NEW YORK
COMMERCIAL LITIGATION INSIDER

An ALM Publication

September 8, 2014

Nonparty Depositions: From 'Potted Plant' Rule to Venus Fly Traps

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This fall, New York's highest court will review the Fourth Department's decision in *Sciara v. Surgical Assoc. of W. N.Y., P.C.*, 104 A.D.3d 1256 (4th Dep't 2013), which reaffirmed the controversial precedent set forth in *Thompson v. Mather*,[1] essentially neutralizing real time assistance by counsel to nonparty deponents during the course of depositions.

Although the Court of Appeals recently reviewed the mechanism by which discovery may be secured from a nonparty,[2] the issue of nonparty counsel's role at a deposition is one of first impression for the court and one that will resolve an important dispute between the Fourth Department and the Second Department. In keeping with the current trend towards equalizing the scope of disclosure from parties and nonparties alike,[3] the Court of Appeals has the opportunity in *Sciara* to abandon the *Thompson* line of cases, which has posed both practical and ethical challenges in connection with nonparty depositions.

In *Thompson*,[4] a medical malpractice action, the trial court was confronted with a situation in which plaintiff's counsel arranged for the videotaped depositions of the treating physicians in anticipation of trial. At one such deposition, counsel to a nonparty doctor interposed objections as to form and relevance. Plaintiff's counsel objected, the deposition was suspended, and plaintiff's counsel then moved for an order limiting the participation of the nonparty deponent's counsel to objecting solely on the grounds of privilege or abusive or harassing questioning.

The trial court, anticipating that the nonparty might subsequently be impleaded into the action, ordered the parties to consider providing the nonparty with general releases and, in the alternative, to set ground rules for the deposition to help mitigate any prejudice to the nonparty due to the limited role of his or her counsel. Should the parties not agree to these rules, the plaintiff was precluded from taking the deposition and instead would be required to subpoena the doctor to testify at trial.

On appeal, the Fourth Department in *Thompson* reversed this decision and "precluded" counsel for the nonparty witnesses "from objecting during or otherwise participating in" the videotaped depositions at issue. The appeals panel premised its holding entirely on the plain language of CPLR 3113(c), which provides that witness examination and cross-examination at depositions "shall proceed as permitted in the trial of actions in open court."[5] Indeed, the panel saw no distinction between trial testimony and pretrial videotaped deposition testimony that might later be presented at trial, viewing the prospect of providing general releases to nonparties in anticipation of a deposition as "repugnant" to the obligation to provide truthful testimony.[6]

Prior to *Thompson*, counsel for nonparty witnesses enjoyed the right to participate in depositions on their clients' behalf. Decisions such as *Maxon v. Woods Oviatt Gilman LLP*, which affirmed the denial of a motion to disqualify defendant law firm from representing a nonparty witness at a deposition and preserved the role of counsel at a nonparty deposition, had underscored that a nonparty witness was, in fact, entitled to counsel of his own choosing.[7] Notably, no changes in the laws or rules governing depositions were implemented in the three years that elapsed between the Fourth Department's decision in *Maxon* and its decision in *Thompson*.

For whatever reason, the *Thompson* court simply seemed to decide not to employ traditional principles of statutory construction in interpreting any ambiguity in the language of CPLR 3113(c) — which addresses the sequence of "examination and cross-examination" — in a manner that comports with contemporary rules and practices specifically governing depositions.[8] Nor did it apply such methodology towards other relevant sections of the CPLR, such as CPLR 3103(a), which allows "any person" (not just "any party") "from whom or about whom discovery is sought" to seek a protective order to combat improper questioning.[9]

CPLR 3115(b) similarly militates against the result in *Thompson*, as it requires prompt objections to errors in questioning and states that any such objections, which could lead to an immediate cure of the error, are waived if not made during the deposition.[10] Furthermore, CPLR 3101(b) specifically contemplates objections to disclosure on privilege grounds by counsel to nonparty witnesses by making clear that the objection may be interposed "by a person" (and not just "by a party").[11]

Against this backdrop, the trial court in *Sciara*,[12] also a medical malpractice action, attempted to reconcile the new doctrine relegating nonparty counsel to the status of a "potted plant" with counsel's obligations under the Rules of Professional Conduct to represent their clients competently and diligently.[13] In *Sciara*, the issue arose when a plaintiff's deposition of a nonparty doctor was terminated by the nonparty's counsel after the lawyer interrupted to clarify a question and was instructed by plaintiff's counsel, pursuant to *Thompson*, not to "interrupt or coach" the witness.

Observing that "[n]onparties are routinely allowed to be represented by counsel during their depositions," the trial court precluded objections by nonparty counsel only as to form and relevance, holding that nonparty counsel retained a role during depositions to guard against the situations governed by Uniform Rules §§ 221.2 and 221.3.[14] Tracking those rules, the trial judge permitted nonparty counsel to object in order to (i) preserve a privilege or right of confidentiality; (ii) enforce a limitation set forth in an order of a court or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.[15]

On appeal, in a split decision, the Fourth Department reversed, finding that the lower court erred under *Thompson* in allowing nonparty counsel to participate in the deposition. The *Sciara* court reasoned that, inasmuch as the Uniform Rules conflicted with CPLR 3113(c), it is well established that, "between a statute and a regulation, the statute controls."[16] In spite of its adherence to *Thompson*, the Fourth Department majority acknowledged the criticism of that decision and the practical difficulties attendant to it, stating that nonparties have the right to seek a protective order under CPLR 3103(a) if necessary.[17]

In contrast, the dissenting judges noted the numerous cases that do not criticize the active participation of counsel for nonparty deponents — including the Second Department's decision in *Horowitz v. Upjohn Co.*, which implicitly recognized the right of nonparty counsel to interpose objections.[18] The dissent also refused to read 22 NYCRR Part 221 as conflicting with CPLR 3113(c), positing that "the Chief Administrator of the Courts was aware of CPLR 3113(c) when the Uniform Rules regarding depositions were adopted and that the Chief Administrator would not create a direct conflict with the statute."[19] Moreover, the dissent forcefully argued that disclosure protections under the CPLR are useless to a nonparty witness without the benefit of counsel to identify privileged material and assert the protection, and that resort to a protective order under 3103(a) would similarly be useless without counsel to identify the need.[20] Finally, the dissent highlighted certain incentives created by the *Thompson* rule that it considered unfortunate, including that of impleading nonparty deponents whose testimony has already been captured on the record without the benefit of counsel.[21] This loophole, the dissent argued, would facilitate a ploy by attorneys to extract information from unprotected witnesses at nonparty depositions, sue those deponents, and then later depose them again as parties.

In the wake of *Thompson* and *Sciara*, efforts to circumvent this judicial doctrine have been made, including a proposed CPLR amendment[22] requested by the Chief Administrative Judge of the New York State Courts upon the recommendation of the Advisory Committee on Civil Practice. In June 2012, the New York Bar Association's Committee on Civil Practice Law and Rules additionally issued a memo in support of amending CPLR 3113(c) to overrule *Thompson*. The amendment specifically would have allowed nonparty counsel to participate in depositions and to make objections in the same manner as counsel for a party. Ultimately, the bill did not pass.

Parallel to the failed legislative campaign to overturn *Thompson*, lower courts and courts in other Appellate Division departments have sought to distinguish, limit or otherwise circumvent the doctrine.

In *Yoshida v. Hsueh-Chih Chin*,[23] the Second Department acknowledged that 22 NYCRR 221.2, one of the Uniform Rules directly governing the conduct of depositions, was an appropriate basis for nonparty counsel to object in a deposition. Specifically, the court held that nonparty counsel's directions to his client to decline to answer certain deposition questions were improper, given that those questions targeted material and necessary information and that the directions not to answer "were not *otherwise authorized* by §§ NYCRR 221.2" (emphasis added).[24]

Additionally, lower courts have held that *Thompson* does not apply to nonparties represented by party counsel,[25] a rule that could engender disparate treatment between nonparty counsel who simultaneously represent a party, on the one hand, and nonparty counsel who only represent the nonparty, on the other hand. In an effort to sidestep *Thompson*, courts may be more likely to grant protective orders, leading to the greater inconvenience, cost, and delay that are attendant to such applications, which is inconsistent with the goals of Article 31 of the CPLR.

Moreover, in *Kapon v. Koch*, the First Department affirmed[26] the lower court's decision[27] pursuant to the Uniform Rules to allow nonparty counsel to object, and for the witnesses to decline to answer any questions for the purpose of protecting confidential information and trade secrets. In the alternative, the panel stated that a private referee or special master could be appointed to address any objections raised at the nonparty depositions. While the Court of Appeals on appeal in *Kapon* was focused on the threshold for obtaining disclosure from nonparties, it affirmed the First Department's decision in its entirety, perhaps presaging its forthcoming decision in *Sciara*.[28]

If the Court of Appeals' decision this past April in *Kapon* is any indication of its upcoming review of *Sciara*, the reaffirmance of the trend towards a more uniform and streamlined disclosure process applicable to parties and nonparties alike will validate *Thompson's* detractors and free nonparty counsel from the confines of the controversial doctrine

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[1] 70 A.D.3d 1436 (4th Dep't 2010).
[2] *See Matter of Kapon v. Koch*, 11 N.E.3d 709 (N.Y. Apr. 3, 2014) (validating the "material and necessary" standard as in keeping with New York's policy of liberal discovery.).
[3] *Id.*
[4] Docket 492/2006 (Sup. Ct. Oswego Cnty. Oct. 27, 2008).
[5] N.Y. C.P.L.R. 3113(c) (2014).
[6] *Thompson* at 1438.
[7] 45 A.D.3d 1376, 1377 (4th Dep't 2007).
[8] *See* the Uniform Rules for Trial Courts (22 NYCRR) part 221 providing for the Uniform Rules for the Conduct of Depositions, adopted in 2006.
[9] N.Y. C.P.L.R. 3103(a).
[10] N.Y. C.P.L.R. 3115(b).
[11] N.Y. C.P.L.R. 3101(b).
[12] 32 Misc.3d 904 (Sup. Ct. Erie Cnty. 2011).
[13] *Sciara* at 910; Rule 1.1 and Rule 1.3 of the Rules of Professional Conduct (22 NYCRR part 1200), respectively.
[14] *Sciara* at 912-13.
[15] *See* Uniform Rule 22 NYCRR 221.2.
[16] *Sciara* at 1257.
[17] *Id.*
[18] 149 A.D.2d 467, 467-8 (2d Dep't, 1989).
[19] *Id.* at 1259.
[20] *Id.* at 1259-60.
[21] *Id.* at 1260.
[22] New York State Senate Bill S66656A-2011.
[23] 111 A.D.3d 704 (2d Dep't, 2013).
[24] *Id.* at 706.
[25] *See St. Louis v. Hrustich*, 953 N.Y.S.2d 554 (Sup. Ct. Albany Cnty. 2012); *Alba v. N.Y. City Tr. Auth.*, 37 Misc.3d 838, 841 (Sup. Ct. N.Y. Cnty. 2012).
[26] *Matter of Kapon v. Koch*, 105 A.D.3d 650 (1st Dep't 2013).
[27] *Matter of Kapon v. Koch*, 961 N.Y.S.2d 361 (Sup. Ct. N.Y. Cnty. 2012).
[28] *Matter of Kapon v. Koch*, 11 N.E.3d 709 (N.Y. Apr. 3, 2014).