SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

X

RAYMOND BURBIGE,

Plaintiff,

-against-

Index No.: 010334/07
Motion Sequence...04, 05
Motion Date...06/04/12

SIBEN & FERBER, a partnership consisting of STEVEN B. FERBER and GARY L. SIBEN, STEVEN B. FERBER doing business as SIBEN & FERBER, GARY L. SIBEN doing business as SIBEN & FERBER and LEONARD G. KAPSALIS,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Notice of Cross-Motion.....x
Affirmation in Opposition.....x

Upon the foregoing papers, the Defendants, Siben & Ferber, a partnership consisting of Steven B. Ferber and Gary L. Siben, Steven B. Ferber doing business as Siben & Ferber, Gary L. Siben doing business as Siben & Ferber, and Leonard G. Kapsalis, move, pursuant to CPLR § 3101 (d) (1), seeking an Order precluding the Plaintiff, Raymond Burbige, from offering expert testimony at the trial of this action. The Plaintiff, Raymond Burbige, cross moves, pursuant to CPLR § 3126, seeking an Order, granting sanctions, including the striking of the Defendants' answer upon the grounds that, *inter alia*, the

Defendants intentionally or negligently disposed of crucial items of evidence. The motion and cross-motion are decided as hereinafter provided.

This is an action for legal malpractice. The Plaintiff alleges that the Defendants failed to properly prosecute a products liability case against the manufacturer of a ladder which broke while the Plaintiff was descending it.

A jury trial of this legal malpractice action commenced on or about April 6, 2010. After the conclusion of the opening statements, the Defendants' counsel moved, in effect, pursuant to CPLR § 4401, for judgment as a matter of law or, in the alternative, for an offer of proof.

This Court (Mahon, J.) reserved decision.

However, before the close of the Plaintiff's case, the Court granted the Defendants' motion based upon the Plaintiff's failure to make an offer of proof that he would have been successful in the underlying products liability action by offering expert testimony that the ladder from which he fell was defective.

On appeal, the Appellate Division, Second Department, on November 1, 2011, held that the Trial Court erred in granting the Defendants' motion, which was in effect, pursuant to CPLR § 4401 for judgment as a matter of law, and dismissing the action before the Plaintiff rested. The Appellate Division stated:

> A motion for judgment as a matter of law is to be made at the close of an opposing party's case or at any time on the basis of admissions ***and the grant of such a motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in this action is improbable***Therefore, the judgment must be reversed and a new trial granted

to the plaintiff.

The matter has been restored to this Court's calender.

On February 21, 2012, the Defendants received a "Notice pursuant to CPLR § 3101 (d)" attempting to identify Dr. C.J. Abraham as the Plaintiff's expert witness. The Defendants rejected the disclosure as untimely and as having been made without any reasonable explanation for the untimeliness.

Upon the instant motion, the Defendants seek an Order of preclusion arguing that as the Plaintiff did not identify his expert during the two years of discovery, or in opposition to the motion for summary judgment, or on the original trial, and because the Plaintiff waited until the eve of the re-trial to disclose an expert, he should now be precluded from offering the expert testimony at the re-trial of this action. The Defendants argue that this behavior, the failure to disclose his expert witness as required by the provisions of CPLR § 3101 (d), rises to a level of disregard of the Plaintiff's obligation which was willful and should not be permitted by this Court.

The Plaintiff opposes the Defendants' motion and seeks an Order awarding sanctions, including the striking of the Defendants' answer upon the grounds that the Defendants intentionally or negligently disposed of crucial items of evidence by failing to inspect, preserve and retain an expert to verify the defective manufacturer of the ladder in the Plaintiff's underlying lawsuit.

As to the order of preclusion, this Court begins with noting that, here, the Appellate Division has not only directed a new trial but has specifically set forth the

evidentiary issue inadequately established at the original trial by the Plaintiff; to wit, "plaintiff[] fail[ed] to make an offer of proof that he would have been successful in the underlying products liability action by offering expert testimony that the ladder from which he fell was defective." Consequently, the issue becomes whether the Plaintiff should be permitted to now present evidence that it could have properly presented at the first trial, the expert affidavit necessary to establish his success in the underlying products liability action.

CPLR § 3101 (d) (1) (I) was intended to provide timely disclosure of expert witness information between parties for the purpose of adequate and thorough *trial* preparation (*Young v. Long Island University*, 297 A.D.2d 320 [2nd Dept. 2002]). While a specific time frame is not set forth in that section, a trial court has discretion to preclude expert testimony for failure to reasonably comply with the statute (*Id*; *Schwartzberg v. Kingsbridge Heights Care Center, Inc.*, 28 A.D.3d 463 [2nd Dept. 2006]). Before imposing the drastic remedy of preclusion, the court must consider the reasons for the delay and whether or not the failure to disclose was intentional (*Vancott v. Great Atlantic & Pacific Tea Co., Inc.*, 271 A.D.2d 438 [2nd Dept. 2000]).

Based upon the papers presented for this Court's consideration, this Court finds that the Plaintiff's failure to disclose his expert was in fact willful and intentional. Indeed, the Appellate Division found that the Plaintiff's offer of proof was inadequate and wholly insufficient due to the absence of an expert affidavit demonstrating the merits of the underlying products liability action. Perhaps more critical is the fact that counsel for the Plaintiff, in support of his cross-motion, *infra*, again states that "the case law and the

circumstances do not warrant the plaintiff to obtain an expert" (Aff. In Supp. Of Cross-Motion, ¶ 6). Furthermore, the Plaintiff has failed entirely, even at this juncture in opposition to the Defendants's instant motion, to proffer a reasonable excuse, under the circumstances, for his delay in furnishing the name and affidavit of his expert (CPLR § 3101 [d] [1]; *Wartski v. C.W. Post Campus of Long Is. Univ.*, 63 A.D.3d 916, 917 [2nd Dept. 2009]). Moreover, the Defendants will clearly be prejudiced should this Court determination be to permit the Plaintiff to now submit the name and testimony of their expert.

Although a new trial has been granted by the Appellate Division and further that the Appellate Division has specifically set forth the evidentiary issue inadequately established at the original trial, the fact is that the Plaintiff has, nonetheless, failed to meet his burden, under CPLR § 3101 that would sufficiently oppose the Defendants' entitlement to preclusion. In fact, the Plaintiff has even failed to establish his burden under 22 NYCRR 202.21 (d) that would permit this Court to award post-note of issue discovery (*cf. Scanga v. Family Practice Assocs. of Rockland, P.C.*, 2006 WL 6822760 [Sup. Ct. Rockland 2006]; *Bierzynski v. New York Central Railroad Co.*, 59 Misc. 2d 315 [Sup. Ct. Erie 1969] *aff'd* 29 N.Y.2d 804 [1971] *rearg. denied* 30 N.Y.2d 790 [1972]).

This Court finds that the Plaintiff should not be permitted to now offer the affidavit of his expert as a consequence of a tactical decision he made during the course of the pre-note of issue discovery, in opposition to the underlying motion for summary judgment, or on the original trial (*Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 863 [2nd Dept. 2008]).

The Court will now consider the Plaintiff's cross-motion seeking an Order granting sanctions, including the striking of the Defendants' answer, upon the grounds that, *inter alia*, the Defendants intentionally or negligently disposed of crucial items of evidence.

Counsel for the Plaintiff bases his entire motion on a spoiliation of the evidence argument; that is, counsel for the Plaintiff submits that allegedly for more than 16 years, counsel for the Defendants, failed to inspect and preserve the defective ladder, failed to obtain expert reports with respect to the defectively manufactured ladder, and effectively destroyed the key physical evidence of the defective ladder prior to the commencement of the Plaintiff's legal malpractice action.

Spoliation of evidence is a factual and legal question in this malpractice case involving an underlying products liability claim. Spoliation of evidence occurs where a litigant intentionally or negligently disposes of crucial items of evidence before his or her adversaries have any opportunity to inspect them (*Kirkland v. New York City Housing Authority,* 236 A.D.2d 170 [1st Dept. 1997]).

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 [2007]; *Verdi v. Jacoby & Meyers, LLP*, 92 A.D.3d 771, 772 [2nd Dept. 2012]). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred

any damages, but for the lawyer's negligence" (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, supra at 442).

The underlying action was one sounding in products liability. The Plaintiff claims herein that the product that was alleged to be defectively designed or manufactured, the ladder, was negligently or intentionally lost or destroyed subsequent to his accident and before anyone had an opportunity to inspect it. Although the Plaintiff charges his former attorneys in the underlying action, the Defendants herein, with spoliation of evidence, the Plaintiff makes no attempts to show that the ladder in question was ever in the possession of the Defendants or that it existed or was available when they were retained.

Having failed to adequately show that the Defendants were responsible for spoliation of evidence, the Plaintiff's application pursuant to CPLR § 3126 for sanctions should be denied (*Ortega v. City of New York*, 9 N.Y.3d 69 [2007]).

The parties' remaining contentions have been considered and do not warrant discussion.

Accordingly, it is hereby

ORDERED, that the Defendants' motion for preclusion pursuant to CPLR § 3101 is **GRANTED**; and it is further

ORDERED, that the Plaintiff's cross-motion seeking an Order granting sanctions, including the striking of the Defendants' answer, is **DENIED**.

All applications not specifically addressed are herewith denied.

This shall constitute the decision and order of this Court.

DATED: Mineola, New York
July 30, 2012

Hon. Randy Sue Marber, J.S.C.