

O'Connor v Port Auth. of N.Y. & N.J.

2011 NY Slip Op 30677(U)

March 10, 2011

Supreme Court, New York County

Docket Number: 106274/2001

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 106274/2001
O'CONNOR, THOMAS
VS.
PORT AUTHORITY
SEQUENCE NUMBER : 003
PRECLUDE

INDEX NO. _____
MOTION DATE 8/23/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-6
7-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with annexed memorandum decision and order.*

M.B. -- pre-trial conf. scheduled for ~~9/10/11~~ 9/11 at 2 PM.

FILED

MAR 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/10/11

[Signature]
JANE S. SOLOMON ^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x

THOMAS O'CONNOR,

Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, PORT AUTHORITY POLICE
DEPARTMENT, and POLICE OFFICER FRANK
CONTI,

Defendants.

-----x

JANE S. SOLOMON, J.:

DECISION and ORDER

Index No.: 106274/01

FILED

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Defendant Port Authority of New York and New Jersey (Port Authority) moves to preclude certain medical expert testimony from admission at trial. The motion is granted for the reasons below.

Plaintiff Thomas O'Connor (O'Connor) alleges that he sustained serious injuries, including fractures to bones in his face, while in the custody of Port Authority Police Officer Frank Conti (Officer Conti) at the Port Authority bus station in midtown on October 21, 2000. Officer Conti arrested and handcuffed O'Connor after a confrontation in a waiting area. O'Connor is legally blind. He alleges that Officer Conti negligently permitted him to fall face forward while handcuffed, causing the injuries, or alternatively, that Officer Conti intentionally beat him and caused him to

fall (Verified Bill of Particulars, Aff. of Kathleen Gill Miller, Esq. In Support of Motion, Ex. C).

Discovery did not proceed smoothly. On August 31, 2009, I issued an order in response to defendants' motion to preclude claims for psychological harm and economic damages. The order provided that plaintiff was to file a note of issue by September 10, 2009, and provide CPLR 3101(d) expert disclosure by October 23, 2009. The note of issue was timely filed, but no expert disclosure was made until December 7, 2009. Port Authority challenges the admissibility of any expert disclosures made after October 23, 2009, and it challenges the substance of the late disclosures as well. Officer Conti joins in and supports the Port Authority's motion.

O'Connor's verified bill of particulars, dated July 13, 2007, identifies hospitals in New York and his native Minneapolis, Minnesota, where he received treatment for the injuries claimed in this action (Verified Bill of Particulars, paragraphs 13-14). Three individual treating physicians are identified: Cornelius Lam, MD, Barry Kimberly, MD, and Crispin E. See, MD, all of Minneapolis. The plaintiff's CPLR 3101(d) disclosure at issue identifies three potential expert witnesses: Michael M. Paparella, MD,

Leslie W. Smith, DO, and Dr. Lam.¹ The disclosures state that Dr. Paparella will testify that O'Connor suffers hearing loss and tinnitus as a result of trauma to his face on October 21, 2000 (Paparella Disclosure, annexed to Miller Aff., Ex. D); Dr. Smith will testify that O'Connor underwent surgery on February 13, 2008, which involved an incision and drainage of an abdominal abscess and treatment, including a skin graft, to a third degree burn to his left hand and forearms (Smith Disclosure, annexed to Miller Aff., Ex. E); and Dr. Lam will testify that O'Connor underwent multiple surgeries to treat facial fractures, and that he underwent spinal surgery on May 12 2002, in addition to a host of neurological conditions such as pain and numbness, all caused by injuries he sustained on October 21, 2000 (Lam Disclosure, annexed to Miller Aff., Ex. F).

At his deposition, O'Connor testified that he was in an accident in 1984 or 1986, when he fell off a train. He also filed a lawsuit in connection with that accident. The medical records in this motion show that O'Connor did not mention that earlier accident when he sought treatment,

¹ Plaintiff's lawyer avers that other disclosures were made that are not challenged, citing exhibit T to his affirmation, which includes only exhibits A - S.

but the records do show a history of spinal disc disease. Also, his blindness arose in connection with a condition called hydrocephalus, for which he had surgery to his skull in the 1960s, and the subsequent treatment for this condition resulted in optic nerve damage resulting in blindness in 1981. At his deposition, O'Connor further testified that, notwithstanding his lack of sight, he offered to help two young women whose car was broken. He reached into a hot engine and tried to unscrew a bolt on the carburetor. One of the young women screamed and said his hand was on fire; he did not feel it immediately, and then he suddenly pulled his hand away and it stuck to the hot metal (a contemporaneous medical report states that the burn was caused by battery acid). O'Connor testified that he thinks he could not feel the heat due to the injury he sustained on October 21, 2000, and this lack of sensation caused him to suffer a severe burn.

Notably, O'Connor has not supported any of the medical opinions at issue with a physician's affidavit; plaintiff relies upon lay opinions set forth in his lawyer's affirmation.

Dr. Paparella

The Paparella Disclosure states that his testimony will be based upon medical records and a physical examination of the plaintiff. However, no record that Dr. Paparella ever examined O'Connor has been produced, and it is too late at this juncture to provide additional records from before December 7, 2009 to support plaintiff's CPLR 3101(d) disclosure.

