

BURDEN OF PROOF

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Not Sure If I Can Say Something

Introduction

With the holiday season over, January is a busy month for litigators, occasioned in large part by matters adjourned due to the near universal post-Thanksgiving malaise. With depositions back in full swing, we return to a previous topic.

In 2010 the Fourth Department issued its decision in *Thompson v. Mather*,¹ concerning the role of an attorney representing a non-party witness at a deposition. I managed to milk the topic for not one, not two, but three columns,² with just one trial-level decision having applied *Thompson* at that time – *Sciara v. Surgical Associates of Western N.Y., PC*.³ I now return to that old chestnut to discuss a recent spate of trial-level decisions applying *Thompson* in the real world.

For those readers who do not obsess over the *Thompson* decision the way I do, the crux of the court’s holding was:

We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pre-trial deposition.⁴

The four trial courts applying the Fourth Department’s holding in *Thompson* discussed herein are located in the First and Third Departments. As a reminder, where the Court of Appeals has not ruled on an issue, and one Appellate Division has ruled on the issue, that appellate court’s holding is controlling throughout the

state, including the trial courts in the other three departments:

The Appellate Division is a single State-wide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.⁵

With depositions back in full swing, we return to a previous topic.

Where the Attorney Representing the Non-Party Witness Also Represents a Party

In prior columns I expressed the opinion that the holding in *Thompson* did not apply to the situation where an attorney representing the non-party witness also represented one or more parties in the same action. In *Alba v. New York City Transit Authority*,⁶ Justice Michael B. Stallman in New York County concluded that the *Thompson* holding did not, in fact, apply where counsel representing the non-party also represented a party in the action:

Commentators have suggested that *Thompson* does not address the situation, where a party’s counsel represents the non-party

as well, because a party’s counsel may raise objections at trial. This Court agrees.

“*Thompson* does not place any restrictions on the ability of an attorney representing a party to the action to represent a non-party at the deposition and to participate fully in that deposition. Thus, it is the hat worn by the attorney, rather than that worn by the witness, that controls the ability of the attorney to participate in a nonparty deposition.” (David Paul Horowitz, *May I Please Say Something?*, 83 NY St BJ [6] at 82.) Otherwise, a party’s counsel who is entitled to raise objections at a deposition would lose that right to object by virtue of the dual representation of a non-party.⁷

Where the Witness Acts as “[Parties] Agent”

In *St. Louis v. Hrustich, M.D.*,⁸ Justice Michael C. Lynch ruled on a motion by defense counsel to compel a second deposition of the fiancé of the plaintiff in a medical malpractice action. The fiancé, a non-party, had testified at his deposition concerning certain medical treatment received by the plaintiff but was directed by plaintiff’s counsel not to answer questions concerning conversations between the fiancé and plaintiff’s counsel, regardless of whether or not the plaintiff was present when the conversations took place. The court explained the grounds for the motion:

Now, defendants claim that [the fiancé's] communications with [plaintiff's counsel] are not protected by the attorney-client privilege because [the fiancé] is a non-party and is not represented by [plaintiff's counsel]. Further, defendants claim that plaintiff herself waived the right to assert that the attorney-client privilege attaches to any communications she had with her attorney while [the fiancé] was present. In defendants' view, [plaintiff's counsel] had no basis to object to [the fiancé's] testimony with regard to his conversations with counsel and he should therefore be compelled to reappear at a deposition.⁹

The court reviewed the proof submitted by the plaintiff in opposition to the motion:

In response to defendants' motions, plaintiff submits an affidavit wherein she avers that "[i]n nearly all respects," she and [the fiancé], "treat one another as husband and wife." She explains that when she received the anonymous letter, she was "in great pain and unable to care for [herself] or to go about legal or medical assistance." She therefore "relied on the [fiancé] in this regard, and I am aware that [the fiancé] contacted an attorney on my behalf." Further, she explains that [the fiancé] took her to her medical appointments and meetings with her attorney and she avers that she, "certainly expected that all of our communications with counsel would remain confidential."

[Plaintiff's counsel] submits an affirmation wherein he avers that his firm represents [the fiancé] and that both [the fiancé] and plaintiff signed a retainer agreement with the firm. He avers that when [the fiancé] first contacted him, plaintiff's medical condition, "prevented her from speaking for herself."

[Plaintiff's counsel] avers that, "at all times, [he] regarded [his] communications with [the fiancé] to be confidential and covered by the attorney-client privilege with both

of them." As an example of the services provided, [plaintiff's counsel] avers that his firm researched whether, based on the nature of his relationship with plaintiff, [the fiancé] could assert a loss of consortium claim against defendants.¹⁰

Based upon the proof submitted, the court denied the defendants' motion for a second deposition of the fiancé.

As set forth above, this dispute arose because [plaintiff's counsel] would not allow [the fiancé] to answer any questions with regard to his communications with counsel. Generally, though a non-party witness has the right to be represented by counsel at a deposition, counsel may not object or otherwise participate in the deposition unless necessary to invoke a testimonial privilege. In this Court's view, [the fiancé's] deposition testimony, together with plaintiff's affidavit and [plaintiff's counsel's] affirmation, support plaintiff's claim that [the fiancé] was seeking legal advice when he contacted [plaintiff's counsel], thus, an attorney-client relationship existed between them. Further under the circumstances presented on the submissions, the Court concludes that [the fiancé] was acting as plaintiff's agent when he met with plaintiff and counsel. The communications were therefore privileged and [plaintiff's counsel] properly asserted the attorney-client privilege as the basis for his objection to [the fiancé's] testimony with regard to his communications with counsel.¹¹

Where the Non-Party Witness Has a Privilege to Assert

Two cases applying *Thompson* arose where New York courts were asked to enforce a subpoena for a deposition in connection with an action pending in another jurisdiction.

In the first decision, *Morgan Keegan & Co., Inc. v. Eavis*,¹² Justice Lucy Billings ruled on a motion to quash a subpoena directing the non-party deposition of a journalist in connection with

an action pending in New Jersey. The request for the subpoena had been granted *ex parte* by another justice and directed that the non-party appear in New York for deposition for use in the New Jersey action.

Justice Billings quashed the subpoena based upon the journalist's assertion of privilege pursuant to Civil Rights Law § 79-h. Citing *Thompson*, Justice Billings observed, in *dicta*, that the non-party's attorney would be unable to "object to questioning or otherwise participate in the deposition," which the journalist would have to assert himself.

In the second decision, *In re Quash Subpoena Ad Testificandum ex rel. Kapon v. Koch*,¹³ Justice Michael D. Stallman also confronted a motion to quash a subpoena, brought under CPLR 3119,¹⁴ which "provides that out-of-state subpoenas can be submitted to an attorney licensed to practice in New York, who may then issue a subpoena."¹⁵

After denying the motion to quash, Justice Stallman addressed the branch of the motion seeking a protective order concerning confidential information that might be disclosed in the course of the deposition:

Nevertheless, petitioners' concerns about being required to disclose confidential information during their non-party depositions are not unfounded, in light of the Appellate Division, Fourth Department's decision in *Thompson v. Mather*.¹⁶

Justice Stallman, following *Sciara*, held:

"Uniform Rules §§ 221.2 and 221.3 are not limited to parties but apply to deponents.' Thus, in the event that a question posed to a nonparty fits within the three exceptions listed in § 221.2, the nonparty's attorney is entitled to follow the procedures set forth in §§ 221.2 and 221.3." Thus, at the very least, counsel for a non-party witness at a deposition may object under the permitted exceptions set forth in the Uniform Rules for the Conduct of Depositions. (22 NYCRR 221.1 et seq.).¹⁷

Justice Stallman next addressed the right of the attorneys for other parties who might be adversely impacted by the disclosure of confidential information at the deposition:

In the Court's view, the right of Kapon's counsel or Christoph's counsel to object at their non-party depositions pursuant to the Uniform Rules for the Conduct of Depositions does not provide reassurance against disclosure of the confidential information or trade secrets of AMC. After all, Kapon and Christopher were named individually in the subpoenas, and any significant prejudice caused in the event that a question calls for disclosure of AMC's confidential information or trade secrets would fall upon AMC.

Therefore, this Court will permit Kapon's counsel and Christoph's counsel to object and the witnesses to decline to answer any question at the deposition on the ground that the answer would divulge

confidential information or trade secrets of AMC. Every such question to which this objection is raised shall be marked for a ruling, which shall be made upon respondent's motion.¹⁸

Alternatively, Justice Stallman directed that the parties could agree to the appointment of a private referee or special master "to determine any objections raised at the non-party depositions."¹⁹

Conclusion

These four cases will not be the last word on the application of *Thompson*, and practitioners representing non-party witnesses should check for new decisions before representing their clients at depositions.

In the next issue, finally, this column will return to the topic of the disclosure of privileged and confidential information raised in last September's column, "I Thought That Was Confidential."²⁰ ■

1. 70 A.D.3d 1436 (4th Dep't 2010).

2. *Just Sit There and Be Quiet*, N.Y. St. B.J. (June 2011), p. 15; *May I Please Say Something*, N.Y. St. B.J. (Jul./Aug. 2011), p. 82; *You May Say Something*, N.Y. St. B.J. (Sept. 2011), p. 16.

3. 32 Misc. 3d 904 (Sup. Ct., Erie Co. 2011).

4. 70 A.D.3d 1436, 1438 (4th Dep't 2010).

5. *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984) (citations omitted).

6. 37 Misc. 3d 838 (Sup. Ct., N.Y. Co. 2012).

7. *Id.* at *3-4.

8. 35 Misc. 3d 1232(A) (Sup. Ct., Albany Co. 2012).

9. *Id.*

10. *Id.* at *2.

11. *Id.* at *2-3 (citations omitted).

12. 2012 N.Y. Slip Op. 22310 (Sup. Ct., N.Y. Co. Mar. 2, 2012).

13. 37 Misc. 3d 1211(A) (Sup. Ct., N.Y. Co. 2012).

14. Effective Jan. 1, 2011.

15. *Kapon*, 37 Misc. 3d 1211(A), at *2.

16. *Id.* at *8 (citation omitted).

17. *Id.* at *8 (quoting *Sciara v. Surgical Assocs. of W. N.Y., PC*, 32 Misc. 3d 904, 913 (Sup. Ct., Erie Co. 2011)).

18. *Id.* at *8-9.

19. *Id.* at *9.

20. N.Y. St. B.J. (Sept. 2012), p. 20.

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