

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART 48

*Justice*

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JACOB HINDLIN,

INDEX NO. 651974/2018

Plaintiff,

- v -

ORDER

PRESCRIPTION SONGS LLC, and KASZ MONEY, INC.,

Defendants.

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**MASLEY, J.:**

Because the parties to this complex commercial action are burdened by a multitude of discovery issues, they asked this court to designate a judicial hearing officer for the supervision of disclosure. Unfortunately, there are no judicial hearing officers available because of budget cuts. (Chief Judge DiFiore Remarks Oct. 5, 2020, <https://www.nycourts.gov/whatsnew/pdf/October5-CJMessage.pdf>). Likewise, the court's referees are not available for discovery supervision. Further, this court, like many others, are understaffed indefinitely because of a hiring freeze. (Ryan Tarinelli, *Courts Bracing for Cut of About \$300 Million From Judiciary Budget, Judge Marks Says in Memo*, NYLJ, Sept. 30, 2020.) Accordingly, this court and its remaining staff cannot devote exclusive time and attention to this matter. Mindful that justice delayed is justice denied, the court is not without tools and volunteers to unburden the parties as they labor toward a trial or resolution. Litigants should not suffer delay when this forum was established precisely to afford such business litigants efficiency. (Uniform Rules for Trial Cts [22 NYCRR] § 202.70 Preamble [4] ["New York is the center of world commerce, the headquarters of international finance, the home of America's leading businesses. As such, it strongly needs a modern, well-staffed, properly equipped forum for the swift, fair and expert resolution of significant commercial disputes".])

CPLR 4212 provides that, "on its own initiative, the court may submit any issue of fact required to be decided by the court to an advisory jury or, upon a showing of some exceptional condition requiring it or in matters of account, to a referee to report." The court may refer discovery matters as long as it does not delay the case. (*Luppino v Mosey*, 103 AD2d 1117, 1119 [4th Dept 2013] [internal quotation marks and citations omitted]. During a prior economic crisis, to assist the court, the New York County Lawyers Association organized such a special discovery master program in 1976, providing 350 volunteers. (<https://www.nycla.org/NYCLA/About/AboutNYCLA.aspx>).

**OTHER ORDER – NON-MOTION**

In the commercial division, appointment of special discovery masters is not uncommon, though it is usually at the request of the parties. (CPLR 3104<sup>1</sup>; The Chief Judge's Task Force on Commercial Litigation in the 21<sup>st</sup> Century, *Report and Recommendations to the Chief Judge of the State of New York June 2012* at 11.) "The referee to report may be analogized in many ways to the old master in chancery, who acted as a kind of assistant to the chancellor in the carrying out of various judicial functions." (Siegel, NY Prac § 379 [6th ed].) That kind of assistance has never been needed more than now especially for a case such as this with complex issues.

Such extraordinary circumstances are certainly present today because of COVID-19 and its economic impact. The court is not able to determine the discovery issues here expeditiously without extraordinary impingement on the court's regular business. (See *Luppino*, 103 AD2d at 1119). This action is but one in a docket of over 400 hundred; a docket that is growing every day especially as cases previously assigned to Justice Saliann Scarpulla are redistributed with her appointment to the Appellate Division. (Christine Simmons, *Cuomo Appoints 4 Judges to First Department*, NYLJ July. 13, 2020.) As the number of commercial cases increase, the number of judges is decreasing. (Stephen P. Younger, Muhammad U. Faridi, Alvin Li and Eric Barnosky, *Commercial Division Sees Uptick, Followed by Flattening in Case Filings*, NYLJ, Aug. 19, 2020; Jason Grant, *2 Manhattan Commercial Division Justice to Retire as Judicial Budget Cut Takes Hold*, NYLJ, Oct. 2, 2020.) This reference will actually shorten the time for this proceeding by providing expert supervision.

Accordingly, the court appoints Mark H. Alcott, Esq. to supervise discovery to conclusion, including settlement, with all of the powers under CPLR 4201. The court is grateful to Mr. Alcott<sup>2</sup>, and the many other retired attorneys who volunteered to the Office of Court Administration<sup>3</sup>, according to the Administrative Judge Deborah Kaplan,<sup>4</sup> to assist the court at this critical time. Consistent with CPLR 4315, Mr. Alcott shall file his oath in NYSCEF for this case. As Special Discovery Master, after meeting with the parties, Mr. Alcott shall set a schedule for completion of discovery and keep the parties on schedule. Any discovery orders shall be in writing. (See *e.g.* Uniform Rules for Trial Cts [22 NYCRR] § 202.70 Rule 11. Discovery.) Consistent with CPLR 4320, any disputed discovery matters shall be heard by the Special Discovery Master on the record, the cost of the transcript shall be evenly split by the parties unless the parties

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<sup>1</sup> Under CPLR 3104, the parties select the referee and share the cost. There is no such agreement in this case. The court is confounded by this resistance. (See motion 09 objecting to special master. NYSCEF 305, Notice of Motion; NYSCEF 413, Transcript; 424, Decision). However, the parties may stipulate to proceed under CPLR 3104 and submit the stipulation to the court to be so ordered.

<sup>2</sup> Mr. Alcott is a retired partner of Paul Weiss Rifkind Wharton & Garrison LLP. He chaired the Commercial and Federal Litigation Section responsible for the N. Y. State Bar Assn., A Commercial Court for New York (Jan. 1995) (proposing the creation of the Commercial Division).

<sup>3</sup> Special Masters, 22 NYCRR §202.14.

<sup>4</sup> September 22, 2020 meeting of Commercial Division judges with Administrative Judge Deborah Kaplan, Supreme Court, New York County.

agree otherwise. Within 20 days from the initial meeting, the Special Discovery Master shall notify the court of party cooperation and plan. Consistent with CPLR 4320, the Special Master shall file his final report. The parties shall move to confirm the report consistent with 22 NYCRR § 202.44.

Accordingly, it is

ORDERED that Mark H. Alcott, Esq. shall be designated to hear and report, unless the parties stipulate to have the Special Discovery Master Alcott hear and determine,<sup>5</sup> to this court on the following individual issues of fact, which are hereby submitted to Special Discovery Master Alcott for such purpose: (1) supervision of all discovery and (2) settlement, if the parties wish to engage in settlement negotiations with the assistance of the Special Discovery Master; and it is further

ORDERED that the powers of the Special Discovery Master Alcott shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that counsel shall file memoranda or other documents, including emails and e-letters, directed to the assigned Special Discovery Master in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (*see* Rule 2 of the Uniform Rules); and it is further

ORDERED that the parties shall meet with the Special Discovery Master forthwith; and it is further

ORDERED that the Special Discovery Master shall establish a schedule to get the parties back on track and move discovery along pursuant to that schedule; and it is further

ORDERED, that the Special Discovery Master shall notify the court within 20 days of this order as to the cooperation of the parties and a plan; and it is further

ORDERED that any motion to confirm or disaffirm the final Report of the Special Discovery Master shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Dated: New York, New York  
October 6, 2020

ENTER:   
J.S.C.

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<sup>5</sup> If the parties wish to stipulate to hear and determine, they may submit a stipulation within 7 days after their initial meeting with the Special Discovery Master for the court to so order.