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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____X

VICKIE WILLIAMS,

Plaintiff(s),

-against-

DAVITA HEALTHCARE PARTNERS, INC. and DVA RENAL HEALTHCARE INC., d/b/a FREEPORT KIDNEY CENTER,

Defendant(s).

_____X

TRIAL/IAS, PART 27
NASSAU COUNTY

Index No. 9847/15

Motion Seq. No.: 001
Motion Submitted: 9/19/17

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X[1]

Defendants, Davita Healthcare Partners, Inc. and DVA Renal Healthcare Inc., d/b/a Freeport Kidney Center, move this court for an order, pursuant to CPLR §3126, dismissing the complaint, or precluding Plaintiff from offering evidence at trial, for failure to comply with discovery. In the alternative, Defendants seek an order pursuant to

[1]Plaintiff submitted opposition, but served it the day before the return date, which is clearly late. Plaintiff did not seek leave, nor offered an explanation, for the untimely submission. There court therefore would not consider the papers.

CPLR §3124 compelling Plaintiff to comply with all outstanding discovery. There is no opposition.

Before a motion relating to discovery or 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...", or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). Herein, Defendants' counsel submits an affirmation of good faith that contains one sentence addressing good faith efforts, to wit: "While defendant sent multiple good faith letters seeking the request for production of outstanding discovery, and further while the Court directed plaintiff to provide all outstanding discovery within 30 days of the July 11, 2017 Compliance Conference, no such discovery has been received to date" The affirmation is inadequate and fails to include any of the required information. There is no indication if counsel conferred, when they conferred, and what was discussed during such conferences. There is no indication that any efforts, much less diligent efforts, were made to resolve the

issues raised in the motion. The fact that counsel sent "good faith letters" does not satisfy the rule.

Courts have found letters alone do not satisfy the good faith requirement. (*See Eaton v. Chahal*, 146 Misc.2d. 977, 983 [N.Y.Sup. 1990] ("...the court interprets a 'good faith effort' to mean more than an exchange of computer generated form letters or cursory telephone conversation."); *Santiago v. Park Ambulance Serv., Inc.*, 53 Misc.3d 1201(A)[N.Y.Sup. 2016]("Merely sending letters...is not sufficient to satisfy the requirement of 22 NYCRR §202.7(c)."); *Amherst Synagogue v. Schuele Paint Co.*, 30 A.D.3d 1055, 1057 [4th Dept. 2006](sending only letters "'failed to demonstrate that they made a diligent effort to resolve this discovery dispute.'", *quoting Baez v. Sugrue*, 300 A.D.2d 519, 521 [2nd Dept. 2002]).

The problem with simply sending a letter is that a letter will rarely satisfy the requirement that the parties make a "diligent effort" to resolve the dispute. (*Deutsch v. Grunwald, supra*). While a letter is considered "communication", the rule requires that the affirmation of good faith contain the "time, place and nature of the consultation and the issues discussed...". Clearly, the rule requires discussion, and an explanation of what was addressed during the discussion. This court can envision a series of letters, or perhaps emails, between the parties meaningfully addressing these issues and responding to one another's arguments satisfying this requirement, but letters from one party

repeatedly pointing out how the other party's responses are deficient does not allow for the exchange of information and negotiation that the rule intends to occur.

The parties are required to confer, and consultation is expected to take place. Unless a compelling argument can be made that sending a letter rose to the level of conferring and consultation, the failure to confer is fatal to the affirmation of good faith or other efforts made. (*Murphy v. County of Suffolk, supra; Gonzalez v. International Bus. Machs., Corp.*, 236 A.D.2d 363 [2nd Dept. 1997]); *Matter of Greenfield v. Board of Assessment for Town of Babylon,* 106 A.D.3d 908 [2d Dept. 2013]; *Koelbel v. Harvey*, 176 A.D.2d 1040 [3rd Dept. 1991]. It cannot be argued that Defendants herein made "diligent efforts" to resolve the dispute, as required by 22 NYCRR 202.7 by sending three letters over a period of 16 months.

For the all foregoing, the court is constrained to deny the motion as defective. The court's frustration with the parties, and Plaintiff in particular, is palpable. It appears clear that this case has been delayed by Plaintiff's dilatory conduct. To be sure, Plaintiff could not even manage to serve opposition to this motion in a timely manner. After reviewing the motion papers, had the court reached the merits of the motion, it is likely Plaintiff would have been sanctioned in some form for failure to comply with discovery. For that reason, Plaintiff should interpret Defendants' failure to bring a proper motion as the second or third chance she does not necessarily deserve. The court urges Plaintiff to take this opportunity to provide all outstanding discovery immediately upon reading this order

in a manner that convinces Defendants there is no need to re-bring this motion. Defendants are cautioned to read 22 NYCRR 202.7(c) before bringing the within motion a second time.

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss, preclude and compel is DENIED, without prejudice with leave to renew upon proper compliance with 22 NYCRR 202.7 in its entirety.

This constitutes the decision and order of the court.

Dated: October 25, 2017
Mineola, New York

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

ENTERED
OCT 27 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE