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To be Argued by:
DENNIS T. D'ANTONIO
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2019-04601

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

Plaintiffs-Respondents,

– against –

SENECA INSURANCE COMPANY,

Defendant-Appellant.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Trial Court properly allowed Plaintiffs' to conform the pleadings to the proof, pursuant to CPLR 3025(c), and seek reformation of the policy, as the reformation claim related back to their cause of action for breach of contract and their claim that the Protective Safeguard Endorsement ("PSE") was inapplicable and unenforceable?

2. Whether the Trial Court properly allowed Plaintiffs to conform the pleadings to the proof, pursuant to CPLR 3025(c), and seek reformation of the policy, before Defendant presented its case, when the Defendant's Vice President, Carol Muller, admitted at trial that underwriting materials that would have necessarily existed if a Protective Safeguard was intended to be in the policy did not exist?

3. Whether Defendant's unclean hands, including the failure to timely turn over its underwriting file to Plaintiffs for five years after it was initially requested, and only after the actual underwriter who bound the coverage left the company and could no longer testify due to disability, estopped it from asserting a "statute of limitations" defense in response to Plaintiffs' application to the Trial Court to have the pleadings conform to the proof?

4. Whether Seneca waived any right it may have had to raise the question of "prejudice" relating to Plaintiffs' application to conform the pleadings to the

proof by failing to raise such argument at the time that Plaintiffs made their application, when the Court could have fashioned a remedy?

5. Whether Seneca possessed a viable claim of "prejudice" when it voluntarily made the decision not to call additional witnesses at trial, submit an offer of proof to the Court or otherwise seek a continuance in order to present additional evidence?
6. Whether the Trial Court correctly concluded that Seneca failed to establish that the jury's verdict should be vacated in the "interests of justice"?

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 appeal filed by Defendant-Appellant Seneca Insurance Company ("Defendant" or "Seneca") in which Seneca seeks to vacate the judgment entered after jury trial resulted in a verdict in Plaintiffs' favor in this matter. As detailed below, Defendant's conduct directly contributed to delaying Plaintiff's ability to discover that the Protective Safeguard Endorsement ("PSE") contained in the Subject Policy was issued in error. Once discovered, the Trial Court correctly allowed Plaintiff to amend its pleadings to conform to the proof and Seneca subsequently failed to meet the high standards needed to overturn the jury's verdict in favor of Plaintiff and the subsequent judgment entered by the Trial Court after the denial of Defendant's post-trial motion. Accordingly, the Trial Court's refusal to vacate the jury verdict was proper and should not be disturbed on appeal.

During the course of the trial, Defendant admitted that the production of its complete underwriting file did not take place until five years after Plaintiffs' demand. By the time that the underwriting file was produced, Defendant's underwriter, Mr. Guardino, who handled this policy and whose testimony likely would have favored Plaintiffs, had become incapacitated to testify. Yet on this appeal, Defendant has the gall to claim that Plaintiff was impermissibly granted

leave to amend its pleading to conform to the proof elicited by counsel's examination of Defendant's Vice President—who admitted that the Protective Safeguard Endorsement was likely an error. Furthermore, based on the evidence, the jury found the Plaintiffs' reformation claim meritorious. Notably, Defendant does not challenge this verdict as being against the weight of the evidence.

In championing its claim that Plaintiffs' inclusion of a reformation cause of action was unfair and prejudicial, Defendant fails to acknowledge that (a) its own witness, Defendant's Vice President, admitted on the witness stand during the trial, that the "complete file" was missing the critical documents that would necessarily exist if it was the Defendant's intent to have included a PSE in the policy in the first place and (b) that it had failed to ever assert at trial that it was being "prejudiced" by the inclusion of the reformation cause of action—including a failure to call witnesses while presenting its case, present evidence during its case, or ask for a continuance so as to call additional witnesses. Rather, the Defendant has only generically argued that it was prejudiced by the grant of the motion to amend the pleadings to conform to the proof by making conclusory allegations without otherwise specifying how it was prejudiced.

Defendant's "statute of limitations" defense in connection with this amendment fairs no better. Putting aside Defendant's "conduct", which would estop it from asserting such a defense, the Trial Court correctly concluded that because the

PSE was always at issue in this litigation, any reformation claim relating to the PSE would relate back to Plaintiff's complaint. As such, Defendant cannot establish that the Trial Court erred in either the granting of Plaintiff's motion to amend its pleadings to conform to the proof or denying Defendant's motion to vacate the trial verdict.

COUNTERSTATEMENT OF FACTS

On March 18, 2019, during the second day of a six day trial, Plaintiff called to the witness stand Carol Muller, Defendant's Vice President. *See* R. at 577-79. At the time of trial, Ms. Muller had worked for the Defendant for twenty-five years, including time spent as an underwriting manager prior to her then-current role as vice president. *See* R. at 579-80. Through a series of admissions made during her testimony, it became clear that not only was the PSE that was at the heart of Defendant's denial of the claim an endorsement to the Policy that was issued in error, but also that Defendant knew or should have known of this error and never alerted Plaintiff to this fact.

Plaintiff's questioning revealed that the initial application for the policy of insurance issued by Defendant that is the subject of this dispute included coverage for nine separate locations, including vacant lots and other vacant and uninhabitable buildings. *See* R. at 605-21; R. at 785-87; 1904 *et. seq*. The application 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, Defendant physically inspected the properties, which revealed that the properties were as described in the applications. *See* R. at 639-43. The inspection report for the property at issue in this litigation specifically stated that this building, like every other property on the policy, lacked functional sprinklers. *See id.*, R. at 1801-12. Notwithstanding this fact, when Defendant, after the inspections, issued a recommendations letter to Plaintiffs with respect to this property, the Defendant did not instruct Plaintiffs to repair the sprinkler system, but only to address issues such as cracks in the sidewalk and "make the insurer aware" that the sprinkler system was out of service, a fact, as indicated above, that Defendant was already aware of. *See* R. at 646-49, 1726-27.

It is undisputed that Defendant was aware from the applications prior to the binding of coverage that the Subject Property did not have functional sprinklers. This fact was confirmed in their inspection reports. *See* R. at 782 et seq.; R. at 807-08. It did not seek to modify or cancel the subject policy. *See* R. at 658-65.. The obvious question became why? The answer was revealed shortly thereafter when it was revealed that the underwriting file lacked any indication that Defendant had ever intended to issue the Subject Policy with a PSE in the first place.

Ms. Muller testified that she had spent multiple hours over the course of two weeks preceding trial reviewing the Defendant's file in preparation for her appearance, including approximately two hours with defense counsel. *See* R. at 582-587. Ms. Muller admitted that the PSE was also not included in the initial quote sheet sent by Defendant to Plaintiffs' broker. *See* R. at 791. Ms. Muller further admitted that there was no indication that Defendant had ever indicated to Plaintiffs that Defendant desired to include a protective safeguard endorsement in the Subject Policy prior to the binding of the policy. *See* R. at 796-97. Consistent with the above, and as admitted by Ms. Muller, Plaintiffs had not been issued a premium credit associated with maintaining a PSE, which Ms. Muller stated would typically be reflected in the file if a PSE required the buildings to be sprinklered. *See* R. at 652-55. Similarly, the issuance of a PSE was not referenced in the binder of insurance, the temporary policy, which would have been the first written indication on an agreement between the parties to include a PSE in the policy. *See* R. at 794-95, 2002-13.

The questions then continued:

> Q Would you agree with [] me for the jury unequivocally that at no time prior to binding coverage did Mr. Guardino ever say to the insured or the broker that they were going to attach a protective safeguard clause requiring sprinklers in all ten properties on this vacant building coverage?
> MR. KOVNER: Objection.
> THE COURT: Overruled. You may answer.
> A. It's not in the file; correct.

> Q. Okay; and you testified previously insurance companies keep files?
> A. Yes, we do.
> Q. Everything is recorded; correct?
> A. Things get missing too.
> Q. Yeah, people make mistakes. I understand. But unless things get missing, it's all there.
> A. Yes, of course.
> . . .
> Q. There's no mention of protective safeguard clause at any time during this entire process giving rise to the binding of coverage by your own admission on April 3rd, 2009; correct?
> A. Correct.
> . . .
> Q. All of your testimony that you've given to Mr. Kovner and to me is based on the insurance company's keeping books and records of their transactions and communications; correct?
> A. Correct.
> . . .
> Q And in fact, based upon those records, would it be correct that there is not one scintilla of evidence that at the time the $41 ,000 premium was quoted, there was going to be a requirement that there be protective safeguards on these vacant buildings?
> MR. KOVNER: Objection.
> THE COURT: Overruled.
> A. Based on the way the paperwork looks, you're correct.

See R. at 796-97, 799-800. Ms. Muller also was forced to concede that Mr. Guardino, Seneca's underwriter for the Subject Policy, did not include any written indication that the Subject Policy include a PSE. On this topic, Ms. Muller testified as follows:

> Q. And if Mr. Guardino is making different arrangements, he makes notes; correct?
> A. I would hope so, yeah.
> Q. And they should be in the underwriting file?
> A. They should be.

> . . .
> Q. Just stay prior to April 3rd. There is not anything in the file that says that there is going to be a protective safeguard requirement; correct?
> A. Correct.
> Q. And there is no notes for Mr. Guardino saying that?
> A. No.
> Q. And you don't know — do you actually know once coverage is bound, how does the policy come into effect? How do they create the physical policy?
> A. They follow his instructions.
> Q. And he would have had to give instruction to someone?
> A. Yes.
> Q. Were you able to find a copy of those instructions?
> A. I -- there is a sheet somewhere in this file.
> Q. You've seen it?
> A. I don't remember it.
> Q. Okay. Well, there should be, but it might not be there.
> A. No, they couldn't issue the policy without it.
> Q. Well, is it possible someone took it out before they can produce to?
> MR. KOVNER: Objection.
> A. It's possible.
> THE COURT: Overruled.
> Q. Is it possible before Seneca produced it, they took the *route sheet* out?
> A No. No.

See R. at 800-01. Ms. Muller then admitted that a *route sheet*, which would have been in the underwriting file had a protective safeguard endorsement had been intended to attach to the policy, did not exist. *See* R. at 801-803.

> Q. You haven't seen a rec sheet in that — you haven't seen a document in that file that dictates that the policy should be issued with a protective safeguard clause; have you?
> A. I don't remember.
> Q. Well –
> A I have 800 pages. I don't remember.

> Q. You recognize what this case is about; correct?
> A. I understand. *You can not issue a policy without a route sheet.*
> Q. Miss Muller, I agree with you; but there is a difference between issuing a policy without a route sheet and showing us what the route sheet actually said. So you haven't seen the route sheet; correct?
> A. I don't remember.
> Q. *So if there was a route sheet, it would be important for us to look at it to see if it says to include a protective safeguard; correct?*
> MR. KOVNER: Objection.
> A. *Correct.*
> THE COURT: Overruled.
> Q. In the preparation you've done for trial, the reviewing of the files, meeting with Mr. Kovner, you don't remember ever seeing that route sheet that you know must have existed at sometime; correct?
> A. I don't remember if I saw it or I didn't see it.
> Q. But it should be there?
> A. It should be in the file.
> Q. And if it's not, can you explain why it's missing?
> A. Absolutely not. How would I explain it?

See R. at 801-803 (emphasis added). Indeed, as later discussed, not only was the route sheet missing, but the original quote was also missing:

> *Q. So I gather from what you're telling us, there is a missing document that's not in your file that should be there?*
> *A. It looks, yes.*
> *Q. That should be the quote according to the questions that —*
> *A. And the route sheet.*
> *Q. And the routing. So there are two missing document?*
> *A. Yes.*
> *Q. And they are both critical documents on this question; correct?*
> *A. Correct.*
> Q. And those documents would be in your files; correct?
> A. Yes. Absolutely.

Q. And your files were produced as part of discovery in this case; correct?
A. Yeah.
Q. By your lawyers; correct?
A. I don’t know who produced them.
Q. And when those files were produced according to those bate stamped numbers, there are two critical documents missing; correct?
A. Yes.
Q. What’s the name of the first critical document that’s missing?
A. The original quote.
Q. The original quote. And you have no explanation as to why it's not in your files?
A. I have no idea.
. . .
Q. Okay. There's another critical document on the issue that's being litigated that's also inexplicably missing from Seneca's file according to your testimony; correct?
MR. KOVNER: Objection.
THE COURT: Overruled.
A. Yes.
Q. And tell the jury what that other missing document is.
A. The original quote.
Q. And the original quote is relevant to the issues that we are litigating here; correct?
A. Correct.
Q. And the original quote absolutely should be part of the file that was produced in this case?
A. Correct.
Q. Correct And again, it's not. It’s missing from the file; correct?
A. Correct.
Q. And you have no explanation as to why it's missing?
A. I have none.
Q. And if I had the original quote or if the jury had the original quote, we could see whether the original quote included the protective safeguard clause; correct?
A. Correct
Q. So not having the quote and not having the routing sheet, we can't see whether or not those documents were silent as it relates to the protective safeguard clause?

> MR. KOVNER: Objection.
> THE COURT: I think that I'll overrule the objection, but this is the last question on the subject.
> Q. Isn't that correct?
> A. I'm sorry. You have to say that again.
> *Q. Sure. I will restate it again. Because of these two missing documents, the routing sheet and the quote that should be in Seneca's file, we are not able to see whether or not they didn't include the protective safeguard clause?*
> *A. Correct.*

See R. at 855-59 (emphasis added).

At the close of her testimony, after being confronted with what was and was not contained in the underwriting file, Ms. Muller was compelled to make one last admission--that the inclusion of the PSE in the Subject Policy could have been a mistake. *See* R. at 834-35. Ms. Muller's statement of mistake was bolstered by the testimony of Plaintiffs' own representative, who testified that he had not wanted a PSE included in the Subject Policy and had said as much to the broker negotiating the Subject Policy. *See* R. at 344-51, 433.

In light of Ms. Muller's stunning admission, Plaintiffs sought leave from the Trial Court, pursuant to CPLR 3025(c), to amend its pleading to conform to the proof adduced at trial. The Trial Court heard argument on the motion, at which Defendant's sole contentions in opposition, were that Plaintiffs' proposed amendment was futile or barred by the statute of limitations. *See* R. at 1006-23, 1298-1312. Defendant did not raise any issue relating to prejudice, or indicated any desire to call additional witnesses or even ask for a continuance in order to do so.

See id. Plaintiffs, in contrast, argued that the amendment related back to its initial cause of action. *See* R. at 1298-1312. In granting Plaintiffs' application, the Trial Court read into the Record a portion of a pre-trial decision by Hon. Tanya Kennedy, who supervised the case during discovery. The Trial Court noted that Judge Kennedy observed that Plaintiffs had previously argued that pursuant to the terms of the policy Defendant had the right to cancel the policy within the first 60 days and by not doing so, had waived its right to enforce the endorsement. *See* R. at 979. The Trial Court then concluded, "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." *See* R. at 979.

Following Ms. Muller's testimony, one additional fact relevant to the Trial Court's determination emerged. Ms. Muller testified over the course of two days. *See* R. at 578 *et seq.*, 769 *et seq.* After the close of her testimony, Defendant's counsel, realizing the impact of her testimony and the fact that it had now been revealed for everyone to see that not only was the PSE issued in error, but that Defendant knew it had been issued in error, attempted to salvage his case (and Defendant's reputation) by attempting to have her return to the witness stand for a

third day so as to introduce a "missing document" from its underwriting file as a new exhibit, although never previously disclosed to Plaintiffs.[1] *See* R. at 978 *et seq.*

At the hearing held by the Court, Ms. Muller testified that somehow she was able to miraculously retrieve the "missing pages" from her digital file on the intervening night because the absence of these documents bothered her. See R. at 985. She further testified that she had no idea why the documents were not produced during discovery. See R. at 987. In denying Mr. Kovner's application to offer into evidence this newly found document, the Court made it very clear the basis for its refusal to allow this document into evidence. "This is pretty much outrageous that this is – this document that contains -- that references the very protective safeguard, it's referencing the ILN form, it's - I mean, you need to come up with a better explanation than it was copied blank." *See* R. at 981. The Court proceeded to conduct a hearing on Defendant's failure to produce the alleged relevant document, noting in part, "[s]o 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

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[1] That this page was discovered overnight is particularly suspect in light of Ms. Muller's testimony that she had reviewed the file over the course of two weeks, including a two-hour meeting with counsel. *See* R. at 582-587. While Plaintiff cannot speak as to the validity of the document *per se*, it is simply inconceivable that Defendant was unaware of its omission prior to trial. Thus, Ms. Muller, Defendants Vice-President and a 25-year employee who was also the underwriting manager at the time that the Subject Policy was issued, took the stand knowing that the page was missing from Defendant's production and that based on the "complete" underwriting file produced, the protective safeguard endorsement in the Subject Policy was issued in error.

gross negligence. It says -- it references the very, very protective safeguard form at issue in this case and the -- and the fire of the building." *See* R. at 982.

Thereafter, the Court granted Plaintiffs' motion to amend. At the close of trial, the Court submitted four questions in the following order to the jury: (1) whether Plaintiffs had shown by clear and convincing evidence the PSE had been included in the Subject Policy by mutual mistake; (2) whether the Plaintiffs had shown by a preponderance of evidence that Defendant knowingly and voluntarily waived its right to enforce the PSE; (3) whether the Plaintiffs had shown by a preponderance of evidence that Defendant should be estopped from relying on the PSE; and (4) whether Plaintiffs had shown by a preponderance of evidence that they complied with the PSE. *See* R. at 2131-35. In returning a verdict in favor of Plaintiffs, the jury concluded that it was never the intent of Defendant to have issued the Subject Policy with a PSE and that therefore the Subject Policy had to be reformed to delete this endorsement. Defendant moved the Trial Court to set aside the jury verdict pursuant to CPLR 4404(a). *See* R. at 2457. On the motion to set aside the jury verdict, Defendant did not claim that the verdict was against the weight of the evidence. *See* R. at 29. Rather, Defendant sought to reargue the Court's earlier determination to grant Plaintiffs' motion to amend. *See id.* It was on this motion to set aside the verdict that Defendant asserted, for the first time, that it had

suffered prejudice as a result of Plaintiffs' delay in seeking to amend their Complaint. *See* R. at 1006-23, 1298-1312.

This action, and the subsequent trial, arose from Defendant's failure to indemnify Plaintiffs in accordance with a policy of insurance issued by Defendant to Plaintiffs (the "Subject Policy") when a fire loss (the "Loss") occurred at a vacant commercial building located 50-09 27th Street, Long Island City, New York owned by the Plaintiffs and insured under the Subject Policy (the "Subject Premises"). *See* R. at 1642 *et seq.* The Subject Policy provided coverage to nine vacant buildings and lots owned by Plaintiffs, insuring the vacant properties against all basic loss, including coverage for fire losses. *See* R. at 605-21; R. at 785-87; 1904 *et. seq.* By its own admission, Defendant knew at the time of the initial application that the Subject Premises lacked a working sprinkler system. *See* R. at 605-21; R. at 785-87; 1904 *et. seq.* Defendant further received an inspection report dated April 30, 2009 from its retained expert that stated that the Subject Premises were not actively sprinklered. *See* R. at 639-43, 1801-12. Seneca took no action with regard to this report to require Plaintiffs to repair the sprinkler system. *See* R. at 646-49, 1726-27. Plaintiffs subsequently learned that despite these facts, the Subject Policy include a Protective Safeguard Endorsement (the "PSE") that required Plaintiffs to maintain an automatic sprinkler in the Subject Premises. *See* R. at 344-51.

On September 8, 2009, while the Subject Policy was in full force and effect, the Subject Premises was destroyed by fire. *See* R. at 129-30, 937. On or about April 13, 2011, after a nearly twenty-month long investigation, Defendant wrote a letter to Plaintiffs denying coverage on the basis that Plaintiffs failed to comply with the PSE. *See* R. at 2487-92. As a result of Defendant's refusal to pay, on September 1, 2011, Plaintiffs filed their Complaint in this matter. *See* R. at 2493-96.

On or about October 5, 2011, issue was joined when Defendant filed its answer. *See* R. at 2497-2504. From the time of the Defendant's answer, it was clear to all parties that the focus of this litigation would be the PSE. *See* R. at 2497-2504. The parties did not dispute the existence of a contract between them, specifically the Subject Policy issued by Defendant to Plaintiffs. *See* R. at 2497, ¶ 3 (admitting policy). Nor did the parties dispute that a fire occurred at the Subject Premises, such that there was no dispute as to the fact of damages. *See* R. at 2498, ¶ 4 (admitting fire occurred). Defendant further admitted, notwithstanding the all risks nature of the Subject Policy discussed above, that Defendant had not paid for the losses suffered by Plaintiff as a result of the fire. *See* R. at 2498, ¶ 5 (admitting non-payment). Rather, consistent with its prior denial letter, the parties' dispute centered on the PSE, which Defendant asserted as its Fourth Affirmative Defense. *See* R. at 2499-2500, ¶¶ 11-12.

During the pendency of this litigation, Defendant actively concealed its underwriting file and personnel from Plaintiff. As part of Plaintiffs' initial set of document requests, dated November 29, 2011, Plaintiffs requested a copy of the underwriting file. *See* R. at 2683-2685. Plaintiffs also noticed the deposition of Mr. Robert Guardino, a Seneca employee who had been identified by Defendant as the underwriter involved in the issuance of Plaintiffs' insurance policy. *See* R. at 2687-91 (initial notice), 2692-96 (subsequent subpoena). Defendant itself had initially identified Mr. Guardino as a current employee under Seneca's control. *See* R. at 2735-39. On February 17, 2016, after Defendant had failed repeatedly to produce its underwriting file, as well as Mr. Guardino, notwithstanding multiple requests to do so, the Court issued an Order commanding Defendant to produce the underwriting file by March 8, 2016, and to produce Mr. Guardino shortly thereafter. *See* R. at 2697-98. Notwithstanding this Court Order, Defendant failed to comply with the Court's Order, even though Plaintiffs sent multiple letters throughout March and April 2016. *See* R. at 2699-2704. Nearly sixty days later, when Plaintiffs had expressed intent to file a motion to compel production of the underwriting file and Mr. Guardino, Defendant finally produced the underwriting file on <u>April 28, 2016</u>. *See* R. at 2705. This belated production of the Defendant's underwriting file did not alleviate the prejudice incurred to Plaintiffs as a result of the Defendant's failure to timely produce its underwriting file.

Mr. Guardino not only no longer worked for Defendant, but had been formally declared disabled as of November 2013. *See* R. at 2692-96; 2707-10. It was further revealed that Mr. Guardino would never be able to testify due to his diminished mental incapacity. *See* R. at 2707-10. This of course would not have been the case if the underwriting file had been timely produced when it was initially demanded in November 2011. *See* R. at 2687-91. While Plaintiffs did not know it at the time it has become clear, based upon the testimony of Ms. Muller, that if Mr. Guardino's deposition had been taken, he would have provided favorable testimony for the Plaintiff which, at the very least, would have enabled Plaintiffs to seek reformation of the Policy and perhaps would have compelled Defendant to withdraw its defenses and pay the Plaintiffs' insurance claim. Defendant thereafter took a year before it produced a supervising underwriter, Carol Muller, to testify on its behalf on April 5, 2017. *See* R. at 2711-18.

Plaintiffs, without conceding that they were in violation of the PSE, attacked the legitimacy of enforcing the PSE against them, including via a motion for summary judgment on Defendant's Fourth Affirmative Defense. *See* R. at 979. While the Motion Court denied Plaintiffs motion by Decision and Order dated July 3, 2018, Defendants were certainly aware that Plaintiffs were not only defending the propriety of its insurance claim based upon its compliance with the PSE but was also claiming that it was in full compliance with all policy terms and conditions, and

challenging Defendant's right to rely upon the PSE in order to deny Plaintiffs' claim. *See* R. at 979. Plaintiffs also contended in the alternative that at the time of the loss, they complied with all terms and conditions. *See* R. at 71-72. Therefore, because "fire" was a covered cause of loss, Plaintiffs continued to assert Defendant's failure to pay Plaintiffs' claim constituted a breach of contract. *See* R. at 57-84.

Following the denial of both parties' summary judgment motions, a jury including three attorneys was impaneled for trial of this case. *See* R. at 1239-40. On March 22, 2019, the jury returned a verdict in which it found that Defendant had breached its contract with Plaintiffs by failing to pay Plaintiffs insurance claim and that the PSE was never intended to be issued by Defendant and was therefore a mistake, thus requiring reformation. When Defendant's motion to set aside the verdict, as detailed above, was denied, it filed the instant appeal. This opposition now follows.

ARGUMENT

I. Applicable Standards

Defendant's appeal asserts that the Trial Court erred (1) by granting Plaintiffs' motion to amend to add a cause of action for reformation and (2) by denying Defendant's post-trial motion to set aside the jury verdict in this case. Contrary to Defendant's misleading statements in its initial brief on this appeal (the "Initial

Brief" or "Initial Br."), neither question falls within the Court's generic discretion. *See* Initial Br. at 21-22.

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 this Court has previously stated, "in the absence of surprise or prejudice, it is an abuse of discretion, as a matter of law, for the trial court to deny leave to amend an answer during or even after trial." *See Pensee Associates, Ltd. v. Quon Shih-Shong*, 199 A.D.2d 73 (1st Dept. 1993) (internal citations omitted). "A party opposing leave to amend 'must overcome a heavy presumption of validity in favor of [permitting amendment].'" *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dept. 2012).

Similarly, "it has often been stated that a jury verdict in favor of [a party] should not be set aside unless 'the jury could not have reached the verdict on any fair interpretation of the evidence.'" *Nicastro v. Park*, 113 A.D.2d 129, 134 (2nd Dept. 1985); *Annunziata v. Colasanti*, 126 A.D.2d 75, 79-80 (1st Dept. 1987) (same). "[A] directed verdict is only appropriate 'where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could

base a finding in favor of the nonmoving party.'" *Holt v. Welding Services, Inc.*, 264 A.D.2d 562, 563 (1999); *see also Rumford v. Sing*, 130 A.D.3d 1002, 1003-04 (2nd Dept. 2015) ("A motion for judgment as a matter of law pursuant to C.P.L.R. 4401 or 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party."). "A new trial in the interest of justice is warranted only if there is evidence that substantial justice has not been done." *See Schafrann v. N.V. Famka, Inc.*, 14 A.D.3d 363 (1st Dept. 2005) *citing Gomez v. Park Donuts, Inc.*, 249 A.D.2d 266, 267 (2nd Dept. 1998) (observing that evidence that substantial justice has not been done would include situations "where the trial court erred in ruling on the admissibility of evidence, there is newly discovered evidence, or there has been misconduct on the part of the attorneys or jurors" and new trial should not be granted absent same).

II. The Trial Court Properly Granted Plaintiffs' Motion To Amend

CPLR 3025(c) explicitly authorizes the grant of a motion to amend to conform to the proof at the time of trial. The standard utilized by a Trial Court when passing on such an application, that "leave should be freely granted", is identical to the standard utilized in passing on a motion to amend a pleading under CPLR 3025(b).

See supra at 21, *citing 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) (observing that in such situations, a party likely has "collected and preserved available evidence relating to the entire transaction or occurrence and the defendant's sense of security has already been disturbed by the pending action" and permitting amendment to add new defendants who were united in interest with previously named defendants even after the statute of limitations had elapsed). Consistent with this judicial philosophy, "[t]he relation-back doctrine, now codified in 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 [or] occurrences . . . to be proved pursuant to the amended pleading.'" *O'Halloran v. Metropolitan Transp. Auth.*, 154 A.D.3d 83 (1st Dept. 2017).

A. Relation Back Is Presumptively Proper (And Therefore Was Proper Here) Where Facts Adduced At Trial Support An Additional Cause of Action

This case was never simply about whether the Plaintiffs had complied with the PSE. From the point in time when Plaintiffs were finally provided with Defendant's underwriting file on April 28, 2016 to the time when Plaintiffs were able to take the deposition of Carol Muller on April 5, 2017, the applicability of the

PSE had always been an issue. Because the enforceability of the PSE is directly connected to Defendant's affirmative defenses and Plaintiffs' responses thereto, it is simply disingenuous for Defendant to suggest that there is no relation between Defendant's alleged breach of contract by not paying Plaintiff's covered claim and the cause of action for reformation.

"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"). Where the "variance between the pleadings and the proof was not so great that the defendants could not reasonably have expected that such evidence would be adduced at trial," a court may properly permit amendment at trial. *See A-1 Check Cashing Serv. v Goodman*, 148 A.D.2d 482, 482 (1st Dept. 1989); *see also Guarino v. Mine Safety Appliances Co.*, 31 A.D.2d 255, 261 (2nd Dept. 1969) (permitting amendment to allow new theories of recovery because "[r]eason and

fairness demand that the causes of action based on new theories of recovery relate back to the fundamental [causes of action], which were commenced prior to the expiration of the applicable limitations period.").

In *Consolidated Edison Co. of New York v. General Accident Ins. Co.*, 204 A.D.2d 164, 611 N.Y.S.2d 199 (1st Dept. 1994), this Court upheld the Trial Court's decision to permit an insured to amend its complaint to add a cause of action for reformation in connection with the insured's motion for summary judgment. As this Court correctly noted therein, "leave to amend is freely granted and it is well established that the decision to allow or disallow amendment is committed to the Court's discretion." *Consolidated Edison Co. of New York v. General Accident Ins. Co.*, 204 A.D.2d 164, 165, 611 N.Y.S.2d 199 (1st Dept. 1994). For this reason, and in light of the Court's view that the evidence provided on the summary judgment motion established the cause of action for reformation, this Court in *Consolidated Edison Co.* affirmed the IAS trial part's decision to permit the plaintiff insured in its breach of contract action to amend, on a summary judgment motion, its complaint to conform the pleadings to its proof and add a cause of action for reformation against the defendant insurer. *See id.* at 165.

In *Abrams v. Maryland Casualty Co.*, *supra*, the Court of Appeals sustained judgment against an insurer following the trial court's grant of a motion to amend the complaint from one for reformation to one for breach of contract. *See id.* The

plaintiff therein had initially asserted a cause of action for reformation in the erroneous belief that she was not covered under the policy as an additional insured and therefore could not recover on a breach of contract theory. *See id.* at 84. Defendant there, like the Defendant here, claimed that the applicable period of limitations had run and that the new theory at law, rather than at equity, should be barred as untimely. *See id.* at 85. The Court of Appeals disagreed. *See id.* In the Court's opinion, the "cause of action will be deemed the same if the amended and original complaints both seek to enforce the same obligation or liability."

Furthermore, New York case law historically has supported the proposition that reformation is properly granted as an amendment at trial where it is asserted in response to an affirmative defense by an insurer that the insured has failed to comply with a policy. *See Arthur v Homestead Fire Ins. Co.*, 33 Sickels 462, 78 N.Y. 462 (1879) (holding that where trial judge offered to permit plaintiff to amend complaint to assert cause of action for reformation at trial, "the evidence of mistake was proper . . . in reply to the claim of breach of warranty").

The case at bar also bears striking similarities to *Green v. Phoenix Ins. Co.*, 218 Iowa 1131 (1934), in which the plaintiff brought an action at law to enforce a contract of insurance. There, the defendant asserted an exclusion in the policy which the plaintiff, as here, claimed should not have been included in the policy because the application clearly indicated that the insured property was in violation of the

exclusion. *See id.* at 38. The Iowa Supreme Court affirmed that the trial court acted correctly in permitting the action to proceed on an equitable theory of reformation, notwithstanding the fact that the original action was for breach of contract, because "the right, if any, to reformation of the instrument, was an incident of its original cause of action, and inhered therein as a part of the ultimate remedy to which the plaintiff might be entitled." *See id.* at 42-43.

Remarkably, Defendant admits on this appeal that the evidence used to support Plaintiffs' cause of action for reformation "support[s] the argument that Seneca waived or should be estopped from relying on plaintiffs' alleged breach of the PSE" and further acknowledge that such was "precisely the position plaintiffs took throughout the litigation." *See* Initial Br. at 18. Thus, as the Trial Court held, "Plaintiff has contended from day one that the PSE was unenforceable." *See* R. at 30. On this basis alone, Defendant has established that Plaintiffs' amendment relates back to the causes of action at issue in its Complaint, as it arises from those facts adduced at trial and which Defendant reasonably knew and expected to encounter in this litigation.

B. Relation Back Is Proper Where Defendant Had Notice Of The Issues That Support The Amended Pleading

Notwithstanding the above, in its Initial Brief, Defendant specifically observes the following regarding *Abrams*:

> Essentially, the Court of Appeals held that the claim in the amended complaint was essentially the same as the claim in the original complaint for Statute of Limitations purposes because both claims asserted that the employee of the truck driver who caused the accident was covered under the policy issued by defendant, which was at all times apprised of the nature of plaintiff's claim.

Defendants claims that the instant case is different because it did not know that Plaintiffs disputed the enforceability of the PSE until Plaintiffs' motion to amend at trial. *See* Initial Br. at 23-31. Such contention is sophomoric, as Defendant admits in its Initial Brief that Plaintiffs claimed alternative compliance with the PSE or that the PSE was unenforceable as a matter of waiver or estoppel. *See* Initial Br. at 31. Said differently, Defendant admits on appeal that Plaintiffs have maintained in the alternative from the start of this case that either the PSE was unenforceable against Plaintiffs or Plaintiffs complied therewith at the time of loss. A review of the record in this matter establishes this fact. Indeed, Plaintiffs' request for and dogged pursuit of the Defendant's underwriting file would be entirely inexplicable if, as Defendant's brief at times seemed to claim, Plaintiffs' only position in this matter was that they had complied with the PSE. *See* R. at 2683-2704. As the Trial Court observed, "for [Defendant] to sit here and say that waiver and estoppel was not part of this case . . . is absurd." See R. at 979. Moreover, much like at the time of Plaintiffs' initial motion to amend and Defendant's post-judgment motion, Defendant here has failed again to articulate any substantive differences between the

discovery one would undertake to evaluate potential equitable responses to an assertion of noncompliance with the Subject Policy. *See* R. at 29-30.

Furthermore, a review of the cases cited by the Defendant reveals their inapplicability to the case at bar. Tellingly, with one exception, those cases cited by Defendant on the issue of amendment do not touch the question of reformation, and vice versa. Rather, the cases cited by Defendant generally stand for the unremarkable proposition that an amended complaint's new claims must be related to those claims initially asserted by a plaintiff for the relation-back doctrine to apply. *See*, *e.g.*, *O'Halloran v. Metropolitan Transp. Auth.*, 154 A.D.3d 83 (1st Dept. 2017). Similarly, Defendants cases on reformation stand for the equally unremarkable proposition that a defendant may not assert a counterclaim for reformation where the statute of limitations has run. *See*, *e.g.*, *182 Franklin St. Holding Corp. v Franklin Pierrepont Assoc.*, 217 A.D.2d 508, 509, 630 N.Y.S.2d 64 (1st Dept. 1995) ("If the plaintiff's claims relate to its right to performance under the terms of an agreement, counterclaims arising out of the negotiation and events leading up to the execution of the agreement are not revived."). The one case that does not fit this pattern is *New York University v. Factory Mutual Ins. Co.*, 2018 U.S. Dist. LEXIS 53148 (S.D.N.Y. 2018), where the plaintiff sought leave to amend its complaint for breach of contract to assert for the first time that the defendant had engaged in a vast fraudulent conspiracy to switch policy terms during the agreement

renewal process. That situation, in which the Court specifically held that defendant could not have been on notice of the proposed new claims, can clearly be distinguished from the instant case where Defendant was at all points aware that Plaintiffs contended that the PSE was unenforceable as a matter of equity.

In any event, Defendant's proposed conclusion ignores the Court of Appeals' statement that a "cause of action will be deemed the same if the amended and original complaints both seek to enforce the same obligation or liability." *See id.* at 86. The cause of action for reformation added by Plaintiffs at trial was used to support its contention that it was entitled to coverage under the Subject Policy for its losses on September 9, 2009. As the policy period has ended, a grant of reformation herein will have no effect other than to enforce Defendant's obligation to pay for this loss that Plaintiffs indisputably have pursued from the initiation of this litigation. *See* R. at 1642. As such, the amendment relates back and the Trial Court's decision should be affirmed.

Finally, to the extent that Defendant contends that a reformation cause cannot exist for an insurance policy because the insured is presumed to have read the policy and consented to the terms, Defendant is simply in error. *See*, *e.g.*, *Gotkin v. Allstate Ins. Co.*, 142 A.D.3d 17 (2016) ("Granting reformation of an insurance contract under appropriate circumstances is not new or novel."). Of the cases cited by Defendant, only *Metzger v. Aetna Ins. Co.*, 227 N.Y. 411 (1920) dealt with the

question of reformation, and in that case, the Court held only that reformation must be established by clear and convincing evidence. Indeed, Defendant argued the absence of a mutual mistake based on Plaintiffs' receipt and reading of the policy to the jury at the time of trial. Rejecting this argument, the jury found and Defendant does not dispute that clear and convincing evidence established that the PSE was the result of a mutual mistake.

C. Defendant's Failure to Timely Comply With Discovery Demands Estops It From Claiming That Plaintiffs Should Have Asserted A Cause For Reformation Earlier And Is Now Time Barred From Doing So

In complaining on appeal that if Plaintiffs had truly believed that the inclusion of the PSE was a mistake, it would have sought reformation at an earlier date, Defendant seemingly suffers from amnesia as it relates to its continued dereliction as it relates to discovery in this action. *See* Initial Br. at 23-31. As the Trial Court noted in its decision denying Defendant's motion to set aside the verdict, "defendant can hardly complain about [the] 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 record clearly shows that Plaintiffs first requested Defendant's underwriting file in 2011, not long after suit began. *See* R. at 2683-2686 (Plaintiffs' Demand for Discovery and Inspection dated November 29, 2011). Defendant appears to have provided its initial discovery responses over a year later, in January 2013, including its statement that Robert Guardino, Denise Frayman, and Fran

Solomon were witnesses with knowledge relevant to this litigation. *See* R. at 2735-3739. In this disclosure, Defendant indicated that Mr. Guardino remained in Defendant's employ. *See* R. at 2738. Defendant failed to update its disclosure of Mr. Guardino as a witness when Mr. Guardino departed Seneca's employment, notwithstanding the ongoing disclosure obligations applicable in all civil cases. The record shows that on February 17, 2016, Defendant was ordered to produce its underwriting file Mr. Guardino for a deposition or to provide his last known address within thirty days. *See* R. at 2697. It was only when Defendant failed to provide such disclosure or produce Mr. Guardino, after Plaintiffs advised Defendant of their intent to file a motion to compel such discovery, that Defendant for the first time advised that Mr. Guardino was no longer employed with the company. *See* R. at 2699-2706. Defendant continued to fail to produce an underwriter with knowledge of this matter to speak on its behalf until April 2017, when it at last produced Carol Muller, whom it had identified more than four years previous in response to demands nearly six years old at the time of production. *See* R. at 2711.

The delay in the discovery process clearly weighed on the Court, particularly in light of the admission at trial that notwithstanding Defendant's explicit representation in 2016 that it had produced its full and unredacted underwriting file, Defendant had in fact failed to do so. *Compare* R. at 2705 ("This is the complete and unredacted underwriting file.") *with* R. at 978 *et seq.* (discussing discovered

document). Indeed, Ms. Muller retrieved literally overnight a page allegedly helpful to Defendant which had been purportedly produced in a redacted form as a purely blank page without any indication of redaction years earlier.[2] *See* R. at 985. The Trial Court thus correctly concluded that having delayed the case for over five years, Defendant had no right to complain about the timing of the amendment vis-à-vis the statute of limitations. *See* R. at 30.

"To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *See Glus v. Brooklyn East. Term.*, 359 U.S. 231, 232-33, 79 S.Ct. 760, 762 (1959); *see also General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125 (1966) ("Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay . . . ."). Estoppel "operates to bar a party from asserting the Statute of Limitations when that party's own wrongful concealment has engendered the delay in prosecution." *See Matter of Steyer*, 70 N.Y.2d 990, 992-93, 521 N.E.2d 429, 430 (1988).

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[2] Plaintiff does not concede that this page, which mysteriously appeared overnight from Ms. Muller's computer, *see* R. at 988-91, but somehow was not located during Ms. Mueller's two weeks of preparation for trial, *see* R. at 582-87, is not a recent fabrication.

Consequently, a defendant may be equitably estopped from asserting a statute of limitations defense where the delay is caused by the defendant's failure to produce records within the defendant's possession that would have indicated the existence of the cause of action to plaintiff if timely produced. *See Kamruddin v. Desmond*, 293 A.D.2d 714, 715-16 (2nd Dept. 2002) (affirming trial court's decision that defendant estopped from asserting statute of limitations); *see also Arbutina v. Bahuleyan*, 75 A.D.2d 84 (1980); *see also Drake v. Laboratory Corp. of America Holdings*, No. 02-cv-1924 (FB)(RML), 2007 WL 776818, *8 (E.D.N.Y. Mar. 13, 2007) (denying motion to dismiss on statute of limitations grounds despite eight-year delay in filing cause of action because defendant ignored plaintiff's requests for information, thereby concealing relevant information, until ordered to provide same). It was not until Plaintiffs had the file and took the deposition of the available underwriter with respect to this file on April 5, 2017 that Plaintiffs would have been able to initially determine the existence of a reformation claim.

Furthermore, a review of the Record indicates that Defendant knew or should have known years ago that its underwriting file reflected the fact that Defendant had never intended to issue a PSE in connection with Plaintiffs' policy. During Ms. Muller's examination at trial by Plaintiff, she identified the two documents that would be in the underwriting file that would have evidenced the carrier's intent to have issued a PSE with Plaintiffs' policy. *See* R. at 855-59. Counsel for Plaintiff

asked the witness, with the 800-page underwriting file in front of her, to go through the file and locate these documents. *See* R. at 801-03. Ms. Muller admitted that they were not there—supporting the inference that she knew about the non-existence of these documents before she took the witness stand and explaining why she did not attempt to search the file to find them. *See* R. at 801-03; 855-59. Furthermore, prior to her testimony, she spent approximately two hours with counsel for Defendant preparing for her testimony. *See* R. at 582-87. Finally, after Ms. Muller made these admissions, counsel for Defendant, during re-cross examination, did little to soften the effects of or sought to explain her testimony. *See* R. at 837 *et seq.*; R. at 859-60. All of the above, leads to the inescapable inference that Defendant knew that the PSE was issued to Plaintiffs in mistake—yet at no time did Defendant, as the insurance carrier for these Plaintiffs, ever see fit to acknowledge this to its insured.

An insurance policy, as with every other contract issued in the State of New York, requires that the parties act in a manner to each other consistent with the principles of "good faith and fair dealing." *See New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318, 662 N.E.2d 763 (1995) ("implicit in every contract is a covenant of good faith and fair dealing"). One cannot imagine a more fundamental application of this principle than a carrier, upon a proper investigation, admitting to its insured that it had issued a policy endorsement in error—irrespective of its consequences. Defendant, at bar, failed to adhere to this basic tenant and now seeks

to double down and exacerbate its conduct by seeking to use it as a sword in order to deprive Plaintiffs of the recovery the jury and the Trial Court has determined that it is owed.

All of the above is material to the Court's evaluation of Defendant's claims herein. As this Court is no doubt aware, a unilateral mistake is generally not grounds for reformation. *See*, *e.g.*, *Chimart Associates v. Paul*, 66 N.Y.2d 570 (1986) (denying appeal seeking reformation in light of absence of mutual mistake). Accordingly, while discussed at length by Defendant that the evidence entered at trial shows that Plaintiffs informed their broker that they did not want the PSE in their agreement, *see* Initial Br. at 13, *citing* R. at 433-434, 2618-2621, there was no evidence to establish the carrier's agreement to same until Ms. Muller testified as to the documents that were "not" in the underwriting file. Given all of the above, Defendant's complaint of "untimeliness" should fall flat—together with its present appeal.

D. Defendant Failed To Timely Assert Any Claim of Prejudice In Response To Plaintiffs' Request To Amend And In Fact Suffered No Prejudice

As discussed *infra* at 43-44, Defendant failed to assert any claim of prejudice at the time of Plaintiffs' motion to amend the complaint and has thereby waived any right to raise same on this appeal. *See* R. at 1006-23, 1298-1312; *supra* at 43-44, *citing Andre v. Warren*, 214 A.D.2d 323, 323, 624 N.Y.S.2d 430 (1st Dept. 1995); *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) (holding that "a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation"). Had the Defendant raised the issue during trial and provided an offer of proof as to the testimony that would be elicited, the Trial Court would have had broad latitude to grant such relief as it deemed proper, including a continuance for Defendant to in fact take the discovery it now claims that it needs. *See* CPLR 3025(c). Defendants' failure thus constitutes at best an omission by trial counsel and at worst a deliberate tactic aimed at obtaining the result it now shamelessly seeks – to have judgment entered in its favor for the lack of discovery that it could have conducted prior to trial after entry of a verdict that it concedes was not against the weight of the evidence adduced at trial.

Even if Defendant had properly raised the argument, it is unlikely that Defendant would have succeeded in showing prejudice. Under New York law, prejudice results from a motion to amend a complaint only where there is "some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *See Loomis v Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23-24 (1981). Where relevant evidence is obtained during discovery and the issue is explored, a party not prejudiced or surprised by the admission of such evidence and amendment to

conform to the pleadings related thereto. *See supra* at 20-21, *Rizzo v. Kay*, 79 A.D.3d 1001, 1002 (2nd Dept. 2010) (holding that "appellant was not prejudiced or surprised by the admission of evidence on the issue of abandonment and the submission of this issue to the jury, since the issue was explored, and relevant evidence obtained, during discovery"). As noted above, Defendant concedes that the parties took discovery with regard to the underwriting process and as a result, Defendant knew that Plaintiffs' policy contained a PSE that was unenforceable. *See* Initial Br. at 18 (observing that much of the evidence regarding Plaintiffs' cause of action for reformation "support[s] the argument that Seneca waived or should be estopped from relying on plaintiffs' alleged breach of the PSE" and further acknowledging that such was "precisely the position plaintiffs took throughout the litigation"). Moreover, during Plaintiffs' counsel's examination of Ms. Muller, both she and her counsel were aware that the underwriting file was missing the critical documentation that would necessarily have been part of the file if Defendant had intended to issue the Subject Policy with a PSE, and at no time did the witness or Seneca's counsel ever advise the Court, Plaintiffs' counsel, or its own insured that the protective safeguard endorsement was in all likelihood an error. *See infra* at 45 *et seq.* Only following the jury verdict in Plaintiffs' favor, and in support of its motion to vacate the jury verdict pursuant to CPLR 4404(a), did 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* Initial Br. at 33-35.

Defendant first identified Mr. Guardino and brokers Denise Frayman and Fran Solomon of JFA as individuals with knowledge relevant to this proceeding back in January 2013. *See* R. at 2735-2739. At the time Mr. Guardino was still employed by Defendant it would have taken very little investigatory effort on the part of Defendant to preserve his testimony for use at trial. *See* R. at 2738. Defendant inexplicably failed to do so.[3] Defendant also had more than six years in which to seek discovery from Denise Frayman and Fran Solomon of JFA, but nevertheless inexplicably failed to do so. In its defense, Defendant asserts that it would not have known to ask specifically if the PSE had been included in the policy by mistake. *See* Initial Br. at 33. Such assertion is illogical. Defendant concedes that it was aware that Plaintiffs responded to Defendant's affirmative defense of Plaintiffs' purported noncompliance with the PSE through the doctrines of waiver and estoppel. In particular, Defendant knew that Plaintiffs claimed that Defendant knew at or around the time of contracting that the building lacked the fixtures required by the PSE, and

[3] As set forth above, if the Defendant timely complied with Plaintiff's November 2011 notice for the deposition of Mr. Guardino, along with its notice to produce underwriting file, Mr. Guardino would have testified in 2012. Furthermore, there is no reason to doubt, and every reason to believe, that his testimony would have been consistent with the testimony adduced at trial, and therefore favorable to Plaintiff. Defendant's active concealment of the underwriting file and Mr. Guardino for five years frustrated and prejudiced Plaintiff's ability to preserve such evidence, thereby subsequently prejudicing Plaintiff in its right to conduct discovery.

that certain of the other properties insured by the same policy were vacant lots in which the fixtures required by the PSE could not possibly exist. Said somewhat differently, Defendant was aware that Plaintiffs believed the PSE was unenforceable. Neither party can say with certainty whether a deposition of Ms. Frayman or Ms. Solomon would have revealed evidence regarding the mutual mistake in this matter, as their depositions were never taken. Finally, it should be noted that Defendant filed its post-judgment motion 24 days after the verdict was handed down against them. *Compare* R. 2131 (verdict sheet dated March 22, 2019) at *with* R. at 2457 (motion dated April 15, 2019). If either of these two witnesses had pertinent knowledge as it relates to the inclusion of the PSE in Plaintiffs' policy, counsel for Defendant could have obtained an affidavit or provided the Court with some type of "offer of proof" as to what these witnesses would have testified to if they had been called to the witness stand. It failed to do so. Rather, Defendant's decision to merely theorize as to the fact that their testimony would be beneficial to Defendant speaks volumes.

As to Mr. Guardino, there is a remarkable irony in Defendant's complaints about Defendant's inability to obtain his testimony. As discussed *supra* at 30-36, Defendant spent the better part of five years, and nearly six years, concealing its underwriting file and its underwriters, respectively, from Plaintiffs' scrutiny. *See also* R. at 2683-2711. This delay in fact prevented Plaintiffs from obtaining the

deposition of Mr. Guardino, which they sought as soon as they were informed that Mr. Guardino was no longer employed by Seneca, only to learn that Mr. Guardino had been incapacitated and was on Social Security disability from November 2013 onward. *See* R. at 2692, R. at 2707-2710. Consequently, Defendant cannot now be heard to seriously contend to be prejudiced by its inability to obtain the very discovery that it prevented Plaintiffs from obtaining.

All of the above makes it abundantly clear that even if Defendant had not waived its right to claim "prejudice" by not raising it at the time of Plaintiffs' initial application to conform the pleadings, it suffered no prejudice as a result of the Trial Court's decision to allow those pleadings to be amended to conform to the truth. As a result, Defendant has failed to justify the reversal of the Trial Court's decision that allowed Plaintiffs' reformation claim to go to the jury.

III. The Trial Court Properly Denied Defendant's Post-Trial Motion

A. Defendant's Appeal Fails On Its Face To Meet The Relevant Standard

Separate and apart from Defendant's claim that the Trial Court erred in allowing the amendment of the pleadings, it assigns a "separate" error to its second bite of the apple strategy by reiterating similar arguments under the guise of a CPLR 4404(a) motion. As noted above, CPLR 4404(a) permits the court to grant a motion to set aside a jury verdict only "where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree." *See supra* at 22,

quoting Gomez v. Park Donuts, Inc., 249 A.D.2d at 267. There is no dispute that the jury reached agreement in this matter. *See* R. at 2131-35 (verdict sheet). Moreover, as the Trial Court observed, "Defendant does not claim the verdict was against the weight of the evidence." *See* R. at 29. Accordingly, Defendant concedes that the underwriting file, together with the other evidence elicited at trial, clearly and convincingly established that the Subject Policy should be reformed to delete the PSE from the Policy. [4]

Consequently, Defendant was boxed-in to making its post-trial motion to set aside the verdict "in the interest of justice" in that the Trial Court erred in granting Plaintiffs' motion to amend at trial. *See* R. at 29. As the Trial Court held, and as discussed in greater detail *infra*, "Plaintiff's reformation claim relates back to its original breach of contract claim." R. at 29 *citing O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 (1st Dept. 2017). Moreover, as the Trial Court correctly concluded, "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. In light of the clear and convincing evidence in support of

[4] In order for a party to be entitled to reformation it must establish either a mutual mistake or a fraudulently induced unilateral mistake. *See 313-315 West 125th Street L.L.C. v. Arch Specialty Ins. Co.*, 138 A.D.3d 601, 602, 30 N.Y.S.3d 74 (1st Dept. 2016). "To succeed, the party asserting mutual mistake must establish by "clear, positive and convincing evidence" that the agreement does not accurately express the parties' intentions or previous oral agreement." *See id.* (citations omitted). This in fact is how the Trial Court charged the jury. *See* R. at 1537 *et seq.*; R. at 1544-46.

the verdict, together with Defendant's own malfeasance in the discovery process in this litigation, granting of the motion to set aside the verdict would not have been "in the interests of justice," the only basis on which Defendant sought relief. As such, denial was proper.

Defendant seeks to avoid its burden of establishing that the Trial Court erred in denying its post-trial motion by strategically combining the granting of the pleading amendment and the denial of Defendant's post-trial motion into one big argument. In doing so, it seeks to run away from the burden it carries in establishing that the Trial Court erred in denying the post-trial motion.

As articulated by the Court of Appeals in *Micallef v. Miehle Co.*, 39 NY2d 376, 381-82, 384 NYS2d 115 (1976),

> CPLR 4404 (subd [a]) authorizes the court, either by motion of any party, or on its own initiative, to order a new trial "in the interest of justice". It is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein (4 Weinstein-Korn-Miller, NY Civ Prac, par 4404.01). The Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected (*Matter of De Lano*, 34 A.D.2d 1031, 1032, *aff'd* 28 N.Y.2d 587) and "must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision" (4 Weinstein-Korn-Miller, NY Civ Prac, par 4404.11).

Similarly, in New York, "the policy of the courts [is] to permit actions to be determined on their merits." *See Scott v. Allstate Ins. Co.*, 124 A.D.2d 481 (1st Dept. 1986) (granting motion to amend pleading in light of merits); *see also Xu v JJW Enterprises, Inc.*, 149 A.D.3d 1146, 1147, 53 N.Y.S.3d 660, 661 (2nd Dept. 2017)

(affirming order compelling acceptance of late answer). The interests of justice thus are best served by resolution such as the jury verdict issued in this case, rather than resolution on procedural or technical grounds. *See U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 72 (2019). In this case, the jury found that Plaintiffs had established by clear and convincing evidence – a more stringent standard than the typical civil preponderance of evidence – that the PSE's inclusion in the Subject Policy was the result of a mutual mistake. *See* R. at 2132 (jury verdict sheet).

Nowhere in its Initial Brief does Defendant even attempt to embrace these criteria in support of an "interest of justice" reversal. Rather, it merely rehashes the unsuccessful arguments that it initially raised with the Trial Court, albeit this time including a claim of prejudice, a claim that Defendant failed to advance prior to the case going to the jury. *See* R. at 1006-23, 1298-1312. It is beyond cavil that a party who fails to raise an argument at the time a motion is made cannot thereafter seek reargument or appeal on the basis that was not argued. *See*, *e.g.*, *Andre v. Warren*, 214 A.D.2d 323, 323, 624 N.Y.S.2d 430 (1st Dept. 1995); *Thompson–Shepard v. Lido Hall Condominiums*, 168 A.D.3d 614, 614 (1st Dept. 2019) *see also Ballan v. Sirota*, 163 A.D.3d 516, 517-18 (2nd Dept. 2018) (party seeking to reargue a prior Order cannot raise contentions not raised in prior papers).

It should further be noted that when the Trial Court ruled that Plaintiffs could proceed with its reformation claim, it did not do so without thought, analysis and given both sides an opportunity to be heard. As previously referenced, Ms. Muller testified on March 19, 2020, that the inclusion of the PSE in the Subject Policy could have been a mistake. *See* R. at 834-35. The following day, on March 20, 2020, Plaintiff moved the Court to amend to conform the pleadings to the proof. *See* R. at 1006-23. The Court initially reserved its decision. *See* R. at 1023 ("I will reserve on reformation and whether we'll add it until the end of [Defendant's] case."). The parties discussed the reformation issue again at the Charging Conference, with the Court focusing particularly on the question of the statute of limitations. *See* R. at 1298-1312. The Court specifically discussed its own research into the issue, and its conclusion that the reformation, if necessary, would relate back to the time of Complaint. *See* R. at 1305-1312 ("The Court. . . . I think it relates back. Why wouldn't it relate back?"). The Court also noted that Defendant was clearly aware at the time of the contract that there were no sprinklers in the insured properties. *See* R. at 1305-06 ("And you know, part of the problem is you have a -- there is no sprinkler. It's clear that there was no -- that the insured said there was no sprinkler."). Defendant made no assertion of prejudice at either the time of the motion or the subsequent charging conference discussion, raising the issue for the first time on its' post-verdict motion.

Defendant now seeks this Court's vacatur of the jury verdict based upon its claim that the Trial Court gave Defendant's unpreserved "prejudice" arguments short shrift. *See* Initial Br. at 32. As set forth in detail *supra* at Point II, Defendant was aware of Plaintiffs' attack as to the issuance and application of the PSE as well as the purported knowledge of the witnesses it did not call. For at least six years prior to trial Defendant had identified the discovery that it now claims it would have sought as part of its own disclosures in this matter.

The Trial Court, in its order denying Defendant's motion to set aside the verdict, summarized the evidence in support of the jury's verdict:

> Defendant's Vice President, Carol Muller, admitted at trial that the inclusion of the PSE in the policy might have been a mistake. At the time of the fire loss, plaintiffs had insured the building with a package commercial insurance policy that provided coverage for fire losses at nine properties plaintiff owned. Moreover, defendant knew that plaintiff did not have a working sprinkler system at the premises that burned down. It received inspection reports reflecting the lack of sprinklers at vacant properties and vacant lots, including the damaged premises, Defendant's underwriting files and the trial testimony demonstrated that the damaged premises did not have functioning sprinklers, that defendant was aware of this circumstance, but took no action.

See R. at 29-30; *see also* R. at 834-35. Defendant rails against the evidence, claiming at length that "the only testimonial evidence that Seneca made a mistake," specifically Carol Muller's admission that the PSE could have been a mistake, is "speculation . . . not evidence." *See* Initial Br. at 34. To the contrary, Ms. Muller's

statement was not mere speculation, but a conclusion that she reached based on review of the file before the jury. Furthermore, Defendant's claim of speculation by Ms. Muller is belied not only by the jury, who rejected this explanation, but by Defendant itself when it chose not to attack the verdict as being against the weight of the evidence.

Furthermore, Ms. Muller was not some junior underwriter. As the Trial Court noted, she was Defendant's Vice President and appeared in this capacity at trial. *See* R. at 579-80. Prior to her damning but honest admissions, Ms. Muller provided relevant testimony regarding the underwriting file, specifically admitting Seneca's knowledge of the absence of functional sprinklers at the Subject Premises and failure to take any action regarding same. *See* R. at 605-21, 639-43, 785-87. Ms. Muller also discussed that typically, an insured would be granted a credit to its premium for meeting the standards set forth in a PSE at its insured locations. R. at 652-55. Compellingly, Ms. Muller further observed that no such credit had been provided to Plaintiffs in connection with the Subject Policy. *See id.* Thus, based on her review of the file, Ms. Muller admitted on Defendant's behalf that the PSE's inclusion in the Subject Policy could have been a mistake. R. at 834-35. Consequently, while Defendant would like to portray this as some wild speculation, it is rather a reasoned conclusion with which the jury ultimately agreed. *See* R. at 2132 (jury verdict sheet) and which Defendant has implicitly conceded supports the jury's determination that

the Subject Policy should be reformed to eliminate a PSE that Plaintiffs did not want as part of their policy and that Defendant never intended to issue as part of Plaintiffs' policy.

B. Affirming The Jury's Verdict Advances The Interests Of Justice

As an initial matter, and as noted above, "it has often been stated that a jury verdict in favor of [a party] should not be set aside unless 'the jury could not have reached the verdict on any fair interpretation of the evidence.'" *See supra* at 21, *citing Nicastro v. Park*, 113 A.D.2d 129, 134 (2nd Dept. 1985); *Annunziata v. Colasanti*, 126 A.D.2d 75, 79-80 (1st Dept. 1987) (same). There was ample evidence in the record from which the jury could and did conclude that Plaintiffs had established by clear and convincing evidence that the inclusion of the Protective Safeguard Endorsement in the Subject Policy was the result of a mutual mistake.

Plaintiffs' representative testified that he had not sought a policy that included a protective safeguard endorsement because the subject properties consisted of derelict buildings and vacant lots which were known not to contain sprinkler systems. *See* R. at 344-51, 433. Defendant's representative admitted at trial that the application for insurance did not indicate that the buildings were sprinklered. *See* R. at 605-21; R. at 785-87; 1904 *et. seq.* Defendant's representative testified at trial that the quote for the Subject Policy, which should have included a reference to the protective safeguard endorsement if one were meant to be part of the Subject Policy,

did not in fact include such a reference. *See* R. at 791. Defendant's representative further testified that other documents, including the underwriter's notes and a route sheet, both of which should have included references to the protective safeguard, were both missing from the file. *See* R. at 801-03, 855-59. The Defendant had inspected the insured premises, determined that they were unsprinklered, and taken no action, despite having a right to cancel the Subject Policy if any of the representations made in the policy had been breached. *See* R. at 2528-2532.

From all of the foregoing, the jury concluded that the parties had not intended to include a protective safeguard endorsement in the Subject Policy. *See* R. at 2132. Defendant does not claim that the verdict was against the weight of the evidence. *See* R. at 29, Initial Brief *passim*. To overturn a jury verdict supported by clear and convincing evidence would not advance the interests of justice. The verdict therefore should be allowed to stand.

IV. The Relief Sought By Defendant Is Inappropriate In This Matter

On appeal, Defendant seeks exclusively to have judgment entered in its favor, choosing not to request that this Court provide it with a new trial or for such other or further relief as the Court may order. *See* Initial Br. at 38-39. In so doing, Defendant betrays its true purpose – to avoid the just requirement that it pay Plaintiff for the loss suffered in accordance with the terms of the applicable policy of insurance. In New York, "the party who has successfully obtained a judgment or

order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal." *See Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 544 (1983) (further observing that "where the successful party has obtained the full relief sought, he has no grounds for appeal or cross appeal"); *Dormitory Authority of N.Y. v. Samson Construction Co. et al*, 30 N.Y.3d 704, 94 N.E.3d 456 (2018) *discussing Brushton-Moira Cent. School Dist. v Thomas Assoc.*, 91 N.Y.2d 256 (1998) (holding that a party who obtains judgment for the damages sought on one but not all factually related causes of action is not aggrieved and has no right to appeal). The jury in this case included multiple attorneys, who would no doubt have been aware that where plaintiff established by clear and convincing evidence that the PSE should not have been included in the policy, the term was no longer part of the contract. *See* R. at R. at 1239-40, 2132. Once the jury concluded that the PSE was not a part of the contract, there therefore could be no waiver or estoppel, because such a result would be inconsistent with the finding that the PSE was not part of the agreement between the parties. Plaintiffs therefore would be entitled to a new trial on these issues. Defendant undoubtedly knows that it cannot succeed in such trial where it has been established that the PSE was not agreed to by clear and convincing evidence, including the admission of its own corporate representative that the inclusion of the PSE may have been a mistaken, and therefore has not sought such a remedy. *See* R. at 834-35. It would be a miscarriage of justice

to grant the only relief sought by Defendant on this appeal. For this reason alone, the appeal must be denied.

CONCLUSION

In light of the foregoing, Plaintiffs respectfully requests that the judgment of the Trial Court be affirmed in all respects, and for such other and further relief as the Court may find just and proper.

Respectfully submitted,

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