

Vazquez v J. Mullen & Sons, Inc.
2022 NY Slip Op 35251(U)
May 2, 2022
Supreme Court, Orange County
Docket Number: Index No. EF004431-2017
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X

RAYMOND VAZQUEZ

Plaintiff,

-against-

J. MULLEN & SONS, INC. and CENTRAL HUDSON
GAS & ELECTRIC CORPORATION

Defendants.

-----X

J. MULLEN & SONS, INC.

Third-Party Plaintiff

-against-

ETHAN ALLEN STAFFING CORPORATION; ETHAN
ALLEN PERSONNEL GROUP, INC.; ETHAN ALLEN
STAFFING; ETHAN ALLEN PERSONNEL; ETHAN
ALLEN STAFFING and/or ETHAN ALLEN
PERSONNEL; and GROUP, INC. a/k/a ETHAN ALLEN
PERSONNEL and/or ETHAN ALLEN STAFFING,

Third-Party Defendants.

-----X

To commence the 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.

Index No. EF004431-2017

DECISION and ORDER

Motion Date: April 6, 2022

Motion # 7

The following papers numbered 1 through 7 were read and considered on a motion *in limine* by the Plaintiff to preclude certain testimony from Joel R. Milzoff, Ph.D., DABFT.

Order to Show Cause- DuSault Affirmation- Memorandum of Law- Exhibit A	1-4
Opposition- Kurtz Affirmation	5
Opposition - Lee Affirmation- Exhibit A	6-7

Upon the foregoing papers it is hereby,

ORDERED, that the motion is granted.

Factual/Procedural Background

In expert disclosure, the Defendant J. Mullen & Sons, Inc. (hereinafter “J. Mullen”) indicated, in relevant part, that it would present expert testimony at trial from Joel R. Milzoff, Ph.D., DABFT as follows:

[That] Toxicology was performed [on the Plaintiff after his accident] at the Health Alliance Hospital Laboratory with the resulting positive presumptive findings: Benzoyllecgonine, Cocaine metabolite and opiates. Confirmation tests were performed by LabCorp Raritan Forensic Tox. Benzoyllecgonine, a metabolite of cocaine, was confirmed positive. While Mr. Vazquez received drug therapy at HealthAlliance Hospital including Dilaudid and Zofran, and this could account for presumptive positive (unconfirmed) toxicology results, drug therapy does not account for the positive confirmation of Benzoyllecgonine, a metabolite of cocaine found in Mr. Vazquez. It will be his opinion with a reasonable degree of toxicological certainty that Benzoyllecgonine persists in urine at detectable concentrations from two to four days. Chronic, heavy use of cocaine can result in detectable amounts of Benzoyllecgonine in urine for up to 10 days following a binge. The toxicology records confirm that there was cocaine use by Mr. Vazquez within days of the accident. Dr. Milzoff will also testify as to the effects of cocaine use including early phase effects of cocaine that include but are not limited to euphoria, feelings of well being, increased focus and alertness, dizziness and with higher doses may exhibit a pattern of psychosis with confused and disoriented behavior, delusions, irritability and aggressive behavior. The late phase effects of cocaine including depression, agitation, nervousness, general central nervous system depression and fatigue.

The Plaintiff moves to preclude such testimony.

In support of his motion, the Plaintiff submits an affirmation from counsel, Marie DuSault.

DuSault notes that, not once in the six (6) years since the accident, had any Defendant ever claimed that the Plaintiff was under the effects of any drug at the time at issue. Nonetheless, she notes, now, on the eve of trial, J. Mullen has disclosed its intention “to use expert testimony to raise the inflammatory topic of drug use and urge the jury to engage in wild speculation and bias against Plaintiff.” More specifically, based solely on the fact that Plaintiff’s medical records

on the day of the incident reported a positive result for Benzoylcegonine, J. Mullen seeks to present an expert to testify that there was some cocaine use by Plaintiff within days of the incident, and as to “bald generalities about cocaine use regarding wide-ranging and entirely potential early phase effects, late phase effects, and numerous variables.”

Significantly, DuSault asserts, Dr. Milzoff will offer no opinion as to the Plaintiff's condition at the time of the incident, “as [he] patently cannot.”

Thus, she argues, the testimony would not raise a genuine issue of fact as to any impairment at the time of the accident.

Accordingly, she argues, the Court should preclude the testimony.

Alternatively, she asserts, the Court should order a *Frye* hearing.

Finally, she argues, the proposed testimony should be precluded because it was not timely disclosed.

In opposition to the motion, the Defendant Central Hudson Gas & Electric Corporation submits an affirmation from counsel, Eric Kurtz.

Kurtz argues that the Plaintiff's motion rests upon an overly-rigid interpretation of CPLR 3101(d), and a misinterpretation of the Expert Witness Disclosure.

Further, he asserts, the Plaintiff's arguments ignore the fact that the expert's testimony could be used on the damages portion of the trial concerning the long-term health effects of cocaine usage, and concerning the Plaintiff's ability to maintain gainful employment.

In further opposition to the motion, J. Mullen submits an affirmation from counsel, Kimberly Lee Hunt.

Hunts notes that the Plaintiff argues that the expert disclosure of Dr. Milzoff should be

precluded because: (1) the disclosure was untimely and (2) Dr. Milzoff's opinions are irrelevant, speculative and inflammatory.

However, she argues, CPLR §3101(d) does not provide a deadline for the disclosure of expert witnesses.

Moreover, she asserts, [s]omewhat ironically," the Plaintiff complains about J. Mullen's disclosure of Dr. Milzoff on March 1, 2022, when the Plaintiff did not disclose his expert witness Kristin Kucsma, M.A. until March 3, 2022. Further, she argues, it is clear that the expert disclosure meets the requirements of CPLR §3101(d), as Dr. Milzoff's credentials are stated, the materials he reviewed disclosed, and substance of his testimony, and the facts upon which he relies, are clearly outlined.

As to the substance, Lee notes that, according to Dr. Milzoff, benzoylecgonine, a metabolite of cocaine, persists in urine at detectible concentrations from two to four days. This means that the Plaintiff had ingested cocaine before the accident.

Further, she asserts, as the accident at issue occurred on a Friday, and the Plaintiff testified that he had been on this job site for three weeks, the Plaintiff was using cocaine during the period he was working at the job, despite his being hired by Ethan Allen, who touts a "Drug-Free Workplace."

In addition, she argues, the positive findings as to cocaine use are probative and relevant to the accident and the damages in general, including the contributory negligence of the Plaintiff.

Thus, she asserts, it is proper for Dr. Milzoff to testify as to his interpretation of the toxicology results, and to explain the results to a jury, including the long and short term effects of cocaine use.

Thereafter, she argues, it is the job of the jury, armed with all the facts, to render a fair verdict.

In addition, Lee asserts, cocaine use is illegal, and implies moral turpitude. Thus, Dr. Milzoff's testimony concerning the same goes to the Plaintiff's credibility. Indeed, she argues, it is unquestionable that the Plaintiff's use of cocaine is fodder for cross-examination, and that he can be questioned concerning the same. Moreover, she asserts, here, Dr. Milzoff's testimony is particularly important because the Plaintiff does not have a memory of the specifics of the happening of the accident.

Finally, she argues, the confirmation that the Plaintiff used cocaine is also relevant to the claims against Ethan Allen, as Ethan Allen sent an employee using cocaine to jobsite. Had Ethan Allen performed a drug test, she asserts, the Plaintiff would not have been on site. Thus, she argues, Ethan Allen failed in its duties and responsibilities to J. Mullen.

Discussion/Legal Analysis

As a threshold issue, CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time, or mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute. *Mazzurco v. Gordon*, 173 A.D.3d 1001 [2nd Dept. 2019]; *Arcamone-Makinano v. Britton Property, Inc.*, 117 A.D.3d 889 [2nd Dept. 2014]. Rather, 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). Generally, preclusion is unwarranted without evidence of intentional or willful failure to disclose and a showing of prejudice by the party seeking preclusion. *Mazzurco v. Gordon*, 173 A.D.3d 1001 [2nd Dept. 2019];

Arcamone-Makinano v. Britton Property, Inc., 117 A.D.3d 889 [2nd Dept. 2014].

Here, applying this standard, Dr. Milzoff is not precluded from testifying based on CPLR § 3101(d).

However, on the merits, the challenged testimony is precluded, as a minimum, at the liability phase of the trial.

An expert opinion is proper when it will help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror. *Curry v. Eastern Extension, LLC*, 202 A.D.3d 907 [2nd Dept. 2022]. The admissibility and scope of expert testimony is a determination that lies within the discretion of the trial court. *Curry v. Eastern Extension, LLC*, 202 A.D.3d 907 [2nd Dept. 2022]. Such testimony may be excluded when it is conclusory, unsupported or speculative. *Buchholz v. Trump 767 Fifth Ave., LLC*, 5 N.Y.3d 1 (2005).

In general, expert opinion evidence must be based on facts in the record or personally known to the witness. An expert may also rely on out-of-court material if it is of a kind accepted in the profession as reliable in forming a professional opinion, or if it comes from a witness subject to full cross-examination on the trial. *Hamsch v. New York City Transit Authority*, 63 N.Y.2d 723 (1984); *Searle v. Cayuga Medical Center at Ithaca*, 28 A.D.3d 834 [3rd Dept. 2006].

The facts underlying the opinion must be either established or fairly inferable from the evidence. *Kowalsky v. County of Suffolk*, 139 A.D.3d 903 [2nd Dept. 2016]. Conclusions reached by an expert based on assumed facts not supported by the evidence, and not otherwise in the record or personally known by the witness, and not fairly inferable from the evidence, are merely speculative and inadmissible. *Reilly v. Ninia*, 81 A.D.3d 913 [2nd Dept. 2011].

In general, to be admissible, evidence must be relevant, and its probative value outweigh the risk of any undue prejudice. *Mazella v. Beals*, 27 N.Y.3d 694 (2016).

Here, significantly so, and as noted by the Plaintiff, there has never been any mention of drug use by the Plaintiff as contributing to the accident, even though the case has been actively litigated for almost six years. Indeed, in prior motion practice (which resulted in the Court's 45 page decision of August 23, 2021) the parties laid bare their proof in their respective summary judgment motions and the record, which was extensive, was devoid of any reference to possible drug use and its effect on the accident or occurrence of May 13, 2016. In fact, Defendant J. Mullen's predominate, if not exclusive, focus and arguments were centered around, *inter alia*, Plaintiff's movement from his assigned position outside the work zone to an area within the work zone and his general lack of attentiveness to the nature of the work being performed; with further focus on Ethan Allen lack of training and on-site inspections.

Further, although for purposes of comparative fault, and damages, the Plaintiff's mental and physical states at the time of the accident are relevant, J. Mullen does not contend that Dr. Milzoff has any basis to testify, or will in fact testify, that the Plaintiff was under the influence of cocaine at the time of the accident, or that he was a chronic user of the cocaine who was suffering from the long-term affects of the same at the time of the accident.

Thus, the proposed testimony is not probative of the issues to be determined, and will encourage (indeed invite) the jury to speculate concerning the significance, if any, of Benzoylcegonine in the Plaintiff's urine. Indeed, the proposed testimony appears offered primary to prejudice the Plaintiff in the eyes of the jury. At a minimum, the probative value of learning that the Plaintiff might have used cocaine in the days before his accident is significantly

outweighed by the resulting prejudice from the same.

Obviously, all of these issues could have been obviated had the Defendants identified potential drug use as an issue and engaged in disclosure concerning the same. Indeed, although the medical records upon which Dr. Milzoff relies are not appended to the motion papers, they concern treatment for the accident at issue. Thus, they were presumably generated years prior to this motion practice.

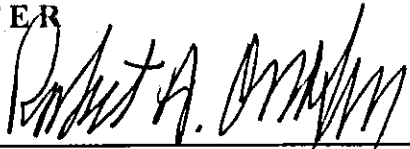
In sum, the motion is granted, and the challenged testimony is precluded at the liability phase of the trial. The Court reserves decision on its admission at the damage phase and the limitations that may apply to the same.

ORDERED, that the motion is decided as set forth herein.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 2, 2022
Goshen, New York

ENTER


HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

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