

Kamal v CureMD.com, Inc.

2021 NY Slip Op 31041(U)

March 30, 2021

Supreme Court, New York County

Docket Number: 651956/2017

Judge: Shawn T. Kelly

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X
IMAN KAMAL,

Plaintiff,

- v -

CUREMD.COM, INC.,

Defendant.

INDEX NO. 651956/2017

MOTION DATE 12/16/2020,
01/06/2021

MOTION SEQ. NO. 012 013

**DECISION + ORDER ON
MOTION**

-----X
CUREMD.COM, INC.

Plaintiff,

-against-

IMAN KAMAL

Defendant.

Third-Party
Index No. 595853/2017

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 357, 358, 359, 360, 361, 362, 363

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 364, 365, 366, 367, 368, 369, 370, 371, 372, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387

were read on this motion to/for DISCOVERY

Upon the foregoing documents, it is

Plaintiff Iman Kamal, as Administratrix of the Estate of Kamal Hashmat, brought this underlying action to recover on an outstanding promissory note issued by defendant and counterclaim plaintiff/third-party plaintiff CureMD.com, Inc. (CureMD) to the Estate of Kamal Hashmat c/o Iman Hashmat, as Executrix. In motion sequence 012, CureMD moves, pursuant to

CPLR 3124, for an order compelling the deposition of plaintiff and counterclaim defendant/third-party defendant Iman Kamal (Iman) for an additional four hours and for an order compelling Iman to produce all responsive documents pursuant to this court's order dated July 29, 2019 and entered by the court on August 2, 2019. If Iman fails to produce these documents within 7 days, CureMD is seeking an order compelling Iman to produce her computer hard drive, cell phone and other data sources for forensic imaging. Lastly, CureMD is requesting that the court extend the deadline for the filing of the note of issue from December 18, 2020 to January 29, 2021.

In the event that the note of issue deadline is extended, plaintiff cross-moves, pursuant to CPLR 3101 and 3106(d), for an order directing that James Austin (Austin), CureMD's financial controller, be produced for a deposition.

In motion sequence number 013, plaintiff moves, pursuant to CPLR 3124, to compel CureMD to comply with plaintiff's second demand for discovery and inspection dated October 29, 2020 to produce the documents specified therein. Plaintiff also moves to compel CureMD to furnish plaintiff with the appropriate authorizations to permit plaintiff to obtain the United States and New York State income tax returns, K-1s and 1099-Divs or equivalent of CureMD for the years 1999 to date. Motion sequence numbers 012 and 013 are hereby consolidated for disposition. For the reasons set forth below, motion sequence number 012 is granted in part and denied in part, and the cross motion is denied. Motion sequence number 013 is denied in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

On March 1, 2014, CureMD signed a non-negotiable promissory note, promising to pay to the order of the Estate of Kamal Hashmat c/o Iman Hashmat, as Executrix (Estate),

\$352,000.00.¹ The complaint states that CureMD made payments pursuant to the promissory note totaling \$160,000, but that the remainder of the payments, plus interest, is still outstanding and due.

CureMD asserted eleven counterclaims against both Iman and the Estate, grounded in breach of fiduciary duty and fraud, among others. In brief, CureMD alleged that, from the time CureMD was founded in 1999, Kamal Hashmat (Kamal), as cofounder, served as its President and CEO and as a member of its board of directors. When Kamal died in 2014, he did not have a life insurance policy. CureMD alleges that, “[i]n order to assist his family economically, following Kamal’s death CureMD.com made his widow, Iman, an officer and director of the company, and arranged for her to receive an annual salary of \$215,000 despite the fact that Iman had no college education and had never been in the workforce.” NYSCEF Doc. No. 336, verified answer, counterclaims and third-party complaint, ¶ 13.

After CureMD hired an accounting firm in 2016, “[a] review of CureMD.com’s financial records following Kamal’s death revealed that, prior to his death, Kamal regularly diverted corporate funds for his own personal use.” *Id.*, ¶ 16. CureMD alleges that Kamal used corporate funds to pay his mortgage and also made “false journal entries in CureMD.com’s accounting system, reflecting purported capital contributions made by Kamal that were never actually made.” *Id.*, ¶ 20. CureMD also alleges that, following Kamal’s death, Iman “abused her position as an officer and director of the company to continue her late husband’s wrongful conduct.” *Id.*, ¶ 15. For instance, CureMD alleges that Iman “used her control over CureMD.com’s finance department to conceal the improper diversion to company funds, by

¹ On April 15, 2014, Iman Kamal, the wife of Kamal Hashmat, who is now deceased, was granted administration of goods, chattel rights and credits of Kamal Hashmat.

disguising illicit withdrawals as valid payments to CureMD.com contractors.” *Id.*, ¶ 38. Iman also allegedly engaged in a fraudulent bonus payment scheme whereby she, or someone on her behalf, altered the records to state that she was an employee since 1999, not 2014, and she received a greater bonus than she was entitled to.

Additional Time for Deposition

In relevant part, Iman has also commenced an action against CureMD and numerous CureMD shareholders alleging that the Estate is the sole shareholder of CureMD. *See* Index No. 652710/2017 (Shareholders Action). Paula K. Colbath, Esq. (Colbath), counsel for CureMD, states that her law firm represents 15 separate defendants in the Shareholder Action. She continues that, given the number of defendants they represent, the bulk of Iman’s deposition, held for an approximate total of 7 hours, consisted of testimony related to the claims raised in the Shareholders Action. Counsel maintains that she was unable to fully depose Iman with respect to the claims and counterclaims pertinent to the instant action. As a result, Colbath is seeking an additional four hours to depose Iman with respect to the promissory note claims. Colbath states that, “[w]hile Iman’s counsel had 13 days of depositions that they took of the numerous defendants in the Shareholders Action (with three additional witnesses that they seek to take), we only took depositions of Iman and Terrence McLaughlin” NYSCEF Doc. No. 333, Colbath affirmation in support, ¶ 8.

In motion sequence 007 of the Shareholders Action, CureMD brought a motion to compel, seeking, among other things, to compel the continuation of plaintiff’s court-ordered deposition. Iman had been deposed on July 24, 2020. Pursuant to an order dated August 21, 2020, the court granted CureMD’s motion, to the extent that Iman was ordered to appear for a two-hour deposition. CureMD brought a similar order to show cause in this action pursuant to

motion sequence 010, to compel Iman to continue her deposition. The court then denied motion sequence 010 as moot, “pursuant to this court’s decision and order (motion seq. no. 007) in *Kamal v Hashmat*, Index No, 652710/2017.” NYSCEF Doc. No. 325 at 1. Iman appeared for this deposition on October 27, 2020.

Colbath argues that a significant amount of the 7-hour deposition (the combination of the two days of testimony) was also unproductive due to technical issues. She continues that CureMD should be allowed to depose Iman to examine her with respect to instant action. She is seeking an additional four hours of deposition time for Iman’s deposition solely in connection with this action. “Iman has information that is material and necessary for CureMD’s prosecution of its counterclaims and CureMD should be afforded a full and fair opportunity to examine Iman on these issues.” Colbath affirmation in support, ¶ 19. CureMD claims that its counterclaims have a cumulative damage of approximately a million dollars related to Iman’s fraudulent conduct when she was in charge of CureMD’s finance department. It also requires more time to ask about Kamal’s allegedly improper actions prior to his death.

In addition, CureMD states also that, on November 25, 2020, Chase Bank produced documents in response to a subpoena. These documents now allegedly show “that Iman made numerous payments from the Estate bank account for her personal use that CureMD needs to have an opportunity to explore with Iman at a deposition” *Id.*, ¶ 15. Chase Bank made a partial production of documents but still needs to produce emails and “anticipates making another production to CureMD of email communications and related documents” *Id.*, ¶ 16.

Plaintiff’s Opposition

In opposition, counsel argues that Iman has already been examined pursuant to the court’s August 21, 2020 order and that her testimony was limited to two hours. According to

plaintiff, this motion should be denied, as it is “just a motion that seeks reconsideration of the Court’s August 21, 2020 Order.” NYSCEF Doc. No. 344, Ira Levine (Levine) affirmation in opposition, ¶ 5. In addition, Iman has already testified for close to 8, not 7, hours. Counsel argues that, if the court considers the motion, “defense counsel fails to establish any basis for seeking a third day of depositions.” *Id.*, ¶ 23.

Document Production

In motion sequence 007 of this action, as part of its requested relief, CureMD sought to compel Iman to produce documents pursuant to CureMD’s first set of document requests. During an oral argument that took place on July 11, 2019, Judge Reed held that “[t]o the extent that motion sequence number seven sought to compel plaintiff to provide documents, those documents shall be provided within 30 days or such other time as the parties may agree to by stipulation.” NYSCEF Doc. No. 174, tr at 61. That order was entered on August 2, 2019. *See* NYSCEF Doc. No. 169.

CureMD alleges that production of Iman’s personal bank account statements is still outstanding, despite CureMD’s document request dated October 17, 2017. After Iman responded on August 12, 2019, CureMD informed plaintiff’s counsel that numerous categories of documents had still not been produced. For instance, the letter states that Iman failed to produce, in pertinent part:

“Documents with regard to Kamal Hashmat’s use of corporate funds to pay his personal expenses (Request Nos. 15-17). Iman obviously has documents showing her husband’s use of corporate funds to pay his home mortgage and credit cards (among others).

“We also have not received any documents with regard to repayments made by Babar and Adeel Malik and/or EMR Specialist [the contractors] at Iman’s request (Request No. 22).

“Documents showing compensation (including bonus payment) Iman Kamal and other CureMD employees received for the year 2015 (Requests No. 24 and 25).

“Bank account(s) in which the monies Iman Kamal received pursuant to the promissory note were deposited (Request No. 29).”

See NYSCEF Doc. No. 342 at 2.

On October 16, 2020, CureMD sent plaintiff a letter following up on numerous outstanding discovery defaults. According to CureMD, Iman has still not complied with the August 2, 2019 order. CureMD argues that Iman's personal bank account statements would be relevant for, among other reasons, assessing any loans or payments made to the contractors. CureMD is further seeking, among other numerous categories of documents, "communications with regard to the string of \$10,000 payments she paid herself while at CureMD." Colbath affirmation in support, ¶ 24. CureMD states that, if Iman fails to comply with the August 2, 2019 order for document production, "the Court should order Iman to turn over her hard drives, her cell phone, and other data sources to CureMD's e-discovery vendor so they can be forensically imaged and searched using search terms and other appropriate techniques." *Id.*, ¶ 29.

During Iman's deposition held on July 24, 2020, Iman testified that she possessed certain responsive documentation such as bank statements texts and emails. However, according to CureMD, she also testified that she was never directed by counsel to review for responsiveness or to turn them in for production. "Iman unequivocally testified that her counsel never asked Iman to review for documents, which is shocking in light of the Court's Order" *Id.*, ¶ 22. Iman further testified that, although she traded in her old phone for a new one in 2017, her counsel never asked her to turn over the old phone or her current phone for production. "As such, Iman testified that while she is in possession of texts, emails and bank statements, she was not asked to review for responsiveness or to turn them over to her counsel for production." *Id.*, ¶ 23.

Plaintiff's Opposition

In opposition, plaintiff argues that CureMD's discovery motion should be denied, as CureMD's counsel did not submit a good-faith affirmation. It continues that CureMD "could not submit a good-faith affirmation," as this motion lacks in good faith. Iman maintains that she has produced thousands of pages of documents in response to CureMD's demands made in 2019. According to counsel, Iman served her document production in 2019 and CureMD has not complained of any deficiencies until now. Even in July 2020, CureMD did not raise any deficiencies with Iman's document production.

Plaintiff states the following, in relevant part:

"Furthermore, the defendant's document demand (Exhibit 7 to Motion) never sought Iman's personal bank statements or the Estate account statements. The Court can see for itself. The only Demand that refers to a 'bank account' is Demand No. 29. That Demand seeks only the 'identity' of the accounts in which 'monies received or paid pursuant to the Promissory Note were deposited.' And Iman produced documents in August 2019 that identified the Estate bank account. Iman did not produce 'documents relating to the opening of such account(s)' because she did not have them. (See No. 15 of Response; Exhibit 5)."

NYSCEF Doc. No. 344, Levine affirmation in opposition, ¶ 20.

Extension of Note of Issue Deadline

Lastly, CureMD seeks to extend the deadline for the note of issue. CureMD states that it requires an extension so that it can, among other things, compel Iman to produce responsive documents and be deposited. Further, CureMD needs to work with Chase Bank to expedite the remainder of the outstanding discovery. Although CureMD's counsel informally requested pursuant to an email dated November 16, 2020 that plaintiff agree to extend the note of issue, plaintiff's counsel did not agree to do so.

Plaintiff's Opposition and Cross Motion

On June 3, 2020, plaintiff's counsel sought to take the deposition of Adam Hashmat, as the corporate officer of CureMD. Pursuant to a letter dated August 7, 2020, CureMD advised

plaintiff that, pursuant to CPLR 3106 (d), it was designating Bilal Hashmat, CureMD's CEO, as its deposition witness. *See* NYSCEF Doc. No. 363. Pursuant to a status conference order dated July 20, 2020, the depositions were scheduled. In relevant part, fifteen deponents were scheduled, including Billal Hashmat as the CureMD designee. Adam Hashmat and Austin were not part of the deposition schedule. In a letter dated November 18, 2020, counsel asked CureMD to voluntarily produce Austin and Adam Hashmat for depositions. NYSCEF Doc. No. 354 at 1.

Plaintiff opposes CureMD's motion, including the request to extend the Note of Issue deadline. However, counsel argues that, if this court grants CureMD's request to extend the note of issue beyond its December 18, 2020 deadline, plaintiff seeks to have the court direct that CureMD produce Austin for a deposition.² Austin has submitted an affidavit in support of the Shareholders Action and two affidavits in support of Index No. 656306/2018, an action brought by Iman for judicial dissolution of CureMD. However, according to plaintiff, Austin, in his affidavit, has testified to facts that are "relevant and germane to this case and the [Shareholders Action]." Levine affirmation in opposition, ¶ 26. Counsel states that "Iman should be permitted to examine Mr. Austin to ascertain the facts that led him to 'confirm' the identity of the Company's shareholders, and others areas that [sic] relevant and germane to the two cases." *Id.*, ¶ 27.

CureMD's Opposition

² Levine states that he "submit[s] this affirmation in opposition to CureMD's motion that seeks an order to compel Iman to submit to a third day of deposition, produce documents, and to extend the note of issue deadline in this case and the companion action, Kamal v. Hashmat (652710/2017)" Levine affirmation in opposition, ¶ 1. Contrary to this contention, CureMD did not seek to compel the note of issue for the Shareholders Action and this will not be addressed.

In opposition, CureMD argues that plaintiff's request to take Austin's deposition should be denied. Among other things, CureMD maintains that plaintiff originally sought Adam Hashmat, not Austin as it now "insinuates." NYSCEF Doc. No. 357, Colbath Reply affirmation, ¶ 21. Colbath states that Austin has never submitted an affidavit in this action. Further, although Iman requests that Austin be deposed to confirm the identity of the Company's shareholders, "this suit has nothing whatsoever to do with CureMD's other shareholders and therefore Iman cannot have Mr. Austin's deposition in this action as to matters pertaining in an entirely different action." *Id.*, ¶ 24.

Motion Sequence 013

Plaintiff is seeking to compel CureMD and the Hashmat Family members who currently control the corporation to produce the corporation's income tax returns filed in the United States and New York from 1999 to the present, together with, among other things, the K-1's and 1099-Divs that it gave to its shareholders. Plaintiff maintains both the instant action and the Shareholders Action seek to resolve the identity of CureMD's shareholders. Plaintiff claims that the documents requested are relevant in this action because Iman, "in her reply to the Corporation's counterclaims and her answer to the third-party complaint, asserted as her Sixth and Seventh Affirmative Defenses that the counterclaims and third-party complaint were unauthorized because Iman is the Corporation's sole shareholder." NYSCEF Doc. No. 366, Levine affirmation in support, ¶ 9.

Levine is also requesting that the court direct CureMD to execute and deliver authorizations for Iman herself to obtain the documents. If the Corporation does not have copies of its tax documents, Iman should be permitted to obtain the records from the IRS or the New

York State Department of Taxation and Finance. Levine alleges that, regardless of the confidential nature of the documents, as a shareholder and director, Iman is entitled to them.

CureMD's Opposition

Plaintiff served her second demand for discovery and inspection on October 29, 2020. As set forth in the record, on November 30, 2020, CureMD's counsel apprised Levine that "[a]s we state in the responses, we are prepared to meet and confer in good faith as to any and all of the objections asserted." NYSCEF Doc. No. 375 at 1. On December 13, 2020, Levine responded with the following, in relevant part:

"Your formal responses stated that you undertook a search for responsive documents. That search should have been completed by now. I insist that that the documents should be turned over forthwith, but not later than by noon on Tuesday, December 15, 2020, failing which, a motion will be made to compel their disclosure and to compel CureMD to execute and deliver the appropriate authorizations."

NYSCEF Doc. No. 371 at 2.

On December 14, 2020, Colbath responded with the following, in pertinent part:

"Ira: We will review your letter with our clients and respond to your letter, hopefully in writing, as soon as possible. We appreciate the press of other business as we too have numerous commitments this week and next (I will be out of the office starting on Wednesday for the remainder of this week). Perhaps it would make sense for us to schedule a telephonic meet and confer for next week, so that in the event we are unable to respond to your letter by way of one of our own this week, we have a date on the calendar to discuss the numerous issues raised in your letter."

NYSCEF Doc. No. 376 at 1.

On December 18, 2020, Levine submitted an affirmation of good faith pursuant to 22 NYCRR § 202.7. Levine stated that he received CureMD's formal response on November 30, 2020 "inviting me to reach out to defense counsel to confer with respect to [plaintiff's Second Demand for Discovery and Inspection]." NYSCEF Doc. No. 365, good faith affirmation, ¶ 2.

In Levine's good faith affirmation, he states that, "[o]n December 13, 2020, I wrote to defense counsel setting forth my position. A copy of the letter is attached to my affirmation dated December 18, 2020 in support of the motion. Defense counsel responded that she would address my letter before December 23, 2020." *Id.*, ¶ 3. Levine continues that, "[p]ursuant to the Court's July 20, 2020 Order, the Note of Issue must be filed by December 18, 2020. Out of a concern that the filing of the Note of Issue may prejudice the plaintiff's rights to seek relief from the Court after the Note of Issue filing, I have submitted this motion." *Id.*, ¶ 4.

CureMD argues that plaintiff's motion should be denied as counsel failed to follow the rules set forth in this court's practices and procedures. Justice Reed's "Part 43-Practices and Procedures" set forth the following, in pertinent part:

"Discovery motions are discouraged. If a dispute cannot be resolved after good faith efforts to meet and confer, the parties should proceed in accordance with Commercial Division Rule 14. The parties shall coordinate to make a single Rule 14 submission to Chambers, at sfcpart43@nycourts.gov, containing both the initial letter and any responsive letter(s)."

Commercial Division Rule 14 indicates, in relevant part:

"Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. *See* section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the moving party shall submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute and requesting a telephone conference."

Specifically, although plaintiff's counsel filed an affirmation of good faith, there has never been a meet and confer with CureMD's counsel. Colbath states that "Levine never had a meet and confer with the undersigned counsel with regard to Plaintiff's Demand, despite my specific offer to him to do so before the filing of this Motion." NYSCEF Doc. No. 374, Colbath affirmation, ¶ 5. CureMD maintains that it has now had to incur additional costs because plaintiff did not attempt to first resolve the discovery dispute at a meet and confer. It is seeking

an order directing plaintiff to pay for the legal fees and expenses incurred by CureMD as a result of responding to this motion. CureMD further argues that this motion is defective as plaintiff has already filed the note of issue and a certificate of readiness for trial. “If Plaintiff seeks additional discovery (which she does), then she should not have filed the Note of Issue and required Certificate of Readiness for Trial.” *Id.*, ¶ 11.

In addition to any procedural deficiencies, among other things, CureMD maintains that the discovery requested has either been produced or is irrelevant to the promissory note action.

In reply, plaintiff claims that “[a]lthough this Court has recently been reassigned to the Commercial Division, we did not understand that these cases are now Commercial Division cases and subject to its rules.” NYSCEF Doc. No. 382, Levine reply affirmation, ¶ 15. According to plaintiff, courts have excused the compliance with 202 NYCRR § 202.7 where, like here, the effort to resolve the discovery dispute would be futile.

DISCUSSION

“Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [t]here shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof. . . . The test is one of usefulness and reason.” *Forman v Henkin*, 30 NY3d 656, 661 (2018) (internal quotation marks and citations omitted). CPLR 3101 (a) “embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise.” *Id.* at 661 (internal quotation marks and citation omitted). “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court” *Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843 (2d Dept 2013) (internal quotation marks and citations omitted).

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. *Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412 (U), *5 (Sup Ct, NY County 2015). “[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure.” *Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD2d 451, 452 (1st Dept 2012). Courts have found that a party is not required to respond to a discovery demand that is “palpably improper . . . [in that it is seeking] irrelevant information, or [is] overbroad and burdensome.” *Montalvo v CVS Pharm, Inc.*, 102 AD3d at 843.

In its motion to compel pursuant to 3124, CureMD is seeking to have Iman deposed for an additional four hours. It is also seeking to compel outstanding documents pursuant to its document request and the court’s order of production dated August 2, 2019. As set forth below, both requests are granted. Here, CureMD has established that Iman’s additional deposition testimony solely related to the promissory note claim is “material and necessary.” *See e.g. Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 555 (1st Dept 2015) (internal quotation marks and citation omitted) (“The words material and necessary, as used in CPLR 3101 (a) are to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy”). Although Iman was produced for a deposition, CureMD did not have enough time to depose her in connection with the instant action. Furthermore, CureMD has established that additional deposition time is needed to elicit testimony regarding the Chase Bank Estate bank account statements and any documents produced pursuant to this order.

Iman provided some of the documents requested in response to the discovery demands, stating that the responses provided “reflect the current state of Plaintiff’s knowledge, understanding and belief respecting matters about which inquiry has been made.” NYSCEF Doc. No. 341, plaintiff/third party defendant’s responses to defendants’ demand for discovery and inspection at 1. At her deposition on July 24, 2020, Iman testified that she does keep personal bank statements. She further stated that she was not asked to produce texts, emails or bank statements to her counsel for responsiveness. It was only on that date that CureMD became aware that Iman was in possession of these documents and that there may be deficiencies with discovery production. These documents still remain outstanding. According to CureMD, these documents are necessary, to, among other things, establish how both Kamal and Iman allegedly improperly diverted corporate funds for personal use.

Counsel for plaintiff maintains that the document demand never asked for personal bank statements or the Estate account statements, only the identity of these accounts. However, the request for personal bank statements and accounts would automatically be covered in a number of the document requests, including the outstanding communications (request number 1), documents relating to payments or loans made to the contractors or documents relating to Kamal’s use of CureMD’s funds to pay personal expenses (request number 15).

Accordingly, CureMD has demonstrated that the information sought is “material and necessary” to its defense for failing to pay the remainder of the promissory note. In response, plaintiff has failed to establish how the requests are overbroad or unduly burdensome. *See e.g. Munoz v 147 Corp.*, 309 AD2d 647, 648 (1st Dept 2003) (“The items sought in the supplemental demand for discovery and inspection are ‘material and necessary in the prosecution or defense’

of the instant action (CPLR 3101[a]) and the City has not shown that the requests are overly broad or unduly burdensome”).

However, CureMD’s motion to compel production of Iman’s hard drives, cell phones and other data sources for forensic imaging is premature and is denied. If Iman fails to comply with this order or if CureMD has reason to believe Iman deliberately failed to produce discovery, it may, at that time, move for appropriate relief such as a motion for sanctions for spoliation of evidence.

Austin Deposition

In the cross motion, in the event that the court allows an extension of the note of issue deadline, plaintiff seeks to have CureMD produce Austin for a deposition. Plaintiff claims that Austin’s affidavits submitted in connection with other actions contain relevant information about the identity of the shareholders in the Company and that these facts are germane and relevant to both the Shareholders Action and the instant one. However, Austin did not submit an affidavit for this action. The record indicates that, although Iman requested Adam Hashmat, as listed on the court’s status conference order scheduling the depositions, CureMD designated Billal Hashmat as its designated witness. Austin was not listed among the 15 witnesses to be deposed. Pursuant to a letter dated November 18, 2020, Iman’s counsel requested that Adam Hashmat and Austin both voluntarily be produced for depositions.

Pursuant to CPLR 3106 (d), with timely notification, a corporation is entitled to choose the designated corporate officer for deposition. Upon requesting that the court compel an additional party to appear for a deposition, plaintiff must “make a detailed showing of the necessity for taking additional depositions or the substantial likelihood that those sought to be deposed possessed information necessary and material to the prosecution of the case.” *Epperson*

v City of New York, 133 AD3d 522, 523 (1st Dept 2015). The court declines to require CureMD to produce Austin for a deposition. In the instant action, plaintiff is seeking to recover on a partially paid promissory note. Plaintiff has not established how Austin's ability to confirm the identity of the shareholders is necessary and material to the prosecution of the case. In addition, plaintiff has already deposed multiple other witnesses, including Billal Hashmat. Plaintiff has also failed to show that the witnesses already deposed were inadequate. *See e.g. Hayden v City of New York*, 26 AD3d 262, 262 (1st Dept 2006) ("plaintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate . . .").

Plaintiff opposed CureMD's informal request and this motion to extend the deadline for filing the note of issue. On December 18, 2020, plaintiff filed the note of issue, requesting a nonjury trial and stating that the matter is ready for trial. "Items 1-7 must be checked" is set forth under the heading entitled "Certificate of Readiness for Trial." Plaintiff did not check off the box number 7 which stated "[d]iscovery proceedings now known to be necessary completed." NYSCEF Doc. No. 373 at 2. Counsel attached a rider explaining, among other things, that plaintiff still has outstanding discovery requests and that she is seeking to depose Austin. Plaintiff states "[t]his Note of Issue is being filed pursuant to the Court's July 20, 2020 Order that directed the plaintiff to file the Note of Issue not later than December 18, 2020. Plaintiff reserves all of her rights to additional discovery." *Id.* at 3. On the same date, as discussed below, plaintiff filed motion sequence 013, seeking to compel CureMD to comply with plaintiff's second demand for discovery, among other things.

Pursuant to 22 NYCRR § 202.21 (e) "[a]t any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some

material respect.” *See e.g. Gomes v Valentine Realty LLC*, 32 AD3d 699, 700 (1st Dept 2006). Although items one through seven were supposed to be checked prior to filing the note of issue, plaintiff did not check off box seven. However, it is undisputed that discovery remains outstanding and that plaintiff did not waive her right to conduct additional discovery. Therefore, counsel’s signature on the certificate of readiness form, representing that the case was ready for trial, was materially incorrect. *See e.g. Simon v City of Syracuse Police Dept.*, 13 AD2d 1228, 1229 (4th Dept 2004) (Given “the patent untruth of plaintiff’s certification that discovery had been waived, was unnecessary, or had been completed . . . the court should have exercised its power to treat the note of issue as a nullity and to vacate it sua sponte”); *see also Matos v City of New York*, 154 AD3d 532, 533 (1st Dept 2017) (“Since discovery was not completed, the motion court correctly vacated the note of issue”).

Accordingly, the court, sua sponte, vacates the note of issue and strikes this action from the trial calendar.³

Plaintiff’s Motion to Compel (Motion Sequence 013)

Plaintiff’s motion seeking to compel CureMD to comply with plaintiff’s second demand for discovery and inspection, among other things, is denied. Pursuant to 22 NYCRR § 202.7 (a), a motion relating to disclosure must be filed with “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.” The affirmation of good faith must set forth “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).

³ CureMD’s request to extend the deadline to file the note of issue is now moot.
651956/2017 KAMAL, IMAN vs. CUREMD.COM, INC.
Motion No. 012 013

The record indicates that CureMD twice offered to meet and confer in good faith as to any and all of the asserted objections. Counsel for plaintiff did not attempt to set up a meeting, but objected to CureMD's formal responses, attempted to justify why the documents were necessary and informed CureMD that he would be filing a motion to compel. Accordingly, the affirmation of good faith is deficient as plaintiff's counsel failed to indicate that he conferred or discussed the issues raised in the motion as required by 22 NYCRR § 207.7 (a), (c). *See e.g. 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 (1st Dept 2013) (internal quotation marks and citation omitted) ("affirmation of its good faith effort to resolve the dispute . . . did not substantively comply with the requirements of 22 NYCRR § 202.7. . . . There is nothing in the letter, which was written before the continued deposition date, indicating that GSY's counsel actually conferred with Shavolian's lawyer in a good faith attempt to resolve the dispute").

Counsel further states that he was prompted to file the motion, in response to counsel's unsatisfactory responses and the obvious discovery dispute. However, as noted, CureMD's counsel offered twice to meet and confer. *Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 (1st Dept 2019) ("[T]he record does not support defendants' contention that the parties have historically been unable to resolve discovery disputes without court intervention").

Moreover, this motion is procedurally defective. Counsel claims that he had to engage in motion practice to resolve this discovery dispute because the note of issue was coming due shortly. Under either this court's or the Commercial Division's Rules, discovery motions are discouraged. If the dispute could not be resolved after good faith efforts to meet and confer, plaintiff should have sent a letter to chambers.

The court, exercising its discretion, declines to award CureMD the legal fees and expenses associated with having to make this motion.

CONCLUSION

Accordingly, it is

ORDERED that CureMD's motion (motion sequence 012) is granted to the extent of compelling the deposition of plaintiff and counterclaim defendant/third part defendant Iman Kamal for an additional four hours and compelling Iman Kamal to produce all responsive documents pursuant to this court's order entered by the court on August 2, 2019, and the remainder of the motion is denied; and it is further

ORDERED that plaintiff's cross motion seeking to depose James Austin is denied; and it is further

ORDERED that the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed within 90 days from service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's motion (motion sequence 013) seeking to compel CureMD to comply with plaintiff's second demand for discovery and inspection and to produce CureMD's tax returns and provide plaintiff with appropriate authorization to obtain the federal and New York State income tax returns is denied; and it is further

ORDERED that, within 20 days from entry of this order, CureMD shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (60 Centre Street, Room 158M), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that upon completion of discovery as hereinabove directed, plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and

certificate of readiness (for which a fee shall be imposed), to which shall be attached a copy of this order [the plaintiff shall move to reinstate the note of issue as provided in Uniform Rule 202.21 (f)]; and it is further

ORDERED that such service upon the Clerk of the Trial Support Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptctmanh); and it is further

ORDERED that the new note of issue date is April 30, 2021; and it is further

ORDERED that counsel are directed to appear for a status conference to be held on ~~March 23, 2021 at 2:30pm~~ ^{June 3, 2021 at 11:00am} via Microsoft Teams.

~~2/18/2021~~
3/30/2021

DATE



SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: