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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY  
SUPREME COURT IAS PART 13

-----x Hon. JAMES P. DOLLARD  
OLIVER GITTENS and RHODA GITTENS,

Index No. 14325/99

Motion Date: Oct. 3, 2001

Plaintiffs,

Motion Cal. No. 13

-against-

RANDOLPH LOCKIBY, UNIQUE VAN  
SERVICE INC., and HENDERSON BOURNE,

Defendants.

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This is one of numerous motions presented to the Court to vacate the Note of Issue and strike the case from the trial calendar on the ground that discovery is not complete. Some of these motions are opposed and some like the instant one are submitted without opposition. What they all have in common is a failure by the movant to comply with 22 NYCRR 202.7 either by not submitting a good faith affirmation or by submitting one that is grossly insufficient.

In the instant case the Affirmation of Good Faith states that the opposing parties have not responded to Notice of Discovery and Inspection, submitted to independent physical examinations or appeared for depositions.

So far as is applicable subdivision (a) of 22 NYCRR 202.7 provides that

"no motion shall be filed with the Court unless there have been served and filed with the motion papers (1) a Notice of Motion and (2) with respect to a motion relating to disclosure or to a Bill of Particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion".

Subdivision (c) of this section provides that

"The affirmation of the good faith effort to resolve the

issues raised by the motion shall include the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held".

The intention of the rule is to "remove from the Court's work load all but the most significant and unresolvable disputes over what has been most prolific generator of pretrial motions; discovery issues". A good faith effort means "more than an exchange of computer generated form letters or cursory telephone conversations. Significant, intelligent and expansive contact and negotiations must be held between counsel to resolve any disputes and said efforts must be adequately detailed in the affirmation" (Eaton v. Lowell, 146 Misc 2d 977, 982; see, Nikpour v. City of New York, 179 Misc 2d 928). The Eaton case has been cited by the Appellate Division in the First (Barber v. Ford Motor Company, 250 AD2d 552) the Second (Romero v. Korn, 236 AD2d 598), and the Third Departments (Koebel v. Harvey, 176 AD2d 1040).

The First Department has held that motions to strike a case from the calendar based on a failure to complete pretrial proceedings relate to disclosure and are subject to the rule (Matos v. Mira Management Corp., 240 AD2d 214; Vasquez v. G.A.P.L.W. Realty, Inc., 236 Ad2d 311). In both the Matos and the Vasquez cases the Court held that without any affirmation of good faith a summary denial of the motion to strike is mandated. The Matos case has been cited by the Second Department in (Barnes v. NYNEX Inc. 274 AD2d 368) where that Court held an affirmation to be inadequate on its face since it failed to discuss the notice of discovery and inspection which was the subject of the motion (see also Hegler v. Lowe's Roosevelt Field Cinemas, Inc., 280 AD2d 844). The First Department has held also that summary denial of a motion to compel further disclosure is mandated when it is made without a proper affirmation of good faith (Sixty-Six Crosby Associates v. Berger & Kramer, L.L.P., 256 AD2d 26) and that even if the need for additional discovery is meritorious, if it is made without any affirmation of good faith a summary denial is mandated (Vasquez v. G.A.P.L.W. Realty, supra). In Gonzalez v. International Business Machines Corporation (236 AD2d 363) the Second Department held that the Supreme Court did not err in summarily denying a defendant's motion to strike the complaint since its counsel failed to confer with plaintiff's counsel in a good faith effort to resolve the issues raised by the motion. The Third Department has held that the Supreme Court was justified in summarily denying a defendant's motion for an order of preclusion where it failed to fulfill the requirements of 22 NYCRR 202.7(a)(2). (Koebel v. Harvey supra).

Upon review of the above case law and the text of the rule the Court is of the opinion that the rule applies to all motions relating to discovery or bills of particulars; that motions to strike cases from the calendar are included where they are discovery based; that a proper affirmation confirming full

compliance with subdivision (c) of 22 NYCRR 202.2 which demonstrates that there have been significant contacts and negotiations between counsel is required and that since the intended primary beneficiary of the rule is the Court and not merely the adverse party the motion should be summarily denied even if unopposed if a proper, non pro forma affirmation of good faith is not submitted. The exception provided in the rule is if the movant presents an affirmation indicating good cause why no conference was held. For example, in Carrasquillo v. Netsloth Realty Corp., 279 AD2d 334), it was held that a failure to provide a good faith affirmation would have been futile and is excusable under the unique circumstances of that case in light of the frequency in which both sides resorted to judicial intervention in discovery disputes in the three years prior to the motion.

The Good Faith Affirmation offered in this case is insufficient. It fails to indicate that there was any consultation or good cause why there was no consultation.

Accordingly the branches of the motion to vacate the Note of Issue and Statement of Readiness, to strike the case from the calendar and for a discovery order are denied. The branch of an extension of time to move for summary judgment is granted to the extent that the movant's time to so move is extended to 60 days after service of a copy of this Order.

Short Form Order signed.

Dated: November 29, 2001

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J. S. C.