

Mayer v Godoy

2020 NY Slip Op 34541(U)

February 14, 2020

Supreme Court, Albany County

Docket Number: 904543-16

Judge: James H. Ferreira

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This opinion is uncorrected and not selected for official publication.

scheduled to commence on March 2, 2020. By Decision and Order dated December 4, 2019, the Court granted defendants' motion for summary judgment only inasmuch as the Court dismissed plaintiff's claim of lack of informed consent and dismissed plaintiff's claims arising from treatment provided to decedent by defendants Timothy J. McElrath, M.D., and Daniel C. Kredentser, M.D. The Court otherwise denied the motion.

Presently pending before the Court is a motion by defendants seeking an order, pursuant to CPLR 3126 and CPLR 3101(d), striking plaintiff's First Supplemental Expert Disclosure and any opinions regarding the alleged negligence of Dr. McElrath and Dr. Kredentser and prohibiting plaintiff from offering expert proof at trial as to the opinions in the supplemented disclosure. Plaintiff opposes the motion and defendants have submitted a reply.

CPLR 3101(a) provides that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." With respect to the disclosure of experts, CPLR 3101 (d)(1)(i) states, in relevant part:

"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 on 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 motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just."¹

¹ In addition, the Third Judicial District Expert Disclosure Rule provides: "Except as otherwise directed by the Court, a party who has the burden of proof on a claim, cause of action, damage or defense shall serve its response to an expert demand pursuant to CPLR 3101(d) on or before the filing of the Note of Issue. Such party has until the filing of the Note of Issue to serve such response regardless of how early the demand is made. Any opposing party shall serve its answering response pursuant to CPLR 3101(d) within 60 days after the filing of the Note of Issue. Any amended or supplemental expert disclosure shall be allowed only with the permission of the Court. Unless the Court directs otherwise, a party who fails to comply with this rule is precluded from offering the testimony and opinions of

This expert disclosure rule is “intended to provide timely disclosure of expert witness information between parties for the purpose of adequate and thorough trial preparation” (Silverberg Community Gen. Hosp. of Sullivan County, 290 AD2d 788, 788 [3d Dept 2002]). “[A] trial court has discretion to preclude expert testimony for failure to reasonably comply with the statute . . . [but b]efore imposing the drastic remedy of preclusion, the court must consider the reasons for the delay and whether or not the failure to disclose was intentional” (id. at 788-789; see McColgan v Brewer, 84 AD3d 1573, 1576 [3d Dept 2011]).

The papers before the Court reflect the following facts relevant to this motion. This action was commenced in August 2016. In October 2016, defendants served a demand seeking expert witness information. Plaintiff served a response to this demand in October 2017 stating that, to date, she had not retained any experts and that she “reserves the right to amend and/or supplement her response” to the demand (Affidavit in Support of Motion, Exhibit G, at 2). In February 2019, plaintiff served a Supplemental Response to Demand for Expert Witness Information (see id., Exhibit H). She indicated that she may call a gynecologic oncologist² to testify at trial. Among other things, plaintiff stated that the expert would provide an opinion as to the “failed diagnosis of mesothelioma” and “the reasons why [decedent’s] mesothelioma should have been diagnosed earlier than it was” (id. at 3-4). Plaintiff specified that the expert would testify, among other things, that defendants “failed to appreciate the significance of [a] pathology report and findings of the malignancy as being of mesothelial origin” and deviated from good and acceptable medical and gynecological oncology practice in failing to obtain MRIs, PET scans, ultrasounds, lung biopsies

the expert for whom a timely response has not been given.”

² Plaintiff did not disclose the identity of the expert as permitted by CPLR 3101 (d)(1)(i).

(surgical and non-surgical), or blood tests specifically to rule out mesothelioma prior to starting treatment for a malignant neoplasm ovary” (*id.* at 8, 10). Plaintiff also stated that the expert would provide an opinion that defendants committed medical negligence by, among other things, “failing to order a biopsy of plaintiff’s decedent’s left lung in a timely manner” (*id.* at 17).

Plaintiff filed a note of issue and certificate of readiness on February 28, 2019. Defendants filed their motion for summary judgment on May 17, 2019. In opposition to the motion, plaintiff submitted the affidavit of Paul Liu, M.D. Among other things, he stated in his affidavit that it was a deviation from the standard of care for defendant Heidi E. Godoy, D.O., to rely on the ambiguous pathology report to diagnose ovarian cancer. He asserted that Dr. Godoy departed from accepted standards of gynecological oncology by failing to obtain the necessary clinical and imaging studies to be used in correlation with the pathology report to diagnose ovarian cancer (*see* Affidavit in Support of Motion, Exhibit O at Expert Affidavit ¶ 20). He further asserted that she should have “obtain[ed] the necessary consults or order the proper tests to rule out mesothelioma” and departed from acceptable standards of care in not doing so (*id.* ¶ 47). As noted above, the Court executed a Decision and Order resolving defendants’ motion for summary judgment on December 4, 2019; it was uploaded to the e-filing system on December 6, 2019.

On January 7, 2020, approximately two months before trial, plaintiff served a First Supplemental Expert Response (*see* Affidavit in Support of Motion, Exhibit S). The response added information as to Dr. Liu’s expected expert testimony (*see id.* at 19-27), as well as information with respect to the expected testimony of two other experts, Dr. Henry L. Pass and Dr. Dennis Rassias. By letter dated January 24, 2020, defendants’ counsel objected to the supplemental expert response as untimely and in violation of the Third Judicial District Expert Disclosure Rule requiring permission of the Court before serving supplemental expert disclosure. Defendants thereafter filed

the instant motion.

Preliminarily, the Court notes that, in opposition to the motion, plaintiff has withdrawn the supplemental opinions of Dr. Pass and Dr. Rassias as set forth in the First Supplemental Expert Response and “any opinions as to the alleged negligence as to Dr. McElrath and Dr. Kredentser” (Affirmation in Opposition ¶¶ 3-4). As such, defendants’ motion is denied as moot inasmuch as it seeks relief with respect to those aspects of plaintiff’s First Supplemental Expert Response.

With respect to plaintiff’s supplementation of the expected testimony and opinions of Dr. Liu, the parties appear to agree that the supplemental disclosure, for the most part, “mirrors” the opinions contained in the affidavit of Dr. Liu that was submitted in opposition to defendants’ motion for summary judgment (Affidavit in Support of Motion ¶¶ 21, 33). In their motion, defendants argue that plaintiff’s supplemental disclosure must nevertheless be stricken because it is untimely, as plaintiff knew of the additional opinions in July 2019 (when plaintiff filed her opposition to defendant’s motion for summary judgment) yet waited to serve supplemental expert disclosure until there were less than two months before trial, and because plaintiff failed to obtain permission of the Court before serving the supplemental disclosure. Defendants also argue that, with respect to Dr. Liu’s expert disclosure, they are prejudiced by the delay because, “although much of it is verbatim from Dr. Liu’s expert affidavit, the plaintiff attempts to add a seemingly new allegation of negligence, that fluid cytology should not be relied on to diagnose either ovarian cancer or mesothelioma” (Affidavit in Support of Motion ¶ 33).

Upon review, defendants’ motion is denied. The Court discerns no prejudice arising from plaintiff’s delay in serving the supplemental disclosure with respect to Dr. Liu. Defendants were made aware of the bulk of the additional opinions of Dr. Liu in July 2019 when plaintiff’s opposition to their motion was filed. The Court declines defendants’ invitation to find prejudice based solely

on the fact that plaintiff did not formally serve supplemental disclosure until January 2020, or on the fact that plaintiff did not obtain Court permission before serving supplemental disclosure. In addition, as plaintiff's original expert disclosure and Dr. Liu's affidavit make it clear that plaintiff expects to offer expert opinion testimony with respect to the adequacy of the tests performed in diagnosing decedent's cancer, the Court does not find it prejudicial to defendants for plaintiff to advise that her expert would offer an opinion that "the standard of care is to obtain a tissue biopsy of the abnormality rather than simply relying on fluid cytology," even assuming that this is a new opinion that was not disclosed earlier (Affidavit in Support of Motion, Exhibit S, at 22). The Court disagrees with defendants' characterization of this part of plaintiff's supplemental disclosure as making a new allegation of negligence. The Court also finds that plaintiff has offered a reasonable explanation for the delay, namely, that she waited to serve the supplemental disclosure until after the Court decided defendants' summary judgment motion because the disclosure would have been unnecessary if the Court had granted the motion. Under these circumstances, the Court does not find that the relief sought by defendants is warranted and denies defendants' motion in its entirety (see McColgan v Brewer, 84 AD3d at 1576; compare Dombrowski v Moore, 299 AD2d 949, 950-951 [4th Dept 2002]).

Accordingly, it is hereby


ORDERED that defendants' motion is denied.

The foregoing constitutes the Decision and Order of the Court.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
February 14, 2020


Hon. James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Motion, dated February 4, 2020;
2. Affidavit in Support by Kathleen M. Ryan, Esq., sworn to February 4, 2020, with attached exhibits;
3. Affirmation in Opposition by Amber Wright, Esq., dated February 7, 2020; and
4. Affidavit in Reply by Kathleen M. Ryan, Esq., sworn to February 12, 2020.