King v Nonez
2018 NY Slip Op 33575(U)
September 12, 2018
Supreme Court, Putnam County
Docket Number: 1109/2015
Judge: Victor G. Grossman

24

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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DONNA KING,

Plaintiff,

-against -

GERALD E. NONEZ, GELCO CORPORATION AND TYCO INTEGRATED SECURITY LLC,

Defendants.

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AMENDED
DECISION & ORDER

Index No. 1109/2015

Sequence No. 2
Motion Date: 9/12/18

GROSSMAN, J.S.C.

The following papers, numbered 1 to 37, were considered in connection with Defendants Tyco Integrated Security and Gerald E. Nonez (collectively "Defendants") six (6) motions in limine.

PAPERS	**NUMBERED**
Notice of Motion/Affirmation/Memorandum of Law (loss of consortium)	1-3
Notice of Motion/Affirmation/Memorandum of Law (relative wealth)	4-6
Notice of Motion/Affirmation/Memorandum of Law (loss of income)/Exh. A	7-10
Notice of Motion/Affirmation/Affidavit/Exhs. A-C (pro hac vice)	11-16
Notice of Motion/Affirmation/Memorandum of Law (medical evidence or opinion not disclosed)	17-19
Notice of Motion/Affirmation/Memorandum of Law (expert testimony)	20-22
Affirmation in Opposition/Exhs. 1-3	23-26
Defendants' Reply (expert testimony)/Exhs. A-E	27-32
Defendants' Reply	33
Defendants' Reply (loss of consortium)	34
Defendants' Reply (loss of income)	35
Defendants' Reply (medical evidence or opinion not disclosed)/Exh. A	36-37

Plaintiff commenced this action for personal injuries sustained in an automobile accident. Plaintiff filed the Note of Issue on December 19, 2017. The trial was scheduled for May 21, 2018, but was adjourned to January 9, 2019.

Defendants move for in limine rulings on a variety of issues.

Loss of Consortium

According to the Amended Verified Complaint, Plaintiff alleges Defendants' negligence in a rear-end collision, caused her to sustain serious injuries and economic loss greater than basic economic loss as to satisfy the exceptions of Insurance Law §5104. Plaintiff is the only plaintiff in this action.

Defendants are seeking an Order, precluding Plaintiff from proffering any evidence or other reference to damages related to Plaintiff's spouse's loss of consortium because he has not asserted a loss of consortium claim.

Plaintiff opposes the motion only to the extent that she argues that "this is not a cognizable remedy as plaintiff's husband has never been a party to the action, nor does plaintiff intend to assert a derivative claim on the husband's behalf at trial." But, Plaintiff "reserve[s] the right to discuss the myriad of ways the accident has impacted the plaintiff, including her relationship with her children and husband."

In response, Defendants argue that Plaintiff is barred from making a consortium argument where she has not made such a claim, and neither has her husband. Defendants note that the initial Bill of Particulars, as well as the six supplemental bills are silent as to this type of claim.

To the extent Plaintiff is attempting to raise a loss of consortium claim on behalf of her husband, that is precluded, as it is not pled in the bills of particulars. See Ciriello v. Virgues, 156 A.D.2d 417 (2d Dept. 1989); see also Johnson v. Lazarowitz, 4 A.D.3d 334, 335 (2d Dept. 2004) (plaintiff's wife could not testify about need to hire contractors to do work that, but for injuries, plaintiff would have performed where there is no such assertion in bill of particulars and complaint). However, to the extent Plaintiff asserts in her Bill of Particulars that her "[a]bility to engage in and enjoy sex has been significantly reduced" (Opposition, Exh. 2 at ¶7), Plaintiff is entitled to making that argument at trial, but only as it pertains to her.

Loss of Wages

To the extent Plaintiff acknowledges that she is not seeking loss of wages, and she did not specify to any loss wages in her amended complaint and/or her bills of particulars, she is not entitled to testify, or to elicit evidence, or to argue, that her ability to work has been frustrated due to the injuries sustained in the subject car accident, as it would prejudice Defendants. See Johnson v. Lazarowitz, supra. Furthermore, as Defendants allege in their motion papers, which is not refuted by Plaintiff, Plaintiff specifically stated that she was not asserting a claim for lost wages,[1] and she acknowledges the same in her opposition. The Court finds that Plaintiff's reservation of her right to testify how the accident impacted her work is rejected, as it is prohibited by Johnson. Thus, Defendant's request is granted.

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[1]Defendants do not provide that portion of Plaintiff's deposition testimony to which they refer.

Disparity of Wealth

To the extent Defendants are seeking to prohibit testimony or evidence related "to the comparative wealth, power, corporate status or size of" Defendants and Plaintiff, that request is granted. Plaintiff does not overtly oppose this request, and the Court finds that this information is irrelevant, and potentially prejudicial.

Pro Hac Vice

Defendants are seeking the admission of Charles E. Eblen, Esq., pro hac vice, as he is an attorney from Shook Hardy & Bacon, LLP, national counsel for Tyco. Plaintiff does not oppose this request.

"An attorney and counselor-at-law or the equivalent who is a member in good standing of the bar of another state * * * may be admitted pro hac vice: (1) in the discretion of any court of record, to participate in any matter in which the attorney is employed." 22 N.Y.C.R.R. §520.11(a)(1). Here, Mr. Eblen is an attorney in good standing in Missouri and New Jersey. He is desirous to appear to assist local counsel in this lawsuit. The Court grants this request.

Exclude Medical Evidence or Opinion Not Disclosed

Defendants are seeking to exclude Plaintiff from offering any medical evidence or opinion not disclosed. Plaintiff opposes this request to the extent it is overbroad and lacks any specificity. While the request is overbroad, Plaintiff does not have a license to pursue undisclosed theories. Accordingly, the denial is without prejudice, depending on what unfolds at trial.

Expert Testimony

Defendants are seeking an Order, precluding Plaintiff from offering any expert witness testimony because Plaintiff has failed to disclose those witnesses to date, despite Defendants repeated demand for them. Specifically, Defendants assert that the trial was previously set to begin on July 9, 2018, with the pre-trial conference set for June 20, 2018. Defendants state that during discovery, they served Plaintiff's counsel with a demand for expert disclosure, and then "recently followed up" with both counsel, requesting Plaintiff's witness lists. As of the initial motion in limine – May 23, 2018 – Plaintiff failed to disclose the experts she intends to call at trial and she failed to provide an adequate response to this failure.

The pretrial conference was reset to June 12, 2018, but on the eve of that conference, Plaintiff retained trial counsel, who requested an adjournment of the trial date. Defendants agreed to the adjournment and the Court rescheduled the trial to January 9, 2019. Then, on June 19, 2018, Plaintiff's new counsel disclosed that Plaintiff intends to call her two treating physicians as her expert witnesses at trial (Reply, Exh. E). But, in her opposition papers, Plaintiff states there are three treating physicians she plans to call, and that to date, she has not retained an expert to testify if required, but that she reserves the right to do so (Affirmation in Opposition at ¶23).

The Court rejects Plaintiff's position with respect to her overbroad invocation of being able to reserve the right to call an expert witness. To the extent Plaintiff has failed to name an expert in biomedical engineering to purportedly rebut Defendants' expert in that field, Plaintiff has until October 1, 2018 to identify that expert to Defendants. If Plaintiff fails to do so by that

date, Plaintiff will be precluded from calling that expert. Further, the parties are reminded that CPLR §3101(d) does not apply to Plaintiff's treating physicians, and those physicians may give expert testimony without prior notice pursuant to CPLR §3101(d). See Jing Xue Jiang v. Dollar Rent a Car, Inc., 91 A.D.3d 603 (2d Dept. 2012). However, the Court will not tolerate a willful failure to disclose any additional treating physicians as potential, or probable, witnesses.

* * *

In sum, the Court reminds the parties that this matter has been pending for over three years, and almost six years have passed since the accident. This case is proceeding to trial. There will be no further adjournments. The litigants have a right to have this matter resolved, and the Court intends to do so expeditiously.

As such, it is hereby

ORDERED that Defendants' request for an Order, precluding Plaintiff from proffering any evidence or other reference to damages related to Plaintiff's spouse's loss of consortium is granted. However, Plaintiff may make that argument at trial only as it pertains to her; and it is further

ORDERED that Defendants' request for an Order, precluding Plaintiff from testifying, or introducing evidence, about loss of wages is granted; and it is further

ORDERED that Plaintiff is prohibited from proffering testimony or evidence related "to the comparative wealth, power, corporate status or size of" Defendants and Plaintiff; and it is further

ORDERED that Defendants' request for an Order, precluding Plaintiff from offering any medical evidence or opinion not disclosed is denied without prejudice; and it is further

ORDERED that Defendants' request for an Order, precluding Plaintiff from offering any expert witness testimony is denied to the extent Plaintiff has until October 1, 2018 to disclose the same, and if Plaintiff fails to do so, Plaintiff will be precluded from calling any expert witnesses at trial. Nothing herein shall be construed to apply to Plaintiff's treating physicians; and it is further

ORDERED that Defendants' request to admit Charles E. Eblen, Esq., pro hac vice, is granted to the extent the provided in the separate Order signed this date.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
September 12, 2018

HON. VICTOR G. GROSSMAN, J.S.C.

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