

Lazar v Burger Heaven
2010 NY Slip Op 31477(U)
June 10, 2010
Sup Ct, NY County
Docket Number: 109336/2008
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

Lazar and Lazar

INDEX NO. 109336/08

MOTION DATE 5/11/10

MOTION SEQ. NO. 600

MOTION CAL. NO. _____

- v -

Burger Heavens et al.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/10/10

Ley
LOUIS B. YORK J.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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
SYDELLE LAZAR AND MICHAEL LAZAR,

Plaintiffs,

Index No.: 109336/2008

-against-

BURGER HEAVEN, EVRICK RESTAURANT
INC., 804 LEXINGTON AVE. LLC and 804
LEXINGTON AVENUE RESTAURANT INC.,

Defendants.
-----X

LOUIS B. YORK, J.S.C.:

DECISION/ORDER

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Plaintiffs filed the Note of Issue in this action on January 19, 2010 pursuant to this Court's September 2, 2009 preliminary conference order ("the Order"). Paragraph 7 of that Order set a discovery deadline of January 12, 2010 and directed the parties to contact the Court by that date with any discovery issues. Failure to do so, the Order clearly states, waives the discovery. In addition, paragraph 5 of the Order states that the parties could not adjourn the depositions without Court approval. An additional directives sheet, which plaintiffs did not attach to their opposition papers but which is part of the Order, reiterates the above in very strong language, again emphasizing that failure to follow the procedures outlined in paragraphs 5 and 7 waives the discovery.

Plaintiffs filed the Note of Issue on January 19, 2010, after the discovery deadline expired and on the Note of Issue deadline set forth in the Order. On February 8, nearly one month after the expiration of the discovery deadline, defendants made this motion to strike the Note of Issue based on pending discovery, including the

deposition of co-plaintiff Michael Lazar which was scheduled for November 12, 2009 and a physical of Sydelle Lazar. Defendants do not indicate that they sought the Court's permission for the adjournment or sought Court assistance with the discovery process although the Court included this requirement in three separate parts of its Order. As for their good faith efforts to avoid motion practice, counsel states that her assistant sent a letter seeking an IME in December of 2009, months prior to the motion. She does not state that she pursued the deposition of Mr. Lazar at any time. She also does not indicate that she made a follow up inquiry after the December letter or that she contacted plaintiffs' counsel after plaintiff Note of Issue at any time, in an effort to avoid motion practice.

The Court denies this motion for several reasons. First, movant's good faith affirmation is inadequate. Under NYCRR 202.7, an affirmation of good faith must accompany all discovery motions. Denial of the motion is appropriate where the motion does not show that the movant tried to obtain the discovery at issue prior to initiating the motion. See, e.g., Chervin v. Merçura, 28 A.D.3d 600, 602, 813 N.Y.S.2d 746, 748 (2nd Dept. 2006). Moreover, this rule requires the Court to deny even unopposed motions where there is noncompliance. See Buřtamante v. Green Door Realty Corp., 69 A.D.3d 521, 521, 893 N.Y.S.2d 57, 57 (1st Dept. 2010). Here, defendants allegedly sought a portion of the discovery once, writing a letter with no follow up, three months prior to motion practice. Defendants did not attempt to resolve all of the issues in this motion to strike and they did not seek to resolve any of the issues before they made this motion. As neither the affirmation of good faith nor the single attempt it details did not address the motion, the Court denies the motion. See Barnes v. NYNEX, Inc., 274 A.D.2d 368,

[* 4]
368, 711 N.Y.S.2d 893, 894, (2nd Dept. 2000).

Even if the Court did not deny the motion for noncompliance with NYCRR 202.7, it would deny the motion due to movants' failure to comply with the Order. Movants made this motion one month after the expiration of the discovery deadline. This is clearly prohibited by paragraph 7 and by the additional directives sheet of the Order. Movants' request for an additional party deposition is prohibited at this late date by the above paragraphs and by paragraph 5 of the Order as well.¹ Moreover, movants provide no explanation for their failure.

The Court notes that, contrary to plaintiffs' contention, defendants have not waived the nonparty discovery they seek. As the Court had no jurisdiction over the nonparties at the conference, the Order did not apply to nonparty discovery. However, as defendants did not request a discovery extension for the nonparty discovery by the deadline in the Order defendants are precluded from seeking on the basis of the nonparty discovery to (1) vacate the Note of Issue, (2) delay the trial date, or (3) seek an extension of time to make a summary judgment motion.

Plaintiffs may choose to cooperate with opposing counsel and permit a physical examination of the injured plaintiff either in Florida or when she next visits New York – either a few days before trial or on an earlier trip to the area, at her convenience. The

¹Apparently plaintiffs sought Court assistance by writing to the Court on January 12, 2010, the last date for discovery. It appears that counsel tried and failed to reach the Court through a phone call on that date. Counsel should be aware, for future reference, that she should follow the explicit directions in the Court order for obtaining a conference. This Court has several hundred cases so cannot write back to its numerous litigants. Also, she should call the Court before the discovery deadline. A call on the discovery deadline's expiration date requesting a future conference to extend the deadline is necessarily too late.

Court will not direct plaintiffs to cooperate and will not vacate the Note of Issue or delay the trial on this basis. However, plaintiffs' opposition indicates that defendants did not provide all the documentary discovery they seek so perhaps the parties can enter into some arrangement without involvement of the Court.


Finally, the Court notes that the parties are in disagreement over whether certain depositions were held. Defendants state that they did not depose co-plaintiff Michael Lazar. Plaintiffs mistakenly thought defendants were referring to Sydelle Lazar, the injured plaintiff. In addition, defendants claim that Burger Heaven was not deposed and plaintiffs contend that the deposition went forward. Plaintiffs did not annex any evidentiary support for their statement so the Court cannot resolve the confusion. However, plaintiffs do not seek to depose Burger Heaven and therefore the dispute is irrelevant.

Accordingly, it is

ORDERED that the motion is denied.

ENTER:

Dated: 6/10/10



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
JUN 15 2010
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