect to Plaintiffs' compliance with the policy's Protective Safeguards Endorsement." (Id.) Plaintiffs stated that "[i]t is ***undisputed*** that the Subject Premises is identified as 'Prem. No. 10' for the Subject Policy and thus, was ***required*** under the Protective Safeguards Endorsement to maintain an 'Automatic Sprinkler System.'" (R. 2587.) (Emphasis added.)

35. In support of their position that summary judgment in Seneca's favor would be improper, Plaintiffs cited to Mr. Malik's deposition testimony, stating that "Mr. Malik testified that, ***in compliance with the obligations under the Subject Policy***, Plaintiffs retained Chief Fire to perform monthly inspections and any

necessary repair work to maintain the fire sprinkler system at the Subject Premises in working order." (R. 2588.) (Emphasis added.) Thus, again, Plaintiffs admitted that the PSE was properly in the Policy and specifically claimed that they hired a company to perform inspections and repair work on the sprinkler system in an effort to comply with the PSE.

36. The Motion Court ultimately denied Plaintiffs' and Seneca's motions, finding issues of fact that could not be resolved on summary judgment. (R. 2609; R. 2611.) The Motion Court found, based on the facts and arguments presented by Plaintiffs and Seneca, that the issues to be decided at trial with respect to the PSE were: (1) whether Seneca waived the ability to disclaim coverage on the basis of noncompliance with the PSE (which Plaintiffs admitted was otherwise enforceable) because Seneca failed to cancel the Policy at any time after it learned that the Premises did not have a functioning sprinkler system (which fact it learned nearly one month ***after*** the Policy became effective); and (2) if not, whether Plaintiffs complied with the terms of the PSE. (R. 2602-2612.)

37. At no point in time prior to trial beginning on March 14, 2019 did Plaintiffs indicate they had any intention to claim that the PSE was included in the Policy by mistake, or that any pre-policy communications were even relevant.

E. TRIAL

38. This case proceeded to a jury trial, which began on March 14, 2019. (R. 3.) On March 14, 2019, during their opening statement, Plaintiffs claimed, ***for the first time***, that there was a dispute with regard to whether the Policy was issued with the proper terms. More specifically, Plaintiffs made the following statements in their opening statement:

- And the building is a sprinkler building. But, the evidence is going to show, we didn't ensure [*sic*] these buildings as sprinklered building. That was never the intent. That was never the request, because when you have vacant buildings, you're not making sure everything is and you don't always know what it is that you have happening in the building. And, you will hear Mr. Malik's testimony on this. (R. 62.)

- And, you will see the application process that Mr. Malik goes through where, in every case, with every building insured under this policy, you know, vacant buildings, it says, no sprinklers. That's what the insurance company is told when he goes to buy the contract. That's what's in the application. (R. 63.)

- And also, now the coverage is bound. It is our position in this case and we believe the evidence will show, they didn't insure sprinkler buildings. If some of the buildings had sprinklers, that was just incidental. It wasn't material. It wasn't important. And it didn't make a difference to the carrier.

  Therefore, we say it doesn't make a difference whether it worked or not at the time of the fire, because they weren't ensuring [sic] them as sprinklered buildings. (R. 64.) (Emphasis added.)

39. Thus, Plaintiffs were, at the time of opening statements and for the very first time after eight years of litigation and after the close of discovery and the filing

and ruling on motions for summary judgment, explicitly asserting a new inconsistent theory of the case. Prior to trial, Plaintiffs indisputably and repeatedly claimed that the PSE was properly in the Policy and that they were required to comply with the PSE. Upon commencing trial, all of that changed when they added the theory that the PSE never should have been in the Policy in the first place.

40. Mr. Malik's testimony at trial as to his intentions with respect to the contents of the Policy, upon which Plaintiffs largely relied to support their newly asserted claim, was available to Plaintiffs since before this case began. Mr. Malik is the owner of the Plaintiffs and, as such, the Plaintiffs would have had his knowledge on this subject since the Policy was negotiated and issued. The application was available to Plaintiffs, at the latest, during pre-trial discovery and prior to the summary judgment motion practice, through their broker's file (the application was submitted by the broker to Seneca on behalf of Plaintiffs)[1] and again when they received Seneca's underwriting file on April 28, 2016, (R. 2705.).[2]

41. Nonetheless, Plaintiffs never claimed that there was any possibility that the PSE may have been included in the Policy by mistake until their opening statement.

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[1] Plaintiffs served a Subpoena Duces Tecum on their broker on or about January 15, 2013. (R. 2689.)

[2] The application may have been available to and in the possession of the Plaintiffs even before the case began given that it was a document submitted on behalf of Plaintiffs to Seneca and not a document created by Seneca.

42. Mr. Malik testified at trial, for the first time, 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.) He further testified that he communicated his intent to obtain a policy without a PSE to his broker by way of an oral conversation. (R. 433-434.) Mr. Malik also testified that it was his understanding that the broker communicated his desire to obtain a policy without a PSE to Seneca. (R. 434-435.)

43. Mr. Malik admitted that he received the Policy prior to the fire, but asserted that he did not read it. (R. 440, 776.) It is clear that the insured's broker received the Policy prior to the fire and read it because the broker noted several mistakes, requested that Seneca correct them, and Seneca did so. (R. 2618-2622.).

44. Contrary to Mr. Malik's testimony, there is no indication in any written documents that the broker ever asked Seneca to delete the PSE. Prior to trial, Seneca never deposed the broker and, thus, never asked the broker about whether there was an oral conversation between Mr. Malik and the broker about the PSE because the broker's testimony was not relevant to the only claims that were pled.

45. Of course, if reformation had been pled, Seneca would have taken that deposition and it would have been relatively contemporaneous with when any conversation between Mr. Malik and the broker would have taken place—ten years prior to trial.

46. Moreover, it is undisputed that Mr. Malik received Seneca's disclaimer letter, which quoted the PSE and disclaimed coverage on the basis that Plaintiffs failed to comply with the PSE (R. 427-429; 431-433; 2487-2492), and yet he never advised Seneca of his position that it should not have been put into the Policy until trial.

47. Prior to Plaintiffs questioning Ms. Muller at trial, Seneca objected to her anticipated testimony given Plaintiffs' assertion of a reformation claim for the first time in their opening statement. (R. 513-514; 519; 526-527; 538-539). Despite Plaintiffs' clear insertion of a new theory into the case during opening statements, Plaintiffs incorrectly represented to the Trial Court that they were not changing their theory. (R. 514.)

48. The Trial Court then proceeded to rule that the new claim was "part and parcel of the whole thing" (Id.); that "the theory that's advanced is just a variation on the theme" (R. 519); and that "waiver is a variation on a theme of it not being in the policy or these weren't insured buildings" (R. 527.).

49. The focus of Plaintiffs' questioning of Ms. Muller was on the contents of the underwriting file, a file that Plaintiffs were given on April 28, 2016 and had during Ms. Muller's deposition, which took place on April 5, 2017. Plaintiffs specifically focused their questioning on establishing proof that the inclusion of the

PSE in the Policy was a mistake, a strategy they certainly did not take at Ms. Muller's deposition.

50. On March 20, 2019, a day after Plaintiffs rested, they moved to amend the Complaint to assert a claim for reformation. (R. 1006.) Plaintiffs' motion to amend was based entirely on Mr. Malik's trial testimony, what was and was not contained in the underwriting file, and Ms. Muller's trial testimony. (R. 1006-1009.)

51. Contrary to Plaintiffs' contention, it is plain that all of this evidence was, or could have been, available to Plaintiffs from, at the latest, April 5, 2017, the date upon which Ms. Muller was deposed. At that time, Plaintiffs knew Mr. Malik's version of events; had the underwriting file; and had deposed Ms. Muller. What Plaintiffs failed to do, and waited until trial to do much to the surprise of Seneca, was to present Mr. Malik's testimony regarding his intention to have a Policy without the PSE and to ask an entirely new line of questions to Ms. Muller with respect to the underwriting of the Policy, questions that could have been asked at her deposition but were not.

52. Seneca responded to the motion by arguing that there is no basis to find reformation. (R. 1022-1023.) The Trial Court reserved its decision until the end of Seneca's case. (R. 1023.)

53. During the charge conference, the Trial Court addressed the issue of reformation again. (R. 1298-1312.) Seneca further argued that the reformation

claim was barred by the statute of limitations. (R. 1299-1312.) Plaintiffs again contended that it was not until trial that the evidence came out that there was never any basis to include the PSE in the Policy, again based on the testimony of Ms. Muller. (R. 1301.) In so arguing, Plaintiffs conceded that their reformation claim was entirely new.

54. The Trial Court ultimately decided to send the issue of mutual mistake to the jury stating that it did not "think reformation is necessarily time barred under the facts of this case because I think it's part of the whole thrust of the complaint originally." (R. 1311.)

55. At the close of trial, the Trial Court submitted the following four questions to the jury:

1. Did plaintiffs prove by clear and convincing evidence that the parties' try agreement was a Policy *without* a Protective Safeguard Endorsement, and that it was a mistake to include the Protective Safeguard Endorsement in the Policy?

2. Did plaintiffs prove by a preponderance of the evidence that Seneca knowingly, voluntarily, and intentionally waived its right to enforce the Protective Safeguard Endorsement in connection with Seneca's denial of plaintiffs' insurance claim?

3. Did plaintiffs prove by a preponderance of evidence that Seneca should be estopped from relying on the Protective Safeguard Endorsement in connection with Seneca's denial of plaintiffs' insurance claim?

4. Did plaintiffs prove by a preponderance of the evidence that it exercised due diligence in maintaining an automatic sprinkler system in their building at the time of the fire?

(R. 2131-2135.)

56. Each question was to be answered individually, without consideration of the answers to the preceding or following questions. (Id.) Five of the jurors answered "yes" to the first question; six of the jurors answered "no" to the second question; five of the jurors answered "no" to the third question; and six of the jurors answered "no" to the fourth question. (Id.)

57. Thus, the only claim the jury returned a verdict against Seneca on was the newly contrived reformation claim. The jury concluded that there had been a breach of contract by the Plaintiffs; that Seneca had not waived its right to enforce the PSE; and that Seneca should not be estopped from relying on the PSE. Thus, the jury rejected the ONLY claims the Plaintiffs had asserted for the first eight years of the litigation. The jury accepted ONLY the newly created claim of reformation.

F. POST-TRIAL PROCEEDINGS

58. On April 15, 2019, Seneca moved, pursuant to CPLR § 4404(a), 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. (R. 2457.) Seneca argued that the reformation claim was time-barred and did not relate back to the breach of contract claim and that Seneca was surprised and prejudiced when Plaintiffs added an entirely new theory of reformation to the case during trial, nearly eight years after the Complaint was filed. (R. 2459.) Plaintiffs opposed the motion. (R. 2627.)

59. The Trial Court denied Seneca's motion by way of Order dated October 18, 2019. (R. 29.) The Trial Court found that Plaintiffs' reformation claim related back to the original breach of contract claim. (Id.) The Trial Court found that there was support for the verdict against Seneca on the reformation claim because Seneca knew that the Plaintiffs did not have a working sprinkler system at the Premises. (R. 30.) The Trial Court stated that Seneca "received inspection reports reflecting the lack of sprinklers at vacant properties and vacant lots, including the damaged premises. 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." (Id.) The Trial Court further commented that "[t]his evidence was the same as that plaintiff used to support its original breach of contract claim. Plaintiff has contended from day one that the PSE was unenforceable. Essentially, reformation was a variation on the theory of breach of contract . . ." (Id.)

60. None of those conclusions by the Trial Court, and none of the evidence it referred to, are relevant to the proofs necessary for a reformation claim: pre-policy inception communications. On December 4, 2019, the Trial Court entered final judgment in the amount of $4,541,957.73. (R. 3-4.)

G. THE APPEAL

61. Seneca timely filed a Notice of Appeal on December 5, 2019, seeking reversal of the Trial Court's October 18, 2019 decision and the final judgment entered on December 4, 2019. (R. 2.)

62. After the appeal was fully briefed, this Court issued its Decision and Order on January 28, 2021. (A true and accurate copy of the Decision and Order is annexed hereto as Exhibit A.) This Court unanimously affirmed the decision of the Trial Court to deny Seneca's motion pursuant to CPLR 4404(a). (Id.)

63. This Court found that the Trial Court properly granted Plaintiffs' application to conform the pleadings to the proof at trial to assert a claim for reformation as it related back to the Complaint because the PSE:

> has been at the heart of the litigation from the outset and the same evidence that defendant waived enforcement of the endorsement because it inspected the subject premises and knew they were non-sprinklered but did not cancel the policy supports plaintiffs' claim that the endorsement was unenforceable, regardless of whether the claim is based on waiver or reformation.

(Id.)

64. This Court stated that "[c]ontrary to defendant's contention that reformation to eliminate the PSE is a fundamentally different claim, the applicability of the PSE is at the heart of both, and as Supreme Court observed, the same evidence supporting the waiver claim also supports reformation." (Id.) Finally, this Court found that Seneca's assertion of prejudice was unpersuasive because Seneca "had in

its possession the underwriting file which provided the basis for the testimony of its vice president tending to show inclusion of the endorsement in the policy was a mistake but failed to produce it to plaintiffs for more than four years." (Id.)

65. The Court's decision was filed with Notice of Entry on March 10, 2021. (Id.) Therefore, this motion is timely.

III. STATEMENTS PURSUANT TO RULES 1250.16(d) OF THE PRACTICE RULES OF THE APPELLATE DIVISION

66. Pursuant to Rule 1250.16(d)(2) of the Practice Rules of the Appellate Division, this Court respectfully misapprehended and/or overlooked the limits on application of CPLR § 3025(c) and CPLR § 203(f). Moreover, this Court misapprehended and/or overlooked the requirement that a claim for reformation be timely asserted and that the applicable statute of limitations barred this claim. This Court should have found that the Trial Court abused its discretion in permitting Plaintiffs' amendment to add a reformation claim and should have entered judgment in favor of Seneca because Plaintiffs' Complaint (and all of their subsequent submissions) did not contain any of the facts necessary to put Seneca on notice that Plaintiffs would pursue a reformation claim, and Plaintiffs waited to assert the reformation claim until after they closed at trial despite having the evidence necessary to assert a reformation claim years prior.

67. In the alternative, Rule 1250.16(d)(3)(i) of the Practice Rules of the Appellate Division, Seneca requests that this Court grant leave to appeal to the Court

of Appeals to consider: (1) whether a plaintiff is permitted to amend its complaint to assert a reformation claim for the first time eight years later, after trial, pursuant to CPLR § 3025(c) when the initial complaint does not set forth any facts that would support a reformation claim and when the plaintiff had the ability to raise the reformation claim years before trial; (2) whether a plaintiff has failed to timely assert a reformation claim pursuant to CPLR § 213(6) when it has possession of documents reflecting the mistake prior to filing an action but waits until eight years later to assert the claim; and (3) whether the relation back doctrine codified at CPLR § 203(f) saves a reformation claim that is otherwise time barred when the only claim that has been alleged in the initial pleading is breach of contract. It is submitted that with respect to the relation back doctrine, it would be appropriate to grant leave to appeal to the Court of Appeals because this Court's decision is inconsistent with Matter of SCM Corp. (Fischer Park Lane Co.), 40 N.Y.2d 788. It is further submitted that all three of the questions set forth above are important questions that have potential far-reaching consequences in terms of how insurers and defendants in other contract-based cases pursue discovery and prepare their defenses.

68. Seneca further submits that the support for their Motion for Reargument or, in the Alternative, for Leave to Appeal to the Court of Appeals is set forth more fully in the annexed Memorandum of Law.

Dated: New York, New York
March 23, 2021

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