

Miller v Lewis
2013 NY Slip Op 33912(U)
December 4, 2013
Sup Ct, Kings County
Docket Number: 11358/09
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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SHIRLEY MILLER, by YEHUDA MILLER and
MALKA MILLER, Guardians of the Person and
Property of SHIRLEY MILLER Pursuant to the
Laws of the State of Israel,

Plaintiffs,

Decision and order

- against -

Index No. 11358/09

HENRY F. LEWIS, DUANE READE SHAREHOLDERS,
LLC, DUANE READE INC., & DUANE READE
GENERAL PARTNERSHIP,

Defendants,

December 4, 2013

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to enforce a stipulation entered into between the parties during the first trial. Specifically, during that trial the defendant stipulated to the admission of a notice pursuant to CPLR §3101(d) concerning the proposed expert testimony of Dr. Tack Lam. The plaintiff seeks to once again introduce the notice based upon the prior stipulation. The defendants object arguing that any stipulation made at the previous trial does not automatically bind the parties in similar fashion at this trial. Further, the defendants assert that they are not again stipulating to the admission of that notice and consequently the notice may not be admitted. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Recently, the Supreme Court in Standard Fire Insurance

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Company v. Knowles, __US__, 133 S.Ct 1345, 185 L.Ed2d 439 [2013] reiterated that generally a stipulation is an "express waiver made ... by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact" and that a stipulation is "not subject to subsequent variation" (id). However, the term 'stipulation' is broad indeed and applying a single definition to multiple strands of this evidentiary expedient would improperly narrow or expand its scope depending on the facts and circumstances of each case. Thus, some stipulations are made to relieve a party of the necessity of calling witnesses and proving facts that can be accomplished with greater ease and convenience (Davies v. Lynch, 4 AD2d 1008, 167 NYS2d 849 [4th Dept., 1957]). Other stipulations are conclusory and not evidentiary in nature (see, Waldorf v. Shura, 142 F3d 601 [3rd Cir. 1998]). The precise parameters of these stipulations will be explored presently, however, whether stipulations agreed upon at a first trial are binding in a subsequent trial will depend on the particular type of stipulation in question.

Thus, in New York it has long been held that stipulations pertaining to evidentiary facts, agreed upon by the parties at the first trial, are binding in a subsequent trial as well (see, Clason v. Baldwin, 152 NY 204, 46 NE 322 [1897]). Thus, in Pencon Systems v. Shapiro, 237 AD2d 144, 658 NYS2d 258 [1st Dept., 1997] the court held that documents were properly admitted

as business records upon a retrial. In addition, concerning the evidentiary nature of the documents the court concluded that "moreover, the stipulation for the admission of such records, entered into by defendant, at the prior trial, continued to be binding upon defendant at the retrial" (id). The rationale supporting this principle is compelling. Stipulations concerning facts or evidence agreed upon to efficiently and swiftly admit evidence (see, e.g. People v. Aratice, 111 Misc2d 1015, 445 NYS2d 951 [Supreme Court, New York County 1981], Matter of Bray v. Marsolaie, 21 AD3d 1143, 801 NYS2d 84 [3rd Dept., 2005] concern matters that are generally static, involve little if any complex strategy or tactics and can rarely result in surprise or unfair advantage. Thus, a stipulation by a criminal defendant that substances recovered by the police were in fact cocaine (see, People v. Brown, 175 AD2d 210, 572 NYS2d 349 [2d Dept., 1991]) would surely be admissible in any subsequent trial or proceeding. The factual nature of the stipulation, the continuing application of its truth and relevance and the absence of any potential surprise or prejudice would allow its introduction at any trial.

Concerning conclusory stipulations, however, a different standard emerges. These stipulations are agreed upon not merely to obviate expending efforts to introduce evidence but for other specific reasons that may arise during a particular trial. These stipulations involve particular considerations that thus touch

upon particularized trial strategy, tactics, how best to present certain information to the jury and how best to direct the flow of such evidence. These demands necessarily can only apply to the trial in which the stipulation occurs. A few cases will highlight various applications of these principles.

The case of Hunt v. Marchetti, 824 F2d 916 [11th Cir. 1987] is instructive. In that case a newspaper, Liberty Lobby, wrote an article that the CIA sought to implicate the plaintiff, Hunt, in the assassination of President Kennedy in Dallas, Texas on November 22, 1963. Hunt sued the newspaper alleging libel. At the trial the newspaper's attorney stated during opening arguments that "we are not going to come forward and try to prove that Mr. Hunt was involved in the Kennedy assassination.... [T]here is no question in my mind that he was not involved. There is no question in the minds of the people at Liberty Lobby" (id). Further, the attorney stated on the record that he 'stipulated' during opening arguments that the newspaper would not prove Hunt was in Dallas that day. The jury returned a verdict for Hunt but that verdict was vacated on appeal. At the second trial the newspaper made a motion arguing they were not bound by the stipulation of the first trial and Hunt moved seeking to prevent the newspaper from withdrawing the stipulation. The court permitted the newspaper to withdraw the previous stipulation and a verdict was reached in favor of the newspaper. On appeal, Hunt

argued that the stipulation made by the newspaper consisted of the fact that Hunt was not in Dallas on the day of the assassination and that such factual stipulation was binding during the second trial as well. However, the court disagreed. The court held that the statements were "more accurately viewed as a stipulation that the question of Hunt's alleged involvement in the assassination would not be contested at trial. They thus served merely to narrow the factual issues in dispute" (*id.*). Since the purpose was "limited" the court held it was not meant to apply at any subsequent trial. In other words, the statements in opening arguments were not stipulations of fact rather they were stipulations that certain facts would not be contested at trial. While the distinction is subtle it is crucial.

Morrison Knudsen Corp., v. Ground Improvement Techniques, Inc., 532 F3d 1063 (10th Cir. 2008) further illuminates the application of conclusory stipulations. Morrison concerned a lawsuit where a general contractor, MK, terminated a subcontractor's contract, GIT, based on alleged default. GIT counterclaimed based upon wrongful termination. At trial both parties stipulated that if GIT were to prevail the prejudgment interest would begin as of the date of the termination. The first trial was vacated and a second trial was held on the issue of damages. At that trial GIT sought to enforce the stipulation from the first trial and the district court agreed. However, the

Court of Appeals reversed in part. It held that after the parties agreed to the stipulation other events took place between GIT and its subcontractors that could not have reasonably been foreseen by MK. Therefore, enforcing the stipulation for amounts of money owed as of a date that no longer really made sense and would never have been stipulated if the facts would have been known was termed "manifestly unjust" (*id.*).

While factually different these cases share similar results regarding conclusory stipulations and highlight that a more nuanced analysis must be employed to determine whether they are binding in a subsequent trial. Therefore, stipulations entered into for tactical or trial strategy reasons (*Hunt, supra*) or for reasons that have been superseded by unforeseeable events (*Morrison, supra*) cannot bind the party in a subsequent trial.

In this case the stipulation sought to be enforced concerns the admission of defendant's CPLR §3101(d) notice. There is no dispute that without a stipulation the notice would be inadmissible at trial. That stipulation, however, was clearly not made to permit the easy introduction of uncontested evidence. In fact, a review of the trial record of the previous trial on February 21, 2012 demonstrates that the notice was stipulated by the parties as part of a bargain whereby another discovery document was stipulated and then admitted into evidence. That other document concerned a discovery request of Shirley Miller's

cell phone records. This 'agreement' between the parties, stipulating to the admission of one document only if another document was admitted clarifies the limited scope intended by the stipulation. Furthermore, at oral argument regarding this motion both plaintiff and defendant highlighted the tactical nature of the stipulations at the first trial (Plaintiff's counsel: "with the cell phone records of Shirley Miller, I objected to them over numerous, numerous times and tactically in the end and in front of the jury, I ended up not objecting as a business record that they come in" page 706, and defense counsel: "the admissibility of items to the extent that the lawyers agreed in some respect to allow certain things in for tactical reasons and have since changed their position..." page 709). This additionally supports the conclusion that a limited agreement, applicable to the specific trial at the time was contemplated (see, Vasquez v. Poole, 331 FSupp2d 145 [EDNY 2004]). Moreover, the agreement and the stipulations entered in the previous trial followed extensive questioning of Mr. Lewis based upon the opening statements of defense counsel. However, two significant legal determinations since that date undermine the applicability of the stipulations at this trial. First, the court has prohibited impeachment of Henry Lewis with the opening statements of counsel. Second, Shirley Miller's cell phone records have been limited to only circumstantial evidence of cell phone use. These rulings, and

other factors, have changed the posture and tenor and strategies of this second trial. All the factors, evidence, preparations, theories, strategies and tactics employed at the first trial are simply inapplicable in light of the many changes that have since taken place. Of course, the core case remains the same but so many crucial and ancillary realities that were true in the first trial are no longer pertinent. This presents a third reason why the stipulations in question at the first trial cannot bind the parties at this trial.

The plaintiff argues that in the previous trial defense counsel and Mr. Lewis offered different explanations how the accident occurred. Indeed, the §3101(d) notice was intended to bolster that discrepancy by highlighting what counsel believed, and what experts hired by counsel would offer, as the cause of the accident. Regardless of the underlying reason for defense counsel's previous position, to the extent they still maintain that position, its introduction would potentially serve two purposes. First, it would impeach Henry Lewis' testimony and second, it would expose defense counsel to changing theories of liability, and possible further changes yet again, in contrast to Mr. Lewis' steadfast consistency. However, even if true, those are improper avenues of exploration.

First, this court has already barred impeachment of Henry Lewis based upon statements of counsel. While that decision

concerned opening statements its reasoning applies to any statements of counsel even statements contained in a CPLR §3101(d) notice. As explained in that decision, Henry Lewis' counsel cannot be considered an agent of Lewis thus binding Lewis to statements of counsel where the statements of counsel and the statements of Lewis are expressly at odds with each other. Moreover, the notice would serve to impugn the credibility of defense counsel. However, such evidence is not relevant. The theories of counsel, even as fluid as alleged, have no bearing upon the facts of this case. The evidence defense counsel sought to prove or the reasons they sought to prove it or the changes in theories they have presented do not concern any participant in the accident, as broadly as can be defined, and therefore does not assist the jury in any significant way. This especially true since Henry Lewis has never wavered from his description of how the accident happened. Whether defense counsel agrees with Mr. Lewis now or did or did not agree with him at some point during the course of this litigation does not impeach the credibility of Mr. Lewis in any way. Rather, as noted, its introduction would only tend to impeach the credibility of defense counsel and is improper.

To the extent during the course of the trial the introduction of any further evidence, depending on its content, will require the court to revisit these issues, an appropriate

motion can be made at that time.

However, at this juncture, the motion seeking to enforce the stipulation entered between the parties during the previous trial is consequently denied.

So ordered.

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DATED: December 4, 2013
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

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