STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 15, 2014)

ROSIE K. SWEREDOSKI, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOUGLAS A. SWEREDOSKI, AND INDIVIDUALLY RECOGNIZED AS SURVIVING SPOUSE	:	
	:	**C.A. No. PC-2011-1544**
v.	:	
ALFA LAVAL, INC., et al.	:	

DECISION

GIBNEY, P.J. Before the Court is Defendant Crane Co.'s (Crane) Motion to Preclude the trial testimony of Plaintiff Rosie K. Sweredoski's (Plaintiff) naval expert witness, Captain William Lowell (Lowell). Plaintiff objects to this motion. Jurisdiction is pursuant to Super. R. Civ. P. 37(d). For the reasons explained in this Decision, Crane's motion is denied.

I

Facts & Travel

This is an asbestos liability suit filed by Plaintiff on behalf of herself and her late husband, Douglas A. Sweredoski (Sweredoski), who was allegedly exposed to asbestos from several companies' products, including Crane's, during his service in the Navy from 1964 to 1968. Plaintiff filed suit against Crane in March 2011.

Thereafter, Crane propounded several interrogatories, including interrogatory number 40, which asked for the names of all experts whom Plaintiff intended to call as witnesses at trial, and interrogatory number 41, which asked for specific information about the nature and subject matter of each expert's anticipated trial testimony. In response, in May 2011, Plaintiff identified

Captain Arnold Moore (Moore) as her intended naval expert and provided Crane with a detailed statement outlining Moore's qualifications and anticipated testimony. After the parties had agreed to an October 28, 2013 trial date, however, Plaintiff's counsel informed Crane's counsel on October 1, 2013 that Moore was no longer willing to testify at trial and that Lowell, also a naval expert, would testify instead of Moore. At that time, Plaintiff's counsel also communicated to Crane's counsel that Lowell would be available for deposition on November 14, 2013. To date, however, Crane has declined to depose Lowell.

One day after Plaintiff's announcement that Moore would no longer serve as her expert witness, on October 2, 2013, the parties agreed to move the trial date to January 13, 2014. Subsequently, the parties again agreed to continue the trial date until February 10, 2014. Then, on January 8, 2014, Plaintiff served amended answers to Crane's interrogatory number 40 and interrogatory number 41, identifying Lowell as an expert witness and detailing his qualifications and the substance of his anticipated trial testimony.

Asserting that Plaintiff has violated Super. R. Civ. P. 33(c) and 26(e) (respectively, Rule 33(c) and Rule 26(e)), and alleging that its defense will be severely prejudiced if Plaintiff substitutes Lowell for Moore, Crane seeks to preclude Plaintiff from presenting Lowell's testimony at trial. Plaintiff, on the other hand, maintains that she has not violated any procedural rules and that Plaintiff, not Crane, would be prejudiced if this Court were to prohibit Lowell's testimony.

II

Standard of Review

"The purpose of Rule 33(c) and the other discovery rules is to enable litigants to prepare for trial free from the elements of surprise and concealment so that judgments can rest upon the

merits of the case rather than the skill and maneuvering of counsel." Gormley v. Vartian, 121 R.I. 770, 775, 403 A.2d 256, 259 (1979). To that end, Super. R. Civ. P. 26(b) permits a party to use interrogatories to "require any other party to identify each person whom the other party expects to call as an expert witness at trial." Super. R. Civ. P. 26(b)(4)(A). Once a party has thereby identified such experts, it "is under a duty seasonably to amend [that] response" "to include information thereafter acquired." Rule 26(e). Similarly, Rule 33(c) provides that, "[i]f the party furnishing answers to interrogatories subsequently shall obtain information which renders such answers incomplete or incorrect, amended answers shall be served within a reasonable time thereafter but not later than 30 days prior to the day fixed for trial." Rule 33(c) (emphasis added).

"If a party . . . fails . . . to serve answers or objections to interrogatories [in accordance with] Rule 33, . . . the court on motion may make such orders . . . as are just." Super. R. Civ. P. 37(d). Thus, this Court has discretion to allow or "to refuse to allow a party to call a witness whose name was not [timely] supplied in the answer to a properly propounded interrogatory." Gormley, 121 R.I. at 774 n.1, 403 A.2d at 258 n.1; see also Margadonna v. Otis Elevator Co., 542 A.2d 232, 233 (R.I. 1988) (noting that trial court justices have discretion to choose the "most appropriate" resolution of an alleged Rule 33(c) violation); Rule 33(c). In particular, this Court may prohibit such expert testimony "if it is apparent that the [Rule 33(c)] violation has or will result in prejudice to the [opposing] party." Gormley, 121 R.I. at 775, 403 A.2d at 259. However, "forbidding a party to call a witness is a drastic sanction in a trial whose goal is the ascertainment of truth," and the Court should not lightly impose such a sanction. McGonagle v. Souliere, 113 R.I. 683, 688, 324 A.2d 667, 670 (1974).

III

Analysis

A

Rule 33(c)

Crane's primary assertion in support of its motion to preclude Lowell's trial testimony is that Plaintiff has violated Rule 33(c) by failing to update her expert witness list "not later than 30 days prior to the day fixed for trial." Rule 33(c). Specifically, Crane notes that Plaintiff first informed Crane that she intended to substitute Lowell for Moore on October 1, 2013, and, at that time, the trial was scheduled to begin on October 28, 2013. Therefore, Plaintiff clearly notified Crane later than thirty days before the trial date that was scheduled at that time. Subsequently, however, the parties have postponed the trial date to February 10, 2014. Nonetheless, Crane urges this Court to rule that "for the purposes of applying Rule 33, the operative trial date is October 28, 2013," because Crane only "agreed to the continuance for the limited purpose of accommodating plaintiff['s] counsel's trial schedule."

Crane's argument, however, strains the bounds of the plain language of Rule 33(c). The rule does not require a party to amend answers to interrogatories more than thirty days before the date that happens to be fixed for trial at the time the party amends its answers. Rather, the rule requires a party to serve an amended witness list "not later than 30 days prior to the day fixed for trial." Rule 33(c). Trial dates are routinely continued as discovery and motion practice transpires. Requiring parties to calculate time limits based on defunct trial dates would be impractical and contrary to the language of the rule. See id. Because the date fixed for trial is now February 10, 2014, this Court, applying the plain language of the rule, will calculate Rule 33(c)'s time limitation according to that date. Plaintiff served amended answers to both

interrogatory number 40 and interrogatory number 41 on January 8, 2014. Because January 8, 2014 is more than thirty days in advance of the February 10, 2014 trial date, Plaintiff has not violated Rule 33(c). Consequently, this Court has no jurisdiction to impose any sanction against Plaintiff, such as the outright preclusion of Lowell's testimony. See Super. R. Civ. P. 37(d) (allowing this Court to "make such orders . . . as are just" when a party "fails" to comply with Rule 33).

Even if Crane's reading of Rule 33(c) were correct, this Court would not exercise its discretion to prohibit Lowell from testifying. This Court is empowered to "make such orders . . . as are just" when a party fails to comply with Rule 33. Super. R. Civ. P. 37(d) (emphasis added). Although a trial justice may preclude the testimony of a witness who was not disclosed to the opposing party in compliance with Rule 33(c), the rule "is not intended to create a trap" for parties who, through no fault of their own, become aware of the need to supplement a witness list within thirty days of trial. Robert B. Kent et al. Rhode Island Civil and Appellate Procedure (West 2004 and Supp.) § 33:11. In fact, "forbidding a party to call a witness is a drastic sanction that should be imposed only if it is apparent that the violation has or will result in prejudice to the party asserting the violation." Gormley, 121 R.I. at 775, 403 A.2d at 259 (emphasis added). Our Supreme Court has "made clear that such prejudice results when the party alleging a violation is surprised by the witness's testimony." Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 95 (R.I. 2006). In particular, our Supreme Court has upheld the prohibition of a witness's testimony when the party offering the witness had no "meritorious explanation" for its Rule 33(c) violation and when the opposing party "had neither the opportunity to depose [the witness], . . . nor sufficient time to prepare for his cross-examination." Gormley, 121 R.I. at 776, 403 A.2d at 259; Neri v. Nationwide Mut. Fire Ins. Co., 719 A.2d 1150, 1152 (R.I. 1998); see also

Kent (explaining that "if delay would operate to the further detriment of the aggrieved party, a preclusion order may be justified in the face of a willful or otherwise inexcusable failure to serve amended answers") (emphasis added).

In the case at bar, Plaintiff has a "meritorious explanation" for failing to notify Crane until October 1, 2013 that Lowell, instead of Moore, would serve as her expert witness: Plaintiff herself had only recently learned of Moore's resignation. Gormley, 121 R.I. at 776, 403 A.2d at 259. Moreover, Crane has not been surprised by the substitution of Lowell for Moore because Plaintiff first notified Crane of this substitution over four months in advance of the current trial date. See Narragansett Elec. Co., 898 A.2d at 95. Consequently, Plaintiff's use of Lowell instead of Moore will not result in prejudice to Crane, as Crane still has time to depose Lowell. See id. (finding that the defendant was not surprised, and therefore not prejudiced, by the plaintiff's Rule 33(c) violation because the defendant had a chance to depose the plaintiff's expert witness before trial and thereby became aware of the nature of the witness's testimony before trial). In contrast, forbidding Plaintiff to call Lowell as a witness would be an exceptionally "drastic sanction" in this case, as it would leave Plaintiff with no expert naval witness, the testimony of whom is key to Plaintiff's case. See Kent (noting that if the disputed testimony "has [a] significant relationship to the issues, preclusion . . . would run[] counter to the general principle that cases should be decided on their underlying merit").

B

Rule 26(e)

Crane also argues that Plaintiff has violated Rule 26(e), which requires parties to "seasonably . . . amend a prior response [to interrogatories] if the party obtains information . . . that the response though correct when made is no longer true or complete." Although the Rules

of Civil Procedure do not define "seasonably," nor did this Court find any interpretation of the term from our Supreme Court, some federal courts have provided guidance as to what constitutes an unseasonable amendment to interrogatories. See Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985) (noting that "where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule"); see also Fed. R. Civ. P. 26, Notes of Advisory Committee (explaining that, prior to the 2007 amendments, Fed. R. Civ. P. 26(e) required discovery responses to be "seasonably" amended). A federal court, for example, has determined that "delaying the retaining of experts and . . . supplement[ing the witness list] at the last possible moment before trial" was not "seasonable," nor was "postpon[ing] supplementation [of interrogatories] by not obtaining . . . the information [requested]." Ferrara v. Balistreri & Di Maio, Inc., 105 F.R.D. 147, 150 (D. Mass. 1985). In addition, withholding information for months, then supplementing answers "four days before trial," was not seasonable. Freund v. Fleetwood Enters., 956 F.2d 354, 357-58 (1st Cir. 1992).

Plaintiff's actions have not been nearly so extreme. On the contrary, Plaintiff appears to have provided Crane with updated information relating to her expert witnesses shortly after she herself became aware of the information. In particular, Plaintiff effectively amended her answer to interrogatory number 40—which asked for the names of Plaintiff's anticipated expert witnesses—on October 1, 2013, when her counsel notified Crane that she was supplementing her witness list to include Lowell. See Rule 26(e). Plaintiff's counsel represents that October 1, 2013 was only a short time after they learned of Moore's refusal to continue to serve as Plaintiff's expert witness, and there is no indication in the record to suggest otherwise. Moreover, Plaintiff's counsel indicated at the December 6, 2013 hearing on the instant motion

that they had not yet amended their answer to interrogatory number 41—which asked for specific information about each expert witness's anticipated trial testimony—because they were in the process of working with Lowell to determine the details of his testimony. Shortly thereafter, on January 8, 2014, Plaintiff served Crane with an amended response to interrogatory number 41. Because Plaintiff's counsel kept Crane apprised in as timely a manner as circumstances allowed, Plaintiff has not violated Rule 26(e).

IV

Conclusion

After due consideration of the parties' arguments, this Court finds that Plaintiff's expert witness substitution has violated neither Rule 33(c) nor Rule 26(e). Therefore, Crane's Motion to Preclude is denied. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Sweredoski v. Alfa Laval, Inc., et al.**
CASE NO:	**PC-2011-1544**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 15, 2014**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**Robert J. Sweeney, Esq.**
For Defendant:	**David A. Goldman, Esq.** **Kendra A. Christensen, Esq.**