MondayMonday

No Free Ticket, Says CPLR

August 3, 2015

As we sit mired in the dog days of summer (*dies caniculares*), we recall this story from the dozens which involve The Little Goniff. "Goniff," in Yiddish, is used here as a term of endearment, though it technically means "thief." Our late friend Richie was not that kind of goniff. He was a "little" goniff: He always had an angle, even if it was somewhat more or less than 90°.

The Little Goniff painted a glorious life, in checkered yellow. We would drive NYC taxicabs. In those days, our pay would be 50% of the meter and all our tips. Unlike today's drivers, who have to lease the cab and pay for gas, we would pay nothing for the privilege. The Little Goniff never mentioned that taxis, in those days, had no air conditioning, no radios and no suspension.

So, we joined the few, the proud and the hemorrhoid-afflicted. We took the Hack License course and passed the rigorous exam (we still have the answer sheet, helpfully provided to us by our instructors prior to the exam.) The orange Hack

license was a passport into a world of adventure, to say nothing of $20 cash in our pocket every Saturday night (we only drove one day a week.) Gas at 36¢ a gallon, a six pack of Bud for under $3 and SUNY tuition only $1500 (including room and board.) We were stardust. Our Uncle Harvey, who drove a taxi in 1936, gave us our best advice: Keep the cab clean. However, neither The Little Goniff nor Uncle Harvey told us what to do when our first fare was a prostitute who suggested we take the fare out in trade. Who needs Uber? We are cabbie yellow to the core. We took the cash.

It is a modern, technology-rich world. In our profession, nowhere is this more evident than in the area of discovery. So when AD2 decided *Feng Wang v. A&W Travel*, 2015 NY Slip Op 06312 (2d Dep't 7/29/15) last week, we were scarcely surprised. Plaintiff, who was injured while a passenger on a bus, stood for deposition, which was not completed. Before its continuation, plaintiff returned to China to be with his wife and child, as he could no longer care for himself. Defendants moved for an order dismissing the complaint or precluding plaintiff from testifying as to damages at trial unless he returned for his EBT and a DME. Plaintiff cross-moved for a protective order allowing a remote deposition and the use of that video deposition in lieu of appearing at trial, as he could not obtain a visa to re-enter the United States. Supreme Court ordered preclusion unless plaintiff provided business class airfare to China for defendants' entourage.

AD2 reverses, stating that plaintiff's predicament is an "undue hardship" which calls for flexibility. CPLR 3117(a)(3) permits the substitution of video testimony at trial under these circumstances. As to defendants' DME, plaintiff is not required to pay for a hotel and business class plane ticket to China for defendants' doctor. Nonetheless, plaintiff had offered to pay for "reasonable" airfare/hotel anyway.

How "flexible" is CPLR discovery? As flexible as need be, it seems.