D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro
2018 NY Slip Op 33318(U)
December 14, 2018
Supreme Court, New York County
Docket Number: 603732/2007
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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D & R GLOBAL SELECTIONS, S.L., Index No. 603732/2007

Plaintiff

- against - DECISION AND ORDER

BODEGA OLEGARIO FALCON PINEIRO,

Defendant

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LUCY BILLINGS, J.S.C.:

I. DEFENDANT'S MOTION TO EXCLUDE ITS REPRESENTATIVE'S DEPOSITION

Defendant moves to exclude plaintiff's use of the videotaped deposition of defendant's representative, Maria Falcon, at trial, on the ground that she is available to testify and will testify at trial. C.P.L.R. § 3117(a), which governs the use of depositions at trial, however, permits the deposition of a party or a party's representative to be used at trial under circumstances well beyond the witness' unavailability. 22 N.Y.C.R.R. § 202.15(i), which governs the use specifically of videotaped depositions, simply defers to the provisions of the New York Civil Practice Law and Rules and any other applicable law. C.P.L.R. § 3117(a)(2) provides that:

> the deposition testimony . . . of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by a party . . . who is adversely interested when the deposition testimony is offered in evidence.

Defendant does not claim that Falcon was not an officer,

director, member, employee, or managing or authorized agent of defendant when she was deposed. Therefore plaintiff, which is adversely interested, may use her deposition for any purpose at trial, "so far as admissible under the rules of evidence," whether or not Falcon actually testifies. C.P.L.R. § 3117(a). Notably, both C.P.L.R. § 3117(a)(2) and 22 N.Y.C.R.R. § 202.15(i) allow the videotaped deposition to be "used" and thus played and shown, rather than just read. C.P.L.R. § 3117(a)(2).

II. PLAINTIFF'S CROSS-MOTION FOR SANCTIONS

A. Defendant's Three Motions to Exclude Falcon's Deposition

Plaintiff cross-moves for sanctions in the form of attorney's fees and expenses incurred in opposing defendant's motion, as it is the third time defendant has sought to exclude plaintiff's use of Falcon's videotaped deposition at trial. 22 N.Y.C.R.R. § 130-1.1. Defendant's prior two motions, however, sought this relief on a different ground: plaintiff's delay in forwarding a copy of the videotape, in addition to the transcript, of the deposition to defendant. Between the Appellate Division's dismissal of this action in May 2015 and the Court of Appeals' reversal of that dismissal in June 2017, D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 128 A.D.3d 486, 487 (1st Dep't 2015), rev'd, 29 N.Y.3d 292, 299-300 (2017), plaintiff believed that any further exchange of information in the action was unnecessary, therefore did not forward the videotape until November 2017, and sought an extension of time until then. The court (Mendez, J.) granted

that extension and thus denied exclusion of the videotaped deposition, because plaintiff's delay was neither deliberate nor part of a pattern of delay, was excusable, and did not prejudice defendant, particularly when it already possessed the deposition transcript.

Defendant then moved to reargue its motion to exclude the videotaped deposition, which the court (Mendez, J.) also denied, finding the motion simply an attempt to rehash the points previously raised and decided. E.g., Ping Lee v. Consolidated Edison Co. of N.Y., 40 A.D.3d 481, 482 (1st Dep't 2007). In those two motions, defendant relied on C.P.L.R. § 3126(2), which authorizes preclusion of evidence due to nondisclosure of the evidence. The current motion seeks to preclude evidence preliminary to the trial due to the claimed inadmissibility of the evidence. Deonarine v. Montefiore Med. Ctr., 113 A.D.3d 496, 497 (1st Dep't 2014); State of New York v. Metz, 241 A.D.2d 192, 198 (1st Dep't 1998). This claim may lack merit, but, whatever its merit, the issue is best left to the trial judge.

Even though the court found defendant's second motion, its motion to reargue exclusion of the videotaped deposition due to its delayed exchange, repetitive of defendant's first motion for that relief and again lacking in merit, the court denied the relief plaintiff now seeks: sanctions in the form of plaintiff's costs incurred in opposing defendant's repetitive motion. The court concluded that defendant had not engaged in a pattern of intentional frivolous behavior. Plaintiff now urges that

defendant's current, third attempt to exclude the videotaped deposition meets that standard.

B. The Bases for Sanctions

Several factors weigh in favor of plaintiff's position. (1) Plaintiff warned defendant that plaintiff considered defendant's current motion frivolous and would seek sanctions if defendant did not withdraw its motion. 22 N.Y.C.R.R. § 130-1.1(c); Johnson v. Law Off. of Kenneth B. Schwartz, 145 A.D.3d 608, 614 (1st Dep't 2016); Borstein v. Henneberry, 132 A.D.3d 447, 452 (1st Dep't 2015). (2) Defendant ignored the warning. (3) Defendant did not even oppose plaintiff's cross-motion. (4) The relief sought by defendant's motion finds no support in C.P.L.R. § 3117(a), 22 N.Y.C.R.R. § 202.15, or any other law.

On the other hand, while the relief sought is repetitive of the relief sought by two prior motions, as set forth above the grounds for that relief are not repetitive. While defendant intentionally sought the same relief a third time, and the grounds for that relief are "completely without merit in law," 22 N.Y.C.R.R. § 130-1.1(c)(1), plaintiff does not show that the lack of merit was intentional or knowing, rather than careless and misguided; "to delay or prolong . . . the litigation, or to harass or maliciously injure" anyone, 22 N.Y.C.R.R. § 130-1.1(c)(2); or based on false factual allegations. 22 N.Y.C.R.R. § 130-1.1(c)(3). See Gordon Group Invs., LLC v. Kugler, 127 A.D.3d 592, 594 (1st Dep't 2015); Komolov v. Segal, 96 A.D.3d 513, 514 (1st Dep't 2012); Hunts Point Term. Produce Coop. Assn.,

Inc. v. New York City Economic Dev. Corp., 54 A.D.3d 296, 296 (1st Dep't 2008); Parametric Capital Mgt., LLC v. Lacher, 26 A.D.3d 175, 175 (1st Dep't 2006).

The complete lack of merit to defendant's current motion is a basis on which to find the motion frivolous and impose sanctions, to be sure, but it is neither the standard of repetitive, intentional frivolous behavior that Justice Mendez previously set, nor the basis for sanctions on which plaintiff relies. See Henriques v. Boitano, 304 A.D.3d 467, 468 (1st Dep't 2003). Nowhere in plaintiff's warning to defendant July 10, 2018, or in its subsequent cross-motion for sanctions does plaintiff point out that the relief sought by defendant's motion finds no support in C.P.L.R. § 3117(a), 22 N.Y.C.R.R. § 202.15, or any other law. Plaintiff consistently maintains only that defendant's motion seeks the same relief sought by its prior motions and specifically points out how the motions are duplicative. Although plaintiff does recite the various bases for sanctions, including lack of legal merit, 22 N.Y.C.R.R. § 130-1.1(c)(1), plaintiff refers only to the court's prior determinations that defendant was not entitled to exclusion of the videotaped deposition, which was unrelated to its admissibility under C.P.L.R. § 3117(a), 22 N.Y.C.R.R. § 202.15, or any other statute or rule of evidence. Plaintiff instead relies on defendant's protraction of the litigation, delay tactics, and disregard of prior determinations. 22 N.Y.C.R.R. § 130-1.1(c)(2).

III. CONCLUSION

Consequently, the court denies plaintiff's cross-motion for sanctions, Gordon Group Invs., LLC v. Kugler, 127 A.D.3d at 594; Komolov v. Segal, 96 A.D.3d at 514; Hunts Point Term. Produce Coop. Assn., Inc. v. New York City Economic Dev. Corp., 54 A.D.3d at 296; Parametric Capital Mgt., LLC v. Lacher, 26 A.D.3d at 175, but warns defendant that another meritless, careless, misguided, and hence wasteful motion, on any ground, for any relief, may result in sanctions. 22 N.Y.C.R.R. § 130-1.1(a) and (c)(1); Zappin v. Comfort, 146 A.D.3d 575, 575 (1st Dep't 2017); Pentalpha Enters., Ltd. v. Copper & Dunham LLP, 91 A.D.3d 451, 452 (1st Dep't 2012); Gassab v. R.T.R.L.L.C., 69 A.D.3d 511, 513 (1st Dep't 2010); Tsabbar v. Auld, 26 A.D.3d 233, 234 (1st Dep't 2006). Absent any merit to defendant's motion to exclude plaintiff's use of the videotaped deposition of Maria Falcon at trial, for the reasons explained above, the court denies defendant's motion, without prejudice to the trial judge's exclusion of any part of the deposition. Plaintiff may use Falcon's deposition for any purpose at trial, "so far as admissible under the rules of evidence," whether or not Falcon actually testifies, C.P.L.R. § 3117(a), and as permitted by the trial judge. C.P.L.R. § 3117(a)(2); 22 N.Y.C.R.R. § 202.15(i).

DATED: December 14, 2018

LUCY BILLINGS, J.S.C.

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