

<b>Schwalbe v Davol, Inc.</b>
2016 NY Slip Op 33120(U)
June 16, 2016
Supreme Court, Nassau County
Docket Number: 604651/14
Judge: James P. McCormack
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**SUPREME COURT - STATE OF NEW YORK**

**PRESENT:**

**Honorable James P. McCormack**

**Justice**

\_\_\_\_\_x

**CHARLES SCHWALBE and DIANE  
SCHWALBE,**

**TRIAL/IAS, PART 29  
NASSAU COUNTY**

**Plaintiff(s),**

**Index No. 604651/14**

**-against-**

**DAVOL, INC., C.R. BARD, INC., NORTH  
SHORE LONG ISLAND JEWISH HEALTH  
SYSTEM, INC., NORTH SHORE  
UNIVERSITY HOSPITAL AT SYOSSET,  
COLIN POWERS, M.D., ERICH LEE, M.D.**

**Motion Seq. No.: 001 & 002  
Motion Submitted: 6/9/16**

**Defendant(s).**

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The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X  
Notice of Cross Motion/Opposition/Supporting Exhibits.....X  
Reply Affirmations.....X

Defendants, Davol, Inc. and C.R. Bard (the moving Defendants), move this court for a protective order, pursuant to CPLR §3103, regarding a rider annexed to a notice to take a deposition. Plaintiffs oppose the motion and cross move for an order, pursuant to CPLR §3126, compelling the moving Defendants to produce the majority of the

documents sought in the rider and to produce a witness for a deposition.

Plaintiffs commenced this action by service of a summons and complaint dated September 4, 2014, alleging, *inter alia*, negligence for personal injuries sustained from a hernia repair product and medical malpractice. While neither party saw fit to annex an answer to their papers, the e-file folder indicates issue was joined by the moving Defendants, by service of an answer dated October 24, 2014.

A discussion of the history of the discovery process of this case is necessary. The parties appeared for a preliminary conference on March 23, 2015. The court issued a preliminary conference order which set down a discovery schedule that the parties largely ignored. It was just the first time they felt free to ignore an order of this court. Pursuant to the preliminary conference order, the parties were to appear for a compliance conference on August 27, 2015. On that date, the parties informed the court that much of the paper discovery, and none of the depositions, scheduled in the preliminary conference order were completed. The court adjourned the conference to October 29, 2015 and directed that all depositions at least be rescheduled by that date. On October 29, 2015, the parties appeared and the court was informed that depositions had not yet been scheduled and there were still many outstanding paper demands. The court then so-ordered a stipulation which rescheduled Plaintiff and Defendant depositions and directed by when discovery demands would be responded to. The conference was adjourned to January 20, 2016. On January 19, 2016, the parties faxed a “stipulation to adjourn conference” to the

court, adjourning the conference to February 24, 2016. The parties did not first check with the court to see if the case could be adjourned, as is required by the Part's rules. Regardless, the court allowed the adjournment. On February 24, 2016, the parties appeared and the parties informed the court that almost nothing from the so-ordered stipulation dated October 29, 2015 had been completed. For the second time in the case, the parties simply ignored this court's order. The only excuse offered for virtually no discovery taking place over the five months since the so-ordered stipulation was signed was that one party changed attorneys. The parties asked the court to so-order another stipulation on that date, which the court refused to do. The court saw no reason to give them yet another order to ignore. The parties were directed to move on with discovery. The case was adjourned until April 14, 2016, on which date the court was informed that one Plaintiff deposition had taken place. To be clear, in the 13 months since the preliminary conference, the parties had managed to accomplish some paper discovery and one out of the at-least seven depositions that needed to be done. The matter was adjourned until June 15, 2016, and the parties were informed the case would certify ready for trial on that date. On June 15, the court was informed the within motions had been filed. The conference was adjourned until July 13, 2016, on which date the case will certify ready for trial.

Before a motion relating to discovery or a bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has

conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the “time, place and nature of the consultation and the issues discussed...”. 22 NYCRR 202.7(c). The moving Defendant’s counsel’s affirmation of good faith states: “On Wednesday May 18, 2016, I informed [Plaintiffs’ counsel] that Defendants objected to the Notice because it was not proper notice consistent with CPLR 3016 and it also contained a Schedule A that identified an overly broad request for documents and topics of testimony. I explained to [Plaintiffs’ counsel] that Defendants would file a motion for Protective Order [sic] if the Notice did not comply with the CPLR.” This sentence appears to be the extent of the moving Defendants’ attempts to “consult”. Plaintiffs’ counsel’s affirmation is even less effective, merely stating: “This Affirmation of Good Faith is submitted to demonstrate that a good faith effort has been undertaken to avoid the within motion.” Both affirmations are woefully inadequate. There is no information in either affirmation indicating consultation took place, the nature of the consultation and any other efforts made. There is no indication that either side made a diligent effort to resolve the present dispute. (22 NYCRR 202.7 (c); *Deutsch v. Grunwald*, 110 A.D.3d 949 [2<sup>nd</sup> Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2<sup>nd</sup> Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1<sup>st</sup> Dept. 2007]). The failure to comply with 22 NYCRR 202.7 renders both motions defective, and amounts to yet

another waste of time by these parties.

Even had the court considered the motions on their merits, the moving Defendants' motion would have been denied. While complaining that the rider to the deposition notices served by Plaintiffs involved 24 topics exclusive of "subparts", the moving Defendants only make reference to three that they object to as an example as to why the entire document should be disallowed. The moving Defendants appear to be of the opinion that this court should read through the demand for them and find the arguments for why they should get a protective order for each demand, as opposed to the moving Defendants actually making an argument for each demand. This court, being unable to advocate on behalf of a party, would have therefore dismissed the motion.

Nothing contained in this order shall change the court's direction that the case will certify ready for trial on July 13, 2016.

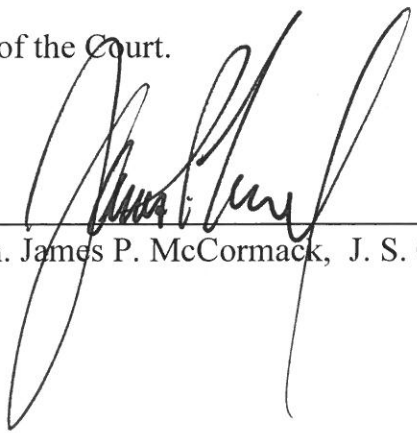
Accordingly, it is hereby

**ORDERED**, the moving Defendants' motion is DENIED as defective; and it is further

**ORDERED**, that Plaintiffs' motion is DENIED as defective.

This constitutes the Decision and Order of the Court.

Dated: June 16, 2016  
Mineola, N.Y.



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Hon. James P. McCormack, J. S. C.

**ENTERED**  
JUN 21 2016  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE