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Schneider National Carriers v. Konold, et al

SCHNEIDER NATIONAL CARRIERS, INC., Plaintiff,
v. CLYDE KONOLD AND
CLYDE I. KONOLD TRUCKING, Defendants
CLYDE KONOLD, INDIVIDUALLY AND
D/B/A CLYDE KONOLD TRUCKING, Plaintiff,
v. JAMES R. TROUTMAN AND
SCHNEIDER NATIONAL CARRIERS, INC., Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 2001–1759

Use of depositions at trial; Unavailability of witness

1. In relevant part, Pa.R.C.P. 4020 guides the use of depositions at trial: (a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions: (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds (a) that the witness is dead, or (b) that the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or (c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or (e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open courts, to allow the deposition to be used.

2. At time of trial, if a witness is more than 100 miles from place of trial, it is an abuse of discretion for the trial court to refuse to allow his deposition to be introduced.

3. The issue of whether or not a witness' testimony should be used at trial is waived if no protective order is sought under Pa.R.C.P. 4012, which provides that (a) After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined, the court may make an order that (1) the deposition shall not be taken.

4. In cases where the deposition sought to be introduced is of a party, the trial court is given wide discretion in excluding the deposition; this is due to the deprivation of cross-examination, and the abridgment of the right to confrontation that occurs under such circumstances.

5. Confrontation is essential to the elicitation of reliable testimony; depriving the factfinders of the ability to see the demeanor of a witness makes it more difficult for them to judge credibility.

6. One factor the court may consider in deciding whether to permit the use of a deposition is if the witness procured his own absence from the trial.

7. Pa.R.E. provides in relevant part, (a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant: … (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3) or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

8. The decision based on the sufficiency of proof of unavailability is within the trial court's discretion.

9. The mere fact that a party witness lives outside the state of Pennsylvania is not basis enough for the court to allow him to testify by videotaped deposition at trial.

Appearances:

James R. Callan, Esq., *Counsel for Schneider and Troutman*

Karl R. Hildabrand, Esq., *Counsel for Konold*

OPINION

Walsh, J., January 20, 2004

This matter is before the Court on Schneider National Carriers, Inc., ("Schneider") and James R. Troutman's, ("Troutman") Plaintiffs in Action 1/Defendants in Action 2, Motion for Protective Order Pursuant to Pa.R.C.P. 4012 Precluding Clyde Konold, Defendant in Action 1/Plaintiff in Action 2, from Offering his Videotaped Deposition Testimony at Trial Instead of Appearing at Trial. We have reviewed Schneider and Troutman's Motion, the Answer with New Matter filed by Clyde Konold ("Konold") and the applicable law, and we are now ready to decide the matter.

Procedural History

Schneider commenced this lawsuit in May, 2001 by the filing of a Praecipe for Writ of Summons naming Konold and Clyde I. Konold Trucking as Defendants (Action 1). In November of 2001 Konold filed a Complaint in Franklin County naming Schneider and Troutman as Defendants (Action 2). Schneider filed a Complaint in Action 1 in January, 2002. Pursuant to motion, Judge Walker consolidated the two actions on August 1, 2002.

On September 30, 2003 Schneider and Troutman filed a Motion to Compel the Deposition of Konold seeking to require Konold to appear in Pennsylvania for a discovery deposition; on the same date, Schneider and Troutman also filed a Motion to Compel Answers to Interrogatories and Request for Production of Documents by Konold. The Court issued an Order on December 3, 2003 requiring the scheduling of the deposition of Konold within sixty (60) days (i.e., not later than February 1, 2004) to be taken either in person in Utah or by video teleconference. Also by Order of Court dated December 10, 2003, Konold was given sixty (60) days within which to answer the propounded interrogatories and to produce the requested documents.

On December 3, 2003 Schneider and Troutman filed the Motion for Protective Order that is the subject of this opinion. According to counsel for Schneider and Troutman, on November 24, 2003 counsel for Konold advised that Konold would appear in Pennsylvania in January of 2004 for his discovery deposition. Counsel for Konold also informed opposing counsel that immediately following Konold's discovery deposition, counsel planned to videotape Konold's testimony for use at trial. Schneider and Troutman oppose the use of Konold's deposition testimony at trial in lieu of Konold's presence at trial; and they oppose any notion of taking trial testimony by deposition immediately following the taking of Konold's discovery deposition later this month.

Discussion

In relevant part, Pa.R.C.P. 4020 guides the use of depositions at trial:

(a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds

(a) that the witness is dead, or

(b) that the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or

(c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or

(d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or

(e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open courts, to allow the deposition to be used.

Pa.R.C.P. 4020(a)(3).

Defense counsel argues that Konold should not have to appear in person for a trial in Franklin County. Konold makes his home in Valley City, Salt Lake County, Utah. Therefore, according to his lawyer, under the Pennsylvania Rules of Civil Procedure 4020 he should be able to submit his trial testimony by deposition since he is at a greater distance than one hundred miles from the place of the trial. Pa.R.C.P. 4020(a)(3)(b). Further, defense counsel submits that if the situation fits within the criteria outlined in Pa.R.C.P. 4020, discretion is removed from the trial judge. Kuntz v. Firth, 216 Pa.Super. 155, 264 A.2d 432 (1970). Defense counsel asserts the court must admit the deposition when it finds that the requirements of the rule have been met. Id.

Schneider and Troutman's counsel is opposed to allowing Konold to testify only by deposition at trial because Konold commenced his lawsuit in this jurisdiction as Plaintiff in Action 2. Counsel argues that since Konold chose this forum for his lawsuit and cannot now show good cause for failing to appear in person in Franklin County to prosecute his case or to defend against Schneider and Troutman's action, he should not be permitted to testify by deposition in lieu of live testimony. Schneider and Troutman also reference Pa.R.C.P. 218(c), which provides that "[a] party who fails to appear for trial shall be deemed to be not ready without satisfactory excuse." Schneider and Troutman argue that since Rule 218 makes no provision for a party to appear at trial by having his attorney offer the party's videotaped deposition testimony, Konold should be prohibited from taking his own deposition testimony for use at trial absent a compelling reason, other than the inconvenience of prosecuting his action and defending against Schneider and Troutman's action.

Finally, Schneider and Troutman assert that neither Rule 4020 nor the Pennsylvania Rules of Evidence permit a party to use his own deposition testimony either to bolster his trial testimony or in lieu of testimony and cross-examination at trial. Schneider and Troutman claim that they have found no controlling authority in this Commonwealth permitting a plaintiff to remain outside the Courthouse as a matter of personal convenience while his counsel puts on his case, supported only by a videotape of plaintiff's testimony. In essence, Schneider and Troutman argue that absent a showing of good cause, videotaped testimony is no substitute for the personal appearance, testimony and cross-examination of the parties in the presence and scrutiny of the triers of fact.

The Superior Court in Kuntz v. Firth, 216 Pa.Super. 155, 264 A.2d 432 (1970), did find that where, at time of trial, a witness was more than 100 miles from place of trial, it was an abuse of discretion for the trial court to refuse to allow her deposition to be introduced. The Superior Court based that decision on Pa.R.C.P. Nos. 4003(a)(1), 4012, 4020, 4020(a)(3) and 12 P.S. Appendix. Counsel for Konold cites Kuntz for the proposition that this court has no authority to disallow the taking of Konold's trial testimony by deposition and no authority to preclude the introduction of that testimony at the time of trial.

Kuntz involved a defense witness — not a party — who at the time of trial in Montgomery County, Pennsylvania was a student at Shippensburg State College in Cumberland County, Pennsylvania, some 127 miles from Montgomery County. The Superior Court in its reasoning stated that "there is nothing in the record to support appellee's argument that the deposition was improperly taken." Kuntz at 157, A.2d at 433. The defense witness was considered a "going" witness, defined as a witness who is about to depart from the state or who is in the state only temporarily. 4 Standard Pennsylvania Practice 512. Id.

The Superior Court went on to say that the appellee had waived the issue of whether or not the witness' deposition should be used at trial for the reason that no protective order was sought under Pa.R.C.P. 4012, which provides that

"(a) After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined, the court may make an order that (1) the deposition shall not

be taken."

Id. Further, because the defense witness was at a greater distance than 100 miles from the place of trial, Rule 4020(a)(3) was satisfied; the trial court should have allowed the use of the deposition since the requirements of the rule had been met. Id. at 158, A.2d at 433.

The instant case, however, differs from Kuntz in two significant ways. First, the Kuntz case involved a party wanting to use the deposition of a witness in place of trial testimony. Here, the party wants to use his own deposition instead of showing up and testifying in person at trial. Second, in Kuntz the party opposed to allowing the use of the deposition did not seek a protective order from the court under Rule 4012. In this case, the party opposing the use of the deposition, Schneider and Troutman, have petitioned the Court for a protective order.

The Superior Court in Baysmore v. Brownstein, 771 A.2d 54 (Pa.Super. 2001), dealt with a situation very similar to the one at issue here. In Baysmore, a party, the defendant Dr. Brownstein, chose to go on vacation rather than attend his trial. There, the trial court found that while Brownstein was outside the Commonwealth, he had procured his own absence. The trial court held: "…there was no appropriate excuse under the rule. The [Defendant] was well aware that trial was scheduled to begin on November 8, 1999, but he made the decision to go on his vacation rather than attend his trial." Id. at 59. The trial court further noted "...that the deposition was that of a party the defendant. In cases where the deposition sought to be introduced is of a party, **the trial court is given wide discretion in excluding the deposition**. This is due to the deprivation of cross-examination, and the abridgment of the right to confrontation, that occurs under such circumstances." Id. at 59 [emphasis ours]. "Confrontation is essential to the elicitation of reliable testimony… The factfinder here would also have been deprived of the ability to see the demeanor of Dr. Brownstein, thus it would have been more difficult for them to judge his credibility." Id. at 59–60.

The Superior Court determined that the trial court did not abuse its discretion in excluding Brownstein's deposition. In so deciding, the Superior Court looked to the wording of Pa.R.E. 804, which provides in relevant part:

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant:

...

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3) or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

Pa.R.E. 804.

The decision based on the sufficiency of proof of unavailability is within the trial court's discretion. Williams v. A Treat Bottling Co., 380 Pa.Super. 195, 551 A.2d 297 (1988). In the instant case, we have no evidence of nor has his counsel offered argument to suggest that Konold is unable to attend trial or testify because of age, sickness, infirmity or imprisonment. See Pa.R.C.P. 4020 (a)(3)(c). In fact, we have no reason to think that Konold's position is grounded in anything other than his convenience, much as was the case with Dr. Brownstein in Baysmore, supra; and that, in effect, Konold is procuring his own absence simply by choosing to do something other than attend trial. Because Konold has been able to show that his circumstance is covered by any of the subsections of Pa.R.C.P. 4020 (a)(3), there is no basis for admitting at trial Konold's deposition testimony as substantive evidence or for any other purpose.

Based on the Baysmore and Williams cases, it is apparent the trial court does, in fact, have the discretion to determine that Konold's trial testimony may not be presented by taking his deposition in advance of trial. Here, there is not enough proof in the record that Konold is "unavailable" for trial in Franklin County. The mere fact that Konold lives in Utah is not basis enough for the Court to allow him, a party to this lawsuit, to testify by videotaped deposition at trial. As the Superior Court pointed out in Baysmore, the

right to confrontation and cross-examination are concepts too important to allow that.

While we acknowledge that circumstances in this matter might arise between now and the time of trial necessitating the taking of Konold's videotaped deposition for trial, the current record does not reflect that need. On the forgoing bases, we will exclude the deposition of Konold as substantive evidence at trial; and we will order that Konold's trial testimony deposition not be taken. Pa.R.C.P. 4012(a)(1).

Finally we note that even if the Court had determined that the taking of Konold's trial testimony by deposition was appropriate as a substitution for his live testimony at trial, we still would have given counsel for Schneider and Troutman some minimal period of time following the taking of Konold's discovery deposition to prepare for Konold's trial deposition. To authorize the taking of Konold's trial testimony by deposition immediately following the taking of his discovery deposition is inherently unfair and prejudicial to Schneider and Troutman. If discovery is to have any meaning at all, good judgment and common sense suggest that there must be time to consider the fruits of discovery in order meaningfully to prepare for trial. Under no circumstances could we condone the practice that appears to be the game plan in this case.

Any stay imposed by the filing of Schneider and Troutman's Motion for a Protective Order will be lifted and depositions of Konold may proceed consistent with this Opinion and our accompanying Order. Lapp v. Titus, 224 Pa.Super. 150, 302 A.2d 366 (1973).

Conclusion

Based on the current state of the record, Konold is neither unavailable as a witness as that concept is defined by Pa.R.E. 804; nor has he met any of the requirements of Pa.R.C.P. 4020 (a)(3) that would permit his deposition to be used in lieu of live trial testimony. Accordingly, the Court will disallow the taking of his videotaped deposition later this month for the purpose of presenting deposition testimony as substantive evidence and in lieu of live trial testimony.

ORDER OF COURT

Now this 20th day of January, 2004, the Court having reviewed Schneider and Troutman's Motion for a Protective Order, the Answer with New Matter filed by Clyde Konold and the applicable law,

it is hereby ordered that Schneider and Troutman's Motion for A Protective Order is granted. The stay imposed by the filing of Schneider and Troutman's Motion for a Protective Order is lifted. Counsel for Konold may not videotape Konold's testimony for use at trial.