

Van de Walle v Van de Walle
2020 NY Slip Op 33951(U)
October 5, 2020
Supreme Court, Nassau County
Docket Number: 614060/2018
Judge: Antonio I. Brandveen
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ANTONIO I. BRANDVEEN,

Justice

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SANDRA VAN DE WALLE, CARLA VAN DE
WALLE, ALEXA VAN DE WALLE and JAMES VAN
DE WALLE,

TRIAL/IAS, PART 22
NASSAU COUNTY

Plaintiffs,

INDEX NO. 614060/2018

-against-

Motion Sequence: 004

NAHEED ASAD VAN DE WALLE, individually and in
her capacity as Executor of the Estate of CHARLES R.
VAN DE WALLE,

SHORT FORM

ORDER

Defendant.

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The following papers have been read on this motion:

Plaintiffs' Notice of Motion, Affirmation and Exhibits	<u>1-2</u>
Defendant's Affirmation and Exhibits in Opposition	<u>3</u>
Plaintiffs' Reply Affirmation and Exhibits	<u>4</u>
Briefs: Plaintiffs'	<u>5-6</u>
Defendant's	<u>7</u>

Upon the foregoing papers, the plaintiffs' motion (sequence 004) for an order striking the errata sheet to the transcript of the deposition of the defendant, Naheed Asad Van de Walle ("Naheed"), first served by the defendant on July 2, 2020, is granted.

The defendant was deposed in this action on February 28, 2020.

On March 18, 2020, Governor Andrew Cuomo issued Executive Order 202.6, requiring non-essential employers to reduce their in-person workforces by 50%. On March 19, 2020, Governor Cuomo issued Executive Order 202.7, which required non-essential employers to reduce their in-person workforces by 75%. On March 20, 2020, Governor Cuomo issued Executive Order 202.8, which required non-essential employers to reduce their in-person workforces by 100%. At that time, law firms were considered non-essential businesses.

On March 21, 2020, counsel for the defendant sent an e-mail inquiring as to whether counsel for the plaintiffs had sent him the defendant's deposition transcript yet. On the same date, counsel

for the plaintiffs responded that she had not done so because of the events of the preceding week and offered to e-mail the transcript. Counsel for the defendant responded, "Please do."

On March 22, 2020, counsel for the plaintiffs e-mailed a copy of the defendant's deposition transcript to counsel for the defendant, along with a letter requesting that the defendant sign and return the transcript, along with any errata sheet containing corrections, pursuant to CPLR § 3116. At no time did counsel for the defendant reject or object to the CPLR § 3116 notice that the plaintiffs' attorney sent via e-mail.

On May 23, 2020, the plaintiffs electronically filed a motion for summary judgment. A certified copy of the complete, uncorrected transcript of the defendant's deposition was annexed to the plaintiffs' motion. On June 11, 2020, the defendant electronically filed opposition to the plaintiff's motion and her own cross-motion for summary judgment, in which she relied upon the uncorrected copy of her deposition transcript that was annexed to the plaintiffs' motion for summary judgment. In her memorandum of law, the defendant also acknowledged that, at her deposition, she: "testified that she had no knowledge of...the transactions about which Plaintiffs complain here."

On June 25, 2020, the plaintiffs electronically filed submissions in further support of their motion for summary judgment and in opposition to the defendant's cross-motion for summary judgment. On July 2, 2020, the defendant electronically filed reply submissions in further support of her cross-motion for summary judgment. The defendant's submissions included an errata sheet which purported to alter portions of her deposition testimony. This was the first time the defendant's errata sheet was provided to the plaintiffs. The errata sheet states that it was executed by the defendant on June 1, 2020, but in her opposition to the instant motion the defendant admits that this was a typographical error and that she did not sign the errata sheet until July 1, 2020

On July 3, 2020, the plaintiffs requested leave to file a sur-reply. They argued that the Court should disregard the defendant's errata sheet in deciding the parties' motions because it was belatedly served and improperly sought to make substantive changes to the defendant's testimony without sufficient justification. On July 6, 2020, this Court granted the plaintiffs leave to file their sur-reply.

The plaintiffs now move to strike the errata sheet to the defendant's deposition transcript.

CPLR § 3116(a) provides, as follows:

The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and 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. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. *No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination* (emphasis added).

Here, the defendant's deposition transcript was sent to her attorney via e-mail on March 22, 2020. The defendant contends that the electronic transmission of her deposition transcript did not commence the running of the sixty-day period prescribed by CPLR § 3116(a) because electronic service was not permissible under CPLR § 2103(7). That statute only allows service by e-mail where the party to be served consents to electronic service in writing. According to the defendant, her attorney did not agree in writing to electronic service of her deposition transcript.

The Court rejects the defendant's argument. In doing so, the Court notes that CPLR § 3116(a) does not require "service" of the transcript on the deponent; it requires "submission" of the transcript to the deponent. Even if "submission" is equivalent to "service," the record belies the defendant's assertion that her attorney did not provide written consent to electronic service. The plaintiffs' attorney specifically asked defense counsel whether he wanted her to send the defendant's deposition transcript via e-mail, to which he replied, "Please do." Thereafter, the plaintiffs' attorney sent the transcript with a notice pursuant to CPLR § 3116 and the defendant's attorney never objected.

Given that the defendant's transcript was properly submitted to her on March 22, 2020, her time to execute and make changes to it expired sixty-days later on May 21, 2020. However, through e-mails dated March 2, 2020, counsel for the parties agreed that the defendant's time to execute and make changes to her deposition transcript would be extended by two weeks, thereby making her deadline June 4, 2020. Accordingly, the defendant's errata sheet, served on the plaintiffs for the first time on July 2, 2020, was untimely. *See* CPLR 3116(a).

The defendant argues that her time to serve her errata sheet was extended by Governor Andrew Cuomo's Executive Order 202.8 (and subsequent extensions thereof), which tolled deadlines for the "commencement, filing or service of any legal action, notice, motion or other process or proceeding...." This argument fails because the service of an executed deposition transcript and/or errata sheet is not a legal action, notice, motion, proceeding or other process.

The defendant has failed to show good cause that would justify the late submission of her errata sheet (*see Zamir v Hilton Hotels Corp.*, 304 AD2d 493, 493-94 [1st Dept 2003]). To the contrary, after being served with the plaintiffs' dispositive motion, which was based in part upon the very same testimony that the defendant purports to alter through her errata sheet, the defendant failed to complete an errata sheet and serve it upon the plaintiffs. The defendant instead proceeded by relying heavily on her unsigned and uncorrected deposition transcript in her opposition to the plaintiffs' summary judgment motion and in her submissions in support of own cross-motion for summary judgment. By doing so, the defendant adopted her unsigned and uncorrected transcript as accurate (*see Gallway v Muintir, LLC*, 142 AD3d 948, 949 [2d Dept 2016]); *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 936, 936 [2d Dept 2012]).

The defendant's errata sheet is improper for the additional reason that "material or critical changes to testimony through the use of an errata sheet [are] also prohibited" (*see Torres v Bd. of Educ. of City of New York*, 137 AD3d 1256, 1257 [2d Dept 2016]).

In this action, the plaintiffs allege that Charles Van de Walle, the defendant's husband, intentionally and fraudulently transferred certain real property and retirement accounts to the defendant in order to defeat the plaintiffs' rights to those assets under a divorce settlement

agreement. With knowledge of the plaintiffs' claims, the defendant testified at her deposition that she never had a conversation with her husband about changing the way his assets were titled; never had a discussion with her husband about becoming the beneficiary of his retirement accounts; never saw a change of beneficiary designation relating to her husband's retirement accounts; never saw a deed signed by the her husband transferring certain real property to himself and the defendant as tenants by the entirety; never had a conversation with her husband about him transferring his solely owned real estate to himself and the defendant as tenants by the entirety; only learned about the transfer of her husband's real property after he died; did not know why her husband transferred his real estate to her; and did not know why her husband later encumbered the real property with a home equity line of credit. These transactions are at the heart of this action, and the defendant reaffirmed her deposition testimony in her memorandum of law, dated June 11, 2020, wherein she stated that she "testified that she had no knowledge of ...the transactions about which Plaintiffs complain here."

Despite this, the defendant now purports to alter the foregoing testimony in her errata sheet so as to state that she "does not recall" whether she knew about these events or ever discussed them with her husband. In each case, the defendant offers the following omnibus reason for these changes: "Clarification. I have no present recollection of events that took place so many years ago."

The changes the defendant has attempted to make to her deposition testimony are material. The defendant's previous admission that her husband kept secret the transactions at issue in this litigation is part of plaintiffs' proof of their claims. To permit the defendant to make such changes at this late stage would defeat the "statutory purpose of imposing the 60-day restriction in the first place, [which] is to enable other parties, including the party who took the deposition, to rely upon the deposition as final" (*Zamir*, 304 AD2d at 494).

Moreover, the defendant's proffered explanation that she is merely clarifying her testimony, after reaffirming the truth of the testimony as it was originally transcribed just three weeks prior to the filing of her errata sheet, is inadequate (*see Torres*, 137 AD3d at 1257). As such, the errata sheet cannot "properly be considered in determining the existence of a triable issue of fact" (*Ashford v Tannenhauser*, 108 AD3d 735, 736 [2d Dept 2013]).

Therefore, the plaintiffs' motion to strike the defendant's errata sheet is granted.

The foregoing constitutes the decision and order of this Court.

Dated: October 5, 2020

ENTER:



ANTONIO I. BRANDVEEN, J.S.C.

NOT FINAL DISPOSITION

ENTERED

Oct 13 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE