Orser v Wholesale Fuel Distribs.-CT, LLC
2017 NY Slip Op 33317(U)
March 16, 2017
Supreme Court, Greene County
Docket Number: 14-0835
Judge: L. Michael Mackey
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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

BRYAN D. ORSER,
Plaintiff.

-against-

WHOLESALE FUEL
DISTRIBUTORS-CT, LLC
Defendant.

DECISION AND ORDER

Index No. 14-0835
RJI No.

(Supreme Court, Greene County, Trial Term)

(Justice L. Michael Mackey, Presiding)

APPEARANCES: GLEASON DUNN WALSH & O'SHEA
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Mackey, J:

In this action scheduled for trial on March 28, 2017, plaintiff Brian Orser ("plaintiff") alleges breach of an alleged employment contract and statutory violations for which he claims money damages from defendant Wholesale Fuel Distributors-CT, LLC ("defendant"). In essence, defendant contends that the alleged contract is the result of fraud and collusion between plaintiff and Sammy Eljamal and that no valid contract exists. Mr. Eljamal purportedly executed

DECISION AND ORDER

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an employment contract on behalf of defendant under which plaintiff was entitled to a 3-year term at a stated salary, together with various benefits. In relevant part, defendant claims that during the period of time the plaintiff was allegedly employed as a "marketing manager" pursuant to the contract in controversy, plaintiff was simultaneously working for Mr. Eljamal's various businesses.

Presently before the Court are (1) plaintiff's motion to quash or modify a subpoena *duces tecum* served by defendant seeking production of various documents at trial; and (2) motions *in limine* addressing the admissibility of certain trial proof. The Court conducted oral argument of the motions on March 23, 2017. At the oral argument, the parties narrowed the issues in dispute concerning the scope of documents sought by the trial subpoena, as well as the nature of the evidentiary offers and objections anticipated at trial.

Plaintiff's motion to quash or modify defendant's subpoena *duces tecum*

Defendant timely served a subpoena *duces tecum* dated February 23, 2017 requiring plaintiff to produce documents related to plaintiff's alleged employment by defendant, as well as plaintiff's employment with companies associated with Sammy Eljamal. As set forth at length during the oral argument, defendant concedes that many of the documents sought in the subpoena *duces tecum* have been provided through discovery; however, defendant seeks to assure that plaintiff's discovery responses are complete and that, to the extent that the admissibility of these documents at trial is subject to proper foundation, defendant's offer of these documents is not subject to objections based upon authenticity or "best evidence". At the oral argument, plaintiff's counsel stipulated that plaintiff will not object on "best evidence" grounds to introduction of documents which are responsive to the subpoena but have already been provided through discovery, such that the documents that have previously been provided

through discovery will not need to be produced again and certified in order to comply with the subpoena.

Plaintiff objects to the subpoena *duces tecum* on the grounds that it is overly broad and that it seeks documents that are not relevant to the trial of this matter. "Generally, the standard to be applied on a motion to quash a subpoena *duces tecum* is whether the requested information is utterly irrelevant to any proper inquiry". *Mokay v. Mokay*, 124 AD3d 1097 (3d Dep't 2015) *quoting Hyatt v. State of Ca. Franchise Tax Bd.* 105 AD3d 186, 201 (2d Dep't 2013). In assessing whether income tax returns are subject to discovery, the Court is mindful that because of their confidential and private nature, disclosure of tax returns is generally limited to situations where the information contained in the return is "indispensable to (the) litigation and unavailable from other sources". *Slate v. State*, 267 AD2d 839 (3d Dep't 1989) *quoting Nanbar Realty Corp. v. Pater Realty Co.*, 242 AD2d 208, 209 (1st Dep't 1997) and *Briton v. Knott Hotels Corp.*, 111 AD2d 62, 63 (1st Dep't 1985).

Here, the Court (Tailleur, J.) previously held that plaintiff was not required to disclose tax returns during the discovery process; plaintiff provided defendant with copies of W-2 and 1099 statements. During the term of the employment contract at issue here, plaintiff apparently received income memorialized in wage statements from other companies, including companies ostensibly controlled by Sammy Eljamal. At oral argument, plaintiff advised the Court that plaintiff and his wife filed a joint income tax return in 2012, such that the income tax return sought in the subpoena *duces tecum* contained some information that would be of a confidential and private nature. Defendant essentially argues that review of the tax return is required to confirm the plaintiff has accurately and completely disclosed the source of his wages during the period of time that he was ostensibly working over 50 hours weekly for the defendant

corporation. The Court finds that plaintiff's 2012 Federal and New York State income tax return likely contains information that is indispensable to the litigation and unavailable from other sources, at least to the extent that it memorializes plaintiff's wages (as opposed to other income sources that are not relevant to the trial issues). For instance, if the tax return demonstrates income from wages that exceed the income demonstrated on the wage statements, then the income tax return may in fact be indispensable at trial. However, mindful of the confidential and private nature of the return (as opposed to the previously disclosed W-2 and 1099 statements), the Court orders that plaintiff respond to the subpoena *duces tecum* seeking plaintiff's federal and state tax records by providing to the Court, *in camera*, the federal and New York State tax returns for the year 2012. Following review of the tax returns *in camera*, the Court will afford counsel the opportunity for further argument if the Court's review raises a question about any material discrepancy.

At oral argument, plaintiff's counsel stated that plaintiff was not in possession of any employment contracts or agreements responsive to the subpoena, except for the original employment contract at issue in this case. Based upon that representation, it cannot be said that plaintiff is unduly burdened by responding to plaintiff's demand for employment contracts and agreements as described in the subpoena *duces tecum*, such that plaintiff is directed to respond. Of course, based upon counsel's representations, such response may indeed be limited to a statement that no employment contracts or agreements exist, other than the original contract at issue in this case.

Consistent with the oral arguments of counsel, and the Court's findings, defendant's subpoena *duces tecum* is hereby modified to the extent that plaintiff need not respond to the demands for "all records" relating to plaintiff's employment with defendant and its affiliates or

relating to plaintiff's employment with Sammy Eljamal and associated companies due to the overbreadth of the description. Similarly, the demand for production of "documents evidencing the performance of employment duties" is overly broad and plaintiff is relieved from producing any documents in response to it, subject to the stipulation of counsel waiving any "best evidence" objections to documents produced during discovery that would otherwise be responsive to the subpoena *duces tecum*.

Motions *in limine*

The parties seek rulings on the admissibility of evidence at trial, including statements of plaintiff and Sammy Eljamal made in other court proceedings. Initially, the Court notes that the admissibility of particular statements necessarily involves analysis of facts that are not presently before the Court. For instance, to the extent that counsel seek advisory rulings concerning the use of out-of-court statements or acts to impeach, any ruling must consider *inter alia* the foundation and relevance of such statements, whether they constitute hearsay, whether any hearsay exceptions apply, or whether there is any specific statutory basis to exclude or admit such statement. Particularly when the subject of the motion *in limine* is purportedly "an inconsistent statement", the Court cannot determine the admissibility of the statement until it hears the trial testimony. Accordingly, the Court will not predetermine the admissibility of statements for impeachment purposes based upon counsel's representation of "anticipated trial testimony." Nonetheless, the court can apply general evidentiary principles to certain issues raised in the motions *in limine* relating to defendant's use of statements of plaintiff and Mr. Eljamal, respectively.

Defendant proposes to cross-examine plaintiff with plaintiff's testimony in other legal proceedings. Pursuant to CPLR 4514, "(i)n addition to impeachment in the manner permitted by

common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in writing subscribed to him or was made under oath." NY CPLR 4514. Under common law rules, a party may impeach the credibility of any witness called by another party with a prior inconsistent statement; the prior inconsistency may be written or oral and it need not consist of a statement under oath. CPLR 4514, Practice Commentaries, Vincent C. Alexander (McKinney's 2016). Prior conduct that is inconsistent with the witness's testimony may also be used to impeach. If the prior inconsistent statement is that of an adverse party, the statement is usually admissible against the party as substantive evidence pursuant to the hearsay exception for party admissions. *Id. citing Koester v. Rochester Candy Works*, 194 N.Y. 92 (1909). To the extent defendant seeks to use prior inconsistent statements of plaintiff for impeachment purposes, such evidence may generally be used on cross-examination or as substantive evidence on defendant's direct case, subject to other evidence rules including relevance. Depending upon the source of the testimony and its proposed use, it may be subject to the foundational requirements of CPLR 3117(a)(1) or 4517(a) to be admissible.

Defendant intends to call Sammy Eljamal as a witness; plaintiff does not intend to call Mr. Eljamal. Assuming this witness is called by defendant, he generally may be impeached only with prior inconsistent statements, and not with evidence of prior bad acts. Prior bad acts or conduct that evinces moral turpitude may be admissible when those acts can reasonably bear on credibility. *State v. Smith*, 27 NY3d 652 (2016); *Badr v Hogan*, 75 NY2d 629 (1990). However, even a hostile party cannot be impeached on direct examination by evidence of prior bad acts or criminal convictions under the longstanding principle that counsel is "vouching" for the witnesses she calls. *See. Miller v. Galler*, 45 AD3d 1325 (4th Dep't 2007) *citing Hanrahan v.*

New York Edison Co., 238 NY 194 (1924) ("it logically follows that one should not be permitted to say in one breath, 'the witness speaks truthfully for me and, by reason of his bad character, is not to be believed when he testifies against me'). Thus, absent reasons (not presently before the Court) to depart from these general rules, defendant may not impeach the general or specific credibility of Mr. Eljamal on direct examination, except by use of prior inconsistent statements.

Plaintiff seeks to preclude defendant from adducing "evidence of character, propensity, prior misconduct, hearsay and the testimony of witnesses defendant failed to identify in discovery" and witnesses who lack "relevant first-hand knowledge." Plaintiff opposes defendant's proposed use of statements of judges in other legal proceedings involving plaintiff and/or Mr. Eljamal. Defendant apparently intends to offer these judicial statements as evidence of the "character and credibility" of plaintiff and Sammy Eljamal. In general, neither application is sufficiently specific nor ripe to permit an informed, binding evidentiary ruling. Nonetheless, in order to promote an efficient trial, the Court notes general principles that govern these applications.

In general, evidence of the character of a party or witness to show that he acted in conformity with such character is inadmissible in a civil action. *Wolfe v. Mahrer*, 273 AD2d 812 (4th Dep't 2000) *citing O'Connell v. Jacobs*, 181 AD2d 1064 (4th Dep't 1992) *aff'd* 81 NY2d 797 (1993); *Fanelli v diLorenzo*, 187 AD2d 1004 (4th Dep't 1992). While credibility of a party is always an area of proper inquiry, the parties are foreclosed from proving character absent some showing of an exception to this general rule.

The Court declines defendant's request that it take "judicial notice" of credibility determinations of other courts relating to plaintiff and Mr. Eljamal. The matters which defendant seeks to be judicially noticed are not the type of substantive legal matters contemplated by CPLR

4511(a) or (b); instead, defendant asks the Court to introduce collateral factual "findings" regarding the credibility of a party or witness, solely to impeach, without due regard for evidentiary requirements. *See, Sleasman v. Sherwod*, 212 AD2d 868 (3d Dep't 1995); *Mendelovitz v Cohen*, 26 Misc3d 1230 (Kings Co. Sup. Ct 2010).

Finally, plaintiff's motion to preclude the trial testimony of those retail operators who signed letters procured by defendant to oppose plaintiff's summary judgment motion is denied. Plaintiff has been aware of the names and addresses of these witnesses for several months since the dispositive motion was filed and has not sought any relief (including further discovery) until now. Furthermore, because plaintiff presumably encountered these retail operators during his many site visits, and counsel was aware of their unsworn statements for several months, plaintiff cannot now argue that he is surprised and prejudiced by their possible trial testimony.

All other relief requested but not specifically addressed herein is denied without prejudice to reconsideration upon receipt of the proof at trial.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for plaintiff. A copy of this Decision and Order together with the papers upon which it is granted are being forwarded to the Greene County Clerk for filing. The signing of the Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry and notice of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: March 16, 2017
Albany, New York

L. MICHAEL MACKEY
Supreme Court Justice

Papers Considered:

1. Plaintiff's Notice of Motion to Quash/Modify dated March 3, 2017; Affidavit of Daniel A. Jacobs, Esq. in Support of Motion to Quash/Modify with Exhibits A-L dated March 3, 2017; Plaintiff's Memorandum of Law in Support of Motion to Quash/Modify dated March 3, 2017;
2. Affirmation of Marc S. Oxman, Esq. in Opposition to Motion to Quash/Modify dated March 9, 2017;
3. Defendant's Notice of Motion in Limine dated February 6, 2017; Defendant's Memoranda of Law in Support of Motion In Limine dated February 6, 2017 and February 16, 2017, respectively;
4. Affidavit of Lisa F. Joslin, Esq. in Opposition to Defendant's Motion in Limine with Ex. A-E dated February 14, 2017; Defendant's Memorandum of Law in Opposition to Defendant's Motion in Limine dated February 14, 2017;
5. Plaintiff's Notice of Motion in Limine dated February 6, 2017; Affidavit of Lisa F. Joslin, Esq. In Support of Motion in Limine with Ex. A-K dated February 6, 2017; Plaintiff's Memorandum of Law in Support dated February 6, 2017