Fernandez v State of New York
2012 NY Slip Op 33800(U)
June 5, 2012
Court of Claims
Docket Number: 118692
Judge: Richard E. Sise
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STATE OF NEW YORK COURT OF CLAIMS

RAMON FERNANDEZ AND JOHANNY FERNANDEZ,

Claimants,

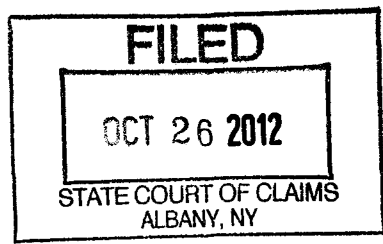
DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Defendant.

Claim No. 118692
Motion No. M-81579



BEFORE: HON. RICHARD E. SISE
Presiding Judge of the Court of Claims

APPEARANCES: For Claimants:
DELL, LITTLE, TROVATO & VECERE, LLP
BY: Christopher R. Dean, Esq.

For Defendant:
HON. ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
BY: Faisal H. Sheikh, Esq.
Assistant Attorney General

The following papers were read on Defendant's motion to preclude the testimony of an expert witness:

1. Notice of Motion and Supporting Affirmation of Faisal H. Sheikh, Esq., with annexed Exhibits; and

2. Affirmation in Opposition of Christopher Dean, Esq., with annexed Exhibits.

Filed papers: Claim; Answer

By this motion *in limine*, Defendant seeks to preclude the testimony of Peter Pomeranz, Professional Engineer, an expert witness that Claimants intend to call at trial. Defense counsel

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contends that the expert's proposed testimony would cause undue prejudice to Defendant because the CPLR 3101(d) response was untimely and "fails to enlighten Defendant as to the expected testimony of Mr. Pomeranz" and because the witness' testimony "seeks to introduce new theories of liability not readily discernible from Claimant's Bill of Particulars" (Sheikh affirmation, ¶ 1).

This action arises from a February 14, 2007 incident that occurred on a pathway leading from a parking lot to the Stony Brook University Hospital Cancer Center. The claim alleges that Claimant Ramon Fernandez fell and injured himself as a result of Defendant's failure to remove snow, ice and other debris from the pathway and otherwise make it safe for pedestrian travel.

Timeliness: There had been no discovery order or judicial direction setting a specific date set for submission of the CPLR 3010(d) responses in this action. Claimant's response relating to Pomeranz' testimony was mailed to Defendant on May 7, 2012 and received by Defendant on May 8, 28 days before the scheduled trial date. Counsel for Claimant states that the notice was provided as soon as he was able to confirm that Pomeranz would in fact be available to testify at trial. The Court has broad discretion in permitting expert testimony as long as Defendant is not unduly prejudiced (Getman v Petro, 266 AD2d 688 [3d Dept 1999]; Marra v Hensonville Frozen Food Lockers, Inc., 189 AD2d 1004 [3d Dept 1993]), and in this case, the Court accepts that Claimant did not wilfully or intentionally delay proceedings. Furthermore, in response to this motion, counsel for Claimant contacted defense counsel to offer a short adjournment to permit Defendant to consider the matter and perhaps retain its own expert. According to Claimant's counsel, Defendant rejected this offer (Dean affirmation, ¶ 2). If timing

[* 3]

of the notification did have any detrimental effect on Defendant, it was given an opportunity to avoid such an impact.

Theory of Liability: The relevant items in Defendant's Demand for a Verified Bill of Pariculars (Sheikh Affirmation, Exhibit E) are the following:

> (7) State, if applicable, each rule, policy, accepted standard, ordinance or statute deviated from by defendant or its employees or agents.
>
> (8) The acts or omissions constituting the negligence claimed against the defendant.

In response to these demands, Claimant's response stated, "the presence of snow and the formation of ice on the pathway due to the absence of any salt, sand, ashes, mats, adequate lighting, or warning signs and/or cones, and the presence of drainage pipe on said pathway."

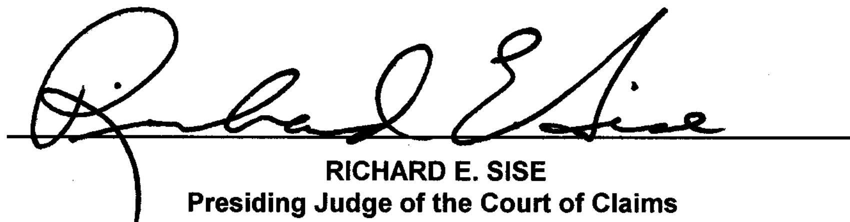
The CPLR 3101(d) response relating to Peter Pomeranz's testimony (Sheikh Affirmation, Exhibit A) states that the testimony will establish that Defendant was negligent in failing to provide proper protection for pedestrians because 1) "the subject pathway, retaining wall and drainage system in question were not in compliance with all applicable rules, regulations, codes, statutes and industry standards" and 2) "the subject pathway, retaining wall and drainage system were negligently constructed, installed and maintained."

Defendant asserts that Claimant's reference to "negligence in construction of the pathway" presents a new theory of liability and that the reference to "all applicable rules, regulations, codes, statutes and industry standards" is insufficient to meet the requirement of the Demand. In the Court's opinion, the reference to drainage pipe in the bill of particulars provides sufficient indication that the construction and configuration of the walkway will be at issue. Defendant is correct, however, in contending that the reference to "all applicable rules,

regulations, codes, statutes and industry standards" is not adequately responsive, and accordingly any testimony regarding violation of applicable rules, regulations, codes, statutes and industry standards shall be limited to any such violation as evidence of negligence but not as a separate basis of liability.

Defendant's motion is granted in part and denied in part.

Albany, New York
June 5, 2012



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