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Memorandum in Opposition

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #2 May 18, 2015

S. 5188 By: Senator Bonacic
A. 6265 By: M. of A. Kaminsky
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to the use of expert affidavits in summary judgment motions.

LAW & SECTION REFERRED TO: CPLR 3212(b)

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES OPPOSES THIS LEGISLATION

This bill would amend CPLR 3212(b) (relating to summary judgment motions) to remove discretion from a trial court to decline to consider an expert's affidavit, submitted in support or opposition to a summary judgment motion, on the ground that an expert exchange pursuant to CPLR 3101(d)(1)(i) had not been furnished prior to the submission of the affidavit.[1]

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of her Advisory Committee on Civil Practice. The stated purpose of the bill is to overrule *Singletree, Inc. v. Lowe*, 55 A.D.3d 861 (2d Dep't 2008). *Singletree* was a construction case which involved a cross-claim for

[1]CPLR 3101(d)(1)(i) provides: Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph."

breach of warranty. After completion of discovery, the defendant on the cross-claim moved for summary judgment on the grounds that there was no evidence to sustain the claim of breach of warranty. In opposition, the cross-claimant presented an affidavit of an expert who had not been identified during discovery. The trial court refused to consider the affidavit as the expert had not been disclosed during pre-trial disclosure. The Second Department upheld this exercise of discretion.

In *Rivera v. Birnbaum*, 102 A.D.3d 26 (2012), the Second Department held that late disclosure is but one factor to be considered and that the court has discretion to accept the affidavit as well. The court also pointed out that the trial court "under its general authority to supervise disclosure deadlines, and consistent with its discretion to supervise the substance of discovery, may impose a specific deadline (for example, prior to the filing of the note of issue and certificate of readiness or prior to the making of a motion for summary judgment) for the disclosure of experts to be used in support of a motion for summary judgment, or who are expected to testify at trial, or both " and that "where a trial court has set a specific deadline for expert disclosure, it has the discretion, pursuant to CPLR 3126, to impose appropriate sanctions if a party fails to comply with the deadline."

The Committee agrees with the drafters of the bill that a trial court should not have discretion to refuse to consider an expert's affidavit merely because the expert has not been previously identified in the situation where no deadline has been set. (CPLR 3101(d)(1)(i) itself imposes no deadline for expert disclosure.) However, as is often the case, the court may have set a deadline for disclosure by order, or the parties may have done so by stipulation, or a standing rule may have set a deadline, as is the situation in the Commercial Division. In those situations, to divest the trial court of discretion to exclude consideration of the affidavit would undermine the efficacy of such orders and the court's authority to set deadlines. Moreover, it would undermine the efficacy of summary judgment by allowing parties to oppose a summary judgment motion with evidence that they were obligated to disclose but did not disclose during the discovery phase of the case. It would also tend to turn the summary judgment motion from a device for resolving cases into a discovery device.

The Committee would support the bill if it upheld the court's discretion to exclude an expert affidavit on summary judgment where the failure to disclose the expert was in violation of an order of the court, a stipulation of the parties, or the rules of the chief administrator.

As so revised, the court would retain discretion to refuse to consider an affidavit where its own order, or the stipulation of the parties or a Uniform Rule required prior disclosure, but would also retain discretion to consider it as well. However, where no order, stipulation or rule was violated by the non-disclosure, the court would be obligated to consider the affidavit. The Committee believes that this modification would eliminate the problem raised by *Singletree* while at the same time permitting the court to exercise its authority to supervise disclosure proceedings and permit parties to make appropriate summary judgment motions where, after the deadline for the production of evidence, there is no evidence warranting a trial.

For the foregoing reasons, the Committee on Civil Practice Law and Rules **OPPOSES** this legislation.

The Person Who Prepared this Memorandum: Paul H. Aloe, Esq.

Chair of the Committee: Robert P. Knapp, III, Esq.