

**JPB Carpeting, Inc. v Seneca Ins. Co.,  
Inc.**

2008 NY Slip Op 31804(U)

June 24, 2008

Supreme Court, New York County

Docket Number: 0603070/2004

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

JPB Carpeting

- v -

Samea Insurance

INDEX NO. 603070/04

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.*

**FILED**

JUN 27 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/24/08

JUDITH J. GISCHE  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----x  
JPB CARPETING, INC.,

Plaintiff,

-against-

SENECA INSURANCE COMPANY, INC.,

Defendant.

-----x  
SENECA INSURANCE COMPANY, INC.,

Third-Party Plaintiff

-against-

S&M KLEIN CO.,

Third-Party Defendant.

-----x

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Motion Sequence No. 003 - Papers</b>	<b>Numbered</b>
Third-party def S&M Klein's n/m CPLR §§ 3211 (a); 3016 (b) and 3101, HSK affirm, exhs	1
Def/Third-party pltf Seneca's x/motion CPLR § 3025(b) w/MMM affirm, KM affid, exhs	2
Pltf's opp w/DLC affirm, exhs	3
Third-party def S&M Klein's HSK reply affirm	4
Third-party def S&M Klein's HSK reply affirm	5
<b>Motion Sequence No. 004 - Papers</b>	<b>Numbered</b>
Third-party def S&M Klein's n/m CPLR § 3211 (a), HSK affirm, exhs	1
Def/Third-party pltf Seneca's x/motion CPLR § 3211 (a) w/MMM affirm, exhs	2
Pltf's opp w/DLC affirm, exhs	3
Third-party def S&M Klein's HSK reply affirm	4

*Upon the foregoing papers the court's decision is as follows:*

The underlying action arises from a dispute involving insurance coverage. In

motion sequence number 004, third-party defendant S&M Klein Co.<sup>1</sup> moves to dismiss plaintiff's complaint. CPLR § 3211. Defendant/third-party plaintiff Seneca Insurance Company, Inc. ("Seneca") cross-moves to dismiss plaintiff's complaint. Plaintiff opposes motion sequence 004 entirely.

In motion sequence number 003, S&M Klein moves to dismiss the third-party complaint and also seeks to vacate the March 8, 2007 compliance conference order of the Hon. Emily Jane Goodman, J.S.C. (the "3/8/07 order").<sup>2</sup> Seneca cross-moves, pursuant to CPLR § 3025(b), for leave to amend the third-party complaint to name as an additional third-party defendant SMK Administrative Agency, LLC ("SMK Admin"). On this motion sequence, Plaintiff opposes only that portion of S&M Klein's motion to vacate the 3/8/07 Order.

Since the disposition of each motion sequence directly impacts the other, they are hereby consolidated for consideration by the court.

The following facts and documents are considered in connection with the arguments presented:<sup>3</sup>

Keith McCarthy ("McCarthy"), Vice President in charge of Seneca's New York Branch Office, states that by letter dated July 27, 1994, Seneca and S&M Klein entered

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<sup>1</sup> There is no dispute that third-party defendant S&M Klein Co. Inc. has been incorrectly sued herein as "S&M Klein Co." Nonetheless, the court will refer to the third-party defendant as "S&M Klein".

<sup>2</sup> Justice Goodman recused herself from presiding over this action by order dated January 25, 2008.

<sup>3</sup> Many of the relevant facts are set forth in the decision of the Hon. Emily Jane Goodman, J.S.C., dated April 17, 2006 (the "4/17/06 decision").

into a brokerage agreement, wherein S&M Klein would serve as broker of Seneca and the rights and obligations of each party was allegedly set forth (the "letter"). The letter is addressed to Steven J. Klein ("Klein"), principal of S&M Klein, and was signed by Fred Morelli ("Morelli"). The letter references a "Profit Sharing Agreement", which Morelli asked Klein to sign and return to Seneca. The letter specifically states that "[a]ll claims are to be reported to our claims department." The Profit Sharing Agreement has not been provided to the court.

Plaintiff is the owner and operator of a retail carpeting store. Plaintiff was insured by Seneca under a Comprehensive Business Liability insurance policy numbered BO 5006735 (the "policy"). Plaintiff obtained the policy through its broker, Lazaro Rodriguez ("Rodriguez"). Rodriguez is a licensed insurance broker and has been working in the insurance industry since 1988. Although there is no dispute that the declarations page of the policy lists SMK Admin as "Agent", Seneca nonetheless claims that S&M Klein was the broker of record for plaintiff in connection with the policy at the time of the accident.<sup>4</sup> S&M Klein is a wholesale broker that assisted plaintiff's insurance broker in placing insurance with Seneca. Finally, SMK Admin is a wholly owned subsidiary of S&M Klein, but otherwise, its relationship with S&M Klein and the business which it presumably conducts has not been made clear to the court.

On September 30, 2002, within the policy period, Hadassah S. Loeb ("Loeb") slipped and fell at premises owned by plaintiff (the "accident"). On or about the same

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<sup>4</sup> However, a copy of the policy in effect at the time of the accident has not been provided to the court.

day, plaintiff notified Rodriguez of the accident. Rodriguez claims to have faxed a notice of the accident to SMK Admin on October 1, 2002. Plaintiff alleges that SMK Admin failed to forward to October 1, 2002 notice to Seneca.

Seneca denied coverage to plaintiff on late notice grounds refusing to defend or indemnify plaintiff in a personal injury action brought by Loeb (Loeb v. JPB Capreting, Inc., Index No. 112356/03 [Sup Ct, NY County]) (the "Loeb action"). Seneca admits that it was notified of the accident on January 28, 2003.

Plaintiff's sole cause of action is for breach of contract. Seneca, in addition to general denials of the allegations of the complaint, asserted an affirmative defense based solely upon late notice. Before the third-party action was commenced, Seneca and plaintiff each moved and cross-moved for summary judgment, respectively. In the 4/17/06 decision, the Hon. Emily Jane Goodman found that there were two triable issues of fact which precluded summary judgment for either side, to wit: [1] whether Rodriguez promptly notified Seneca of the accident; and [2] whether SMK Admin "was or was not Seneca's agent for purposes of notice of the accident." Relevant to these motions, Justice Goodman held:

Whether the word "agency" should be taken to mean that SMK was Seneca's agent or [plaintiff's] for purposes of notice, or whether Rodriguez, as a professional, should have know (sic) that it meant that SMK was [plaintiff's] agent, is a factual question, upon which summary judgment fails.

Seneca then impleaded S&M Klein as a third-party defendant.

#### **Motion and cross motion to dismiss plaintiff's complaint**

The court will first address the motion and cross-motion to dismiss plaintiff's

complaint. S&M Klein and Seneca move for dismissal of the complaint pursuant to CPLR §§ 3211 (a) (1) and 3211 (a) (7). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1<sup>st</sup> Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]).

S&M Klein argues that, based on Rodriguez' deposition testimony, he could not have had a reasonable belief that he could notify SMK Admin as if he were notifying Seneca.

Rodriguez stated in an undated affidavit that it that "[i]t was clear to [him] from [his] prior dealing with [SMK Admin] that they were direct agents of Seneca. When [Rodriguez] wished to insure a new line of business or to change existing policy limits, [Rodriguez] would simply call [SMK Admin] and they would immediately bind or modify the coverage on Seneca's behalf without having to first consult Seneca for approval."

On March 22, 2007, Rodriguez testified about his statements in the affidavit.

- Q. I am asking you why you think as you put in your affidavit, SMK is the agent, simple as that?
- A. It is my belief that an agent searches the entity that when a company writes their name, it is on a policy, they are the agents for the company, they are representing the company.
- Q. Did you have any direct dealings with Seneca in any respect?

A. No.

Q. Never?

A. I am saying I never placed any lines. I guess I am not an authorized agent. It is my understanding that a company that has an arrangement with certain entities or individuals where they declare them agents and they say in the business, they open them up, they are open to represent the company.

Q. Am I correct in that Seneca never told you that SMK was its agent?

A. That Seneca –

Q. Verbally told you that SMK was their agent?

A. No.

Q. Other than what you refer to as the policy, Seneca never provided you with any other documentation saying that SMK was their agent?

A. No.

...

Q. My question now is what lead you to believe that it would be appropriate to notify SMK of the Loeb accident as opposed to notifying Seneca?

A. Because their name is on the policy, they are the representative that is representing the company.

Rodriguez also obtained other insurance policies for plaintiff with Seneca through two different brokers, to wit: Owen A. Perla (“Perla”) and The Lewis Agency, Ltd (“Lewis”). On the declarations page of each of these policies, Perla and Lewis were listed as the Agent, just like SMK Admin was in the subject policy.

With respect to Lewis, Rodriguez testified:

Q. Mr. Rodriguez are you familiar with the Lewis

Agency?

A. Yes.

Q. What do you know? How are you familiar with them?

A. I used to place business with them.

Q. Were they a wholesale broker?

A. No.

Q. What were they?

A. They were just a regular signature agency.

Q. When you say you used to place insurance with them how did you do that?

A. I would place business with them?

A. I would place business with them pretty much the same. I would go out and get the clients and they then they would place the business.

Q. ... You testified that Morstan and SMK were wholesale brokers, correct?

A. Right.

Q. How did what they did for you differ from what the Lewis Agency did which makes them a wholesale broker as opposed to the Lewis Agency.

A. If there are differences I am not clear about the differences, but I know there are differences.

Q. Did you ever believe they were an agent?

A. The Lewis Agency?

Q. Yes for any carriers.

A. The Q never came up I never asked the Q.

Q. Did you ever see anything or hear anything that led

you to believe that they were an agent?

A. No.

With respect to Perla, Rodriguez testified that “[t]o the best of [his] knowledge, it is agency (sic). I don’t know if they are an agent or not.”

Also, immediately to the right of the Agent box, there is a space for the “Authorized Agent” to sign each of the declarations page. This space is blank on each declarations page for all of the insurance policies that have been submitted on this motion. Rodriguez admitted during his deposition that he did not know what the difference was between an “Authorized Agent” and an “Agent,” as contemplated by the declaration pages of the policies.

Rodriguez testified that “to the best of [his] knowledge”, the only difference between a broker and an agent is that an agent has binding authority, and that he did not know if SMK, Perla and Lewis had binding authority for Seneca. Rodriguez further testified that he could not contact Seneca directly, but that he had deal with SMK Admin, who would, in turn, call Seneca and “place the business.”

In its cross-motion, Seneca contends that Rodriguez “recanted the testimony in his affidavit that he believed that SMK had binding authority for Seneca.” Seneca also asserts virtually the same arguments made by S&M Klein with respect to Rodriguez’ beliefs as to SMK Admin’s relationship with Seneca.

Plaintiff argues that the motion and cross-motion to dismiss are infirm because they lack affidavits from persons with personal knowledge of the facts and, to the extent that Seneca and S&M Klein move pursuant to CPLR § 3211 (a) (1), many of the documents relied upon are not “documentary evidence” for purposes of such a motion.

Plaintiff also contends that there are sufficient facts alleged to withstand dismissal.

### Discussion

Preliminarily, the court addresses S&M Klein's suggestion that this court convert this motion to dismiss into one for summary judgment. This request was first made in reply papers. None of the parties to this action have unequivocally requested treatment under CPLR § 3211 (c). Moreover, the court finds no reason to convert this motion to summary judgment and the court only considers this motion only to the extent it seeks dismissal under CPLR § 3211 (a).

The motion and cross motion pursuant to CPLR § 3211 (a) (1) each fail. A motion to dismiss may be granted on documentary evidence so long as the documents alone "definitively dispose of plaintiff's claim" (Blonder & Co., Inc. v. Citibank, N.A., 28 AD3d 180 [1st Dept 2006]). The movant may not rely on affidavits or depositions to support a motion to dismiss pursuant to CPLR § 3211 (a) (1) (see generally Demas v. 325 West End Ave. Corp., 127 AD2d 476 [1st Dept 1987]). S&M Klein and Seneca have failed to even provide to the court a copy of the policy in effect at the time of the accident. Therefore, there is no documentary evidence submitted which supports a motion pursuant to CPLR § 3211 (a) (1).

Although on a dispositive motion pursuant to CPLR § 3212 or at trial, the burden will be on the plaintiff to prove that plaintiff's notice was transmitted to SMK Admin and that Rodriguez had a reasonable belief that SMK Admin was Seneca's agent for purposes of notice of the accident, at this stage of the case, plaintiff's burden is far easier, which is to present facts that state a cause of action against Seneca. Argo Corp. v. Greater New York Mutual Insurance Company, 4 NY3d 332 (2005). Plaintiff

has easily met its burden because, at this stage, these facts are afforded every favorable inference. EBC I, Inc v Goldman, Sachs & Co., *supra*.

Based on Justice Goodman's 4/16/06 decision, all plaintiff must do is allege sufficient facts to show that Rodriguez had a "specific reasonable belief" that SMK Admin had the apparent authority to "accept notice of suit on behalf of Seneca" in this breach of contract of insurance action. The court further held that it is the actions of Seneca, not of SMK Admin, which must create the agency.

S&M Klein has not, as a matter of law, resolved any of the fact questions identified by Justice Goodman in the 4/16/06 decision. Specifically, Justice Goodman wrote:

On the declaration page relating to the Seneca policy, at the very bottom, next to the word "agent," appears the name of SMK, and the number 10-10577 (the meaning of which has not been explained). [Plaintiff] and Rodriguez consider this conclusive proof that SMK was Seneca's agent for purposes of notice. SMK, on the other hand, explains through its vice president, Keith McCarthy (McCarthy), that the word "agent" in that context always means either the policy holder's agent, or the broker used to obtain the policy for the insured. McCarthy explains that this is something that "every industry professional knows." ... Although not mentioned by the parties, the Court notes that the signature of Raymond David appears to the left of and below, the typed words "Authorized Agent," which has not been explained by the parties.<sup>5</sup>

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<sup>5</sup> The court notes that neither S&M Klein nor SMK Admin are parties to the main action, and it appears on this record, that the court's reference to McCarthy as vice president of SMK was in error. The parties have not addressed this discrepancy, but Seneca has provided, on its cross motion in motion sequence number 003, an affidavit from McCarthy who states that he is the Vice President in charge of Seneca's New York Branch Office. In any event, it is of no moment whether McCarthy was employed by Seneca, S&M Klein or SMK Admin at the time of the prior affidavit. The fact questions identified by the court in the 4/16/06 decision nonetheless remain unaddressed on this motion.

Nor has S&M Klein established that Rodriguez' belief, that SMK Admin was Seneca's agent for purposes of notice, was unreasonable. Here, plaintiff alleges that by Seneca listing SMK Admin as "Agent" on the declarations page of the policy, Rodriguez reasonably believed that SMK Admin was Seneca's agent for purposes of notice, and therefore relied on that representation in reporting the accident on behalf of plaintiff. Plaintiff further maintains that Seneca never dealt with plaintiff directly, but only through independent agents such as SMK Admin. In fact, Rodriguez, a licensed insurance broker with many years of experience in the insurance industry, testified that he never directly dealt with Seneca, but instead contacted SMK Admin, which would act as an intermediary between plaintiff and Seneca. Based on this record, there are sufficient facts to support plaintiff's claims.

S&M Klein, in reply, asserts that many of the cases relied on by plaintiff, where a broker was found to be the agent of the insurer, are *factually distinguishable* from the instant case. However, sufficient indicia of authority exist so as to withstand dismissal at this stage.

Moreover, although Rodriguez expressed confusion when asked to explain his understanding of the relationships between Seneca and the respective "Agents" in connection with each policy, this is simply not outcome determinative at this juncture. Accordingly, the motion and cross-motion by S&M Klein and Seneca to dismiss plaintiff's complaint are hereby denied in their entirety.

**Motion to dismiss and cross-motion to amend the third-party complaint**

S&M Klein has also moved to dismiss the third-party complaint. Seneca cross-moves to amend the complaint to add SMK Admin as a third-party defendant.

The court will address the cross-motion to amend first, since its disposition will bear on the motion to dismiss.

Additional facts relevant to motion sequence number 003 are as follows. In or about March 1998, McCarthy claims that the principals of S&M Klein and Seneca agreed that Seneca would accept business from SMK Admin. Seneca has asserted three causes of action in the third-party complaint: [1] indemnification; [2] contribution; and [3] breach of fiduciary duty. Seneca cross-moves to amend the third-party complaint to assert causes of action for contractual indemnification and breach of fiduciary duty against both S&M Klein and SKM Admin.

“Leave to amend a pleading is to be freely given where... there is no showing of prejudice or surprise to the nonmoving party, and the proposed amendment is not totally devoid of merit.” Gjokaj v. Fox, 25 AD3d 759 (2d Dept. 2006).

S&M Klein does not even allege prejudice as a result of the proposed amendment. In fact, S&M Klein argues that “[w]hether or not the motion to amend is granted to add another party is of no matter since it does not change the fact that Seneca, as a matter of law, does not possess a cause of action against either.”

The new claims fail, however, because they completely lack merit. The breach of fiduciary claim is barred by the applicable statute of limitations. Seneca states that “a six year statute of limitations is applicable to causes of action for indemnification, including indemnification arising from a breach of duty.” However, this argument is unavailing. The statute of limitations period applicable to a breach of fiduciary duty claim depends upon the relief sought. Loengard v. Santa Fe Industries, Inc., 70 NY2d 262 (1987). Where monetary damages are sought, the applicable period is three years,

but where the relief sought is equitable in nature, a six-year statute of limitations applies (Kaufman v. Cohen, 307 AD2d 113 [1st Dept 2003]). Here, Seneca seeks indemnification and/or contribution on its breach of fiduciary duty claim, which is legal relief because monetary damages would make Seneca whole. Cadwalader Wickersham & Taft v. Spinale, 177 AD2d 315 (1st Dept 1991). Therefore, the three-year statute of limitations applies.

Seneca claims that S&M Klein breached its fiduciary duty when it failed to forward the notice from Rodriguez on October 1, 2002. The third-party action was commenced by filing with the County Clerk on May 2, 2006, which is more than three years after this cause of action accrued. Therefore, the cause of action for breach of fiduciary duty was brought outside the statute of limitations.

The first and third causes of action for contractual indemnification also fail. The contract between the parties does not have any express obligation on the part of S&M Klein to indemnify Seneca under the circumstances presented. Seneca has not even alleged this necessary element of its claim against SKM Admin, either. Therefore, the causes of action for contractual indemnification must also fail. For these reasons, the cross-motion to amend must be denied in its entirety and the motion to dismiss Seneca's cause of action for breach of fiduciary duty is granted and the third cause of action for breach of fiduciary duty is severed and dismissed.

S&M Klein argues several grounds for dismissal of the remaining causes of action for common law indemnification and contribution, to wit: [1] Seneca has failed to plead the necessary elements for its common law indemnification and contribution claims; [2] S&M Klein did not have a duty to Seneca upon which a claim for common

law indemnification and contribution can be based; [3] Seneca cannot suffer any damages even if required to provide reimbursement for defense costs and indemnification to plaintiff because such payment would merely represent Seneca's obligation under the policy; and [4] S&M Klein is not the proper party to this action.

The court rejects S&M Klein's arguments. Where the basis for the motion to dismiss is the purported failure to state a cause of action (CPLR § 3211 [a] [7]), the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v. Orofino Realty Co., *supra*. Although bare conclusions will not suffice, affidavits and other evidence may be freely relied upon to preserve inartfully pleaded but potentially meritorious claims. *Id.* At this juncture, Seneca has alleged sufficient facts to establish a duty running from S&M Klein to Seneca who may be held liable in the main action (see e.g. Raquet v. Braun, 90 NY2d 177 [1997]; see generally Trustees of Columbia University in City of N.Y. v. Mitchell/Giurgola, 109 AD2d 449 (1st Dept 1985)).

As for Seneca's alleged damages, Seneca seeks "any and all damages assessed in [the main action] against Seneca, including costs, expenses and attorneys fees." These assertions are general and sufficient to withstand dismissal. Specifically, Seneca's damages, if found liable in the main action, may include damages sustained as a result of its failure to play a role in the direction and control of the underlying personal injury litigation.

Finally, S&M Klein's argument that it is not a proper party belies the allegations contained in the complaint and the facts that SKM Admin is a wholly owned subsidiary of S&M Klein, that the fax was allegedly sent to S&M Klein and not SKM Admin.

Therefore, the causes of action for common law indemnification and contribution against S&M Klein remain.

**Motion for vacatur of the 3/8/07 order**

S&M Klein now moves to “vacate” the 3/8/07 order on the grounds that, based on Rodriguez’ testimony, the documents sought by plaintiff are “neither relevant nor material and necessary, nor can they lead to any documents or evidence that are relevant, material or necessary in the prosecution or defense of the action.” However, S&M Klein essentially seeks to reargue the 3/8/07 order, and the court will treat this motion as such.

As a general matter, reargument should be addressed to the Justice who made the underlying decision. People v. Jennings, 69 NY2d 103, 113-114 (1990). Where a Judge is “unavailable” to consider a motion to reargue, however, a newly assigned Judge can decide the issues raised. People v. Davis, 162 Misc2d 662 (N.Y.Sup 1994).

Reargument should be granted if a judge has over looked or misapprehended the relevant facts, or misapplied any principle of law in his or her prior orders (CPLR § 2221 [d] [2]; Foley v. Roche, 68 AD2d 558, 567 [1st Dept. 1979]). S&M Klein has failed to meet its burden.

The documents and other information sought from S&M Klein as incorporated into the 3/8/07 order are as follows: [1] names and addresses of other brokers who placed insurance policies with S&M Klein and Seneca; [2] the number of policies S&M Klein placed with Seneca during 2000, 2001 and 2002; [3] documents identifying the relationship of S&M Klein and Seneca since inception, if available; [4] copies of declaration pages, counter signature pages and any other pages that state or refer to

S&M Klein and Seneca as Agent, for any policies placed by S&M Klein with Seneca since 1998; [5] correspondence between S&M Klein and Seneca since 2001 in which the word "agent" or "broker" is used referring to the relationship of/between those 2 entities; [6] the number of policies produced/processed by S&M Klein on behalf of Rodriguez with Seneca since 1998; and [7] documents received by S&M Klein from Rodriguez relating to plaintiff's claims.

S&M Klein contends that since the only issue in this case is whether Seneca made representations to Rodriguez which thereby created apparent agency, and because Rodriguez testified that his belief that SKM Admin was Seneca's agent was based on the declarations page of the policy, no other documents are relevant or necessary.

However, plaintiff argues that apparent authority can be founded on documents given by the principal to the agent. It is true that in proving the existence of apparent authority, there must be a factual showing "that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal-not the agent" (*Hallock v. State*, 64 NY2d 224, 231 [1984]). All of the documents sought by plaintiff are relevant to the issue of apparent authority, including whether S&M Klein made any misrepresentations based on Seneca's allegedly misleading conduct. Therefore, S&M Klein has not established that the court overlooked the relevant facts or misapplied the law.

Accordingly, S&M Klein's motion to the extent that it seeks to reargue the 3/8/07 order is denied.

## **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that the motion and cross-motion by S&M Klein and Seneca, respectively, to dismiss plaintiff's complaint, are denied in their entirety; and it is further

**ORDERED** that the cross-motion by Seneca to amend the complaint is denied; and it is further

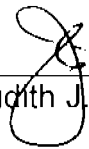
**ORDERED** that the motion by S&M Klein to dismiss the third-party complaint and to reargue the 3/8/07 order is granted only to the extent that the third cause of action for breach for breach of fiduciary duty is hereby severed and dismissed; the motion by S&M Klein is otherwise denied.

The court hereby schedules a status conference in this matter for July 31, 2008 in Part 10 at 80 Centre Street, Room 122.

Any relief requested but not expressly addressed is hereby denied. This shall constitute the decision and order of the court.

Dated: New York, New York  
June 24, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
JUN 27 2008  
NEW YORK  
COUNTY CLERK'S OFFICE