

Miller v Lewis

2014 NY Slip Op 33526(U)

February 5, 2014

Supreme Court, Kings County

Docket Number: 113585/09

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

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,

February 5, 2014

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to subpoena two experts retained by the defendants, namely Dr. Tack Lam and Steven Schorr. The defendants have opposed the motion on the grounds the plaintiff may not properly subpoena them. The background concerning this motion is as follows: The plaintiff moved seeking a unified trial on the grounds the medical evidence concerning damages would necessarily be utilized to prove liability in this unwitnessed accident. Specifically, the plaintiff alleges she was struck by the front of defendant's truck at the intersection of 9th Avenue and West 48th Street on December 19, 2008 and the medical evidence of her injuries will support the contentions as to the precise location of where she was struck. In opposing that motion defendants presented expert disclosures of Dr. Lam and Mr. Schorr. Those disclosures stated that if the experts were called they would offer testimony that indeed the plaintiff was struck by the front of the defendant's

truck. Thus, there was no need for a unified trial since in any event all parties agreed how the accident occurred. The standard questions of negligence and contributory negligence, if any, argued defendants did not necessitate a unified trial. The motion seeking a unified trial was granted and during the course of Henry Lewis' testimony he testified that he did not see the plaintiff in front of the truck and that she was hit by a rear wheel. The plaintiff has now moved seeking to subpoena those experts and to call them as witnesses at trial in the event the defendants do not call them. The plaintiff argues these experts have prepared reports that are contrary to the testimony of Henry Lewis and this inconsistency should be presented to the jury. The defendants counter the experts have been retained by the them and these subpoenas and subsequent testimony is improper.

Conclusions of Law

In Guiliano v. Levy, 24 AD2d 591, 262 NYS2d 372 [2d Dept., 1965] the court held that it was improper for a plaintiff to call, as a direct witness, an expert retained by the defendant. As the court observed the plaintiff's use of a defense expert "constituted a basically improper trial tactic. It enabled plaintiff to turn unfairly to his advantage the opinion of an expert for the defense who had already been engaged by his adversaries and had reported to them, though plaintiff himself

lacked no expert testimony in proof of his own cause of action" (id). That conclusion was criticized in Carrasquillo v. Rothschild, 110 Misc2d 758, 443 NYS2d 113 [Supreme Court Bronx County 1981] where the court urged a "re-examination" of this issue. Specifically, the court noted that "the testimony of a witness, particularly an expert, should be totally unaffected by the question of which party to the litigation retains that expert. An expert belongs to no one" (id). The court further stated that "the trier of fact is entitled to all available information so as to be in a position to make a reasoned, intelligent judgment. If, for example, two experts (retained by opposing parties) are in agreement, should this information be kept from the trier of facts because of a highly dubious concept of ethics?" (Id). In a footnote the court further argued that adherence to Gugliano (supra) and similar holdings could lead to "injustice" (id).

Indeed, in Gilly v. City of New York, 69 NY2d 509, 516 NYS2d 166 [1987] the Court of Appeals relaxed the constraints placed upon litigants seeking to call experts retained by the opposing party. In Gilly the plaintiff was a passenger on a boat and was injured when the boat struck a seawall. The defendant retained Dr. John Edson who examined the plaintiff and issued a report wherein he could not refute that plaintiff's condition was caused by the accident. The plaintiff sought the testimony of Dr.

Edson, however, the trial court refused the request and the Appellate Division affirmed the judgement. Upon appeal, the Court of Appeals reversed. The court explained that "a physician in the position of Dr. Edson, who has examined the plaintiff, formulated his findings and had them conveyed to both parties in litigation, should not be barred from relating the substance of his report when called as a witness by plaintiff" (id). The court further stated that "once a physician's report has been reduced to writing and served on the adversary, it ceases to be for the exclusive use of defendant. At that point both sides have access to this probative evidence and there is no basis for withholding it from the trier of fact" (id).

Thus, following Gilly, only one Appellate court has favorably cited Guigliano and that Fourth Department case cannot control the outcome here (see, County of Onondaga v. Hiawatha Plaza Associates, 195 AD2d 1009, 600 NYS2d 573 [4th Dept., 1993]). Thus, there is no rule prohibiting the plaintiff from calling the experts retained by the defendants.

The cases cited by defendants, namely Morgan v. New York City Transit Authority, 24 AD3d 639, 808 NYS2d 388 [2d Dept., 2005] and Metropolitan New York Coordinating Counsel on Jewish Poverty v. FGP Bush Term, 1 AD3d 168, 768 NYS2d 190 [1st Dept., 2003] do not demand a contrary result. Those cases merely hold that an expert cannot be compelled to offer expert testimony.

Thus, while it is true that the experts cannot be called to offer expert testimony, without their consent, they can be called and may be asked about reports they have already prepared, the substance of which has already been furnished to the plaintiff (see, Gilly, supra).

The defendants further argue that in any event subpoena's for experts are only proper upon a showing of special circumstances. While the requirement for special circumstances has been largely abrogated, it is still retained in certain instances including subpoena's regarding experts (see, Kooper v. Kooper, 74 AD3d 6, 901 NYS2d 312 [2d Dept., 2010]). However, the requirement demonstrating 'special circumstances' originally only concerned a showing whether the witness would appear for trial. In Town of Hancock v. First National Bank of Oxford, 93 NY 82, 48 Sickels 82 [1883] the court explained that special circumstances "evidently mean such as will make the presence and evidence of the witness at the trial doubtful and uncertain, and relate to his personal condition and purposes as bearing upon the probability of his future attendance" (id). Thus, the special circumstances requirement did not touch upon the value or nature of the proposed testimony but rather the mere availability of the witness for trial. A showing of special circumstances allowed securing the participation of the witness in advance should such unavailability materialize. Therefore, special circumstances

need not be demonstrated where the witness is sought only for trial testimony. A framework that allows a party to call as a witness an expert retained by the opposing side (Gilly) but requires a showing of special circumstances to conduct discovery of such expert requires further elaboration. As Federal Judge Joseph McLaughlin observed "it is certainly an interesting notion that an expert may be subjected to a trial subpoena, but not to a discovery subpoena" (see, Discovery and Admissibility of Expert Testimony, Notre Dame Law Review [1988]). In any event since plaintiff primarily seeks to call these experts as trial witnesses, this anomaly need not be resolved.

Clearly, there is no legal prohibition preventing the plaintiff from calling the experts retained by the defendants.

Turning to the practical applications of those rules to this case, the testimony of both Dr. Lam and Mr. Schorr as represented by the defendants in prior motion practice will support the plaintiff's theory that the plaintiff was hit by the front of the truck driven by Henry Lewis. Thus, the plaintiff seeks to call Dr. Lam and Mr. Schorr for two distinct purposes. The first is to "show that plaintiff was struck by the front of defendants' truck while in the crosswalk" (Plaintiff's Motion, page 11). Additionally, plaintiff seeks to inform the jury, through their testimony, that "defendant's believe, and have stated, that their proof establishes something different from what they have claimed

thus far at trial" (id).

The first stated goal seeking their testimony to support the contention the plaintiff was struck by the front of the truck is cumulative of expert testimony and evidence already presented in the case and is denied on that basis (Xanboo, Inc., v. Ring, 40 AD3d 1081, 836 NYS2d 690 [2d Dept., 2007]).

The second stated goal, introducing the experts to highlight the inconsistencies of defendant's positions at trial is based upon the doctrine of estoppel against inconsistent positions (see, Davis v. Wakelee, 156 US 680, 15 S.Ct 555, 39 L.Ed 578 [1895]). In that case the Court established that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him" (id). This doctrine is rooted in the preservation of the Courts and integrity of the judicial system by preventing gamesmanship and arguing contrary positions (Teledyne Industries v. N.L.R.B., 911 F2d 1214 [6th Cir. 1990]). Therefore, the doctrine only applies where the court has made a determination based upon a party's position which the party now seeks to contradict. The doctrine does not prevent a party from contradicting himself or herself.

In this case there has been no determination made by the

court, based upon a position asserted by the defendants, which they now seek to contradict. To the extent the court held the case should be unified for trial, such determination was against the position argued by the defendants. Rather, the plaintiff seeks to demonstrate that the defendants presented expert evidence during the progression of the case that concluded the plaintiff was indeed hit by the front of the truck and that those conclusions were contrary to the testimony of Henry Lewis. There is no mechanism by which that testimony could be introduced during plaintiff's case in chief.

However, in Marshall v. Davies, 78 NY 414, 33 Sickels 414 [1879] the court held that rebuttal evidence is proper where such evidence is offered "in denial of some affirmative fact which the answering party has endeavored to prove" (id). The utilization of such rebuttal evidence is proper where one party seeks to call an expert retained by the other party (see, Matter of the State of New York v. Hall, 96 AD3d 1450, 947 NYS2d 856 [4th Dept., 2012]).

Therefore, if the defendants, the 'answering party' present any expert testimony seeking to establish and prove that the plaintiff was not struck by the front of the truck then the plaintiff may subpoena Dr. Lam and Mr. Schorr to rebut those conclusions.

The court will execute any subpoenas presented pursuant to

the Uniform Interstate Depositions and Discovery Act in
furtherance of this decision.

So Ordered.

ENTER:

DATED: February 5, 2014
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC



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