At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, 360 Adams Street, Brooklyn, New York, on the 13th day of February, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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HARTFORD CASUALTY INSURANCE COMPANY & HARTFORD FIRE INSURANCE COMPANY,
Plaintiffs,

Index No.: 511775/2017

- against -

DECISION AND ORDER

NORMA DISCOUNT STORES, INC.,

Motion Sequence #2

Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3,
Reply, Sur-Reply, Affidavits (Affirmations)	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Defendant Norma Discount Stores, Inc. (hereinafter "the Defendant") now moves (motion sequence #2) for an order pursuant to CPLR 3212 granting summary judgment and dismissal of the complaint. The Defendant contends that the complaint should be dismissed as against it because the Plaintiffs fail to proffer any evidence in support of the Plaintiffs' claim that Defendant failed to pay the Plaintiffs the sum of $84,376.35. The Defendant also seeks an order pursuant to CPLR 3126(3) striking **Defendant's Answer** or, in the alternative, precluding the **Defendant** from offering evidence at trial (emphasis added)[1]. The Plaintiffs oppose the motion

[1]Although the Notice of Motion and some parts of the supporting papers indicate that the Defendant is seeking relief against itself, the Court will treat this as a ministerial error, resulting in no prejudice to the Plaintiffs.

and argue that it should be denied, as discovery is still outstanding. The Plaintiffs' counsel contends that it was recently retained and is attempting to comply with all discovery requests.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of the Defendant's motion, the Court finds that the Defendant has provided insufficient evidence to meet its *prima facie* burden. The instant motion fails to satisfy CPLR 3212(b), in as much as there is no affidavit or other available proof (such as a deposition) in support of the motion, by a person with knowledge of the facts. *See JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 384, 828 N.E.2d 604, 612 [2005]. As a result, the Defendant has failed to meet its *prima facie* burden, and as a result the Court need not review the

sufficiency of the Plaintiffs' opposition papers. *See In re Talbot*, 115 A.D.3d 670, 671, 981 N.Y.S.2d 550 [2nd Dept, 2014]. The Defendant's motion for summary judgment is denied.

In relation to the Defendant's motion in relation to discovery compliance, the Court finds that it is also denied. *See Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condo.*, 51 A.D.3d 784, 785, 857 N.Y.S.2d 697, 699 [2nd Dept, 2008]. The moving party on a motion seeking to resolve a discovery dispute has the burden of demonstrating that they have satisfied the requirements of 22 NYCRR §202.7[c]. Said rule provides as follows:

> The affirmation of the good faith effort to resolve the issues raised by the motion shall 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. 22 NYCRR §202.7[c].

The purpose of the rule requiring an affirmation of good faith is to ensure that the parties can attempt to resolve disputes prior to the Court's involvement so as to narrow the focus of the dispute and potentially eliminate the Court's involvement. In the instant proceeding, the Defendant has failed to provide an Affirmation in Good Faith regarding any communications between the parties related to what discovery was outstanding and what steps were taken to resolve the discovery dispute at issue. This insufficiency reflects a lack of good faith on the Defendant's part. As a result, the instant motion is procedurally defective and is therefore denied. *See Quiroz v. Beitia*, 68 A.D.3d 957, 960, 893 N.Y.S.2d 70, 74 [2nd Dept, 2009]; *Hegler v. Loews Roosevelt Field Cinemas, Inc.*, 280 A.D.2d 645, 646, 720 N.Y.S.2d 844 [2nd Dept, 2001]; *Barnes v. NYNEX, Inc.*, 274 A.D.2d 368, 711 N.Y.S.2d 893 [2nd Dept, 2000]; *Romero v. Korn*, 236 A.D.2d 598, 654 N.Y.S.2d 38 [2nd Dept, 1997]; *Gonzalez v. International Bus. Machs. Corp.*, 236 A.D.2d 363, 654 N.Y.S.2d 327 [2nd Dept, 1997]. The Defendant is granted leave to renew

it's application in relation to discovery compliance only, upon proper papers, before the Central Compliance Part.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendant (motion sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.