NY CLS CPLR § 4512

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New York

Consolidated Laws Service ***>***

Civil Practice Law And Rules (Arts. 1 — 100) ***>***

Article 45 Evidence (§§ 4501 — 4551)

§ 4512. Competency of interested witness or spouse

Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes: CPA § 346; CCP § 828.

Advisory Committee Notes:

This section is a simplified form of former § 346. The words in the former section “except as otherwise specially prescribed” are not needed in view of the substitution of § 4519 for former § 347. The words of the former section “or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed or defended” are encompassed in the more general

phrase “by reason of his interest in the event.” The opening phrase of this section alerts practitioners to the limitations contained in § 4502 relating to the testimony of a spouse.

Notes to Decisions

I. Under CPLR

1. Generally

A party in a civil suit may be called as a witness by his adversary and questioned as to matters relevant to the issues. McDermott v Manhattan Eye, Ear & Throat Hospital, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E.2d 469, 1964 N.Y. LEXIS 817 (N.Y. 1964).

Plaintiff in a malpractice action can call the defendant doctor to the stand and question him both as to his factual knowledge of the case, that is, as to his examination, diagnosis, treatment, and the like, and if he be so qualified, as an expert to establish the generally accepted medical practice in the community. McDermott v Manhattan Eye, Ear & Throat Hospital, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E.2d 469, 1964 N.Y. LEXIS 817 (N.Y. 1964).

Unsworn testimony of two patients at hospital for mentally retarded was properly received at hearing concerning discipline of hospital attendant for striking one of the patients where although patients had I.Q. levels of 43 and 50 the school psychologist testified that they were able to relate to reality, and could explain what was going on around them and understood the difference between telling the truth and telling a lie; reliance on unsworn testimony, which was consistent with circumstantial evidence indicating that injury resulted from a blow by a hard object, did not deprive attendant of a fair administrative hearing. Brown v Ristich, 36 N.Y.2d 183, 366 N.Y.S.2d 116, 325 N.E.2d 533, 1975 N.Y. LEXIS 1728 (N.Y. 1975).

At common law, person was incompetent to testify if interested in event, on supposed ground that he or she was unworthy of belief, but for most part and under statute, interest disqualification has been abolished. Coleman v New York City Transit Authority, 37 N.Y.2d 137, 371 N.Y.S.2d 663, 332 N.E.2d 850, 1975 N.Y. LEXIS 1938 (N.Y. 1975).

Where testimony of former patient at state hospital established prima facie case that state's negligence contributed to or caused her accident, there was no basis on which the court could disregard such testimony even though patient was an interested witness. Bradshaw v State, 24 A.D.2d 930, 264 N.Y.S.2d 725, 1965 N.Y. App. Div. LEXIS 2940 (N.Y. App. Div. 3d Dep't 1965).

Rule that failure of party to call witness will not raise inference that witness' testimony would not have been favorable to the party if witness was equally available to both parties is not applicable in case where witness, though equally accessible to both parties, is favorable to one party and unfavorable or hostile to the other. In negligence action against motorist for personal injuries sustained when automobile came into contact with plaintiff, motorist's failure to call as witness his wife who had been in automobile at time of accident entitled jury to draw inference that her testimony would not have been favorable to motorist with regard to how accident occurred, and refusal to so charge was error, even though wife was in courtroom and available to both sides. Rosa v Blander, 47 A.D.2d 865, 366 N.Y.S.2d 36, 1975 N.Y. App. Div. LEXIS 9223 (N.Y. App. Div. 2d Dep't 1975).

It was error to refuse to qualify witness as expert on ground that he was personally involved in disputed transaction since parties with firsthand knowledge may be permitted or even compelled to render expert testimony, and nonparty witness may not be held to stricter standard than interested party; facts involving witness' business relationship with parties might affect his credibility and weight given his testimony, but not his competency as expert witness. Hirschfeld v IC Secur., Inc., 132 A.D.2d 332, 521 N.Y.S.2d 436, 1987 N.Y. App. Div. LEXIS 51567 (N.Y. App. Div. 1st Dep't 1987), app. dismissed, 72 N.Y.2d 841, 530 N.Y.S.2d 556, 526 N.E.2d 47, 1988 N.Y. LEXIS 1128 (N.Y. 1988).

In action by electrical contractor to recover for labor and services performed and materials provided, court properly refused to let defendant testify as his own expert where defendant's own testimony revealed his ignorance of refinements of electrical work and his lack of qualifications in evaluating cost of electrical work. A. C. Electric Co. v Bellino, 135 A.D.2d 678, 522 N.Y.S.2d 578, 1987 N.Y. App. Div. LEXIS 52622 (N.Y. App. Div. 2d Dep't 1987).

Portions of conversation between defendant and his wife were admissible against defendant since they were made in presence of 2 police officers and thus were not made in reliance on marital relationship. People v Gorman, 150 A.D.2d 797, 542 N.Y.S.2d 225, 1989 N.Y. App. Div. LEXIS 7202 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 847, 546 N.Y.S.2d 1012, 546 N.E.2d 195, 1989 N.Y. LEXIS 3864 (N.Y. 1989), app. denied, 75 N.Y.2d 770, 551 N.Y.S.2d 913, 551 N.E.2d 114, 1989 N.Y. LEXIS 4721 (N.Y. 1989).

A party plaintiff, who is also the mother and guardian ad litem of an infant plaintiff, may be permitted to testify as to her opinion as an expert as to the accepted practices and precautionary measures that are followed in the giving of a certain brand name permanent wave treatment in the hair-dressing business. Saccone v Maison Marcel, Inc., 42 Misc. 2d 1029, 249 N.Y.S.2d 758, 1964 N.Y. Misc. LEXIS 1946 (N.Y. County Ct. 1964), rev'd, 45 Misc. 2d 776, 257 N.Y.S.2d 728, 1965 N.Y. Misc. LEXIS 2215 (N.Y. App. Term 1965).

Three accountants who are being paid a contingent fee by petitioners to testify as expert witnesses in a consolidated appraisal proceeding (Business Corporation Law, § 623) brought by

two groups of dissenting shareholders, are not incompetent to testify in the appraisal proceeding by reason of the contingent fee since the nature of an expert's fee arrangement is relevant only to his credibility not his competency to testify. DR 7-109 (C) of the Code of Professional Responsibility which prohibits a lawyer from offering to pay or acquiescing in the "payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case" only represents an indirect "legislative judgment" with respect to contingent fees and in no way limits the applicability of CPLR 4512 which does not preclude a witness from testifying "by reason of his interest in the event". The disciplinary rule only gives the Appellate Division, through its disciplinary powers over attorneys, the power to indirectly limit the provisions of CPLR 4512 and does not provide an exception thereto. In re Shore, 93 Misc. 2d 933, 403 N.Y.S.2d 990, 1978 N.Y. Misc. LEXIS 2157 (N.Y. Sup. Ct. 1978), aff'd, 67 A.D.2d 526, 415 N.Y.S.2d 878, 1979 N.Y. App. Div. LEXIS 10498 (N.Y. App. Div. 2d Dep't 1979).

In an action to recover for personal injuries sustained by an employee while operating a machine, in which the plaintiff's attorney contacted an expert explaining his case and the expert, after declining to testify, accepted a retainer to testify on behalf of the defendant manufacturer, the expert would not be subject to disqualification and there would be no basis for pretrial hearing into potential conflicts; since to hold otherwise would invite a litigant to contact leading experts in anticipation of their retention by his adversary and thereafter claim a disqualification, thus leaving the adversary without a desirable expert. Napolitano v H. G. Grable Co., 116 Misc. 2d 58, 455 N.Y.S.2d 79, 1982 N.Y. Misc. LEXIS 3829 (N.Y. Sup. Ct. 1982).

Licensed psychologist who has never worked as psychologist in general hospital is not competent to testify as expert witness in wrongful death action grounded upon allegations of medical and psychiatric malpractice committed by defendant hospital and staff psychiatrist in discharging plaintiff's former wife who thereafter suffocated parties' 3 infant children, since state law distinguishes between professional practice of psychiatry, medical discipline, and psychology, which is not, and non-medical person cannot be permitted to offer testimony to jury to establish what proper medical and/or psychiatric standard of care was in this case and what,

if any, departures from that standard of care were committed by defendants; additionally, since psychologist was student earning his Masters degree in psychology at time of alleged malpractice in 1972, he would not be competent to testify as to standards of psychiatric care than pertaining in medical community. McDonnell v County of Nassau, 129 Misc. 2d 228, 492 N.Y.S.2d 699, 1985 N.Y. Misc. LEXIS 2690 (N.Y. Sup. Ct. 1985).

II. Under Former Civil Practice Laws

2. Generally

Construction with CPA § 347 (§ 4519 herein). In re Hennessey's Will, 157 A.D. 136, 141 N.Y.S. 736, 1913 N.Y. App. Div. LEXIS 5862 (N.Y. App. Div. 1913).

The testimony of witnesses who are parties to the action must, by reason of their interest in the result, ordinarily, be submitted to the jury for them to determine what effect, if any, their interest should have upon its credibility. Goldsmith v Coverly, 27 N.Y.S. 116, 75 Hun 48 (1894).

A plaintiff cannot prove conversations between himself and a witness which took place in the absence of defendant. Mason v Corbin, 34 N.Y.S. 773, 88 Hun 540 (1895).

The fact that questions may be put to a witness on examination before trial tending to criminate him, affords no justification for his refusing to be sworn. Greismann v Dreyfus.

3. Depositions in Justice Court

Since Justice Court Act § 202, governing the taking of depositions of witnesses before the trial makes no distinction between witnesses who are parties and those who are not, under CPA § 346 a party to an action in the City Court of Buffalo might be sworn as a witness for that purpose. Windheim v Lafayette Hotel Co., 190 N.Y.S. 833, 117 Misc. 113, 1921 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1921).

4. Legitimacy of children

In a proceeding to prove that the relator was the father of an alleged bastard child of a married woman, the mother was not a competent witness to prove nonaccess of her husband. People ex rel. Wright v Court of Sessions, 45 Hun 54, 9 N.Y. St. 607 (N.Y.).

5. Executor

A person, named as executor in a will, is not prohibited from testifying to prove the execution thereof, upon a proceeding to prove the same in a surrogate's court. If disqualified by the Revised Statutes the provisions of the Code of Procedure (§§ 398 and 399) rendered him competent. Children's Aid Soc. v Loveridge, 70 N.Y. 387, 70 N.Y. (N.Y.S.) 387, 1877 N.Y. LEXIS 629 (N.Y. 1877).

6. Husband and wife

In an action on a bond for permitting premises to become disorderly, the wife of the principal merely as such was not an interested witness and was competent to testify. Green v Altenkirch, 176 A.D. 320, 162 N.Y.S. 447, 1916 N.Y. App. Div. LEXIS 8998 (N.Y. App. Div. 1916).

In action on bond of liquor dealer for permitting premises to become disorderly, record of conviction of wife for keeping a disorderly house was inadmissible. Green v Altenkirch, 176 A.D. 320, 162 N.Y.S. 447, 1916 N.Y. App. Div. LEXIS 8998 (N.Y. App. Div. 1916).

One spouse is not incompetent to identify the other even in a divorce action. Walsh v Walsh, 25 Misc. 2d 441, 208 N.Y.S.2d 380, 1960 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 1960).

Service upon husband in divorce action was not rendered insufficient because process server, who had not previously known or seen husband, identified him from a photograph given to him by wife and by wife's pointing husband out to him at time of service where both wife and process server testified and server identified husband who was in court. Walsh v Walsh, 25 Misc. 2d 441, 208 N.Y.S.2d 380, 1960 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 1960).

Research References & Practice Aids

Cross References:

Inhabitants not incompetent; place of trial of actions and proceedings, CLS Sec Cl Cities § 242.

Federal Aspects:

General rule of competency of witnesses in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 601.

Jurisprudences:

48 NY Jur 2d Domestic Relations § 2192.

58 NY Jur 2d Evidence and Witnesses §§ 338., 347.

58A NY Jur 2d Evidence and Witnesses §§ 841., 936.

81 Am Jur 2d, Witnesses §§ 208 et seq.

Law Reviews:

Evidence symposium. 52 Cornell L.Q. 177.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4512, Competency of Interested Witness or Spouse.

1 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 18.05; 2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 37.03; 4 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 66.09.

6 Rohan, New York Civil Practice: EPTL ¶11-2.3.

Matthew Bender’s New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 10.03. Ensuring Witness Is Competent to Testify.

Matthew Bender’s New York Evidence:

8 Bender's New York Evidence § 29.03. The spouse as a witness.

2 Bender's New York Evidence § 129.01. Competency of Witnesses: In General.

2 Bender's New York Evidence § 137.03. Qualifying Experts.

Annotations:

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 36 ALR3d 820.

Malpractice testimony: Competence of physician or surgeon from one locality to testify, in malpractice case, as to standard of care required of defendant practicing in another locality. 37 A.L.R.3d 420.

Competency of nonexpert witness to testify, in criminal case, based upon personal observation, as to whether person was under the influence of drugs. 21 ALR4th 905.

Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither. 119 ALR5th 275.

Matthew Bender’s New York Checklists:

Checklist for Protecting Privileged Communications LexisNexis AnswerGuide New York Civil Litigation § 10.02.

Forms:

Bender’s Forms for the Civil Practice Form No. CPLR 4511:1 et seq.

Texts:

2 New York Trial Guide (Matthew Bender) § 22.13; 3 New York Trial Guide (Matthew Bender) § 51.13.

Hierarchy Notes:

NY CLS CPLR, Art. 45

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