

Simmons v AAA Buffalo Development Corp.

2001 NY Slip Op 30020(U)

August 13, 2001

Supreme Court, Suffolk County

Docket Number: 0014272/2721

Judge: William L. Underwood

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8-17

SHORT FORM ORDER

INDEX No. 97-14272
CAL. No. 00-02869-OT

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART SUFFOLK COUNTY

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PRESENT:

Hon. WILLIAM L. UNDERWOOD, JR.
Justice of the Supreme Court

MOTION DATE 7-9-01
ADJ. DATE 7-23-01
Mot. Seq. # 004 - MD
005 - XMD

-----X
ANNA MARIE SIMMONS and JEFFREY :
SIMMONS, JR., both infants under 14 yeas of age, :
by their parents and natural guardians, LISA :
MARIE SIMMONS and JEFFREY SIMMONS, :
individually, :
:
Plaintiffs, :
:
- against - :
:
AAA BUFFALO DEVELOPMENT CORP., :
AAA BUFFALO ONE DEVELOPMENT CORP., :
LAWRENCE LOSCALZO, VICTOR PAFUNDI, :
and JACKIE FHIMA, :
:
Defendants. :
-----X

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Upon the following papers numbered 1 to 29 read on these motions to preclude expert testimony and to stay the trial; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 18; Answering Affidavits and supporting papers 19 - 22; 23 - 24; Replying Affidavits and supporting papers 28 - 29; Other 25 - 27; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant, Lawrence Loscalzo, for an order, pursuant to CPLR 3101, to preclude certain expert testimony; and for a stay pending appeal, is denied, and it is further

ORDERED that the cross motion by defendants, AAA Buffalo Development Corp. and Victor Pafundi, for an order, pursuant to CPLR 3101, to preclude the same expert testimony is also denied.

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This personal injury action is currently on the ready day trial calendar. The infant plaintiffs were burned in a fire at the home their parents rented from defendants. Moving defendants seek, initially, to preclude plaintiff's expert from testifying as to theories of liability not raised in plaintiffs' bill of particulars and precluding plaintiffs from amending their bill of particulars. The premises was left vacant after the fire on January 27, 1997. In December 1997 defendants notified plaintiffs that the Town had directed the property be demolished, and that the property would be demolished within two weeks. Defendants also requested that, in response to their expert witness demand, plaintiffs communicate any anticipated expert witness, so that defendants could have their own expert examine the property before its demolition. Defendants also stated that they would object to the calling of any expert witness not identified prior to the demolition.

In May 2001 plaintiffs served defendants with expert disclosure (CPLR 3101[d]), wherein the expert is expected to testify, *inter alia*, that the fire was accidental and caused by a portable space heater coming into contact with combustible material; that the heaters were used because the house was cold and did not have adequate heat; that the dwelling did not have operable smoke detectors; and that this lack led to a delayed awareness of the fire and was the direct and proximate cause of plaintiffs injuries.

The gravamen of defendants motions is that plaintiffs' May 2001 expert witness disclosure, coming some three years after the premises was demolished is untimely and prejudicial, and the plaintiffs' bill of particulars does not contain any allegations that the dwelling's heat was inadequate.

Pursuant to CPLR 3101(a), "there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . ." Although CPLR 3101 (d)(1) requires disclosure of each parties expert and their expected testimony, it does not require a party to respond to a demand for such expert information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (*see, Cutsogorge v Hertz*, 262 AD2d 752, 695 NYS2d 375 [2d Dept 1999]). Further, "as a matter of elementary fairness" loss or destruction of physical evidence which is crucial to defense of an action may be so prejudicial as to warrant dismissal, even where such destruction was outside of plaintiff's control (*see, Behrbom v Healthco International*, __ AD2d __, 2001 NY App Div LEXIS 7575 [2d Dept 2001]). However, here defendants were in control of the dwelling and were not prohibited from having an expert inspect it before its demolition.

The court finds that the extreme remedy of preclusion is unwarranted under the present circumstances (*see, Busse v Clark Equipment Co.*, 182 AD2d 525, 538 NYS2d 243 [1st Dept 1992]). The parties do not dispute that plaintiffs' bill of particulars lists alleged violations of Riverhead Town Code at §86-9, as well as NYCRR §721.1, §1060.1, and §1060.3, all of which address the requirements relative to smoke and fire detectors. Defendants' bill of particulars asserts plaintiffs' culpable conduct with respect to use and placement of space heaters. Therefore defendants were aware of the use of space heaters and the

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alleged violation regarding smoke detectors. Moreover, it appears that plaintiffs' expert's conclusions are not based on an examination of the subject premises and that the materials reviewed in forming his opinion are available to defendants. Therefore, the motion and cross motion for preclusion are denied, since a willful and contumacious failure to disclose was not established, nor have movants established surprise or prejudice (*see, Vega v LaPalorcia*, __ AD2d __, 722 NYS2d 563 [2d Dept 2001]; *Blade v Town of North Hempstead*, 277 AD2d 268, 715 NYS2d 735 [2d Dept 2000]; *Halley v Winnicki*, 252 AD2d 489, 681 NYS2d 60 [2d Dept 1998]).

Lastly, defendant Loscalzo seeks to stay the trial of this matter pending the perfection and subsequent hearing of his appeal. The subject of defendant's appeal is the Order of Supreme Court, dated February 20, 2001 (Hon. Donald Kitson, J.S.C.) which denied his motion for summary judgment dismissing plaintiffs' complaint. Although, staying of a pending action is directed to the sound discretion of the trial court (*see, CPLR 2201; Britt v International Bus Services, Inc.*, 255 AD2d 143, 679 NYS2d 616 [1st Dept 1998]), defendant has not offered any statutory or case law support for his request relative to the instant circumstances (*compare, In re Weinbaum's Estate*, 51 Misc2d 538, 272 NYS2d 461 [1966]), and it is denied.

Dated: 8/13/01

J. Kellan S. Edwards
J.S.C.