

<b>Perez-Nunez v Kanojia</b>
2018 NY Slip Op 32837(U)
September 28, 2018
Supreme Court, Bronx County
Docket Number: 302641/2016
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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LUIS PEREZ-NUNEZ,

Plaintiff,

Index No. 302641/2016

v.

**DECISION AND ORDER**

TINKU KANOJIA and CLANCY MOVING SYSTEMS,  
INC.,

Defendants.

-----X  
GONZALEZ, D.:

Upon: i) the Order to Show Cause, by Hiram Anthony Raldiris, Esq., attorney for the plaintiff, for an Order: 1) adjourning the trial of this matter based on late expert exchanges by defendants raising new, previously undisclosed, defense theories; and 2) precluding defendants from offering any expert witness opinion testimony from Dr. Kevin Toosi at the trial of this matter or, in the alternative, ordering Kowalski & Devito to produce forthwith copies of all “materials reviewed” not previously produced in discovery and all scientific literature, studies or other such documents contained in the “references” section of his report and relied upon by him in arriving at his opinions in this matter; and ii) the Affirmation in Opposition, dated July 17, 2018, by Elizabeth A. Griffin, Esq., attorney for the defendants.

**PROCEDURAL HISTORY**

The action was commenced by the filing of a Summons and Verified Complaint on July 29, 2016. Issue was joined by service of the defendants’ Answer, on or about September 27, 2016.

On or about February 8, 2017, the plaintiff served a Notice for Discovery and Inspection, dated February 8, 2017. The defendants served a Response to plaintiff’s Notice for Discovery and Inspection, dated February 8, 2017, on or about April 13, 2017.

A note of issue and certificate of readiness was served and filed on or about September 28, 2017. No motions for summary judgment were ever made.

The plaintiff served expert exchanges, pursuant to CPLR 3101(d), on or about May 1, 2018, and a supplemental bill of particulars on or about May 4, 2018. On June 11, 2018, the defendants served an amended Response to plaintiff's Notice for Discovery and Inspection, dated February 8, 2017, after the parties had agreed to mediate. The amended Response to plaintiff's Notice for Discovery and Inspection, dated February 8, 2017, disclosed additional insurance coverage. Thereafter, the defendants served an expert exchange on June 12, 2018 and noticed the plaintiff for a vocational rehabilitation examination by Dr. Mark Ramnauth for July 31, 2018.

Almost nine months post-note of issue, on June 18, 2018, the defendants served an expert exchange, pursuant to CPLR 3101(d), for Dr. Kevin Toosi, a biomechanical engineer. The plaintiff moves to preclude the defendant's expert from offering testimony at trial.

There were two conferences held in the pre-trial part and one in the special trial part. The trial of this matter is scheduled for September 28, 2018.

#### FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff arising from a motor vehicle accident that occurred on April 29, 2016, on Avenue of the Americas, at or near its intersection with West 57th Street, in the County, City and State of New York. It is alleged that the plaintiff's vehicle was struck by the vehicle operated by defendant Tinku Kanojia and owned by defendant Clancy Moving Systems Inc.

The plaintiff argues that Dr. Toosi should be precluded from offering testimony at the time of trial or, in the alternative, be provided with any and all documents used as a basis for his opinion

should be exchanged. The plaintiff contends the defendants waited until the eve of trial to serve the expert disclosure despite retaining Dr. Toosi four months earlier.

The defendants oppose the motion arguing that Dr. Toosi's testimony is necessary since the plaintiff's alleged injuries could not have resulted from the accident. The defendants contend that Dr. Toosi's opinion is based on the documents exchanged in discovery.

#### DISCUSSION OF LAW

Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101 (d) (1) (i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion by the lateness of the exchange (*Nathel v Nathel*, 55 AD3d 434, 866 NYS2d 153 [2008]).

The defendants served the exchange approximately four months after retaining the expert, three months before trial and almost nine months post-note of issue. As such, the defendants failed to timely disclose their expert in accordance with CPLR 3101 (d) (1) (i).

The defendants' failure to timely disclose their expert is prejudicial to the plaintiff. Dr. Toosi, a biomechanical engineering expert, intends to testify that the plaintiff could not have sustained the alleged injuries as a result of the accident. Dr. Toosi based his opinion on the documents exchanged in discovery; the accident report, photographs, medical records, the parties' examinations before trial, and the plaintiff's bill of particulars. He also based his opinion on scientific articles and literature published in various articles, journals and text books including:

SAE International, Vehicle Accident Analysis and Reconstruction Methods, Fundamentals of Physics, Stapp Car Crash Journal, Spine, Accident Analysis & Prevention, 3D Static Strength Prediction Program, International Federation of Automotive Engineering Society, ASME 2005 Summer Bioengineering Conference, Clinical Orthopaedics and Related Research, Journal of Bone and Joint Surgery, Knee, Engineering in Medicine, Journal of Biomedical Engineering, Journal of Biomechanics, Arthroscopy: The Journal of

Arthroscopy and Related Surgery, Orthopaedic Sports Medicine, Biomedical Engineering Society Annual Conference, American Journal of Roentgenology, Journal of Neurosurgery, International Orthopaedics, Handbook of Human Tolerance, Accidental Injury: Biomechanics and Prevention, New England Journal of Medicine and the specifications for the 2014 Isuzu Truck and 2011 Acura MDX.

The plaintiff's ability to prepare for trial is hindered without specifically knowing the basis of the biomechanical opinions. Therefore, at the very least, the plaintiff is entitled to know with specificity what scientific literature and materials were the basis of Dr. Toosi's opinion.

ACCORDINGLY, after consideration of the foregoing, the applicable law, a review of the Court file, and due deliberation; it is hereby

**ORDERED**, the motion to preclude is DENIED; and it is further;

**ORDERED**, the motion is GRANTED to the extent that Dr. Toosi is to provide the plaintiff with the specific excerpts of all documents, journals, and/or materials used as a basis for his opinion; and it is further

**ORDERED**, that whether Dr. Toosi or not can testify at trial shall be decided by the Trial Court.

This constitutes the Decision and Order of the Court.

Dated: September 28, 2018  
Bronx, New York

E N T E R:

  
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HON. DORIS M. GONZALEZ, J.S.C.