SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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34-06 73, LLC, Bud Media, LLC and Coors Media, LLC

Plaintiffs,

– against –

Index No.: 652422/2011
Motion Seq. 011

Seneca Insurance Company,

Defendant.

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MELISSA A. CRANE, J.S.C.:

The court denies the motion of Seneca Insurance Company to set aside the jury verdict rendered on March 22, 2019 in favor of plaintiffs. The jury was asked three questions. In answer to the first question: "did plaintiff prove by clear and convincing evidence that the parties' true agreement was a Policy without a Protective Safeguard Endorsement, and that it was a mistake to include the Protective Safeguard Endorsement in the Policy," the jury answered "Yes." The jury answered "no" to questions two and three about Seneca's waiver and estoppel, respectively.

Defendant does not claim the verdict was against the weight of the evidence. Rather, Seneca takes issue with the court's decision at trial that permitted plaintiffs to conform the complaint to the proof to seek reformation of the contract.

Plaintiff's reformation claim relates back to its original breach of contract claim (*see O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dep't 2017]). The evidence supported that the parties did not mean to include a Protective Safeguard Endorsement (PSE) in the policy. Defendant's Vice President, Carol Muller, admitted at trial that the inclusion of the PSE in the policy might have been a mistake. At the time of the fire loss, plaintiffs had insured

the building with a package commercial insurance policy that provided coverage for fire losses at nine properties plaintiff owned. Moreover, defendant knew that plaintiff did not have a working sprinkler system at the premises that burned down. It received inspection reports reflecting the lack of sprinklers at vacant properties and vacant lots, including the damaged premises. Defendant's underwriting files and the trial testimony demonstrated that the damaged premises did not have functioning sprinklers, that defendant was aware of this circumstance, but took no action. Given this evidence, the jury could have easily concluded that the PSE wound up in the policy by mistake.

This evidence was the same as that plaintiff used to support its original breach of contract claim. Plaintiff has contended from day one that the PSE was unenforceable. Essentially, reformation was a variation on the theory of breach of contract and was one, given the evidence, that fit the facts the best. Having litigated this case since 2010, defendant can claim no unfair surprise or prejudice from charging the jury to make a finding on mutual mistake (see *Cherepuck v Liberty Mutual Ins. Co.*, 263 A.D.2d 748 [insureds' amendment of their breach of contract complaint against their homeowners' insurer to add a reformation related back to the original complaint, and thus was timely filed where the original complaint sufficiently notified the insurer of the underlying facts giving rise to both claims]; *see also Abrams v Maryland*, 300 NY 80, 86-87 [1949]). Moreover, defendant can hardly complain about statute of limitations when it failed to turn over its underwriting file until 2016, even though plaintiff filed its complaint in 2011.

Accordingly, it is

ORDERED THAT the court denies defendant's motion, pursuant to Rule 4404(a), to set aside the jury verdict.

DATED: 10-18-2019

ENTER:

MELISSA A. CRANE, JSC

HON. MELISSA A. CRANE
J.S.C.