St. John's Law Review

Volume 55
Number 2 *Volume 55, Winter 1981, Number 2*

Article 9

July 2012

CPLR 3117(a)(2): Use of a Party's Deposition by Adversely Interested Party Subject to Trial Court's Discretionary Power to Control Proceedings

Daniel D. Rubino

ARTICLE 31—DISCLOSURE

CPLR 3117(a)(2): Use of party's deposition by adversely interested party subject to trial court's discretionary power to control proceedings

CPLR 3117(a)(2) authorizes the use of a party's deposition by an adverse party "for any purpose."[36] Pursuant to this provision, a deposition may be admitted into evidence for impeachment purposes or as evidence in chief[37] notwithstanding that the deponent is available to testify as a witness.[38] Nevertheless, it had never been expressly determined whether a trial court, in the exercise of

---

at 9-36. Therefore, if it appears that the defendant will be able to establish nonreliance by the named plaintiff on the alleged misrepresentations, the court may find it necessary to decertify the class to preserve the rights of members of the class who are not before it.

[36] CPLR 3117(a)(2) (Supp. 1980-1981) provides:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:
>
> . . . .
>
> (2) the deposition of a party or of any one who at the time of taking the deposition was an officer, director, member, or managing or authorized agent of a party, or the deposition of an employee of a party produced by that party, may be used for any purpose by any adversely interested party . . . .

CPLR 3117(a) was adapted in part from the Federal Rules of Civil Procedure, FIRST REP. 146, and is virtually identical to rule 32(a)(2) of the federal rules. *See generally* 4A J. MOORE, FEDERAL PRACTICE ¶ 32.01 (2d ed. 1980).

[37] *See* United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 263, 360 N.E.2d 943, 951, 392 N.Y.S.2d 265, 273 (1976); Spampinato v. A.B.C. Consol. Corp., 35 N.Y.2d 283, 286-87, 319 N.E.2d 196, 198, 360 N.Y.S.2d 878, 880 (1974); Gonzalez v. Medina, 69 App. Div. 2d 14, 21-22, 417 N.Y.S.2d 953, 958 (1st Dep't 1979); *In re* Estate of Schaich, 55 App. Div. 2d 914, 914, 391 N.Y.S.2d 135, 136 (2d Dep't 1977); Rodford v. Sample, 30 App. Div. 2d 588, 588, 290 N.Y.S.2d 30, 32 (3d Dep't 1968); CPLR 3117, commentary at 491 (1970); 3A WK&M ¶ 3117.04. It has been noted that CPLR 3117(a)(2) was intended "to authorize the use of a party's deposition unlimitedly against the deponent." SIXTH REP. 318.

[38] *See* Spampinato v. A.B.C. Consol. Corp., 35 N.Y.2d 283, 285, 319 N.E.2d 196, 198, 360 N.Y.S.2d 878, 880 (1974); Perkins v. New York Racing Ass'n, 51 App. Div. 2d 585, 586, 378 N.Y.S.2d 757, 759 (2d Dep't 1976); General Ceramics Co. v. Schenley Products Co., 262 App. Div. 528, 529, 30 N.Y.S.2d 540, 541 (1st Dep't 1941); *cf.* Fey v. Walston & Co., 493 F.2d 1036, 1046 (7th Cir. 1974); Fenstermacher v. Philadelphia Nat'l Bank, 493 F.2d 333, 338 (3d Cir. 1974); Pingatore v. Montgomery Ward & Co., 419 F.2d 1138, 1142 (6th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970); Community Counselling Serv., Inc. v. Reilly, 317 F.2d 239, 243 (4th Cir. 1963); Pursche v. Atlas Scraper & Eng'r Co., 300 F.2d 467, 488-89 (9th Cir. 1961), *cert. denied*, 371 U.S. 911 (1962) (federal rule 32(a)(2) allows introduction of party's deposition notwithstanding his prior testimony or unavailability). Notably, however, if the deponent is a nonparty witness his deposition may not be used as evidence in chief, unless one of the unavailability requirements enumerated in CPLR 3117(a)(3) is satisfied. 3A WK&M ¶ 3117.04. *See* Wojtas v. Fifth Ave. Coach Corp., 23 App. Div. 2d 685, 685, 257 N.Y.S.2d 404, 405 (2d Dep't 1965).

its general discretionary powers,[39] could refuse evidence rendered admissible by the statute.[40] Recently, however, in *Feldsberg v. Nitschke*,[41] the Court of Appeals held that the refusal to allow a deposition to be used for impeachment purposes after the party-deponent had been recalled for redirect examination does not constitute an abuse of the trial court's discretion.[42]

