

Jackson v OpenCommunications Omnimedia LLC
2015 NY Slip Op 30120(U)
January 28, 2015
Supreme Court, New York County
Docket Number: 151596/2014
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

JOSEPH EARL JACKSON,

Plaintiff,

-v-

OPENCOMMUNICATIONS OMNI MEDIA LLC, et al.,

Defendants.

INDEX No. 151596/14

MOTION DATE

MOTION SEQ. No. 003

MOTION CAL NO.

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion to strike plaintiff's errata sheet is decided as follows:

In this employment discrimination case, defendants, OpenCommunications Omnimedia LLC ("OpenCommunications"), John Andrew Morris and Kathryn Campisano (collectively, the "Defendants") move to strike plaintiff, Joseph Earl Jackson's ("Plaintiff") errata sheet to his August 5, 2014 deposition and compelling Plaintiff to reimburse Defendants for the attorneys' fees incurred in having to file this

motion, as well as those fees incurred in having to pursue production of a flash drive Plaintiff now claims never existed.

The underlying action was commenced to remedy sexual harassment, discrimination and retaliation under New York State Executive Law § 290 et seq. and under the New York City Administrative Code § 8-101 et seq. that the Plaintiff allegedly sustained during his employment with the Defendants.

On August 5, 2014, the Defendants took, but did not complete Plaintiff's deposition. Shortly after receiving the deposition transcript from the Defendants, Plaintiff provided an errata sheet where he made changes to his deposition, in places where he misspoke or needed to make a factual correction. Defendants contend that the errata sheet that Plaintiff submitted in regard to his deposition was an outrageous, wholesale reversal of his extensive testimony regarding his use of a flash drive to obtain emails which had been accessed by a former employee of OpenCommunications to assist him with his claims.

Defendants claim that the proposed changes are the result of a transparent and improper attempt to avoid an agreed upon forensic examination of the flash drive, hoping to defeat Defendants' counterclaim, and possibly to avoid discovery of some improper conduct on his part. Defendants therefore contend that Plaintiff's errata sheet should be stricken because these substantive changes are impermissible under the CPLR.

With respect to the issue of the errata sheet, CPLR 3116(a) provides, in relevant part, 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” (*see Keenan v. Munday*, 79 A.D.3d 1415, 1416, 912 N.Y.S.2d 778 [2010]). Here, although there is no question that Plaintiff made substantive amendments to his examination before trial testimony, “a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor” (*Cillo v. Resjefal Corp.*, 295 A.D.2d 257, 257, 743 N.Y.S.2d 860 [2002]). Based upon this Court’s review of plaintiff’s errata sheet and the notations contained upon the relevant pages of his deposition testimony, this Court is satisfied that an appropriate statement of the reasons for such changes was provided (*see id.* at 257, 743 N.Y.S.2d 860; *compare Ashford v. Tannenhauser*, 108 A.D.3d 735, 736, 970 N.Y.S.2d 65 [2013]; *Kuzmin v. Visiting Nurse Serv. of N.Y.*, 56 A.D.3d 438, 439, 866 N.Y.S.2d 781 [2008]; *Garcia v. Stickel*, 37 A.D.3d 368, 368–369, 831 N.Y.S.2d 380 [2007]; *Rodriguez v. Jones*, 227 A.D.2d 220, 220, 642 N.Y.S.2d 267 [1996]). Moreover, any purported conflict between the original deposition testimony and the correction raises issues of credibility and the Defendants will have the opportunity to impeach such changes at the time of trial.

Defendants’ remaining arguments, to the extent not specifically addressed, have been examined and found to be lacking in merit. Plaintiff is directed however to

complete his deposition testimony.

Accordingly, it is

ORDERED that the Defendants' motion is denied in its entirety; and it is further

ORDERED that the Plaintiff Joseph Earl Jackson is directed to appear for further examination before trial within 30 days after service of a copy of this order with notice of entry.

Dated: 1-28-15


DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION