Faber v Binghamton Giant Mkts., Inc.
2015 NY Slip Op 31429(U)
June 3, 2015
Supreme Court, Broome County
Docket Number: 2010-1170
Judge: Jeffrey A. Tait
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 29th day of May 2015.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

Nicoline Faber on behalf of Danielle Faber, an infant,

Plaintiff,

vs.

Binghamton Giant Markets, Inc. and A. L. George, LLC,

Defendants.

DECISION AND ORDER

Index No. 2010-1170
RJI No. 2010-1739-C

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion of the defendant A.L. George, LLC (A.L. George) seeking to quash two subpoenas served by the plaintiff Nicoline Faber on behalf of Danielle Faber. The plaintiff opposes the motion. The defendant Binghamton Giant Markets, Inc. did not submit affidavits or exhibits in opposition to or in support of the motion.

The plaintiff served two trial subpoenas in this matter. One was served on A.L. George seeking statements of John Knapp. The other was served on the non-party Farouq Al-Khalidi, M.D., a disclosed expert witness for A.L. George.

The Knapp statements

Mr. Knapp is a former employee of A.L. George. The parties all have copies of Mr. Knapp's statements. There has been much discussion regarding the statements, as well as a summary judgment motion in which the admissibility of the statements was an issue.

The Knapp statements are clearly hearsay. They are out of court statements which have evidentiary value only for the truth of the matters asserted in the statements. Neither statement is sworn and one is unsigned.

The issue raised here may be moot.

Mr. Knapp is apparently now a resident of Pennsylvania. The plaintiff's counsel has stated that Mr. Knapp was served in New York State with a subpoena to compel his testimony at trial. To provide certainty and to attempt to avoid any last minute delay if Mr. Knapp did not appear at trial, the Court suggested that a deposition of Mr. Knapp taken prior to trial could be used as trial testimony if all parties were on notice and had an opportunity to participate.

The deposition of Mr. Knapp is scheduled during the week of June 1, 2015. If that deposition occurs, then it will be that testimony which is admitted into evidence at trial.

Therefore, the motion to quash the subpoena is left open. A decision on the Knapp statements will be made if necessary, depending on what happens with respect to the anticipated deposition of Mr. Knapp the week of June 1st.

At the return date of the motion to quash, the Court made statements and expressed views regarding some of the issues in this case which will be set forth here for the sake of clarity.

First, the statements are not admissible as an admission of A.L. George. Mr. Knapp did not have speaking authority for A.L. George. The fact that A.L. George personnel asked Mr. Knapp to make a statement to them does not translate into speaking authority on behalf of A.L. George. That request was for a statement to A.L. George, not a statement to third parties on behalf of A.L. George. Based on that, his statements do not constitute an admission of A.L. George.

The cases cited by the plaintiff do stand for the proposition that information gathered by persons whose job or duty it is to do so is admissible into evidence as a business record (*Bracco v. MABSTOA*, 117 AD2d 273 [1st Dept 1986][report held admissible where prepared by dispatcher sent to the location by his employer to gather information and report it]; *Buckley v. J.A. Jones/GMO*, 38 AD3d 461 [1st Dept 2007][on a motion for summary judgment, the court inferred that a foreman was under a business duty to furnish information about an on-the-job accident and the issue of whether the foreman had a duty to report the information to the safety supervisor of another employer was unpreserved for appeal]; *Lindsay v. Academy*

Broadway Corp., 198 AD2d 641 [3d Dept 1993][police report held admissible as a business record, as the statements in it were from police officers who had a duty to report their observations to the person preparing the report]; *Georges v. Am. Export Lines*, 77 AD2d 26 [1st Dept 1980][report deemed an admission and received as such, subject to confirmation that the party making the statement was the agent of the defendant]).[1]

At this point, it is premature to determine if the statement is a business record. The issue could be moot if Mr. Knapp is deposed and his testimony is thus available for trial. If the Knapp statements are still sought to be admitted in evidence at the trial, testimony may be needed to establish whether they are business records or simply hearsay statements with no applicable exception to allow their admission in evidence.

The Al-Khalidi patient records

Dr. Al-Khalidi is the expert witness for the defendants. The plaintiff seeks records of any foot or hand surgery performed by him during the last ten years based on plaintiff's belief that Dr. Al-Khalidi is not experienced and has not conducted many foot and/or ankle surgeries in recent years. The plaintiff wants the records to evaluate and question him on his experience in ankle and foot surgery.

It is A.L. George who seeks to quash the subpoena. The plaintiff asserts that A.L. George lacks standing to challenge the subpoena.

There are several relevant factors here.

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In *Georges*, the report was prepared by the bosun – a senior member of a ship responsible for maintenance – at the request of the master, which is apparently another name for the captain.

New York provides for only limited disclosure of experts as set forth in New York Civil Practice Law and Rules 3101. The defendants have provided that disclosure.

To the extent this information would be used to impeach Dr. Al-Khalidi, it is inadmissible because extrinsic evidence is not admissible to impeach credibility on a collateral issue (*see Halloran v. Virginia Chems.*, 41 NY2d 386, 390 [1977]). A collateral matter is one that has no direct bearing on any issue in the case, other than credibility (*Crooms v. Sauer Bros. Inc.*, 48 AD3d 380, 381 [1st Dept 2008]).

The rule was aptly stated in *People v. Pavao*, 59 NY2d 282, 288-289 (1983):

> The general rule of evidence in this State concerning the impeachment of witnesses with respect to collateral matters is that "the cross-examiner is bound by the answers of the witness to questions concerning collateral matters inquired into solely to affect credibility" (Prince, Richardson on Evidence § 491 at 477 [10th ed]). It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility (citations omitted).

Here, the information is sought to show how many ankle or foot surgeries Dr. Al-Khalidi has performed in the past ten years. Certainly, the plaintiff's counsel is entitled to ask Dr. Al-Khalidi how many foot and ankle surgeries he has performed in the last ten years. However, any effort to use patient records to challenge his answer would be solely for impeaching his credibility on a collateral issue.

To the extent the plaintiff asserts the information is not collateral because it goes to Dr. Al-Khalidi's qualification to testify as an expert, that argument also fails. Dr. Al-Khalidi is an orthopedist. As such, even if he lacks recent experience in actual ankle or foot surgery, that would not disqualify him from testifying about an injury to the ankle or foot and the appropriate treatment for it. It would go only to the weight of his testimony, not its

admissibility (*see Bodensiek v. Schwartz*, 292 AD2d 411 [2d Dept 2002][a physician need not be a specialist in a particular area to qualify as an expert]).

In light of the foregoing, it seems evident that an orthopedist is qualified to testify concerning injuries to an ankle or foot occasioned by a slip and fall and that the plaintiff's concerns in that regard go to credibility – a collateral issue on which extrinsic evidence is not admissible. For these reasons, the motion to quash the subpoena of Dr. Al-Khalidi's records is granted.

Conclusion

The motion to quash the subpoena of Mr. Knapp's statements is held in abeyance pending Mr. Knapp's scheduled deposition and further information which may result in that portion of the motion being moot. The motion to quash the subpoena of Dr. Al-Khalidi's patient records is granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: June 3, 2015
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice