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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

DEREAS,
-v-
New York Road Runners, et ano.

INDEX NO. 115009/2009
MOTION DATE 4/4/12
MOTION SEQ. NO. 004

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 to extend the time to file the Note of Issue, directing non-party depositions and request the time to file the Note of Issue is denied in accordance with the accompanying decision.

FILED

MAY 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/23/12

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

ANTONIA DEREZEAS,

Plaintiff,

Index No. 115009/2009

-against-

NEW YORK ROAD RUNNERS, INC. and
JEFF TURLIP,

Defendants.

LOUIS B. YORK, J.:

Currently, plaintiff moves for an order (1) extending the time in which to file the Note of Issue, (2) directing three depositions, and (3) consolidating this action with another, new action. For the reasons below, the Court denies the motion.

I. Request to Extend Deadline for Discovery

The summons and complaint in this personal injury action were filed on October 26, 2009, and the request for judicial intervention was filed over 2 years ago, on March 24, 2010. The parties appeared for a preliminary conference setting up a timetable for discovery on June 6, 2010. The resulting court order scheduled deposition dates of September 14 and 15, 2010, included an impleader deadline of November 15, 2010, and directed that discovery be completed by January 14, 2011 and the Note of Issue be filed by January 24, 2011. The impleader deadline, of August 19, 2011, was a firm date. After that date, no impleader was permissible except by motion.

This Part's preliminary conference order, paragraph 7, sets forth the Part's directive to the parties regarding discovery issues. This provision states that as soon as a disclosure problem

arises and before the end date for discovery, one or more of the parties is required to call the part and arrange a telephone conference. The order stresses that the failure to comply with this procedure waives all pending and future discovery absent a showing of good cause for the failure. The court requires the parties to write in the requirement to make sure that they pay attention to it. In addition, under the order depositions may not be adjourned without the court's prior approval; and the additional directives page reiterates this rule in harsh language, threatening sanctions, the waiver of discovery, or both, to any parties who do not obtain this approval in a timely fashion.

Initially, following these directives, plaintiff contacted the Court for a phone conference when, in September 2010, she realized the parties could not complete the depositions pursuant to the original schedule. In the ensuing phone conference, the Court scheduled new deposition dates of October 28 and 29, 2010. Through a subsequent phone conference, on November 10, 2010, the parties again rescheduled depositions, this time for December 6, 2010. The end date for discovery of January 14, 2011 and the note of issue deadline of January 21, 2011 remained in effect.

It was at this point that the parties' conduct became problematic. Plaintiff called with additional discovery problems on December 17, 2010, after the deposition dates. At this point, as the telephone conferences had been of no avail, the Court scheduled an in person conference on January 12, 2011. Unfortunately on January 12 and the next adjourn date of February 2, 2011, the conference could not be held because of snowstorms. However, there is no explanation on the Court's case card as to why the parties adjourned the conference on March 9, and again on April 27.

Next, plaintiff attempted to amend the complaint in March, two months after the discovery and note of issue deadlines had expired. The Court denied the motion partly for this reason. Also, the Court denied the motion due to the conclusory statements made in the motion papers, and lack of information about the proposed amendment and the lack of evidentiary support.

The April 27 adjournment was marked as the final permissible adjournment. Therefore, when the parties again sought an adjournment – until May 11, 2011 – the matter, which was on the pre-Note calendar beyond the standards and goals and well past all deadlines for discovery, was scheduled for a status conference, which this Court holds in cases in which the parties are delinquent and in default of the terms of the Court's discovery orders. The parties continued to argue for and obtain adjournments – to June 13, September 14, October 26, and finally December 7, 2011 – apparently due to an alleged motion to consolidate this matter – which plaintiff ultimately made – with another action, against Jeff Turlip.[1] At the status conference on December 7, 2011 – a year after plaintiff's initial call requesting the conference – the Court set a final Note of Issue deadline of March 6, 2012.

Rather than adhere to the status conference order and the guidelines set forth above for seeking extensions, on March 6, 2012 – as stated, the last possible day to file the Note of Issue – plaintiff prepared this motion. She served it on March 7, 2012, after the Note of Issue deadline had passed. The papers do not reference any of the conferences, adjournments, the Court's rules or plaintiff's reasons for deviating from these rules. There is no indication – in the court computer, on the case card kept by the Part, or in the motion papers – that movant contacted the Court regarding any discovery problems or applications to extend prior to making this motion.

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[1]Initially the action was against New York Road Runners, Inc. only.

Moreover, the motion does not explain whether good cause existed justifying the failure to comply. Thus, under the terms of the preliminary conference order, the parties have waived the right to seek court assistance with the discovery process. This is especially true here, in light of the history of delay, adjournments and other problems.

Moreover, the Court notes, the papers do not set forth any valid reason for obtaining additional time. Instead, it appears that all parties have been deposed and all discovery has been exchanged. The only reason to seek an extension is to obtain discovery against nonparties whom plaintiff seeks to add to this action but who were not served with the motion. For this reason too the Court denies the motion. The Court further notes that these deficiencies are strikingly similar to those which caused the Court to deny plaintiff's March 2011 motion to amend the complaint. This is yet another reason for denial. Accordingly, plaintiff must file the note of issue on or before May 25, 2012 or the case shall be dismissed.

II. Depositions of the three coaches and other discovery

To the extent that plaintiff seeks additional discovery of "the three coaches," this also is denied. 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 (1st Dept. 2005). Here, plaintiff has not annexed any affirmation regarding her good faith efforts. Therefore, denial of the motion is mandated.

If the above were not enough, there is a further, even more fundamental reason for denial of this prong of the motion. Plaintiff seeks discovery against three individuals who are not

parties to the action. Instead, according to plaintiff's unsubstantiated claim, they are employees of Robert H. Glover & Associates, Incorporated – the defendant in the action which she seeks to consolidate with this action. Under CPLR § 3120(b), a party may seek nonparty discovery as follows:

> A person not a party may be directed by order to do whatever a party may be directed to do under subdivision (a). The motion for such order shall be on notice to all adverse parties; **the non-party shall be served with the notice of motion in the same manner as a summons.** . . .

(emphasis supplied). Any defect in service upon a nonparty who has not appeared in the litigation is jurisdictional in nature. See Hernandez v. Mueller, 29 Misc. 3d 522, 523-24, 907 N.Y.S.2d 583, 584 (Sup. Ct. Kings County 2010)(regarding defect in service pursuant to terms of order to show cause). When the Court has no jurisdiction over the nonparty, it has no power to order relief against it. Dune Deck Owners Corp. V. J.J. & P. Assoc. Corp., 85 A.D.3d 1091, 1092, 926 N.Y.S.2d 318, 318-19 (2nd Dept. 2011).

When plaintiff made this motion, she served both defendants but did not serve Robert H. Glover & Associates, Incorporated – the defendant in her new action but not in this case – with these motion papers. To clarify, she not only did not serve the nonparty in compliance with CPLR § 3120(b), but she did not serve Robert H. Glover & Associates, Incorporated at all. Therefore, this Court has no jurisdiction over Robert H. Glover & Associates, Incorporated, the nonparty, and it cannot direct any discovery with respect to it. The Court denies this aspect of the motion as well.

III. Motion to consolidate.

"The discretion of a court on a motion to consolidate should be accorded great deference." Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d 337, 339, 821 N.Y.S.2d 162, 165

(1st Dept. 2006). This is true as long as the Court considers the appropriate factors. Among other things, the Court must consider judicial economy. Where both cases are at similar stages of discovery and involve the same parties and questions of fact and law, it is proper to consolidate. See, e.g., 43rd St. Deli v. Paramount Leasehold, L.P., 89 A.D.3d 573, 932 N.Y.S.2d 694 (1st Dept. 2011)(in case in which, in addition, full relief was only available in one of the two actions). However, where "[t]he two actions are at completely different stages of discovery," denial of consolidation is appropriate because it would unduly delay the resolution of the older action. Barnes v. Cathers and Dembrosky, 5 A.D.3d 122, 122, 771 N.Y.S.2d 895, 895 (1st Dept. 2004); see Ambac Assurance Corp. v. Countrywide Home Loans, Inc., – A.D.3d –, – N.Y.S.2d – (1st Dept. April 5, 2012)(avail at 2012 WL 1123873); Goldman v. Rosen, 15 A.D.3d 321, 789 N.Y.S.2d 879 (1st Dept. 2005).

Here, the Court exercises its discretion and denies consolidation. As the Court stated in the context of plaintiff's request for additional discovery, plaintiff has submitted no evidentiary support which justifies consolidation. Her references to Mr. Glover's testimony have no value as she has failed to annex the transcript itself. The complaint in the new action, which asserts claims against Glover's company, similarly lacks evidentiary value as it is verified by counsel, who has no personal knowledge of the underlying facts. In light of this, and of the age of this case, the amount of time the parties already have had in which to conduct discovery, and the fact that discovery in the already consolidated action is complete, it is inefficient to add another party who will have to start the discovery process from scratch. Though this case is not on the trial calendar at the moment, this is only because plaintiff failed to follow the directives of the status conference order; and, her failure to comply with the Court's order and its deadlines should not stand her in better stead than compliance with the order would have. Finally, the Court notes

that the parties' failure to follow the rules and guidelines of this Part, and their repeated delays in the litigation of this matter, also militate in favor of denial of this prong of the motion.

Accordingly, it is

ORDERED that this motion is denied in its entirety.

Dated: 4/03, 2012

Enter:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

MAY 07 2012

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