To be Argued by:
PAUL KOVNER
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – First Department

Case No.: 2019-04601

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

Plaintiffs-Respondents,

- against -

SENECA INSURANCE COMPANY,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT

THE TRIAL COURT ERRED IN SUBMITTING REFORMATION TO THE JURY AND DENYING SENECA'S POST-TRIAL MOTION 5

The Standard of Review 5

Plaintiffs' Reformation Claim Was Time-Barred 8

The Relation Back Doctrine Does Not Apply 10

Seneca Is Not Estopped from Asserting that Plaintiffs Should Have Pleaded Reformation in the Complaint 16

Seneca was Irreversibly Prejudiced by Plaintiffs' Eight Year Delay in Pleading Reformation 19

Seneca Did Not Waive the Right to Assert Prejudice 23

CONCLUSION 26

PRINTING SPECIFICATIONS STATEMENT 27

TABLE OF AUTHORITIES

Page

Cases:

1414 APF, LLC v. Deer Stags, Inc.,
39 A.D.3d 329 (1st Dept. 2007).....8

A-1 Check Cashing Serv. v. Goodman,
148 A.D.2d 482 (2nd Dept. 1989) 15

Abrams v. Maryland Casualty Co.,
300 N.Y. 80 (1949) 13, 14

Andre v. Warren,
214 A.D.2d 323 (1st Dept. 1995).....24

Annunziata v. Colasanti,
126 A.D.2d 75 (1st Dept. 1987).....7

Arbutina v. Bahuleyan,
75 A.D.2d 84 (4th Dep't 1980).....18

Arthur v. Homestead Fire Ins. Co.,
78 N.Y. 462 (1879) 14

Bernstein v. Remington Arms Co.,
18 A.D.2d 910 (2nd Dept. 1963) 15

Chimart Associates v. Paul,
66 N.Y.2d 570 (1986) 18

Consolidated Edison Co. v. General Accident Ins. Co.,
204 A.D.2d 164 (1st Dept. 1994).....14

D'Angelo v. D'Angelo,
109 A.D.2d 773 (2nd Dept. 1985) 19

Diarassouba v. Urban,
24 A.D.3d 602 (2nd Dept. 2005) 19

Forman v. Davidson,
74 A.D.2d 505 (1st Dept. 1980).....19

General Stencils, Inc. v. Chiappa,
18 N.Y.2d 125 (1966) 18

Glus v. Brooklyn,
359 U.S. 231 (1959).....18

Gomez v. Park Donuts, Inc.,
249 A.D.2d 266 (2nd Dept. 1998) 6

Green v. Phoenix Ins. Co.,
218 Iowa 1131 (1934).....15

Guarino v. Mine Safety Appliances Co.,
31 A.D.2d 255 (2nd Dept. 1969) 15

Holt v. Welding Services, Inc.,
264 A.D.2d 562 (1st Dept. 1999)..... 7-8

Huma v. Patel,
68 A.D.3d 821 (2nd Dept. 2009) 24

In re Steyer,
70 N.Y.2d 990 (1988) 18

Kamruddin v. Desmond,
293 A.D.2d 714 (2d Dep't 2002).....18

Lariviere v. New York City Tr. Auth.,
131 A.D.3d 1130 (2nd Dept. 2017) 5

Loomis v. Corinno Corp.,
54 N.Y.2d 18 (1981) 6

McGhee v. Odell,
96 A.D.3d 450 (1st Dept. 2012).....7

Micallef v. Miehle Co., Div. of Miehle-Goss Dexter,
39 N.Y.2d 376 (1976) 5

National Amusements v. South Bronx,
253 A.D.2d 358 (1st Dept. 1998).....8

New York Univ. v. Factory Mut. Ins. Co.,
2018 U.S. Dist. LEXIS 53418 (S.D.N.Y. 2018).....10, 11

Nicastro vs. Park,
113 A.D.2d 129 (2nd Dept. 1985) 7

O'Connor v. Papertsian,
309 N.Y. 465 (1956) 5

O'Halloran v. Metropolitan Transp. Auth.,
154 A.D.3d 83 (1st Dept. 2017).....11

Pensee Associates, Ltd. v. Quon Shih-Shong,
199 A.D.2d 73 (1st Dept. 1993).....7

People v. Chestnut,
19 N.Y.3d 606 (2012) 25

Rabouin v. Metropolitan Life Ins. Co.,
25 A.D.3d 349 (1st Dept. 2006).....5

Rizzo v. Kay,
70 A.D.3d 1001 (2nd Dept. 2010) 19

Scott v. Allstate Ins. Co.,
124 A.D.2d 481 (1st Dept. 1986).....8

Small v. Lorillard Tobacco Co.,
94 N.Y.2d 43 (1st Dept. 1999).....5

Thompson-Shepard v. Lido Hall Condominiums,
168 A.D.3d 614 (1st Dept. 2019).....24

U.S. Bank National Association v. DLJ Mortgage Capital, Inc.,
33 N.Y.3d 72 (2019) 7

Wallace v. 600 Partners Co.,
86 N.Y.2d 543 (1995) 8

Xavier v. Grunberg,
67 A.D.2d 632 (1st Dept. 1979).....19

Xu v. JJQ Enterprises, Inc.,
149 A.D.2d 1146 (2nd Dept. 2017) 8

Rules, Laws and Statutes:

CPLR 205(a) 7

CPLR 3025(b).....7

CPLR 4404(a) 6

PRELIMINARY STATEMENT

Defendant-Appellant, Seneca Insurance Company, Inc. ("Seneca"), respectfully submits this reply brief in connection with its appeal from the decision of the Trial Court, which denied Seneca's post-trial motion to set aside the verdict in favor of Plaintiffs-Respondents ("plaintiffs") on the issue of reformation and direct that judgment be entered in favor of Seneca as a matter of law.

Plaintiffs' entire brief constitutes a disingenuous attempt to excuse their failure to plead reformation in the complaint in 2011. Had they done so, the entire course of the litigation leading up to trial in 2019 would have been different.

Plaintiffs do not dispute that Seneca's April 13, 2011 letter, which denied their claim, quoted the Protective Safeguards Endorsement ("PSE") and stated there was no coverage because plaintiffs breached the PSE by failing to maintain the sprinkler system in the premises in complete working order. Plaintiffs also do not dispute that their attorney knew the basis for the denial before he prepared the summons and complaint. Clearly, therefore, if Malik's testimony for the first time at trial that it was a mistake to include the PSE in the policy were truthful, the attorney would have included a cause of action for reformation in the complaint.

Plaintiffs do not even try to contradict Seneca's assertion that they could have pleaded reformation in the complaint. Instead, plaintiffs assert that Seneca's delay

in producing the underwriting file directly contributed to their ability to discover that the PSE was included by mistake. But if Malik's trial testimony were truthful, plaintiffs' attorney had all the knowledge he needed to plead a cause of action for reformation in the complaint in 2011. Viewed in that light, it is obvious that plaintiffs' constant mention of the delay is not relevant and designed solely to distract the Court from their failure to plead reformation in the complaint.

Moreover, plaintiffs conveniently ignore that even after they received the underwriting file and deposed Muller, they admitted that the Protective Safeguards Endorsement ("PSE") was properly in the policy, but argued only that Seneca waived the right to rely on the breach when they moved to dismiss Seneca's affirmative defense based upon the PSE.

Plaintiffs also conveniently ignore the well settled principle set forth in Seneca's opening brief, which plaintiffs do not dispute, that reformation can be based upon unilateral mistake of one party accompanied by fraud of the other party. Notably, that is precisely what plaintiffs' attorney argued at trial before Muller testified when he said that Malik did not want to have a PSE, but reformation was appropriate because Seneca tried to slip in the PSE. R. 784.

Furthermore, plaintiffs do not dispute that, as set forth in Seneca's opening brief, Malik never alleged prior to trial in 2019 that the PSE was included in the

policy by mistake. Thus, it is clear that plaintiffs' attorney added a new claim of reformation at trial.

The law is well settled – and plaintiffs have not cited any case to the contrary - that the relation back doctrine applies only if the allegations in the original complaint give the defendant notice of the claim sought to be added by amendment. Furthermore, plaintiffs do not dispute that a cause of action for breach of contract is distinct from a cause of action for reformation and they do not arise out of the same transactions or occurrences. Clearly, therefore, plaintiffs' complaint for breach of contract, which alleged that they complied with all policy conditions, including the PSE, did not give Seneca notice that plaintiffs would assert at trial eight years later that the PSE was included in the policy by mistake so as to justify reformation.

Plaintiffs argue that they contended from day one that the PSE was unenforceable, but that is sophistry, designed to excuse the failure to plead reformation in the complaint. Throughout the litigation, plaintiffs acknowledged that the policy contained the PSE, but argued that plaintiffs either complied with the PSE, or Seneca waived its right to rely on a breach of the PSE because it knew that the sprinkler system in the premises was not working, but did not cancel the policy. Plaintiffs changed their position at trial to assert that the PSE was in the policy by mistake. That is not the same as alleging that the PSE was properly included in the

policy, but is unenforceable because of waiver. Therefore, the relation back doctrine does not apply.

Seneca was unquestionably prejudiced by plaintiffs' eight-year delay in arguing reformation at trial because it was deprived of the opportunity to prepare a defense to the reformation claim. The Trial Court recognized the obvious prejudice to Seneca because Guardino, the only Seneca employee with personal knowledge of the negotiations for the policy, did not testify. R. 1315, 1321.

Moreover, and as attested to by Mark Binsky, the attorney whose law firm represented Seneca until plaintiffs' motion to disqualify that firm was granted in 2014, if plaintiffs' attorney had pled reformation in the complaint in 2011, he would have deposed Guardino, who was available to testify, as well as the insurance brokers and Malik himself about the negotiations for the policy and the alleged mistake in including the PSE. R. 2484 – 2486.

Thus, the Trial Court's decision to grant plaintiffs' motion to conform the pleadings to the proof at trial, and to deny Seneca's post-trial motion, constituted reversible error.

The jury unanimously concluded that plaintiffs breached the PSE and that Seneca had not waived its right to enforce the PSE. Five out of six jurors agreed that Seneca was not estopped from relying on the PSE. R. 2133 - 2135. Therefore,

if this Court agrees that the Trial Court erred as a matter of law in submitting the issue of reformation to the jury and denying Seneca's post-trial motion, the judgment must be vacated and judgment entered in favor of Seneca. In light of the verdict, there would be no need for a new trial.

ARGUMENT

THE TRIAL COURT ERRED IN SUBMITTING REFORMATION TO THE JURY AND DENYING SENECA'S POST-TRIAL MOTION

The Standard of Review

In their brief, plaintiffs assert that Seneca's brief contains misleading statements relating to the standard of review, but fail to identify any. Indeed, and as noted in Seneca's opening brief, this Court has discretion to review the discretionary factual and legal decisions of the Trial Court. Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 39 N.Y.2d 376 (1976); O'Connor v. Papertsian, 309 N.Y. 465 (1956); Lariviere v. New York City Tr. Auth., 131 A.D.3d 1130 (2nd Dept. 2017); Rabouin v. Metropolitan Life Ins. Co., 25 A.D.3d 349 (1st Dept. 2006); Small v. Lorillard Tobacco Co., 94 N.Y.2d 43 (1st Dept. 1999).

Thus, this Court has discretion to review the factual and legal bases of the Trial Court's decisions to submit the issue of reformation to the jury and to deny Seneca's post-trial motion. Plaintiffs do not challenge this principle.

Plaintiffs cite Loomis v. Corinno Corp., 54 N.Y.2d 18 (1981), which overturned long-standing precedent and held that plaintiff's motion to increase the *ad damnum* clause of the complaint can be made before, or even after, the verdict in the absence of prejudice to defendant. The Court of Appeals in Loomis noted that prejudice sufficient to defeat a motion to amend requires "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." Id., 54 N.Y.2d at 23. The prejudice identified by the Court in Loomis is precisely the prejudice suffered by Seneca as a result of plaintiffs' lengthy delay before claiming that the policy should be reformed for the first time at trial.

Gomez v. Park Donuts, Inc., 249 A.D.2d 266 (2nd Dept. 1998), cited by plaintiffs, supports Seneca because the Court noted that a motion under CPLR 4404(a) should be granted in the interest of justice where the trial court erred in the admissibility of evidence. Plaintiffs' suggestion (at p. 43) that Seneca "seeks to run away from the burden it carries in establishing that the Trial Court erred in denying the post-trial motion" is absurd. Seneca's opening brief established that the decision to grant plaintiffs' motion to amend the complaint to conform the pleadings to the proof and the denial of the post-trial motion constituted reversible error.

Clearly, Seneca was prejudiced by the decision of plaintiffs' attorney to add the new claim of reformation after eight years of litigating only a claim of breach of

contract. Moreover, the conclusion is inescapable that Malik's testimony for the first time at trial that is was a mistake to include the PSE in the policy was not truthful. Thus, a decision by this Court to reverse would be in the interest of justice.

Plaintiffs also argue that the interests of justice would be best served by resort to the jury verdict herein, rather than resolution on procedural or technical grounds, but the case they cite, U.S. Bank National Association v. DLJ Mortgage Capital, Inc., 33 N.Y.3d 72 (2019), does not support that proposition. Rather, that case merely dealt with whether plaintiff's failure to comply with a condition precedent within the applicable statute of limitations foreclosed plaintiff's ability to refile the action under CPLR 205(a). Seneca does not seek to resolve this case on procedural or technical grounds. To the extent that this Court agrees that it was error for the Trial Court to submit plaintiffs' new reformation claim to the jury and to deny Seneca's post-trial motion, the interests of justice would not be served by the verdict on reformation.

The other cases cited by plaintiffs are clearly inapposite or readily distinguishable. Pensee Associates, Ltd. v. Quon Shih-Shong, 199 A.D.2d 73 (1st Dept. 1993) and McGhee v. Odell, 96 A.D.3d 450 (1st Dept. 2012) both deal only with the generic standard on a motion for leave to amend under CPLR 3025(b). Nicastro vs. Park, 113 A.D.2d 129 (2nd Dept. 1985), Annunziata v. Colasanti, 126 A.D.2d 75 (1st Dept. 1987) and Holt v. Welding Services, Inc., 264 A.D.2d 562 (1st

Dept. 1999), merely deal with the propriety of the trial court's grant of a directed verdict.

Plaintiffs cite several cases for the general proposition that the policy in New York is to decide actions on the merits. However, neither this general proposition nor the cited cases have anything to do with Seneca's arguments on this appeal. Scott v. Allstate Ins. Co., 124 A.D.2d 481 (1st Dept. 1986) and Xu v. JJQ Enterprises, Inc., 149 A.D.2d 1146 (2nd Dept. 2017), cited by plaintiffs, merely dealt with untimely answers and motions to enter a default judgment. The jury decided all issues on the merits, but Seneca submits it was reversible error for the Trial Court to submit the issue of mistake to the jury.

Plaintiffs' Reformation Claim Was Time-Barred

Seneca established in its opening brief that a claim for reformation based on mutual mistake is governed by a six-year Statute of Limitations and accrues on the date the mistake was made. Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995); 1414 APF, LLC v. Deer Stags, Inc., 39 A.D.3d 329 (1st Dept. 2007); National Amusements v. South Bronx, 253 A.D.2d 358 (1st Dept. 1998).

Malik never moved to amend the complaint prior to expiration of the Statute of Limitations. Instead, Malik continued to litigate the case based only upon a cause

of action for breach of contract and the allegation that plaintiffs complied with all policy conditions, including the PSE, at least until trial began in March 2019.

In denying Seneca's post-trial motion, the Trial Court said that Seneca "can hardly complain about Statute of Limitations when it failed to turn over the underwriting file until 2016, even though plaintiff filed its complaint in 2011." R. 29-30. Although plaintiffs' initial discovery demands in November 2011 included a request for the underwriting file, plaintiffs did not raise the issue until a status conference on February 17, 2016. A Stipulation was entered between counsel and So-Ordered by the Judge which referred to numerous outstanding discovery items and provided on the second page that Seneca was to turn over its underwriting file within twenty days. R. 2697-98. Seneca produced the file not long thereafter on April 28, 2016. R. 2705.

The Trial Court was apparently swayed by plaintiffs' argument as to the delay, but ignored the fact that if there were any truth to Malik's trial testimony that it was a mistake to include the PSE in the policy, plaintiffs could have pleaded reformation in the complaint. Plaintiffs and their attorney had all the knowledge they needed to plead reformation in the complaint in 2011. Therefore, any delay in producing the underwriting file was not relevant to plaintiffs' ability to plead.

Even after receiving the underwriting file, plaintiffs never questioned Muller at her deposition about whether the PSE was included in the policy by mistake. Moreover, plaintiffs never moved for leave to amend the complaint to add reformation after receiving the underwriting file and deposing Muller. On the contrary, plaintiffs' subsequent motion to dismiss Seneca's affirmative defense based upon the PSE admitted that the PSE was properly included in the policy, but argued that Seneca waived its right to rely on a breach of the PSE.

The Relation Back Doctrine Does Not Apply

In its opening brief, Seneca established that a claim for breach of contract and a claim for reformation do not arise out of the same transactions or occurrences. Furthermore, the relation back doctrine does not apply because the facts alleged in plaintiffs' complaint for breach of contract did not give Seneca notice of the facts supporting the claim for reformation made for the first time at trial.

With one exception, plaintiffs' brief does not even address, let alone distinguish, Seneca's authorities. The exception is New York Univ. v. Factory Mut. Ins. Co., 2018 U.S. Dist. LEXIS 53418 (S.D.N.Y. 2018), cited by Seneca, which is clearly on point. In that case, the original complaint alleged that defendant wrongfully denied coverage under a provision of the insurance policy, which constituted a breach of contract. After over a year of litigation, plaintiff moved to

amend the complaint to assert a claim for reformation, which was time-barred. The Court denied the motion and held that the insurance company's denial of coverage and the reformation claim involved unrelated facts involving the representations made prior to the policy being created.

As plaintiffs acknowledge, the Court in New York Univ. denied plaintiffs motion to amend and "held that defendant could not have been on notice of the proposed new claims." However, plaintiffs argue that the case is distinguishable because Seneca "was at all points aware that plaintiffs contended that the PSE was unenforceable as a matter of equity." In fact, and as noted, throughout the eight years of litigation prior to trial, Seneca was aware only that plaintiffs acknowledged that the PSE was properly included in the policy, but asserted that plaintiffs either complied with the PSE or Seneca waived its right to rely on the breach. Seneca could not have been on notice of the claim of mistake until trial began in 2019.

Here, the Trial Court ignored Seneca's controlling precedents and held that plaintiffs' reformation claim related back to their original breach of contract claim, citing three cases, each of which were shown to be distinguishable in Seneca's opening brief. Of those cases, plaintiffs' brief cites only to O'Halloran v. Metropolitan Transp. Auth., 154 A.D.3d 83 (1st Dept. 2017). Plaintiffs acknowledge that the Court in O'Halloran held that a claim asserted in an amended complaint relates back to the original complaint only if the original complaint gave

defendant notice of the transactions or occurrences plaintiff sought to prove in the amended complaint. However, it bears repeating that plaintiffs' original complaint for breach of contract, which alleged that they complied with all conditions, including the PSE, did not give Seneca notice that plaintiffs would assert for the first time at trial that the PSE was included in the policy by mistake.

Clearly, the controlling precedents cited by Seneca conclusively establish that plaintiffs' reformation claim does not relate back to their breach of contract claim. In an effort to overcome this case law, plaintiffs have concocted a spurious argument that "relation back is presumptively proper where facts adduced at trial support an additional cause of action." If this were the law, plaintiffs could always introduce a new theory at trial which was supported by new facts, even though defendants were not aware of the new theory until trial. Not surprisingly, plaintiffs have not cited a single case which supports this absurd idea.

Plaintiffs' argument is based upon their oft-repeated, but patently false, assertion throughout their brief that the enforceability of the PSE was always an issue. In an outrageous attempt to support this assertion, plaintiffs contend (at p. 27) that Seneca "admits on this appeal that the evidence used to support plaintiffs' cause of action for reformation supports the argument that Seneca waived or should be estopped from relying on plaintiffs' alleged breach of the PSE." Plaintiffs' reference

is to Seneca's deconstruction of that portion of the Trial Court's denial of Seneca's post trial motion, which noted, as follows:

> 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. Given this evidence, the jury could have easily concluded that the PSE wound up in the policy by mistake. R. 30.

In its opening brief, Seneca pointed out that this evidence noted by the Trial Court did not support the conclusion that the PSE was included by mistake so as to justify reformation. Rather, this evidence supported the argument, which plaintiffs made throughout the litigation, that Seneca waived or should be estopped from relying on their alleged breach of the PSE. Throughout the litigation, Seneca vigorously disputed that waiver or estoppel apply. Importantly, however, the jury concluded that Seneca did not waive its right to enforce the PSE and should not be estopped from relying upon the PSE.

Plaintiffs cite Abrams v. Maryland Casualty Co., 300 N.Y. 80 (1949) for the proposition that a cause of action will be deemed to be the same if the amended and original complaints both seek to enforce the same obligation or liability with respect to a provision in an insurance policy governing the time to sue. The case involved an accident and the issue of whether an employee of the insured who was driving the insured's vehicle at the time of an accident was covered under the insured's liability policy. 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 whose negligence caused the accident was covered under the policy issued by defendant, which was at all times apprised of the nature of plaintiff's claim. Clearly, Abrams is readily distinguishable.

Plaintiffs also cite Consolidated Edison Co. v. General Accident Ins. Co., 204 A.D.2d 164 (1st Dept. 1994), in which the Court granted plaintiff's motion to amend the complaint to add a cause of action for reformation in response to defendant's motion for summary judgment because there were triable questions of fact as to whether there was a mistake in the policy due to a scrivener's error. Here, by contrast, if Malik's testimony that it was a mistake to include the PSE in the policy were truthful, plaintiffs' attorney could have pleaded reformation in the original complaint.

In Arthur v. Homestead Fire Ins. Co., 78 N.Y. 462 (1879), plaintiff was permitted to amend the complaint, even though the court recognized that defendant was prejudiced by the new allegation, but defendant was given time to conduct discovery with respect to that allegation. More importantly, this old case was decided before the C.P.L.R. was codified.

Plaintiffs assert that this case is strikingly similar to an old Iowa case, Green v. Phoenix Ins. Co., 218 Iowa 1131 (1934), but Green is readily distinguishable. In Green, plaintiff initially obtained a judgment in an action for breach of contract, but the judgment was reversed. On remand, plaintiff amended the complaint to assert a claim for reformation. The Court said that the amendment was properly granted because the issue relating to reformation had not previously been adjudicated and, more importantly, because the factual basis for reformation was included in the original claim. Here, by contrast, plaintiffs' reformation claim does not arise out of the same facts as their breach of contract claim.

Plaintiffs' other cases are also inapplicable. Bernstein v. Remington Arms Co., 18 A.D.2d 910 (2nd Dept. 1963) involved a case in which the amended complaint was based upon the same set of facts as the original complaint. In A-1 Check Cashing Serv. v. Goodman, 148 A.D.2d 482 (2nd Dept. 1989), plaintiff alleged that an officer of defendant committed fraud by issuing worthless checks in the name of the corporate defendant. The Court held that it was proper to conform the pleadings to the proof to assert that the officer was also individually liable because the variance between the pleadings and the proof was not so great that defendants could not reasonably have expected such evidence to be introduced at trial. Guarino v. Mine Safety Appliances Co., 31 A.D.2d 255 (2nd Dept. 1969) involved the issue of whether breach of warranty liability could be extended to non-users of the

defective product. The Court held that it could because the "danger invites rescue" doctrine made the rescuer's injuries foreseeable to defendant.

Here, by contrast, plaintiffs' complaint and all pre-trial proceedings over eight years were based upon a claim of breach of contract and compliance with all policy conditions, including the PSE. Until trial began, plaintiffs never asserted that the PSE was included in the policy by mistake. Rather, plaintiffs asserted that they either complied with the PSE, or that Seneca waived its right to rely on the breach of the PSE, because it learned that the sprinkler system was not working shortly after policy inception, never followed up to determine if plaintiffs had repaired the system, and did not cancel the policy. R. 2547-2601. Plaintiffs' assertions throughout the litigation directly contradict their reformation claim advanced for the first time at trial.

Clearly, the allegations in the original complaint did not give Seneca notice that plaintiffs would allege at trial that the PSE was included in the policy by mistake and the policy should be reformed. Therefore, the Trial Court erred when it submitted reformation to the jury and when it denied Seneca's post-trial motion based upon the relation back doctrine.

Seneca Is Not Estopped from Asserting that Plaintiffs Should Have Pleaded Reformation in the Complaint

It is obvious that plaintiffs' attorney recognizes that there is no valid rebuttal to Seneca's contention that if Malik's testimony at trial that it was a mistake to include the PSE in the policy were truthful, the attorney should have pleaded a claim for reformation in the complaint. Remarkably, plaintiffs contend that Seneca should be estopped from asserting that plaintiffs should have pleaded reformation in the complaint because of Seneca's five-year delay in producing the underwriting file. This contention is totally without merit.

It bears repeating that while plaintiffs' initial discovery demands in November 2011 did include a request for the underwriting file, plaintiffs did not raise an issue relating to the failure to produce the file until a court conference in February 2016. R. 2697-98. Seneca produced the file not long thereafter. R. 2705. Again, it is important to emphasize that plaintiffs did not need the underwriting file to plead reformation in the complaint, assuming Malik's trial testimony about mistake was truthful.

But even if the delay had been five years, there would still be no basis for estoppel. If Malik truly believed it was a mistake to include the PSE in the policy, plaintiffs' attorney had all the knowledge he needed to plead reformation before he drafted the complaint. Any delay in producing the underwriting file was an irrelevant red-herring.

Recognizing the futility of the position that plaintiffs could not have pleaded reformation in the complaint based upon unilateral mistake accompanied by fraud, they make the preposterous statement (at p. 36) that "[a]s this Court is no doubt aware, a unilateral mistake is generally not grounds for reformation, citing Chimart Associates v. Paul, 66 N.Y.2d 570 (1986). However, the Court in Chimart said no such thing. On the contrary, the Court noted noted that reformation can be based upon either mutual mistake or unilateral mistake accompanied by fraud. The Court granted the motion for summary judgment because the claim of mutual mistake and the claim of unilateral mistake and fraud were both too uncertain and conclusory.

The cases cited by plaintiffs for their contention about estoppel, Glus v. Brooklyn, 359 U.S. 231 (1959), General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 126 (1966), In re Steyer, 70 N.Y.2d 990, 991 (1988), *Kamruddin v. Desmond*, 293 A.D.2d 714 (2d Dep't 2002) and Arbutina v. Bahuleyan, 75 A.D.2d 84 (4th Dep't 1980), all were cases in which the defendants misrepresented the time within which to sue, or fraudulently concealed their conversion or engaged in other wrongful conduct to prevent plaintiffs from timely asserting their rights.

Here, by contrast, plaintiffs' contention that they did not learn of the basis of a reformation claim until they received the underwriting file and deposed Muller is directly contradicted by plaintiffs' subsequent motion to dismiss Seneca's affirmative defense based upon the PSE. In the motion, plaintiffs only argued

waiver, not reformation. Furthermore, at trial, plaintiffs' attorney argued that reformation was appropriate based upon unilateral mistake accompanied by fraud even before Muller's trial testimony that it may have been a mistake to include the PSE in the policy.

Seneca was Irreversibly Prejudiced by Plaintiffs' Eight Year Delay in Pleading Reformation

Courts have long recognized that a party is prejudiced when, as here, a case is decided on a theory which the opposing party presents for the first time at trial. See e.g., Diarassouba v. Urban, 24 A.D.3d 602 (2nd Dept. 2005); D'Angelo v. D'Angelo, 109 A.D.2d 773 (2nd Dept. 1985); Forman v. Davidson, 74 A.D.2d 505 (1st Dept. 1980).

In Xavier v. Grunberg, 67 A.D.2d 632 (1st Dept. 1979), plaintiff was permitted to change her theory from constructive notice to actual notice to conform the pleadings to the proof. The testimony regarding actual notice changed the theory of the case substantially. The Court held that the new theory of notice constituted surprise and operated to the prejudice of defendants' ability to prepare for trial, warranting reversal and remand for a new trial.

In Rizzo v. Kay, 70 A.D.3d 1001 (2nd Dept. 2010), cited by plaintiffs, the Court held that plaintiff was not prejudiced or surprised because the issue raised by

the amendment was explored and relevant evidence obtained during discovery. Contrary to plaintiffs' brief, however, there was never any discovery prior to trial with respect to their belated assertion at trial that the PSE was included in the policy by mistake. As noted in Seneca's opening brief and not disputed by plaintiffs, their attorney asked Muller no questions during her deposition about the possibility that the PSE was included by mistake or that there were any documents missing from the underwriting file. The only discovery with regard to the underwriting process was deposition testimony from Muller as to the reasons why Seneca elected not to cancel the policy, even though Seneca knew that the automatic sprinkler system in the premises was not working. Muller testified at deposition, just as she did at trial, that one of the reasons was that Seneca had the protection of the PSE. R. 781.

Plaintiffs' brief has lengthy quotes from Muller's testimony (at pp. 7-12) regarding the two pages which Muller then realized were missing from the underwriting file during her testimony. These excerpts demonstrate the extent to which Seneca was prejudiced. Guardino was still employed by Seneca when the complaint was filed in 2011. As noted in the affidavit of Mark Binsky, the attorney whose firm was handling the case until 2014, had plaintiffs originally pleaded a claim for reformation, he would have interviewed and deposed plaintiffs' broker, Seneca's underwriter and Malik himself about whether or not the PSE was supposed to be included in the policy. R. 2484 – 2486. Guardino may have had copies of the

quote letter and route sheet which were ultimately missing from the underwriting file when Seneca later produced it, or an innocent explanation as to why they were not in the file, or he may have recalled conversations with the broker on that issue.

As to the reformation claim, plaintiffs assert that the applications for the other properties insured under the policy indicated that there were no sprinklers. However, Malik admitted that three of the properties, including the property where the fire occurred, did have sprinklers. R. 436 – 437. Muller testified that the PSE was included in the policy to protect Seneca in case the information from the broker is not accurate. R. 781, 829.

The only testimonial evidence that Seneca made a mistake by including the PSE in the policy came from Muller, who initially said that she "would have no idea if [Guardino] made a mistake [by including the PSE], but subsequently said it was possible that "could [including the PSE] have been a mistake? I guess so." R. 2648. But that is pure speculation.

Thus, it is a virtual certainty that the basis of the jury verdict on mutual mistake was the adverse inference which the jury was entitled to draw against Seneca under the missing document charge relating to the quote letter and route sheet which were not in the underwriting file. R. 1325-1333. Therefore, Seneca is not in a position to, and has not, challenged the verdict as being against the weight of the

evidence. However, the nature of the evidence regarding mistake demonstrates the extent of the prejudice to Seneca by plaintiffs' eight-year delay in pleading mistake.

Importantly, the underwriting file did contain a quote letter, dated April 5, 2013, which Muller testified included all of the relevant policy terms which the broker would have needed to review to determine if they should accept the policy on behalf of plaintiffs. R. 2127, 775 – 776. Plaintiffs' attorney argued that it was of no consequence because it was dated several days after the effective date of the policy. But that document might have been the quote letter which Guardino and the broker relied upon to set forth the terms and conditions of the policy. But without having testimony from the broker or Guardino relating to the negotiations for the policy, Seneca could not explain this document.

Guardino could not have testified at trial in 2019 with respect to communications with the brokers about a policy which went into effect in 2009 in light of the multiple serious health issues about which he informed Seneca's attorney and then plaintiffs' attorney in 2016. That is why plaintiff deposed Muller in 2017 instead of Guardino. R. 2706 - 2709. Plaintiffs' assertion that Seneca hid the underwriting file and Guardino from them is outrageous and their contention that Guardino's testimony would have assisted them is sheer speculation.

Clearly, therefore, if Malik's trial testimony that it was a mistake to include the PSE were true, Seneca was irreversibly prejudiced because it was deprived of an opportunity to develop the potential defenses to plaintiffs' claim for reformation when the claim should have been made – in the complaint filed in 2011. By the time the reformation claim was belatedly asserted at trial in 2019, Seneca had no opportunity to defend against the claim.

It is almost like living in an alternate universe for plaintiffs' attorney to argue that Seneca and its attorneys from two separate law firms conspired to keep the underwriting file and Guardino hidden and that Seneca and the attorneys knew or should have known throughout the litigation that Seneca did not intend to include the PSE in the policy. It is undisputed that three of Malik's properties covered by the policy had sprinklers, despite incorrect information in the applications. It is also undisputed that Malik knew the policy contained a PSE, but never said that it was a mistake until trial in 2019. The PSE was included in the policy to protect Seneca's interest. Like the proverbial big lie, plaintiffs' attorney believes that if he repeats it often enough, it will become true. Simply stated, the argument is outrageous and false.

Seneca Did Not Waive the Right to Assert Prejudice

In his opening statement, plaintiffs' attorney said that his clients did not want to insure the buildings as sprinklered buildings. Seneca's attorney recognized that

plaintiffs were thereby asserting a new theory of mistake to support a claim of reformation. Therefore, Seneca objected to any testimony by Muller with respect to the new theory before she took the stand. The judge overruled the objection after asking plaintiffs' attorney if he was changing the theory, and the attorney said no. That was not accurate.

Clearly, the objection to Muller's testimony about mistake was made because Seneca would be surprised and prejudiced by testimony on a new theory. R. 519. As the Trial Court recognized, the prejudice to Seneca by not having testimony from Guardino was obvious. R. 1315, 1321.

Nonetheless, plaintiffs contend that Seneca waived its right to argue prejudice. However, none of the cases cited by plaintiffs support their contention. In Andre v. Warren, 214 A.D.2d 323 (1st Dept. 1995), the Court held that respondent waived its right to object to the admissibility of blood tests because he failed to object to its admission at trial or to cross-examine petitioner's expert witness or call his own expert. In Thompson-Shepard v. Lido Hall Condominiums, 168 A.D.3d 614 (1st Dept. 2019), the Court held that defendants waived their right to object to the admissibility of plaintiff's expert report because they did not raise the issue in opposition to plaintiff's motion for summary judgment. In Huma v. Patel, 68 A.D.3d 821 (2nd Dept. 2009), the Court held that defendant could not raise new matters on a motion to renew which could have been raised in the original opposition papers.

Clearly, Seneca preserved the objection to plaintiffs' belated reformation claim when it objected to Muller's testimony because it was surprised and prejudiced by evidence of a new reformation claim. See, People v. Chestnut, 19 N.Y.3d 606 (2012).

Plaintiffs' attorney again makes the absurd suggestion (at p. 44) that if Seneca had made an offer of proof as to the testimony that would be elicited from Guardino or plaintiffs' insurance brokers, the Trial Court had latitude to grant a continuance so Seneca could depose these witnesses. The negotiations between Guardino and the brokers for the insurance policy took place in 2009. Seneca had no idea what Guardino or the brokers would say about the issue of whether the PSE was included in the policy by mistake precisely because plaintiffs did not plead reformation in the complaint and had never made mistake an issue until trial in 2019. But even if Seneca contacted the brokers in 2019, how would they be reasonably expected to remember routine negotiations for a policy ten years earlier. Further, Guardino had informed Seneca's attorney and then plaintiffs' attorney in 2016 that he had mental health issues which precluded him from giving a deposition. Plaintiffs' contention about an offer of proof highlights the prejudice suffered by Seneca because of plaintiffs' lengthy delay in raising mistake for the first time at trial.

CONCLUSION

Accordingly, Seneca Insurance Company respectfully submits that the Trial Court's decision to submit the issue of mutual mistake to the jury and its denial of Seneca's post-trial motion to set aside the verdict constituted reversible error as a matter of law. In light of the jury verdict that plaintiffs breached the PSE, that Seneca did not waive the right to enforce the PSE and should not be estopped from doing so, there is no need for a new trial. Seneca respectfully requests that judgment should be entered in favor of Seneca and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 18, 2020

Respectfully submitted,

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