

Otoni v Seastreak, LLC
2020 NY Slip Op 33282(U)
October 6, 2020
Supreme Court, New York County
Docket Number: 152135/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ARLENE P. BLUTH</u>	PART	IAS MOTION 14
	<i>Justice</i>		
-----X		INDEX NO.	<u>152135/2018</u>
LUIZA OTTONI		MOTION DATE	<u>10/02/2020, 10/02/2020</u>
Plaintiff,		MOTION SEQ. NO.	<u>002 003</u>
- v -			
SEASTREAK, LLC,			
Defendant.			

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 77, 78 were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 58, 68, 69, 70, 71, 72, 73, 74, 75, 76, 79, 80 were read on this motion to/for AMEND CAPTION/PLEADINGS.

Motion Sequence Numbers 002 and 003 are consolidated for disposition.

The motion (MS 002) by defendant to strike plaintiff's errata sheet from her deposition is granted.

The motion (MS003) by defendant for leave to file an amended answer with a counterclaim for fraud is granted.

Background

Plaintiff's complaint alleges that she tripped and fell over a dangerous condition while she was a passenger on a ferry operated by defendant as the ferry traveled from the Brooklyn Navy Yard to Pier 11 in Manhattan. She asserts that she attended a Halloween party at a venue in the Brooklyn Navy Yard prior to taking the ferry back to Manhattan.

MS002

Plaintiff's deposition testimony was wildly different from the complaint her lawyers drafted and defendant moves to strike plaintiff's errata sheet on the ground that plaintiff seeks 39 substantive changes to her deposition testimony. Defendant points out that plaintiff claimed that the accident occurred while she was standing on a ledge on the top deck of the ferry and she fell when the ferry stopped. Defendant emphasizes that, according plaintiff's deposition testimony, this fall allegedly happened on the west side of Manhattan (Pier 11 is on the east side) and that the vessel was run by New York Waterways (not the defendant). It argues that plaintiff testified at her deposition that she did not recognize photographs of the ferries operated by Seastreak (defendant's boat) and that she was not on such a boat at the time of her accident.

Defendant points out that it operates ferries only on the east side of Manhattan and does not have any routes on the west side (where plaintiff testified she had her accident). It also observes that it does not operate ferries to Randall's Island, another location where plaintiff testified that she went on the evening of the accident. Defendant points out that plaintiff's errata sheet seeks to change 19 references to New York Waterways to defendant Seastreak. Defendant also notes that plaintiff's other changes include alterations to testimony about the location of the pier to answers such as "I don't know" or "I don't remember" and changes to testimony about the ferry operator as well as the locations where she boarded and disembarked.

In opposition, plaintiff contends that she was confused by many of the questions at her deposition and that she was unsure if she was at Randall's Island or the Brooklyn Navy Yard. She argues that she had a ticket to a party located in the Brooklyn Navy Yard on the night of her accident. Plaintiff insists that the alleged inconsistencies are issues of fact and credibility that

defendant's counsel can raise at trial. She maintains that there are only 3 actual changes to the deposition testimony and the remaining 36 were simply done for consistency.

“[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]).

The Court grants this motion. The errata sheet in question (NYSCEF Doc. No. 52) contains dramatic changes to plaintiff's testimony. The original deposition testimony is clear that when asked which ferry she was on, plaintiff responded that it was one operated by New York Waterways (*id.* at 14). Plaintiff's proposed changes include inserting defendant Seastreak in place of New York Waterways on numerous occasions (*id.* at 136). That's a material change. And plaintiff does not ask for a single change; she asks for over 30 changes that demonstrably alter plaintiff's testimony.

The Court also points out that the deposition testimony suggests that plaintiff freely asserted that the accident happened on a ferry operated by New York Waterways (*id.* at 14). This is not a case where an attorney asked a leading question and got a witness to admit something that contradicted the complaint. Instead, plaintiff volunteered that she was on a ferry operated by a different entity when she fell.

It may be that plaintiff was confused. She submits her own affidavit (NYSCEF Doc. No. 61), the affidavit of her sister (NYSCEF Doc. No. 64) and the affidavit of her friend Eduardo Missel (NYSCEF Doc. No. 65) all of whom assert that the accident occurred after a party in the Brooklyn Navy Yard and aboard a vessel operated by defendant Seastreak. She also attaches a

copy of the ticket for the party (NYSCEF Doc. No. 62). But the issue on this motion is whether the errata sheet should be stricken, not to determine issues of credibility. Plaintiff is obviously entitled to assert that she got it wrong or was confused at her deposition, but that does not mean she can rewrite her entire testimony after the fact.

