Hall v Holiday Mtn. Fun Park, Inc.
2017 NY Slip Op 32801(U)
May 19, 2017
Supreme Court, Sullivan County
Docket Number: 1334-2015
Judge: Mark M. Meddaugh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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REBECCA HALL,

Plaintiff,

-against-

HOLIDAY MOUNTAIN FUN PARK, INC.,

Defendant.

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ORDER ON MOTION IN LIMINE
Index #1334-2015
RJI # 52-36917-15

Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court

Appearances: **Sobo & Sobo, LLP**
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By: Matthew J. Kelly, Esq.
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MEDDAUGH, J.:

The Defendant has submitted a trial memorandum seeking a ruling on evidentiary matters that may arise at trial, and the Plaintiff submitted a memorandum in reply.

The following represents the ruling of the Court on these issues:

Hearsay Statements of Employees are not Admissible

The Defendant seeks to prevent the Plaintiff from introducing the testimony of an attendant at the tubing run at the Defendant's facility, who is alleged to have said they were not supposed to sending riders down the third tubing lane, where the Plaintiff allegedly suffered her injury.

The Plaintiff opposes this request, arguing that the employee's statement was within the scope of the employee's authority and is admissible.

The speaking agent exception to the hearsay rule provides that the hearsay statement of an agent is admissible, as an admission against his employer, only if the making of the statement is an activity within the scope of his authority *(Loschiavo v Port Auth. of New York & New Jersey*, 58 NY2d 1040, 1041, 462 N.Y.S.2d 440 [1983]; *Simpson v New York City Tr. Auth.*, 283 AD2d 419, 724 N.Y.S.2d 196 [2d Dept 2001]). In *Risoli v Long Is. Light. Co.*, 195 AD2d 543, 600 N.Y.S.2d 497 [2d Dept 1993], the Court explained that a declaration by an agent without authority to speak for the principal, does not fall within the "speaking agent" exception even where the agent was authorized to act in the matter to which his declaration relates.

In Candela v City of New York, 8 AD3d 45, 778 N.Y.S.2d 31 [1st Dept 2004], the Court observed that the statements of a field supervisor, a store manager, or a project manager, who has broad authority to act on behalf of their employer, may be admissible under the speaking agent hearsay exception (*see, Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 735 N.Y.S.2d 132 [1st Dept 2002]; *Brusca v El Al Israel Airlines*, 75 AD2d 798, 427 N.Y.S.2d 505 [2d Dept 1980] *cf., Cohn v Mayfair Supermarkets, Inc.*, 305 AD2d 528, 759 N.Y.S.2d 131 [2d Dept 2003]), whereas, the hearsay statement of a low-level employee of the Defendant, who as not been shown to have the authority to speak on his employer's behalf, will not be admissible (*Lowen v Great Atl. & Pac. Tea Co.*, Inc., 223 AD2d 534, 636 N.Y.S.2d 393 [2d Dept 1996]).

The party seeking to introduce hearsay evidence has the burden of proving the applicability of a hearsay-rule exception (*Tyrrell v Wal-Mart Stores Inc.*, 97 NY2d 650, 737 N.Y.S.2d 43 [2001]).

The Plaintiff's deposition testimony was that a teenaged employee of the Defendant, who was working at the bottom of the tubing run, told her that the third tubing lane was not supposed to be open. The Plaintiff also provided the deposition testimony of two former employees at the ski hill, Andrew Exner, who was 17 years old on the date of the Plaintiff's injury on Janaury 19, 2013, and James Petrowsky, who was 26 years old on Janaury 19, 2013. Both witnesses described themselves as lift operators and they each denied they had any supervisory capacity,[1] and they both testified that they were not the persons who made the decision to close a tubing lane, or to groom the tubing lane when it became icy.

Andrew Exner also testified that he generally worked as the lift operator at the bottom of the tubing hill, and that he had only started in the job during the 2012-2013 winter season. He also testified that he only knew the first name of the person who was in charge of the ski hill.

Therefore, there is nothing in the record presented by the Plaintiff to establish that either of the deposed former employees were authorized to speak on the Defendant's behalf, and any admissions attributed to such employees shall not be admitted into evidence.

Testimony of Expert Witness should be Limited

The Plaintiff has provided expert disclosure indicating that she intends to call Dr. Gabriel Dassa, who she saw on one occasion on June 26, 2016, to conduct an Orthopedic evaluation and to prepare a report. The Defendant seeks to limit Dr. Dassa testimony, which the Plaintiff has not opposed.

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[1]Andrew Exner described Jim Petrowsky as the Supervisor at the ski hill, but James Petrowsky specifically denied this and said that he was only a lift operator.

To be properly admitted, expert opinion evidence must generally be based upon facts either found in the record, personally known to the witness, derived from a "professionally reliable" source or from a witness subject to cross-examination (*Brown v County of Albany*, 271 AD2d 819, 706 N.Y.S.2d 261 [3d Dept 2000], *lv. denied* 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653 [2000]). Based on the foregoing rule, "a non-treating physician, hired only to testify as an expert witness, may not state the history of an accident as related to him by the plaintiff or testify as to plaintiff's medical complaints" *Nissen v Rubin*, 121 AD2d 320, 321, 504 N.Y.S.2d 106 [1st Dept 1986]), nor can the expert summarize and read statements and findings contained in the reports and records of plaintiff's treating physicians, where reports and records were not in evidence and treating physicians did not testify at trial (*Adkins v Queens Van-Plan, Inc.*, 293 AD2d 503, 740 N.Y.S.2d 389 [2d Dept 2002]). This rule is designed to prevent unfair bolstering of a party's testimony as to the cause and extent of his injuries (*Easley v City of New York*, 189 AD2d 599, 592 N.Y.S.2d 690 [1st Dept 1993]). The expert may, however, give an opinion based on, inter alia, an examination of the plaintiff (*Adkins v Queens Van-Plan, Inc., supra.*).

The Court in *Nissen v Rubin, supra.*, also held that, where a physician only met the Plaintiff on a single occasion in order to conduct an evaluation, which evaluation was arranged by plaintiff's attorney solely for testimonial purposes, the Plaintiff cannot then claim that the physician was a treating physician to get around the rule with regard to the limits on testimony of a non-treating physician.

Accordingly, the testimony of Dr. Dassa shall be limited in accordance herewith, and that he shall not be permitted to state the history of an accident as related to him by the Plaintiff,

nor to testify as to plaintiff's medical complaints, but may give an opinion based on his examination of the Plaintiff.

WHEREFORE, based on the foregoing, it is hereby

ORDERED that, based on the absence of any proof that either of the deposed former employees were authorized to speak on the Defendant's behalf, any admission attributed to such employees shall not be admitted into evidence; and it is further

ORDERED that the Gabriel Dassa, D.O., shall not be permitted to testify as to the history of an accident as related to him by the Plaintiff, nor to testify as to plaintiff's medical complaints, but he may give an opinion based on his examination of the Plaintiff.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: May 19, 2017
Monticello, New York

ENTER: Mark M Meddaugh
HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Trial Memorandum submitted by the Defendant's Counsel, on May 9, 2017.
2. Memorandum of Law in Reply, submitted by Plaintiff's counsel on May 18, 2017.