

**Vergara v Fligr**

2024 NY Slip Op 30220(U)

January 17, 2024

Supreme Court, New York County

Docket Number: Index No. 452780/2021

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS PART 10M

Justice

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INDEX NO. 452780/2021

MICHAEL VERGARA,

MOTION DATE 08/25/2023

Plaintiff,

MOTION SEQ. NO. 003

-v-

JENNIFER FLIGR, DDS, CHRISTOPHER NIQUETTE, DDS
and NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 132, 133, 134, 135,
136, 137, 138, 139, 140, 141, 142, 143, 144

were read on this motion to/for PRECLUDE

The court grants Defendants Jennifer Fligr, DDS's ("Fligr") and New York City Health
and Hospitals Corporation's (collectively "Defendants") unopposed motion to preclude Plaintiff
Michael Vergara's ("Plaintiff") use of the video recording of Defendant Fligr's deposition for
any purpose at the time of trial.

Defendants move to preclude Plaintiff's use of Defendant Fligr's deposition video and
argue in substance that Plaintiff failed to comply with the deposition video recording rules. More
specifically, Defendants argue in substance that Plaintiff failed to comply with the CPLR 3113
and 22 NYCRR 202.15 when he improperly recorded Defendant Fligr's deposition without her
knowledge or consent. Defendants further argue in substance that they timely objected to each of
the Notices of Video Recorded Depositions served by Plaintiff on June 15, 2022, September 14,
2022, and September 17, 2022.

Defendants contend that on April 27, 2023, Defendant Fligr's deposition occurred via
Zoom. Defendants further contend that at the time of the deposition neither Defendant Fligr nor
her counsel were made aware that the deposition was being recorded. After Defendant Fligr's
deposition, Defendants received a hyperlink and a CD of the deposition. Defendants argue in
substance that Plaintiff failed to follow the procedure set forth in 22 NYCRR 202.15(d),
including, but not limited to, stating a proper deposition introduction on the record, timing the
deposition with a time-date generator that permanently records the hours, minutes and seconds of
the deposition, making a concluding statement at the end of the deposition, etc. Additionally,
Defendants argue in substance that Plaintiff failed to adhere to 22 NYCRR 202.15(f) because
Plaintiff failed to attach a certification that the witness was properly sworn in and that the video
recording is a true record of the witness's testimony.

CPLR 3113(b) states:

All objections made at the time of the examination to the qualifications of the officer taking the deposition or the person recording it, or to the manner of taking it, or to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order (*see* CPLR 3113[b]).

22 NYCRR 202.15(a)-(d), (f) state:

- (a) *When permitted.* Depositions authorized under the provisions of the Civil Practice Law and Rules or other law may be taken, as permitted by section 3113(b) of the Civil Practice Law and Rules, by means of simultaneous audio and visual electronic recording, provided such recording is made in conformity with this section.
- (b) *Other rules applicable.* Except as otherwise provided in this section, or where the nature of videotaped recording makes compliance impossible or unnecessary, all rules generally applicable to examinations before trial shall apply to videotaped recording of depositions.
- (c) *Notice of taking deposition.* Every notice or subpoena for the taking of a videotaped deposition shall state that it is to be videotaped and the name and address of the videotape operator and of the operator's employer, if any. The operator may be an employee of the attorney taking the deposition. Where an application for an order to take a videotaped deposition is made, the application and order shall contain the same information.
- (d) *Conduct of the examination.* (1) The deposition shall begin by one of the attorneys or the operator stating on camera:
  - (i) the operator's name and address;
  - (ii) the name and address of the operator's employer;
  - (iii) the date, the time and place of the deposition; and
  - (iv) the party on whose behalf the deposition is being taken.

The officer before whom the deposition is taken shall be a person authorized by statute and shall identify himself or herself and swear the witness on camera. If the deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced by the operator.

- (2) Every videotaped deposition shall be timed by means of a time-date generator which shall permanently record hours, minutes and seconds. Each time the videotape is stopped and resumed, such times shall be orally announced on the tape. . \*
- (4) At the conclusion of the deposition, a statement shall be made on camera that the recording is completed. As soon as practicable thereafter, the videotape shall be shown to the witness for examination, unless such showing and examination are waived by the witness and the parties.
- (5) Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.
- (f) Certification. The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by the officer and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification in accordance with the provisions of section 3116 of the Civil Practice Law and Rules.

The court finds that Plaintiff failed to comport with the procedures set forth in CPLR 3113 (b) and 22 NYCRR 202.15 regarding video recording Defendant Fligr's deposition. The court finds that Plaintiff, over the explicit objections of Defendants, video recorded Defendant Fligr's deposition without her knowledge or consent. Additionally, the court finds that as Defendants were not aware that the deposition was being recorded, Defendants did not have an opportunity to further state their objection on the record.

The court finds that Plaintiff did not adhere to 22 NYCRR 202.15 in that Plaintiff failed to begin the deposition with a proper introduction that included the operator's name and address; the name and address of the operator's employer; the date, time and location of the deposition; and the name of the witness being deposed. Additionally, the court finds that the deposition was not properly videotaped because the videotape did not include a time-date generator that permanently recorded the hours, minutes and seconds of the deposition. The court finds that Plaintiff failed to make a statement on camera that the deposition concluded. Therefore, the court grants Defendants' motion to preclude Plaintiff's use of the video recording of Defendant Fligr's deposition for any purpose at the time of trial.

Therefore, the court grants Defendants' motion to preclude Plaintiff from the use of Defendant Fligr's video recorded deposition for any purpose at the time of trial.

As such, it is hereby

ORDERED that the court grants Defendants Jennifer Fligr, DDS's and New York City Health and Hospitals Corporation's unopposed motion to preclude Plaintiff Michael Vergara's use of Defendant Jennifer Fligr, DDS's video recorded deposition for any purpose at the time of trial; and it is further

ORDERED that the court directs Plaintiff Michael Vergara to remove any and all hyperlinks to Defendant Jennifer Fligr, DDS's video recorded deposition from NYSCEF within twenty (20) days of the date of entry of this decision and order.

This constitutes the decision and order of the court.

1/17/2024

DATE

*Erika M. Edwards*  
ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: