

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-3**

HARRY SORIANO,

Plaintiff,

- against -

ROSA INOA and UBALDO INOA,
WELSBACH ELECTRIC CORP., and
THE CITY OF NEW YORK,

Defendants.

Index No.: 28970/02

DECISION/ORDER

Present:

Hon. Larry S. Schachner
Justice, Supreme Court

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion of plaintiff to set aside the trial court's order of dismissal:

Papers	Numbered
Notice of Motion, Affirmation and Exhibits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

Plaintiff, Harry Soriano, seeks damages for personal injuries allegedly sustained on the night of October 3, 2002 while a pedestrian attempting to cross the street at the intersection of the Grand Concourse and East Tremont Avenue in the Bronx. Plaintiff was struck by the motor vehicle of the co-defendant Uloa. He claims that there was a controller problem affecting all the traffic signal lights at the intersection. Trial of this action was commenced on July 10, 2007 and concluded on July 13, 2007. After plaintiff rested, the court granted defendant City of New York's (City) motion to dismiss based upon plaintiff's failure to establish a prima facie case, as the testimony of Dr. Hal Gutstein, plaintiff's expert neurologist, did not include a causal link between the accident and plaintiff's injuries.

Plaintiff now moves pursuant to CPLR 4404 and 4405 to set aside the trial court's order dated July 13, 2007 dismissing plaintiff's complaint. Plaintiff argues that the court improperly

limited the testimony of plaintiff's "treating" physician, precluding testimony on the issue of causation which also resulted in the court improperly granting defendant's motion to dismiss at the close of plaintiff's case in chief. Defendant City opposes the motion.

After trial, a court may set aside a verdict or any judgment entered thereon and direct judgment in favor of a party entitled to judgment as a matter of law where the verdict is contrary to the weight of the evidence or in the interest of justice. CPLR 4404.

Prior to trial, plaintiff served an expert disclosure response pursuant to CPLR 3101 (d) for Dr. Hal Gutstein on June 19, 2007 as per the affidavit of service annexed to the disclosure statements. The late disclosure contained medical reports, records, and notes dated from November 1, 2002 through September 23, 2003. At trial, plaintiff testified that Dr. Lyzette Velazquez was his treating physician. In addition, at his deposition on March 18, 2004, plaintiff testified that he was seen at Neuro Care through 2003, sometimes 3-5 days per week. Plaintiff also stated that he only saw Dr. Velazquez at Neuro Care and that she discussed her diagnosis of his condition with him. The records annexed to plaintiff's late disclosure are for the same time period that plaintiff testified to only seeing Dr. Velazquez at Neuro Care.

At the commencement of the trial proceedings, defendant City informed the court that it had an application to preclude Dr. Gutstein from testifying on the grounds that: (1) the 3101(d) exchange was served on the eve of trial, without good cause, containing new medical evidence that was prejudicial to the City; (2) the narrative report did not establish a causal link between the incident and injury, permanency or a diagnosis; (3) the narrative was speculative; and (4) the City requested HIPAA compliant authorizations a year prior to trial and none were provided. The court determined that the trial would begin and the application could be made at the

appropriate time during the trial.

The City's application to completely preclude Dr. Gutstein from testifying due to a late expert disclosure pursuant to CPLR 3101 (d) was renewed during the trial. At that time, plaintiff argued that Dr. Gutstein was a treating physician and that CPLR 3101 (d) was not applicable. The court denied the City's request for preclusion, but since the expert disclosure was late, limited Dr. Gutstein's testimony to the to the contents of his narrative report, dated November 1, 2002, and the documents that were attached to the CPLR 3101 (d) and exchanged with the City on June 19, 2007. The court clarified its ruling that Dr. Gutstein would only be allowed to testify as to what was contained in his report and if permanency, causation or a diagnosis were not contained in the report, then he would not be allowed to offer it.

Following the testimony of Dr. Gutstein, which was limited to the contents of his report as per the court's ruling, the City moved to dismiss the plaintiff's case for failure to show causation between the injuries plaintiff sustained and the accident on October 3, 2002.

The court held:

“Given the fact that the testimony by Dr. Gutstein did not include any testimony with regard to a causal connection between the alleged accident and the symptoms of this alleged scar tissue or any of the other injuries, the doctor did not testify with regard to causation, and quite frankly the Court prevented him from doing so based on the previous ruling with regard to 3101 (d) exchange. However, given that fact, the Court is constrained to dismiss the case.

Plaintiff has not established a causal link. There is also in the medical records a question of whether there was an old brain injury, there was a previous pulmonary arrest, those are all things which could have contributed to the symptoms that the plaintiff was experiencing.

In addition, while there was testimony by Dr. Gutstein about scar tissue, there was no testimony by the doctor which link the scar tissue to any symptoms which – that the plaintiff

allegedly is suffering from or that the scar tissue was caused by the car accident.

Given all of that, the Court is constrained to dismiss the case. The City's motion is granted."

CPLR 3101 entitled "Scope of disclosure" provides, in pertinent part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof..." Its subdivision, CPLR 3101 (d) is entitled "Trial preparation" and its subsection CPLR 3101 (d) (1) (i) specifically pertains to "Experts" and governs the content and timing of disclosure of an expert.

CPLR 3101 (d) (1) (i) provides, 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 the 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..."

McKinney's Cons Laws of NY, Book 7B, CPLR 3101 (d) (1) (i) (emphasis added).

CPLR 3101 (d) (1) is applicable "only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses." *Rook v 60 Key Centre*, 239 AD2d 926, 927 (4th Dept 1997). Additionally, CPLR 3101 (d) (1) (i) does not require that an expert disclosure be accompanied with a report. *Love Canal Actions*, 161 AD2d 1169 (4th Dept 1990). Moreover, limited preclusion or limiting of the scope of an expert's

testimony is appropriate when CPLR 3101 (d) has been violated. *1515 Summer St. Corp. v Parikh*, 13 AD3d 305 (1st Dept 2004); *Galaz v Sobel & Kraus, Inc.*, 280 AD2d 427 (1st Dept 2001); *Matter of Richard S.*, 208 AD2d 750 (2d Dept 1994), *lv denied*, 86 NY2d 704 (1995).

In *Matter of Richard S.*, 208 AD2d 750, it was held proper for the trial court to limit the appellant mental patient's medical experts to testify only as to their observations and to preclude them from offering their opinions due to appellant's failure to disclose, pursuant to CPLR 3101 (d), any detail as to the substance of their opinions. Similarly, in *1515 Summer St. Corp.*, 13 AD3d 305, the trial court properly precluded the parties' experts from testifying about matters that were not included in their CPLR 3101 (d) (1) (i) disclosure statements (citing *Matter of Richard S.*, 208 AD2d 750). The trial court was also upheld in *Galaz*, 280 AD2d 427, where it "properly precluded plaintiff's economic expert from testifying as to plaintiff's alleged lost future income, since plaintiff's disclosure pursuant to CPLR 3101 (d) (1) (i) was inadequate and, when combined with plaintiff's bill of particulars, was misleading." *Galaz v Sobel & Kraus, Inc.*, 280 AD2d 427, 428 (1st Dept 2001) (citing *Parsons v The City of New York*, 175 AD2d 783 [1st Dept 1991]).

In the instant matter, plaintiff's primary allegation was that he sustained severe brain and back injuries as a result of the accident. However, based on the late exchanged narrative, plaintiff had an "old brain injury" and had been involved in a "severe assault with stabbing of the abdomen on 7/2/02", just 3 months prior to the subject motor vehicle accident, and "[d]uring surgery and removal of some of his organs, he had pulmonary arrest." Moreover, the narrative is speculative and does not indicate the basis for the diagnosis regarding the injuries sustained by plaintiff as a result of the subject car accident, but merely states that "*according to the discharge*

summary, it seems that he [plaintiff] received a closed head injury with subarachnoid hemorrhage.” (Emphasis added). As plaintiff denied any prior brain injury during his examination before trial, defendant believed that the subject car accident may have been the only potential cause of his alleged injuries only to learn on the eve of trial that plaintiff’s injuries were likely from prior incidents and other causes based on the late exchanged narrative, indicating the presence of an “old brain injury”.

The court considered Dr. Gutstein an expert medical witness since a CPLR 3101 (d) expert disclosure for Dr. Gutstein was served by plaintiff, albeit late, and there was no indication in plaintiff’s testimony at trial or in his examination before trial that he ever treated with anyone other than Dr. Velazquez. The records annexed to plaintiff’s late expert disclosure were inconclusive with respect to Dr. Gutstein being plaintiff’s treating physician and he did not offer any clarification upon testifying.

In addition, counsel for plaintiff never offered an excuse for serving the expert disclosure or the medical documents annexed just 19 days prior to the start of trial when the information had been in his possession for well over 5 years. Counsel also failed to provide HIPAA compliant authorizations for plaintiff’s medical records despite being sent a letter by defense counsel, dated May 12, 2006, requesting same, as the previously provided authorizations were rejected by the medical providers as not HIPAA compliant.

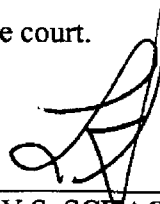
As a result of plaintiff’s late 3101 (d) exchange the City was prejudiced since only 19 days before trial it learned that plaintiff: (1) had an old brain injury of unknown origin, (2) had been involved in a severe assault during which he was stabbed in the abdomen (which may have had an impact on his back), and, (3) had suffered a pulmonary arrest during the surgery required

after the stabbing incident (wherein his body and brain were likely deprived of oxygen which may have caused the very injuries claimed in the subject lawsuit.) All of the above impact directly on the issue of causation.

Therefore, the court made its rulings accordingly, and since the CPLR 3101 (d) expert disclosure was late, and without good cause or any excuse for that matter, the court was within its discretion to limit Dr. Gutstein's testimony to the to the contents of his report and the documents attached. *See* CPLR 3101 (d) (1) (i). Plaintiff's failure to comply with the mandates of CPLR 3101 (d), without good cause, prejudiced the City in its defense of this action.

Accordingly, plaintiff's motion to set aside the trial court's order dated July 13, 2007 dismissing plaintiff's complaint is denied.

This constitutes the decision and order of the court.



LARRY S. SCHACHNER, J.S.C.

Dated: October 28, 2008