

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

MOSIS ROBLES,	)	CASE NO. SX-09-CV-503
	)	
Plaintiff,	)	
	)	ACTION FOR DAMAGES
v.	)	
	)	
BEAUTIFUL HAIR DESIGNS, PATRICIO	)	<u>JURY TRIAL DEMANDED</u>
FABIAN, JULIAN FABIAN, and JANE	)	
DOE HAIRDRESSER,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM

BEFORE THE COURT is Defendants' Motion for Reconsideration of Order Appointing Mediator, filed May 16, 2011. Also before the Court is Defendants' Objection to Plaintiff's Discovery Demands, filed August 27, 2010. For the reasons stated below, the Court will grant the motion for reconsideration. The Court will also construe the Objection as a motion to compel and deny it.

I. BACKGROUND

Plaintiff commenced this damages action for injuries allegedly sustained during a hairdressing appointment. (*See generally* Compl., filed Oct. 22, 2009.) Plaintiff claimed that a hair-relaxer burned her scalp, causing her hair fall out and then requiring a year of follow-up treatments. *Id.* ¶¶ 11-21. Plaintiff sued the hair salon, Defendant Beautiful Hair Designs, the salon owners, Defendant Patricio Fabian and Defendant Juliana Fabian, and a salon employee pseudonymously captioned as Defendant Jane Doe Hairdresser. *Id.* ¶¶ 4, 7. The salon and salon owners (hereinafter "Salon Defendants") appeared and filed a Verified Answer. (Ver. Answer, filed Nov. 17, 2009.) In their Answer, the Salon Defendants confirmed they owned

the salon, but denied that Defendant Jane Doe Hairdresser was their employee, claiming instead that Defendant Doe was self-employed. *Id.* ¶ 4,7.¹

The Court later entered a Scheduling Order governing discovery. (Sch. Order, entered May 19, 2010.) Pursuant to that Order, the parties had until October 29, 2010 to complete fact discovery. *Id.* at 1. In August 2010, Plaintiff served the Salon Defendants with initial discovery demands. (Not. of Serv. of Pl.'s Interrog. and Req. for Prod. of Docs. to Defs., filed Aug. 9, 2010.) The Salon Defendants objected,² arguing that Plaintiff had to first provide her initial disclosures before she could serve other discovery demands. (Defs. Obj. to Pl Disc. Demands, filed Aug. 27, 2010.) Plaintiff provided her initial disclosures and then filed a response in opposition to the Salon Defendants' Objection. (Pl. Not. of Serv. of Rule 26 Disclosures to Defs., filed Sept. 10, 2010; Pl. Resp. to Defs Obj. to Pl. Disc. Demand, filed Sept. 10, 2010.)

Three days before the deadline for completing fact discovery, Plaintiff and the Salon Defendants stipulated to extend all discovery deadlines, including the deadline for completing fact discovery. (Stip. Sch. Order, filed Oct. 26, 2010.) The Court later granted that stipulation, entered an Amended Scheduling Order, and also referred this matter to mediation. (Amend. Sch. Order, entered Mar. 24, 2011; Med. Refer. Order, entered Mar. 24, 2011.) Per the Mediation Referral Order, the parties had twenty days to select a mediator or notify the Court

¹ Immediately after appearing, the Salon Defendants moved for partial summary judgment as to Doe's employment status. They argued that by verifying their Answer, they had "established, as a matter of fact, that Jane Doe [wa]s not [their] employee." (Memo. in Supp. of Mot. for Partial S.J. 2, filed Nov. 24, 2009.) Plaintiff opposed summary judgment, arguing that "the issue of whether Jane Doe Hairdresser is an employee is itself a factual matter to be explored through the exchange of discovery, none of which ha[d] been undertaken at th[at] point." (Pl. Memo. in Supp. of Opp'n to Mot. for Partial S.J. 2, filed Dec. 16, 2009.) The Court denied the Salon Defendants' motion for summary judgment as Doe's employment status was still in dispute. (Order, entered May 19, 2010.) To date, Plaintiff has not identified Doe nor served her.

² The Salon Defendants captioned their filing as an "objection," not a motion. (See Defs Obj. to Pl. Disc. Demands 1.) As Plaintiff responded to the Salon Defendants' objection as a motion, the Court will so construe it.

of their inability to agree.³ (Med. Refer. Order 1.) If they could not reach agreement, the Court would “appoint a certified mediator, thereafter.” *Id.*

The twenty-day deadline expired on Wednesday, April 13, 2011. Counsel for Plaintiff contacted counsel for the Salon Defendants regarding mediator selection on April 13th and requested that counsel for the Salon Defendants “please send . . . suggested mediators within three (3) days . . .” (Pl. Selection of Med. at Ex. A (Letter from J. Stucki to M. Milligan (Apr. 13, 2011)), filed Apr. 26, 2011.) He did not identify his own suggestions, however. A week later, Plaintiff’s counsel sent a second letter, stating he would “file a notice with the court giving them our mediator preference” if counsel for the Salon Defendants did not propose a mediator. *Id.* at Ex. B (Letter from J. Stucki to M. Milligan (Apr. 20, 2011). When neither party exchanged names of prospective mediators, Plaintiff moved to have Felice Quigley, Esq. appointed as mediator. *Id.* The Court granted Plaintiff’s motion and entered an Order appointing Felice Quigley as mediator. (Order, entered May 11, 2011.) The same day the Court’s Order was entered, the Salon Defendants filed their response in opposition. (Opp’n to Pl. Req. for Appt. of Med., filed May 11, 2011.) The Salon Defendants then moved for reconsideration of that Order. Plaintiff filed a response in opposition to reconsideration. (Pl. Resp. to Defs’ Mot. for Reconsid. of Order Appt. Med. 1-2, filed May 24, 2011.) The Salon Defendants have not replied further.

II. DISCOVERY AND INITIAL DISCLOSURES

The Salon Defendants filed an Objection to Plaintiff’s discovery demands because Plaintiff served those demands before providing her initial disclosures. (*See generally* Defs’

³ The Mediation Referral Order states “[w]ithin twenty (20) days after the date of this Order . . .” (Med. Refer. Order 1, entered Mar. 24, 2011.) That was in error as written orders of the court take effect upon their entry by the Clerk’s Office. Therefore, the starting date here was March 24th, the date of entry, and not March 22nd, the date the Order was signed. *Id.* at 2.

Obj. to Pl Disc. Demands.⁴) In opposition, Plaintiff “pray[ed] that Defendants’ Objection to Plaintiff’s Discovery Demands be denied as moot,” as she had provided her initial disclosures. (Pl. Resp. to Defs’ Obj. to Pl.’s Disc. Demand 1.) Because no rule mandates that initial disclosures be provided first before other discovery methods can be used, the Court will deny the Salon Defendants’ Objection.

Discovery in the Superior Court is governed by the Federal Rules of Civil Procedure. Super. Ct. R. 39 (adopting Fed. R. Civ. P. 26-37 inclusive). Federal Rule of Civil Procedure 26(a) requires that each “party must, *without awaiting a discovery request*, provide to the other parties” their initial disclosures. Fed. R. Civ. P. 26(a)(1)(A).⁵ Initial disclosures provide the parties with: 1) the names and addresses of individuals likely to have discoverable information; 2) copies of documents or tangible things in that party’s possession that could support her claims or defenses, 3) a computation of damages; and 4) copies of any insurance agreements that might satisfy any judgment. Fed. R. Civ. P. 26(a)(1)(A)(i)-(iv). They must be served within fourteen days after the parties meet regarding discovery. Fed. R. Civ. P. 26(a)(1)(C). The parties must meet regarding discovery “as soon as practicable—and in any event *at least 21 days before . . . a scheduling order is due* under Rule 16(b).” Fed. R. Civ. P. 26(f)(1) (emphasis added). A scheduling order is due “within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.” Fed. R. Civ. P. 16(b)(2).⁶ If a defendant has been served with the complaint, the parties have

⁴ As the function of a document and not its caption controls, the Court will construe the Salon Defendants’ Objection as a motion to compel. *See, e.g., Smith v. Evans*, 853 F.2d 155 (3d Cir. 1988).

⁵ In general, the Federal Rules of Civil Procedure are made applicable in the Superior Court through Rule 7. Superior Court Rule 39, however, specific makes the discovery rules applicable to this Court. Super. Ct. R. 39.

⁶ The pretrial conference required by Federal Rule of Civil Procedure 16 is not automatically applicable in the Superior Court. *See* Super. Ct. R. 38. Instead, Rule 16’s applicability is contingent upon “the discretion of the presiding judge, the trial judge or on motion of any party.” *Id.* Mandating a pretrial conference for every civil

ninety-nine days to hold the Rule 26(f) conference, i.e., twenty-one days before the one-hundred-twenty day deadline. If a defendant has appeared, however, the parties have only sixty-nine days to hold the Rule 26(f) conference. Fourteen days after that conference, the parties must provide Rule 26(a) initial disclosures. Here, all parties failed to follow any of these deadlines.

The Salon Defendants filed their notice of appearance on November 17, 2009. (Not. of Appear., filed Nov. 17, 2009.) Once they appeared, the parties had sixty-nine days, until January 25, 2010, to hold the Rule 26(f) conference. The last possible date for both parties to provide initial disclosures was February 8, 2010, fourteen days after the last day for the Rule 26(f) conference. Neither met that deadline.⁷ Plaintiff's initial disclosures were not provided until September 2010. (Pl. Not. of Serv. of R. 26 Discl. to Def., filed Sept. 10, 2010.) Neither the Court's file nor the docket for this matter reflects whether, and if so when, the Salon Defendants provided their initial disclosures. The parties did not hold the Rule 26(f) conference until October 2010. (See Stip. Sch. Order 1, filed Oct. 26, 2010 ("COME NOW counsel for Plaintiff . . . and counsel for [Fabian] Defendants . . . and hereby agree to the following scheduling deadlines *in comport with Rule 26(f)* . . .") (emphasis added).) By then, the Court had already entered a scheduling order, which then required revision once the parties finally conferred.

matter filed in the Superior Court would consume precious and limited judicial resources. As Rule 26(f) explicitly incorporates Rule 16, however, the parties must hold their Rule 26(f) as required, following the timeline provided in Rule 16. See Fed. R. Civ. P. 16(b), 26(f).

⁷ The Court notes that pending before it was the Salon Defendants' partial summary judgment motion. As noted above, that motion challenged the Doe's status as an employee. Pendency of that motion, however, should not have prevented Plaintiff and the Salon Defendants from holding the Rule 26(f) conference regarding discovery between them.

Initial disclosures provide vital information fundamental for civil litigation to function efficiently. Without the names of persons likely to have discoverable information, for example, discovery would be severely curtailed. But nothing in the rules of civil procedure requires that a party provide her initial disclosures before she may utilize any other discovery method. In fact, Rule 26 clearly states the opposite: the “methods of discovery may be used *in any sequence*.” Fed. R. Civ. P. 26(d)(2)(A) (emphasis added). The only prerequisite is that “[a] party may not seek discovery from any source *before the parties have conferred* as required by Rule 26(f)” Fed. R. Civ. P. 26(d)(1). Once the Rule 26(f) conference occurs, initial disclosures must be provided at least fourteen days later. Any party could serve a demand for production of documents five days after the conference, for example, then serve interrogatories seven days later, and finally provide initial disclosures on the last day. No rule prohibits this scenario. Moreover, Rule 26(e) allows for parties needing to “supplement or correct its [initial] disclosure or response” upon learning new information. Fed. R. Civ. P. 26(e). “If a party fails to make a disclosure required by Rule 26(a), any other party may *move to compel disclosure* and for appropriate sanctions.” Fed. R. Civ. P. 37(a)(3)(A) (emphasis added). Parties who fail to provide initial disclosures may be precluded from “us[ing] that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

Here, the Salon Defendants were correct to object to Plaintiff’s discovery demands, but not because those demands came before initial disclosures. Plaintiff’s discovery demands were untimely because they preceded the Rule 26(f) conference. As noted, however, both parties failed to follow the timelines governing discovery. Both failed to timely hold their Rule 26(f)

conference. And both failed to timely provide initial disclosures. Accordingly, Defendant's Objection will be denied.

III. MOTION FOR RECONSIDERATION

The Salon Defendants move for reconsideration of the Order appointing Attorney Quigley as mediator. (*See generally* Mot. for Reconsid. of Order Appt. Med.) They assert that: 1) the Court granted Plaintiff's motion before the time to respond elapsed; 2) Plaintiff's motion did not qualify for ruling without a response; and 3) the Court should have selected a mediator at random. *Id.* at 1. The Salon Defendants also reiterated an objection raised in their Opposition to Plaintiff's motion for appointment of Attorney Quigley, namely that Attorney Quigley is not a proper mediator in this matter because of her involvement in an adversarial role opposite counsel for the Salon Defendants in another matter. *Id.* at 1-2. Plaintiff opposed reconsideration, explaining that her motion attempted to comply with the terms of the Mediation Referral Order. (Pl. Resp. to Defs' Mot. for Reconsid. of Order Appt. Med. 1-2.) Plaintiff also objected to Attorney Quigley being automatically ineligible to serve as mediator because of her involvement opposite counsel for the Salon Defendants in another matter. *Id.* at 2-3. Plaintiff did not address the Salon Defendants' other arguments, however.

"A party may file a motion asking the Court to reconsider its order or decision." LRCi 7.3 (applicable via Super. Ct. R. 7). The motion must be filed within fourteen days after entry of the order to be reconsidered. *Id.* Motions for reconsiderations cannot be used as "a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not." *Bostic v. AT & T of the V.I.*, 312 F. Supp. 2d 731, 733 (D.V.I. 2004). Reconsideration is

proper where there has been an intervening change in controlling law, new evidence becomes available, or there is a “need to correct clear error or prevent manifest injustice.” LRCi 7.3

The Salon Defendant moved for reconsideration five days after entry of the Court’s Order. Therefore, it was timely filed. They argue that the Court committed clear error when its “Order was entered May 9th and before the fourteen (14) day time period allowed for [the Salon] Defendants to file their Opposition to Plaintiff’s motion” (Mot. for Reconsid. of Order Appt. Med. 1.) Plaintiff filed its motion on April 26, 2011. According to the certificate of service, Plaintiff served counsel for the Salon Defendants by hand that same day. (Pl.’s Selection of Med. 2.) A response in opposition was due fourteen days later. LRCi 7.1(e)(1) (“A party shall file a response within fourteen (14) days after service of the motion.”). Fourteen days later was May 10, 2011. The Salon Defendants filed their Opposition on May 11, 2011: only one day late, but also the same day the Court’s Order was entered.⁸ Therefore, the Court did not rule before the Salon Defendants’ time to respond had expired and thus did not commit clear error. Accordingly, the Court need not address whether ruling before a response was due, pursuant to Local Rule 7.1(e)(3), was proper.

The Salon Defendants also argue that the Court committed clear error when “[i]nstead of selecting a mediation [sic] ‘by rotation, this Court simply appointed the mediator unilaterally selected by Plaintiff’” (Mot. for Reconsid. of Order Appt. Med. 1.) Instead, the Court was required to “‘appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order of the Court.’” *Id.* (quoting LRCi 3.2(f)(4)(B))

⁸ The Salon Defendants incorrectly stated that the Order was “entered May 9th.” (Mot. for Reconsid. of Order Appt. Med. 1.) The Order was dated May 9th, but the controlling date for court orders is the date of entry. Here, the Order was entered May 11th.

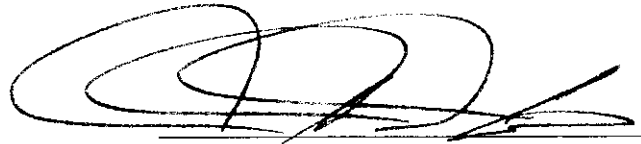
(emphasis in original). Although the Salon Defendants cite the incorrect rule,⁹ they quote the correct law.

Pursuant to Superior Court Rule 40, parties must stipulate to the selection of mediator within ten days from entry of a mediation referral order. Super. Ct. R. 40(e)(6)(A). “If the parties cannot agree . . . the plaintiff or petitioner shall so notify the Court within 10 days of the expiration of the period to agree . . . and the Court shall appoint a Mediator selected by rotation” Super. Ct. R. 40(e)(6)(B). Here, the Mediation Referral Order was entered March 24, 2011 and granted the parties twenty days to select a mediator. (Med. Refer. Order 1.) Thus, the parties had until April 13, 2011. If they could not reach agreement, Plaintiff had an additional ten days after expiration of the period to agree to inform the Court. Ten days from Wednesday, April 13, 2011 was Saturday, April 23, 2011. Plaintiff filed her motion on the next available business day, Tuesday, April 26, 2011, since the Court was closed that Monday for a holiday. Therefore, Plaintiff’s notice was timely filed. Proposing a mediator in that notice was not proper, however. The Salon Defendants correctly point out that where parties cannot reach agreement any mediator must be selected by the Court at random. Selection of Attorney Quigley was not at random and was clearly in error. Accordingly, the Salon Defendants’ motion for reconsideration will be granted. The Order appointing Attorney Quigley as mediator will be vacated. For that reason, the Court need not reach the Salon Defendants’ remaining argument regarding a concurrent conflict of interest as to Attorney Quigley specifically.

⁹ The Local Rules of Civil Procedure apply to “practice and procedure in the Superior Court . . . to the extent not inconsistent” with the Rules of the Superior Court. Super. Ct. R. 7. Rule 40 governs mediation in the Superior Court. Therefore, Local Rule 3.2—governing mediation in the District Court—is inapplicable here.

IV. CONCLUSION

Based on the discussion above, the Court will construe the Salon Defendants' Objection to Plaintiff's Discovery Demands as a motion and will deny the motion. The Court will grant the Salon Defendants' Motion for Reconsideration of Order Appointing Mediator. The Court's Order appointing Felice Quigley, Esq., as mediator, entered May 11, 2011, will be vacated and another mediator will be selected by rotation. The deadlines for mediation will also be extended. An appropriate order follows.

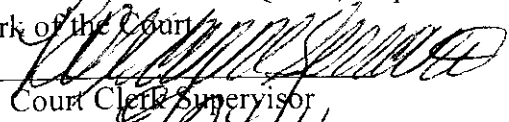


DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:

VENETIA H. VELAZQUEZ, Esq.

Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 8/30/11