Graciela Rodriguez v. Costco Wholesale Corporation, Case No. SACV 24-48 JVS (JDEx)

Tentative Minute Order re Motions *in Limine*

Costco Wholesale Corporation ("Costco" moves the Court for relief by way of Motions *in Limine.* The Court now enters its rulings.

I. Costco's Motion *in Limine* No. 1: Exclude Experts.

Costco seeks an order to exclude Gabriela Rodriguez' ("Rodriguez) experts. (Docket No. 37). Rodriguez has filed an opposition (Docket No. 40), and Costco has replied (Docket No. 48).

Costco contends that Rodriguez has failed to identify her expert witness in accordance with Rule 26(a) of the Rules of Civil Procedure, and seeks their exclusion by way of sanction under Rule 37(c) of the Rules of Civil Procedure.

Per the Court's Scheduling Order (Docket No. 11), the parties were required to file expert disclosures and required reports on November 4, 2024. Belatedly (3 days late), Rodriguez disclosed Marc A. Firestone ("Firestone") and Ben Shwachman ("Shwachman"), but provided no reports. Despite repeated efforts to take the depositions of these experts, they have yet to give a deposition. (Flock Decl, pp. 2-3,) Rodriguez disputes Costco's version of deposition scheduling. (Opposition, pp.3-4.)

A. Legal Standard.

Expert disclosures are governed by Rule 26(a)(2) which provides in part:

> 2) Disclosure of Expert Testimony.
>
> (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(I) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(I) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

Rule 37(c)(1) of the Federal Rules of Civil Procedure establishes a self-executing sanction for failing to make required disclosures: “If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the

party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); Yetti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-06 (9th Cir. 2001). The Rule also provides for alternate sanctions:

> In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> > (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> >
> > (B) may inform the jury of the party's failure; and
> >
> > (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(I)-(vi).

(Id.)

The production of a report is critical to taking an expert's deposition, and moreover, it is also critical to the receiving party's determination whether a deposition is even necessary. (Fed. R. Civ. P. 26, Commentary to 1993 Amendment of paragraph (a)(2).)

There is no dispute that the experts were disclosed late, and no report has been produced for either. The problem is exacerbated by Rodriguez's failure to make them available for deposition. The Court finds that the total failure to provide the materials required by Rule 26(a)(2) is not justified and is not harmless.

The contention that Rodriguez did not produce any reports for these experts because they did not create any reports is without basis. (See Opposition, p. 3) They were required to produce reports as part of the expert disclosures whether or not they had previously prepared reports. (Fed. R. Civ. P. 26(a)(2)(a).) Moreover, Rule 26(a)(2) requires additional materials to assist and examine either at depositions or trial, such a specification of what the expert has reviewed or relied upon. The Opposition here asserts that the expert relied upon material produced in discovery. (Opposition, p. 4). What materials? The assertion that

"[experts] are both willing to share via oral testimony . . . at trial " amounts to a request that the Court allow the experts to sand bag and/or blindside Costco. (See id., p. 3.) That will not occur.

The Court further finds that at this stage of the case, three weeks from trial, there are no lesser sanctions. Eleventh hour depositions of the expert distracts from trial preparation and is an incomplete solution without reports and all that Rule 26(a)(2) requires. The Court excludes both experts. Fed. R. Civ. P. 37(c)(1); Yetti by Molly, 259 F.3d at 1105-06.

Rodriguez may well be right that exclusion here may be a "case killer." (Opposition, p. 3.) But that is the consequence of failure to disclose a report for an expert and all the other material specified in Rule 26(a)(2). Mock outrage does not obscure that facts. (See id., p. 4.)

The Motion is granted

II. Costco's Motion *in Limine* No. 2: Medical Billings.

Costco seeks an order to exclude the full amount of Rodriguez' medical billings. (Docket No. 38). Rodriguez has filed an opposition (Docket No. 40-1), and Costco has replied (Docket No. 50).

Costco contends that bills alone do not establish the monetary harm incurred or the reasonable value of the services. (Motion, p. 3, citing Howell v. Hamilton Meats & Provisions, Inc., 52 Cal, 4th 541, 556 (2011).

The Court agrees that the face amount of a bill without more is not evidence of the reasonable value of the services rendered. Corenbaum v. Lampkin 215 Cal. App. 4th 1308, 1327-28, 1330 (2013.) Payment of a specific amount or an expert opinion of reasonableness is required. Here the collateral source rule is somewhat of a red herring. It does not matter whether the amount paid was by the plaintiff or an insurer who issued a policy covering the injury and paid a specific amount.

Rodriguez cites no authority for the proposition that the face amount of a bill is relevant to other issues, such as the extent or injuries or noneconomic

damages. Indeed, she admits that there are not such authorities. (Opposition, p. 3.)

The Court excludes the face amount of all medical bills where there is no proof of payment (total or partial) and/or a medical opinion that the charges are reasonable and necessary. The Court does no exclude the text of such bills to show the extent of injury or the nature of noneconomic injury.

II. Costco's Motion *in Limine* No. 3: Hearsay Evidence.

Costco seeks an order to exclude Rodriguez' testimony that she overheard someone making a statement about chicken grease on the floor of the area where she fell. (Docket No. 39). Rodriguez has filed an opposition (Docket No. 40-2), and Costco has replied (Docket No. 49).

After she slipped and fell at the Costco store, she overhear a statement by a Costco employee telling her supervisor that there was chicken grease in the area where she fell:

> Q. Can you describe what it was that you saw?
>
> A. Yes, As I fell down, you know, I was walking normal - in a normal manner, and as I fell down, I remember the supervisor calling the young lady telling her to come and clean some grease that was on the ground, grease from the rotisserie chicken. And so at that point, you know, the girl told Mr. Felipe that there was grease all over the place from the rotisserie chicken.

(Rodriguez Depo., p. 15.)

Costco contends that the testimony should be excluded as speculation under Rule 602 of the Federal Rules of Evidence. The Court disagrees.

Rodriguez heard the colloquy between the Costco employees. That is not speculation. The young lady described the liquid as chicken grease. The point is she encountered grease as she was cleaning up the area. That is a declaration

against interest by an employee whose job was to clean up the area. Rule 801(d) provides an applicable hearsay exception:

> An Opposing Party's Statement. The statement is offered against an opposing party and:
>
> (A) was made by the party in an individual or representative capacity;
> . . .
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.

(Fed. R. Evid. 801(d)(2); emphasis supplied.) All the requirements are met.

The Motion is denied.

* * * * * * * * * * * * *

Counsel are ordered to advise the parties and all witnesses of the Court's rulings so that there are no inadvertent violations of this Order.