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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

Issing

-v-

Madison Square Garden

INDEX NO. 116265/06

MOTION DATE _____

MOTION SEQ. NO. _____

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 decided in accordance with the accompanying decision.

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/18/12

Hon

J.S.C.

LOUIS B. YORK 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

SUPREME COURT OF THE STATE OF NEW YORK

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COUNTY OF NEW YORK: IAS PART 2

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THOMAS G. ISSING and ELLEN ISSING,

Plaintiffs,

Index No. 116265/06

-against-

MADISON SQUARE GARDEN CENTER, INC., BECK'S NORTH AMERICA INC. and BECK'S NORTH AMERICA INC. d/b/a BECK'S BEER,

Defendants.

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Louis B. York, J.:

This is a personal injury action arising from an alleged slip and fall by plaintiff Thomas Issing on a wet floor at Madison Square Garden on March 29, 2004, while playing in a basketball game sponsored by defendant Beck's North America Inc. (Beck's). Plaintiffs move for an order compelling further depositions from Beck's and defendant Madison Square Garden Center, Inc. (MSG), and to compel the production of the names and addresses of maintenance workers who may have been in the vicinity at the time of plaintiff's alleged slip and fall. Plaintiffs also seek the name of the person who acted as liaison between MSG and Beck's, as well as an extension of the time to file the note of issue.

Plaintiffs' motion to compel discovery is denied. First, plaintiffs have failed to comply with Uniform Rule 202.7 (a) (2),

which provides, in relevant part, that with respect to disclosure motions, the moving party must submit an "affirmation 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) (2). In *Molyneaux v City of New York*, (64 AD3d 406, 407 [1st Dept 2009]), the Appellate Division, First Department, held that the trial court "improperly granted plaintiffs' CPLR 3126 motion in the absence of the required affirmation by their attorney that the latter had conferred with defendants' attorney in a good faith effort to resolve the issues raised by the motion." *See 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 (1st Dept 2009); *Cerreta v New Jersey Tr. Corp.*, 251 AD2d 190 (1st Dept 1998).

Here, it is undisputed that plaintiffs' motion does not contain an affirmation stating that plaintiff's counsel conferred with defendants' counsel in a good faith effort to resolve the issues raised by the motion. Plaintiffs' counsel states only that a letter was sent on September 6, 2011 to defendants, requesting a response to an earlier notice for discovery. Therefore, on this basis alone, the motion must be denied.

Furthermore, plaintiffs have failed to comply with this court's rules for discovery, as set forth in the preliminary conference order dated April 30, 2008. The order requires that, before making any motion, and as soon as a disclosure problem arises, the party seeking relief is required to contact the part

and arrange for a telephone conference.

Here, plaintiffs' motion papers state that counsel called the part and was told to make a motion without a conference being held. However, counsel's affirmation does not state when this phone call occurred. Moreover, although MSG objected to plaintiffs' demand for discovery in a letter dated October 25, 2011, the instant motion was not made until December 14, 2011. Thus, plaintiffs have not demonstrated that they sought relief from the court in the manner required by the preliminary conference order.

In any event, plaintiffs have not demonstrated that they are entitled to the discovery sought on this motion. First, plaintiffs have not demonstrated that they are entitled to further depositions.

A party seeking additional depositions must demonstrate that the witnesses already deposed "had insufficient knowledge, or were otherwise inadequate, and that there was a substantial likelihood that the person sought by the plaintiffs for an additional deposition possessed information which was material and necessary to the prosecution of the action." *Bentze v Island Trees Union Free School Dist.*, 92 AD3d 709 (2d Dept 2012). Here, on July 8, 2011, plaintiffs deposed William Martino, who is currently MSG's Vice President of Building Operations and was the Director of Building Operations at the time of the alleged slip and fall.

Plaintiffs now seek to depose two additional individuals from MSG, one of whom was an engineer and the other a maintenance supervisor. However, plaintiffs have not demonstrated that Martino's deposition was inadequate or that he had insufficient knowledge.

Moreover, although plaintiffs suggest that the additional depositions could lead to discoverable evidence, they have not demonstrated a substantial likelihood that the additional individuals they seek to depose possess information that is material and necessary to the prosecution of this action.

With respect to Beck's, on April 4, 2011, plaintiffs deposed Ray Curley, a witness produced by Beck's. Plaintiffs contend that Curley stated that Mike Harrington, Beck's Executive Vice President of Marketing would know which individual from MSG acted as the liaison between Beck's and MSG. However, plaintiffs have not pointed to anything in Curley's deposition which supports this contention and the transcript does not appear to contain any reference to Harrington. Therefore, plaintiffs have not demonstrated that they are entitled to depose Harrington.

Plaintiffs also seek to compel MSG to produce the names and addresses of maintenance workers who may have been in the vicinity at the time of plaintiff's alleged slip and fall. However, this request is vague and overly broad. As such, that portion of the motion is denied.

Finally, plaintiffs seek the name of the MSG employee who

acted as liaison between MSG and Beck's. MSG has already responded that it conducted a search and does not have such information and that no current employee acted in that capacity. However, that response was made by MSG's attorney, who does not state that she conducted the search personally. Therefore, MSG must submit an affidavit from a party with knowledge of the search, stating that the information could not be located and stating what efforts were made to locate such information. The affidavit should include a description of where the relevant information was likely to be kept; what efforts, if any, were made to preserve such information; whether such information was routinely destroyed; and whether a search was conducted in every location in such information was likely to be found. *See Rivera-Irby v City of New York*, 71 AD3d 482, 483 (1st Dept 2010); *Jackson v City of New York*, 185 AD2d 768, 769 (1st Dept 1992).

Accordingly, it is

ORDERED that the motion by plaintiffs Thomas Issing and Ellen Issing to compel discovery is granted to the extent that, within twenty days of service of copy of this order with notice of entry, defendant Madison Square Garden must serve an affidavit, from a party with knowledge of the search, for the name of any person who acted as liaison between MSG and Beck's on the date of plaintiff's alleged accident, as set forth above; and it is further

ORDERED that the time to file the note of issue is extended

to May 25, 2012; and it is further

ORDERED that the motion is otherwise denied.

DATED: 4/13/12

ENTER:

J.S.C.