

and for Other Relief, and the within motion on notice to Kaufman, Bern, Deutsch & Liebman, L.L.P., (Dennis Deutsch, appearing) attorneys for Slava Lerner, and the court having considered the papers submitted by the parties and the arguments of counsel, and good cause having been shown,

IT IS, on this _____ day of March 2010,

ORDERED THAT:

1. Michael R. DeLuca's Motion For Reconsideration of Entry of the Court's February 9, 2010 Order Granting Rule 4:11-1 Discovery and for Other Relief is hereby granted.

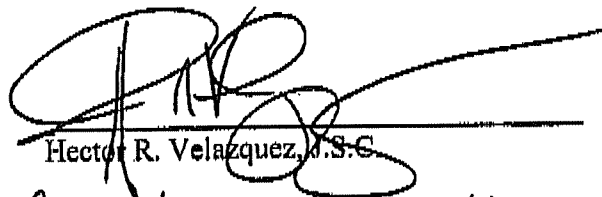
2. The court's February 9, 2010 Order granting Rule 4:11-1 discovery is hereby vacated in its entirety, and SLAVA Lerner's petition to perpetuate testimony and preserve evidence pursuant to R. 4:11-1 is denied w/o prejudice. ~~The following information is protected from discovery by Petitioner Slava Lerner:~~

~~any information identifying or leading to the identification of anonymous or pseudonymous authors who have posted or have provided statements which have been or are posted to the Web site web site known as "Galaxy Facts", located on the internet at URL:~~

~~http://www.galaxyfacts.com/~~

~~4. The court's February 9, 2010 Order granting Rule 4:11-1 discovery is hereby stayed pending Respondent Michael DeLuca's Motion for Leave to Appeal, provided, however, that the stay shall expire in the event that Respondent Michael DeLuca shall not file a Motion For Leave To Appeal or otherwise perfect his right to appeal within 20 days of his receipt of this order.~~

IT IS FURTHER ORDERED THAT a copy of this order shall be served on all counsel within _____ days of the date herein.


Hector R. Velazquez, J.S.C.

See attached findings and conclusions as well as Court's findings placed on the record on 3/19/10 @ 2:30 p.m.

R. 4:11-1 demands six discrete showings in the verified petition, the first of which is "that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought." R. 4:11-1(1). The rule must be strictly construed as limited to this purpose. Petitioner of Hall v. Hall, 147 N.J. 379, 385 (1997). In Hall, the Supreme Court iterated that the litigant must not only show that he has a cause of action, but that he is presently unable to commence the action because of some obstacle beyond his control. Hall, 147 N.J. at 385. Furthermore, the rule was not designated to assist the plaintiffs in framing a cause of action, but was intended for cases in which there existed a genuine risk that testimony would be lost or evidence destroyed before suit from being filed immediately. *Id.*; see Patrick E. Higginbotham, 6-27 Moor's Federal Practice- Civil 627.13 (2007) (explaining that "the rule insists on necessity and is not met by convenience or tactical preferences. There must be a true inability to bring any action at the time the petition is presented."); O'Hara v. Royal Coachment, 2008 N.J. Super. Unpub. LEXIS 2289 (finding that discovery rule were not designed to allow R. 4:11 applications merely because a lawyer fears a discovery end date would not be satisfied if he or she commences an action at an early date); Johnson v. Tighe, 365 N.J. Super. 237, 240 (App. Div. 2003) (reaffirming that the rule was not intended to authorize pre-suit discovery for the sole purpose of assisting a prospective plaintiff in acquiring the facts necessary to frame a complaint).

In the case at bar, Lerner proffers no reason beyond his control why he cannot plead a cause of action before conducting discovery. Instead, the requested discovery would merely assist the plaintiff frame a cause of action, specifically, identifying the individual defendants by name. However, the anonymity of the pretrial defendants does not justify the granting of the petition for pre-trial discovery pursuant to R. 4:11-1, where the petitioner can sue the message board posters as John Does and thereafter file a request for pre-service discovery subject to the Dendrite principles.