Attached to the Paparella Disclosure is his curriculum vitae and a report by another doctor, Barry Kimberly, MD. Dr. Kimberly's report is dated May 2, 2001. It states that O'Connor complained about ringing in his ears, pain in the left cheek, numbness of two pinkies, and high-frequency hearing loss. Dr. Kimberly reports that O'Connor gave him a medical history, which includes a history of disc disease, and told him that he was assaulted in New York City by a police officer and sustained left facial fractures. O'Connor said the ringing in his ears began after the assault. Dr. Kimberly examined O'Connor, and concluded that the facial pain is probably due to the resolving injuries sustained in the assault, and that he is recovering well. Dr. Kimberly states that the tinnitus is probably due to a minimal amount of fluid in the ear, and

that the numb pinkies are probably due to the disc disease. Notably, neither the tinnitus nor the numbness is attributed to the assault, and no cause is attributed to the hearing loss. In a follow-up report, dated November 14, 2001, Dr. Kimberly states that he again examined O'Connor; there is no mention of tinnitus, but he does have "100% speech discrimination" (this appears to be a good thing, suggesting he is able to hear normal speech well). O'Connor's facial pain was still present, and he was being treated by a neurologist who had referred him to a neurosurgeon "for consideration of neck/spine problems." The November 14, 2001 report is the most recent record regarding the subject of Dr. Paparella's testimony.

Port Authority argues that Dr. Paparella should be precluded from testifying because the disclosure is late, and the medical records relied upon do not support the inference that the conditions complained of are due to the October 21, 2000 incident.

Here, there is no report from Dr. Paparella, but he is said to be associated with Dr. Kimberly, who has since left Dr. Paparella's medical practice (Affirmation in Opposition of Richard E. Schrier, Esq., paragraph 44). O'Connor's attorney states that Dr. Paparella will be called

to testify that the hearing loss and tinnitus are attributable to the October 21, 2000 incident (*id.*, paragraph 47).

Based upon the submitted records, there is no basis for that opinion, which is articulated only by plaintiff's counsel and not by a physician. "In the absence of record support, an expert's opinion is without probative force" (*Guzman v 4030 Bronx Blvd Assoc. LLC*, 54 AD3d 42, 49 [1st Dept 2008], [citing *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 (1991)]). Here, Port Authority has made a prima facie showing that the CPLR 3101(d) disclosure is not supported by the medical records and deposition testimony. To defeat the motion, O'Connor needed to show that the proposed expert testimony has factual support. His lawyer's opinion is not probative (and is not persuasive in any event), and there is no affirmation from a physician to explain how the evidence could support the opinions in Dr. Paparella's expert disclosure. Consistent with this court's role as "gatekeeper" in determining the adequacy of the foundation upon which an expert's opinion is based (*see, Guzman v 4030 Bronx Blvd Assoc. LLC*, 54 AD3d at 43), Dr. Paparello's opinion must be precluded.

Dr. Smith

Dr. Smith treated O'Connor for the burn he suffered in 2008. His report of February 13, 2008 states that the burn was caused by battery acid, and makes no mention of the October 21, 2000 incident. The only opinions connecting this injury to this lawsuit are those of O'Connor and his lawyer. Even the Smith Disclosure makes no mention of any causation relevant to this lawsuit. Accordingly, the motion to preclude also is granted with respect to Dr. Smith (*Guzman v 4030 Bronx Blvd Assoc. LLC, supra*).

Dr. Lam

Dr. Lam is a neurologist who treated O'Connor from 2001 through 2008. The Lam Disclosure lists eight conditions, including hand numbness and disc herniations, that he will testify are attributable to the October 21, 2000 incident. A review of the records relied upon, including an October 26, 2001 radiological report of a Crispin See, MD and Eric Bressler, MD, does not indicate any opinion relating these conditions to the assault. Indeed, the report state that, based on the doctor's reading of a CT scan, O'Connor had degenerative disc disease with "chronicity", suggesting that the condition had existed for a long time (see Miller Aff., Ex. F; Schrier Aff., Ex. J).

The contention by plaintiff's counsel that this report states that the disc injuries are caused by the assault is not borne out by the document itself (Schrier Aff., paragraph 18). The reports authored by Dr. Lam, of November 27, 2001 and April 9, 2002 (Schrier Aff., Ex. K), mention O'Connor's statement that he was assaulted, but do not attribute any condition under treatment to the assault. In short, while Dr. Lam could testify as a fact witness to his treatment of the plaintiff, the Lam Disclosure provides no basis for the opinion relating any condition for which he treated O'Connor to this lawsuit. Therefore, Port Authority's motion also is granted with respect to the Lam Disclosure (*Guzman v 4030 Bronx Blvd Assoc. LLC*, supra).

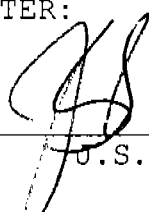
Timeliness

All three of the expert disclosures at issue in this motion were made well after the October 23, 2009 deadline the court set for such disclosure. The merits of these disclosures are addressed above because they were presented and argued on the merits by the parties. This decision does not address any other expert disclosures which may have been made, and the court's silence with respect to these disclosures should not be construed as a pre-trial

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on April 4, 2011 at 2 PM.

Dated: March 10th, 2011

ENTER:



J.S.C.

JANE S. SOLOMON

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