

Carroll v City of New York

2019 NY Slip Op 30400(U)

February 20, 2019

Supreme Court, New York County

Docket Number: 150464/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

INDEX NO. 150464/2016

LISA CARROLL,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 004

- v -

THE CITY OF NEW YORK, MORGAN STANLEY 1585
BROADWAY, LLC, MORGAN STANLEY & CO., LLC,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96

were read on this motion to/for DISCOVERY

The motion to strike the errata sheet for plaintiff's deposition transcript is granted.

Background

This action arises out of plaintiff's purported trip and fall on April 20, 2015 in front of a building located at 1585 Broadway in Manhattan. The exact location of plaintiff's fall is in dispute.

Defendants Morgan Stanley 1585 Broadway LLC and Morgan Stanley & Co. LLC ("Moving Defendants") seek to strike the errata sheet stemming from plaintiff's May 15, 2018 deposition on the ground that the changes proposed by plaintiff drastically alter her testimony. The Moving Defendants claim that plaintiff asks to change her answers regarding the distance that her accident took place in relation to a sidewalk grate, her reluctance to walk near grates, the timing of her accident, how the accident occurred and whether there were any witnesses to her accident. The Moving Defendants also claim that the errata sheet is untimely.

In opposition, plaintiff contends that she is elderly and has significant health issues which prevented her from submitting a timely errata sheet. Plaintiff insists the changes are not drastic and it does not matter that the errata sheet includes answers to central questions in the case. Plaintiff also points out that third-party defendant ConEdison will depose plaintiff and the Moving Defendants can examine the alleged discrepancies at the deposition.

Background

CPLR 3116(a) provides that: The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance 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. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.”

“[M]aterial or critical changes to testimony through the use of an errata sheet [are] . . . prohibited” (*Torres v Bd. of Educ. of City of New York*, 137 AD3d 1256, 1257, 29 NYS3d 396 [2d Dept 2016]). An errata sheet may be struck where “plaintiff made numerous substantive changes to the testimony without providing a sufficient explanation for them” (*Carrero v New York City Hous. Auth.*, 162 AD3d 566, 567, 75 NYS3d 419 (Mem) [1st Dept 2018]).

As an initial matter, the errata sheet was late. The Moving Defendants submit an affidavit of service for plaintiff’s deposition transcript that claims it was mailed on June 15, 2018 (NYSCEF Doc. No. 85). Plaintiff claims she did not receive the transcript until “on or about the first week of July” and then sent along the errata sheet on August 30, 2018 (NYSCEF Doc. No.

89, ¶ 4). Plaintiff's counsel does not sufficiently rebut the fact that the deposition transcript was served on June 15 or give a specific reason why it took so long to complete the errata sheet. Noting that plaintiff is elderly is not enough for this Court to extend the time to respond. And plaintiff's focus on when the transcript was actually received misses the point; even if plaintiff did not receive the transcript until early July, that does not automatically toll plaintiff's time to submit an errata sheet. Therefore, the errata sheet dated August 30, 2018 was is stricken because it was submitted well beyond the sixty-day time limit.

Even if this Court were to consider the merits of the motion, a review of plaintiff's proposed changes demonstrate that they are substantive and are not accompanied by sufficient explanations. For instance, when plaintiff was asked whether the sidewalk in front of her was crowded, she responded that "It wasn't crowded and it wasn't empty, it was just pleasant, if you can use that word to traffic" (NSYCEF Doc. No. 83 at 27 [plaintiff's deposition transcript]). The errata sheet changes plaintiff's answer to be "there were people walking directly in front of me and to my right" and plaintiff explains she didn't understand the question (NYSCEF Doc. No. 84). Plaintiff gave a clear and descriptive answer in her deposition and now wants to change the answer to her benefit. Obviously, if the sidewalk was crowded, then it reduces the possibility that plaintiff might be found partially (or fully) at fault for her own accident. And claiming that plaintiff didn't understand the question is not a sufficient explanation for why the change is necessary. The initial question was not confusing and plaintiff offered a coherent response.

Plaintiff also changed her answer concerning where she was walking in the sidewalk. Plaintiff testified she was walking "in the middle" (NYSCEF Doc. No. 83 at 28). In her errata sheet, plaintiff contends that "the grate was more than a foot to my left" and explains that she did not know she could approximate and re-reviewed photos (NYSCEF Doc. No. 84). The problem

with this “new” answer is that it is no longer responsive to the question posed by the Moving Defendants’ counsel at the deposition. The question was whether plaintiff was walking in the middle, left or right of the sidewalk. The word grate was not mentioned at all; adding information about a grate and an estimated distance is inappropriate and must be stricken.

Next, plaintiff stated in her errata sheet that she did not like to walk on or near grates (*id.*). But her original answer in the deposition was “Yes” to a follow-up question about when she saw grates on the sidewalk (NYSCEF Doc. No. 83 at 28). Specifically, plaintiff was asked whether she noticed the grates before her accident and she acknowledged that she had noticed them (*id.*). Adding that she does not like to walk near grates is not a more complete answer as plaintiff now contends. Instead, it goes well beyond the scope of the question and it is obviously designed to help plaintiff’s case. The Court cannot allow plaintiff to add beneficial testimony via an errata sheet to a clear question and answer.

Another proposed change concerns a question posed to plaintiff whether she recalled making a statement at the hospital about her accident that “she was walking and her shoe got caught on a metal grate” (NYSCEF Doc. No. 83 at 41). Plaintiff responded, “No” (*id.*). Plaintiff’s errata sheet changes her answer to be “I told them I fell next to a metal grate” and explains that this is a more complete answer (NYSCEF Doc. No. 84). That is not a sufficient explanation for changing an answer from “No” to a specific response about her accident.

When asked whether it was “the front part of your shoe that came into contact with something or was it the middle part or something else,” plaintiff responded that “I can’t specifically clarify that” (NYSCEF Doc. No. 83 at 61). Plaintiff’s errata sheet now claims the answer should have been “front tip of my left shoe got caught” and that she didn’t understand the question (NYSCEF Doc. No. 84). Again, this changed response makes no sense and its

explanation is not sufficient. The question was clear, and plaintiff responded. Plaintiff cannot now offer a substantive account of how the accident happened through an errata sheet.

Summary

The purpose of an errata sheet is to correct obvious errors in a deposition transcript. Often, these errors are typographical or might be a mistake made by a court reporter. An errata sheet is not designed to permit a plaintiff to strengthen her case by changing key answers about how her accident occurred. Certainly, an errata sheet may be used to make larger changes (even substantive alterations) to a deposition transcript where the deponent believes the transcript mischaracterizes what was actually said. But that is not the case here. The deposition testimony at issue in this motion was clear, unambiguous and not subject to competing interpretations. The Court finds that plaintiff simply failed to provide sufficient reasons for why the changes were necessary.

Accordingly, it is hereby

ORDERED that the motion to strike plaintiff's errata sheet is granted.

Next Conference: 4-23-2019 at 2:15 p.m.

2/20/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

HON. ARLENE P. BLUTH