| **Kohan v Nehmadi** |
| --- |
| 2017 NY Slip Op 31202(U) |
| June 6, 2017 |
| Supreme Court, New York County |
| Docket Number: 104259/11 |
| Judge: Kelly A. O'Neill Levy |
|  |
|  |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----------X

SHAHRAM KOHAN and PAN AM PROPERTIES, LLC,

Plaintiffs,

-against-

BEHZAD NEHMADI, a/k/a BEN NEHMADI, BITA NEHMADI, SIMON MANAGEMENT CORP., REPUBLIC ASSET MANAGEMENT LLC and BRAVO REALTY CORP.,

Defendants.

----------X

**DECISION AND ORDER**

Index No.: 104259/11

Motion Seq. No. 003

**KELLY O'NEILL LEVY, J.S.C.:**

In a case in which neither plaintiffs nor defendants have been exemplary in the manner in which they have conducted discovery, plaintiffs seek an order striking defendants' answer, alleging that defendants have violated six court orders and spoliated evidence. In the alternative, plaintiffs, pursuant to CPLR 3124, seek an order compelling defendants to: (1) produce documents and electronically stored information (ESI), and pay a $100 sanction for each day that these documents are not provided; (2) allow for the inspection of a computer tower allegedly damaged in an office sprinkler incident; (3) produce or allow to be inspected "a copy of Defendants' RAISH computer software program"; (4) provide another search affidavit; (5) produce, in New York, defendant Behzad Nehmadi (Nehmadi) for a continued deposition; and (6) reimburse plaintiff for attorneys' fees and expenses "in connection with these discovery proceedings and this motion."

Defendants cross move for an order (1) declaring that plaintiffs have waived their right to a continued deposition of Nehmadi, (2) certifying that discovery is complete and the action is

ready for trial; and (3) awarding defendants attorneys' fees associated with making the cross motion.

**BACKGROUND**

This is a case about two friends who had a falling out.[1] Kohan and Nehmadi are both California residents. In 1998, they decided to purchase a building together in New York. The building is located at 628 West 151st Street and they bought it for $1,900,000 (complaint, ¶¶ 10-12). They formed an entity, plaintiff Pan Am Property (Pan Am), to own the building. Ten years after purchasing the building, Pan Am sold the property, apparently, for approximately $13 million (*see* defendants answer, ¶ 27). At the time of the sale, plaintiff, Kohan, owned 100% of Pan Am, thus 100% of the building.

The complaint makes somewhat vague accusations that Nehmadi, as well as his wife, Bita Nehmadi, and his various management companies have bilked Kohan out of money through their management of the building. The allegations are necessarily vague as Kohan was a passive owner, which he attributes, in part, to an unnamed illness (complaint, ¶ 16). In any event, Kohan suspects and alleges that Nehmadi charged him for unnecessary repairs and enriched himself at Kohan's expense through serial refinancings of the building (complaint, ¶¶ 23-35).

Nehmadi and Pan Am filed the complaint in April 2011. The first cause of action is for an accounting. Plaintiffs seek a complete and accurate accounting of "all sums received from loans, re-financing, rent and other sources and all expenditures" made on plaintiffs' behalf (*id.*,

[1] In another matter between these parties, the First Department noted that "[b]oth plaintiff and defendant Behzad Nehmadi acknowledge that they were friends" (*Kohan v Nehmadi*, 130 AD3d 429). Eventually this other case, which involved another property and a claim of a constructive trust, was dismissed on a directed verdict by Judge Oing after plaintiff put on his case at trial (*see* Trial Transcript, *Kohan v Nehmadi*, Index No. 104185/11, at 685-689).

¶¶ 36-39). The second cause of action is for an injunction, directing defendants to submit, "and relinquish," a full and complete inventory of all records belonging to Pan Am; and to provide a full accounting of all funds "maintained by defendants" on behalf of Pan Am (*id.*, ¶¶ 40-42). In the third cause of action, plaintiffs allege that defendants are liable for $5,000,000 in damages for both breach of contract and negligence (*id.*, ¶¶ 43-45).

Initially, Judge Singh oversaw the discovery process in this case. Over six years and two judges, that process, as plaintiffs' counsel put it, has followed a "tortuous" path (Castro aff, ¶ 5). While plaintiffs seek dismissal of defendants' answer, plaintiffs are the only party in this matter to have been issued conditional language for failure to conduct discovery. On April 4, 2012, Judge Singh ordered that "[p]laintiffs to respond to outstanding demands by April 18, 2012. In the event that [plaintiffs] fail to serve responses by April 18, 2012, [plaintiffs] will be precluded from submitting evidence and the complaint will be stricken." No similar language has been directed at defendants by Judge Singh or this court.

**Six Allegedly-Violated Orders**

As plaintiffs claim that defendants have flouted six discovery orders, a close retrospective of the path of discovery is necessary. All six of these orders were issued by the prior court.

Judge Singh issued the first allegedly-violated order on June 20, 2012. In it, he directed defendants "to respond to plaintiffs' discovery demands within 45 days of this order." Plaintiffs acknowledge that, on August 3, 2012, defendants timely responded to this directive with an 11-page response.

Plaintiffs claim that the response violated Judge Singh's order as defendants turned over no documents and provided eight general objections that plaintiffs characterize as pretextual boilerplate. Plaintiffs assert that these objections, including those on overbreadth and

confidentiality grounds, were made in bad faith. An example of the bad faith, plaintiffs allege, is that defendants eventually turned over reams of documents in this case without a confidentiality order, despite stating, in the August 2012 response, that they would not turn over documents until a confidentiality order was in place. Here, the court does not need to evaluate the quality of defendants' objections to state simply that defendants complied with Judge Singh's order by responding to plaintiffs' demands within the time provided.

The second alleged violation of a court order relates to a stipulation between the parties that Judge Singh so-ordered on November 7, 2012. The stipulation sought to resolve disputes arising from plaintiffs' dissatisfaction with defendants' responses. In it, defendants agreed "to produce the documents demanded by plaintiffs on or before November 30, 2012." The parties also scheduled an additional discovery conference for January 9, 2013 and agreed that if "defendants claim any documents are confidential, those documents are to be listed or redacted and if no agreement is reached between the parties those documents shall be reviewed by the Court on January 9, 2013 for in camera review."

The parties then entered into a dispute as to the meaning of "produce," which came to a head on November 29, 2012, the day before defendants were to produce the documents. Plaintiffs, without attaching any preceding messages, submit two emails exchanged between counsel before the deadline. Defendants' counsel wrote to plaintiffs' counsel to express their desire to produce the documents via an in-site inspection rather than to plaintiffs' counsel's office as had been done with a previous production. Plaintiffs' counsel, later on November 29, 2012, wrote back to highlight plaintiffs' differing interpretation of "produce," stating that "produce" obviously does not mean produce for inspection, and to raise the prospect of motion practice.

Without entering the fray as to the meaning of "produce," the court observes that, on January 9, 2012, neither Judge Singh, nor the parties, made any note on the so-ordered stipulation issued that day stating that defendants had violated the prior order. The court defers to Judge Singh, as he was overseeing discovery at that time. As the prior court did not see a violation at the time, the court declines to conceive of one now: defendants did not violate the so-ordered stipulation of November 7, 2012.

The January 9, 2011 stipulation states: "1. Plaintiff shall review the documents to be produced by [d]efendants in response to the [p]laintiffs' document demand on or before January 30, 2013. 2. Defendants represent that no documents have been redacted on confidentiality grounds." The stipulation also sets an on-or-before date for all depositions in March 2013. Plaintiffs' counsel agreed to review the documents at the office of defendants' counsel. However, when he did the review, plaintiffs' counsel found what he describes as a "dump" of seven banker's boxes of non-itemized documents, "most of which were waterlogged and stuck together to the point where they could not be separated without being damaged further" (Castro aff, ¶ 26).

According to defendants, these documents became waterlogged while they were being stored in a basement during Superstorm Sandy. When the parties next appeared before Judge Singh on March 27, 2013, it was to resolve, by stipulation, a motion made by plaintiffs to quash subpoenas served on two nonparty witnesses. The so-ordered stipulation provided that the nonparties were to provide affidavits confirming that they were not in possession of certain documents sought by defendants, and directed plaintiffs "to serve a supplemental document demand within 15 days." Plaintiffs claim that this is the third court order to be violated by defendants, yet defendants are not directed to do anything by the stipulation.

At the next conference, held on July 10, 2013, Judge Singh issued a compliance conference order, stating that "the Court's Case Management Order of 3/27, 2013 has not been complied with in that [d]efendants' document production + all EBTs remain outstanding." The compliance language is from the pre-printed section of a conference order form and in this case it appears that, by filling in the blank provided with a reference to defendants' document production, the court simply intended to indicate what discovery remained outstanding. That is, the March 27, 2013 order did not specifically direct defendants to do anything and, thus, defendants could not have violated it.

In any event, Judge Singh, in the July 10, 2013 order, directed defendants "to have documents reproduced by mutually-acceptable 3rd party vendor" and to "provide itemized responses to [plaintiffs] by August 30, 2013." The court also set a new outside date for depositions and directed the parties to "discuss and agree to allocation of document reproduction costs."

Defendants violated this order by failing to provide an itemized response to plaintiffs' document demands by August 30, 2013. While by plaintiffs' count this as the fourth court order violated by defendants, it is actually the first. When the parties appeared in Judge Singh's part on October 2, 2013, defendants apparently attributed their failure to comply with the effects of Hurricane Sandy, and the parties entered into the following so-ordered stipulation:

> (1) Defendants shall within 30 days of the date of this Order: (a) organize the [d]efendants documents responsive to the outstanding request and all indicate which documents are responsive to which demand; (b) [d]efendants contend that [their] documents that would be responsive to [plaintiffs'] demand have been severely damaged by water. Accordingly, to the extent that [d]efendants in good faith believe that any or all documents can neither be produced or photocopied, [d]efendants shall so advise [p]laintiffs' counsel in writing; (c) [d]efendants shall advise [plaintiffs] in writing whether or not any documents responsive to [plaintiffs'] demands are contained in electronic form. If so, they will be

> organized and produced; (d) to the extent that the physical condition of the documents prevent the production of same, the parties reserve all rights as a result thereof; (d) [d]epositions of parties to be completed on or before December 23, 2013.

The first day of defendant Nehmadi's deposition was April 8, 2014.[2] At the deposition, defendants' counsel acknowledged that they did not organize the documents they produced by request, as required by the October 2, 2013 so-ordered stipulation:

> "And I do not believe, based upon what I have been advised, when I looked at the documents, and as you acknowledge, that I could have organized them because they were so waterlogged that they stuck together and to try to pull them apart would have destroyed them, but, Mr. Castro, if you would like, I acknowledge that I did not comply with the letter of the stipulation"

(Nehmadi April 8, 2014 tr, at 17).

Plaintiffs count this as defendants' fifth violation of a court order while the court counts it as the second. However, the court apparently did not find defendants' conduct to be contumacious as no conditional language was put into a discovery order when the parties next appeared on May 21, 2014. At that appearance, defendants made a document production, apparently flowing from Nehmadi's answers to questions about electronically-stored documents (*see* Nehmadi April 8, 2014 tr, at 34-36).

The May 21, 2014 stipulation provided: "1. Defendants represent that the documents produced to Plaintiff today in Court represent all documents in Defendants possession or control that are responsive to Plaintiff's discovery demands. 2. Defendant Ben Nehmadi's continued deposition shall be completed on before July 15, 2014 . . . " Nehmadi's continued deposition was instead held on September 18, 2014. There, Nehmadi again testified as to possibly relevant

[2] Apparently, defendants made production of electronically stored documents on the day before the deposition, on April 7, 2014 (*see* Castro June 17, 2016 email, stating that Nehmadi "was obviously able to print several ledgers in his supplemental production on April 7, 2014 . . . ").

documents stored in electronic form (*see* Nehmadi's September 18, 2014 tr at 89-90). Defendants' counsel also stated that the document production made on May 21, 2014 consisted of the hurricane-damaged documents that retained enough physical integrity to be copied (*id.* at 37-38).

The parties appeared in Judge Singh's part again on November 5, 2014. Defendants apparently advised the court that they were taking steps to salvage the documents that had not retained enough physical integrity to withstand the copying process. The court so-ordered the following stipulation: "(1) Defendant is in the process of salvaging documents that were damaged by Hurricane Sandy. Defendant will provide legible salvaged documents by or before December 2, 2014; (2) Upon receipt, [plaintiffs] reserve the right to recall [Nehmadi] for a continued deposition relating to the production." Again, the court did not issue any conditional language that would indicate to defendants that their conduct in discovery was nearing sanctionable contumaciousness.

On December 30, 2014, defendants produced more than 11,000 documents. Plaintiffs count this as the sixth violated order, as the defendants did not produce the documents by December 2, 2014 as provided for by the stipulation. The court counts this as the third order that defendants have not fully complied with, although the violation here is relatively minor.

**The Much-Ordered Third Day of Nehmadi's Deposition and Additional Discovery Sought**

The parties again appeared in Judge Singh's part on February 18, 2015. On that date, the court issued a discovery order that listed Nehmadi's continued deposition as outstanding, and ordered that the deposition be held on or before May 15, 2015. Between then and the parties' next court appearance on July 22, 2015, Judge Singh was appointed to the Commercial Division, and this court inherited oversight of these issues.

On July 22, 2015, the parties, appearing for the first time in this part, again entered into a so-ordered stipulation in which the only outstanding discovery listed was Nehmadi's continued deposition. Under the so-ordered stipulation issued on that date, the parties were to hold the deposition by November 13, 2015. Defendants contend that plaintiffs were unresponsive to their attempts to schedule the deposition.

The parties appeared for another conference on January 20, 2016. At that time, plaintiffs complained that the deposition could not be held until defendants' last production, which had been made in December 2014, was organized as to demand. Despite the lag in time and plaintiffs' failure to communicate this complaint directly to defendants prior to the conference, the court – in an effort to be consistent with the prior court's orders and to insure compliance with those orders – ordered defendants "to provide a letter to [plaintiffs] indicating which documents in the last production correspond to which of plaintiffs' document demands." The court noted that it was ordering this over defendants' objection and gave plaintiffs "10 days to object to [defendants'] letter or plaintiffs waive objections to the letter."

Defendants provided the letter to plaintiffs on March 9, 2016 and plaintiffs made no objection to it within the ten days provided by the order. The court, in the January 20, 2016 order, also set a date certain for Nehmadi's continued deposition: March 23, 2016. However, once again, Nehmadi's continued deposition was not conducted.

The parties appeared for another court conference on April 6, 2016. They stipulated, once again, to conduct the continued deposition. This time it was to be done "by or before June 30, 2016." Years after receiving defendants' last production, and well after the ten-day period plaintiffs had to object to the way in which the documents were organized as to demands, plaintiffs' counsel, on April 29, 2016, emailed the following message to defendants' counsel:

> "...our review of the documents that you have produced, including the second set of documents, do not contain a General Ledger for the years 1988 (inception) through the date of sale of the premises. Also missing is the cash receipts books for 2007. If I have missed these records, please refer me to the bates stamps that refer to those documents. As for the General Ledger, I am advised that since other management records such as rent receipt, etc. were produced, the program that was used for those documents could also produce a General Ledger for the years at issue. I would like to avoid any issue with regard to your clients' document production so that when we take Mr. Nehmadi's continued deposition, we can conclude it without being told that additional documents are discovered after the deposition has been completed. Accordingly, I am requesting that you confirm in writing whether the General Ledgers for the period as of the purchase of the premises to the sale of the premises are available to your client for production and whether or not the cash receipt books for 2007 are available to your client. If any of those documents are available for production, produce them immediately so we can complete Mr. Nehmadi's deposition."

Despite this email, when informed that Nehmadi was available to be deposed on June 23, 2016, plaintiffs' counsel wrote back, on June 3, 2016, "confirming that Mr. Nehmadi's continued deposition will proceed on June 23, 2016." Less than a week before the deposition was to be held, however, plaintiffs' counsel wrote back to defendants' counsel stating that he would not take Nehmadi's deposition until he was provided with documents responsive to his April 2016 email, "or you provide us with an affidavit from your client confirming that a thorough search has been made" (Claude Castro's June 17, 2016 email to Evan Schieber).

Plaintiffs also demanded additional items not mentioned in the April 2016 email, arguing that while Nehmadi "was able to print several ledgers in his supplemental production on April 7, 2014," he nevertheless "did not produce . . . documents that are part of the standard management software program . . ."[3] After listing the documents sought, plaintiffs informed defendants that they did not want to take the deposition without the documents or a search affidavit.

---

[3] While plaintiffs should have made such objections to the April 7, 2014 supplemental production closer to April 2014, and not less than a week before the third day of Nehmadi's

After Nehmadi's deposition did not take place June 23, 2016, the parties appeared before the court on August 3, 2016. The court issued an order resolving the issues that had percolated up between the parties. As to the April and June emails, the court ordered the defendants to provide an affidavit, by September 15, 2016, as to the scope of their search for documents referenced in plaintiffs' June and April 2016 emails. The affidavit was also to state that they have provided all documents they believe "are responsive to all demands, subject to their objections."

As Nehmadi had already come to New York from California to prepare for the June 2016 deposition before it was cancelled by plaintiffs, the court also ordered that the continued deposition of Nehmadi was to be held, via videoconference, by November 15, 2016 (August 3, 2016 order, ¶ 2). On September 22, 2016, defendants provided a ten-page search affidavit from Nehmadi. However, things were further complicated on the day before, when plaintiffs issued a third formal discovery demand to defendants. Defendants characterize the timing of this demand as inexplicable.

Defendants, despite finding these demands untimely and overbroad, nevertheless produced 17,000 pages of documents in response on October 19, 2016, in order, they state in their papers, to avoid further disputes and to bring discovery to a close. Neither of the goals was achieved as plaintiffs cancelled the November 15, 2016 deposition, the day before it was to be held, alleging that Nehmadi's affidavit was inadequate and that they needed more time to review the October production.

---

deposition, it appears that the delay, among other things, is related to advisements made by plaintiffs' accounting expert.

In response to the April 2016 email – which sought general ledgers from the purchase of the building in 1998 through the sale in 2008, as well as the cash receipt book for 2007 – Nehmadi, in his affidavit, stated that:

> "[t]hese documents were initially maintained and preserved in the basement of 630 First Avenue, New York, New York until the occurrence of Hurricane Sandy, when they were damaged and destroyed . . . Although, during the relevant time period that Plaintiff owned the Building, data was also maintained on a computer system located at 630 First Avenue, New York, New York, those computer files can no longer be accessed. Defendants' computer system operated on a now discontinued version of RAISH, which is an antiquated DOS tenant management system that is incompatible with more modern computer systems. As such, files can no longer be opened or retrieved. Complicating the matter is the fact that the software data was installed and backed-up in [a] Windows XP tower at 630 First Avenue, New York, New York. The PC tower was damaged irretrievably on February 15, 2016, when a sprinkler burst and flooded the office. The hard drive is therefore damaged and no further data can be removed from it"

(Nehmadi aff, ¶¶ 8-9).

As to the June 2016 email, Nehmadi addressed each of the items requested, and referred to specific bates stamp numbers where the items were produced already, to the extent within defendants' possession and control (*id.*, ¶¶ 9-20). Specifically, these items include monthly and annual financial statements/management reports (*id.*, ¶ 10), monthly and annual detail ledgers (*id.*, ¶ 11), monthly rent rolls (*id.*, ¶ 12), annual detailed depreciation schedules (*id.*, ¶ 13), documentation for write-offs for repair and maintenance expenses (*id.*, ¶ 14), management agreements (*id.*, ¶ 15), documentation as to payroll (*id.*, ¶ 16), management fees, construction fees, insurance and rental commissions (*id.*, ¶ 17), consulting fee (*id.*, ¶ 18), documentation as to interest payments (*id.*, ¶ 19), and documentation relating to payments made to contractors (*id.*, ¶ 20).

## DISCUSSION

### I. CPLR 3126 and Plaintiffs' Application to Strike the Answer

CPLR 3126, entitled "Penalties for refusal to comply with order or to disclose," provides, in relevant part, that if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed," then the court may:

> "make such orders with regard to the failure or refusal as are just, among them: 1. an order that issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part therof, or rendering a judgment by default against the disobedient party."

The Court of Appeals has repeatedly stressed the importance of party compliance with court orders issued for the purpose of overseeing discovery. In *CDR Créances S.A.S. v Cohen*, for example, the Court warned that: "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (23 NY3d 307, 318 [2014] [internal quotation marks omitted]). "Compliance," the Court added requires "a timely response and one that evinces a good-faith effort to address the requests meaningfully" and that "[a] trial court has discretion to strike pleadings under CPLR 3126 when a party's repeated noncompliance is "dilatory, evasive, obstructive and ultimately contumacious" (*id.* [internal quotation marks and citation omitted]).

The Court of Appeals has also noted that, "[a]part from CPLR 3126, a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice (*id.*, *citing*

*Anderson v Dunn*, 19 US 204, 227 [1821]). When a party seeks the third remedy provided by CPLR 3126, striking of the answer, the court's interest in inspiring compliance with its orders and preserving the integrity of the judicial process must be balanced with a countervailing interest in deciding cases on their merits (*see Cappel v RKO Stanley Warner Theaters*, 61 AD2d 936, 937 [1st Dept 1978] ["it is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible").

In balancing those two interests here, the interest in determining the trial on the merits is stronger than any threat presented to the integrity of the system by the conduct of defendants during discovery. As the recital of the facts above should make clear, defendants have not violated six discovery orders, as is alleged.

Moreover, to the extent that defendants failed to comply with three discovery orders, the court that was overseeing discovery in this case at that time elected not to issue defendants any conditional language that would put them on notice that their conduct was treading near sanctionability. This court declines to retroactively substitute her own judgment for that of her esteemed colleague, especially where there appears to be little reason to do so.

Finally, it is the court's general policy not to issue sanctions under CPLR 3126 unless the offending party has been issued warning in the form of conditional language. This policy maintains a balance for protecting the integrity of court orders, while not subjecting parties to ambushes where part or all of the case will be decided not on the merits in the absence of warning shots from the court that provide an opportunity to parties to repair their conduct in discovery. Plaintiffs have also contributed significantly to the delays in this action.[4] It is simply

[4] For example, by raising, in April and June 2016 emails, alleged deficiencies to productions made in 2014.

not appropriate to strike the answer of defendants when plaintiffs are the only side that has been issued conditional language. As a result, the branch of plaintiffs' motion that seeks the striking of defendants' answer must be denied.

**II. Spoliation**

Plaintiffs seek the same remedy, the striking of defendants' answers, that they sought in the CPLR 3126 context because of defendants' alleged spoliation of evidence. Plaintiffs argue that, as "the litigation was commenced a full 18 months before Hurricane Sandy hit in late October 2012," defendants should have taken steps to safeguard all relevant documents (Castro aff, ¶ 17). Specifically, plaintiffs argue that "all relevant documents should have been safeguarded, copied, scanned, or otherwise preserved" (*id.*, ¶ 18).

Plaintiffs seek the ultimate sanction for two separate categories of allegedly spoliated documents. First, hard-copy documents destroyed by Hurricane Sandy in 2012. Second, the electronically-stored documents allegedly destroyed by the burst sprinkler incident of February 2016.

Initially, however, the court must sketch the landscape on spoliation law, as plaintiffs are asking for level of preservation that has not been called for by previous cases -- that is, that all relevant documents be copied or scanned to protect against acts of nature, like Hurricane Sandy, and mishaps, like the sprinkler incident. Plaintiffs cite to *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, which imported the federal court standard set out by Judge Shira Scheindlin, formerly of the Southern District of New York, in a groundbreaking series of rulings in *Zubulake v UBS Warburg, LLC* (93 AD3d 33 [1st Dept 2012], citing Zubulake, 220 FRD 212 [SD NY 2003]). However, *Zubulake* and *Voom* dealt specifically with the steps parties must take to

prevent the automatic destruction of electronically-stored information. That is, information that will be predictably destroyed.

More generally, the Court of Appeals recently reiterated the general standard for spoliation sanctions:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense

(*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 [2015]).

*Pegasus Aviation*, like *Voom* and *Zubulake*, both of which the Court of Appeals cite extensively, concerned the obligation to place a litigation hold. Such a hold bars the automatic deletion of documents "[o]nce a party reasonably anticipates litigation" (*Voom*, 93 AD3d at 41 [internal quotation marks and citation omitted]). In *Voom*, the First Department explained why it was extending spoliation jurisprudence, which traditionally embraced only affirmative acts of destruction, to place an obligation to avoid the automatic deletion of electronic information:

> "In the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process. Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data"[5]

[5] The sophistication required of a litigation hold appears to depend, at least in part, on the sophistication of the party (*see Voom*, 93 AD3d at 42 ["(i)n certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold,

(*id.* [internal quotation marks and citation omitted]).

In sum, the cases relied on by plaintiffs refer to a litigation hold that prevents parties from automatically deleting electronic information. Such deletion, even when it is merely negligent, and without any intent to destroy documents, is sanctionable (*id.* at 45). None of the cases cited by plaintiffs or reviewed by the court suggest that parties may be sanctioned for spoliation for failure to copy and scan documents to prevent against future acts of nature and accidents (*see, e.g., Chan v Cheung*, 138 AD3d 484 [1st Dept 2016] [holding that striking the answer was appropriate after defendants destroyed highly relevant emails after being put on notice of litigation]).

**A. The Hurricane Sandy Documents**

In looking at the issue of the documents that were destroyed as a result of Hurricane Sandy, the court notes that there is no caselaw that suggests that parties have an obligation to copy or scan hard copy documents to prevent their destruction. While plaintiffs are understandably frustrated that these documents were not turned over before Hurricane Sandy hit, the court has determined that any delays by defendants did not rise to a sanctionable level under CPLR 3126. Plaintiffs are not entitled to the striking of defendants answer as a spoliation sanction for the destruction of these documents as defendants did not have an obligation to copy or scan the lost documents to prevent against an act of nature.

---

to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel]).

**B. The Sprinkler Incident Documents**

One thing that is clear, through the moving papers and oral arguments, is that there is a trust deficit between the parties. That is, plaintiffs simply do not seem to believe Nehmadi's account of the sprinkler incident. [6]

In any event, the documents allegedly lost during the sprinkler incident of February 2016 warrant a closer look. Here, electronic documents that are the subject of *Zubulake*, *Voom* and their progeny are at issue. Moreover, it appears that defendants failed to issue any kind of document hold. However, that omission is less insidious than it sounds because it appears that there was no mechanism by which defendants' documents were being automatically destroyed. However, some documents were apparently lost in the alleged sprinkler malfunction of February 2016.

As plaintiffs seek an examination of the allegedly damaged computer tower, the branch of their motion seeking spoliation sanctions for documents allegedly destroyed by the sprinkler incident is also premature. That is, the universe of destroyed documents remains uncertain and an examination of the tower by plaintiffs' computer expert might shed more light on this issue. For all of these reasons, plaintiffs' application for an order striking defendants' answer as a spoliation sanction for the destruction of electronic documents caused by the sprinkler incident of February 2016 must be denied (*see Positive Influence Fashions, Inc. v Seneca Ins. Co.*, 43 AD3d 796, 797 [1st Dept 2007] [holding, where plaintiff had disposed of documents at the time defendant was seeking them, that "regardless of whether some lesser sanction for spoliation of

[6] It is unclear whether plaintiffs believe that the sprinkler incident was intentional or nonexistent.

evidence might prove warranted in the future . . . the extreme sanction of dismissal of the complaint is not warranted"]).

**III. Other Remedies: Additional Discovery and Nehmadi's Continued Deposition**

The court's interest in matters being tried on their merits serves not only as a shield which protects defendants from having their answer stricken absent a strong showing under CPLR 3126, but also as a sword that will allow plaintiffs to continue seeking discovery at a time when defendants implore the court to order both sides to put their discovery weapons down. While plaintiffs should not, under these circumstances, be able to attain liability over defendants via CPLR 3126, nor should plaintiffs be denied discovery that would be useful to making their case.

This court, in all matters of discovery, is guided by the general commands of CPLR 3101 (a), which governs the scope of discovery. Interpreting the statute, the Court of Appeals has held:

> "3101 (a) entitles parties to "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." What is "material and necessary" is left to the sound discretion of the lower courts and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason"

(*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000] [internal quotation marks and citation omitted]).

**A. Inspection of Computer Tower**

The court is sympathetic to defendants' arguments that discovery must, at some point, end. Moreover, the court also understands and shares defendants' frustration with plaintiffs' failure to seek additional documentary discovery between defendants' productions in 2014 and

plaintiffs' emails in April and June 2016; and with plaintiffs' history of cancelling scheduled depositions soon before they were to go. However, the court finds that it would be useful and reasonable that defendants be compelled to make their allegedly damaged computer tower available for inspection by plaintiffs' computer forensics expert.

This inspection holds a reasonable possibility of providing plaintiffs with relevant documents concerning the management of the subject building. Defendants are also to make available a copy of their outdated RAISH software program so that plaintiffs' computer forensics expert may examine it at the inspection. As for timing, the inspection of the computer tower and software program is to take place within 45 days of the filing of this order and the parties are prohibited from adjourning this deadline without court approval. If plaintiffs fail to conduct the inspection within the time allotted, they will have waived their right to conduct the inspection.

**B. Nehmadi's Continued Deposition**

Plaintiffs are to take Nehmadi's continued deposition within 45 days of the examination of the computer tower; if plaintiffs fail to conduct the inspection of the computer tower within 45 days of the filing of this order, plaintiffs have 90 days from the filing of this order to conduct Nehmadi's continued deposition. The parties are prohibited from adjourning these dates without court approval. If plaintiffs fail to conduct Nehmadi's deposition within this time allotted, they will have waived their right to do so. This deposition is to be conducted in person, in New York, as Nehmadi maintains an office in New York, and travelling from California would not present him with a significant hardship.

**C. Search Affidavit**

As for plaintiffs' desire for a new search affidavit, plaintiffs can probe Nehmadi at his deposition on any areas they believe were inadequately addressed in his search affidavit.

**D. Other Relief Sought**

Given the history of discovery in this case, plaintiffs are not entitled to attorneys' fees or other monetary sanctions sought. Nor, given the same history, are defendants entitled to attorneys' fees.

To the extent that plaintiffs seek to compel defendants to turn over additional documents outside of any that may be discovered at the computer tower examination, plaintiffs are already in possession of a search affidavit that states that defendants have turned over all relevant, non-privileged documents within their control. Thus, no order with respect to further document production is appropriate.

**CONCLUSION**

Accordingly, it is

ORDERED that plaintiffs' motion for sanctions and additional discovery is resolved as follows:

- the branch of the motion seeking the striking of defendants' answer is denied;
- the branch seeking an inspection of defendants' computer tower is granted; defendants are to make the computer tower available to plaintiffs for an inspection to be held within 45 days of the filing of this order; the parties are prohibited from adjourning the deadline for holding this without court approval and plaintiffs will have waived their right to the inspection if they do not conduct it within the time allotted;
- the branch seeking an inspection of defendants' RAISH software is granted and plaintiffs' expert may examine the software at the inspection detailed above;

- the branch of the motion seeking additional document production outside of the computer inspection is denied;
- the branch seeking a new search affidavit is denied;
- the branch seeking the continued deposition of defendant Behzad Nehmadi is granted and the deposition is to take place 45 days from the date of the inspection or, in any event, 90 days from the filing of this order; the parties are prohibited from adjourning this deadline without court approval and plaintiffs will have waived their rights to take the deposition if they fail to conduct it within the time allotted;
- the branch seeking attorneys' fees and monetary damages is denied;

and it is further

ORDERED that defendants' cross motion for an order declaring that plaintiffs have waived their right to a continued deposition of Behzad Nehmadi, certifying that discovery is complete, and awarding them attorneys' fees is denied; and it is further

ORDERED that plaintiffs' deadline for filing the note of issue is extended to August 18, 2017; this date is final and will not be adjourned barring extraordinary circumstances.

This constitutes the decision and order of the court.

Dated: June 6, 2017

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY, J.S.C.

**HON. KELLY O'NEILL LEVY**
**J.S.C.**