

Franco v Hyatt Corp.
2016 NY Slip Op 31990(U)
October 21, 2016
Supreme Court, New York County
Docket Number: 153152/2014
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ANTHONY FRANCO,
Plaintiff,

-against-

INDEX NO. 153152/2014
MOTION DATE 09/21/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

HYATT CORPORATION d/b/a HYATT TIMES SQUARE,
and NICOLE HALL,

Defendants.

The following papers, numbered 1 to 6 were read on this order to show cause to vacate the Note of Issue, Strike Plaintiff's errata sheet, and extend Defendants' time to move for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion to vacate the note of issue, strike Plaintiff's errata sheet and/or order Plaintiff to appear for a further deposition, and extend Defendants' time to move for summary judgment, is denied.

Plaintiff commenced this action on April 2, 2014, alleging sexual harassment/gender discrimination and workplace retaliation against the Defendants, in violation of New York State and New York City Human Rights Laws. (Mot. Exh. A). Issue was joined and the parties proceeded with discovery.

Plaintiff provided Defendants with his executed deposition transcript and corresponding errata sheet on May 4, 2016. In a correspondence letter dated July 20, 2016, Defendants notified Plaintiff that they were rejecting the corrections made in the errata sheet because the corrections were significant, improper changes which substantively changed Plaintiff's deposition testimony. (Mot. Exh. C). Defendants also requested that Plaintiff withdraw these changes to avoid motion practice.

Plaintiff responded to this rejection in a letter dated July 26, 2016, stating that he would not withdraw the changes because the changes were timely, proper, permissible, and adequate. (Id.) Plaintiff further stated that at the deposition he had either clarified or elaborated on his testimony identified by Defendants as improper, in other portions of his deposition.

Plaintiff filed the Note of Issue and Certificate of Readiness for Trial on July 29, 2016. (Mot. Exh. D).

Defendants now move for an Order: (1) vacating the Note of Issue because discovery is not complete; (2) enjoining this case from being placed on the trial calendar; (3) striking Plaintiff's errata sheet, and/or ordering Plaintiff to appear for a further deposition; and (4) extending Defendants' time to move for summary judgment to 120 days after Plaintiff re-files the Note of Issue upon discovery being completed.

Defendants contend that Plaintiff's changes on the errata sheet were improper because they substantively changed his deposition testimony and are tailored to avoid the consequences of his testimony as to critical facts. Defendants argue that the reasons given on the errata sheet for the changes (for "clarification" or "correction") are unacceptable. Defendants contend that they had an option to request an extension of the discovery schedule to address any issues with the errata sheet, however Plaintiff prematurely filed the Note of Issue knowing that there were outstanding discovery issues.

Further, Defendants contend that Plaintiff's deposition testimony contradicts the allegations in the Complaint, and the errata sheet attempts to reverse Plaintiff's testimony so that it creates a triable issue of fact. Defendants argue that these changes are an improper attempt to create material issues of fact and are beyond the scope of permissible changes to deposition testimony. Defendants contend that if the errata sheet is not stricken, and/or in the alternative if Plaintiff is not ordered to appear for a further deposition to be questioned on these corrections, Defendants would be severely prejudiced in their defense.

Plaintiff opposes the motion arguing that the corrections made in form and substance to the deposition testimony were timely, permissible, proper and adequate, and contained the reasoning for the changes. (Aff. In Opp. Exh. 2). Plaintiff contends that in keeping with this Court's Compliance Conference Order dated March 16, 2016, he filed the Note of Issue on the required date. (Mot. Exh. B).

Plaintiff argues that any conflict between the deposition testimony and changes on the errata sheet are credibility issues to be raised at trial. That the Defendants fail in demonstrating how Plaintiff tailored the changes in the errata sheet to avoid his earlier testimony, that they cannot show that the Plaintiff has recanted the allegations alleged in the Complaint, and that the facts in the Complaint remain uncontroverted

despite any inconsistencies claimed by Defendants.

“Where a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect” (Vargas v. Villa Josefa Realty Corp., 28 A.D.3d 389, 390, 815 N.Y.S.2d 30 [1st Dept., 2006]; see 22 NYCRR § 202.21 [e]).

Uniform Rule 202.21(e)(1) provides the vehicle for vacating a note of issue and striking a case from the trial calendar. A note of issue and certificate of readiness will be vacated where there is still extensive discovery to be completed or where the certificate of readiness erroneously states that all discovery is complete (see *Carte v. Segall*, 134 A.D. 2d 396, 520 N.Y.S. 2d 943 [2nd Dept. 1987] note of issue vacated where extensive discovery yet to be completed); *Ortiz v. Arias*, 285 A.D. 2d 390, 727 N.Y.S. 2d 879 [1st Dept. 2001], vacating note of issue that contained erroneous facts including incorrect statement that discovery had been completed or waived). Vacatur of the Note of Issue and Certificate of Readiness is proper where the defendants demonstrate “unusual or unanticipated” circumstances or “substantial prejudice” sufficient to warrant post-note of issue discovery (*Desario v. SL Green Management LLC*, 118 A.D.3d 520987 N.Y.S.2d 151, 152 [2nd Dept., 2014] citing to, *Schroeder v. IESI N.Y. Corp.*, 24 A.D.3d 180, 805 N.Y.S.2d 79 [1st Dept., 2005]; 22 NYCRR 202.21[d]).

The Defendants fail to establish that extensive discovery remains outstanding or that the Certificate of Readiness erroneously states that discovery is complete, and fail to establish how they would be substantially prejudiced if the Note of Issue was not vacated. The Defendants’ conclusory assertion that they would be substantially prejudiced in their defense is not enough to warrant vacatur of the Note of Issue. Further, according to the motion, the only discovery that remains outstanding appears to be recalling the Plaintiff for a further deposition to address his changes on the errata sheet. This does not equate to discovery not being complete or that Plaintiff prematurely filed the Note of Issue.

Further, Defendants fail to provide Plaintiff’s entire deposition transcript, and instead provide only select pages of the testimony. (See Mot. Exh. E). Plaintiff, in his opposition, likewise provides only select pages of testimony. (See Aff. In Opp. Exh. 1). A review of the available deposition testimony raises, if any, issues of credibility left for trial and do not warrant further depositions. (*Cillo v. Resjefal Corp.*, 295 A.D.2d 257, 743 N.Y.S.2d 860 [1st Dept. 2002]). “...a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor.” (*Id.*, see also CPLR 3116(a)). Plaintiff identifies on the errata sheet the reason for the changes as either correction, misprint, or clarification.

ACCORDINGLY, it is Ordered that Defendants' Hyatt Corporation d/b/a Hyatt Times Square, and Nicole Hall's motion to vacate the Note of Issue, enjoin the case from being placed on the trial calendar, strike Plaintiff's errata sheet to his deposition, and/or in the alternative order Plaintiff to appear for a further deposition, and to extend Defendants' time to move for summary judgment, is denied, and it is further,

ORDERED, that pursuant to the Stipulation entered into between the parties on August 18, 2016 (NYSCEF Doc # 20), the time for dispositive motions to be made and filed is 120 days from September 21, 2016.

ENTER:

Dated: October 21, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE