

Marino v City of New York
2022 NY Slip Op 35167(U)
October 20, 2022
Supreme Court, Richmond County
Docket Number: Index No. 150041/2019
Judge: Orlando Marrazzo, Jr.
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

Part C2

-----X
SALVATORE MARINO,

Present:

Hon. Orlando Marrazzo, Jr.

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 150041/2019

THE CITY OF NEW YORK, and FRANK CRANE

Motion No. 004

Defendants.

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The following papers numbered 1 to 2, including e-filed documents listed by NYSCEF document numbers 96-102, 114 were marked fully submitted on the 12th day of October, 2022:

Notice of Motion to Preclude and/or Strike Expert Testimony

By Defendant FRANK CRANE, with Supporting Papers and Exhibits

(dated June 16, 2022) 1

Affirmation in Opposition

By Plaintiff SALVATORE MARINO

(dated September 22, 2022) 2

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Upon the foregoing papers, the motion (No. 004) by defendant FRANK CRANE to preclude and/or strike expert testimony submitted by plaintiff, is denied.

FACTS

Plaintiff SALVATORE MARINO (hereinafter “plaintiff”) commenced this action to recover damages for injuries he sustained when he tripped and fell on a broken and raised sidewalk, protruding some 3 ½ to 4 inches from the ground in front of 111 Walbrooke Avenue in Staten Island. According to plaintiff, defendants either created the sidewalk condition or allowed the sidewalk to remain in a dangerous condition for a substantial period of time in spite of notice of said condition.

As a result of his fall, plaintiff alleges to have sustained, *inter alia*, serious injuries to his cervical and lumbar spine which required that he undergo surgery for a bilateral L2-L5 lumbar medial branch block under fluoroscopic guidelines. Plaintiff further alleges that he sustained bilateral neck calcifications; left shoulder chronic Hill-Sachs deformity; left hand abrasions; left knee tenderness, forehead abrasions; active right L4-L5 radiculopathy with denervation in the right anterior tibialis and the right L4-L5 parasp muscles. He further alleges that he was confined to the hospital for one day following surgery and is confined intermittently to bed and home up to the present time. He makes no claim for lost wages since he is retired from the New York City Sanitation Department.

Following the completion of discovery and the issuance of a Certification Order directing the filing of the Note of Issue, this Court granted plaintiff's motion (No. 005) for a special preference trial pursuant to CPLR 3403(a)(4) on the ground that he is over seventy (70) years of age. In a separate motion (No. 004), defendant FRANK CRANE (hereinafter "CRANE") moved to strike, exclude and preclude plaintiff from introducing evidence at trial from two of plaintiff's expert witnesses whose names and opinions were not previously disclosed pursuant to CPLR 3101(d) regarding expert witness exchange.

According to CRANE, a Preliminary Conference Order dated July 16, 2019, provided for the exchange of expert witness information within 45 days of the date of that Order. However, no expert witness disclosure was ever exchanged. CRANE further contends that another demand for expert witness disclosure was served on December 18, 2019 but, again, no disclosure was ever exchanged. CRANE contends that it was not until he moved for summary judgment (No. 002) in June of 2021 that plaintiff finally submitted the expert affidavits of an engineer and an arborist, who both concluded that the sidewalk condition was caused by tree roots and that CRANE had repaired the sidewalk by cutting or removing the roots. The Court denied CRANE's motion as it

found triable issues as to causation and the credibility of the experts. CRANE argues that based on plaintiff's delay in disclosing expert witness testimony, he will be prejudiced at trial since he will not have a fair opportunity to prepare/present evidence to rebut said testimony. Thus, plaintiff should be precluded from offering expert evidence from these two witnesses.

In opposition, plaintiff contends that the motion must be denied since CPLR 3101(d)(1)(i) does not provide for a particular time frame within which to exchange expert witness testimony. Plaintiff further contends that when he first submitted his expert witness affidavits in opposition to CRANE's motion for summary judgment back in 2021, the Note of Issue was not even filed yet. Moreover, plaintiff argues that the substance contained in each expert's affidavit is so detailed that there can be no question regarding the specifics of each experts' testimony and, therefore, any claim of prejudice by CRANE is without merit. Also, in regard to the provision in the Preliminary Conference Order regarding expert witness disclosure, plaintiff argues that there is nothing in the Order which indicates that preclusion would be an appropriate remedy for not complying with said Order. Accordingly, CRANE's motion must be denied.

DISCUSSION

It is well settled that CPLR 3101(d)(1)(i) requires a party to disclose his or her expert witness and certain expert information when served with a proper demand but does not require a response at any particular time or mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute (*see Rowan v. Cross Country Ski & Skate, Inc.*, 42 AD3d 563, 564 (2nd Dept. 2007)). In this regard, trial courts are vested with broad discretion in making determinations concerning matters of disclosure, including imposing a penalty on a party for its failure to comply with CPLR 3101(d)(1)(i) (*see Rivers v. Birnbaum*, 102 AD3d 26 [2nd Dept. 2012]). In general, preclusion is unwarranted without evidence of intentional

or willful failure to disclose and a showing of prejudice by the party seeking preclusion (*see Rowan v. Cross Country Ski & Skate, Inc.*, 42 AD3d at 564).

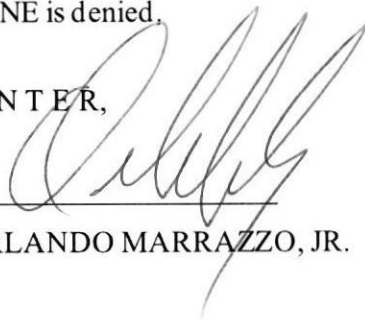
Here, while the Court does not condone any repeated delays in the exchange of discovery, there is no proof suggesting any willful or intentional conduct by plaintiff in regard to the exchange of expert witness information. There is also no proof that CRANE will suffer any prejudice since plaintiff had submitted expert witness affidavits in opposition to CRANE's summary judgment motion as far back as June of 2021, before the filing of the Note of Issue and well in advance of trial. Accordingly, CRANE has more than enough time to properly prepare a defense based on the information contained within these affidavits. Moreover, the expert witness affidavits of both an arborist and an engineer are sufficiently detailed to give notice of the anticipated trial testimony by each witness. Thus, any claim of prejudice is without merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendant CRANE is denied.

ENTER,


HON. ORLANDO MARRAZZO, JR.

DATED: Oct 20, 2022