New York Supreme Court

Appellate Division—First Department

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

Plaintiffs-Respondents,

– against –

SENECA INSURANCE COMPANY,

Defendant-Appellant.

Appellate Case No.: 2019-04601

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

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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-Appellant" or "Seneca") in which Seneca seeks to reargue the determination of this Court, in its January 28, 2021 Decision and Order, to affirm the Trial Court's refusal to overturn the jury verdict rendered on October 18, 2019 or the final judgment entered on December 4, 2019. Plaintiffs also file this brief in opposition to the alternative relief sought by Seneca, by which it seeks leave to appeal the Appellate Division's Decision and Order to the New York Court of Appeals.

On March 22, 2019, a New York County jury determined that Seneca breached its contract by refusing to pay Plaintiffs first-party property insurance claim. By decision dated October 18, 2019, the Trial Court affirmed the jury's verdict. On January 28, 2021, the Appellate Division affirmed the jury's determination and the Trial Court's refusal to set aside the verdict. *See 34-06 73, LLC et al. v. Seneca Insurance Company*, 190 A.D.3d 628, 2021 WL 278280 (1st Dept. Jan. 28, 2021). Notwithstanding the above, Seneca, by way of the instant motion, seeks for a third time to reverse the jury's determination. This effort to seek an appellate "do-over" is representative of the manner in which Seneca has sought

to avoid coverage of this claim from the very beginning. Given the four and half years that it took Seneca to produce a "complete unredacted" copy of its underwriting file in discovery, followed by trial testimony in which it could not account for the fact that pages in the file were blank—pages that the testifying underwriter deemed critical to the determination as to whether Seneca had intended to issue a Protective Safeguard Endorsement, it is not surprising that the instant motion is a product of Seneca's decision to fire its trial and initial appellate counsel and retain another law firm for the purpose of filing a 27-page affidavit followed by a 60-page memorandum of law in connection with the instant motion—all to suggest that somehow this Court overlooked various legal precedent and/or misapprehended various material facts. Notwithstanding the length of such papers, the instant motion fails in this quest. Rather, this most recent submission merely regurgitates arguments explicitly rejected by this Court or raises new appellate arguments for the first time. Consequently, this Court can deny the instant motion on these grounds alone.

Assuming *arguendo* that this Court chooses to revisit or entertain the arguments raised in the instant motion, the Record is clear that the facts necessary to support a claim for reformation, which bears a heightened burden of pleading and proof as to mutual mistake, or fraud in the case of a unilateral mistake, were not known to Plaintiffs at the outset of trial as Seneca now claims. At best, the Record reflects that Plaintiffs were aware of a unilateral mistake as to the terms of the

contract which – without any evidence of fraud – would not constitute a claim for reformation. However, that is not to say that the applicability of the Protective Safeguard Endorsement ("PSE") to the loss at issue was not a central issue from the beginning of this litigation. In fact, Seneca conceded in its initial appellate submissions that it knew from the beginning of this litigation that Plaintiffs were challenging the applicability or enforceability of the PSE in connection with the Subject Policy of insurance. That the precise nature of that challenge ultimately was determined by the jury to call for reformation, as opposed to waiver or estoppel does not change the essential fact that Seneca knew that their Fourth Affirmative Defense, as it relates to the ability of the PSE to exclude coverage for the loss in question, was subject to an equitable challenge.

Finally, Seneca has failed to articulate a basis upon which this case should be certified to the Court of Appeals. The issues do not raise constitutional questions, nor do they reflect a split of authority as to how various Appellate Courts in New York State view such issues. Certainly, the "interest of justice" requirement is not implicated where it is clear 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) Seneca has never disputed that the jury was provided with clear and

convincing evidence establishing that the PSE was issued in error. As a result, this Court should deny Seneca's motion in all aspects.

STATEMENT OF FACTS

This litigation stems from the failure of Seneca to comply with 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.

Nevertheless, 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 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, 2019 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 ought to include a PSE. *See* R. at 800-01. Additionally, Muller admitted that a necessary route sheet did not exist as part of the file, thereby raising a further question as to Seneca's intention 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.

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 Plaintiff-Respondent's 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 their availability. On March 22, 2019, Plaintiffs motion to amend was subsequently granted. *See id*.

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

Subsequent to its multiple losses at the trial level, Seneca appealed to this Court seeking reversal of the judgment. *See* Seneca's Brief for Defendant-Appellant ("Seneca's App. Brief"), App. Dkt. No. 13. 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 this Court 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, this Court 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, this Court 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. This Court 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 the instant motion, consisting of a 27-page affidavit followed by a 60-page memorandum of law, ostensibly to identify law that this Court overlooked or facts that this Court misapprehended. In truth, the instant motion constitutes Seneca's attempt to file a substitute appellate brief and wish away this Court's prior determination. As the arguments raised in this motion are both palpably improper from a procedural perspective and unpersuasive from a substantive perspective, Seneca's instant motion should be denied.

ARGUMENT

POINT ONE

SENECA'S MOTION TO REARGUE FAILS TO IDENTIFY ANY FACTS OR LAW THAT WERE OVERLOOKED OR MISAPPREHENDED BY THIS COURT IN ITS JANUARY 28, 2021 DECISION

A. The Standard Of Review

Pursuant to the explicit terms of 22 NYCRR 1250.16, a motion to reargue must be based upon matters of fact or law that the Court is alleged to have overlooked or misapprehended when deciding the prior motion. The purpose of a motion to re-argue is to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the law or facts pertinent to the original motion, and not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. *See Foley v. Roche.* 68 A.D.2d 558, 567 (1st Dept. 1979), *lv denied* 56 N.Y.2d 507. *See also Diorio v. City of New York,* 202 A.D.2d 625, 609 N.Y.S.2d 304 (2nd Dept. 1994) (concluding that a motion to reargue is particularly warranted where the moving party demonstrates that the court misapplied a controlling principle of law in its original order); *Dunitz v. JLM Consulting Corp.,* 22 A.D.3d 455, 803 N.Y.S.2d 653 (2d Dept. 2005) (same). Such motions are addressed to the sound discretion of the court. *LaSalle Bank N.A. v. Lawrence,* 2020 N.Y. App. Div. LEXIS 5131 at *2 (2nd Dept., decided Sept. 23, 2020); *Tardif v. Hauppauge Off. Park Assoc.,* 184 A.D.3d 887, 888-89, 124

N.Y.S.3d 226, 227 (2nd Dept. 2020); *Fuessel v. Chin,* 179 A.D.3d 899, 900-01, 116 N.Y.S.3d 395, 397 (2nd Dept. 2020). It is well-established that a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *See Independent Chem. Corp. v. Puthanpurayil,* 165 A.D.3d 578, 578, 87 N.Y.S.3d 164, 165 (1st Dept. 2018); *Jaspar Holdings, LLC v. Gotham Trading Partners #1, LLC,* 186 A.D.3d 582, 584 (2d Dept. 2020); *People v. Illis,* 184 A.D.3d 859, 862, 126 N.Y.S.3d 482, 485-86 (2d Dept. 2020) ("It is well settled that a motion to reargue is not an appropriate vehicle for raising new questions... which were not previously advanced."). Indeed, this Court routinely declines to consider issues raised for the first time on appeal. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Ferrell & Myers, Inc.*, 26 A.D.3d 191 (1st Dept. 2006) *citing Dinneny v. Allstate Ins. Co.*, 295 A.D.2d 797, 798–799, 744 N.Y.S.2d 74 (3rd Dept. 2002); *Avid Equities, Ltd. v. Commerce and Industry Ins. Co.*, 225 A.D.2d 446, 447 (1st Dept. 1996).

As the Court of Appeals has made clear, "the requirement of preservation is not simply a meaningless technical barrier to review." *See Wilson v. Galicia Contracting & Restoration Corp.*,10 N.Y.3d 827, 829 (2008). This is because there is an element of unfairness about seeking to reverse a judgment on a point not called to the attention of the trial court or intermediate appellate court, and on which the

court was not given an opportunity to rule or correct its asserted error. Furthermore, the preservation requirement affords the opposing party an opportunity to make a necessary factual showing or take available legal counter-steps.

Finally, where a party fails to demonstrate that facts or law have been overlooked or misapprehended, several cases have concluded that the Court lacks discretion to entertain a motion to reargue. *See*, *e.g.*, *In the Matter of Carla Williams v. Board of Education of City School District of City of New York,* 24 A.D.3d 458 (2nd Dept. 2005), (reversing grant of motion to reargue and observing discretion was improvidently exercised where the petitioner "simply sought to restate her earlier arguments rather than point out matters of fact or law allegedly overlooked or misapprehended").

Following the decision of this Court affirming the Supreme Court's entry of judgment after jury verdict and denial of a post-trial motion, Seneca's decision to replace its prior counsel does not provide an exception to any of the above rules. Thus, the current submission of a 27 page affidavit together with a 60 page memorandum of law must be read through a lens to determine if these "pages" identify and/or explain what and how this Court overlooked or misapprehended material law and facts.

B. The Court Correctly Analyzed Applicable Facts

When Seneca filed its post-trial motion after the jury rendered a verdict against it, Seneca's motion did not base its request to vacate the verdict based on a claim of insufficient evidence. *See* R. at 29. Consequently, at bar it is conceded that Plaintiff had presented to the jury sufficient evidence to allow it to find that Plaintiffs had established by clear and convincing evidence that Seneca had never intended to include a PSE in the Subject Policy. *See* R. at 1566 (reading of verdict); R. at 2131 (verdict sheet).

Furthermore, 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.

As none of these facts are in dispute, there were no material facts for this Court to have overlooked or misapprehended. Faced with this conundrum, Seneca's new counsel improperly raises new claims as it relates to these facts. Specifically, Defendant 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. As noted *supra* at Point I, the assertion of a "new" argument in a motion to re-argue is procedurally improper and should not be considered by the Court for that reason alone. Putting this procedural infirmity aside, Seneca is just plain wrong. 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 Brief, App. Dkt. No. 21 at 34 *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 it 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.[1]

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.

Furthermore, there is nothing in this Court's decision to suggest that it overlooked the pleadings in this action. See Seneca's Motion Brief, App. Dkt. No. 21at 31 *et seq.* To the contrary, as this Court noted, "the reformation claim is responsive to defendant's fourth affirmative defense." *See 34-06 73, LLC et al. v.*

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[1] 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).

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 (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* the Court deemed an amendment of a pleading to add a cause of action for reformation at trial because "the evidence of mistake was proper . . . in reply to the claim of breach of warranty." *See id.*

Finally, this Court 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, this Court 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, this Court 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 this Court's decision to affirm the Trial Court's denial of Seneca' s post trial motion was proper and Seneca has failed in the filing of this motion to demonstrate any basis to reconsider this Court's prior determination.

C. <u>The Court Correctly Analyzed Applicable Case Law</u>

Similarly, any reasonable review of the Seneca's Motion to Reargue confirms that it has failed to articulate any legal arguments that this Court overlooked or misapprehended. Rather, Seneca simply reiterates its earlier arguments, namely that the Trial Court erred in permitting Plaintiffs to amend their complaint to include a reformation claim. This "error" is predicated on the claim that (a) a proper evaluation of the circumstances surrounding Plaintiffs' proposed amendment was not undertaken by any Court and (b) that in any event the Court overlooked the analysis which should have resulted in the determination that the statute of limitation in connection with any reformation claim had expired. Both of these arguments, however, were submitted to this Court at the time of Seneca's appeal and both were rejected by this Court.

1. *The Court Correctly Concluded That Amendment of the Pleadings Was Proper Pursuant to CPLR 3025(c)*

At the outset Seneca argues that this Court misapprehended and/or overlooked the limits on application of CPLR 3025(c) by permitting amendment during the course of the trial. It predicates its claim on the fact that this Court 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 ignore the fact that trial counsel for Seneca never identified any "prejudice" or even requested a continuance in the course of opposing the amendment. Seneca's last ditch attempt through the vehicle of the instant motion does nothing to save the day.

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).

Initially, it must be noted that both the Trial Court and this Court, upon review, have 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."). Not only was the applicability raised in connection with Seneca's Fourth Affirmative Defense, but 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").

Furthermore, as detailed in Plaintiffs initial opposition brief to this Court, Seneca admitted in connection with its submission to this Court that it was fully aware that Plaintiffs were attacking the ability of Seneca to rely upon the PSE in order to deny coverage for Plaintiffs' claim. *See* Plaintiffs' Brief in Opposition to Appeal ("Plaintiffs' App. Opp. Brief"), App. Dkt. No. 14 at 28-29 and the citations

contained therein. Secondly, it cannot be overemphasized the import of the testimony given by Seneca's underwriter. *See supra* at 7-9. It was this testimony, combined with the prior motion practice that led all of the courts who reviewed these circumstances that amendment pursuant to CPLR 3025(c) was appropriate. Finally, the reviewing courts took into consideration the fact that there was a nearly five year delay in producing Seneca's Underwriting File, robbing it of any equitable claim of prejudice.

Finally, and as identified by Plaintiffs in their initial opposition brief, *see* Plaintiffs' App. Opp. Brief, App. Dkt. No. 14 at 36-41, the Record fails to identify any claim of trial counsel as to "prejudice" and/or a request for a continuance of the trial. Nor did trial counsel ever suggest or document that witnesses who it would call in connection with the formation of the Subject Policy were unavailable. *See* R. at 1006-23,1298-1312. Consequently, there is no basis to claim that the Trial Court and this Court erred in allowing Plaintiffs to amend its pleadings to conform to the proof.

Notwithstanding the above, Seneca argues that the underlying breach of contract, waiver and estoppel claims at issue in the initial pleadings are fundamentally different from those facts necessary to plead a reformation cause of action. This contention is incorrect, as each cause of action stems from the same PSE at the heart of the entire litigation. Not only do all facts adduced through discovery illustrate that Seneca was aware of the non-functional sprinkler system at Plaintiffs'

property, but that it took no action to cancel the policy, thereby cementing that the PSE was included in the policy by mistake. As such, Seneca could not have suffered prejudice as a result of the reformation, as it was fully aware from the inception of this litigation of all the underlying facts which support the reformation claim, namely that the parties could not have reasonably agreed to include the PSE as part of the policy based on the facts presented here.

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. The 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. In fact, Seneca admitted that Plaintiffs claimed alternative compliance with the PSE or a conclusion that the PSE was unenforceable. 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*, the Seneca cannot claim surprise or prejudice from amendment of the complaint and reformation of the policy.[2]

Prejudice exists only when the matters pleaded were such that Seneca could not have been reasonably expected to be prepared for the variance at the trial. Prejudice--*irremediable* prejudice--is the main barrier, and amendment will be denied when it seeks a change that constitutes a variation between the pleading and the proof so total that it undermines the party's credibility by evincing an intention to invent the facts along the way.

In the case at bar, Seneca was aware from inception of litigation that the validity and applicability of the PSE was at issue. Plaintiffs' position has always been that it was entitled to coverage under the subject policy, a contention supported by years of discovery on the matter. *See* R. at 29-30, *supra* at 5-6, 16-17. Plaintiffs

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[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.

further engaged in protracted efforts to obtain the underwriting file pertaining to the underlying policy, which ultimately showed following testimony at trial that the inclusion of the PSE was likely a mistake. *See supra* at 5-9, 16-17. At no point in time did Plaintiffs attempt to invent facts along the way – rather it relied on the evidence presented, including the trial testimony of Seneca's own witness, which ultimately illustrated that not only was the PSE a central issue in the matter at hand, but that the cause of action and proof supporting Plaintiff-Respondent's claims were well within the knowledge of Seneca since inception of this litigation. As such, this Court properly held on appeal that the PSE is at the heart of both the breach of contract cause of action, as well as the reformation cause of action, so much so that not only was amendment of Plaintiffs' pleadings proper, but prejudice to Seneca is implausible.

Finally, 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. Rather, Seneca's only objections to Plaintiffs' motion to amend to conform the pleadings to the proof centered on the statute of limitations and the alleged failure to state a cause of action. Seneca 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, to say nothing of in a motion to reargue the denial of its appeal.

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). 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 Seneca's App. Brief, Dkt. No. 13 at 33-35.

As discussed by Plaintiffs in the initial appeal, Seneca had itself identified all three individuals as persons with knowledge relevant to this dispute in June 2013. *See* R. at 2735-2739. At that time, Mr. Guardino was employed by the Seneca and his testimony could have been preserved easily by Seneca. 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, who became 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).

2. *The Court Did Not Err In Its Analysis of CPLR 203(f)*

Seneca next seeks to assign error by claiming that this Court conflated an amendment to pleadings, pursuant to CPLR 3025(c) with the relation back doctrine as set forth in CPLR 203(f). The primary basis for this claim is its contention that the Court failed to take cognizance of the Court of Appeals holding in *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). This is plainly not the case.

In analyzing *In re SCM Corp. (Fisher Park Lane Co.)*, *supra*, both this Court's January 28, 2021 Decision and the Trial Court's decision explicitly addressed and distinguished this case in detail. Indeed, a third of this Court's decision consists of discussion of *In re SCM Corp.* and related cases. *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) As this Court observed, 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 the Court of Appeals wrote when deciding *In re SCM Corp.*, a primary basis for its 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, this Court 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 Court further observed, "the same evidence supporting the waiver claim also supports reformation." *See id.*

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.

