

Pedron v Port Imperial Ferry Corp.
2021 NY Slip Op 32329(U)
November 16, 2021
Supreme Court, New York County
Docket Number: Index No. 150376/2020
Judge: Alexander M. Tisch
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

-----X

YANNICK PEDRON,

Plaintiff,

- v -

PORT IMPERIAL FERRY CORP., NY WATERWAY,
REICON GROUP, LLC, THE CITY OF NEW YORK, NEW
YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Defendants.

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INDEX NO. 150376/2020
MOTION DATE 06/22/2021,
06/22/2021
MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 99, 100

were read on this motion to/for STRIKE PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 96, 102, 103

were read on this motion to/for DISCOVERY

Upon the foregoing documents, per motion sequence No. 003, Reicon Group, LLC (Reicon), and per motion sequence No. 004, The City of New York and New York City Economic Development Corporation (City defendants), (collectively moving defendants) move pursuant to CPLR 3116 (a) striking plaintiff Yannick Pedron's errata sheet which lists twenty-six (26) corrections to his deposition transcript, alleging the corrections are untimely signed and returned. In opposition, plaintiff seeks costs for preparing opposition to this motion per CPLR 8106, as pursuant to 22 NYCRR 202.20-f, plaintiff argues motion practice was unwarranted because the moving defendants failed to confer with plaintiff's counsel in good faith to try and resolve the errata sheet corrections prior to filing the motions and moving defendants failed to provide good faith affidavits with their filed motions.

Moving defendants contest 17 of the 26 corrections that were submitted 49 days late. They allege these corrections are prejudicial because the changes are substantive and are made without sufficient explanation. Accordingly, the Court considers only those 17 challenged changes and permits the changes as to the remaining 9 as set forth below.

Under CPLR 3116 (a) “any [errata sheet] 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” and “[n]o changes to the [deposition] transcript may be made by the witness more than sixty days after submission to the witness for examination.” “[C]ourts should be circumspect about extending the 60-day period inasmuch as an indication from the courts that an extension will be allowed without a strong showing of justification will quickly evolve a dilatory attitude that can undermine the purpose of CPLR 3116 (a)'s time limit altogether” (*Zamir v Hilton Hotels Corp.*, 304 AD2d 493, 494 [1st Dept 2003] [internal quotation marks omitted], quoting David D. Siegel, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C3116:1). However, pursuant to CPLR 2004 “the court may extend the time fixed [...] upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.

Plaintiff relies on *Jackson v Adfia Realty, LLC*, (171 AD3d 477, 477 [1st Dept 2019]) which held that if errata sheet “changes are not critical, substantive changes that materially alter plaintiff’s original deposition testimony on issues concerning the basis for [the] alleged negligence” then the errata sheet changes should be accepted. However, *Jackson*, (171 AD3d 477) is silent as to the issue of returning an errata sheet late. In *Zamir* (304 AD2d at 494, *supra*), the plaintiff returned the errata sheet well over the 60-day period and the Court found:

“plaintiff offers no reasons for his proposed substantive changes which, rather than clarifying or correcting obvious or even subtle transcription errors, contradict crucial

elements of his deposition testimony concerning the cause of the accident. Nor does he make any showing of good cause to extend his time to return his deposition”

(*Id.*). Likewise, the Second Department in *Torres v Bd. of Educ. of City of New York*, (137 AD3d 1256, 1257 [2d Dept 2016]) reasoned that “[a] correction will be rejected where the proffered reason for the change is inadequate. Further, material or critical changes to testimony through the use of an errata sheet is also prohibited” (*Id.* [internal citations omitted]). The Court in *Torres* (137 AD3d at 1257) found “defendants demonstrated that the plaintiff made numerous and significant corrections to his deposition testimony on his errata sheets [...which] sought to substantively change portions of the plaintiff’s deposition testimony which would have been in conflict with his earlier testimony” (*Id.*).

Here, plaintiff has not provided an affidavit or any evidence demonstrating how plaintiff’s health was a contributing factor for the dilatory errata sheet, which moving defendants contest the proffer of cancer treatment is an inapposite excuse as this has been ongoing for over two years and the lack of a proffered physician’s note corroborating plaintiff’s averment is insufficient (NYSCEF Doc. No. 99, [reply papers], ¶ 15) Moreover, the proffered excuse seeking good cause for an extension of the late errata sheet is only being proffered in opposition papers and not in the errata sheet. Should the Court find good cause has been shown, the corrections do not appear to be “clarif[ications] or correcti[ons ...] or even subtle transcription errors” (*Zamir* at 494). For example, plaintiff during his deposition was asked:

“Q: In describing what your condition was, they told you, Dr. Iofin told you, that there was essentially no bone left in the top part of the femur because of this tumor you had, right?”

MS. DENENBERG: Objection.

A: Yes. I mean yeah, true.

Q: They said that the proximal half of the femur was destroyed with minimal bone remaining, right? Do you recall them telling you there was very little bone left here?

A: We didn't go into great detail. But yeah, the point was made, yeah. They needed to replace it."

(NYSCEF Doc. No. 86, [deposition transcript], p.50:7-21). Plaintiff wants to correct the transcript to say:

"A: I don't recall him saying that there were no bone left"

([sic]; NYSCEF Doc. No. 89, [errata sheet correction for p. 50:20]). On first instance, this correction is substantive with no explanation having been provided (*see Riley v ISS intern. Service System, Inc.*, 284 AD2d 320 [2d Dept 2001] ["errata sheet lacked a statement of the reasons for making the corrections"]). A further example of a proposed correction is found on page 42, line 22, where plaintiff's proposed corrected answer is actually the same referenced line for an original question; therefore, the correction contradicts the deposition transcript.

In sum, the proposed corrections are 49 days late, appear to contradict crucial elements of the prior deposition testimony (*see Curry v Duane Reade Inc.*, 2012 WL 1360926, 2012 NY Slip Op 30969[U] [Sup Ct, NY County 2012]), and appear substantive without sufficient explanation being provided (*see e.g., Schachat v Bell Atl. Corp.*, 282 AD2d 329, 329 [1st Dept 2001] [when errata sheet corrections are not accompanied by "the requisite statement of the reasons for the corrections" the court should reject the "deposition transcript correction sheet"]). Therefore, after 60 days from the deposition, the moving defendants should be entitled "to rely upon the deposition as final" (*Zamir* at 494; *see also Id.*, quoting Practice Commentaries, *supra* at 167-168 ["A dilatory deponent who can't justify a delay in returning the deposition is perhaps best left to confront the discomfort of cross-examination should his live testimony at the trial differ in

some significant particular from the unaltered deposition”)). Having carefully considered all remaining arguments, the Court finds them unavailing.

Accordingly, it is ORDERED the moving defendants’ motions to strike the errata sheet are granted in-part as to errata sheet corrections pp.: 24:4, 29:16, 32-33, 37:17, 42:22, 50:20, 51:12, 58:14, 59:2, 66:9, 79:23, 81:15, 81:23, 91:11, 99:19, 101:4, and 105:7; and it is further

ORDERED the part of moving defendants’ motions seeking to strike the errata sheet corrections for pp.: 10:4, 12:4, 14:15, 22:8, 35:19, 63:5, 65:13, 72:19, 83:3, is denied without prejudice; and it is further

ORDERED parties are to appear for their subsequent remote status conference via Microsoft Teams scheduled for December 8, 2021; and it is further

ORDERED that the note of issue in this matter is extended to March 31, 2022.

This Constitutes the decision and order of the Court.

11/16/2021

DATE



ALEXANDER TISCH, 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

APPLICATION:

CHECK IF APPROPRIATE: