

Curry v Duane Reade Inc.

2012 NY Slip Op 30969(U)

April 10, 2012

Supreme Court, New York County

Docket Number: 111061/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Mary Curry

Plaintiff (s).

INDEX NO.

111061/2010

MOTION DATE

MOTION SEQ. NO.

1

MOTION CAL. NO.

Duane Reade

Defendant (s).

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

Motion (s) decided in accordance with
the accompanying memorandum decision

FILED

APR 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/10/2012

J. Gische

Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

Mary Curry,

Plaintiff,

-against-

Duane Reade Inc. and World Security Consultants Inc.,
"John Doe" and "William Roe", fictitious names of
security guards because real names are unknown,

Defendants.

Decision/Order

Index No.: 111061/10

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers

FILED numbered

Def's n/m [strike deposition] w/ JFJ affirm, exhs.	1, 2
Pltf's opp. w/ DDC affirm, exhs.	3
Def's reply w/ JFJ affirm.	4

APR 11 2012

Upon the foregoing papers, the decision and order of the court is as follows:
NEW YORK COUNTY CLERK'S OFFICE

This is an action involving the plaintiff, Mary Curry ("Curry"), who claims she was injured outside a Duane Reade ("DR") store on the public sidewalk when her grandson became embroiled in an altercation with a security guard employed by World Security Consultants, Inc. ("WSC") (collectively "defendants"). DR presently moves this court (1) for an order striking plaintiff's Complaint because she thwarted discovery by testifying at her deposition in a meaningless manner and then submitted four pages of "corrections" with one hundred four changes to a one hundred seventy page transcript; (2) that plaintiff be equitably estopped from continuing prosecution of this action, (3) precluding plaintiff from offering any evidence at the trial because she abused the deposition process; or, (4) compelling plaintiff to appear for a further examination before trial.

Summary of the Facts and Arguments

Plaintiff alleges that DR and WSC were joint and severally negligent, in causing her to be struck and physically contacted by a security guard employed by plaintiffs, which resulted in personal injuries on November 3, 2009, when plaintiff was present on DR's premises, located at 279 West 125th Street in New York County. Plaintiff further alleges a claim against the defendants for negligent supervision. DR denies any culpability.

On April 6, 2011, plaintiff appeared for an examination before trial ("EBT" or "deposition"). On May 12, 2011, plaintiff's counsel received a copy of the EBT transcript. On July 1, 2011, plaintiff's counsel mailed an executed copy, with an attached errata sheet, to DR's counsel. On July 6, 2011, DR's counsel claims that it received four pages of changes to the EBT transcript, that included 104 changes to a 170 page transcript.

DR now claims that plaintiff's EBT transcript (Def's Ex. E), demonstrates that she gave answers which were largely unintelligible, and in which she contradicted herself on numerous occasions. DR further claims that the deposition transcript is evidence that plaintiff was not prepared for her deposition, and that she had the intent of making a sham of any attempt to elicit simple answers from her, particularly in light of the 104 changes in an errata sheet (Def's Ex. H). DR claims that the errata sheet constitutes further meaningless and illogical responses to simple questions posed to plaintiff.

Plaintiff's counsel submitted an affirmation in opposition stating that plaintiff is "an 85-year-old, diabetic great grandmother with a cataract still in one eye, [who] after a four-hour grueling EBT" simply submitted timely correction (a.k.a errata) sheets with numerous entries, the majority of which are "immaterial." Plaintiff counsel claims that DR's motion should be denied because the errata sheets make virtually no material substantive

changes to the content of the original transcript of plaintiff's EBT. Plaintiff's counsel further claims that the entries on the errata sheets either (1) merely repeat the content of the original answer with no significant change; or (2) note plaintiff's lack of understanding of the questions asked; or (3) express her lack of recall of being asked the questions posed; or (4) simply deny having given the answer.

Discussion

CPLR § 3116(a) provides that "any changes in form or substance [to a deposition] which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." (Schachat v. Bell Atlantic Corp., 282 A.D.2d 329, 329-30 (1st Dept. 2001); The Marine Trust Company of Western New York v Collins, 19 A.D.2d 857 [4th Dept 1963]).

A witness may change a deposition transcript: if it is an incorrect rendering of the testimony actually given at the deposition, or, where the transcript is correct, if the witness now recollects the matter differently and wishes to give a different response. In either instance, the parties to the litigation may differ with the witness, and may wish to make an issue at trial about the nature of the change and the reason for it. Devaux v. St. Vincent's Hosp., 2001 WL 36370079 (N.Y. Sup. Ct. 2001) (internal citations omitted).

Thus, "witnesses have the explicit right to change deposition testimony provided that they do so in accordance with [the statute]" (Boyce v Vazquez, 249 A.D.2d 724, 725 [3d Dept 1998]). However, a conclusory statement in an errata sheet will be deemed insufficient to explain "a significant, substantive amendment of [a party's] deposition testimony." Marzan v. Persaud, 29 A.D.3d 652, 653 (2d Dept. 2006); Rodriguez v. Jones, 227 A.D.2d 220 (1st Dept. 1996).

The court notes that many of plaintiff's corrections contained in her errata sheets

fail to provide the reasons for the corrections, in violation of the statute and case law. (Marine Trust Co. of Western New York v. Collins, *supra* ("the omnibus statement of the witness that corrections were made to correct his errors in testifying ... is improper"); Columbia v. Lee, 239 A.D. 849, 850 (2d Dept. 1933); Schachat v. Bell Atlantic Corp., *supra*, at 329-30 (1st Dept. 2001); Marzan v. Persaud, *supra*, at 653 (2d Dept. 2006) (conclusory reason for correction insufficient to explain significant, substantive amendment to deposition testimony); Schachat v. Bell Atlantic Corp., *supra*, at 329-30 (1st Dept. 2001); Rodriguez v. Jones, *supra* (Court refused to consider plaintiff's correction sheet to her deposition because the correction sheet lacked a statement of the reasons for making the corrections).

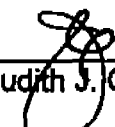
Furthermore, it is not clear whether the handwritten notes in the errata sheet actually address changes or transcription errors, or they are simply commentary relating to the questions posed. Courts have refused to allow changes that the deponent has failed to explain sufficiently. (See, e.g., Riley v. ISS Int'l Serv. Sys., 284 A.D.2d 320 [2d Dept. 2001] [Striking plaintiff's errata sheet to his deposition transcript where plaintiff provided only an omnibus reason for making late corrections and where the sheet lacked a statement of reasons for making the corrections]; Rodriguez v. Jones, *supra*).

Upon a review of the errata sheet at bar, the court finds that a majority of plaintiff's handwritten entries are, as her attorney states, "immaterial." However, the court is troubled that buried amongst plaintiff's general commentaries of "lies" and general "no's" there are changes that not only clarify or correct obvious or even subtle transcription errors, but entries that may contradict crucial elements of her prior deposition testimony. Therefore, the court grants the motion only to the extent of striking the present errata sheet in its

entirety. The court, however, is mindful that the plaintiff made attempts to comply with CPLR § 3116, albeit imperfectly. Therefore, the court extends the plaintiff's time to submit a proper errata sheet, that comports with the applicable statute and case law, to 60 days from the date this decision and order appears on the Supreme Court On-Line Library (SCROLL). (CPLR § 3116; CPLR § 2004; compare: Zamir v. Hilton Hotels Corp., 304 A.D.2d 493 [1st Dept 2003]). Plaintiff's counsel is admonished to properly supervise the new submission to make sure it is in appropriate form. Failure to submit a new proper errata sheet will automatically result in the court deeming the original deposition transcript as signed and sworn to without the need for an additional motion. The other relief requested by DR, such as striking the complaint, is too severe a remedy for the identified conduct.

Any arguments not specifically addressed herein have nonetheless been considered. Any relief requested but not specifically addressed *supra* is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
 April 10, 2012

So Ordered:

 Hon. Judith J. Gische, JSC

FILED
 APR 11 2012
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