

Bardsley v Great Lakes Indus. Dev., LLC
2023 NY Slip Op 35317(U)
May 12, 2023
Supreme Court, Erie County
Docket Number: Index No. 814857/2019
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DINA BARDSLEY and MICHAEL BARDSLEY,
her husband, individually and as
Class Representative Plaintiffs,

DECISION AND ORDER
Index No.: 814857/2019

Plaintiffs,

v.

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC
and INDUSTRIAL MATERIALS RECYCLING, LLC,

Defendants.

ASHLEY TORRES, Individually, et al.,

Plaintiffs,

v.

Index No. 800789/2021

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC
and INDUSTRIAL MATERIALS RECYCLING, LLC,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **VINAL & VINAL, P.C.**
Jeanne M. Vinal, Esq., Of Counsel
Attorneys for Plaintiffs

NIXON PEABODY LLP
Kevin T. Saunders, Esq., Of Counsel
Attorneys for Defendant, Great Lakes Industrial Development, LLC

GOLDBERG SEGELLA, LLP
Meghan M. Brown, Esq., Of Counsel
Attorneys for Defendant, Industrial Materials Recycling, LLC

WALKER, J.

Defendants, Great Lakes Industrial Development, LLC (“Great Lakes”) and Industrial Materials Recycling, LLC (“Industrial Materials”), have jointly applied for orders (Motion 11; Doc 298 in Index No. 814857/2019, and Motion 4; Doc 139 in Index No. 800789/2021) “precluding plaintiffs’ proposed experts based on inadequate disclosure and lack of qualifications; precluding cumulative expert testimony; together with such further relief as this Court may deem just and proper” (*id.*).

The court provided a detailed recitation of the facts pertaining to these related (and joined) matters in its Decision and Order, dated March 17, 2023 (Doc 296)¹, and such facts are repeated below, as necessary.

Defendants seek to preclude Plaintiffs from offering the expert testimony and/or opinions of Edwin Ortiz, William Tojek, Peter Klemann, Gregory Heitman, Daniel Whitcomb, Edward Hughes and Stu Morrison, P.E.

Edward Ortiz

Plaintiffs expert disclosure letter, dated April 5, 2023 (“Disclosure Letter”) (Doc 300) states that Plaintiffs “intend to call Retired Captain and Fire Marshall Edwin Ortiz as an expert in fire marshall and investigation” (*id.*, at p. 2). While it is unclear what Plaintiffs mean with respect to Mr. Ortiz testifying as an expert “in fire marshall,” Plaintiffs seek his testimony with respect to the field of fire investigation.

Although Plaintiffs did not include a copy of Mr. Ortiz’s CV in the Disclosure Letter, he is identified as, *inter alia*, (i) having twenty-five (25) years’ experience in the Buffalo Fire

¹ Unless otherwise stated, all references to NYSCEF documents are to those documents filed in *Bardsley*, Index No. 814857/2019.

Department (“BFD”) as well as twenty (20) years’ experience as a United States Air Force Fire Marshall; (ii) a graduate of the FBI Fire Investigation Academy, the ATF Fire Investigation Academy, and the National Fire Investigation Academy; (iii) a combat veteran while enlisted with the Air Force, having investigated fires in Iraq, Germany, Puerto Rico, and in the state of Indiana; and (iv) having investigated in excess of four thousand (4,000) fires.

Mr. Ortiz was also at the scene of, and investigated the fire that underlies these joined actions (“Fire”). Mr. Ortiz is expected to testify that, *inter alia*, the Fire was caused by a light bulb exploding over flammable materials, namely plastic; the Fire doubled in size each minute; and that an alleged delay in notifying the fire department immediately at the start of the Fire resulted in the Fire not being properly contained.

Defendants seek to preclude Mr. Ortiz from testifying for three (3) reasons: (i) the expert disclosure is inadequate under the CPLR; (ii) Mr. Ortiz is not qualified to render an opinion as to the cause of the Fire; and (iii) his testimony would be cumulative of the testimony of Messrs. Whitcomb and Morrison, other proposed liability experts.

Adequacy of the Expert Disclosure

It is within the court’s sound discretion to determine whether the Disclosure Letter “sufficiently detail[s] the theory” that Mr. Ortiz is expected to “advance at trial, along with the grounds for . . . [his] opinion” (*Cocca v. Conway*, 283 A.D.2d 787, 788 [3de Dept. 2001]).

In detailing Mr. Ortiz’s expertise in the field of fire investigation and disclosing his theory that the Fire was caused by an exploding light bulb, the Disclosure Letter sufficiently provides Defendants with the notice required by CPLR 3101(d)(1).

Whether Mr. Ortiz Is Qualified to Testify about, *inter alia*, the Fire’s Cause

An expert “should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable” (*Matott v. Ward*, 48 N.Y.2d 455, 459 [1979]). Defendants contend that “the few brief sentences regarding each of the proposed experts fails to demonstrate that they have the requisite skill, training or experience to render any expert opinions, let alone opinions as to the cause or origin of the [F]ire, building codes, or storage of materials” (Doc. 308, p. 4).

Mr. Ortiz has approximately forty-five (45) years’ experience in the field of combating fires, including some extended period of time relating to fire investigation. It appears to the court that he is likely qualified to opine as to the cause of the Fire. However, the court is unable to render an opinion, based on the record before it, whether he is qualified to render opinions regarding applicable building codes and the storage of materials. These (along with his qualifications to render opinions concerning the cause of the Fire) shall be the subject of *voir dire* at trial, prior to Mr. Ortiz being permitted to testify.

The Remaining Experts

The court’s findings regarding Mr. Ortiz apply equally to Messrs. Tojek, Klemann, Heitman, Whitcomb, Hughes, and Morrison; that is, the Disclosure Letter sufficiently provides Defendants with the notice required by CPLR 3101(d)(1); and whether they shall be permitted to testify at trial shall be decided at the time of trial, following *voir dire*.

Cumulative Expert Testimony

Defendants object to the anticipated trial testimony of Messrs. Ortiz, Morrison, and Whitcomb, as being cumulative regarding the cause of the Fire.

It is well settled in New York that “[w]hether evidence should be excluded as cumulative

is a matter that rests within the sound discretion of the trial court” (*Clemons v. Vanderpool*, 289 A.D.2d 1078, 1079 [4th Dept. 2001]).

While it is clear that Plaintiffs seek to have each of Messrs. Ortiz, Morrison, and Whitcomb testify as to the cause of the Fire, Plaintiffs contend that each individual should be permitted to testify, because it is anticipated they will address the issue from a different vantage point; that is, that Mr. Ortiz is expected to testify as an expert in the field of fire investigation; Mr. Morrison is expected to testify as a “as to [, *inter alia*,] the forensic engineering of the facility, how the facility’s defects played into the [F]ire resulting into the disaster that occurred, how the change of use changed the fire-load for the facility, what premises liability applies to this case at hand, and much more to this extent (Doc. 309, ¶45); and Mr. Whitcomb is expected to testify, as an electrical engineer, “as to the electrical maintenance of the facility, the proper use and environment for halide lamps, how wet conditions can cause the halide lamps to shatter, and how the lack of maintenance played into the cause of the [F]ire . . .” (*id.*, at ¶38).

The court acknowledges the potential for cumulative testimony. On the other hand, the different perspectives from which each witness is expected to testify (fire investigator, forensic engineer, and electrical engineer) may offer sufficiently different, non-cumulative testimony that may be helpful for the jury. Thus, while Plaintiffs are strongly cautioned to avoid the presentation of cumulative evidence, they shall be permitted to offer the testimonies of each witness, to the extent their testimony is not cumulative, and only after proper foundations have been laid following *voir dire* that has not otherwise disqualified them from testifying (*Rucigay v. Wyckoff Heights Med. Ctr.*, 194 A.D.3d 865, 868 [2d Dept. 2021] [“The court providently exercised its discretion in precluding the plaintiff’s’ second expert from offering testimony that was

cumulative of that of the first expert, and permitting him to testify as to matters not covered by the first expert”)).

In light of the foregoing, it is hereby

ORDERED, that Defendants’ joint motion in the *Bardsley* and *Torres* actions is denied, provided Defendants shall have the opportunity to raise these objections at trial, consistent with this Decision and Order.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not constitute notice of entry.

Dated: May 12, 2023
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice