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New York Supreme Court

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.

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REARGUMENT OR, IN THE ALTERNATIVE, LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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I. PRELIMINARY STATEMENT

This Memorandum of Law is submitted in reply and in further support of Defendant/Appellant Seneca Insurance Company's ("Seneca") Motion to Reargue or, in the alternative, for Leave to Appeal to the Court of Appeals this Court's January 28, 2021 Decision and Order, which affirmed the Trial Court's decision dated October 18, 2019, and final judgment entered on December 4, 2019. In opposing Seneca's Motion, Plaintiffs, 34-06 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs") argue that Seneca has failed to meet the standard for reargument. Plaintiffs submit that this Court's Decision and Order was correct because the Protective Safeguards Endorsement ("PSE") in the Policy has always been at issue. In making this argument, Plaintiffs attempt to steer this Court away from the proper focus in determining whether Plaintiffs should have been permitted to amend their Complaint to assert a reformation claim after resting at trial—the allegations in the Complaint. Rather than focus on these allegations (which are plainly deficient for a reformation claim and Plaintiffs do not assert otherwise), Plaintiffs point this Court to what took place during discovery, motion practice, and at trial. Plaintiffs further submit that Seneca's delay in producing its underwriting file and failure to ask for a continuance of the trial to collect evidence to dispute the reformation claim support permitting amendment.

Plaintiffs' arguments are without legal support and, in fact, are directly contrary to well-established case law. Most notable of that case law is Matter of SCM Corp. (Fischer Park Lane Co.), 40 N.Y.2d 788 (1976), a binding Court of Appeals case that this Court was required to follow in issuing its Decision and Order on appeal. If this Court had followed that decision, its conclusion would have to have been that Plaintiffs were not permitted to amend their Complaint to assert a reformation claim after resting at trial.

In affirming the Trial Court's decision, which permitted Plaintiffs to submit the reformation claim to the jury, this Court improperly focused on the evidence revealed during discovery, motion practice, and at trial and how that evidence supported the reformation claim. Instead, this Court should have focused on the actual allegations contained in the Plaintiffs' Complaint in determining whether amendment pursuant to CPLR § 3025(c) was proper, as required by well-established precedent. The CPLR places the burden on Plaintiffs to place Seneca on notice of their claims. Plaintiffs have utterly failed to meet this burden with respect to the reformation claim. A review of Plaintiffs' three-page Complaint makes clear that Seneca was never put on notice that the Plaintiffs may claim that it was a mistake to include the PSE in the Policy. What occurred during discovery, motion practice, and at trial could not cure this deficiency, particularly because during discovery and motion practice and at all times prior to opening statements, there was no suggestion

that a mistake had been made and, thus, Seneca never had notice of this claim until the trial began.

If Plaintiffs truly believed that the PSE was in the Policy by mistake, Plaintiffs could and should have asserted the reformation claim in the Complaint. There is no requirement under the CPLR that a plaintiff have all of the evidence necessary to prove a claim when it is asserted in the complaint. That is the purpose of discovery. So long as a plaintiff has a reasonable basis to assert a claim, it should do so timely and then pursue discovery to further develop that claim. Instead of following this logical approach mandated by the CPLR and case law, including decisions from this Department,, Plaintiffs advocate for a try the case first, establish the theories of recovery later approach, which has been rejected by this Department (and others) on several occasions and which should have been rejected by this Court in the instant matter. Pleadings have significance in shaping litigation and their importance was improperly undercut by this Court's Decision and Order.

Plaintiffs' failure to raise the reformation claim in a timely fashion left Seneca with no ability to properly defend itself against the claim. One of the key discovery points for a reformation claim such as Plaintiffs is establishing the communications between the broker and the insured and the broker and the insurer. At a minimum, Seneca would have needed to have deposed the broker given that there was no indication in writing that Plaintiffs asked for a Policy without a PSE or that this

desire was communicated to Seneca. However, such a deposition would have undoubtedly been useless at the time of trial given that the conversations at issue took place ten years prior and any testimony would be based solely on attenuated personal recollection. Seneca had no indication when the Complaint was filed or even throughout the discovery process that communications with the broker about the terms of the Policy would ever be at issue. These types of communications have nothing to do with claims handling or Seneca's inspection of the property or decision not to cancel based on the inspection.