The purpose of an errata sheet is not to clean up harmful testimony, it is generally used to correct minor misstatements. And the reason submitted for the changes sought here is not sufficient—confusion does not permit changes to an errata sheet that makes so many fundamental changes to a plaintiff’s testimony. In this case, plaintiff changed her mind about where she was on the night of the accident, the route of the ferry and who ran the ferry where she allegedly fell. In other words, plaintiff wants to alter her entire story now that it contradicts the complaint.

MS003

Defendant also moves for leave to amend its answer to add a counterclaim for fraud. It argues that the verified complaint contends that plaintiff was on her way home from Brooklyn to Manhattan after a Halloween party. Defendant claims that the deposition testimony from plaintiff contained contradictory information about the pier she departed from, the venue of the Halloween party, the identity of the ferry operator and the details of the ferry on which the accident allegedly occurred.

Defendant claims that there is no prejudice or surprise to plaintiff for the proposed amended pleading and that the medical records from Lenox Hill Hospital contain statements from plaintiff that she was injured while dancing on some speakers while wearing high heels. Defendant argues that this directly conflicts with plaintiff’s claim that she fell as a result of some condition on the boat. It points out that on its ships, there are no exterior steps located in the

middle of the ship and the vessels do not contain any boxes or ledges despite plaintiff's claim that she fell on a box or a ledge. Defendant also points out that the errata sheet, discussed above, demonstrates that plaintiff is attempting to sue defendant based on a false pretense.

In opposition, plaintiff claims that the alleged admissions in the hospital records are inadmissible and are not germane to the diagnosis or treatment of plaintiff. She argues that the issues raised by defendant are merely credibility determinations that must be resolved by a trier of fact. Plaintiff points to the ticket for the party, her affidavit and the affidavits from her companions that night as proof that defendant cannot assert a claim for fraud.

In reply, defendant emphasizes that plaintiff confirmed at her deposition that the medical records were related to her treatment within hours of the accident. It argues that these are admissible as an exception to the hearsay rule because they inconsistent with plaintiff's current position and they relate to how and where her accident occurred.

"Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise, although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-55, 797 NYS2d 434 [1st Dept 2005] [internal quotations and citations omitted]).

Here, defendant wants to amend for leave to assert a counterclaim for fraud. The Court grants the motion. Defendant has clearly asserted a cognizable cause of action that plaintiff misrepresented the accident in an attempt to hold defendant liable. The Court finds that the statements made in the hospital records are admissible as an admission against interest (*Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95, 96, 698 NYS2d 652 [1st Dept 1999]). Statements made to medical personnel on the night of the accident that contradict plaintiff's current theory are

admissible under this exception to the hearsay rule. Plaintiff said she fell on her significant other at a Halloween party while dancing on speakers and wearing high heels (NYSCEF Doc. No. 40 at 57). Asserting that she fell on the boat in the complaint after previously telling medical personnel that she fell at the party states a fraud claim. Plaintiff is certainly free to contest the validity and accuracy of the statements, but they can serve as a basis for the amended counterclaim.

“The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages” (*Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98, 665 NYS2d 415 [1st Dept 1997]). Defendant claims that plaintiff concocted a false story about falling over a dangerous condition in the middle of the ship when the ferry stopped at its destination despite the fact that she told hospital workers that she fell while dancing on speakers at a party. She also testified that she was on a New York Waterways ferry and that the party was on Randall’s Island rather than in the Brooklyn Navy Yard. Defendant alleges that these misrepresentations were asserted to hold defendant liable for damages when plaintiff knew defendant had nothing to do with the injuries she suffered that night.

The Court recognizes that plaintiff’s position is that she simply misunderstood many of the questions at her deposition and points to her ticket from the Halloween party as proof she was in the Brooklyn Navy Yard and likely took the nearby ferry run by defendant after the party. But the Court cannot credit one party’s theory in the instant motion. Defendant merely has to allege a cause of action for fraud and it has done so here based on the hospital records and plaintiff’s own testimony. That testimony contradicts the complaint with respect to where the party was, the ferry routes and which entity operated the ferry. If taken as true, a trier of fact

could conclude that plaintiff created a story to hold defendant accountable for an accident that happened nowhere near a ferry operated by defendant.

The Court observes that it did not consider the letter writing campaign the parties engaged in on the submission date of the motion (NYSCEF Doc. Nos. 81-85). A letter is not a basis upon which discovery relief can be granted nor is it the place to offer substantive arguments related to a pending motion.

Accordingly, it is hereby

ORDERED that the motion (MS002) to strike the errata sheet is granted; and it is further

ORDERED that the motion (MS003) for leave to file an amended answer is granted and defendant shall e-file the proposed pleading (NYSCEF Doc. No. 43) as a separately filed and labeled document within 7 days and plaintiff shall respond pursuant to the CPLR.

Remote Conference Adjourned to January 29, 2021.

10/6/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE