Motion No. 2021-588
New York County Clerk's Index No. 652422/11
Appellate Division–First Department Case No. 2019-04601

Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents,

– against –

SENECA INSURANCE COMPANY,

Defendant-Appellant.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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STATE OF NEW YORK
COURT OF APPEALS

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34-05 73, LLC, BUD MEDIA, LLC, and
COORS MEDIA, LLC,

Plaintiffs-Respondents,

-against-

SENECA INSURANCE COMPANY,

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----------X

Appellate Division
1st Department
Docket No.: 2019-04601

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CORPORATE DISCLSOURE STATEMENT

Pursuant to 22 N.Y.C.R.R. § 500.1(f) and 22 N.Y.C.R.R. § 500.22(b)(5), Plaintiffs 34-05 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs"), hereby disclose that each entity is a limited liability company organized and existing under the laws of New York, and that with the exception of their affiliation with one another, Plaintiffs have no corporate parents, subsidiaries, or affiliates.

Dated: July 14, 2021
New York, New York

Respectfully submitted,

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PRELIMINARY STATEMENT

Plaintiffs-Respondents 34-06 73, LLC, Bud Media, LLC, and Coors Media, LLC ("Plaintiffs"), by and through their attorneys, respectfully submit this brief in opposition to the motion filed by Defendant-Appellant Seneca Insurance Company ("Defendant or "Seneca") wherein it seeks leave to appeal the January 28, 2021 decision of the Appellate Division, First Department that affirmed the Trial Court's refusal to overturn the jury verdict rendered on October 18, 2019 or the final judgment entered on December 4, 2019. Defendant previously sought and was denied leave to appeal by the Appellate Division.

While this is now the fifth time that Seneca has challenged Plaintiffs' ability to demonstrate that the Protective Safeguard Endorsement ("PSE") was never a part of the Subject Policy to wit there was no basis for Seneca to have denied Plaintiffs' insurance claim, Seneca does not dispute that clear and convincing evidence supported a New York County jury's March 22, 2019 determination that Seneca breached its contract by refusing to pay Plaintiffs' first-party property insurance claim. Defendant – without asserting any prejudice – initially challenged Plaintiffs' motion to amend its pleading to conform to the proof prior to the case going to the jury. *See* R. at 1006-23, 1298-1312. Subsequently the Trial Court rejected Seneca's post-verdict motion to set aside the verdict with said rejection being affirmed by the

Appellate Division in *per curiam*. *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 (1st Dept. Jan. 28, 2021). On May 25, 2021, the Appellate Division denied Seneca's next attempt to reverse the jury's verdict, denying both a request for reargument and a request for leave to appeal to this Court. Apparently unsatisfied with all of the opportunities provided to it, Seneca now once again seeks to challenge the results of the trial.

It must also be noted that Defendant's instant application in which it seeks to persuade this Court to grant review, consists of an anemic two-page argument for review. The balance of this "motion" improperly consists of fifty pages in which it attempts to explain why, in Defendant's view, the Trial Court got it wrong by allowing the verdict to stand. Some of these arguments were not preserved down below while other attacks fail to take cognizance of factual determinations made by the Trial Court—making both of these arguments jurisdictionally deficient. As to the only proposed question preserved for appeal, Seneca's motion should fail both because the decisions of the lower courts are entirely consistent with this Court's precedent as well as the fact that these issues do not present any novel legal issues. Defendant concedes that there is no constitutional issue, nor a split among the appellate departments as to the question in issue. Moreover, as referenced above, this Court seldom addresses questions that implicate the discretion of the Trial Court,

as this case does in more than one aspect – *e.g.*, discretion to grant amendment at trial and discretion to sanction a party for its violations of the discovery process. This Court likewise generally does not concern itself with issues that involve questions of fact, which the instant application implicitly raises. Similarly, Defendant does not dispute and therefore concedes that the interests of justice are well-served by the current result in this case.

Moreover, here, the Record demonstrates that (a) Seneca sandbagged the Plaintiffs in connection with its discovery obligations; (b) Seneca was aware at all points in this litigation that there were serious questions as to the applicability and/or enforceability of the PSE; and (c) the jury was provided with clear and convincing evidence establishing that the PSE was issued in error. Plaintiffs therefore respectfully contend that the instant motion should be denied.

STATEMENT OF FACTS

This litigation arises from Seneca's breach of its contractual obligations in connection with a policy of insurance which it issued to Plaintiffs. The Subject Policy provided coverage for nine separate commercial properties owned by Plaintiffs, including coverage to vacant lots and other vacant and/or uninhabitable buildings. *See* R. at 605-21; R. at 785-87; 1904 *et. seq.* The initial application for

coverage clearly indicated that none of these properties, including the vacant lots, had sprinkler systems. *See* R. at 605-21; R. at 785-87; 1904 *et. seq.*

After coverage was bound, Seneca physically inspected each of the properties covered under the Subject Policy. These inspections confirmed that the properties were in the same condition as described in the initial application. *See* R. at 639-43. In fact, the inspection report for the property at issue herein very clearly indicated that the building in question lacked functional sprinklers. *See id.*, R. at 1801-12.

Thereafter, Seneca issued a letter setting forth certain recommendations to Plaintiffs with respect to this property, although it failed to even mention the sprinklers, let alone any instruction for Plaintiffs to repair the sprinkler system. Rather, the letter only addressed issues such as cracks in the sidewalk and requested that Plaintiffs "make the insurer aware" that the sprinkler system was out of service, a fact, as indicated above, that Seneca was already well aware of based on its physical inspection of the premises at issue. *See* R. at 646-49, 1726-27. Thus, it is without dispute that Seneca was not only aware from the applications prior to the binding of coverage that the subject property did not have functional sprinklers, but this fact was confirmed to Seneca upon its receipt of the inspection reports. *See* R. at 782 *et seq.*; R. at 807-08. Nonetheless, Seneca did not seek to modify or cancel the subject policy. *See* R. at 658-65.

On or about September 8, 2009, a fire occurred at one of the commercial properties, resulting in Plaintiffs' suffering of damages resulting from the fire. *See* R. at 129-30, 937. Approximately twenty months after the fire, Seneca disclaimed coverage on the basis that Plaintiffs failed to comply with the PSE. *See* R. at 2487-92. As a result of Seneca's refusal to pay Plaintiffs' claim, Plaintiffs were compelled to institute the instant lawsuit against Seneca for breach of contract. *See* R. at 2493-96.

The parties engaged in years of discovery, during which time Seneca chose to withhold the underwriting file pertaining to the Subject Policy. Plaintiffs first requested that Seneca produce a complete copy of its underwriting file on or about November 29, 2011. *See* R. at 2683-2685. Plaintiffs also noticed the deposition of Mr. Robert Guardino, a Seneca employee who had been identified by Seneca as the underwriter involved in the issuance of the Subject Policy. *See* R. at 2687-91 (initial notice), 2692-96 (subsequent subpoena). On February 17, 2016, after Seneca had failed repeatedly to produce its underwriting file, as well as Mr. Guardino, the Court issued an Order requiring Seneca to produce the underwriting file by March 8, 2016 and to produce Mr. Guardino shortly thereafter. *See* R. at 2697-98.

After almost five years of litigation, on April 28, 2016, Seneca finally produced what it represented to be a "complete unredacted" copy of the underwriting

file. *See* R. at 2705. By this time, Mr. Guardino no longer worked at Seneca and was unable to appear for a deposition due to a declared disability and diminished mental capacity. R. 2692-96; 2707-10. This disability had its onset in or about November 2013, *see id.*, which would have allowed for Mr. Guardino to be deposed if Seneca had produced its underwriting file in a timely manner following Plaintiffs' November 2011 demand for same. *See* R. at 2687-91.

In June 2017, following the completion of all party depositions, Plaintiffs moved to dismiss Seneca's Fourth Affirmative Defense, which asserted non-compliance with the PSE by failing to maintain an automatic sprinkler system at the time of the fire, on the grounds that although Seneca knew that the sprinkler system at the premises was not functional, it did not cancel the policy. *See* R. at 2547-2580. Prior to the filing of this motion, Plaintiffs served Seneca with a Notice of Admit. *See* R. at 2508 *et seq*. In response, Seneca admitted that it knew that the fire sprinkler system at the premises was out of service and that they did not cancel the policy on those grounds. *See* R. at 2528 *et seq.* In response to Plaintiffs' motion, Seneca cross moved for summary judgment on the grounds that Plaintiffs breached the PSE as a result of its failure to maintain the sprinkler system. The Court held that the issues of whether Plaintiffs breached the PSE and whether Seneca waived its right to rely on the breach of the PSE presented questions of fact for the jury to resolve at trial.

R. at 2602-2612. Nonetheless, evidence presented in support of both of these motions clearly raised issues going to the issuance of the PSE and its validity and binding nature.

On or about March 14, 2019, a jury was impaneled for trial of this case. At trial, which lasted from March 14 to March 22, 2019, it became clear that the underwriting file lacked any indication that Seneca had ever intended to issue the Subject Policy with a PSE in the first place. Carol Muller, Seneca's witness, a vice president at the company at the time of trial, testified that the PSE was not included in the initial quote sheet sent by Seneca to Plaintiffs' brokers, nor was there any indication that Seneca had expressed to Plaintiffs the desire to include a PSE in the subject policy prior to the binding of the policy. *See* R. at 796-97. Furthermore, Plaintiffs were not issued a premium credit associated with maintaining a PSE, which is typically reflected in a file when a PSE requires that the building maintains functioning sprinklers. *See* R. at 652-55. Moreover, the issuing of the PSE was not referenced in the binder of insurance or the temporary policy, which would have been the first written indication as to whether the agreement by the parties contemplated including of a PSE in the policy. *See* R. at 794-95; R. at 2002-13.

Most significantly however, was the testimony of Muller, who conceded that the underwriter in charge of the subject policy did not include any written

instructions that the subject policy should include a PSE. *See* R. at 800-01. Additionally, Muller admitted that a route sheet, necessary to the issuance of a PSE, did not exist as part of the file, thereby providing further evidence that Seneca never intended to attach the PSE to the policy. *See* R. at 801-03. Muller's testimony at trial further confirmed that the initial quote on the policy was also missing from the underlying policy produced. *See* R. at 855-59. On the basis of those two missing documents, Muller surmised that it was possible that the inclusion of the PSE in the policy was a mistake. *See* R. at 834-35.

Following Muller's testimony, Seneca somehow miraculously located and attempted to introduce the missing documents from the previously "complete unredacted underwriting file" that had been produce to Plaintiffs on April 28, 2016 – 4 and a half years after the lawsuit commenced and demand was made. *See* R. at 978 et seq.; R. at 2705. Muller testified that she had no idea why the documents were not produced during discovery. *See* R. at 987. The Trial Court denied Seneca's application to have this new document entered into evidence. *See id.*; *see also* R. at 982 ("So far you've told me that it was copied wrong which is at best negligence. Maybe even gross negligence. So all sorts of sanctions start falling from gross negligence.")

In light of Muller's striking admission, Plaintiffs moved for leave, pursuant to CPLR 3025(c), to amend its complaint to conform to the proof presented at trial. The Trial Court heard argument on the motion on March 20, 2019, during which Seneca's sole contention in opposition was that Plaintiffs' proposed amendment was futile or barred by the statute of limitations. *See* R. at 1006-23, 1298-1312. Seneca did not raise any issue relating to prejudice or indicate any desire to call additional witnesses, let alone attempt to ascertain their availability. On March 22, 2019, Plaintiffs' motion to amend was granted. *See id*.

At the close of the trial, the Trial Court submitted four questions to the jury – (1) whether Plaintiffs showed by clear and convincing evidence that the PSE had been included in the subject policy by mutual mistake; (2) whether the Plaintiffs had shown by the preponderance of evidence that Seneca knowingly and voluntarily waived its right to enforce the PSE; (3) whether the Plaintiffs had shown by a preponderance of the evidence that Seneca should be estopped from relying on the PSE; and (4) whether Plaintiffs had shown by a preponderance of the evidence that they complied with the PSE. *See* R. 2131-35. The jury ultimately returned a verdict in favor of Plaintiffs in the amount of $2,481,395.63, finding that Seneca had breached its contract with Plaintiffs by failing to pay Plaintiffs' claim, concluding

that clear and convincing evidence existed to establish that the PSE was issued by mistake. *See* R. at 2131.

Thereafter, Seneca filed a motion to set aside the verdict, solely based upon its claim that Plaintiffs' demand for reformation should not have been presented to the jury. This motion did not, however, contend that the "reformation" finding by the jury was not supported by clear and convincing evidence. *See* R. at 29. Rather, Seneca simply sought to re-argue arguments raised to the Trial Court in opposition to Plaintiffs' application to conform the pleadings to the proof. However, in its post-trial submission, Seneca claimed for the first that it had suffered prejudice as a result of Plaintiffs' application to amend its Complaint to conform to the proof. *Compare* R. at 1006-23, 1298-1312 *with* R. at 2457 *et seq*. Although admitting that it had recognized and been aware of Plaintiffs' claim in which it sought to estop Seneca from relying upon the PSE to negate coverage as well as the claim that it had waived the right to rely on the PSE, *see* R. at 2461, Seneca failed to articulate any meaningful difference between those attacks on the applicability of the PSE to Plaintiffs' claim and the claim that the PSE was issued by mistake. *See also* R. at 979 (wherein the Trial Court stated "for [Defendant] to sit here and say that waiver and estoppel was not part of this case when [Plaintiff's summary judgment] motion was made in July of 2017 and decided on July 3rd, 2018 is absurd."). The Trial Court therefore denied

Seneca's post-trial motion on October 18, 2019, holding that amendment to the pleadings had been proper, both because of Plaintiffs' prior attacks on the PSE as well as the fact that Plaintiffs' reformation claim was a proper response to the pleading of Seneca's Fourth Affirmative Defense. *See* R. at 28-31. Moreover, the Trial Court further noted in the alternative that "defendant can hardly complain about statute of limitations when it failed to turn over its underwriting file until 2016, even though plaintiff filed its complaint in 2011." *See* R. at 30.

Subsequent to its multiple losses at the trial level, Seneca appealed to the Appellate Division for the First Department seeking reversal of the judgment. *See* Motion for Leave to Appeal at 5. In support of its appeal, Seneca argued that Plaintiffs' original complaint did not put Seneca on notice that Plaintiffs would ultimately allege at trial that the PSE contained in the Subject Policy had been issued by mistake, thereby justifying reformation of the Subject Policy. *See* Seneca's App. Brief, Dkt. No. 13 at 25 *et seq*. Seneca further contended in front of the Appellate Division that the Trial Court erred in holding that reformation was merely a variation on the theory of breach of contract and that Seneca could not claim unfair surprise or prejudice.

On January 28, 2021, in a unanimous decision, the First Department affirmed the Trial Court's denial of Seneca's post-trial motion, holding that Plaintiffs'

reformation claim properly related back to its original breach of contract claim, based on all the evidence presented supporting the position that the PSE was not meant to be included in the policy. *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 (1st Dept. Jan. 28, 2021). Moreover, the Appellate Division reasoned that, because Seneca knew that Plaintiffs did not have a working sprinkler system at the demised premises, and it took no action upon learning of same to cancel the policy, the jury could have easily concluded that the PSE was included in the policy by mistake. The First Department further pointed out that evidence as to reformation would be the same evidence used to support the original breach of contract claim, and therefore Seneca could not claim any unfair surprise or prejudice from charging the jury as to reformation based upon mutual mistake. The Appellate Division further explicitly ruled that "where defendant 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, its assertion of prejudice is unpersuasive." *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *2 (1st Dept. Jan. 28, 2021).

Thereafter, Seneca discharged its trial and appellate counsel and retained new counsel to file a motion for reconsideration to the Appellate Division, or, in the

alternative, leave to appeal to this Court, claiming to identify law that the Appellate Division overlooked or facts that the Appellate Division misapprehended. In truth, the motion, consisting of a 27 page affidavit and a 60 page Memorandum of Law constituted Seneca's attempt to file a "substitute" appellate brief and wish away the Appellate Division's prior determination. The First Department denied the motion for reconsideration and refused to grant leave to appeal to this Court by an Order dated May 25, 2021. On June 22, 2021, Defendant Seneca brought the instant motion once again seeking leave to appeal to this Court.

ARGUMENT

POINT ONE

SENECA'S MOTION IS JURISDICTIONALLY DEFICIENT

Pursuant to Rule 500.22(b)(4), Defendant Seneca has an obligation to identify where in the record the arguments for which it seeks leave to appeal were preserved. *See* 22 N.Y.C.R.R 500.22(b)(4) ("Movant shall identify the particular portions of the record where the questions sought to be reviewed are raised and preserved."). Notwithstanding the excessive length of Defendant's motion papers, it has failed to make such specific identification. Indeed, Defendant could not make such showing as regards its arguments relating to prejudice, which were not raised at trial – when the Court could have fashioned a remedy as permitted by CPLR 3025(c) – but were

asserted for the first time in post-trial briefing. Similarly, Defendant did not contend at trial that the Complaint did not plead sufficient facts regarding the cause of action for reformation – indeed, the first time that Defendant raised this question was in its first motion for leave to appeal to this Court. Defendant also did not argue at trial that Plaintiffs had been in possession of all facts necessary to seek reformation at the time that the Complaint was initially filed until it sought leave to appeal to this Court. Arguments that have not been preserved for appeal are not considered reviewable by the Court of Appeals even where the Appellate Division, in its discretion, has considered such issues.[1] *See McGovern v. Mount Pleasant Cent. School Dist.*, 25 N.Y.3d 1051 (2015) (dismissing appeal for lack of preservation of issues raised before Court of Appeals); *People v. Chaitin*, 61 N.Y.2d 683 (1984) (same). Consequently, the instant motion and proposed appeal must be dismissed on this basis alone.

[1] The exception to this rule for cases in which it was an abuse of discretion for the Appellate Division to have reversed the Trial Court on the basis of an unpreserved question is not relevant to this dispute, where the Appellate Division affirmed the Trial Court's decision. It should further be noted that as to those issues raised for the first time in Seneca's motions for leave to appeal, the Appellate Division in fact did not pass upon such questions.

POINT TWO

SENECA'S MOTION DOES NOT MEET THE STANDARDS FOR REVIEW BY THE COURT OF APPEALS

In determining whether to grant leave to appeal, the Court of Appeals looks to the novelty, difficulty, importance, and effect of the legal and public policy issues raised by the proposed appeal. *See Niesig v. Team I,* 156 A.D.2d 650, 650 (2d Dep't 1989) (granting leave to appeal issue of "sufficient importance" to warrant review by the Court of Appeals."); *Town of Smithtown v. Moore,* 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); 22 N.Y.C.R.R 500.22(b). Generally, the Court of Appeals does not review questions committed to the discretion of the trial court. *See Herrick v. Second Cuthouse*, 64 N.Y.2d 692 (1984); *Jacobs v. Chemical Bank of New York Trust Co.*, 30 N.Y.2d 750 (1972). Similarly, where the question at issue turns on the particular facts of a particular case, this Court also will decline to consider an appeal. *See Cannon v Putnam*, 76 N.Y.2d 644, 651 (1990) (findings of fact affirmed by Appellate Division are not reviewable by the Court of Appeals).

Both the Trial Court and the Appellate Division in this case considered the factual determinations in this case highly relevant, including Defendant's failure to comply with its discovery obligations. For instance, the Trial Court found it "absurd" that the Defendant, who admitted knowledge that the enforceability of the

PSE was in dispute regarding Plaintiff's unpleaded responses of waiver and estoppel to Defendant's Fourth Affirmative Defense, would assert any issue with reformation also being put to the jury. *See* R. at 979. The Trial Court further noted in its' post-judgment decision that "defendant can hardly complain about statute of limitations when it failed to turn over its underwriting file until 2016, even though plaintiff filed its complaint in 2011." *See* R. at 30. The Trial Court's position may also have been influenced by the sudden discovery of new documents by Defendant during trial, notwithstanding the Defendant's prior representation to Plaintiffs that the "complete, unredacted" underwriting file had been produced. *See* R. at 978 et seq.; R. at 2705. Indeed, the Trial Court characterized Defendant's behavior as "at best negligence[, m]aybe gross negligence," subject to "all sorts of sanctions." *See* R. at 982. The Appellate Division agreed, noting in its affirmance of the Trial Court's post-judgment decision that "where defendant 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, its assertion of prejudice is unpersuasive." *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *2 (1st Dept. Jan. 28, 2021). In light of the importance of the unique

factual circumstances to this case, it is inappropriate for review by the Court of Appeals.

Similarly, in its motion for leave to appeal before the Appellate Division, Defendant failed to raise any contention whatsoever as to the novelty, difficulty, importance, or effect to legal and public policy of the proposed appeal. The instant motion is little better, providing only the naked contention that all three proposed questions "involve issues of critical public importance," with the further plea that the first question merits leave because the Appellate Division's ruling "is inconsistent with *Matter of SCM Corp.*, 40 N.Y.2d 788." *See* Defendant's Motion for Leave to Appeal at 7, 26-28. Defendant contends without explanation that the Appellate Division's decision "will establish entirely new standards in terms of how plaintiffs and defendants in other contract-based cases pursue discovery and prepare their defenses." *See id.* at 27. This threadbare argument is insufficient to justify a grant of leave to appeal.

As to *Matter of SCM Corp., supra,* that case stands for the proposition that a defendant's counterclaim for reformation does not relate back to the time of the plaintiff's complaint. *In re SCM Corp. (Fisher Park Lane Co.)*, 40 N.Y.2d 788, 390 N.Y.S.2d 398, 358 N.E.2d 1024 (1976). The Appellate Division correctly observed that in that case, "the Court of Appeals held that the landlord's counterclaim for

reformation of the lease could not be saved by CPLR 203 (c) from the applicable period of limitation, because the landlord's claim for reformation and the tenant's action to recover rental overpayments did not arise from the same transactions or occurrences." As this Court wrote when deciding *In re SCM Corp.*, a primary basis for this conclusion was predicated on the fact that the counterclaim did not "seek a recovery-back predicated on some act or fact growing out of the matter constituting the cause or ground of the action brought [by the plaintiff], but is instead a setoff--a separate and distinct claim in favor of the [defendant] landlord." *See* 40 N.Y.2d at 791. In contrast, the Appellate Division concluded that at bar, "as defendant concedes, plaintiffs have contended throughout this litigation that defendant waived or should be estopped from reliance on the PSE." *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *1 (1st Dept. Jan. 28, 2021). Moreover, as the Appellate Division further observed, "the same evidence supporting the waiver claim also supports reformation." *See id.*

Rather than *Matter of SCM*, the more applicable prior decisions of this Court include, for example, *Abrams v. Maryland Casualty Co.*, 300 N.Y. 80 (1949) and *Arthur v Homestead Fire Ins. Co.*, 78 N.Y. 462 (1879). "In a case involving a provision of statute or of contract limiting the time within which suit must be commenced, the cause of action will be deemed the same if the amended and original

complaints both seek to enforce the same obligation or liability." *See Abrams v. Maryland Casualty Co.*, 300 N.Y. 80 (1949) (affirming plaintiff's verdict to recover on contract, where complaint initially sought only reformation and thereafter was amended to include recovery on contract at trial); *see also Bernstein v. Remington Arms Co.*, 18 A.D.2d 910 (2nd Dept. 1963) ("an amended complaint based upon the same set of facts and founded upon the same actionable wrong, as originally pleaded, was not equivalent to the commencement of a new action"). This Court has similarly held that the plaintiff in an action is entitled to "the benefit of every possible answer to [an affirmative] defense," without further pleading, provided that such answer be proved by evidence. *See Arthur v Homestead Fire Ins. Co.*, 78 N.Y. 462, 466-467, 469 (1879). It is beyond cavil that the contractual rights that Plaintiffs sought to enforce have remained consistent throughout the litigation, that the Protective Safeguard Endorsement has been at the heart of this litigation since it was asserted by Defendant as an affirmative defense in its Answer and that the only effect of the reformation is the enforcement of those rights asserted by Plaintiffs' Complaint – to recover for a fire loss insured by the Defendant. To the extent that the reformation was permitted by way of amendment when it should simply have been permitted without amendment as a response to an affirmative defense, the error is harmless.

Consequently, the Record at bar fails to present any basis to grant Defendant's motion.

Moreover, the decision of whether to permit amendment is one committed to the discretion of the Trial Court. *See England v. Sanford*, 78 N.Y.2d 928 (1991) (denying motion for leave to appeal Appellate Division's grant of motion to amend complaint); CPLR 3025. In *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 998 N.Y.S.2d 740, (2014), the Court of Appeals permitted the defendant to amend its answer pursuant to CPLR 3025(c) to assert a counterclaim for monies owed under a settlement agreement that was central to the plaintiffs' declaratory judgment action. As the decision in *Kimso* emphasizes, "[c]ourts are given 'considerable latitude in exercising their discretion [in entertaining motions to amend], which may be upset ... only for abuse as a matter of law.'" On the record before it in *Kimso*, the Court ruled that denial of the amendment constituted an abuse of discretion because the opponents to the proposed amendment to conform the pleadings to the proof could not establish any prejudice. This Court emphasized that plaintiffs' own papers established that they were not only aware of, but also admitted the payment obligations that were the subject of the counterclaim.

Similarly, at bar Seneca admitted on appeal that evidence used to support the reformation cause of action supports the argument that Seneca waived or should be

estopped from relying on plaintiff's alleged breach of the PSE. As such, since Plaintiffs maintained the alternative relief from the inception of litigation, the PSE at issue in the underlying policy would be central, not only to the breach of contract action, but also to the reformation claim. As such, much like in *Kimso*, Seneca cannot claim surprise or prejudice from amendment of the complaint and reformation of the policy.[2] The grant of the motion to amend therefore was not an abuse of discretion and is not subject to this Court's review.

Sanctions for the violation of discovery are similarly questions of discretion. *See CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307 (2014). The decision of the Trial Court, as affirmed by the Appellate Division, incorporated aspects of both a motion to amend and a sanction for Defendant's four-and-a-half year long refusal to comply with its discovery obligations, the absence of which could have resulted in a trial prior to the running of the statute of limitations. The Trial Court and the Appellate Division both clearly considered the question of the statute of limitations when reaching their decision to grant the motion to amend, thus indicating that all relevant factors were considered in reaching the decision to grant the motion to amend.

[2] That the jury's verdict did not find either waiver or estoppel is consistent with its finding that Seneca had not intended to issue the Subject Policy with a PSE. If there was any other finding Seneca would be the first party to claim that the jury's verdict was internally inconsistent and must be vacated.

Absent an abuse of discretion, which Defendant has not and cannot show, this Court cannot disturb the existing decision. The decision rendered is also very particular to the instant facts, depending as it did in part on the Defendant's failure to participate properly in the discovery process.

POINT THREE

THE FIRST DEPARTMENT CORRECTLY ANALYZED ALL RELEVANT CONSIDERATIONS

As noted above, Seneca's claims regarding any alleged prejudice, among other arguments, were not preserved and therefore cannot be considered by this Court.[3] *See supra* at Point I. Similarly, to the extent that Seneca contends that the Appellate Division's decision is in conflict with this Court's decision in *Matter of SCM*, Seneca is simply wrong. *See supra* at Point II. As further discussed at Point II, the Appellate Division correctly recognized that Plaintiffs' "reformation claim is responsive to defendant's fourth affirmative defense." *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *2 (1st Dept. Jan. 28, 2021), *citing Arthur v Homestead Fire Ins. Co.*, 78 N.Y. 462, 466-467, 469

[3] It should, however, be noted that the only discovery that Defendant claimed to need and have been unable to obtain as a result of the amendment – other than materials which it had itself identified as relevant in connection with its own disclosures - was discovery that was in fact sought by Plaintiffs and which could not be obtained as a direct result of Seneca's improper delay in production of discovery materials.

(1879) (concluding that following the joining of the law and equity systems, the plaintiff was entitled as a matter of law to "the benefit of every possible answer to the [affirmative] defense" without further pleading, provided that such answer be proved by evidence). In *Arthur v. Homestead Fire Ins. Co.*, *supra* this Court deemed an amendment of a pleading to add a cause of action for reformation at trial proper because "the evidence of mistake was proper . . . in reply to the claim of breach of warranty." *See id.* Thus, since Defendant placed the PSE in issue via its affirmative defenses to Plaintiffs' complaint, Plaintiffs were entitled to all defenses to this assertion, including without limitation the equitable defense of reformation. *See Arthur v. Homestead Fire Ins. Co.*, *supra*; *see also Susquehanna S.S. Co. v. A.O. Andersen & Co.*, 239 N.Y. 285 (1925) (reformation can be both a claim and an equitable defense).

Although not a basis for this Court to necessarily grant leave, Seneca further contends that the Appellate Division misapprehended and/or overlooked the limits under which amendment pursuant to CPLR 3025(c) may be applied during the course of the trial. It predicates its claim on the basis that the Appellate Division overlooked the allegations that were contained in the pleadings as well as the "inherent prejudice" that Seneca suffered as a result of the amendment. In suggesting such error, Seneca myopically ignores the motion practice which had previously

taken place, where the applicability of the PSE was challenged, as well as the admissions made by its own underwriter on the witness stand. Finally, Seneca ignores the fact that trial counsel for Seneca never identified any "prejudice" or even requested a continuance in the course of opposing the amendment.

CPLR 3025(c) explicitly authorizes the grant of a motion to amend to conform to the proof at the time of trial. Motions to amend under CPLR 3025(c) "are a matter within 'the sound discretion of the court and should be determined in the same manner and by weighing the same considerations as upon a motion to amend pursuant to subdivision (b), except that under (c) the possibly increased effect on orderly prosecution of the trial might be a factor to be taken into account.'" *Loomis v. Corinno Corp.*, 54 N.Y.2d 18, 23 (1981). As a result, where the amendment merely adds a new theory of recovery or defense arising out of a transaction or occurrence already in litigation, amendment generally should be granted. *See Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 477 (1985).

As set forth above, both the Trial Court and the Appellate Division, upon review, concluded that the PSE's applicability has been at the heart of this case from the very beginning. *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *1 (1st Dept. Jan. 28, 2021); R. at 29-30 ("Plaintiff has contended from day one that the PSE was unenforceable."). Furthermore, a

review of the record shows that the applicability of the PSE in question has been an issue throughout the litigation. *See* R. at 29-30, *34-06 73, LLC et al. v. Seneca Insurance Company,* 190 A.D.3d 628, 2021 WL 278280 at *1 (1st Dept. Jan. 28, 2021); *see also supra* at Point II. All evidence clearly illustrates that the reformation cause of action stems from the same obligation or liability on the part of Seneca as does the breach of contract action. *See id.* Accordingly, both the Trial Court and the Appellate Division properly concluded that not only were Plaintiffs within their right to amend its pleadings to add the reformation cause of action, but that the cause of action for reformation stemmed from the same transaction or occurrence already in litigation. *See id.*

Additionally, as set forth above, the most telling evidence that Seneca's contention of prejudice is a mere pretext is the fact that Seneca did not assert a single argument as to any potential prejudice at the time of trial. *See* R. at 1006-23; 1298-1312. It was only following the jury verdict in Plaintiffs' favor, and in support of its motion to vacate the jury verdict pursuant to CPLR 4404 (a), that Defendant self-servingly identified two forms of discovery that it claims it would have sought: (1) the questioning or deposition of Denise Frayman and Fran Solomon of JFA, Plaintiffs' broker and (2) the questioning or deposition of Robert Guardino. *See* Motion for Leave to Appeal at 19. As a result, Seneca's failure to assert any claim

of prejudice at the time of Plaintiffs' motion to amend the complaint renders such a claim waived, together with any right to raise same on this application. *See* R. at 1006-23, 1298-1312; *Thompson–Shepard v. Lido Hall Condominiums*, 168 A.D.3d 614, 614 (1st Dept. 2019); *see also Huma v. Patel*, 68 A.D.3d 821, 822, 890 N.Y.S.2d 639, 640 (2nd Dept. 2009).

As to the witnesses identified in its post-verdict motion, in January 2013 Seneca had itself identified all three individuals as persons with knowledge relevant to this dispute. *See* R. at 2735-2739. At that time, Mr. Guardino was employed by Seneca and his testimony could have been preserved easily by it. Whether through inadvertence or tactical litigation strategy, Seneca failed to do so. Moreover, Seneca's failure to timely provide its underwriting file prevented Plaintiffs from obtaining testimony from Mr. Guardino in a timely manner, only to learn after the underwriting file had been delivered over four years subsequent to the request for these documents that he had become incapacitated during Seneca's delay. *See* R. at 2692, R. at 2707-2710.

Similarly, Seneca also had nearly a full month to obtain an affidavit from either of the brokers as an offer of proof to the extent that evidence contrary to that adduced at trial existed. Seneca failed to do so. *Compare* R. at 2131 (verdict sheet dated March 22, 2019) *with* R. at 2457 (motion dated April 15, 2019).

Seneca next seeks to assign error by claiming that the Appellate Division conflated an amendment to pleadings, pursuant to CPLR 3025(c), with the relation back doctrine as set forth in CPLR 203(f). CPLR § 203(f) provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." The relation back doctrine thus enables a plaintiff to correct a pleading error by adding a new claim after the Statute of Limitations has expired and gives the Court discretion to not enforce the Statute of Limitations if the defendant will not be prejudiced. *Buran v. Coupal*, 87 N.Y. 2d 173 (1995). As noted above, "[i]n a case involving a provision of statute or of contract limiting the time within which suit must be commenced, the cause of action will be deemed the same if the amended and original complaints both seek to enforce the same obligation or liability." *See Abrams v. Maryland Casualty Co.*, 300 N.Y. 80 (1949); *see also Bernstein v. Remington Arms Co.*, 18 A.D.2d 910 (2nd Dept. 1963).

A cause of action for reformation of a contract occurs when the written instrument fails to conform to the agreement between the parties as a consequence of the mutual mistake of the parties, or the mistake of one party and fraud of the

other. *Chimart Associates v. Paul*, 66 N.Y. 2d 570 (1986); *Albany City Sav. Institution v. Burdick*, 87 N.Y. 40 (1881). Reformation based upon mutual mistake is appropriate where the parties reached an oral agreement, but unknown to either, the signed writing does not express that agreement. As Seneca admits in its brief on this motion, "[t]o plead a reformation claim, a plaintiff must allege either a mutual mistake, by asserting that the parties' written agreement does not express a prior oral agreement reached by the parties; or a unilateral mistake accompanied by fraud, by asserting that one party to the agreement fraudulently misled the other such that the writing does not express the intended agreement." *See* Seneca's Motion for Leave to Appeal *citing Greater New York Mut. Ins. Co. v. United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 (1st Dept. 2007). However, the Record is bereft of any evidence to suggest that Plaintiffs were in possession of any evidence to suggest anything more than a unilateral mistake at the time that Plaintiffs filed their Complaint or at any time prior to trial.

That Mr. Malik indicated that he had told his broker that he did not want such an endorsement and that the properties in question lacked a sprinkler system does not establish that the insurer agreed to issue a policy of insurance without that endorsement. Nor does this support an inference that Mr. Malik would have refused to accept a policy of insurance with such an endorsement if it were the only policy

offered to him. Absent such indication, there is no evidence of fraud or mutual mistake that would justify a cause of action for reformation, as it is hornbook law that reformation cannot be had on the basis of a mere unilateral mistake, which is all that was known to the Plaintiffs at that time.[4]

Seneca claims that the lack of a timely disclosure of the Underwriting File was of no moment because all facts necessary to assert a cause of action for reformation were or ought to have been known to Plaintiffs at the time that the initial Complaint was filed. Even the Underwriting documents which were finally produced did not contain such evidence. Rather, it was not until trial where, based upon the testimony of Seneca's Vice President, there was evidence as to Seneca's error. Furthermore, this admission of error in issuing the PSE was based upon "missing documents" from the Underwriting file—not documents that were in the file. *See* R. at 796-803, 855-59. Accordingly, the Underwriting File, as produced, did not contain documents that would have signaled Seneca's error.

[4] To the extent that Seneca contends that this testimony conflicts with Plaintiffs' claim for reformation, all of this evidence was heard by the jury and evaluated. The jury subsequently found that Plaintiffs established by clear and convincing evidence that the PSE was included in the Subject Policy by mistake. Furthermore, in Seneca's post-trial motion, it never alleged that the jury's verdict was not supported by the evidence. *See* R. at 2457 *et seq.*, R. at 29 (Trial Court's observation that Seneca made no argument that verdict was against the weight of the evidence).

The Appellate Division did not merely rely upon the Underwriting File's production to conclude that the amendment was proper. In concluding that reformation properly related back to Plaintiffs' claims of waiver and estoppel, the Appellate Division properly concluded that the validity and the circumstances surrounding the issuance of the PSE "at the heart of the litigation from the outset." *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *1 (1st Dept. Jan. 28, 2021). Furthermore, the Appellate Division properly concluded that the jury could reasonably infer that the reason that Seneca never cancelled Plaintiffs' policy of insurance after it received various inspection reports, *see* R. at 782 *et seq.*; R. at 807-08, was because it knew that the PSE did not belong in the Subject Policy. *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 at *1 (1st Dept. Jan. 28, 2021). Additionally, when the Motion Court denied both parties' motions for judgment, finding that there were issues of fact, the parties were fully aware of the various issues and contentions that could be raised at trial. Consequently, looking at the totality of the Record, the Appellate Division's decision to affirm the Trial Court's denial of Seneca' s post trial motion was proper and Seneca has to demonstrate any basis on which leave to appeal should be granted.

Finally, a party will not be able to complain as to the timing of an amendment when it has played a part in the delay. There is no dispute as to the procedural history leading up to the circumstances under which Plaintiffs' motion to conform the pleadings to the proof was made:

a. Suit was commenced on September 1, 2011. *See* R. at 2493-96.

b. Plaintiffs demanded the Seneca Underwriting File in connection with the Subject Policy on November 29, 2011. *See* R. at 2683-2685.

c. Plaintiffs moved to compel Seneca to produce the Underwriting File on. *See* R. at 2697-98.

d. The Motion Court issued an Order, dated February 17, 2016, compelling Seneca to turn over its Underwriting File by March 8, 2016, and to produce Mr. Guardino for deposition on or before April 29, 2016. *See* R. at 2697-2698.

e. Plaintiffs contacted Seneca regarding their failure to produce the file as ordered on March 17, 2016, and again on April 28, 2016. *See* R. at 2699, 2703-04.

f. Seneca subsequently turned over its Underwriting File on April 28, 2016, referring to it as the "complete unredacted underwriting file." *See* R. at 2705.

g. During her trial testimony on March 19, 2021, Carol Muller testified that the Underwriting File was missing certain documentation that she would have expected to be contained in the Underwriting File if it was Seneca's intent to issue a PSE in connection with the Subject Policy *See* R. at 791-803, 855-59.

h. On March 20, 2019, Plaintiffs make a motion to conform its pleadings to the proof and add a cause of action for reformation. *See* R. at 1006-23.

The Trial Court and the Appellate Division thus correctly concluded that having delayed the case for over four and a half years, Defendant had no right to complain about the timing of the amendment vis-à-vis the statute of limitations. *See* R. at 30.

CONCLUSION

WHEREFORE, in light of the foregoing, Plaintiffs respectfully request that all of the relief sought in Seneca's motion be denied.

Respectfully submitted,

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On July 16, 2021

deponent served the within: **OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on
the 16th day of July 2021.

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

Job# 305737