---

[39] The trial court's discretionary power to control the litigation before it is well settled. In the exercise of its discretion, the court for example may determine the sequence of a trial, Tomassi v. Town of Union, 58 App. Div. 2d 670, 671, 395 N.Y.S.2d 747, 749 (3d Dep't 1977), and the order of introducing evidence, Philadelphia & Trenton R.R. v. Stimpson, 39 U.S. (13 Pet.) 448, 463 (1840); Agate v. Morrison, 84 N.Y. 672, 673 (1881); Blake v. People, 73 N.Y. 586, 587 (1878); Widera v. Widera, 200 Misc. 753, 758, 104 N.Y.S.2d 698, 703 (Sup. Ct. Kings County 1951); and allow a reopening of the case "to supply omissions or to receive further testimony." Barson v. Mulligan, 77 App. Div. 192, 194, 79 N.Y.S. 31, 33 (1st Dep't 1902). *See also* People v. Ferrone, 204 N.Y. 551, 553, 98 N.E. 8, 8 (1912); Forde v. Forde, 53 App. Div. 2d 779, 779, 384 N.Y.S.2d 547, 548 (3d Dep't 1976); Plohn v. Plohn, 283 App. Div. 842, 842, 129 N.Y.S.2d 58, 59 (3d Dep't 1954). The determination of whether a witness is to be excluded from the courtroom to guard against perjury is also subject to the trial court's discretion, People v. Cooke, 292 N.Y. 185, 190-91, 54 N.E.2d 357, 360 (1944); Philpot v. Fifth Ave. Coach Corp., 142 App. Div. 811, 813, 128 N.Y.S. 35, 37 (1st Dep't 1911), as is the manner and extent of cross-examination, People v. Ramistella, 306 N.Y. 379, 384, 118 N.E.2d 566, 569 (1954); Friedal v. Board of Regents, 296 N.Y. 347, 352, 73 N.E.2d 545, 548 (1947); People v. Malkin, 250 N.Y. 185, 197, 164 N.E. 900, 905 (1928), and the extent of an examination to show the hostility of a witness, People v. Sorge, 301 N.Y. 198, 202, 93 N.E.2d 637, 640 (1950); People v. Lustig, 206 N.Y. 162, 172, 99 N.E. 183, 186 (1912); People v. Brooks, 131 N.Y. 321, 326, 30 N.E. 189, 190-91 (1892). *See generally* People v. Pollard, 54 App. Div. 2d 1012, 388 N.Y.S.2d 164 (3d Dep't 1976); Siberfield v. Swiss Bank Corp., 268 App. Div. 884, 50 N.Y.S.2d 841 (2d Dep't 1944); Mohawk Carpet Mills v. State, 173 Misc. 319, 17 N.Y.S.2d 780 (Ct. Cl. 1940); 1 M. BENDER, NEW YORK EVIDENCE § 25.01, at 104-12 (1979); W. RICHARDSON, EVIDENCE § 459 (10th ed. 1973); 4 WK&M § 4011.04-05.

[40] Although the extent to which a trial court, in the exercise of its discretion, could override the provisions of paragraph (a)(2) of CPLR 3117 was unclear, at least one lower court had indicated that its discretion was not constrained by the express language of paragraph (a)(3). In Josbe v. Connolly, 60 Misc. 2d 69, 302 N.Y.S.2d 35 (N.Y.C. Civ. Ct. Bronx County 1969), after noting that "[a] deposition occupies no special place in the law of evidence," the court held that even though the statutory prerequisite to admissibility—the unavailability of the deponent—apparently had been satisfied, the deposition evidence nevertheless was inadmissible because the deponent's unavailability was caused by the party seeking to use the deposition. *Id.* at 70, 302 N.Y.S.2d at 37. Notably, the court acknowledged that the statute did not impose this condition on the right to utilize the deposition. *Id.* Rather, considerations of justice and fairness, according to the court, compelled it to engraft the limitation on the express statutory language. *Id.* at 71, 302 N.Y.S.2d at 37.

On the federal level, the courts have exercised their discretionary power to limit the use of a deposition to exclude repetitious or immaterial matter and to require identification of pertinent portions by specific offer. *See* Fey v. Walston & Co., 493 F.2d 1036, 1046 (7th Cir. 1974); Zimmerman v. Safeway Stores, Inc., 410 F.2d 1041, 1044 n.5 (D.C. Cir. 1969); Cleary v. Indiana Beach, Inc., 275 F.2d 543, 550-51 (7th Cir.), *cert. denied*, 364 U.S. 825 (1960).

[41] 49 N.Y.2d 636, 404 N.E.2d 1293, 427 N.Y.S.2d 751 (1980), *aff'g*, 66 App. Div. 2d 757, 412 N.Y.S.2d 2 (1st Dep't 1978).

[42] 49 N.Y.2d at 640, 404 N.E.2d at 1295, 427 N.Y.S.2d at 753.

Feldsberg was a personal injury and wrongful death action arising out of an automobile accident.[43] During the trial, at which there was conflicting testimony on the issue of negligence, the plaintiffs called the defendant as their witness, and after he was excused, requested that he be available to testify concerning certain photographs of the accident scene.[44] The court granted the plaintiffs' request but emphasized that the recall was not to be for the purpose of repeating conflicts or testimony already covered.[45] On recall, however, the plaintiffs sought to use the defendant's deposition to point out an inconsistency in his testimony.[46] Stating that the use of the deposition was a "further examination of the defendant," the Supreme Court, New York County, ruled that the plaintiffs' counsel could not make any additional use of the defendant's deposition.[47] After judgment for the defendant, the Appellate Division, First Department, specifically addressing the plaintiffs' objection to the trial court's ruling on the use of the deposition, affirmed.[48]

On appeal, a divided Court of Appeals affirmed the appellate division.[49] Chief Judge Cooke, writing for the majority,[50] noted at the outset that absent a "clear abuse of discretion," a trial court's power to control the course of the proceedings overrides a party's right to introduce evidence which is nevertheless technically admissible.[51] The Court stated that since all relevant testimony should be brought out upon initial examination of a witness,[52] a trial court's decision to restrict the scope of examination following recall places "reasonable limits" on the proceedings and relieves "untoward administrative burdens."[53] Recognizing that CPLR 3117(a)(2) does not confer "any special qualities" upon a deposition, the majority stated that a court's discretionary power to con-

---

[43] *Id.* at 641, 404 N.E.2d at 1295, 427 N.Y.S.2d at 753.

[44] *Id.*

[45] *Id.* at 641-42, 404 N.E.2d at 1296, 427 N.Y.S.2d at 754.

[46] *Id.* Asserting that CPLR 3117(a)(2) permitted the use of the deposition without the defendant being present on the stand, the plaintiffs' attorney requested permission to introduce the deposition with the defendant present as a witness. *Id.*

[47] *Id.*

[48] 66 App. Div. 2d 757, 412 N.Y.S.2d 2 (1st Dep't 1978).

[49] 49 N.Y.2d at 640, 404 N.E.2d at 1295, 427 N.Y.S.2d at 753.

[50] Judges Jasen, Gabrielli, and Jones joined Chief Judge Cooke in the majority. Judge Meyer dissented in an opinion in which Judges Wachtler and Fuchsberg concurred.

[51] 49 N.Y.2d at 643, 404 N.E.2d at 1296, 427 N.Y.S.2d at 754.

[52] *Id.* at 644, 404 N.E.2d at 1297, 427 N.Y.S.2d at 755.

[53] *Id.*

trol the use of testimonial evidence extends to the use of depositions.[54] In the majority's view, the plaintiffs, having had sufficient opportunity to demonstrate an inconsistency in the defendant's testimony,[55] should not be allowed to use a deposition to circumvent a restriction placed on the reexamination of the party witness.[56] Indeed, the *Feldsberg* Court concluded, a contrary holding would establish a "per se rule" under which a trial judge would be stripped of the discretionary power to preclude "unnecessary repetition or unfair surprise simply because a deposition is involved."[57]

Authoring a dissenting opinion, Judge Meyer argued that although CPLR 3117(a)(2) does not give a party an indefeasible right to introduce a deposition at any point in the trial, the admissibility of a deposition is not exclusively within the discretion of the trial court.[58] Emphasizing the policy considerations favoring the introduction of relevant and material evidence, the dissent contended that all admissible evidence should be received unless it is demonstrated that unfairness to the opposing party would result.[59] Since a showing of unfairness was absent from the record, Judge Meyer stated that the exclusion of the deposition by the judge was clearly an abuse of discretion.[60] Moreover, since the deposition evidence "bore materially" on the testimony proffered by both the plaintiff and the defendant, Judge Meyer concluded that its exclusion was prejudicial error.[61]

---

[54] *Id. See generally* note 39 *supra.*

[55] A possible inconsistency appeared between the defendant's oral testimony and his deposition concerning the point at which the plaintiff's decedent, a pedestrian, crossed in front of the defendant's vehicle. At his pretrial examination, the defendant stated that the deceased was 20 feet away when he went directly in front of the defendant. 49 N.Y.2d at 651, 404 N.E.2d at 1301, 427 N.Y.S.2d at 759 (Meyer, J., dissenting). At the trial, however, the defendant testified that the distance between him and the decedent ranged from 5 to 50 yards at different points in time. *Id.* (Meyer, J., dissenting).

[56] *Id.* at 644-45, 404 N.E.2d at 1297-98, 427 N.Y.S.2d at 756.

[57] *Id.* at 645, 404 N.E.2d at 1298, 427 N.Y.S.2d at 756.

[58] *Id.* at 646-47, 404 N.E.2d at 1299, 427 N.Y.S.2d at 757 (Meyer, J., dissenting).

[59] *Id.* (Meyer, J., dissenting).

[60] *Id.* at 650, 404 N.E.2d at 1301, 427 N.Y.S.2d at 759 (Meyer, J., dissenting). Judge Meyer stated that the trial court ruling was not based upon a determination that the admission of the deposition would be unfair, rather the decision to exclude the evidence apparently reflected the trial judge's erroneous view that the plaintiffs, in electing to call the defendant and to use his deposition concurrently, could not thereafter use the deposition alone. *Id.* at 649, 404 N.E.2d at 1300-01, 427 N.Y.S.2d at 759 (Meyer, J., dissenting).

[61] *Id.* at 650, 404 N.E.2d at 1301, 427 N.Y.S.2d at 759 (Meyer, J., dissenting). Concluding that the trial court's abuse of discretion was not harmless error, the dissent reasoned that the inconsistency between the defendant's deposition and oral testimony would have been significant to the jury on the issue of the decedent's contributory negligence—a de-

It is submitted that the *Feldsberg* Court properly determined that the discretionary power of the trial court to control the admission of evidence is not limited by CPLR 3117(a)(2).[62] Although this provision gives a party the right to use an adversary's deposition "for any *purpose*,"[63] it does not establish an absolute right to use the deposition at any *time* during the trial.[64] Indeed, since the deposition is a substitute for live testimony,[65] any restriction which

---

fense which the defendant has the burden of establishing in a combined wrongful death and personal injury action brought on a claim accruing, as here, prior to September 1, 1975. *Id.* at 650-51, 404 N.E.2d at 1301, 427 N.Y.S.2d at 759 (Meyer, J., dissenting); *see* note 55 *supra*. *See generally* EPTL § 5-4.2 (Supp. 1980-1981).

[62] *See* note 38 *supra*. The discretionary power vested in a trial court is not expressly limited by the CPLR. Martin v. Marshall, 25 App. Div. 2d 594, 596, 266 N.Y.S.2d 992, 995 (3d Dep't), *appeal denied*, 18 N.Y.2d 579 (1966); 4 WK&M ¶ 4011.03. Indeed, CPLR provisions relating to disclosure expressly reaffirm the trial court's discretionary powers. CPLR 3103(a) provides:

> The court may at any time on its own initiative . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

CPLR 3103(a) (1970); *see* Estates Roofing Co. v. Savo, 85 Misc. 2d 1028, 1028, 381 N.Y.S.2d 198, 199 (Dist. Ct. Suffolk County 1976).

CPLR 4011 provides that "[t]he court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." CPLR 4011 (1963). This statute, it has been suggested, "merely [restates] the inherent discretionary power of a court." 4 WK&M ¶ 4011.03, at 40-21.

[63] CPLR 3117(a)(2) (Supp. 1980-1981) (emphasis added).

[64] In permitting a party's deposition to be introduced by an adversary as evidence of the facts asserted, CPLR 3117(a)(2) is consistent with the traditional admissions exception to the hearsay rule. 3A WK&M ¶ 3117.04. Although a deposition is hearsay evidence when used to prove the truth of its contents, an adversary's deposition is admissible under the admissions exception to the hearsay rule. Josbe v. Connolly, 60 Misc. 2d 69, 70-71, 302 N.Y.S.2d 35, 37 (N.Y.C. Civ. Ct. Bronx County 1969); *see* United Bank Ltd. v. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 264, 360 N.E.2d 943, 951, 392 N.Y.S.2d 265, 273 (1976); CPLR 3117, commentary at 490-91 (1970). *See generally* 4 J. WIGMORE, EVIDENCE § 1048 (3d ed. 1940). The extent of its use, however, will be subject to the trial court's discretion. *See* Swick v. White, 18 Ariz. App. 519, 522, 504 P.2d 50, 52 (Ct. App. 1972); Deffendoll v. Stupp Bros. Bridge & Iron Co., 415 S.W.2d 36, 40 (Mo. Ct. App. 1967); Rolfe v. Olson, 87 N.J. Super. 242, 245, 208 A.2d 817, 819 (Super. Ct. App. Div. 1965); Celeste v. State, 56 Misc. 2d 991, 994, 290 N.Y.S.2d 64, 67 (Ct. Cl. 1968), *aff'd*, 40 App. Div. 2d 880, 337 N.Y.S.2d 252 (3d Dep't 1972); Brown v. Bryant, 244 Or. 321, 323, 417 P.2d 1002, 1004 (1966).

[65] Vicherek v. Papanek, 281 App. Div. 498, 500, 120 N.Y.S.2d 197, 203 (1st Dep't 1953). Legally, "[the deposition] is indeed a substitute for the physical appearance of the witness on the trial and has exactly the same effect as proof of any fact within his knowledge or observation as his oral testimony would have." *Id.*; *see* 1 M. BENDER, NEW YORK EVIDENCE § 25.04 (1979). Although the taking of a deposition is similar to the eliciting of testimony of a witness, there is a practical distinction in that the trier of facts is deprived of the opportunity to observe the demeanor of the deponent. *See* Arnstein v. Porter, 154 F.2d 464, 469-70

might be placed on the examination of a witness should be equally applicable to the use of the deponent's written statement. In reaffirming the broad common-law powers of the trial court to control the conduct of the litigation,[66] the *Feldsberg* Court has recognized that the mere fact that evidence has been rendered admissible by statute should not necessarily mandate its admission.

It is suggested, however, that the holding in *Feldsberg* should not be interpreted as conferring upon the trial court unfettered discretion to exclude material and relevant evidence. As the dissent correctly pointed out, all evidence having probative value is admissible unless forbidden by a specific rule.[67] Thus, unless unfair prejudice would result, any conflict between the trial court's discretion to control the proceedings and the admission of material and relevant evidence generally should be resolved in favor of inclusion of the evidence.[68]

Daniel D. Rubino

ARTICLE 45—EVIDENCE

CPLR 4503(a): Identity of third party who retains attorney for criminal defendant not protected by attorney-client privilege

The attorney-client privilege, codified in CPLR 4503(a), prohibits the disclosure of confidential communications made by a cli-

---

(2d Cir. 1946).

[66] *See* note 39 *supra*.

[67] 49 N.Y.2d at 647, 404 N.E.2d at 1299, 427 N.Y.S.2d at 757 (Meyer, J., dissenting); Ando v. Woodberry, 8 N.Y.2d 165, 167, 168 N.E.2d 520, 521, 203 N.Y.S.2d 74, 75-76 (1960); 1 J. WIGMORE, EVIDENCE § 10, at 293 (3d ed. 1940). For an extensive analysis of the admissibility of logically probative evidence see Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141 (1889).

[68] The power of a trial court to exclude technically admissible evidence may be founded upon such considerations as undue consumption of time, repetition, unfair surprise or undue prejudice to one of the opposing parties. *See* Radosh v. Shipstad, 20 N.Y.2d 504, 508, 231 N.E.2d 759, 762, 285 N.Y.S.2d 60, 63 (1967); People v. Caruso, 246 N.Y. 437, 444, 159 N.E. 390, 392 (1927); People v. Harris, 209 N.Y. 70, 82, 102 N.E. 546, 550 (1913). The New York courts have employed a balancing test to determine the admissibility of evidence—weighing its probative value against these countervailing policy considerations. *See, e.g.*, People v. Duffy, 36 N.Y.2d 258, 262-63, 326 N.E.2d 804, 807, 367 N.Y.S.2d 236, 240, *cert. denied*, 423 U.S. 861 (1975); People v. Sandoval, 34 N.Y.2d 371, 375, 314 N.E.2d 413, 416, 357 N.Y.S.2d 849, 854 (1974); People v. Schwartzman, 24 N.Y.2d 241, 247, 247 N.E.2d 642, 646, 299 N.Y.S.2d 817, 823, *cert. denied*, 396 U.S. 846 (1969).