

## Effects of untimely CPLR 3101[d] disclosures on motion for summary judgment

By Hillary Frommer

In a recent decision in *Rivers v Birnbaum*,<sup>1</sup> the Appellate Division, Second Department, clarified whether a trial court may consider an affidavit submitted by an expert on a motion for summary judgment where the party propounding the submission did not timely provide notice of the expert pursuant to CPLR § 3101[d][1]. In that medical malpractice action, the plaintiff served the defendants with a CPLR § 3101[d][1][i] demand, but then filed the note of issue and certificate of readiness before the defendants responded thereto. Thereafter, the defendants each moved for summary judgment dismissing the complaint, and submitted affidavits from physicians-experts who had not previously been disclosed during discovery. The plaintiff opposed summary judgment arguing, in part, that the expert affidavits should be precluded because the defendants failed to timely provide notice of the expert under CPLR § 3101[d][1][i].

The trial court rejected the plaintiff's preclusion argument and the Appellate Division affirmed. It held that the fact that a party did not disclose its expert pursuant to CPLR § 3101[d][1][i] prior to the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely and divest a trial court of its discretion to review an affidavit by such expert on a motion for summary judgment.

In reaching this decision, the court first looked at the plain language of the statute and noted that it does not contain any time frame for expert disclosures. It then considered the legislative intent in drafting that provision, which, the court noted, was originally "conceived as part of a major overhaul of medical malpractice litigation procedures." The court compared sections 3101[d][1][i] and [d][1][ii], and specifically noted that section [d][1][ii] requires a party to a medical, dental or podiatric malpractice action to accept or reject an offer to disclose the name of, and to make available for deposition, the person

the party making the offer intends to call as an expert witness at trial, *within twenty days of service*. The court determined that the legislature deliberately omitted a timing requirement for the section [d][1][i] disclosure, and instead, vested the trial court with the discretion to allow the testi-

mony of an expert who was not disclosed during pretrial discovery. The court reasoned that based on the express intent to allow expert testimony at trial where notice was not given during discovery, there was no basis to conclude that an expert's submission on summary judgment should be rejected based solely on the lateness of the submission. Moreover, the court recognized the broad discretion of the trial court to supervise discovery. For instance, the court opined that the trial court may set the timing for expert disclosures and impose sanctions-such as precluding the testimony of the expert at trial and/or the submission of an affidavit on summary judgment-against a party for failing to adhere to its deadlines.

The Appellate Division then considered the court's role on summary judgment. It is well-settled in New York that a court's function on a motion for summary judgment is to determine whether there are any issues of fact for trial. Its job is not to resolve them or assess credibility.<sup>2</sup> The court concluded that precluding an expert's affidavit submitted on a motion for summary judgment based solely on a party's failure to timely disclose the expert pursuant to CPLR § [d][1][i] "does not necessarily advance the court's role of determining the existence of a triable issue of fact" and "is not consistent with the purpose and procedural poster of a motion for summary judgment."<sup>3</sup> The court further noted the particular importance of an expert's submission in the medical malpractice context: a party must submit an affidavit or affirmation from an expert in order to satisfy its



Hillary A. Frommer

burden of proof or raise an issue of fact.

Although the court stated that it was clarifying the standard, did it really? It noted that several recent decisions could reasonably be interpreted to hold that the untimeliness of an expert disclosure is a basis to preclude the expert's affidavit on a motion for summary judgment, yet the court did not go so far as to expressly overturn those decisions. For example, in *Pellechia v Partner Aviation Enterprises, Inc.*,<sup>4</sup> the Appellate Division affirmed the trial court's decision granting the defendant's motion for summary judgment and dismissing the complaint, and stated that the trial court properly rejected the plaintiff's expert affidavit because "the plaintiff never complied with any of the disclosure requirements of CPLR 3101[d][1][i], and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness."<sup>5</sup> Although the court also found that the expert failed to demonstrate that (i) he was qualified to render an opinion and, (ii) his opinions were based on accepted industry standards, its determination as to the untimeliness of the disclosure as a basis for rejecting the affidavit is quite clear. Similarly, in *Vailes v Nassau County Police Activity League, Inc., Roosevelt Unit*,<sup>6</sup> the Appellate Division held that the trial court "providently exercised its discretion in declining to consider the affidavit of the plaintiffs' purported expert, since that expert was not identified by the plaintiffs until after the note of issue and certificate of readiness had been filed attesting to the completion of discovery."<sup>7</sup>

Furthermore, *Rivers* does not discuss whether the trial court may or should consider why a party did not timely disclose the expert.<sup>8</sup> Under CPLR § 3101[d][1][i], a party is not precluded from presenting the testimony of an expert at trial where it establishes "good cause" for failing

to timely serve the expert disclosure. Thus, while the court held that the failure to timely disclose an expert prior to the filing of the note of issue and certificate of readiness alone, is not a basis to preclude the trial court from considering that expert's affidavit on a motion for summary judgment, the court seems to have left open the question of whether the trial court may reject the expert's submission on the motion where the party propounding the submission failed to establish good cause for its untimely expert disclosure.

*Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.*

1 2012 NY Slip Op 06935 [2d Dept 2012].

2 See *Kriz v Schum*, 75 NY2d 25 [1989]; *Capelin Assoc., Inc. v Globe Manufacturing Corp.*, 34 NY2d 338 [1974];

3 *Rivers* supra.

4 80 AD3d 740, 741 [2d Dept 2011].

5 *Id.*

6 72 AD3d 804, 805 [2d Dept 2010]; see also *Ehrenberg v Starbucks Coffee Company*, 82 AD3d 829 [2d Dept 2011].

7 *Id.*

8 Although the court implied that *Pellechia* and *Vailes* address the failure to provide good cause, in fact, neither decision addresses that question.