SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*,

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Kapnick, J.

PETITIONERS' SUPPLEMENTAL BRIEF REGARDING WAIVER OF OBJECTION

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Objectors failed to make timely objection to the testimony they now seek to strike, elicited testimony on the same subjects on cross-examination, and now belatedly seek to strike testimony they find unhelpful. Each of the examples Objectors cite is from testimony they elicited. In the first excerpt, the question was posed by Ms. Kaswan. *See* Tr. 2014:14-26. In the second, the question was posed by Mr. Pozner. *See* Tr. 1860:16-1861:15. In the final excerpt, the question was posed by Mr. Reilly. *See* Tr. 1478:16-1479. As set forth below, New York does not permit a party to elicit testimony, fail to object to the testimony it sought, and then afterward seek to strike the testimony because the answer is not to its liking.

It is well settled that "[w]hen a timely objection is not made, the testimony offered is presumed to have been unobjectionable and any alleged error considered waived." *Horton v. Smith*, 51 N.Y.2d 798, 799 (1980); *accord Simon v. Indursky*, 211 A.D.2d 404, 404 (1st Dep't 1995). Accordingly, a party's failure to object until after the completion of objectionable testimony results in a waiver of the objection. *See Koplick v. Lieberman*, 270 A.D.2d 460, 460-61 (2d Dep't 2000) ("The defendant did not object to the admissibility of the testimony of the plaintiffs' expert until after that testimony was completed and the plaintiffs had rested. Where no timely objection is made, the testimony offered is presumed to have been unobjectionable, and any alleged error considered waived."); *Miano v. Westchester Gulf Serv. Station*, 90 A.D.2d 477, 477 (2d Dep't 1982) ("The subject evidence was received during the trial without objection until after that testimony had been completed. By this omission, defendant implicitly waived objection."); *Liddy v. Frome*, 85 A.D.2d 716, 716 (2d Dept. 1981) ("[I]t was not error for the trial court to refuse to strike the testimony" of a witness where there was no "objection by the defendant until long after the conclusion of the testimony when defendant moved to strike it.");

105 N.Y. Jur. 2d Trial § 339 (2013). ("[A] delay in objecting until after the testimony is completed may be considered a waiver of the objection.").

A party's failure to timely object to purportedly improper evidence cannot be cured by its belated motion to strike. *See Sampson v. New York City Hous. Auth.*, 256 A.D.2d 19, 19 (1st Dept. 1998) ("Defendant's present argument challenging the methodology used by plaintiffs' experts was waived by the absence of timely objection on that ground, and was not cured by a motion to strike the testimony at the close of the case." (internal citations omitted)); *Rubio v. Reilly*, 44 A.D.2d 592, 593 (2d Dep't 1974) ("[D]efendant failed to object when plaintiffs offered this evidence. After defendant brought out further evidence on this point on cross-examination, he belatedly raised an objection. This objection should have been made when the evidence was offered by plaintiffs and defendant's failure to timely object cannot be cured by a motion to strike the evidence." (internal citations omitted)).

A motion to strike is particularly improper when the moving party elicited the objectionable evidence on cross examination and chose to object only after determining that it was unfavorable. *See Parkhurst v. Berdell* 110 N.Y. 386, 393 (1888); *Rubio*, 44 A.D.2d at 593. In *Parkhurst*, defendant's counsel failed to object while a witness testified on direct examination about matters potentially covered by the spousal privilege, then elicited testimony on the same subjects on cross-examination, and only afterwards unsuccessfully moved to strike the witness's testimony. The New York Court of Appeals squarely held that "[i]t is a complete answer to this exception that the objection came too late. The defendant could not lie by, tacitly consent to the examination, and take his chances as to the evidence, and, when it proved unsatisfactory to him, complain of its admissibility." *Id.*; c*f. People v. Travato,* 309 N.Y. 382, 386-87 (1955)

(defendant's motion to strike the testimony of a witness was timely where witness's "examination in chief had just begun . . . and there had been no cross-examination").

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