Thursday, June 6, 2013

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials&TRIBULATIONS

Are attorneys for non-party witnesses 'potted plants?'

When Col. Oliver North appeared before the Senate Select Committee investigating the Iran-Contra Affair in 1987, the chairman of the committee, Sen. Daniel Inouye of Hawaii, expressed dissatisfaction at Col. North's attorney's objections. The colonel was represented by Brendan Sullivan, an attorney at Williams & Connolly in Washington, D.C.

When the senator suggested that Mr. Sullivan allow his client to speak for himself rather than interject constant objections, Sullivan responded, "Well sir, I am not a potted plant. I am here as the lawyer. That is my job."

By MICHAEL R. WOLFORD
Daily Record Columnist

I was reminded of that quote when I read a recent decision from the Appellate Division, Fourth Department entitled *Sciara v. Surgical Associates of Western New York PC*, 2013 WL 1064824, 2013 N.Y. Slip Op. 01741 (4th Dept 2013).

The case dealt with a medical malpractice action. The pathologist who had examined tissue removed from the plaintiff during surgery was deposed as a third-party witness. The deposition was discontinued following a "contentious verbal exchange" between plaintiff's counsel and the pathologist's counsel after the pathologist's counsel had interrupted the deposition to clarify a question asked by the plaintiff's attorney.

Following the discontinued deposition, the plaintiff moved for an order precluding the pathologist's attorney from participating, and the pathologist filed a cross-motion to limit and/or regulate the deposition. The trial court granted the cross-motion of the pathologist and ruled that her counsel should be able to participate in a limited fashion at the deposition as provided for in 22 NYCRR §§221.2 & 221.3. The trial court noted that those rules do not make a distinction between an attorney who represents a party and one who represents a non-party witness.

The Appellate Division, in a three-to-two decision, modified the order and concluded that the trial court had erred in allowing the pathologist's attorney to participate. The majority relied upon the court's prior case of *Thompson v. Mather,* 70 AD3d 1436 (4th Dept 2010), in which the court held that "counsel for a non-party witness does not have the right to object during or otherwise to participate in a pretrial deposition."

The *Thompson* court relied upon CPLR 3113(c), which in essence provides that the examination and cross examination of deposition witnesses shall proceed as permitted at the trial of actions in open court. Since counsel for a non-party witness is not permitted to object or otherwise participate at trial, the court concluded that CPLR 3113(c) overrules 22 NYCRR §221.2, which appears to permit a non-party attorney to participate at a deposition.

The only relief the majority in *Sciara* was willing to consider for a third-party witness was the right to seek a protective order pursuant to CPLR 3103(a) when necessary.

The dissenting justices of the Appellate Division concluded that the trial court was correct in allowing the pathologist's counsel to participate in a limited role. The dissenting justices pointed out that the Thompson case involved a videotape of deposition testimony that would be filed with a clerk of a trial court pursuant to 22 NYCRR §202.15(g), whereas in the instant case the deposition was not being taken pursuant to that rule, but rather pursuant to 22 NYCRR Part 221.

The dissent also suggested that in *Thompson*, the plaintiff had moved for an order precluding the non-party deponent's counsel from objecting to the videotape trial testimony "except as to privilege matters or in the event she were to deem questioning to be abusive or harassing." Thus, the dissent argued that even the plaintiff's counsel in *Thompson* recognized that a non-party has certain rights at a deposition.

The dissent also pointed to the Second Department decision in *Horowitz v. Upjohn Co.*, 149 AD2d 467 (2nd Dept 1989), as authority for the proposition that the attorney for a non-party witness may participate in a deposition. In the *Horowitz* case, the

Continued …

Reprinted with permission of The Daily Record ©*2013*

Thursday, June 6, 2013

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

court dealt with a medical non-party witness who refused to answer questions at his deposition concerning matters other than his treatment of the infant plaintiff's mother.

The third-party witness counsel had objected to a number of questions including those which sought opinion evidence. In response to the motion to compel the non-party witness to answer questions, the *Horowitz* court prospectively limited the scope of the plaintiff's inquiry by providing that the witness "is compelled to answer only questions regarding his treatment of his patient Maureen Horowitz," and it further provided that the plaintiff's counsel is directed to make every effort to avoid questions regarding other patients. In other words, the court in Horowitz did not address directly the involvement of counsel for the witness, but implicitly accepted it as appropriate.

The Fourth Department's split decision in *Sciara* has provoked both criticism and a proposal to amend the CPLR. In a recent article in the New York Bar Association Journal, at 85 NY ST. BJ 16 (May 2013), attorney David Paul Horowitz criticizes the Fourth Department's decisions in *Thompson* and *Sciara* and claims they represent a significant change in deposition practice, pointing to the statewide effect these decisions will have on all nonparty depositions.

Horowitz believes help is on the way with the aid of the "Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York" dated January 2013, which proposes that both *Thompson* and *Sciara* be overruled by amending CPLR 3113(c) to specifically provide that a non-party's counsel "may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party."

In the Advisory Committee Report, it is pointed out that as a consequence of *Sciara* a non-party who may be culpable of malpractice or otherwise liable could be deposed and questioned in detail without the witness being permitted to have counsel interpose any objections. The testimony could then be used in a subsequent litigation against the unprotected witness.

While neither *Thompson* nor *Sciara* may remain as controlling in this area, all counsel at present should be aware that they represent the law in the Fourth Department. In other words, attorneys who appear and represent nonparty witnesses at depositions are, in essence, potted plants. To avoid this status, an attorney who represents a nonparty witness should consider moving for a protective order pursuant to CPLR 3103 in order to place some limits on the questioning of counsel along with the appointment of a referee pursuant to CPLR 3104 to supervise the deposition. To do nothing in advance of the deposition may be worse than being relegated to a potted plant during the deposition.

Michael R. Wolford is a partner with The Wolford Law Firm LLP. The firm concentrates its practice in the area of litigation, with a special emphasis in commercial/business litigation, personal injury matters, employment litigation and white collar criminal defense.

Reprinted with permission of The Daily Record ©*2013*