

|                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Cohen v New York Univ.</b>                                                                                                                                                                                                    |
| 2012 NY Slip Op 32843(U)                                                                                                                                                                                                         |
| November 29, 2012                                                                                                                                                                                                                |
| Sup Ct, New York County                                                                                                                                                                                                          |
| Docket Number: 110500/2011                                                                                                                                                                                                       |
| Judge: Louis B. York                                                                                                                                                                                                             |
| Republished from New York State Unified Court<br>System's E-Courts Service.<br>Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for<br>any additional information on this case. |
| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

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

PRESENT: \_\_\_\_\_  
Justice

PART 2

*Cohen,*  
*New York University et al.*

INDEX NO. 110500/11  
MOTION DATE 10/25/12  
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

FILED

DEC 03 2012

**COUNTY CLERK'S OFFICE  
NEW YORK**

MOTION IS DEEMED GRANTED  
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 11/29/12

*[Signature]*, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ 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**

**Index No. 110500/2011**

**Part 2**

MURRAY COHEN,

Plaintiff,

– against –

NEW YORK UNIVERSITY and NYU  
MEDICAL CENTER,

Defendant.

**Decision/Order**

Present:  
Hon. Louis B. York  
Justice, Supreme Court

**FILED**

**DEC 03 2012**

**COUNTY CLERK'S OFFICE  
NEW YORK**

Currently, defendants seek to vacate the note of issue and extend the time to move for summary judgment. For the reasons below, the Court denies the motion except to the extent of allowing all parties 30 days from entry of this order to move for summary judgment.

Plaintiff commenced this action against defendant on September 14, 2011. The request for judicial intervention was filed on January 19, 2012. The preliminary discovery conference took place on February 22, 2012. In the conference, the court set deposition dates of May 16 and May 23, 2012, a disclosure deadline of September 14, 2012, and a Note of Issue deadline of September 21, 2012.

In the order at paragraph 5, which sets forth the deposition date, it states, "no adjournments without court approval." Paragraph 7, which contains the end date for disclosure, states:

Before making any motions, as soon as a disclosure problem arises and before the end date for discovery the affected party must call the court and arrange a telephone

conference 646-386-3852. Failure to comply by discovery deadline waives all pending and future discovery absent good cause.

(emphasis supplied). Moreover, the court requires the parties themselves to write in the quoted language in paragraphs 5 and 7 to make sure that they pay attention to it.

Finally, the preprinted additional directives sheet – which movants fail to annex but which comprises page 3 of the preliminary conference order – states:

There are to be no adjournments of any depositions without prior approval of the Court. If Court approval cannot reasonably be obtained before the adjournment, then the Court shall be contacted as soon as reasonably possible. Any violation of this rule will result in sanctions or deeming any further depositions waived or both.

Thus, the Court order explicitly states that if the parties do not comply with the court order – in particular, by getting permission to adjourn depositions and by getting permission to extend the discovery and note of issue deadlines – harsh penalties up to and including sanctions and the waiver of discovery may result.

It appears that the parties completely ignored all of the provisions of the preliminary conference order. Indeed, movants' own affirmation concedes that the parties adjourned the May depositions to September 20, 2012 – after the discovery deadline – and does not indicate that they obtained this Court's approval for the adjournment. The record for the case also does not indicate they scheduled any telephone or in person conference or otherwise obtained Court approval. Moreover, the parties apparently took no steps whatsoever to obtain an extension of the discovery or note of issue deadline. Indeed, movants acknowledge that they did not contact the Court until after the note of issue had been filed – which, in turn, was after the discovery deadline had passed.

Against this background, defendant made the current motion to vacate the note of issue, contending that discovery is not complete. In addition, movants seek an extension of time in which to move for summary judgment. Under the preliminary conference order, the parties had 60 days from the note of issue date, or until November 20, 2012, to make a dispositive motion.

The court denies the portion of the motion which seeks to vacate the note of issue. Movants failed to comply with the prior Court order when it failed to contact the court in a timely fashion regarding the discovery delays. Movants also violated the order by their failure to seek permission to adjourn the depositions. Moreover, movants do not explain whether there was good cause for this omission. Thus, under the terms of the preliminary conference order, movants have waived the right to seek further court assistance with the discovery process.

In addition to the above, the Court cannot locate an affirmation of good faith in movants' papers. Under NYCRR 202.7, an affirmation of good faith must accompany all discovery motions. Moreover, subsection (c) 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 (1<sup>st</sup> Dept. 2005). 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 (2<sup>nd</sup> Dept. 2007). Failure to submit a good faith affirmation along with a motion to vacate is a

proper ground for denial of the motion. See Seda v. Mall Prop., Inc., Index No. 114679/2009 (Sup. Ct. N.Y. Cnty Oct. 28, 2011)(avail at 2011 WL 5137174).

However, the Court grants the request to extend the time to move for summary judgment or dismissal, granting the parties 30 days from entry of this order to make their motions. As the motion was made before the deadline expired, the Court does not want to deprive the parties of the opportunity to move for dispositive relief.

Accordingly, it is

ORDERED that the motion is denied to the extent that it seeks to vacate the note of issue and granted to the extent of giving the parties 30 days from the date of entry of this order to move for summary judgment.

Dated: 11/29/12

ENTER:

Luy  
Louis B. York, J.S.C.

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

FILED

DEC 13 2012

CLERK OF SUPREME COURT  
JULIUS R. ROSENTHAL