

**H. Kaplan Paint Supply Corp. v Sherry Hill Painting,  
L.L.C.**

2010 NY Slip Op 32767(U)

September 29, 2010

Supreme Court, New York County

Docket Number: 110421/08

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 : 110421/2008  
H. KAPLAN PAINT SUPPLY  
vs.  
SHERRY HILL PAINTING  
SEQUENCE NUMBER : 001  
VACATE NOTE OF ISSUE/READINESS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**

SEP 06 2010  
NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 9/29/10

Ley  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

**LOUIS B. YORK**  
J.S.C.

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

-----X  
H. KAPLAN PAINT SUPPLY CORP. d/b/a MERIT-  
KAPLAN PAINT SUPPLY CORP.,

Plaintiff,

Index No.: 110421/08

-against-

SHERRY HILL PAINTING, L.L.C.,

Defendant.

**FILED**  
OCT 06 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**YORK, J.:**

Sherry Hill Painting, L.L.C., defendant, moves, pursuant to Title 22, § 1202.21(e) of the New York Code, Rules and Regulations, to vacate the note of issue which H. Kaplan Paint Supply Corp. d/b/a Merit-Kaplan Paint, plaintiff, filed on May 21, 2010, and to strike this action from the trial calendar. Plaintiff contends that the note of issue should not be vacated, because defendant failed to actively pursue discovery before the note of issue was filed.

Plaintiff and defendant appeared for a preliminary conference on September 23, 2009. At the conference, both parties agreed to conduct plaintiff's deposition on December 14, 2009 and defendant's deposition on December 15, 2009. The deposition of plaintiff's witness, Jeffrey Kaplan (Mr. Kaplan), commenced on December 14, 2009, however, the deposition was adjourned on consent and was to be completed on an unscheduled date, because Mr. Kaplan had to leave before the deposition was finished. Counsel for defendant stated at the deposition, that because the deposition needed to be finished, the parties would also adjourn the defendant's deposition to a later date.

Despite e-mail correspondence in January of 2010 between counsel for the parties, a date was never agreed upon for the continuation of Mr. Kaplan's deposition. In an email sent to Dennis Pak, Esq., counsel for defendant, on April 15, 2010, Charles von Simson, Esq., counsel for plaintiff, stated that he had not received responses to his document demands and that the discovery end date was fast approaching. On April 23, 2010, Mr. Pak replied to this e-mail and stated that the documents were being gathered and a response would be provided "as soon as possible." (Affirm. in Opposition, ex. C). Mr. Pak also requested dates for the continued deposition of Mr. Kaplan. The deposition was never rescheduled, and the note of issue was filed on May 21, 2010.

Defendant contends that along with the completion of Mr. Kaplan's deposition, documents which were requested in discovery demands and at Mr. Kaplan's deposition were not provided. (Plevritis Affirm., ¶ 8). The documents requested at Mr. Kaplan's deposition include delivery invoices, copies of letters from plaintiff to defendant and blanket letters to all of plaintiff's customers that indicate the increased rates of plaintiff's products, price lists for 2002 through 2008, back order slips, e-mail correspondence between plaintiff and defendant, copies of cash receipts for payments received by plaintiff from defendant, a copy of plaintiff's account ledger, copies of billing statements prior to March 31, 2007, and copies of all monthly statements that were sent by plaintiff to defendant during the course of the relationship.

Plaintiff contends that, pursuant to the preliminary conference order, defendant was to make an additional documentary request via letter, however, defendant failed to send a letter or make any additional document requests prior to Mr. Kaplan's deposition. Plaintiff maintains that, although defense counsel indicated that he would request additional documents based upon

the testimony of Mr. Kaplan, no formal requests were made and plaintiff did not receive a copy of the transcript of the deposition until this motion was filed. Plaintiff further maintains that despite several e-mails and telephone calls regarding the rescheduling of the deposition and inquiries regarding its own document requests, no documents were ever produced. Plaintiff states that it is willing to proceed to trial without any further discovery.

Here, although plaintiff filed the note of issue on May 21, 2010 and stated that discovery was complete, this was inaccurate. Mr. Kaplan's deposition was never completed, defendant's deposition never took place, and documents remain to be exchanged by both parties. Neither plaintiff nor defendant address whether they complied with Part 2's deposition adjournment policy discussed in the preliminary conference order, which provides that parties who seek to adjourn deposition dates must receive prior court approval and that violating this requirement would result in sanctions or the waiver of further depositions. This leaves the court to infer that they failed to request that the court approve adjourned deposition dates. Both parties also fail to address why they did not comply with paragraph seven of the preliminary conference order which states that "as disclosure problems arise and before the end date of discovery, the affected party must contact the part and arrange a telephone conference . . . [f]ailure to comply by discovery deadlines waives all pending and future discovery absent good cause." (Plevritis Affirm., ex. D).

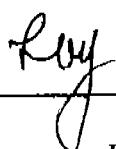
In addition to plaintiff and defendant's failure to comply with Part 2's discovery rules, the request for judicial intervention was filed on August 12, 2009, and over one year has passed, exceeding the court's standards and goals. Therefore, because of the parties' failures to abide by the court's discovery directives, the court will not vacate the note of issue.

Accordingly, it is

ORDERED that defendant Sherry Hill Painting, L.L.C.'s motion to vacate the note of issue is denied.

Dated: September 29, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
OCT 06 2010  
NEW YORK  
COUNTY CLERK'S OFFICE