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). "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"). Thus, 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).

In the case at bar, and as discussed *supra* at II.B, this Court correctly recognized that Plaintiffs' claim for reformation was proper as a response to the Seneca'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 (1879). Moreover, this Court properly considered the claims pursued through discovery and motion practice, as well as the evidence gathered throughout the course of discovery, in coming to the conclusion that the relation back doctrine applies to the facts at issue herein. The applicability of the PSE in question has been an issue from the moment the Seneca had exchanged its underwriting file in April 2016. *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 5-9. 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 this Court properly concluded that not only was Plaintiff-Respondent within its 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.* As such, it is misleading for Seneca to suggest that there is no relation between the alleged breach of contract claim and the reformation claim which Seneca argues was improperly permitted. In fact, Plaintiffs have maintained throughout the course of litigation that the PSE was unenforceable, thereby seeking coverage under the underlying policy for its losses sustained in the September 2009 fire.

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. The Trial Court 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.

"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).

POINT TWO

SENECA'S MOTION FAILS TO TRIGGER REVIEW BY THE COURT OF APPEALS

Seneca also seeks leave to appeal to the Court of Appeals pursuant to 22 NYCRR 1250.16(d)(3)(i). Seneca fails to provide any basis for such a certification.

A motion for permission to appeal to the Court of Appeals in civil cases must include a succinct statement of the questions presented for review and the reasons that the questions presented merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. See 22 NYCRR 500.22(b)(4).

Seneca argues that it should be granted leave to appeal to the Court of Appeals for the consideration of whether Plaintiffs should have been permitted to amend its complaint to assert a reformation cause of action, whether Plaintiffs failed to timely assert a reformation claim and whether the relation back doctrine saves a reformation claim that is otherwise time barred. Seneca's entire application relies on the premise that this Court's prior decision is inconsistent with the holding in *Matter of SCM Corp*. (Fisher Park Lane Co.), 40 N.Y.2d 788. As set forth above, no such inconsistency exists.

In determining whether to grant leave to appeal, courts look to the novelty, difficulty, importance, and effect of the legal and public policy issues raised. *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").

In *Niesig v. Team I*, the Court denied plaintiff's motion for authorization for his attorney to conduct *ex parte* interviews of the individuals to be named by the third-party defendant as possible witnesses to the accident and events which are the subject of the instant action. On appeal, the branch for leave to appeal to the Court of Appeals was granted on the grounds that the issue of *ex parte* communications with employees of a corporate defendant for whom no attorney or record has formally appeared in pending litigation was a purely academic question that was not addressed in the lower court's decision and is of sufficient importance to warrant review by the Court of Appeals. In *Niesig*, the legal and ethical considerations surrounding *ex parte* communications with the employees of an unrepresented defendant were, in fact, of sufficient importance to warrant review by the Court of Appeals given the potential prejudice implications on the unrepresented defendant (who may later obtain representation).

In *Town of Smithtown v. Moore*, leave to appeal the Court of Appeals was granted on the issue of whether the State Board of Equalization and Assessment was validly constituted when, in August of 1960, it fixed the equalization rate for a town

for the year 1959. The question presented in *Town of Smithtown* had important tax implications on an entire town that stemmed from the potentially unauthorized exercise of power by a state government branch that was not properly enacted and/or in existence at the time it made its determination pertaining to the equalization rate, which determines how close a property's assessment value is to its actual value, with broad implications on whether owners of properties with similar actual value are paying equivalent amounts of taxes.

No such issues of importance exist in the case at bar. It was previously established that Plaintiff-Respondent's amendment of its complaint to assert a reformation cause of action stems from facts and evidentiary materials known to all parties throughout the course of the underlying litigation. No evidence of any novel, difficult, or important issues that affect legal and/or public policy have been presented on this appeal which would necessitate review by the Court of Appeals. Rather, the instant appeal is a last-ditch effort at a third bite of the apple on matters previously determined by this Court, with no reliance on new, compelling evidence that would allow this Court to reevaluate its prior determination. As previously established in this Court's January 28, 2021 Decision, the existing precedents of the Court of Appeals sufficiently address all aspects of the issue at bar and no further intervention is necessary or proper. As such, Seneca's motion for leave to appeal should be denied.

CONCLUSION

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

Dated: April 16, 2021
New York, New York

Respectfully submitted,

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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/s/
WEG AND MYERS, P.C.