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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH PART 54

Index Number : 603582/2004

WOODIE, PHILLIP R.

vs

AZTECA INTERNATIONAL

Sequence Number : 011

REARGUMENT/RECONSIDERATION

DEX NO. _____

OTION DATE 9/20/07

OTION SEQ. NO. _____

OTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits _____	3
Replying Affidavits _____	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/20/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PHILLIP R. WOODIE

Plaintiff,

Index No.: 603582/04

DECISION and ORDER

-against-

AZTECA INTERNATIONAL CORPORATION, d/b/a AZTECA AMERICA; LUIS J. ECHARTE, Individually and as CEO of AZTECA AMERICA; JORGE JAIDAR, individually and as Chief Operating Officer, AZTECA AMERICA; TV AZTECA, S.A. de C.V.; MARIO SAN ROMAN, COO of TV AZTECA, S.A. de C.V.,

Defendants,

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KORNREICH, SHIRLEY WERNER, J.:

In this action for employment discrimination, attorneys' fees were imposed on plaintiff as a sanction for contradictory statements about an alleged secret customer list ("List"), which prolonged the proceedings by necessitating a further deposition of plaintiff, as well as the deposition of a non-party witness, Judith Kenny. Further, defendants' motion to dismiss plaintiff's cause of action for misappropriation of the List was granted, by order dated April 6, 2007 ("SJ Order"). Plaintiff moves to reargue this court's decision and order, dated June 19, 2007 ("Sanctions Order"), which imposed sanctions upon him for frivolous conduct, pursuant to 22 N.Y.C.R.R. §130-1.1. Plaintiff also moves for an order *in limine:* 1) preventing defendants from impeaching him based upon the evidence he gave concerning the List; 2) barring defendants from introducing the Sanctions Order at trial; and 3) if plaintiff's motion is denied, permitting

plaintiff to impeach defendants with evidence of settlement of a securities fraud violation and a petition by NBC in a licensing proceeding charging a television station owned by defendant TV Azteca with corruption.

Familiarity with the court's prior decisions in this action is presumed and the facts will be repeated here only as necessary to determine the motions before the court.

Motion to Reargue Sanctions Order

Plaintiff urges in support of reargument that the court erroneously determined a matter of credibility in deciding that attorneys' fees were appropriate as a sanction. Specifically, plaintiff argues that he timely executed an errata sheet stating that the List was not Exhibit 3, as he had testified at his first two deposition sessions, but was Exhibit 31, which was marked at his third deposition. Plaintiff argues that because the errata sheet was timely executed, he was entitled to make this change, that the change merely raised an issue of credibility for the jury and that the court should not rely upon the change of testimony in imposing sanctions, where the testimony was changed in accordance with CPLR §3116(a).

First and foremost, sanctions were not awarded solely because plaintiff testified that a Univision list, given to him by his friend, Ms. Kenny ("Univision List), was his purloined secret customer List, which he had compiled during more than twenty years. Plaintiff also contradicted his verified complaint about the format, contents, creation and secrecy of the List. Plaintiff swore in his verified complaint that he had kept the List secret "from the day he began creating it through the present."

The verified complaint made the following representations about the manner in which the List was created, stored and kept secret:

> To this day plaintiff has had only one "hard copy" and only one computer disk copy on which the contact list is recorded and up dated. Plaintiff keeps these two copies in his home in a secure location.
>
> ... until [the List] was improperly extracted from him by defendants, ... [w]henever plaintiff used the List to generate a mailing ..., he has given the disk containing the contact list to his personal assistant for the purpose of generating mailing labels. The personal assistant is required to return the disk to plaintiff immediately after the mailing labels have been created; plaintiff then takes the disk back to his home. No one else is permitted to handle the disk and no copies may be made.

In describing how defendants came into possession of his secret disk, plaintiff averred in the complaint that at first he refused to give the disk to defendants, but then:

> Mr. Laliere and defendant Jaidar then repeatedly assured plaintiff that 'no one would see the list,' and that the disk would be promptly returned to him. Plaintiff answered that he would personally travel to Mexico City with the disk to supervise the creation of the mailing labels so that he could prevent any copying of his contact list. Laliere and Jaidar then told plaintiff that he could not travel to Mexico City for this purpose; instead, they gave him their assurances that they would keep his contact list secure and secret and would return the disk to him promptly after the mailing labels were prepared. Relying on these representations, ... plaintiff reluctantly acceded to the request and send the disk by courier to Mexico.

Discovery revealed that plaintiff did not have the disk at home and that the disk plaintiff sent to defendants was actually a copy of a paper list, with plaintiff's handwritten notes, that his assistant, Ms. Abreu, typed into a computer at defendants' premises and made into a disk, which was sent to Mexico. The verified complaint also claimed that the List contained "direct telephone numbers" of "principals of advertising agencies," when in fact the List did not have telephone numbers. At plaintiff's deposition he testified that he did not make an effort to delete the List from defendants' computers. The statements regarding the number of copies of the disk, plaintiff's efforts to keep it secret, the creation of the disk on defendants' computer, and whether

the List had telephone numbers, were material to plaintiff's claim that the List was a valuable trade secret. Plaintiffs' misidentification of the List at his depositions was only one of may contradictions, which generated much discovery and multiple depositions, costing defendants a great deal of money.

Second, the Univision List came to light when defendants discovered it in their files and realized that it was identical to Exhibit 3, minus the heading with Univision's name on it. At a disclosure conference, defendants asked for and were granted a further deposition of plaintiff based upon the discovery of the Univision List. It was at that point that plaintiff executed his errata sheet, which gave the following "explanation" for the material change that the List was not the document marked at his prior deposition: "The reason for this change is that the original Exhibit #3 was not my contact list."

The sanction imposed was directly related to the prejudice defendants suffered as a result of plaintiff's conduct. Plaintiff was ordered to pay defendants' attorneys' fees in connection with the depositions that ensued, including plaintiffs' further EBT and the EBT of Ms. Kenny. Whether or not plaintiff intentionally lied, at the very least his failure to take the time and effort to insure that he identified the crucial document correctly was reckless, protracted the proceedings and was costly to his adversaries.

The Sanction Order did not strike the errata sheet or grant summary judgment based upon plaintiff's credibility. Summary Judgment was the subject of an earlier motion. The issue on the sanctions motion was whether the expense engendered by plaintiff's inconsistent statements was a proper sanction for frivolous conduct. In considering whether conduct is frivolous, a court should examine whether or not the conduct was continued when the lack of legal or factual basis

was apparent or *should have been apparent.* 22 NYCRR §130-1.1; *Citibank v. Alotta*, 277 A.D.2d 547 (3rd Dept. 2000). "Nothing could more aptly be described as conduct 'completely without merit in ... fact' than the giving of sworn testimony or providing an affidavit, knowing the same to be false, on a material issue." *Sanders v. Copley*, 194 A.D.2d 85 (1st Dept. 1993). Contrary to plaintiff's assertions, attorneys fees may be awarded for frivolous conduct in cases where false statements are made prior to trial. *Sibersky v. Winters*, 42 A.D.3d 402 (1st Dept. 2007)(frivolous motion practice). And to reiterate, plaintiff's lack of candor was not limited to his deposition testimony identifying the Univision List as his List.

Plaintiff also challenges the Sanctions Order on the ground that the court improperly determined an issue of credibility in deciding the motion for summary judgment. However, the Sanction Order, which is the subject of this motion, did not determine the motion for summary judgment. Plaintiff also mistakenly relies on cases striking errata sheets, pursuant to C.P.L.R. §3116(a), not sanctions.[1] Again the Sanctions Order did not strike plaintiff's errata sheet.

Motion In Limine

Plaintiff seeks a ruling that, so long as plaintiff's case-in chief does not mention the List

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[1]CPLR §3116(a) provides that the deposition "shall be submitted to the witness for examination," that "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," and that "[n]o changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." In construing §3116, it has been held that a court may reject an errata sheet where the witness makes the change within the prescribed sixty days, without showing good cause, or fails to gives a credible reason for the change. *Rodriguez v. Jones*, 227 A.D.2d 220 (1st Dept. 1996)(changed location where plaintiff tripped without explanation; language barrier no excuse because of interpreter); *Garcia v. Stickel*, 37 A.D.3d 368, 1 (1st Dept. 2007)(no explanation for changes or good cause for delay); *Zamir v. Hilton Hotels Corp.*, 304 A.D.2d 493 (1st Dept. 2003)(no reason); *Kelley v. Empire Roller Skating Rink, Inc.*, 34 A.D.3d 533 (2nd Dept. 2006)(changes struck due to absence of explanation and good cause for delay); *Marzan v. Persaud*, 29 A.D.3d 652 (2nd Dept. 2006)(conclusory statement in errata sheet , "I meant to say that," not reason) In this case, plaintiff explanation for the change was a conclusion, not a reason: " the original Exhibit #3 was not my contact list." Timeliness cannot be determined on this record because there is an issue of fact as to when the transcript was submitted to plaintiff.

or any other contact list, "facts relating to the contact lists" be excluded from evidence as character evidence that is immaterial and highly prejudicial to plaintiff's discrimination claim. Defendants counter that the ruling should await the date scheduled by the court for motions *in limine* and the trial, to see if plaintiff opens door. Defendants further urge that plaintiff's litigation misconduct is admissible on credibility, and that the contact list evidence goes to the issues of why plaintiff was hired, whether he met defendants' expectations, and whether plaintiff was so angry at his termination that he filed a false claim.

Now that plaintiff's claim for misappropriation of trade secrets has been dismissed, cross-examination about it is irrelevant to his remaining discrimination claim, the central issue in dispute. *Caster v. Increda Meal, Inc.*, 238 A.D.2d 917 (4th Dept. 1997). However, plaintiff may be cross-examined for the purpose of attacking his credibility with questions about whether he lied about the List, but extrinsic evidence may not be introduced to prove it. *Badr v. Hogan*, 75 N.Y.2d 629, 635 (1990). Evidence of defendants' unrelated misconduct is subject to the same rule regarding extrinsic evidence of unrelated bad acts.

Extrinsic evidence may not be used to show plaintiff's hostility, unless defendants introduce direct evidence at trial that plaintiff brought his employment discrimination case to retaliate for his termination. *People v. Thomas*, 46 N.Y.2d 100, 105 (1978)(extrinsic evidence improperly admitted because hostility based on inference); *Schultz v. Third Avenue Railroad Co.*, 89 N.Y. 242, 250 (1882)(hostility must be proven directly, not by circumstantial evidence). Evidence about the contact list relating to why plaintiff was hired and whether he met defendants' expectations can be admitted and elicited through questions on cross-examination without resort to extrinsic evidence concerning plaintiff's false statements in this action.

The Sanctions Order may not be admitted into evidence under any circumstances because it would usurp the jury's right to assess plaintiff's credibility. Accordingly, it is

ORDERED that the plaintiff's motion to reargue is denied and that plaintiff's motion *in limine* is granted solely to the extent indicated in this decision.

September 20, 2007

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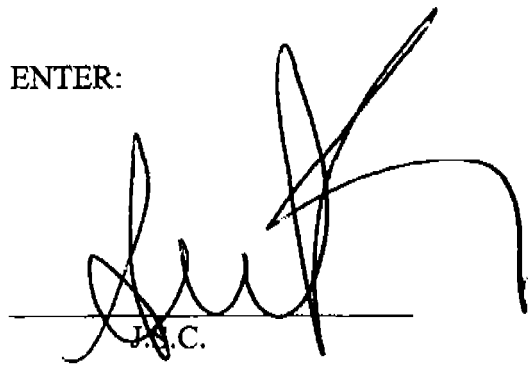

J.S.C.