To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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BRENDA LEE GOMEZ,

Plaintiff,

-against-

RJRH PARK LLC, ROCKIN' JUMP FRANCHISE, LLC, and FOREST CITY REALTY TRUST,

Defendants.

----------x

DECISION & ORDER
Index No. 64377/17
Motion Sequence No. 4

LEFKOWITZ, J.

The following papers were read on this motion (1) by defendants RJRH Park LLC and Rockin Jump Franchise, LLC, for an order (a) directing the issuance of a protective order pursuant to CPLR §3103 as to the production of documents identified as #1, #2 and #3 in the September 20, 2019 Stipulation relating to the RJRH/ROCKIN JUMP's Safety, Maintenance and Training Policies and Procedures; (b) directing the production of the documents listed as #1, #2 and #3 in the September 20, 2019 Stipulation, under the protection of a confidentiality order of this court, directing the documents not be published or shared outside of this litigation, or to the public; and (c) directing that those documents produced under confidentiality be returned to defense counsel after the resolution of this litigation and for further and different relief as this court may deem just and proper (Motion Sequence No. 4); and (2) plaintiff purported to move by a document denoted "Cross Order to Show Cause" for an order directing that plaintiff's deposition be held by video conference, and for such other and further relief as this court deems just and proper:

Motion Sequence No. 4
Order to Show Cause - Affirmation in Support - Exhibits
Affirmation in Opposition - Exhibits (NYSCEF Doc. 108)
Affidavit of Service

Plaintiff's Request for Relief
Cross Order to Show Cause - Affirmation in Support (NYSCEF Doc. 108)
Exhibits
Affirmation in Opposition (NYSCEF Doc. 116)
Affidavit of Service

Upon the foregoing papers and proceedings, this motion is determined as follows:

Plaintiff alleges she sustained serious personal injuries on March 19, 2017 when she was at the Rockin Jump trampoline park located at 241 Market Street, Yonkers, New York. This

action was commenced on September 20, 2017. An amended complaint was filed on October 20, 2017. Issue was joined thereafter by defendants.

Motion Sequence No. 4

Defendants RJRH Park LLC and Rockin Jump Franchise, LLC (hereinafter "movants") seek a protective order pursuant to CPLR 3103 with respect to the contents of a compliance conference order and stipulation of September 20, 2019 wherein they were required to exchange certain documents including: (1) the table of contents for policies and procedures and the relevant portions relating to the use and operation of the trampolines in effect on the date of loss; (2) safety and reporting procedures in effect on the date of the incident in regard to trampoline incidents; and (3) inspection records of the subject trampoline for two weeks prior to the subject accident.

Movants submit they are willing to exchange the documents with plaintiff upon plaintiff's consent to and execution of a confidentiality stipulation, or, in the alternative, movants would agree to make these documents available to the court for an in camera inspection if requested by the court. Movants submitted a proposed confidentiality agreement to all counsel which allegedly was rejected by plaintiff's counsel. Movants argue that the information plaintiff seeks contains trade secrets and proprietary information which warrants protection. In support of this contention, movants submitted an affidavit of Rockin Jump CEO Michael Revak (hereinafter "Revak") which states, in relevant part, as follows:

> Rockin Jump, at is own considerable cost and expense, developed safety policies, procedures and methods of training its employees that did not previously exist.
>
> Rockin Jump retained outside consultants and experts to develop these programs, exerting considerable time, effort and money exclusively for Rockin Jump's benefit and use, and to give Rockin Jump an advantage over competitors.
>
> Rockin Jump, at considerable cost, time and expense, also consulted with manufacturers of trampoline equipment to ensure that the policies, procedures and methods being developed were in compliance with manufacturers' standards.
>
> When Rockin Jump decided to franchise, it took measures to protect this proprietary information, developed at substantial expense, by requiring Franchisees to keep and maintain all disclosed documents and information confidential.
>
> This request for a Protective Order is also based on the fact that the documents and information being requested were originally

produced pursuant to the Franchise Agreement between Rockin Jump (Franchisor) and RJRH Park (Franchisee) which was in effect on the date of plaintiff's accident.

Pursuant to Article 8, page 17, of the Franchise Agreement, Rockin Jump required that the Franchisor keep these documents confidential because Rockin Jump believes they contain Rockin Jump's trade secrets and are therefore proprietary. The Franchise Agreement sets forth the basis for the requirement that these documents be kept confidential, including that the information contained in these documents includes:

a. Methods of training and management relating to Rockin Jump businesses;

b. Methods, formats, specifications, standards, systems, procedures, the Operations Manual, sales and marketing techniques used, and knowledge of and experience in developing and operating Rockin Jump businesses;

c. Sales, marketing and advertising programs and techniques for Rockin Jump businesses;

d. Specifications for and identification of suppliers of certain of the fixtures, furnishings, equipment, products, materials and supplies;

e. The identity of computer system and software programs used in Rockin Jump businesses.

(NYSCEF Doc. 101, Ex. A).

Movants assert that the Rockin Jump documents referenced in Article 8 of the Franchise Agreement include those documents being requested by plaintiff pursuant to September 20, 2019 order and stipulation, as they relate to the development and operation of Rockin Jump businesses. Movants assert that the confidential documents contain Rockin Jump's methods, formats, specifications, standards, systems and procedures; operations manual; suppliers of certain fixtures, furnishings, equipment, products, materials and supplies; and computer system and software programs used or useful in Rockin Jump businesses. Revak affirms in his affidavit that Rockin Jump's success is owed, in part, to its ability to keep and maintain confidential these safety and training policies, procedures and methods which give Rockin Jump a competitive edge. Movants reiterate that they do not seek to withhold the information from plaintiff or to avoid discovery, but only to protect its safely guarded trade secrets.

Plaintiff opposes the motion and argues that movants have not met their burden of proof for a protective order. They argue that the affidavit in support of the motion is defective because it was executed in California, does not contain a certificate of conformity, and fails to establish the proof required for a protective order. Plaintiff's counsel argues that in order to meet its initial burden, the movants' affidavit must contain non-conclusory assertions giving rise to concern that its competitors could gain some competitive advantage as a result of discovery of secret business procedures and information (*citing Linderman v Pennsylvania Bldg. Co.*, 289 AD2d 77 [1st Dept 2001]). Counsel submits that Revak's affidavit, even if considered by the court, does not meet the burden of establishing, in non-conclusory assertions, that the documents at issue warrant protection.

Plaintiff's Request for Relief

In her request for relief, plaintiff seeks an order directing that her deposition be held by video conference, or that defendants bear the cost of her return to New York from Florida.[1] In support of the request, plaintiff, who moved to Florida after the commencement of this action, asserts she should be permitted to appear for her deposition by video conference. She claims she already appeared in New York for her deposition and to visit family, but the deposition did not go forward due to the discovery dispute presented in the defendants' motion. She asserts she should not be required to bear the expense and inconvenience of returning to New York.

Defendants oppose the request and assert that plaintiff has failed to demonstrate any hardship that warrants permitting her deposition to proceed by video conference. Defendants allege that upon the plaintiff's first trip to New York she visited with family and that childcare was provided by her husband. As such, defendants argue that plaintiff does not have to bear the cost of lodging or child care, and that she has not presented sufficient information to suggest she cannot afford the airfare.

Legal Analysis/Discussion

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *see Matter of Kapon*, 23 NY3d 32 [2014], *Foster v. Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party

[1] The court notes that this purported cross-motion was never authorized by the court, and the Order to Show Cause by which it was brought was not signed. This issue is discussed *infra*.

does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch Inc. v Sharf,* 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d at 1139). CPLR 3101(a) further permits the court, in its discretion, to issue an order denying, limiting, conditioning or regulating the use of any disclosure device (*Diaz v City of N.Y.*, 117 AD3d 777 [2d Dept 204]; *Montalvo v CVS Pharm., Inc.*, 102 AD3d 842 [2d Dept 2013]; *County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944 [2d Dept 2012]).

A trade secret is any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it (*Ashland Management v Janien*, 82 NY2d 395, 407 [1993], *citing Matter of New York Tel. Co. v Public Serv. Commn.*, 56 NY2d 213, 219, n 3[1982]). In deciding a trade secret claim several factors should be considered: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others (*Ashland Management v Janien*, 395 NY2D at 407; Restatement of Torts §757, comment b).

In support of a motion for a protective order based upon the assertion of a trade secret, the movants' affidavit must contain non-conclusory assertions giving rise to concern that its competitors could gain some competitive advantage as a result of discovery of secret business procedures and information (*Linderman v Pennsylvania Bldg. Co.*, 289 AD2d 77 [1st Dept 2001]; *citing Jackson v Dow Chem Co.,* 214 AD2d 827, 828 [3d Dept 1995]). A witness who objects to disclosure on the ground that the requested information constitutes a trade secret bears only a minimal initial burden of demonstrating the existence of a trade secret (*Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642, 644 [2d Dept 2014]). Once the burden is met, the party seeking disclosure must then show that the information sought is indispensable and could not be acquired in any other way (*Id.*).

In Motion Sequence No. 4, movants failed to meet their initial burden of establishing the existence of a trade secret in the documents subject to the September 20, 2019 stipulation and order. In support of the motion, movants submitted the affidavit of Revak. While the affidavit is defective for its failure to include a certificate of conformity in accordance with CPLR §230 (c), such defect is not fatal to the motion as it may be corrected, *nunc pro tunc*, or pursuant to CPLR 2001 (*Midfirst Bank v Agho*, 121 AD3d 343, 351 [2d Dept 2014]). Notwithstanding the court's consideration of the Revak affidavit, the motion must be denied because movants failed to establish the existence of a trade secret or secrets as defined above. Indeed, Revak's affidavit is

replete with conclusory assertions which fail to establish the existence of a "formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Management v Janien*, 82 NY2d 395, 407 [1993], *citing Matter of New York Tel. Co. v Public Serv. Commn.*, 56 NY2d 213, 219, n 3[1982]). Conversely, as movants are in the sole possession of the documents and information at issue, plaintiff has satisfactorily established that the information sought is indispensable and cannot be acquired in another way.

Plaintiff's request for relief is also denied. This purported cross-motion was never authorized by the court, and the Order to Show Cause was not signed. While it is true that a briefing schedule was issued authorizing a cross-motion for "costs and fees" (NYSCEF Doc. 106), plaintiff did not move for such relief. Accordingly, the cross-motion is unauthorized pursuant to the Differentiated Case Management Protocol Part Rules, which provide in relevant part, at Part II (C), as follows:

> Any party seeking to make a discovery motion shall do so in accordance with this protocol by requesting a pre-motion conference by e-filing a "Request for Pre-Motion Conference (Compliance Part)" via the NYSCEF system or by e-mailing the Compliance Part clerk and requesting an immediate conference. The parties will be expected to attend such conferences and attempt in good faith to resolve all discovery disputes. Nothing in these rules shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interests. However, to foster the just, expeditious and inexpensive resolution of discovery disputes, pre-motion conferences shall be held in order to permit the Court the opportunity to resolve issues before motion practice ensues. In the event that motion practice is necessary, a briefing schedule will be established by the court attorney-referee(s).

Here, because plaintiff did not seek a pre-motion conference on the issue of plaintiff's request to have her deposition taken by video conference, there was no opportunity for the court to attempt to resolve the issue and avoid a possibly unnecessary motion. In addition, plaintiff improperly filed her request for relief as an "Amended Cross Order to Show Cause" for which a motion fee never was paid.

Plaintiff's request for relief must also be denied on the merits, as plaintiff has failed to demonstrate any hardship warranting the relief requested. When a party to the action is to be deposed, the deposition should take place within the county where the action is pending (CPLR 3110[1]). CPLR 3113 (d) provides that "[t]he parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically." However, "a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result" (*Farrakhan v N.Y.P. Holdings,* 226 AD2d 133, 135-136 [1st Dept

1996]; *see Gabriel v Johnson's L.P. Gas Serv.*, 98 AD3d 168, 175 [4th Dept 2012]; *Gartner v Unified Windows, Doors & Siding*, 68 AD3d 815, 815 [2d Dept 2009]). It is within the discretion of the court to determine whether a party has demonstrated the requisite undue hardship warranting a protective order directing the party's deposition be held outside of New York by video conference or other remote means (*Yu Hui Chen v Chen Li Zhi*, 81 AD3d 818 [2d Dept 2011]; *American Bank Note Corp. v Daniele*, 81 AD3d 500, 501 [1st Dept 2011]; *Gabriel v Johnston's L.P. Gas Serv.*, 98 AD2d at 176 [court abused its discretion in denying protective order directing party deposition be conducted by video conference]).

Such undue hardship has been found by the courts where a party has demonstrated that they are unable to leave their country of residence due to failing health or due to their immigration status (*Feng Weng v A&W Travel, Inc.*, 130 AD3d 974 [2015][deponent's application for Visa to return to the United States denied]; *Yu Hui Chen*, 81 AD3d at 819 [China-based deponent unable to secure visa to travel to United States]; *Wygocki v Milford Plaza Hotel*, 38 AD3d 237 [1st Dept 2007] [76 year old plaintiff medically unable to travel to New York]; *Doherty v City of New York*, 24 AD3d 275 [1st Dept 2005][plaintiff denied travel visas for court-ordered New York deposition on three occasions]; *Hoffman v Kraus,* 260 AD2d 435, 688 NYS2d 575 [2d Dept 1999][defendant was a resident of Hungary, was more than 70 years old, and in failing health]). Where, however, a party seeks to avoid returning to New York from another state or a foreign country based upon inconvenience and expense, the courts have held that undue hardship has not been established *(LaRusso v Brookstone, Inc.*, 52 AD3d 576 [2d Dept 2008] [travel from New Hampshire not an undue hardship]; *Bristol-Myers Squibb Co.* [appeal No. 2], 186 AD2d 999 [4th Dept 1992]; *Carborundum Envtl. Sys. Canada, Ltd. v Nitec*, 69 AD2d 981 [4th Dept 1979][travel from Wisconsin to New York imposes no serious inconvenience or hardship]).

While the sufficiency of a deponent's showing to proceed by video conference is a matter within the court's sound discretion, generally it is sufficient that a proponent of a remote deposition show that personal appearance is simply "not feasible as a practical matter" (*Matter of Singh*, 22 Misc 3d 388, 290 [Sup Ct Bronx Co 2009]; *see Daniele*, 81 AD3d at 502). To that end, a deponent seeking to change the presumptive venue or medium of a deposition must show good-faith reasonable efforts to overcome difficulties in appearing personally in New York.

Here, plaintiff has not alleged nor established that she cannot afford the airfare for the trip, and previously stated she has family in New York and child care for her children provided by her husband.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that Motion Sequence No. 4 is denied; and it is further

ORDERED that plaintiff's request for relief in the form of an order permitting her

deposition to be held by video conference is denied; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Room 800, on March 18, 2020 at 9:30 A.M.; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon plaintiff with notice of entry within five (5) days of entry.

The foregoing shall constitute the decision and order of the court.

Dated: White Plains, New York
March 2, 2020

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF

cc: Compliance Part