

Maldonado v Fresh Meadow Mech. Corp.

2020 NY Slip Op 33471(U)

October 22, 2020

Supreme Court, New York County

Docket Number: 152797/2016

Judge: Carol R. Edmead

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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. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

RENE MALDONADO,

Plaintiff,

- v -

FRESH MEADOW MECHANICAL CORP., 99 JOHN
STREET, LLC, MIDBORO MANAGEMENT, INC.,

Defendant.

-----X

MIDBORO MANAGEMENT, INC.

Plaintiff,

-against-

RAEL MAINTENANCE CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

ORDERED that Defendants' motion to strike Plaintiff Rene Maldonado's errata sheets pursuant to CPLR 3116 (motion seq. 007) is granted; and it is further

ORDERED that counsel for defendants Midboro Management, Inc. and The Board of Managers of the 99 John Deco Lofts Condominium shall serve a copy of this order along with notice of entry on all parties within twenty (20) days

MEMORANDUM DECISION

In this Labor Law action, Defendants Midboro Management, Inc. and The Board of Managers of the 99 John Deco Lofts Condominium move for an order striking Plaintiff Rene Maldonado's errata sheets as untimely pursuant to CPLR 3116 (motion seq. 007). Plaintiff opposes the motion. For the following reasons, the Court grants Defendants' motion.

BACKGROUND FACTS

Plaintiff appeared for deposition on May 3, 2019, and his deposition then continued on June 14 and August 2, 2019 (NYSCEF doc No. 236, ¶ 8). The corresponding notices to execute were served by Defendants, respectively, on July 1, June 14, and November 20. On July 10, 2020, Plaintiff's counsel served letters and executed errata sheets for the May 3 and August 2, 2019 transcripts (*id.* at ¶ 12). The errata sheets contained hundreds of changes by Plaintiff, most of which did not contain an explanation (*id.* at ¶ 15). Instead, Plaintiff justified the changes by stating without explanation "NOTE THIS QUESTION" or "FILL IN BLANKS," despite the lack of blanks in the transcripts (*id.*).

Defendants' counsel received the errata sheets for the May 3 and August 2, 2019 transcripts on July 20, 2020. Defendants' counsel rejected both errata sheets and requested that Plaintiff withdraw the errata sheets to avoid the instant motion, but Plaintiff refused to do so (*id.* at ¶ 18).

Defendants argue that Plaintiffs' errata sheets, which make many substantive changes to his deposition testimony, must be stricken as they are untimely and improper. In opposition, Plaintiff's counsel argues that there is good cause for the delay and the Court should thus accept the errata sheets.

DISCUSSION

CPLR 3116(a) provides, in relevant part,

“(a) Signing. 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.*”

(emphasis added).

CPLR 2004 grants courts discretion in extending the sixty-day deadline. However, the Appellate Division, First Department has noted that "courts should be circumspect about extending the 60-day period," and that courts should permit an extension only upon a showing of good cause," which requires "a strong showing of justification." *Zamir v Hilton Hotels Corp.*, 304 AD2d 493, 494 (1st Dep't 2003). The First Department recently reaffirmed this rule in *Parra v Cardenas*, 183 AD3d 462 (1st Dep't 2020), in which it noted that the motion court should have struck a deposition transcript that a party returned seven months after its adversary served the transcript. See also *Garcia v Stickel*, 37 A.D.3d 368 (1st Dep't 2007) (striking untimely errata sheets).

Here, the corresponding transcripts and notices to execute were served on Plaintiff on July 1, 2019 and November 20, 2019, respectively. Plaintiff, however, did not return the errata sheets until July 10, 2020 which was more than one year and more than seven months after the transcripts were served. Plaintiff's counsel argues that good cause exists for the delay as the handling attorney of Plaintiff's case changed course after the deposition and Plaintiff's current counsel did not even learn until December 2019 that Plaintiff had received the deposition

transcripts (NYSCEF doc No. 246). Plaintiff's counsel avers that Plaintiff should not be held responsible for the failure of his prior counsel to timely send the transcripts.

However, as noted by Defendants, the delay here is still not reasonable as the errata sheets were not executed until July 2020, seven months after Plaintiff's counsel allegedly discovered that Plaintiff had not received the transcripts. Plaintiff's counsel offers no explanation for this additional delay. Plaintiff's counsel also did not move for an extension of Plaintiff's deadline, which further precludes excusal of the extensive delay. See *Zegelstein v Faust*, 179 AD3d 541, 542 (1st Dept 2020) (rejecting extension of time because plaintiff did not move for an extension after they learned that they missed their deadline).

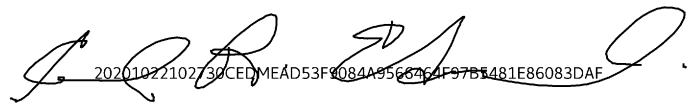
The Court separately notes that Plaintiff's errata sheets must also be stricken as they are patently improper. The First Department has held that even when a deponent's changes are timely delivered, courts should still reject them when they are material to Plaintiff's testimony and designed to change that testimony. *Schachat v Bell Atlantic Corp.*, 282 AD2d 329, 329-30 (1st Dept 2001). Here, Plaintiff's errata sheets consist of hundreds of changes, that, contrary to assertions by Plaintiff's counsel, do not include any sort of explanation other than "FILL IN THE BLANKS" or "NOTE THIS QUESTION" (NYSCEF docs No. 242 and 243). In addition to not being accompanied by a valid explanation, the changes also materially alter Plaintiff's testimony as they alter the description of the manner in which the subject accident in this proceeding occurred and specifically how Plaintiff fell and landed (NYSCEF doc No. 236, ¶ 26). Given that Plaintiff's errata sheets here do not merely correct minor details but instead constitute a material alteration of his testimony, they are improper and must be stricken.

CONCLUSION

It is hereby

ORDERED that Defendants' motion to strike Plaintiff Rene Maldonado's errata sheets pursuant to CPLR 3116 (motion seq. 007) is granted; and it is further

ORDERED that counsel for defendants Midboro Management, Inc. and The Board of Managers of the 99 John Deco Lofts Condominium shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



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10/22/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE