

Newbery v Merli Props. Inc.

2011 NY Slip Op 32264(U)

August 10, 2011

Sup Ct, Nassau County

Docket Number: 16884/08

Judge: Denise L. Sher

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ANNA NEWBERY, an infant by her Mother and
Natural Guardian, RENITA NEWBERY, and
RENITA NEWBERY, Individually,

Plaintiffs,

- against -

MERLI PROPERTIES INC. and WHITE POST
FARMS, LLC, WHITE POST 6, LLC, WHITE POST
EVENTS, LLC, WHITE POST PROPERTY LLC and
WHITE POST SPECIAL EVENTS LLC,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 16884/08
Motion Seq. Nos.: 01, 02
Motion Dates: 06/21/11
06/21/11

The following papers have been read on these motions:

	<u>Papers Numbered</u>
<u>Notice of Motion (Seq. No. 01). Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 02). Affirmation and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition to Cross-Motion and Exhibits</u>	<u>3</u>
<u>Reply Affirmation and Exhibit</u>	<u>4</u>

Plaintiffs move (Seq. No. 01), pursuant to NYCRR 202.21(e), for an order vacating the Note of Issue and Certificate of Readiness or, in the alternative, an order adjourning the trial of the within action to a date certain in September of 2011. Defendants oppose the motion and cross-move (Seq. No. 02), pursuant to CPLR § 3126, for an order precluding plaintiffs from calling Stanley Fein, P.E. as an expert witness at trial and precluding plaintiff from producing medical testimony/medical evidence not previously disclosed. Plaintiffs oppose defendants' cross-motion.

The above entitled action stems from personal injuries allegedly sustained by the infant

plaintiff on October 24, 2007, when she fell off a stationary ride at the premises known as White Post Farm, located at 250 Old Country Road, Melville, New York. As a result of the aforementioned accident, the infant plaintiff sustained serious personal injuries including a right distal humeral fracture that required surgery and percutaneous pinning, as well as follow up care and treatment. The infant plaintiff was approximately sixteen months old at the time of said accident. Plaintiffs commenced the action with service of a Summons and Verified Complaint on or about August 26, 2008. Issue was joined on or about December 23, 2008. On July 22, 2010, plaintiffs filed their Note of Issue and Certificate of Readiness. *See* Plaintiffs' Affirmation in Support Exhibit C.

In support of plaintiffs' motion (Seq. No. 01), counsel for plaintiffs submits that the instant matter was first on for trial in Nassau County Supreme Court on May 3, 2011, but, as counsel for plaintiffs was actually engaged in another jurisdiction, this matter was adjourned to May 26, 2011. On May 26, 2011, the parties once again appeared for trial in the Nassau County Supreme Court, but plaintiffs' counsel made an application to mark the case off calendar. Said application was denied and plaintiffs' counsel was told to make a motion to the IAS judge requesting said relief. The trial of the within action was adjourned to June 22, 2011, so plaintiffs' counsel could file the aforementioned motion.

Plaintiffs' counsel adds that "[o]n May 26, 2011, your affirmant served upon defense counsel an Expert Witness Disclosure pursuant to CPLR 3101(d), a copy of which is annexed hereto as Exhibit 'D'. As can be seen from Exhibit 'D', the within exchange is a disclosure and not discovery." *See* Plaintiffs' Affirmation in Support Exhibit D.

Plaintiffs' counsel contends that, since defendants' counsel is now arguing that plaintiffs are still conducting discovery by serving the Expert Witness Disclosure on May 26, 2011, this alone should be grounds to vacate the Note of Issue and Certificate of Readiness. Plaintiffs' counsel states that defense counsel can pursue discovery as he deems necessary in response to the disclosures of plaintiffs and "if defense counsel's position is that plaintiffs are still trying to conduct discovery, then the appropriate remedy would be to vacate the Note of Issue and Certificate of Readiness, or at minimum, adjourn the trial of the within action to a date certain in September of 2011."

In opposition to the motion, defendants' counsel submits that, once the instant action was commenced in September 2008, discovery progressed over the course of twenty (20) months. Defendants' counsel further submits that, as part of discovery, plaintiffs requested an opportunity to conduct an inspection of the subject premises and that they did so more than one-and-a-half (1 ½) years ago, on November 10, 2009. Plaintiffs' counsel attended the site inspection with an expert who looked at the playground item which plaintiffs allege was involved in the incident.

Defendants' counsel contends that Defendants' Discovery Demands, which were served over two-and-a-half (2 ½) years ago, on or about December 23, 2008, included in paragraph 27A a demand for expert witness disclosure for each expert witness that plaintiffs intended to call at trial. Defendants' counsel submits that, despite said Demand, plaintiffs' counsel never served any disclosure regarding an expert witness.

Defendants' counsel further states that, on May 25, 2010, all counsel attended a Certification Conference at which plaintiffs' counsel signed a Certification Order which stated that the instant matter was certified for trial and directed plaintiffs to file a Note of Issue within ninety (90) days. Despite the additional ninety (90) day window, no expert disclosure was served by plaintiffs upon defendants. On July 25, 2010, plaintiffs' counsel filed a Note of Issue and Certificate of Readiness for Trial. The Certificate of Readiness stated that there had been a reasonable opportunity to complete discovery proceedings. Defendants' counsel argues that Uniform Rule 202.21(b) provides that a Certificate of Readiness for Trial affirmatively represents that medical reports have been exchanged and discovery has been completed. Thereafter, no expert witness disclosures, nor any updated medical disclosures were provided by plaintiffs' counsel.

A Pre-Trial conference was held on November 16, 2010 and, thereafter, the instant matter appeared on the Trial Calendar on January 11, 2011, February 8, 2011 and March 14, 2011. Defendants' counsel submits that no expert/medical witness disclosure was made by plaintiffs' counsel during that entire time frame, nor were any updated medical reports provided. On March 14, 2011, "the parties agreed to put in a slip to pick a jury and were instructed by the court to select a jury on May 3, 2011, and to commence trial on May 5, 2011." Defendants' counsel contends that he was ready to proceed to trial on those dates as defense witnesses were ready and

available to testify, as were defendants' IME physician and a police officer under subpoena. As previously indicated, plaintiffs' counsel was otherwise engaged in another jurisdiction on May 3, 2011, so the trial was adjourned to May 26, 2011 for jury selection and commencement of trial on June 1, 2011. Defendants' counsel states that he was once again ready for trial on the May 3, 2011 and June 1, 2011 dates, having the defense witnesses available and ready, the IME doctor available and the police officer again under subpoena. It was at the May 26, 2011 jury selection appearance that plaintiffs' counsel advised defendants' counsel that he intended to serve an expert witness disclosure regarding an engineer, despite the fact that nineteen (19) months had expired since plaintiffs' expert's site inspection of the premises in November 2009, as defendants' counsel argues. Defendants' counsel claims that, despite the passage of time and appearances for jury selection and trial dates being set by the court on two occasions, no expert disclosure had ever been provided from plaintiff's counsel to defendants' counsel, nor had any additional medical reports been provided. Defendants' counsel argues that, "[g]iven the extreme passage of time, the defendants had reasonably concluded that the plaintiff's (*sic*) expert who had inspected the premises 19 months earlier was not in a position to assist them in their allegations and that they would not be calling the expert to testify at trial. Notably, the plaintiff (*sic*) offers no explanation whatsoever for failing to disclose the expert over the course of 19 months, despite the fact that their late disclosure is clearly a surprise and is unfairly prejudicial to the defense. The same is true with regard to the lack of medical disclosure. No documentation was provided to show that the child continued to receive treatment with Dr. Gaffney after his report of 6/9/08, two years ago. Again, no explanation is offered by plaintiff (*sic*) for the non-disclosure. They do not claim any unusual or unanticipated circumstances developed after the Note of Issue was filed [22 NYCRR 201.21(d)]."

Defendants' counsel further contends that, "[p]ursuant to Uniform rule (*sic*) 22 NYCRR 202.21(e), a motion to vacate a Note of Issue and Certificate of Readiness must be made within 20 days after service, supported by affidavit, and the Court may vacate it if a material fact in the certificate is incorrect. After 20 days 'no motion shall be allowed except for good cause shown.' The plaintiff (*sic*) herein offers no explanation for their failure to provide timely disclosure regarding their liability or medical witnesses. They do not claim law office failure, illness, disability, duress or anything else. They offer no explanation for their failure to comply with the defendants' expert demands during the course of discovery or to subsequently comply with the

requirements of the CPLR regarding the disclosure of experts.” Defendants’ counsel submits that plaintiffs’ attempt at late disclosure results in substantial prejudice and surprise to the defense.

Defendants also filed a cross-motion (Seq. No. 02) to preclude plaintiffs’ liability expert and late medical disclosure.

In support of said cross-motion, defendants’ counsel argues that plaintiffs “cannot establish ‘good cause’ for the late disclosure because plaintiffs’ experts were not retained on insufficient time before the commencement of trial. Rather, they were retained almost two years ago. They subsequently represented in a certification order and in a subsequent Note of Issue/Certificate of Readiness for Trial, that all disclosures have been made. The defendants relied upon those representations in preparing their defense for trial.” Defendants’ counsel submit that it is undisputed that plaintiffs failed to identify any experts in their pre-trial disclosure.

In opposition to defendants’ cross-motion, plaintiffs’ counsel first argues that defendants’ cross-motion is untimely. He next argues that plaintiffs’ expert, Stanley Fein, P.E., should not be precluded from testifying at the trial of the instant action, since CPLR § 3101(d) does not give a deadline as to when expert testimony can be exchanged. Plaintiffs’ counsel adds that defendants’ counsel has known about plaintiffs’ expert witness, Stanley Fein, since September 28, 2009, upon which date plaintiffs’ counsel called defendants’ counsel and advised him that his law firm had retained Mr. Fein as an expert for the subject case and that Mr. Fein needed an opportunity to inspect the subject equipment that was allegedly involved in the accident. Plaintiffs’ counsel also contends that defendants’ counsel was present on November 10, 2009 when Mr. Fein completed the subject inspection and that defendants’ counsel actually met Mr. Fein on that date. Furthermore, photographs taken by Mr. Fein at said inspection were provided to defense counsel on February 6, 2010. Plaintiffs’ counsel also argues that “[t]here is absolutely no surprise and no prejudice to defense counsel with the disclosure of Mr. Fein as a witness. Counsel has known since September 2009 of the expert’s name and was present during the inspection. Photographs were taken and exchanged. The substance of Mr. Fein’s testimony as disclosed in the 3101(d) exchange is entirely consistent with the negligence paragraph in the plaintiff’s bill of particulars and no new theories are offered in the 3101(d) exchange.”

With respect to plaintiffs’ motion (Seq. No. 01), the Court finds that plaintiffs have failed to provide good cause why the Note of Issue and Certificate of Readiness should be vacated. The Court finds that, in essence, plaintiffs are basing their request for said relief on the fact that they

[* 6]

elected to serve their Expert Witness Disclosure on May 26, 2011, the date of trial despite the facts that they signed a Certification Order an entire year earlier on May 25, 2010 and that they, themselves, filed the Note of Issue and Certificate of Readiness on July 25, 2010, nine months earlier. In moving to have the Note of Issue vacated, plaintiffs are now seeking to be rewarded even more time for trial preparation based upon the fact that they were untimely in their initial trial preparation. Given the facts that discovery has been completed, that the matter was Certified by the parties without any objection and that plaintiffs, themselves, were the ones to file the Note of Issue and Certificate of Readiness for Trial, the Court finds that there is no reason to vacate the Note of Issue and strike the matter from the Court's trial calendar. Therefore, plaintiffs' motion (Seq. No. 01) is hereby **DENIED** in its entirety.

With respect to defendants' cross-motion (Seq. No. 02), the Court first finds that said cross-motion was not untimely as alleged by plaintiffs.

CPLR § 3101(d)(1)(i) states,

“1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter in which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon the motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.”

Generally, if a party has failed to identify an expert in a timely manner after being served with a proper disclosure request under the first sentence of CPLR § 3101(d)(1)(i), the expert will not be permitted to testify. *See Fox v. Fox*, 44 A.D.3d 998, 844 N.Y.S.2d 433 (2d Dept. 2007); *Hubbard v. Platzer*, 260 A.D.2d 605, 688 N.Y.S.2d 672 (2d Dept. 2009). The Court notes that defendants had duly served their Discovery Demands, over two-and-a-half (2 ½) years ago, on December 23, 2008, and paragraph 27A in said Demands was a demand for expert witness disclosure for each expert witness that plaintiffs intended to call at trial. Clearly, plaintiffs serving their Expert Witness Disclosure on May 26, 2011 does not constitute “identifying their

expert in a timely manner after being served with defendants' proper disclosure request" on or about December 23, 2008. The facts that plaintiffs' counsel allegedly called defendants' counsel on September 28, 2009, and advised him that his law firm had retained Stanley Fein, P.E. as an expert for the subject case and that Mr. Fein needed an opportunity to inspect the subject equipment that was allegedly involved in the accident, that defendants' counsel was present on November 10, 2009 when Mr. Fein completed the subject inspection and that defendants' counsel actually met Mr. Fein on that date and that photographs taken by Mr. Fein at said inspection were provided to defense counsel on February 6, 2010, do not comply with the statutory requirements set forth in CPLR § 3101(d)(1)(i) in which plaintiffs "shall disclose in reasonable detail the subject matter in which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." See CPLR § 3101(d)(1)(i). Furthermore, plaintiffs' own arguments in opposition to defendants' cross-motion demonstrate that they had not retained Mr. Fein "an insufficient period of time before the commencement of trial" when they argue that they retained him on September 28, 2009, almost two years prior to the trial date.

Based upon the above, the Court is exercising its discretion and precluding plaintiffs' expert witness, Stanley Fein, P.E., from testifying at trial on the ground that proper CPLR § 3101(d) disclosure was not provided. See *Sushchenko v. Dyker Emergency Physicians Service, P.C.*, __ N.Y.S.2d __, 2011 WL 3195307 (2d Dept. 2011); *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dept. 2008); *Lucian v. Schwartz*, 55 A.D.3d 687, 865 N.Y.S.2d 643 (2d Dept. 2008). Plaintiffs' counsel failed to offer any explanation for the inordinate delay in providing the Expert Witness Disclosure, nor why plaintiffs' counsel failed to disclose any report by the expert or the substance of his findings after the November 2009 inspection. See *Schwartzberg v. Kingsbridge Heights Care Center*, 28 A.D.3d 463, 813 N.Y.S.2d 734 (2d Dept. 2006). Therefore, defendants' application that plaintiffs' liability expert, Stanley Fein, P.E., be precluded from testifying at trial is hereby **GRANTED**.

With respect to defendants' application that plaintiffs' medical expert be precluded from testifying with regard to any issues or treatment that were not disclosed prior to the May 3, 2011 jury selection date, defendants' counsel contends that the April 13, 2010 report of Dr. Gaffney was not provided to them until the late afternoon of May 26, 2011, the end of the second day of

which jury selection was supposed to have taken place, while plaintiffs' counsel contends that, "[a]t a mediation held on August 5, 2010, I provided counsel a copy of one additional medical report for an examination on April 13, 2010. This is the same report as the report exchanged with defense counsel on May 26, 2011 along with another fresh HIPAA authorization." Furthermore, plaintiffs' counsel claims that as Dr. Gaffney is the infant plaintiff's treating physician, he is exempt from CPLR § 3101(d).

The Court will accept the representation of plaintiffs' counsel, as an officer of the Court, that the April 13, 2010 report of Dr. Gaffney was provided to defense counsel at a mediation held on August 5, 2010. Furthermore, as the instant action has now been adjourned four months from the May 26, 2011 trial date which defendants allege said report was served, the Court finds that defendants are not prejudiced by permitting Dr. Gaffney to testify with respect to his findings contained in said report. Therefore, defendants' application that plaintiffs' medical expert be precluded from testifying with regard to any issues or treatment that were not disclosed prior to the May 3, 2011 jury selection date is hereby **DENIED**.

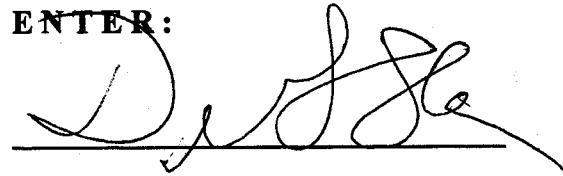
In conclusion, it is hereby

ORDERED that plaintiffs' motion (Seq. No. 01) is hereby **DENIED**; and it is further **ORDERED** that defendants' cross-motion (Seq. No. 02) is **GRANTED in part and DENIED in part**.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on September 15, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 10, 2011

ENTERED
AUG 12 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE