

State of New York v Lone Star Transp., Inc.

2007 NY Slip Op 31751(U)

June 19, 2007

Supreme Court, Albany County

Docket Number: 0000272/0051

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

STATE OF NEW YORK

Plaintiff,

DECISION and ORDER
RJI NO.: 0105081541S
INDEX NO.: L27-05

-against-

LONE STAR TRANSPORTATION, INC. and
JAMES CLAIR WHEELER,

Defendants.

LONE STAR TRANSPORTATION, INC. and
JAMES CLAIR WHEELER,

Third-Party Plaintiff,

-against-

A&R FLAG CAR, INC. and LI NYC TRUCK
ESCORT SERVICE,

Third-Party Defendants.

LONE STAR TRANSPORTATION, INC. and
JAMES CLAIR WHEELER,

Second Third-Party Plaintiffs,

-against-

FRED STARK, CAROL PROSSEDA, CAROL WITTY
and WILLIAM BENNETT,

Second Third-Party Defendants.

Albany County Supreme County All Purpose Term, April 27, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff, the State of New York (hereinafter the State), brings these motions for summary judgment pursuant to CPLR § 3212 and to limit and/or preclude testimony from Defendants', Lone Star Transportation Inc. (hereinafter Lone Star) and Mr. Wheeler, proposed expert pursuant to CPLR § 3126. Lone star and Mr. Wheeler, oppose both motions. Third Party Defendant, A & R Flag Car, Inc. (hereinafter A &R) also brings this motion for summary judgment pursuant to CPLR § 3212. Third Party-Plaintiffs, Lone Star and Mr. Wheeler, oppose the motion and bring a cross-motion to strike A &R's Answer pursuant to CPLR §§ 3124 and 3126. Third Party

Defendant, William Bennet, brings this motion for summary judgment pursuant to CPLR § 3212. Lone Star and Mr. Wheeler oppose the motion.

After fully reviewing the record, this Court denies Plaintiffs motion for summary judgment, denies Plaintiffs motion to preclude and/or limit proposed expert testimony, denies A&R's motion for summary judgment, denies Defendant's motion to strike A&R's answer and denies William Bennet's motion for summary judgment. Additionally, as an act of discretion this Court orders Defendants to submit supplemental expert disclosure limited to the two previously disclosed experts, to inform Plaintiffs of the specific dates of Mr. Konon's education and experience and the specific allegations of damage inflation to which Mr. Blackford is expected to testify to be completed within 20 days of this decision.

Facts

Defendant, Lone Star, obtained a special hauling permit from the Department of Transportation for its employee, Co-defendant, Mr. Wheeler, to transport a "control building" through New York State as an over-sized load. The permit was conditional upon Mr. Wheeler taking a designated route. Lone Star proceeded to hire escort vehicles, driven by Third Party Defendants, Fred Stark, Carol Prosseda, Carol Witty and William Bennet, through A &R. In the midst of transporting the over-sized load, Mr. Wheeler and the escort drivers left the designated route and traveled eastbound on Interstate 495, approximately 1500 feet West of Exit 49N in the Town of Huntington, County of Suffolk where Mr. Wheeler's truck collided with a bridge that was not sufficiently high to allow for passage of the oversized load. Fred Stark, was acting as lead escort and claims to have called out via radio for Mr. Wheeler to stop prior when it became obvious that the bridge posed an obstacle, but that Mr. Wheeler was unable to stop in time

because he was too close to the lead escort.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court’s main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]). This case is replete with triable issues on all fronts.

Summary Judgment Motion by the State of New York

After the accident, the State, revoked the permit it had issued to Lone Star and is seeking recompense for repairs to the bridge necessitated by Mr. Wheeler driving into it with an over-sized load after he deviated from the route outlined in his special hauling permit. The State contends that it is entitled to summary judgment because no triable issue of fact exists regarding Mr. Wheeler’s negligence or Lone Star’s liability for that negligence as Mr. Wheeler’s employer. Lone Star and Mr. Wheeler, contend that the intervening negligence of Third Party Defendants creates a triable issue of fact regarding whether Mr. Wheeler’s conduct (deviating from the prescribed route) was in fact negligent, and to what extent that conduct was the proximate cause of the accident. According to Defendants, Mr. Wheeler was unfamiliar with the area and was reasonably relying on Third Party Defendants to guide him along the delineated route and also to prevent him from driving through overpasses that did not have proper clearance for an over-sized

load.

The State correctly points out that the intervening conduct of Third Party Defendants does not necessarily bar this Court from granting summary judgment as regards the Defendants' liability to Plaintiff (*Koreska v. United Cargo Corp.*, 23 AD2d 37 [1st Dept 1965]). Here, however, Defendants' allegations against Third Party Defendants relate directly to a finding of fact as to whether Mr. Wheeler's presence off the route delineated by the special hauling permit was the result of negligence on his part. While the State appears to allege that no event could excuse or obviate Mr. Wheeler's failure to remain on the delineated route, there clearly exists a possibility that the deviation was through no fault of his own.

The State further contends that it is entitled to summary judgment regarding the amount of damages to which it is entitled. Since this Court has declined to grant the State summary judgment regarding Defendants' alleged negligence, consideration of damages is premature. The State, however, has based its conclusion that no triable issue exists regarding damages on the assumption that its own motion to limit and/or preclude testimony by Defendants' experts will succeed. Defendants have, in fact, retained experts to dispute the amount of damages claimed by the State and, barring, preclusion, a triable issue clearly exists.

Motion to Limit and/or Preclude Expert Testimony by the State of New York

The State brings this motion to limit or preclude testimony by Defendants' experts claiming that Defendants' expert disclosure on January 26, 2007 failed to comply with CPLR § 3101(d) in that it lacked reasonable detail regarding the subject matter of proposed testimony, subject of the proposed facts and opinions, qualifications of the expert or the qualifications as outlined fail to qualify the proposed witness as an expert. Defendants contend that their expert

disclosure was sufficient pursuant to CPLR § 3101(d) in that they provided Plaintiff with information regarding those elements of the proposed experts' experience or education that relate to the proposed testimony and establish the experts' reliability (*Enu v. Sobol*, 171 AD2d 302 [3d Dept 1991]). The State repeatedly points to the lack of curriculum vitae for Defendants' proposed experts as evidence that the information provided by Defendants was insufficient. It is worth noting that Defendants have included the requested curriculum vitae in their motion papers.

Defendants propose to introduce the testimony of Walter Konon of R.L. Grunes & Associates who holds undergraduate and graduate degrees in civil engineering from City College of New York and is a licensed professional engineer in New York and New Jersey. Mr. Konon is expected to testify regarding pre-existing damage to the bridge and possible contributory negligence of the State for defects in the bridge prior to the accident. Despite the State's assertion that Mr. Wheeler's presence off the delineated route forecloses any investigation into their own contributory negligence, material defects in the bridge prior to the accident may be relevant to the determination of both negligence and damages. Plaintiff's contention that Mr. Konon's testimony should be entirely precluded because he lacks experience in civil engineering and highway design is not substantiated by his resume.

Defendants also propose to introduce testimony from Robert Blackford of Elite Consultant Service, Inc., as an expert in the field of auditing labor, material construction and repair of roadways, highways and bridges. He is expected to testify that the State's repair costs were inflated. Once again, Plaintiff's contention that Mr. Blackford is inexperienced in damage and repair assessments and auditing damage mitigation is not substantiated by his resume.

Plaintiff takes issue with Mr. Blackford's lack of experience in highway or bridge construction, but acknowledge in their motion that his testimony will be largely based upon documents they provided to Defendants regarding the cost of repairs. Plaintiff further contends that Defendants should disclose any audit that Mr. Blackford has performed based upon documents provided by Plaintiff. Defendants claim that no such formal audit exists.

After reviewing the disclosed information, this Court finds that it reasonably designed to inform Plaintiff about the backgrounds of proposed experts and the content of their expected testimony. Plaintiff acknowledges that allowing for supplemental disclosure is within this Court's discretion. As an act of discretion this Court orders supplemental expert disclosure limited to the two previously disclosed experts, to inform Plaintiff of the specific dates of Mr. Konon's education and experience and the specific allegations of damage inflation to which Mr. Blackford is expected to testify to be completed within 20 days of this decision.

Summary Judgment Motion by Third Party Defendant, A&R Flag Car, Inc.

A&R contends that it is entitled to summary judgment because it acted solely as a broker that procured guide car services for Lone Star and Mr. Wheeler and assumed no responsibility for any negligence on the part of those driving the guide cars. Third Party Plaintiffs, Lone star and Mr. Wheeler contend, however, that a triable issue of fact exists regarding whether A&R assumed at least some liability in these events by taking out an insurance policy with Progressive Insurance that lists Lone Star as an additional insured. A&R has steadfastly refused to disclose a complete copy of this policy to either confirm or rebut that Lone Star is listed as an additional insured. By Decision on December 12, 2006, this Court ordered A&R to disclose the entire progressive insurance policy. A&R has not yet done so. Instead, A&R filed a motion to renew

and/or reargue regarding the mandate to disclose. At the time this current motion was submitted, no decision had been issued on A&R's motion to renew and/or reargue, but subsequently that motion was denied by this Court on March 12, 2007. Accordingly, it would be premature for this Court to grant A&R summary judgment without consideration of the Progressive Insurance Policy because triable issues remain regarding A&R's liability for the events surrounding this accident.

Third Party Plaintiffs, Lone Star and Mr. Wheeler, bring a cross motion to strike A&R's answer pursuant to CPLR §§ 3124 and 3126 based upon A&R's repeated refusal to comply with this Court's December 12, 2006 Order to disclose the entire Progressive Insurance Policy. While this Court agrees that it has the authority to strike a litigant's pleadings where the failure to comply with a discover demand is willful, contumacious or in bad faith (*Metropolitan Life Insurance Co. v. J.T. Falk & Co.*, 265 AD2d 203 [1st Depot 1999]), this Court, in its discretion, is unwilling to strike A&R's answer because at the time this motion was submitted, A&R had not yet received this Court's March 12, 2007 Decision denying its motion to renew and/or reargue its objections to disclosing the Progressive Insurance Policy, making sanctions premature at this juncture.

Summary Judgment Motion by Third Party Defendant, William Bennet

Third Party Defendant, William Bennet brings this motion for summary judgment contending that documentary evidence conclusively proves that he was not negligent as a matter of law, or that any negligent conduct on his part was not the proximate cause of the underlying accident. This Court denies Mr. Bennet's motion because triable issues of fact exist regarding whether he acted negligently and, if so, whether that negligence caused or contributed to the

accident. Mr. Bennet contends that the accident was caused by Mr. Wheeler's failure to maintain an adequate distance between his truck and the lead escort vehicle and that the distance between the over sized load and the lead escort was neither within Mr. Bennet's control or his responsibility. Third Party Plaintiffs, Lone Star and Mr. Wheeler, contend that, contrary to Mr. Bennet's claims, his responsibilities included knowing and staying on the prescribed route, monitoring the distance between the over sized load and its escorts and aid in avoiding obstacles.

Accordingly, this Court denies Plaintiffs motion for summary judgment, denies Plaintiffs motion to preclude and/or limit proposed expert testimony, denies A&R's motion for summary judgment, denies Defendant's motion to strike A&R's answer and denies William Bennet's motion for summary judgment. Additionally, as an act of discretion this Court orders Defendants to submit supplemental expert disclosure limited to the two previously disclosed experts, to inform Plaintiffs of the specific dates of Mr. Konon's education and experience and the specific allegations of damage inflation to which Mr. Blackford is expected to testify to be completed within 20 days of this decision.

All papers, including this Decision and Order, are being returned to the attorney for the Defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: June 19 2007

Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Plaintiff's Notice of Motion for Summary Judgment, dated March 5, 2007 with Attached Exhibits A-F.
2. Plaintiff's Notice of Motion to Preclude, dated March 12, 2007.
3. Plaintiff's Affirmation in Support of Preclusion, dated March 12, 2007 with Attached Exhibits A-E.
4. Third Party-Defendant's (A& R Flag Car, Inc) Notice of Motion for Summary Judgment, dated March 27, 2007 with attached Exhibits
5. Third Party Defendant's (William Bennet) Notice of Motion, dated March 16, 2007 with attached exhibits A-N
6. Defendants' (Wheeler and Lonestar) Opposition to Plaintiff's Motion for Summary Judgment, dated April 13, 2007 with Attached Exhibits A-D.
7. Defendants' (Wheeler and Lonestar) Opposition to Plaintiff's Motion, dated April 13, 2007 with Attached Exhibits A-E and Unattached Exhibits F-K.
8. Defendants' (Wheeler and Lonestar) Opposition to Third Party Defendant, dated April 11, 2007 with Attached Exhibits A-C.
9. Defendants' (Wheeler and Lonestar) Notice of Cross-Motion, dated April 5, 2007 with Attached Exhibits A-D.
10. Plaintiff's Reply, dated April 26, 2007.
11. Plaintiff's Reply, dated April 20, 2007.