

Kalendareva v United Parcel Serv.

2015 NY Slip Op 31877(U)

August 7, 2015

Civil Court, Queens County

Docket Number: 300523QTS2014

Judge: Cheree A. Buggs

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**Civil Court of the City of New York
County of Queens**

Part 30

Index Number 300523QTS2014
Motion Cal # 6 Motion Seq. #
Papers Submitted to Special Term on: 6/25/15

ALLA KALENDAREVA,

Plaintiff,

against

UNITED PARCEL SERVICE, UNITED
PARCEL SERVICE GENERAL SERVICES
CO., and MAURICIO RODRIGUEZ,

Defendants.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other.....	<u> </u>

Upon the foregoing cited papers the decision on the plaintiff Alla Kalendareva's (hereinafter "Kalendareva") motion to preclude defendants' United Parcel Service, United Parcel Service General Services, Co., and Mauricio Rodriguez (hereinafter collectively "UPS" or "Rodriguez") experts David E. Raymond, Ph.D., John F. Wiechel, Ph.D., and William T.C. Neale, M. Arch. precluding defendants from offering any disclosed and/or non-disclosed materials at the time of trial; or, if the experts are not precluded, directing a unified trial and allowing Kalendareva time to retain her own expert, is as follows:

Initially, although defendants' co-counsel was not served with a copy of the motion, affirmation in opposition or reply papers (CPLR §§2103 [e]; 2214 [b], [c]), the Court will address the merits of the motion since co-counsel appeared at the Court conference.

The portion of Kalendareva's motion for a unified trial is denied without prejudice for Kalendareva to renew her request before the trial judge. The portion of Kalendareva's motion to preclude defendants' experts is denied. The portion of Kalendareva's motion to preclude UPS' undisclosed and disclosed materials is denied without prejudice to renew at the time of trial. The portion of Kalendareva's motion requesting time to retain her own expert or experts in biomechanical engineering or accident reconstruction is granted and Kalendareva is granted sixty (60) days from the date of this Order served with notice of entry to obtain her experts and exchange any expert reports.

This case arises from a motor vehicle accident which occurred on February 24, 2012. Kalendareva, a pedestrian, was allegedly injured when the truck driven by UPS came into contact with her at the intersection of 168th Street and Union Turnpike. UPS claims it was making a right turn from 168th Street onto Union Turnpike. One of the main issues in this case is whether Kalendareva was in the crosswalk at the time of the accident.

In support of the motion, in addition to an attorney affirmation, Kalendareva submitted UPS' expert disclosures for its expert witnesses, David E. Raymond, Ph.D., John A. Bendo, M.D., and John Wiechel, PhD., P.E.; her September 10, 2014 correspondence to UPS, rejecting all three expert witness disclosures as incomplete and alleging they do not meet the *Frye/Daubert* standards; police accident report dated February 24, 2012; her verified bill of particulars, supplemental verified bill of particulars, second supplemental verified bill of particulars, third supplemental verified bill of particulars with a narrative report of Dr. Gary P. Thomas dated May 1, 2013 attached, fourth verified supplemental bill of particulars, fifth verified supplemental bill of particulars, sixth verified supplemental bill of particulars; her deposition transcript dated April 18, 2013; deposition transcript of UPS by defendant Rodriguez dated March 21, 2014; deposition transcript of non-party witness Christina Strack dated January 9, 2012; deposition transcript of non-party witness Shalesse Hurley dated November 13, 2013; deposition on non-party witness Michael Rachwalski dated December 12, 2013; deposition transcript of non-party witness Carlos Rivera dated December 12, 2013; non-party deposition of Captain Richard Diprima dated June 23, 2014; deposition transcript of non-party witness Andre Paul Gonzalez dated June 23, 2014; deposition transcript of non-party witness Charles C. Staples dated June 23, 2014; deposition transcript of non-party witness Ariel Yagudayev dated September 15, 2014; UPS expert exchange of Dr. John A. Bendo; expert exchange report of Dr. Elton Strauss dated April 4, 2014 with addendum dated April 12, 2014; exchange by correspondence dated October 21, 2014 by UPS to Kalendareva with photographic attachments.

Kalendareva testified at her deposition with a Russian Interpreter on April 18, 2013. Prior to the accident, she had been working at a barbershop owned by her husband, and a barbershop owned by non-party witness Alex Yagudayev ("Yagudayev") in Long Island, New York. She was driven to work and home on the date of the accident in a Yagudayev's vehicle. He dropped her off at the intersection of 168th Street and Union Turnpike. She testified in relevant part that at the time of the accident she had crossed at the crosswalk located at 168th Street and Union Turnpike. Union Turnpike has four lanes of travel, two lanes going east and two lanes going west. She noticed the UPS vehicle before the accident but could not remember if it was stopped or moving. She had crossed one side of Union Turnpike with the traffic light in her favor and while crossing the other side of Union Turnpike she was hit. She said the driver's side of the UPS vehicle where the headlights are located came into contact with her.

Rodriguez gave sworn testimony on March 21, 2014. He testified in pertinent part, that he was employed on the date of the accident as a driver for UPS and was making deliveries that day. UPS plans the route for their drivers. The accident occurred within five or six minutes after he made his last delivery or pick-up. He said the

accident occurred close to the crosswalk. He stated that at the time of the accident it was raining very hard. He attested that he had made a right turn onto Union Turnpike from 168th Street and heard what he described as a loud noise after he made the turn. He testified that he never saw Kalendareva before the accident.

Christina Strack, a non-party witness, gave sworn testimony on January 9, 2012. On the date of the accident she was a receptionist at a business located near the accident, Stand Up MRI. She recalled that UPS normally picks up from the business location about 6:30 P.M or 7 P.M. She testified that it was raining heavily that day, and that there are three lanes of traffic at the intersection, which includes a bus lane. She was on her way to the Seven-11 convenience store, which is near the intersection where the accident occurred. She did not witness the accident, but when she approached the scene, she saw Kalendareva on a stretcher and she was not in the crosswalk.

Sheleese Hurley, a non-party witness, testified on November 13, 2013. She is an auxillary police officer who responded to the scene of the accident. She reviewed her memo book entries on the date of the accident and gave testimony. She testified that when she arrived Kalendareva was already in the ambulance. She did not witness the accident.

Michael Rachwalski, a non-party witness, testified on December 12, 2013. He was an EMT that responded to the scene of the accident. He recalled, with the assistance of his written report, that when he and his partner, EMT Carlos Rivera arrived at the scene, Kalendareva was already in full spinal immobilization which was done by the Fire Department of New York (“FDNY”). He read the report into the record and responded to questions regarding the report. He did not recall where Kalendareva was located on the ground when he first saw her.

His partner that day, EMT Carlos Rivera also gave testimony on December 12, 2013 as a non-party witness. He reviewed the ambulance call report for the day of the accident, which he did not prepare. He testified when he arrived at the scene Kalendareva had been immobilized by the Fire Department. He testified that Kalendareva was on the westbound side of Union Turnpike. He did not witness the accident.

Captain Richard Diprima, a non-party witness, gave sworn testimony on June 23, 2014. He is employed by the Fire Department of New York (“FDNY”). He testified based upon his Pre-hospital Care Report, or PCR. His ladder company responded to the scene of the accident. He recalled that on the date of the accident it was dark outside and raining. He could not recall where Kalendareva was in the roadway before she was placed on a backboard. She was moved to the bus stop because it was raining. He could not recall ever seeing her in the crosswalk. It would be normal procedure to position the fire engine between oncoming traffic and the patient. Based upon the positioning of the fire engine, Kalendareva was not in the crosswalk.

A non-party deposition of Charles C. Staples was held on June 23, 2014. He also is employed by FDNY. He responded to the scene of the accident along with his ladder company. He was the chauffeur, which means he drove the fire engine. He recalled that on the date of the occurrence it was dark and raining. He testified that he had to make a U-Turn onto Union Turnpike in order to get to Kalendareva and if Kalendareva had been in the crosswalk, he would not have been able to make the U-turn. If she was in the crosswalk he stated that he would “have positioned the rig where it would be blocking traffic on the opposite crosswalk for traffic coming westbound.” Based on his being able to make the U-turn, and the positioning of the fire engine, he testified that Kalendareva was not in the crosswalk when the fire department arrived. He did not witness the accident.

A non-party deposition of Yagudayev was held on September 15, 2014 with a Russian Interpreter. He refused to answer some questions and often did not recall the answer to questions. He gave Kalendareva a ride home from the barbershop where she was working on the date of the accident which is located in Long Island. He took the Northern State Parkway to the Grand Central Parkway and exited at 168th Street. He dropped her off on the right side of the intersection of 168th Street and Union Turnpike. He stated it was raining a little. He did not witness the accident.

As can be seen, based upon the deposition testimony of the parties and no-party witnesses, there is an issue as to liability and/or comparative negligence.

UPS has retained several expert witnesses in support of their defense. Expert witness, John A. Bendo, M.D., who serves as Director of NYU/HJD Spine Services, and as an Assistant Professor of Clinical Orthopedic Surgery at NYU School of Medicine is expected to testify at trial, among other things, regarding his examination of Kalendareva, as well as his knowledge of dynamics of the accident, injuries, disability and future medical care, and Kalendareva’s future prognosis. Dr. Elton Strauss, a Board Certified Orthopedist, is expected to testify regarding the independent medical examination held on April 4, 2014 and his report dated April 12, 2014 regarding Kalendareva’s radiological films.

On September 10, 2014, Kalendareva objected to the expert witness exchange of David E. Raymond, Ph.D., John F. Wiechel, Ph.D., and William T.C. Neale, M. Arch. as cumulative, untimely and not meeting the standards under *Frye*.

David Raymond, PhD., is a Biomechanical Engineer who is expected to testify that based upon Kalendareva’s version of the accident and her injuries, the accident could not have happened as she said. His curriculum vitae was annexed.

John Wiechel, PhD., P.E. a licensed Professional Engineer, has over 30 years in traffic accident analysis and reconstruction, who is expected to testify about the speed of the UPS truck and deposition testimony of non-party witnesses Christina Strack, EMS personnel and Rodriguez, and expected to testify that Kalendareva could not have been walking in the crosswalk at the time of the accident. His curriculum vitae was annexed.

William Neale, M.Arch. is an expert in forensic visualization and he is expected to testify at trial based upon accident reconstruction and based upon the evidence and his reconstruction of the occurrence, Kalendareva could not have been walking in the crosswalk at the time of the accident. His curriculum vitae was annexed.

The portion of Kalendareva's motion to preclude UPS' experts is denied. Kalendareva failed to demonstrate that the proposed testimony of UPS experts is not "beyond the ordinary knowledge and experience of the trier of fact" (*Matott v Ward*, 48 NY2d 455, 459 [1979]); or not generally accepted in the scientific community or unreliable, requiring a *Frye* hearing (*Frye v U.S.*, 293 F. 1013, 1014 [D.C. Cir., 1923]; see generally *Lipschitz v Stein*, 65 AD3d 573 [2009]; *Abramson v Pick Quick Foods, Inc.*, 56 AD3d 702 [2008]; *Mitchell v Brown*, 43 AD3d 1009 [2007]; *Plate v Palisade Film Delivery Corp.*, 39 AD3d 835 [2007]; compare *Bonilla v NYCTA*, 295 AD2d 297 [2002]). Here, UPS' experts will be testifying that in their opinion, the accident did not occur as plaintiff alleged and the Court finds that the testimony of each expert is relevant and the expected testimony is outside of the knowledge of a layperson (*Valentine v Grossman*, 283 AD2d 571 [2001]). Copies of UPS' experts curriculum vitae's were annexed, demonstrating their experience in their respective fields.

The Court finds as to the portion of Kalendareva's motion seeking a unified trial, "Courts are encouraged to conduct bifurcated trials in personal injury actions" (see *Abrams v Excellent Bus Serv., Inc.*, 91 AD3d 681 [2012]; see also 22 NYCRR 202.42[a]; *Patino v County of Nassau*, 124 AD3d 738 [2015]; *Bertelle v NYCTA*, 19 AD3d 343 [2005]; *Jochsberger v Morandi*, 157 AD2d 706 [1990]). However, if the nature of Kalendareva's injuries have a bearing on the issue of liability, a unified trial is appropriate (see generally *Matthew H. v County of Nassau*, ___ AD3d ___, 2015 NY Slip Op 05157 [2015]; *D'Amato v Yap*, 53 AD3d 523 [2008]; *Pechersky v Queens Surface Corp.*, 18 AD3d 842 [2005]; *Wright v NYCHA*, 273 AD2d 378 [2000], *Lind v City of New York*, 270 AD2d [2000]; *Felice v Southside Hosp.*, 249 AD2d 359 [1998]; compare *Patino v County of Nassau*, 124 AD3d 738 [2015]; *Galarza v Crown Container Co., Inc.*, 90 AD3d 703 [2011]; *Smith v McClier Corporation*, 38 AD3d 322 [2007]; *Berman v County of Suffolk*, 26 AD3d 307 [2006]). "The decision whether to conduct a bifurcated trial rests within the discretion of the trial court..." (*Abrams v Excellent Bus Serv., Inc.*, 91 AD3d 681 [2012]; see also CPLR § 603; 4011). Since it is unclear at this juncture if UPS' experts will be testifying regarding the nature of her injuries to

establish liability and/or comparative negligence, this request is denied without prejudice for Kalendareva to renew her request before the Trial Judge.

The portion of Kalendareva's motion to preclude UPS' undisclosed and disclosed materials is denied without prejudice to renew at the time of trial. At this juncture, there is insufficient basis to preclude such materials, as it is unclear what the testimony of UPS' experts will be relative to the materials, or how they will establish admissibility of the photographs and/or other documents used by each expert to formulate their opinions.

The portion of Kalendareva's motion requesting time to retain her own experts is granted (*see* § CPLR 3101 [d] [1] [i]). According to the Court file, Kalendareva filed a Note of Issue and Certificate of Readiness on August 21, 2013, although there was considerable outstanding discovery, including depositions and her independent medical examinations. UPS' expert exchange as to occurred after the case was placed on the trial calendar. Therefore, Kalendareva is granted sixty (60) days from the date of this Order served with notice of entry to obtain experts in biomechanical engineering or accident reconstruction and exchange any expert reports.

Kalendareva is directed to serve a copy of this Order with notice of entry on UPS' counsel and co-counsel within 30 days of the date of this Order.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 7, 2015

/s/
HON. CHEREÉ A. BUGGS
Judge of the Civil Court of the City of New York
County of Queens