

Genger v Genger

2015 NY Slip Op 30036(U)

January 15, 2015

Supreme Court, New York County

Docket Number: 100697/2008

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----x
ORLY GENGER,

Plaintiff,

Index No. 100697/2008

Motion seq. nos. 31, 34

-against-

DECISION & ORDER

SAGI GENGER,

Defendant.

-----x
BARBARA JAFFE, JSC:

For plaintiff:

Yoav M. Griver, Esq.
Tracee Davis, Esq.
Brian D. Leinbach, Esq.
Zeichner, Ellman & Krause, LLP
1211 Avenue of the Americas
New York, NY 10036
212-753-0396

For defendant:

John Dellaportas, Esq.
Nicholas Schretzman, Esq.
Nancy C. Pennisi, Esq.
Morgan Lewis & Bockius LLP
101 Park Ave.
New York, NY 10178
212-309-6000

This decision addresses the parties' motions *in limine* (seq. no. 31, 31x) and a motion for an order quashing a subpoena *duces tecum* (seq. no. 34), argued and submitted in advance of a bench trial to be held before me on January 27, 2015.

By notice of motion, plaintiff moves for an order precluding defendant from calling as a witness attorney Robert A. Meister. Defendant cross moves for an order precluding plaintiff from calling as a witness attorney Lance Harris. On January 13, 2015, at oral argument of these motions, the parties agreed that as plaintiff did not intend to call Harris to testify about settlement negotiations in another action between these parties in a different court, defendant has no need to call Meister in rebuttal. Consequently, plaintiff's motion is deemed withdrawn.

Defendant cross moves for an order precluding plaintiff from calling attorney Harris as a witness, on the ground that Harris played no role in the events in issue here and thus would not be testifying from his own personal knowledge. Plaintiff maintains that as Harris represented her

at the time of the events in issue at this prospective trial, and given her understanding that he will testify from his own personal knowledge as to those events, his testimony is properly elicited.

There does not appear to be any real dispute as to Harris's personal knowledge.

As the balance of defendant's argument for precluding Harris from testifying depends in large measure on the merit of plaintiff's motion to quash, I first address the motion to quash.

Defense counsel accuses Harris of having filed a potentially and feloniously perjurious declaration in the other, federal, matter, and has subpoenaed the telephone logs of plaintiff's counsel's firm to prove it. He contends that Harris, in a declaration filed with that court, affirmed under penalty of perjury that he had had several telephone conversations with defense counsel about that matter and within a certain time frame. Defense counsel claims that the logs will establish that the two carried on only one telephone conversation during that period, and that the duration of that one conversation precludes a conversation encompassing the substance alleged by Harris in his declaration. Thus, the alleged perjury.

It is well settled that "the cross-examiner is bound by the answers of the witness to questions on collateral matters inquired into solely to affect credibility." (Prince, Richardson on Evidence § 6-305 [Farrell 11th ed]; 5 NY Prac, Evidence in New York State and Federal Courts § 6:59 [2014]). Consequently, no extrinsic evidence may be used to refute the witness on collateral matters, that is, matters solely affecting the witness' credibility. (*Id.*).

Here, defendant concedes that the sole purpose of the logs is to prove that Harris is not credible because he lied when he affirmed that he and defense counsel had several telephone conversations. As the logs constitute extrinsic evidence that defendant seeks to use in order to prove the collateral matter of Harris's credibility, an objection to that use would be sustained at trial if attempted. (*See People v Inniss*, 83 NY2d 653, 658 [1994] [evidence of witness' perjury

for purpose of impeaching credibility barred by collateral impeachment rule]; *Badr v Hogan*, 75 NY2d 629 [1990] [court erred in admitting extrinsic proof for sole purpose of contradicting plaintiff's denial on collateral issue; plaintiff's alleged prior misconduct had no bearing on any issue other than credibility and if proven, would show only that plaintiff had acted deceitfully on prior unrelated occasion, and thus matter was collateral and could not be pursued by cross-examiner with extrinsic evidence]; *People v Parsons*, 6 AD3d 364, 365 [1st Dept 2004] [detective's alleged perjury, subsequent and unrelated to defendant's trial, not material and merely tended to impeach detective's general credibility; motion to vacate judgment based thereon properly denied]).

Absent a valid evidentiary basis for the logs, they are not discoverable. (*See Crowe v Kelly*, 38 AD3d 435 [1st Dept 2007], *lv denied* 9 NY3d 801 [while some documents in disciplinary records of officers reflected on their trustworthiness, documents had no direct bearing on any issue in case other than credibility, and thus as their sole use would be as extrinsic evidence to impeach credibility, production of documents barred by collateral evidence rule]; *Lichtman v Gibbons*, 30 AD3d 319 [1st Dept 2006] [plaintiff's motion to compel disclosure of defendant's tax returns denied; even if defendant made false statements therein, extrinsic evidence may not be used to impeach credibility on collateral issue]; *see also Coventry Real Estate Advisors, LLC v Dev. Diversified Realty Corp.*, 85 AD3d 450 [1st Dept 2011] [court properly denied motion for issuance of commissions for out-of-state depositions as topic of depositions was uncharged crimes of witnesses, and if defense witness denied uncharged crime, plaintiffs not allowed to use extrinsic evidence to impeach credibility]; *Manzo v Westchester Rockland Newspapers, Inc.*, 106 AD2d 492 [2d Dept 1984] [plaintiff's motion to strike interrogatories granted as they requested plaintiff to disclose acts of misconduct unrelated to

case, and thus could not be proved by extrinsic evidence at trial to impeach credibility]).

Defendant also argues that as the attorney for plaintiff, Harris is her agent and his misconduct is imputed to her. While the general principle of agency law that a principal is liable for the torts of his agent applies to the attorney-client relationship (*Poucher v Blanchard*, 86 NY 256 [1881]; *Carolco Pictures Inc. v Sirota*, 700 F Supp 169, 172 [SD NY 1988]), defendant's inability to impeach Harris's credibility by extrinsic evidence poses the same obstacle to proving it as against plaintiff (*see eg Badr*, 75 NY2d 629 [defendant could not impeach plaintiff's credibility on collateral matter through use of extrinsic evidence]). Otherwise, defendant would be permitted to accomplish indirectly, what he cannot do directly.

Consequently, there is no legal basis for precluding Harris from testifying based on the telephone logs. Counsel's assertion that Harris lied during the course of settlement negotiations held in the instant matter also provides no ground for precluding Harris from testifying.

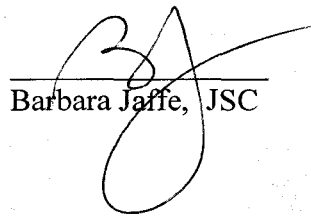
Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order precluding defendant from calling Robert Meister as a witness at trial is denied as withdrawn; it is further

ORDERED, that defendant's motion for an order precluding plaintiff from calling Lance Harris as a witness at trial is denied; and it is further

ORDERED, that plaintiff's motion for an order quashing the subpoena duces tecum calling for the production of the telephone records of Zeichner, Ellman & Krause LLP is granted.

ENTER:


Barbara Jaffe, JSC

DATED: January 15, 2015
New York, New York