

Ortega v Rockefeller Ctr. N. Inc.

2014 NY Slip Op 33667(U)

October 1, 2014

Supreme Court, New York County

Docket Number: 115761/10

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

NANCY ORTEGA,

Plaintiff,
-against-

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NYS SUPREME COURT - CIVIL

INDEX NO. 115761/10

MOTION DATE _____

ROCKEFELLER CENTER NORTH INC., et al.,
Defendants.

MOTION SEQ. No. 006

MOTION CAL. No. _____

The following papers, numbered 1 to _____ were read on this motion to DISMISS.

FILED PAGES NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits 0103 2014

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

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CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is decided as follows:

This is an action for personal injuries plaintiff, Nancy Ortega allegedly sustained on February 6, 2008. On or about January 4, 2013, the plaintiff served a Supplemental Bill of Particulars wherein, for the first time, she alleged traumatic brain injury. On March 4, 2014, this Court issued an order whereby the plaintiff was to appear for a further deposition.

Defendants/third party plaintiffs Rockefeller Center North, Inc., Rockefeller Group International, Inc., Time Inc. and Rockefeller Center, Inc. ('Movants') contend

that on March 18, 2014, during the court ordered further deposition of the plaintiff, Attorney Paula M. Greco of the Wingate, Russotti & Shapiro, LLP Firm (“Attorney Greco”) committed multiple violations of Uniform Rule 221 and seeks the entry of an order (a) compelling answers to certain deposition questions and (b) awarding sanctions. Movants argue that Attorney Greco improperly directed the plaintiff to not answer questions posed by Movants’ attorney, Michael Winter (“Attorney Winter”), on multiple occasions, in violation of Uniform Rule 221.2.

Uniform Rule 221.2 addresses the limited context in which a deponent may refuse to answer a question posed at a deposition when an objection is made. See 22 NYCRR 221.2. It provides that “[a] deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.” 22 NYCRR 221.2. Attorneys may not instruct a deponent not to answer unless CPLR 3115 or 22 NYCRR 221.2 provides a basis for doing so. 22 NYCRR 221.2. When a deponent refuses to answer a question, or an attorney instructs a deponent not to answer, such refusal or instruction “shall be accompanied by a succinct and clear statement of the basis therefor.” 22 NYCRR 221.2. Also, where a deponent does not answer a question, the deposition proceeds, and “the examining party shall have the right to complete the remainder of the deposition.” 22 NYCRR 221.2.

CPLR 3115(b), (c), and (d) provide certain limited bases for making objections during depositions including errors which might be obviated if known promptly, disqualification of the person taking the deposition, and competency of witnesses or

admissibility of testimony. See CPLR 3115(b)-(d). However, despite its inclusion in Uniform Rule 221.2, CPLR 3115 does not provide any separate basis for refusing to answer questions or for an attorney to direct a deponent to not answer questions. See CPLR 3115; 22 NYCRR 221.2. Furthermore, Uniform Rule 221.1(a) provides that objections made at a deposition “shall be noted by the officer before whom the deposition is taken, *and the answer shall be given and the deposition shall proceed subject to the objections* and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.” 22 NYCRR 221.1(a) (emphasis added).

On March 18, 2014 the plaintiff appeared for a further deposition and counsel would not permit the plaintiff to answer any questions concerning injuries, treatment or events that occurred prior to the client’s second deposition on August 29, 2012, including the plaintiff’s history relating to the plaintiff’s newly-alleged traumatic brain injury. Plaintiff’s counsel objected on the record to any questions that the plaintiff had previously answered regarding her examinations by both defendants’ doctors.

Here, the instruction not to answer does not fall within any of the three enumerated categories of Uniform Rule 221.2. Since the plaintiff has made new, broad allegations of a traumatic brain injury, plaintiff should be compelled to submit to a further deposition, limited in scope to her history relative to her alleged brain injury and subjective complaints to physicians. Moreover, unless a question at an EBT is clearly violative of a witness’s constitutional rights, or of some privilege recognized in law, or is palpably irrelevant, questions should be freely permitted and answered, since all objections other than those as to form are reserved for trial and may be raised at that time (see *Humiston v Grose*, 144 AD2d 907 [4th Dept 1988]).

Uniform Rule 130–1.1 provides that the court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130–1.3 of this Part. 22 NYCRR 130–1.1(a). “The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both.” 22 NYCRR 130–1.1(b)

Uniform Rule 130–1.1 defines conduct as “frivolous” if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

As discussed above, Attorney Greco's instructions not to answer certain questions during plaintiff's deposition in this case, were made in violation of Uniform Rules 221.1–221.3 and are therefore without merit in law. Moreover, plaintiff has not offered any arguments for extension, modification or reversal of existing law. As such, the Court directs that within 30 days of the service of a copy of this decision and order with notice of entry, plaintiff shall appear for continued deposition (the “Continued Deposition”). The scope of the Continued Deposition shall be limited to her history relative to her alleged brain injury and subjective complaints to physicians as well as

those questions that flow from the plaintiff's responses to those questions.

Second, having determined that Attorney Greco has engaged in frivolous conduct as defined by Uniform Rule 130–1.1 (c), the Court shall award Movants the costs and attorneys' fees associated with (1) making this motion and with (2) the Continued Deposition, to be paid by Attorney Greco.

Accordingly, it is hereby

ORDERED that, within 15 days of the entry of this order, Movants shall file and serve a copy of this decision and order with notice of entry on all parties (the "Service"); and it is further

ORDERED, that, within 30 days of the Service, Plaintiff shall appear for a continued deposition, which shall be limited to her history relative to her alleged brain injury and subjective complaints to physicians, as well as those questions that flow from the plaintiff's responses to those questions; and it is further

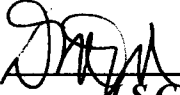
ORDERED, that the plaintiff's deposition shall be held at a location and on a date and time that is mutually agreeable and convenient for the parties, except that such date must be within 30 days of the Service, as set forth above; and it is further

ORDERED, that the Court having determined that Attorney Greco has engaged in frivolous conduct as defined in Section 130–1.1 (c) of the Rules of the Chief Administrative Judge as set forth above, the movants are awarded the costs and attorneys' fees associated with making this motion and the costs and attorneys' fees associated with the plaintiff's deposition, to be paid by Attorney Greco; and it is further

ORDERED, that Movants shall prepare an affirmation detailing the costs and attorneys' fees associated with making this motion and the costs and attorneys' fees

associated with the plaintiff's deposition, and provide it to plaintiff's counsel within 14 days of the conclusion of the plaintiff's deposition.

Dated: 10/1/14



J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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