

Festa v Merola
2024 NY Slip Op 35551(U)
November 29, 2024
Supreme Court, Steuben County
Docket Number: Index No. EF2021-0531CV
Judge: Jason L. Cook
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At a Term of The Supreme Court of the
State of New York held in and for the
Seventh Judicial District, in the County of
Steuben, Bath, New York, heard on the 25th
day of November 2024

PRESENT: HON. JASON L. COOK
SUPREME COURT JUSTICE

STATE OF NEW YORK
SUPREME COURT: COUNTY OF STEUBEN

Diane M. Festa,

Plaintiff,

vs.

Sherry A. Merola, and Corning
Federal Credit Union,

Defendants.

DECISION & ORDER

INDEX#: E2021-0531CV

APPEARANCES: David H. Jacobs, Esq.
Attorney for the Plaintiff

William J. Keniry, Esq.
Attorney for Defendant Sherry A. Merola

Brian S. Gitnik, Esq.
Attorney for Defendant Corning Credit Union

Defendant Sherry A. Merola moves in limine for an Order: (1) admitting Plaintiff's admissions into evidence; (2) precluding Plaintiff from presenting evidence in contradiction of her admissions; (3) precluding Chris Stowell, Ally Payne, and the Plaintiff from providing hearsay testimony; (4) precluding Plaintiff from offering testimony from any undisclosed or unnamed witnesses; (5) instructing the jury with adverse inference charges pursuant to PJI 1:77 and supplemental charge pursuant to 1.77.1; and (6) precluding Plaintiff from offering voicemail recordings and text messages as evidence at trial.

A motion in limine is used to obtain a preliminary order before or during trial excluding the introduction or limiting the use of anticipated inadmissible, irrelevant, immaterial, and/or unduly prejudicial evidence (*Caster v. Increda-Meal, Inc.*, 238 AD2d 917 [4th Dept. 1997]; *Passino v. DeRosa*, 199 AD2d 1017, 1017 [4th Dept. 1993]; *Matter of PCK Dev. Co., LLC v.*

Assessor of Town of Ulster, 43 AD3d 539 [3rd Dept., 2007]) or precluding a party from submitting evidence in violation of some other restriction (*Matter of Murtlow*, 258 AD2d 686 [3rd Dept. 1999]).

“In New York, the general rule is that evidence is admissible unless its admission violates some exclusionary rule” (*People v Scarola*, 71 NY2d 769 [1988]). “Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence” (*id.*). Relevant evidence may be excluded from trial if “its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties” (*People v Davis*, 43 NY2d 17 [1977]). Whether to permit such evidence is a question of judicial discretion (*id.*).

1. Admit Plaintiff's admissions into evidence.

CPLR 3123 provides, in relevant part, that “a party may serve upon any other party a written request for admission by the latter ... of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry” (CPLR 3123[a]). “The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial” (*Ramcharran v. New York Airport Servs., LLC*, 108 AD3d 610 [2nd Dept. 2013] [internal quotation marks omitted]; see also *Johantgen v. Hobart Mfg. Co.*, 64 AD2d 858 [4th Dept. 1978]).

As a disclosure device, the purpose of notices to admit is to “crystallize issues” (*Hodes v City of New York*, 165 AD2d 168 [1st Dept. 1991]), and eliminate from contention factual matters which are easily provable and about which there can be no controversy. A notice to admit is not to be used as a substitute for existing discovery devices (*Voight v. Savarino Const. Corp.*, 94 AD3d 1574 [4th Dept. 2012]; *Jet One Group, Inc. v Halcyon Jet Holdings, Inc.*, 111 AD3d 890 [2nd Dept. 2013]). A notice that seeks admissions regarding facts that are within the unique knowledge of other parties or admissions about ultimate facts or facts requiring expert knowledge is not proper; such information should be obtained by using interrogatories or a deposition on written questions (*Taylor v. Blair*, 116 AD2d 204 [1st Dept. 1986]).

Here, the admissions sought by the plaintiff in the notice to admit improperly included matters in dispute which went to the heart of the controversy (see *Priceless Custom Homes, Inc. v. O'Neill*, 104 AD3d 664 [2nd Dept. 2013]; *Nacherlilla v. Prospect Park Alliance, Inc.*, 88 AD3d 770 [2nd Dept. 2011]). Moreover, the information sought by the plaintiff in the notice to admit may be obtained through depositions and/or additional document discovery. Therefore, Defendant's motion to admit Plaintiff's admissions and precluding her from presenting contradictory evidence is denied, without prejudice to readdress the admissibility of specific undisputed admissions.

2. Preclude Plaintiff from presenting evidence in contradiction of her admissions.

Defendant's motion to preclude Plaintiff from presenting evidence in contradiction of her admissions is denied for the same reasons stated above.

3. Preclude Chris Stowell, Ally Payne, and the Plaintiff from providing hearsay testimony.

The Court reserves on admissibility until such time as the proposed evidence is proffered at trial.

4. Plaintiff from offering testimony from any undisclosed or unnamed witnesses.

Defendant seeks to preclude the testimony of an unnamed employee of Corning Federal Credit Union. At the time of oral argument on the instant motion, Plaintiff informed the Court that he would not be seeking to have the unnamed employee testify. Therefore, Defendant's request to preclude said testimony is moot.

5. Instruct the jury with adverse inference charges pursuant to PJI 1:77 and supplemental charge pursuant to 1.77.1.

The Court finds that a request to charge the jury with specific instructions is not evidentiary in nature; therefore, not properly brought in a motion in limine. A charge conference will be held by the Court prior to the commencement of the trial.

6. Preclude Plaintiff from offering voicemail recordings and text messages as evidence at trial.

CPLR 4547 states, in part, "Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible.

Pre-dispute communications or statements made outside of negotiations, however, do not fall within the scope of the exclusionary rule see, *Colliers ABR, Inc. v. Famurb Co.*, 101 AD3d 409 [1st Dept. 2012] [Section 4547 did not bar evidence of a proposed agreement because the proposal was an attempt to reach a business agreement, rather than an offer to compromise a claim]; *Nineteen Eighty-Nine, LLC v. Icahn*, 96 AD3d 603, [1st Dept. 2012] [email exchange between defendants' counsel and plaintiffs' counsel and a draft agreement prepared by the plaintiff should not have been stricken because the documents did not present any offer or acceptance of a compromise]; *Alternatives Fed. Credit Union v. Olbios, LLC*, 14 AD3d 779 (3rd Dept. 2005) [letters were not precluded where they were not offers to compromise any claim and, as to liability, represented pre-dispute communications]].

In the case at bar, the subject text messages and voicemails do not state defendant's

position on the ultimate issue of liability and likewise do not contain any clear proffer of settlement. In fact, no part of either voicemail discuss any clear offer to settle the matter¹. Neither do the subject text messages. The sole statement in one of the text messages that could possibly interpreted as a settlement offer stated "Well now that YOU HAVE TOLD ANYONE because I didnt (sic) you did not give me 80000 (sic) fucken (sic) dollars your uncle left it to me you selfish bitch!! Now everyone is involved and know the story thank god (sic) any further communication is thru (sic) my lawyer George Welch market st Corning. THE END." However, Court struggles to find that this email is in anyway actually an offer to compromise that is excludable pursuant to CPLR 4547.

Additionally, the Court carefully listened to the recording of both voicemails submitted to the Court and does not find any audibility issues.

It is therefore,

ORDERED, that Defendant's motion to admit Plaintiff's admissions into evidence is DENIED, without prejudice to readdress the admissibility of specific undisputed admissions; and it is further

ORDERED, that Defendant's motion to preclude Plaintiff from presenting evidence in contradiction of her admissions is DENIED; and it is further

ORDERED, the Court reserves decision on the admission of hearsay testimony until the time of trial; and it is further

ORDERED, that Defendant's motion to preclude the testimony of an unnamed employee of Corning Federal Credit Union is DENIED as moot; and it is further

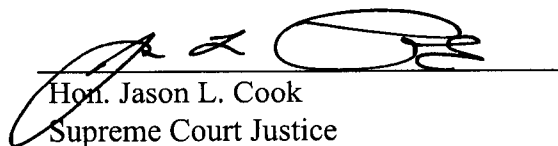
ORDERED, that Defendant's request for specific jury charges is DENIED as said request in not proper in a motion in limine; and it is further

ORDERED, that Defendant's motion to preclude Plaintiff from offering voicemail recordings and text messages as evidence at trial is DENIED.

This shall constitute the Decision and Order of the Court.

ENTER

Dated: November 29, 2024


Hon. Jason L. Cook
Supreme Court Justice

¹ One voicemail states that the caller "would be happy to cut you a check;" however the caller does not provide any context as to that statement.