

Klebanow v Flatto

2008 NY Slip Op 32374(U)

August 21, 2008

Supreme Court, New York County

Docket Number: 0601972/2006

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK**
J.S.C. Justice

PART 2

Index Number : 601972/2006

KLEBANOW, LUCY

vs

FLATTO, ADAM R.

Sequence Number : 005

VACATE NOTE OF ISSUE/READINESS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

AUG 27 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/21/08

Lucy
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
LUCY KLEBANOW,

Plaintiff,

Index No. 601972/2006

-against-

ADAM R. FLATTO, AND 136 EAST 64TH
STREET CORPORATION, A DOMESTIC
CORPORATION,

Defendants.
-----X

ADAM R. FLATTO,

Third-Party Plaintiff,

Index No. 590955/2006

-against-

BERNSHON & FETNER, LLC,

Third-Party Defendant.
-----X

BERNSHON & FETNER, LLC,

Fourth-Party Plaintiff,

-against-

AM SAGE PLUMBING & HEATING LLC, JVA
INDUSTRIES, INC. ADVANCED CONTRACTING
CO., INC. AND BROWN HARRIS STEVENS
RESIDENTIAL MANAGEMENT, LLC,

Fourth-Party Defendants.
-----X

LOUIS B. YORK, J.:

Currently, defendant/third-party plaintiff Adam R. Flatto moves to vacate the note of issue. The

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motion is denied based on movant's failure to comply with the October 3, 2007 preliminary conference order and the May 14 order of this Court, and on his failure to comply with NYCRR 202.7.

The preliminary conference order contained a February 2008 Note of Issue deadline. Paragraph 7 of the order, a copy of which movant annexes to his papers, provides a detailed procedure the parties must follow in the event of any discovery problems. Moreover, at paragraph 5, the order states that the parties cannot adjourn the depositions without the consent of the Court. The additional directives sheet, which is missing from the submitted preliminary conference order, underscores the importance of following this procedure. Finally, at the conference the parties are informed that they must follow the procedure to obtain the right to continued discovery.

The discovery and Note of Issue dates in the preliminary conference order passed and the parties neither requested an extension of the discovery and Note of Issue deadlines nor notified the Court of any discovery disputes. The parties were ordered to appear at a status conference with the Court on May 14, 2008 based on their failure to comply with the preliminary conference order. At the conference the Court reiterated the rules set forth in the preliminary conference order and in a written order refused to allow for further discovery, noting that under the earlier order discovery had been waived. The Court extended the Note of Issue deadline to May 30, 2008 and stated that if the parties did not file the Note of Issue by that date the action would be dismissed. Klebanow v. Flatto, Index No. 601972/2006 (Sup. Ct. N.Y. County May 14, 2008). Plaintiff filed the Note of Issue on May 29, 2008.

Subsequently, defendant/third-party plaintiff filed this motion to vacate the Note of Issue. The affirmation of counsel details plaintiff's alleged discovery failures and the failure to comply with the preliminary conference order but omits discussion of the May 14 conference. As set forth above and as the Court indicated in its May 14 order, movant did not comply with the preliminary conference order and waived its right to seek Court assistance in the discovery process. In addition, movant ignored the mandate of the May 14 order. Therefore, the current motion is denied.

In addition, movant's motion is denied for another reason. Before making a discovery motion the moving party must attempt to resolve the dispute with the party or parties involved. To show compliance with this prerequisite, under NYCRR 202.7 an affirmation of good faith must accompany all discovery motions. Moreover, subsection (c) of this rule provides that this affirmation must "Indicate 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." In the absence of a good faith affirmation, the court must deny the motion. See Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 382, 788 N.Y.S.2d 349, 351 (1st Dept. 2005). Denial of the motion is also appropriate where the motion is insufficiently detailed, does not show that the movant tried to obtain ordered discovery prior to initiating the motion or is otherwise inadequate. See, e.g., Chervin v. Mercura, 28 A.D.3d 600, 602, 813 N.Y.S.2d 746, 748 (2nd Dept. 2006). An affirmation that does not show the movant attempted to obtain discovery that was previously ordered or scheduled is inadequate. See, e.g., Tine v. Courtview Owners Corp., 40 A.D.3d 966, 967, 838 N.Y.S.2d 92, 93 (2nd Dept. 2007). In particular, the First Department has found noncompliance with Rule 202.7 when a party summarily resorts to motion practice after an alleged failure to comply with the preliminary conference order. Barber v. Ford Motor Co., 250 A.D. 552, 552-53, 673 N.Y.S.2d 642, 643 (1st Dept. 1998). Instead, the aggrieved party should first attempt to resolve the disputes with the other party or parties. Id.

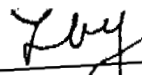
Based on the standard set forth above, movant's affirmation of good faith is patently deficient. The affirmation states, in pertinent part, that movant "has attempted to obtain the necessary pre-trial disclosure from plaintiff as indicated by the preliminary conference order" Aff. of Good Faith ¶ 3. Movant does not indicate that he ever called or wrote to plaintiff in an effort to obtain the discovery; that he ever contacted the Court to schedule a telephone conference or an in person conference; that he made efforts to obtain the discovery between the May 14 conference and order and the filing of the Note of Issue; or that he attempted to resolve the dispute amicably between the parties once the Note of Issue was filed. In short, he does not indicate that he made a good faith effort of any kind. As stated, moreover, the existence of a preliminary conference order is not sufficient to establish good faith. See Barber, 250 A.D. at 552-53, 673 N.Y.S.2d at 643. Thus, the good faith affirmation is defective and under NYCRR 202.7 this Court must deny the motion. Fulton v. Allstate Ins. Co., 14 A.D.3d at 382, 788 N.Y.S.2d at 351.

The Court notes that there is an opposing affidavit by plaintiff and two sets of reply papers, both by nonmoving parties. It is not clear whether these other parties moved separately, or whether there were cross-motion papers that for some reason did not reach this Court. The Court notes that it decides only the motion at hand. Therefore, it is

ORDERED that the motion to strike the Note of Issue and obtain discovery is denied.

Dated: August 21, 2008

ENTER:



LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

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