Courtney Keller, Plaintiff vs. Sears, Roebuck And Co., Defendant, Franklin County Branch, Civil Action - Law, No. A.D. 1996 - 354

Keller v. Sears, Roebuck and Co.

Discovery of factual observations made by expert who will not be called at trial

1. Plaintiff seeks to subpoena fire investigator retained by defendant to investigate cause of electrical shocks of dryer installed by defendant; plaintiff argues investigator has not formed any expert opinions and his factual observations made at the time of his investigation are discoverable, just like the observations made by a regular private investigator.

2. Pa.R.C.P. 4003.5 prohibits a party from discovering facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or in preparation for trial, and who is not expected to be called at trial.

3. Purpose of rule is that a party must be given opportunity to freely consult with experts by minimizing the risk that such expert opinion may be obtained by the opposing party and used against the party who consulted the expert.

4. Rule specifically includes "facts known" by expert; mere fact that plaintiff seeks to elicit only factual observations does not mean that the rule is not applicable.

5. Fire investigator is an expert; such investigator has specific expertise for which he is hired and which he employs during the investigation. Thus, his factual observations cannot be equated with those of a regular private investigator.

6. Fire investigator was not regular employee of defendant and was retained only after plaintiff had commenced suit; it may be deducted that the fire investigator was hired specifically in anticipation of litigation. Thus, his factual observations cannot be discovered or compelled at trial.

John N.Keller, Esq., Attorney for Plaintiff
Mike Adams, Esq., Attorney for Defendant
Thomas J. Finucane, Attorney for Defendant

OPINION and ORDER OF COURT

Walker, P.J., November 16, 1998:

Factual and Procedural Background

This case involves injuries sustained as a result of an electrical shock from a dryer. Lucinda Freeman had purchased this dryer from Defendant Sears, Roebuck and Co. ("Sears") who installed the dryer in her house. On or about March 20, 1996, both Ms. Freeman and Plaintiff Courtney Keller, who was living with Ms. Freeman at that time, were injured by an electrical shock when they came into contact with the dryer.

On August 27, 1996, plaintiff filed a complaint against Sears alleging negligent installation of the dryer by Sears. On the same date, Ms. Freeman also commenced a suit against Sears docketed at A.D. 1996-353. Sears removed the suit by Ms. Freeman to federal court. This court refused a later request by Sears to join Ms. Freeman as an additional defendant in the underlying case. (Opinion of September 30, 1997). Subsequently, the action brought by Ms. Freeman was settled.

Ms. Freeman preserved the dryer in her house in the same condition, including the improper electrical connection, until December 1997 or January 1998. On December 4, 1996, Sears sent John Noblet, a fire investigator, to Ms. Freeman's house to inspect the dryer. He also took photographs of the dryer and its electrical connection and noted the meter readings reflecting the voltage from the electrical outlet. It appears that an expert retained by plaintiff, Mr. Norman Dice, who had previously inspected the dryer, was present at that inspection. It is not disputed that in late December 1997 or January 1998, Ms. Freeman had the dryer properly hooked up, thereby destroying evidence of the improper electrical connection. Counsel for Sears, Thomas Finucane, has informally indicated in a letter that he considers this to be spoliation of evidence.

On September 21, 1998, a preliminary pre-trial conference was held in which several discovery issues were resolved. The only remaining issue is whether plaintiff can subpoena Mr. Noblet to testify at a deposition or at trial. Counsel for both parties submitted letters to this court on this issue, which is the subject of this opinion.

Discussion

Plaintiff seeks to compel the testimony of Mr. Noblet, the fire investigator hired by Sears, at a deposition and/or at trial regarding factual observations he made when he investigated the dryer in question. Sears opposes this, arguing that it will not call Mr. Noblet as a witness at trial and therefore that plaintiff's request is improper under Pa.R.C.P. 4003.5. This rule governs the discovery of expert testimony. It provides for the discovery procedure of facts known and opinions held by experts who are expected to testify at trial. However, with respect to experts who are not expected to be called at trial, the regular discovery rules do not apply. The relevant section of the rule provides as follows:

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b), or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Pa.R.C.P. 4003.5 (a)(3).

Plaintiff argues that Rule 4003.5 does not apply because plaintiff does not seek to elicit an expert opinion from Mr. Noblet. Rather, plaintiff seeks to elicit only his factual observations during the inspection. Plaintiff argues that Mr. Noblet has not formed any expert opinions nor has he prepared an expert report. It is plaintiff's position that Mr. Noblet, whose business card reads that he is a "Senior Fire Investigator," acted merely as an investigator, not as an expert witness when he inspected the dryer and that he can be compared to an ordinary private investigator. Plaintiff argues that the factual observations of Mr. Noblet are discoverable, just as the observations made by a private investigator. Defendant argues that Mr. Noblet was an expert consultant whose testimony is subject to the restrictions set forth in Rule 4003.5. Defendant asserts that Mr. Noblet was retained *after* suit was commenced against it, and that this was done specifically and exclusively in relation to this litigation.

To support his argument that Rule 4003.5 does not apply to this situation because plaintiff seeks to elicit only factual observations from Mr. Noblet, plaintiff directed this court's attention to the case of Columbia Gas Transmission Corp. v. Piper, 150 Pa. Cmwlth. 404, 615 A.2d 979 (1992). In that case, the Commonwealth Court refused to let plaintiff compel the testimony of an appraiser hired by defendant regarding the value of the property involved in the eminent domain suit. The court held that such testimony was expert testimony. The court noted that in preparing an appraisal report, an appraiser assembles relevant facts and then applies expertise and judgment to them to arrive at a conclusion of value. Such appraisal is the "product of the appraiser's brain," and therefore constitutes

expert testimony subject to Rule 4003.5. Columbia Gas Transmission Corp., 150 Pa. Cmwlth. at 410. Plaintiff in the underlying case argues that he does not seek to elicit any conclusions which were reached by Noblet after the application of his expertise and judgment, and thus that plaintiff does not seek to elicit expert testimony.

However, this court cannot agree that merely because plaintiff seeks to elicit only factual observations, Mr. Noblet's testimony is not subject to Rule 4003.5. The rule clearly provides otherwise. The text of subsection (3) states that a party "may not discover *facts known* or opinions held by an expert" who is not expected to testify at trial. The language of this provision clearly shows that "facts known" by an expert who will not be called at trial are covered by the restrictions of the rule and may not be compelled by the opposing party absent an order of court upon a showing of exceptional circumstances. Such "facts known" most certainly include factual observations. Thus, the mere fact that only factual observations are to be elicited does not mean that the rule is not applicable.

Next, it must be determined whether Mr. Noblet is an expert covered by the rule. This court finds the fact that Mr. Noblet's business card designates him as a "fire investigator" does not equate him with an "ordinary private investigator" whose factual observations are discoverable. A fire investigator is person with specific expertise in investigating and finding the cause of fires. Such investigators are generally not hired merely to look at the condition after a fire, but rather to investigate the fire-scene with the purpose of finding the cause of a fire. To do this, expertise and judgment are required. The mere fact that an expert report was never prepared does not mean that the investigator was not an expert. This court finds it extremely hard to believe that Sears would hire a fire investigator merely to tell it what the scene looked like. To do that, they could have hired anyone or sent out one of their own employees. Rather, it can be presumed that Sears retained a fire expert because of such investigator's specific expertise. Such investigator will observe the scene with the specific goal of determining the cause of the fire. Thus, the factual observations of such witness cannot be equated with those made by a regular private investigator.

Lastly, it must be determined whether Mr. Noblet was retained in anticipation of litigation or preparation for trial. The rule does not cover experts who are regular employees of the party because those experts have not been "retained or specially employed." *See* Explanatory Note to Rule 4003.5. Furthermore, the rule only covers expert information which was prepared specifically for purposes of litigation or preparation for trial. For example, a report regarding a fire investigation which is prepared by a fire insurer's expert immediately after the fire is not protected from discovery because it was not prepared in anticipation of litigation but rather as part of the insurer's ordinary business of processing claims. *See* Goodrich Amram 2d §4003.5(a):8.

In the underlying case, it is clear that Mr. Noblet was not a regular employee of Sears. Mr. Noblet's business card (attached as an exhibit to plaintiff's brief in support of the underlying issue) shows that he maintains a business address different from Sears, at 5490 Derry Street in Harrisburg, Pennsylvania. It furthermore appears that Mr. Noblet was retained specifically in anticipation of litigation. In addition to Sears' assertion that it retained Mr. Noblet for that reason, it can also be deducted from the fact that he was retained only *after* plaintiff had commenced his suit against Sears. Furthermore, unlike the fire insurance company in the example given above, such investigation by a fire investigator is not part of Sears' regular business. Thus, this court finds that Mr. Noblet was an expert whose testimony, whether factual in nature or in the form of an opinion, is subject to the discovery restrictions provided by Rule 4003.5. Since Sears has asserted that it will not call Mr. Noblet as a witness at trial, he may not be compelled to testify at a deposition or at trial.

The exclusion of Mr. Noblet's testimony serves the purpose of Rule 4003.5 (a)(3), which is to allow the parties an opportunity to consult freely with experts by minimizing the risk that such expert opinion may be obtained by the opposing party and used against the party who consulted the expert. *See* Goodrich Amram 2d § 4003.5(a):7. As stated above, a fire expert who investigates the fire scene makes observations with the purpose of determining the cause of the fire. The party being held responsible for the fire must have an opportunity to freely consult experts who will give them an independent evaluation of the facts as the expert found them. A party must feel free to hire experts without the fear of such information

being used against it. The information is protected even if the expert does not prepare an expert report as a result of his investigation.

The only way plaintiff could compel the testimony of Mr. Noblet is via the exception provided in the rule, by order of court upon a showing of exceptional circumstances under which it is impracticable for plaintiff to obtain facts on the same subject by other means. However, plaintiff has not asserted that such exceptional circumstances exist, and there do not appear to be any. Plaintiff's expert, Norman Dice, has inspected the dryer himself and was present when Mr. Noblet inspected the dryer. It thus appears that plaintiff had access to the same factual observations of the dryer in its original state.

Lastly, this court agrees with plaintiff that Sears will not be permitted to claim spoliation of evidence because the dryer was not preserved in its original state with the improper electrical connections. Sears has had an opportunity to have its expert examine the dryer in its original state, and the mere fact that it will not call that expert at trial (and therefore is left without any testimony regarding the condition of the dryer) does not mean that Sears can claim spoliation of evidence.

ORDER OF COURT

November 16, 1998, after consideration of the briefs submitted by counsel for the parties, this court finds that pursuant to Pa.R.C.P. 4003.5 (a)(3), plaintiff may not compel the testimony of Mr. John Noblet, a fire investigator retained by defendant, at a deposition or at trial.