

I

Facts and Travel

The underlying factual background of this litigation stems from the construction of the Sakonnet River Bridge (the Bridge). Cardi was the general contractor for the construction of the Bridge. Franklin D. Raposa (Plaintiff) lives in Tiverton, Rhode Island, and, after the construction of the Bridge, he began to experience flooding on his property. On May 1, 2014, Plaintiff filed an action in the Newport County Superior Court alleging that Cardi negligently installed the drainage system for the Bridge and that, as a result, Plaintiff's home and yard have been periodically flooded with water from the negligently-installed drainage system.

Thereafter, on September 14, 2015, Cardi filed a Third-Party Complaint against Commonwealth seeking contribution and indemnification. In it, Cardi claimed that because Commonwealth designed the Bridge it was responsible for any defect relating to the Bridge, including the drainage system that Plaintiff complained of. In response, Commonwealth denied any negligence or wrongdoing.

On November 4, 2015, Commonwealth filed a Motion for Expert Disclosure and Entry of a Scheduling Order. Commonwealth filed the aforementioned Motion because the Third-Party Complaint sounded in professional malpractice, but it was yet to receive any expert discovery or disclosures from Cardi. The Motion came before the Court on December 7, 2015 and—over Cardi's objection—was granted. Accordingly, the Court entered an Order providing that Cardi had sixty days from the date of the hearing or, put another way, until February 16, 2016, to disclose its expert or experts. Commonwealth received the subject disclosure on February 18, 2016, although the disclosure was dated February 16, 2016.

In the disclosure, Cardi identified Michael J. Tuttman, P.E. (Tuttman) as its expert witness to testify regarding the applicable standard of care and Commonwealth's alleged deviation therefrom. Cardi further stated that it expected Tuttman to testify "with regard to the adequacies [or] inadequacies in the design of the Sakonnet River Bridge and the appropriate standard to which Cardi Corporation is to be held in performing the construction thereof."¹ Cardi's Expert Disclosure, 2. However, the disclosure also noted that "Mr. Tuttman has not completed his assessment or formulated his opinion to a degree of finally." Id. In total, the portion of the disclosure that related to Tuttman's expected testimony and opinions consisted of six short paragraphs, or roughly one typed page.

On February 25, 2016, Commonwealth filed a motion to strike Cardi's expert disclosure as being entirely devoid of any opinion of Tuttman which could conceivably support a claim of negligence against Commonwealth. As Commonwealth believed the disclosure made by Cardi was insufficient to comply with the Court's December 16, 2015 Order, it asked that the disclosure be stricken. Cardi did not file an objection to the motion to strike and, at oral arguments, it could not give a reason as to why the disclosure was late or why it was so lacking in substance. On March 7, 2016, after hearing oral arguments from the parties, the Court indicated that it would issue a written Decision.

II

Standard of Review

Rule 37(b)(2) of the Superior Court Rules of Civil Procedure "provides the court with a variety of sanctions that may be imposed on a party who has failed to comply with an order to provide discovery." Flanagan v. Blair, 882 A.2d 569, 572-73 (R.I. 2005). "The decision to

¹ Notably, Commonwealth is not mentioned once in the disclosure.

impose a particular sanction is within the sound discretion of the trial court.” Int’l Depository, Inc. v. State, 603 A.2d 1119, 1124 (R.I. 1992). “The trial justice selects the sanction he or she believes is ‘[the] most appropriate [one] for the situation in question.’” Id. (quoting Margadonna v. Otis Elevator Co., 542 A.2d 232, 233 (R.I. 1988)). “One of the sanctions that is available to the court in appropriate circumstances is the preclusion of a party’s expert witness from testifying at trial.” Malinou v. Miriam Hosp., 24 A.3d 497, 506 (R.I. 2011) (footnote omitted) (citing Rule 37(b)(2)(B)). “The imposition of sanctions under Rule 37 will be overturned only upon a showing of an abuse of discretion by the trial justice.” Goulet v. OfficeMax, Inc., 843 A.2d 494, 496 (R.I. 2004) (mem.).

III

Analysis

Rule 26(b)(4)(A) of the Superior Court Rules of Civil Procedure provides that:

“A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” (Emphasis supplied.)

Clearly, Super. R. Civ. P. 26(b)(4)(A) requires a party to set forth not only the identity, qualifications, and general subject matter to which the expert will testify, but also a more in depth description of the expert’s opinions and a summary of the grounds for those opinions.² This is done to prevent surprise, allow a party to prepare to depose the opposing expert, and to allow litigants to retain their own experts to possibly dispute the opposing party’s expert.

² “In depth” in this regard is not intended to signal that the Court is seeking a highly detailed report from the disclosing party, but rather only that it is “in depth” as compared to the other—more simple—requirements of Super. R. Civ. P. 26(b)(4)(A).

While the parties are generally free to set their own schedule with regard to expert disclosures, the Court is also empowered to, upon motion, issue “an order establishing a schedule of such interrogatories, responses, and depositions.” Id. In the matter at hand, the Court issued such an Order on December 16, 2015 requiring Cardi to disclose its experts on or before February 16, 2016.

On February 18, 2016, Commonwealth received the ordered disclosure from Cardi. That disclosure, as highlighted by Commonwealth’s present motion, did not satisfy even the minimum requirements of Super. R. Civ. P. 26(b)(4)(A). Not only did it fail to set forth the “opinions to which the expert is expected to testify and a summary of the grounds for each opinion,” but it admitted that the expert was yet to formulate an opinion. Id.

Such a disclosure leaves the party on the receiving end wholly unable to further prepare for trial by either preparing to depose the expert or hiring an expert of its own to refute its opponent’s expert. Here, the disclosure only offered conclusory statements regarding what it believed Tuttman would ultimately opine. These unsubstantiated statements afforded Commonwealth no insight as to Tuttman’s grounds for his opinions or what those opinions may in fact be. See Kerlinsky v. Sandoz Inc., 783 F. Supp. 2d 236, 241 (D. Mass. 2011) (conclusory statements and failure to indicate the facts relied on in reaching an ultimate opinion leave an expert’s disclosure subject to a motion to strike). Cardi’s disclosure, “even if taken at face value, did not by any stretch of the most fertile imagination meet the criteria set by the Civil Rules for expert witness [disclosures].” Santiago-Diaz v. Laboratorio Clinico Y De Referencia Del Este, 456 F.3d 272, 274 (1st Cir. 2006) (affirming the district judge’s decision to strike an expert report where the disclosing party merely provided a one-page, conclusory statement and

the expert's curriculum vitae).³ Therefore, the Court finds that Cardi's disclosure was not substantively compliant with either Super. R. Civ. P. 26(b)(4)(A) or the Court's December 16, 2015 Order.

Additionally, Cardi's disclosure was untimely.⁴ The Court's Order explicitly gave Cardi until February 16, 2016 to disclose its experts to Commonwealth, but that disclosure was not received until February 18. Where a party fails to abide by a court order, this Court has broad discretion in determining whether to sanction the violation. Flanagan, 882 A.2d at 572–73; Goulet, 843 A.2d at 496. What's more, when the Court questioned counsel for Cardi at the hearing regarding why he had not complied in time or substance with the Order, he could provide no justification for the deficiencies. As other courts have similarly reasoned, such unexcused noncompliance leaves the subject disclosure vulnerable to sanction by the court. See Scott v. D.C., 246 F.R.D. 49, 51 (D.D.C. 2007) (noting that mistake, inadvertence, or excusable neglect in failing to adhere to a discovery deadline will not immunize a party's actions from sanction). In sum, the Court believes that Cardi's disclosure was neither timely under the rules nor was that tardiness excused.

In sum, the Court finds that Cardi's disclosure wholly failed to satisfy the requirements of Super. R. Civ. P. 26(b)(4)(A), and, by failing to do so, it was also noncompliant with this Court's

³ Despite these cases being federal jurisprudence, Rhode Island courts "often look to federal courts' decisions for guidance and interpretation." O'Connor v. Newport Hosp., 111 A.3d 317, 323 n.5 (R.I. 2015). Those courts' abhorrence towards the conclusory statements of experts, under the federal rules, is consistent with the intent of Super. R. Civ. P. 26(b)(4)(A) and, accordingly, supports this Court's reliance on them as persuasive authority.

⁴ Super. R. Civ. P. 6(d) gives a party required to do an act within a specified amount of time an additional day after service to complete the task, if by mail. Pursuant to Super. R. Civ. P. 5(b), and assuming the present disclosure was to be mailed, it was served on February 16, 2016 and Cardi then had an additional day to comply and get the disclosure to Commonwealth. However, the subject disclosure was not received until February 18, 2016, and it was therefore ultimately untimely.

scheduling Order. Additionally, the disclosure was untimely and, therefore, it was similarly noncompliant with the Court's Order. Consequently, the Court will grant Commonwealth's motion and strike Tuttman's expert report.

IV

Conclusion

Given Cardi's unexcused noncompliance with the Court's December 16, 2015 Order, and based on the reasoning set forth in further detail above, Commonwealth's motion to strike Cardi's expert disclosure is granted. Counsel shall confer and submit an appropriate order that is consistent with this Decision.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Raposa v. Cardi Corporation, et al.**

CASE NO: **NC-2014-0177**

COURT: **Newport County Superior Court**

DATE DECISION FILED: **March 18, 2016**

JUSTICE/MAGISTRATE: **Stone, J.**

ATTORNEYS:

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