In short, Plaintiffs failed to raise their reformation claim within the applicable statute of limitations and given the deficiencies in their Complaint and the fundamental differences between breach of contract claims and reformation claims, the relation back doctrine could not save that claim, as has been held by the Court of Appeals. See Matter of SCM Corp. (Fischer Park Lane Co.), 40 N.Y.2d 788.

If this Court affirms its Decision and Order, Seneca respectfully reiterates its request for leave to appeal to the Court of Appeals on the basis that this Court's decision is inconsistent with binding Court of Appeals precedent (Matter of SCM Corp. (Fischer Park Lane Co.)), and that this Court's decision involves important issues that have the ability to substantially impact how defendants, particularly insurers and other contract-based defendants, conduct discovery and prepare their defenses.

II. ARGUMENT

A. SENECA HAS MET THE STANDARD FOR REARGUMENT.

Seneca has met the standard for reargument because it has explained each of the ways in which this Court misapprehended and/or overlooked the law applicable to: (1) amendments sought pursuant to CPLR § 3025(c), including several cases out of this Department; (2) the application of the statute of limitations for claims based upon a mistake as set forth in CPLR § 213(6); and (3) the relation back doctrine codified at CPLR § 203(f), most notably the binding Court of Appeals' precedent of Matter of SCM Corp. (Fischer Park Lane Co.). Contrary to Plaintiffs' contentions, Seneca is not seeking a "third bite at the apple" nor is Seneca asserting new facts or argument that were not previously before this Court. Seneca's application for reargument is based wholly on the record on appeal and arguments Seneca previously submitted to this Court on appeal, including the argument that Plaintiffs had the facts necessary to assert a cause of action for reformation at the time they filed the Complaint. (See Brief for Defendant-Appellant, Docket No. 13, pp. 2, 14-15, 20, 33.) Seneca has filed the instant Motion in an effort to explain what this Court misapprehended and/or overlooked in its Decision and Order and, in doing so, Seneca has not simply repeated prior arguments nor has it made new arguments never before considered by this Court.

Plaintiffs submit that Seneca has never before argued that the Plaintiffs failed to present sufficient evidence of mistake at trial, and that any attempt to do so at this juncture would be improper. In making this statement, Plaintiffs misunderstand Seneca's position. Seneca is not arguing that the evidence submitted on the issue of mistake was insufficient. Rather, as explained at length in its Memorandum of Law in Support and further below, Seneca is arguing that the issue of mistake never should have been presented to the jury in the first place for the following reasons: (1) the Complaint did not contain any facts to support a reformation claim and discovery, motion practice, and trial testimony could not supplant the need for these allegations; (2) even if what occurred during discovery was relevant and could be considered capable of putting a defendant on notice of the claims a plaintiff intended to prove at trial, the evidence that supported waiver and estoppel, which is the evidence that came out during discovery, is not the same evidence that could support reformation; (3) Plaintiffs had the facts necessary to assert a reformation claim when they filed the Complaint and waiting to do so until after resting at trial constituted impermissible surprise and gamesmanship; (4) the prejudice caused by raising reformation for the first time at trial could not be remedied by a continuance because the evidence necessary to refute that claim depended on the recollection of parties of conversations that took place ten years prior; (5) the reformation claim was time barred; and (6) the reformation claim was not saved by the relation back doctrine

because the reformation claim did not arise out of the same transactions or occurrences as the only claim asserted in the Complaint—breach of contract. In sum, the effect of this Court's Decision and Order was to permit a reformation claim in direct contravention of binding Court of Appeals' precedent (Matter of SCM Corp. (Fischer Park Lane Co.)), and, as such, this Court must permit reargument.

1. Plaintiffs Were Not Entitled To Amendment Pursuant To CPLR § 3025(c) Because The Allegations In Plaintiffs' Complaint Were Insufficient To Put Seneca On Notice That Plaintiffs Would Ever Pursue A Reformation Claim.

In affirming the Trial Court's decision to permit Plaintiffs to amend their Complaint pursuant to CPLR § 3025(c) to assert a reformation claim after Plaintiffs rested at trial, this Court improperly focused on what Seneca learned during discovery and the trial testimony of Carol Muller, as opposed to what Plaintiffs alleged in their Complaint. This approach is inconsistent with well-established precedent.

In determining whether a plaintiff is permitted to amend its complaint at trial, the sole focus must be on the allegations in the complaint leading up to that point, not on what was learned during discovery, motion practice, or at trial. See Symbax, Inc. v. Bingaman, 219 A.D.2d 552, 553 (1st Dep't 1995); DiMauro v. Metropolitan Suburban Bus Auth., 105 A.D.2d 236, 240 (2d Dep't 1984); Forman v. Davidson, 74 A.D.2d 505 (1st Dep't 1980); Xavier v. Grunberg, 67 A.D.2d 632 (1st Dep't

1979); D'Angelo v. D'Angelo, 109 A.D.2d 773 (2d Dep't 1985). The CPLR places the burden on the plaintiff to put the defendant on notice of the claims the plaintiff intends to prove. CPLR § 3013 ("[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense"). Neither the CPLR nor case law require the defendant to prepare to defend against theories the plaintiff may pursue at trial if those theories are not grounded in the allegations in the pleadings. Moreover, neither the CPLR nor case law permit a plaintiff to file a bare bones complaint, pursue a theory through discovery and/or trial that could not be supported by any of the allegations of the complaint, and not seek formal amendment until after resting at trial. Nevertheless, that is exactly what the Trial Court and this Court permitted Plaintiffs to do here.

Notably, in their opposition, Plaintiffs do not attempt to distinguish the case law governing amendments pursuant to CPLR § 3025(c) nor do they offer any explanation of how the allegations in their Complaint could support a reformation claim. A review of Plaintiffs' three-page Complaint makes clear why Plaintiffs have taken this approach. The Complaint is completely devoid of allegations related to the issuance of the Policy or any suggestion that the Policy may contain a mistake. (R. 2493-2494.) The Complaint notifies Seneca only that the Plaintiffs will assert

that after the Policy was in effect, the Plaintiffs sustained a fire loss and that Seneca failed to pay for the damages sustained as a result of the fire in breach of the Policy. (Id.)

Realizing they cannot refute these points, Plaintiffs instead suggest that the allegations of their Complaint are not important for this Court's analysis. Rather, Plaintiffs submit that this Court should focus on the contents of Seneca's own Answer and what took place during discovery, motion practice, and at trial.

With respect to Seneca's Answer, Plaintiffs argue that their reformation claim is a proper response to Seneca's Fourth Affirmative Defense. They rely upon Arthur v. Homestead Fire Ins. Co., 78 N.Y. 462 (1879) for this proposition. Arthur is legally and factually distinguishable from the instant matter.

First, the CPLR was not in effect at the time Arthur was decided. As such, application of that decision must be limited. Second, in Arthur, the plaintiff initially sued the defendant seeking a ruling that the defendant must provide coverage for a fire loss. The defendant answered and pled breach of warranty by way of plaintiff's failure to disclose an additional mortgage on the policy application. At trial, in response to the defendant's proof of the application and additional mortgage, plaintiff offered to prove that his agent was informed of the additional mortgage, but failed to insert the additional mortgage in the application by mistake. Although the court excluded the evidence, it offered to allow the plaintiff to amend his complaint

to plead mistake. Plaintiff refused to do so. Thus, in Arthur, the application, i.e., a key document related to the issuance of the policy, was always at issue because it was explicitly asserted as a defense in a written pleading.

Here, Seneca's Fourth Affirmative Defense made no mention of the application, conversations leading up to issuance of the Policy, or the actual issuance of the Policy. Rather, the Fourth Affirmative Defense cited the PSE and then stated "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. 2499-2500.) The fact that this affirmative defense discusses the PSE cannot be read to open the door to a claim of mistake with respect to including the PSE in the Policy because, unlike in Arthur, neither the Answer nor the Complaint make any reference to anything that took place prior to the Policy becoming effective. There simply is no support in the Arthur decision or any subsequent case law for the finding that an affirmative defense related to the application of an exclusion to a claimed loss somehow provides the underpinning for a pre-policy claim for reformation. The two are truly unrelated.

Furthermore, it is clear from case law that amendments pursuant to CPLR § 3025(c) should not be permitted even where discovery, motion practice, and trial testimony have revealed support for a claim but where the plaintiff has failed to plead any facts related to that claim. See e.g., DiMauro, 105 A.D.2d at 241 ("An adversary

cannot, in all fairness, be expected to proceed to trial on every conceivable theory of liability arising out of an unpleaded state of facts of which he acquires personal knowledge, even though the aforementioned state of facts is revealed during pretrial proceedings.").

Even if discovery, motion practice, and trial testimony were relevant to the question of whether Plaintiffs should be permitted to amend their Complaint pursuant to CPLR § 3025(c), as explained at length in Seneca's Memorandum of Law in Support, the evidence that came out during discovery and motion practice that might have supported waiver and estoppel claims (which the jury rejected), did not support a reformation claim.

Plaintiffs rely upon Kimso Apartments, LLC v. Gandhi, 24 N.Y.3d 403 (2014) for the proposition that Seneca cannot claim surprise or prejudice with respect to the reformation claim because the evidence used to support that claim has been known throughout the litigation and Seneca has admitted that this is the same evidence that supports the waiver and estoppel claims. Kimso is plainly distinguishable.

In Kimso, the plaintiffs sought a declaratory judgment that their corporations had a common-law right to offset the remaining amount they owed Gandhi under a settlement agreement against the money Gandhi owed the corporations on shareholder loan notes. In an amended pleading filed in that case, the plaintiffs explicitly admitted that they were liable for the amounts due Gandhi under the

settlement agreement and that if plaintiffs failed to make the full payments to Gandhi under the settlement agreement, Gandhi may allege that the plaintiffs are in default of the settlement agreement and Gandhi would be entitled to remedies thereunder. Id. at 408. Gandhi's amended answer asserted numerous counterclaims, but he did not assert a counterclaim for back payments under the agreement. The Court of Appeals agreed with the Supreme Court's decision to permit Gandhi to amend his answer at trial, finding support for this ruling in the statement in plaintiffs' amended complaint that they were liable for the amounts due to Gandhi under the settlement agreement, and if they failed to pay, they would be in default of its terms. Id. at 412. "In other words, after arguing from the beginning of the lawsuit that the entire sum of money they owed Gandhi should be reduced by the money he owed them, they cannot now claim prejudice resulting from Gandhi's demand for outstanding payments due him under the settlement agreement." Id.

Unlike the money due under the settlement agreement to Gandhi, here, the pleadings never contained an admission by Seneca or an assertion by Plaintiffs that the Policy contained a mistake or that it should be reformed. There was no allegation that anything leading up to and including the issuance of the Policy was in issue in this litigation. It simply was not—ever—until opening statements.

Moreover, contrary to Plaintiffs' contention, Seneca has never admitted on appeal that the evidence used to support the reformation claim was the same as the

evidence that supports waiver and estoppel. In fact, Seneca has always explicitly argued against that exact position. While the inspection report and Seneca's decision not to cancel the Policy in response to that report may have supported waiver and estoppel claims in connection with Seneca's ability to rely on the PSE (claims that the jury explicitly rejected), that evidence does not support reformation because those pieces of evidence did not exist until after the Policy was issued and, thus, that evidence does not reflect the intent of the parties in forming the Policy.

Plaintiffs have, on the one hand, claimed that the evidence supporting the reformation claim was clear throughout the litigation. And, at the same time, claim they did not have the necessary information to support their reformation claim until after trial started. First, these positions are fundamentally inconsistent. Plaintiffs cannot have it both ways—they cannot claim that it should have been clear to Seneca from the evidence developed during discovery and motion practice that a mistake had been made, and also that there was not enough evidence for Plaintiffs to assert a reformation claim until after trial began. If there was evidence supporting that a mistake was made while discovery or motion practice was taking place, Plaintiffs had an obligation to move to amend much sooner than they did. If there was not enough evidence to support a reformation claim before trial began, then Seneca certainly could not have been on notice that this claim was coming.

Second, both of Plaintiffs' positions with respect to the evidence supporting a reformation claim are clearly refuted by the record. The evidence developed throughout discovery and motion practice did not suggest that a mistake had been made in placing the PSE in the Policy. In fact, the entire focus of discovery and motion practice was on whether Plaintiffs complied with the PSE or if Seneca had waived or should be estopped from enforcing the PSE based upon actions it took ***after*** the Policy was issued. There was absolutely no discussion in discovery or motion practice about the possibility of a mistake in issuing the Policy with the PSE. Nonetheless, contrary to Plaintiffs' contentions, they clearly intended to pursue a reformation claim at trial, which was reflected in their opening statements. (R. 62-64.)

Plaintiffs argue that they could not seek reformation of the Policy until they had Ms. Muller's trial testimony regarding the underwriting materials. There are at least two problems with this argument. First, Plaintiffs did not need all of the evidence necessary to prove their reformation claim before they even asserted it. The Plaintiffs simply needed a reasonable basis for asserting the reformation claim, i.e., Mr. Malik's belief that the PSE was included in the Policy by mistake, and then they would have been given the opportunity to develop this theory during discovery, in the open, with Seneca fully understanding what it was defending against, which is how litigation should occur under the CPLR. Instead of approaching this litigation

in that logical way, Plaintiffs instead decided that they would try their case first and then determine the theory that fit the evidence best. That is exactly what this Department (and other courts) have cautioned against. See Symbax, 219 A.D.2d at 553; DiMauro, 105 A.D.2d at 240; Forman, 74 A.D.2d 505; Xavier, 67 A.D.2d 632; D'Angelo, 109 A.D.2d 773.

Second, Plaintiffs had access to Ms. Muller and the underwriting file years before trial. Ms. Muller's trial testimony was not based on new information that could not have been explored at her deposition. Rather, Plaintiffs simply failed to ask Ms. Muller questions at her deposition with respect to whether the PSE was included in the Policy by mistake. Plaintiffs should not be rewarded for their failure to seek out discovery to support their claims.

Seneca was prejudiced by Plaintiffs' failure to diligently pursue the reformation claim. As a result, Seneca was unable to gather timely testimony related to conversations between the broker and Mr. Malik and the broker and Seneca. It is completely disingenuous for Plaintiffs to assert that Seneca simply could have asked for a continuance to take the broker's deposition. The broker's deposition would have been completely based on her personal recollection of conversations that took place ten years prior. Without doubt, that recollection would have faded and likely would have been nonexistent. Given that Plaintiffs could have brought the reformation claim when they first filed suit and discovery could have been focused

on the issue of mistake from the beginning, Plaintiffs should not be permitted to profit off of Seneca's inability to now obtain the evidence necessary to refute the reformation claim. See Raymond v.Ryken, 98 A.D.3d 1265, 1266 (4th Dep't 2012); Burke, Albright, Harter & Rzepka LLP v. Sills, 187 A.D.3d 1507 (4th Dep't 2020); Boyd v. Trent, 297 A.D.2d 301, 303-04 (2d Dep't 2002).

2. The Reformation Claim Was Time Barred Because It Was Not Filed Within The Applicable Statute Of Limitations.

Plaintiffs do not dispute that the statute of limitations applicable to actions based on a mistake is six years. CPLR § 213(6). Nor do Plaintiffs dispute that the statute of limitations begins to run on the date of the purported mistake. 1414 APF, LLC v. Deer Stags, Inc., 39 A.D.3d 329, 330 (1st Dep't 2007). They also do not dispute that claims of mistake are not ones in which accrual is measured by actual or constructive knowledge. See National Amusements, Inc. v. South Bronx Develop. Corp., 253 A.D.2d 358, 359 (1st Dep't 1998) (citing First Nat. Bank of Rochester v. Volpe, 217 A.D.2d 967, 967 (4th Dep't 1995)). Nonetheless, Plaintiffs claim that Seneca should not be permitted to rely on the statute of limitations because of its delay in producing its underwriting file. This argument must be rejected as the underwriting file has nothing to do with the statute of limitations applicable to a reformation claim.

The problem with Plaintiffs' approach in this case is that instead of asserting a reformation claim when it had a reasonable basis to believe that it may have such a claim, i.e., at the beginning of this case, Plaintiffs have taken the position that they could not formally assert a reformation claim until they had proof of fraud or mutual mistake. Plaintiffs' approach turns the pleading and discovery rules in New York on their head. Plaintiffs are supposed to assert a claim as soon as they have a reasonable basis for believing they have a claim and then the parties focus their discovery efforts on establishing or refuting that claim. This is simply another attempt by Plaintiffs to ignore the importance of pleadings and the notice they provide to the parties in the case.

Simply put, given that Mr. Malik was in possession of the Policy, which contained the PSE, and the disclaimer letter, which referenced the PSE, prior to filing this action in 2011 (R. 427-429; 430-433; 440; 776; 2487-2492), if it was truly his belief that the PSE was in the Policy by mistake, the reformation claim should have been asserted in the Complaint. Plaintiffs should not be permitted to avoid the statute of limitations based upon Seneca's purported delay in producing the underwriting file (which was produced years before trial), something which is not relevant to the application of the statute of limitations, when Plaintiffs were the ones who had the ability to assert this claim within the statute of limitations, but chose to instead keep the claim in their back pocket until it became useful at trial.

3. The Reformation Claim Was Not Saved By The Relation Back Doctrine Codified At CPLR § 203(f) Because Reformation Claims, Including Plaintiffs' Reformation Claim, Do Not Relate Back To Breach Of Contract Claims.

This Court misapprehended and/or overlooked the precedential import of Matter of SCM Corp (Fischer Park Lane Co.), and subsequent First Department decisions relying upon that precedent. Matter of SCM Corp. (Fischer Park Lane Co.) and the subsequent First Department cases are not distinguishable from the instant matter. In fact, they are squarely on point. As such, this Court was required to apply the holding in Matter of SCM Corp. (Fischer Park Lane Co.) that a reformation claim does not relate back to a breach of contract claim in the instant matter.

In Matter of SCM Corp. (Fischer Park Lane Co.), a tenant served a demand for arbitration claiming that the landlord's calculation of the "Expense Base Factor" (a term defined in the lease agreement) and annual increments in expenses had been improper and that the landlord violated section 2.02 of the lease insofar as taxes on the property were concerned. Shortly before the first arbitration hearing, nearly two years after the tenant served the demand for arbitration and nearly eight years after the parties entered the lease agreement, the landlord sought to reform the same section of the lease agreement on which the tenant's claims were based. In finding that the reformation claim was time barred, the Court explained as follows:

> The tenant's demand for a refund of rent overpayment is predicated on acts of the landlord related to, or by which it computed and assessed, escalations of rent after the term of the lease commenced in February, 1968; the landlord's demand for reformation is grounded on allegations as to the intention of the contracting parties prior to and as the time the lease was executed with respect to the proportionate share of electrical expense to be borne by the tenant. 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, in the language of CPLR 203 (subd [c]), the claims do not arise out of the same transactions or occurrences.

Matter of SCM Corp. (Fischer Park Lane Co.), 40 N.Y.2d at 791-92. Thus, the Court of Appeals has made clear that a claim relating to the negotiation and articulation of a written agreement, i.e., reformation, cannot relate back to a claim related to performance under that written agreement, i.e., breach of contract, because they do not arise out of the same transactions or occurrences, as is required by CPLR § 203(f). Notably, the Court of Appeals did not qualify its decision or suggest that if a reformation claim is based upon evidence of which the adversary is aware, then a reformation claim may relate back. That simply is not the case.

Moreover, this Department has cited Matter of SCM Corp. (Fischer Park Lane Co.) on several occasions as standing for the proposition that a reformation claim does not arise out of the same transaction or occurrence as a breach of contract claim. See Davis v. Davis, 95 A.D.2d 674 (1st Dep't 1983); 182 Franklin St. Holding Corp. v. Franklin Pierrepont Assoc., 217 A.D.2d 508 (1st Dep't 1995); Levy v. Kendricks, 170 A.D.2d 387, 388 (1st Dep't 1991). These cases involved the same factual

scenario as Matter of SCM Corp. (Fischer Park Lane Co.) and for that reason, this Department found in each of those cases that reformation claims were time barred.

Here, as in Matter of SCM Corp. (Fischer Park Lane Co.) (and the other First Department cases), Plaintiffs' breach of contract claim and Seneca's Fourth Affirmative Defense related to performance under the Policy. The breach of contract claim and Fourth Affirmative Defense relied upon the terms of the Policy being in effect and the actions taken after the Policy was issued. Plaintiffs' reformation claim, on the other hand, related to the intentions of the parties in negotiating the Policy and up to the time of issuance of the Policy. As such, the Court of Appeals has ruled on this exact issue and it found that such a reformation claim should not be permitted.

This Court distinguished these cases on their facts by stating that the instant matter is unique in that the PSE was always at issue, so even a late reformation claim was permissible because it related to the PSE. However, the fact that the PSE was always at issue is no different than stating that the agreement allegedly breached in the other actions was always at issue. Nonetheless, each of those courts rejected such arguments. Most importantly, the Court of Appeals has rejected this argument, stating that while a breach of contract action and reformation claim "in a most general sense both might be said to be associated with the lease, in the language of CPLR 203 (subd. (c)), the claims do not arise out of the same transactions or

occurrences." Matter of SCM Corp. (Fischer Park Lane Co.), 40 N.Y.2d at 792. This Court must apply this holding here.

Similar to CPLR § 3025(c), the inquiry with respect to application of the relation back doctrine is whether the newly asserted claim is based upon the same transactions or occurrences that are alleged in the Complaint. CPLR § 203(f). The case law relied upon by Plaintiffs supports the conclusion that the sole focus must be that which is contained in the pleadings. See Bernstein v. Remington Arms Co., 18 A.D.2d 910 (2d Dep't 1963) (permitting amendment where the new pleading is "based upon the ***same set of facts and founded upon the same actionable wrong, as originally pleaded***") (emphasis added)).

Here, the transaction or occurrence alleged in the Complaint was Seneca's handling of Plaintiffs' fire loss claim. (R. 2494.) The reformation claim, on the other hand, involves the transaction or occurrence of negotiation and issuance of the Policy, something which is not discussed at all in the Complaint. Thus, the variance between the pleadings and the proof was "so great" that Seneca could not have expected that such evidence would be adduced at trial. See A-1 Check Cashing Serv. v. Goodman, 148 A.D.2d 482, 482 (1st Dep't 1989).

B. IF THIS COURT DENIES REARGUMENT, IT SHOULD GRANT LEAVE TO APPEAL TO THE COURT OF APPEALS BECAUSE THIS MATTER INVOLVES A DEPARTURE FROM COURT OF APPEALS' PRECEDENT AND SUFFICIENTLY IMPORTANT ISSUES.

Seneca has sought the alternative relief of leave to appeal to the Court of Appeals because if this Court denied reargument, it will represent a departure from the binding Court of Appeals' precedent of Matter of SCM Corp. (Fischer Park Lane Co.) and because this Court's decision has the ability to substantially impact how insurers and other defendants in contract-based cases must handle discovery and prepare their defenses.

As discussed above and in Seneca's Memorandum of Law in Support, Matter of SCM Corp. (Fischer Park Lane Co.), stands for the proposition that reformation claims do not relate back to breach of contract claims. This Department has consistently cited to Matter of SCM Corp. (Fischer Park Lane Co.) for this exact proposition. See Davis, 95 A.D.2d 674; 182 Franklin St. Holding Corp., 217 A.D.2d 508; Levy, 170 A.D.2d 387. Accordingly, if this Court denies reargument and affirms the Trial Court's finding that the Plaintiffs' reformation claim related back to its breach of contract claim, that would represent a departure from binding Court of Appeals' precedent and decisions out of this same Department relying upon that precedent. This alone warrants review by the Court of Appeals.

Beyond the precedential impact of Matter SCM Corp. (Fischer Park Lane Co.), is the importance of the issues raised by this Court's decision. If this Court denies reargument, it will certainly have a radical impact on any defendant, including insurers, facing breach of contract claims. These parties will always have to anticipate a reformation claim, even if the plaintiff fails to plead facts supportive of that claim. This will lead to the pleadings having little to no significance, with defendants left to take extensive discovery that they will not even know is relevant until they show up at trial.

Beyond defendants facing breach of contract claims, this Court's ruling as it stands signals more generally that pleadings have little to no meaning in litigation and that litigants can no longer rely on pleadings to serve as a guide for trial. Such a decision will encourage plaintiffs to file barebones complaints, to develop new theories of the case during discovery, and to wait until the evidence has been submitted at trial to vocalize those theories. All the while, defendants will be required to collect any discovery they can imagine may ever potentially be relevant to claims that have not even be asserted and will be left guessing as to what theories plaintiffs may pursue at the time of trial, guided only by what the defendants can conjure up based on discovery.

This outcome is simply not what is envisioned by the CPLR or well-established case law. As such, if this Court denies reargument, leave should be

granted in order to seek a ruling from the Court of Appeals on an issue that has the potential to impact a wide range of parties across the State of New York.

III. CONCLUSION

Based on the foregoing and all papers previously submitted in support of Seneca's instant application, Seneca respectfully requests that this Court issue an Order pursuant to 22 NYCRR § 1250.16(d): (a) granting 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 (b) in the alternative, granting Seneca leave to appeal to the Court of Appeals; and (c) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 23, 2021

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