CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 242

X

RAMON E. CABRERA,

Plaintiff,

HON. SABRINA B. KRAUS

DECISION & ORDER
Index No.: TS-300348-09/BX

-against-

30 E 33RD ST. REALTY, LLC, ALPINE BUSINESS GROUP & SAMCO PROPERTIES

Defendants,

X

BACKGROUND

Plaintiff commenced this action pursuant to a summons and complaint filed in Supreme Court, Bronx County under Index Number 306753-2009. Plaintiff alleges that on August 1, 2008, in the course of his employment at 30 East 33rd Street, New York, New York, a part of the concrete ceiling fell on his head and caused him injury.

Plaintiff was employed by Advantage Turberg Press (Undertenant), a printing company which subleased space from Alpine Business Group (Tenant), a commercial tenant of 30 East 33rd St. Realty LLC (Owner), the owner of the subject building. Samco Properties (Samco) managed the property.

PROCEDURAL HISTORY

The summons and verified complaint were filed on November 23, 2009. Owner

appeared by counsel and filed an answer and discovery demands in October 2009. The answer asserts five affirmative defenses including that recovery should be diminished by collection from a collateral source, and that Plaintiff is limited to recovery provided by workers compensation.

Owner impleaded Tenant as a third party defendant and served notice of same in December 2009. Owner asserts that it is entitled to be indemnified for any damages from Tenant pursuant to the lease agreement between Owner and Tenant. That same month a preliminary conference order was issued, and on December 8, 2009, Civil Court (Douglas, J) issued an order pursuant to CPLR §325(d) transferring the action to Civil Court.

Owner appeared by counsel in January 2010 and filed an answer and cross claim.

An initial motion and cross-motion pertaining to discovery issues were resolved by stipulation in August 2011. The stipulation provided that Owner would provide all post-accident records regarding repairs to the basement ceiling and Tenant and Owner would appear for EBTs.

On August 8, 2011, Plaintiff moved for an order amending the caption and complaint to add Samco as a defendant. The court (Franco, J) granted the motion, noting no opposition had been submitted.

Tenant moved for summary judgment. The summary judgment motion was held in abeyance while the parties conducted additional discovery, pursuant to an order of the court (Capella, J) dated January 10, 2013.

On April 30, 2014, the court (Franco, J) issued an order denying the motion. The court held:

> Alpine has established, *prima facie*, its entitlement to judgment as a matter of law by demonstrating that it did not create the defective condition, nor have actual or constructive notice of the defect in the ceiling.

However, the court further held:

> The plaintiff has raised an issue of fact regarding whether Alpine had actual or constructive notice of the condition of the ceiling. Accordingly, Alpine's motion for summary judgment seeking dismissal of the complaint, cross-claim and third-party claim, is denied. Also Alpine has not presented any evidence to support its motion to dismiss the cross-claims asserted against it, therefore, the branch of Alpine's motion seeking to dismiss the cross-claims, is also denied.

The case first appeared on the Part 21 trial calendar in the fall of 2014.

On July 8, 2016, Owner moved for an order for permission to amend its answer, to assert cross-claims against Samco, and removing the law firm of Martin Bell & Clearwater as counsel for Samco, based on a conflict of interest with the firm's prior representation of Owner. The court (Alpert,J) granted the motion pursuant to a decision and order dated September 30, 2016, which allowed the amended pleading and disqualified Martin Bell as counsel for Samco. The court noted that Martin Bell had represented both Owner and Samco in the pending litigation for six years and further held:

> The interests between 30 East and Samco are materially adverse as evidenced by the cross-claims against Samco for indemnification and contribution. There is a strong possibility that during the six years of Martin, Clearwater and Bell, LLP's representation of 30 East in the instant action that they acquired confidential information that they might use to the detriment of 30 East.

In December 2016, Samco moved for renewal and reargument. The court granted the motion only to the extent of eliminating Owner's claim against Samco for failing to maintain liability insurance, and otherwise denied the motion. The Court adjourned the action for 45 days to afford Samco an opportunity to hire new counsel.

The trial has been repeatedly adjourned by the parties, from the fall of 2014 through September 5, 2018, when the action was assigned to this court for trial.

THE PENDING MOTIONS

On September 5, 2018, the action was assigned to this Court for trial. At the request of counsel, two *in limine* motions are being entertained by the Court, prior to jury selection. The first is Samco's motion to preclude Plaintiff's experts, Dr. Guy and Dr. Brisson from testifying at trial. The second is Plaintiff's motion to preclude Defendant's biomechanical expert from testifying at trial. Both parties also request a *Frye* hearing as alternative relief.

The Court set a deadline of September 14th by 1 pm for submission of all motion papers. On September 14, 2018, papers were submitted, and the court reserved decision. Trial and Jury Selection are scheduled to commence on September 24, 2018. The two motions are consolidated herein for determination.

SAMCO'S MOTION TO PRECLUDE PLAINTIFF'S TREATING DOCTORS FROM TESTIFYING IS DENIED

Samco moves to preclude Plaintiff's doctors from testifying based on its claim that the court should consider a prior degenerative condition of plaintiff to be the same as a prior head injury. There is simply no basis for the court to do so in this case. Samco cites a plethora of cases, primarily addressing the standards on summary judgment motions. The cases cited are distinguishable in that this is not a summary judgment motion, and there was no prior head injury or accident, only Samco's claim that the Court should deem alleged evidence of degenerative problems to be the same as a prior injury or accident.

Out of the many cases relied upon by Samco, the primary appellate authority pertaining to preclusion of witnesses is *Guzman v 4030 Bronx Blvd Associates LLC* 54 AD3d 298. In that case, as in all the cases relied upon by Samco, the Plaintiff had a history of head trauma. While

the Appellate Division did affirm the trial court's decision in that case to preclude Plaintiff's neuropsycologist from testifying, the Appellate Division further found that the trial court "...abused its discretion in denying plaintiff's motion for a continuance pursuant to CPLR 4402 to enable them to retain a medical expert to testify as to causation (Id)." The Appellate Division specifically contrasted this to cases, such as the case at bar, where the medical experts called had been the treating physician of the litigant. "Contrary to (Samco's) contention, the fact that the expert's conclusions contradict ... other evidence ... does not render the expert's conclusions speculative (*Aspromonte v Judlau Contracting, Inc.*162 AD3d 484)."

Nor does the court find any basis to grant Samco's request for a *Frye* hearing as to either Dr. Guy or Dr. Brisson. The conclusion that the accident was the cause of the injury is "... not the type of novel theory of causation that necessitates a Frye hearing; it (is) merely an opinion explaining the physiological process that caused" the injury [*Sadek v. Wesley*, 117 A.D.3d 193, 201 (2014), aff'd, 27 N.Y.3d 982, 51 N.E.3d 553 (2016)]."

PLAINTIFF'S MOTION TO PRECLUDE, AMAN GUPTA, DEFENDANT'S BIOMECHANICAL ENGINEER FROM TESTIFYING IS GRANTED ONLY TO A LIMITED EXTENT

Contrary to Plaintiff's allegation the field of biomechanics is not considered "junk science" and decisions by trial courts to allow such testimony regarding the effects of force on the plaintiff from an accident without requiring a *Frye* hearing have been consistently affirmed [*Vargas v Sabri* 115 AD3d 505 (*affirming trial court's denial of plaintiff's request for Frye hearing and decision to allow biomechancial engineer to testify that accident could not have caused the injury*); *Shillingford v New York City Transit Authority* 146 AD3d 465 (*trial court erred in precluding expert's testimony on maximum force that may have been applied to*

plaintiff, disagreement between experts on methodology and conclusions are for the jury to resolve); *Plate v Palisade Film Delivery Corp* 39 AD3d 835 *(trial court erred in precluding biomechanical engineer from testifying as to whether force of impact could have caused the injury*).

The fact that the witness is not a doctor does not render him unqualified as an expert as to whether the force of the impact could have caused the alleged injury (*Vargas* at 505).

However, to the extent that Defendant's 3101(d) form indicates that Dr. Gupta intends that the cervical and disc pathology was caused by degenerative changes over time or that they did not occur as a result of a single traumatic event based on examination of medical records, as such conclusions are beyond the scope of Dr. Gupta's expertise, and his testimony as to said conclusions is precluded.

CONCLUSION

Based on the foregoing, Defendant's motion to preclude or alternatively asking the court to conduct a Frye hearing is denied in its entirety. Plaintiff's motion is granted only to the extent of precluding Dr. Gupta from testifying that plaintiff's injuries were caused by degenerative conditions, and is otherwise denied.

Trial shall proceed on September 24, 2018, as scheduled and continue day to day, subject to the court's schedule, until completion.

This constitutes the decision and order of the Court.

Dated: Bronx, New York
September 14, 2018

Sabrina B. Kraus, JCC

TO: GREENBERG & STEIN
Attorneys for Plaintiff
By: SCOTT A. STEINBERG, Esq.
360 Lexington Avenue, Suite 1501
New York, NY 10017
212.681.2535

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
Attorneys for Defendant 30 East 33rd Street Realty, LLC
By: MICHAEL F. GRADY, Esq.
1133 Westchester Avenue
White Plains, New York 10604
914.872.7834

HANNUM FERETIC PRENDERGAST & MERLINO, LLC
Attorney for Defendant Alpine Business Group
By: DAVID P. FEEHAN, ESQ.
55 Broadway, Suite 202
New York, New York 10006
212.530.3908

BRODY, O'CONNOR & O'CONNOR
Attorneys for Defendant SAMCO
By: SCOTT A. BRODY, ESQ.
538 8TH Avenue, Suite 1401
New York, New York 10018
212.233.2505