SHORT FORM ORDER **INDEX NO.: 8097-2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motions Submit Date: 03/29/18
Motion Conf Date: 02/14/18
Motion Seq #: 001 - Mot D
Motion Seq #: 003 - MD; RTC

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DAVID FRIEDMAN,

Plaintiff,

-against-

LOUIS NACCARATO

Defendant.

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PLAINTIFF - *Pro Se*:
DAVID FRIEDMAN
305 Knickerbocker Avenue, Suite 4
Bohemia, New York 11716

DEFENDANT'S COUNSEL:
Long Tuminello LLP
120 4th Avenue
Bay Shore, New York 11706

The Court considered the following regarding the parties' motions:

1. Notice of Motion & Affirmation in Support dated April 12, 2017 and supporting papers;
2. Notice of Motion & Affirmation in Support dated February 14, 2018 and supporting papers, it is

ORDERED that plaintiff's motion to strike defendants' answer pursuant to CPLR 3126 is **denied** as follows; and it is

ORDERED that pursuant to CPLR 3124 defendant is hereby directed to conduct a diligent and thorough search of its papers, records and file and to produce any and all outstanding discovery responsive to plaintiff's demands **no later than July 31, 2018;** and it is further

ORDERED that the parties are to have produced witnesses for examinations before trial **on or before September 12, 2018**, and further that no adjournments of these proceedings shall be had **absent application on good cause to the Court;** and it is further

ORDERED that the parties' previous discovery compliance conference scheduled for September 12, 2018 is hereby adjourned to December 12, 2018; and it is further

ORDERED that defendant's motion to dismiss plaintiff's complaint for neglect to prosecute pursuant to CPLR 3126 is also **denied** as follows; and it is

ORDERED that defendant serve a copy of this decision and order with notice of entry on plaintiff *pro se* personally within 30 days of the entry of this order, and further to file proof of service with the Supreme Court Clerk.

Plaintiff David Friedman brought this action seeking the imposition of a constructive trust against defendant Louis Naccarato filing a summons and complaint on May 6, 2015. By his complaint, Friedman alleges that a confidential or fiduciary relationship was created or arose between the parties based on plaintiff's engagement to defendant's daughter Christine Naccarato for over 10 years. Plaintiff further alleges that defendant is the grandfather of plaintiff's two children: Jack and Lucas Friedman. Friedman claims that he and Naccarato agreed that real property located at 695 Old Nichols Road, Ronkonkoma, New York 11779 would be purchased and titled in defendant's name, provided that defendant agreed to provide in his and his wife's wills that the property would be inherited by the Friedman's children on their death. The property was acquired on September 14, 2007 for $298,700, deeded in defendant's name. At time of the property's purchase, $283,765 was mortgaged. Plaintiff agreed at time of purchase to assume and pay the monthly mortgage costs of $950.00 from October 2007 through October 2011, $350.00 a month from November 2011 through March 2014, and $375.00 a month from April 2014 through February 2015. Mortgage payments were made from a joint bank account held between plaintiff and defendant. The remaining balance of the monthly mortgage was paid by defendant. Plaintiff further states that he made improvements to the property incurring $ 3,500 to renovate the backyard including laying down sod, erecting fencing and installing sprinklers.

Plaintiff ended his engagement and relationship with defendant's daughter in or around December 2014. Claiming detrimental reliance, plaintiff claims that he paid $7,467.50 towards the down payment of the property's purchase as well as $4,500 in closing costs, $42,711 in mortgage payments and $10,000 in improvements totaling $64,678.50. Based upon defendant's failure to proffer a will in accord with plaintiff's understanding of their agreement, plaintiff seeks recovery to prevent defendant's unjust enrichment and imposition of a constructive trust in that amount.

Defendant joined issue serving an answer with counterclaims on July 6, 2015. Plaintiff served a reply to the counterclaims on July 21, 2015. A preliminary conference was held, after adjournment, on November 20, 2015, resulting in a Preliminary Conference Order of the same date. Plaintiff states that he served discovery demands on defendant on December 16, 2015, but hat defendant has not made any responsive demand, nor any productive of responsive documents, despite follow up in writing by letter dated March 15, 2016. Due to outstanding discovery, plaintiff further claims that discovery compliance conferences were adjourned on consent on May 1, May 12, August 15, and October 5, 2016. Plaintiff additionally claims that defendant made part production of discovery on September 15, 2016, but that the production was incomplete and insufficient.

This matter appeared again for a compliance conference before the Court on October 4, 2016 where defendant's *per diem* counsel advised that supplemental discovery would be produced on or before November 11, 2016, with party depositions to follow for the remainder of the month. The parties agreed by stipulation dated December 9, 2016 to extend those deadlines into December and then January 2017. Despite their agreement, plaintiff states that defendant did not produce discovery as anticipated and his counsel advised in January 2017 that he would

be withdrawing his representation.

Thereafter, defendant did not appear for a scheduled conference on February 15, 2017 or a pre-motion conference on March 16, 2017. In March 2017, defendant's prior counsel indicated that they would be substituted out, and a consent to change attorney was subsequently executed and filed with the Clerk of the Court on April 7, 0217. However, having not received complete responsive document production on its discovery demands, plaintiffs moved pursuant to CPLR 3126 to strike defendant's answer and enter default judgment for the plaintiff, or in the alternative to preclude defendant's offering of evidence at time of trial as sanction for willful or contumacious refusal to produce discovery shortly followed.

Subsequently, counsel for plaintiff applied in a motion dated September 7, 2017 for and was granted leave to withdraw their representation in a Short-Form Decision and Order of this Court dated September 18, 2017, and the matter was stayed 30 days to allow plaintiff to secure substitutionary counsel.

For his part, since withdrawal of prior counsel and substitution of counsel, defendant has also moved for discovery relief. Since withdrawal of plaintiff's counsel, plaintiff *pro se* has not secured substitute counsel. Further, defendant notes that plaintiff has failed to appear at scheduled conferences with the Court on December 18, 2017, January 12, 2018, February 14, 2018, or March 28, 2018. Having conferenced the matter with the Court on February 14, 2018, defendant has moved pursuant to CPLR 3126 to strike plaintiff's complaint and to dismiss the action altogether.

I. Motion to Strike Defendant's Answer

Plaintiff moves to strike defendant's answer arguing that defendants' failure to provide complete or adequate responses to two separate sets of document demands and interrogatories evidences a willful and contumacious refusal to comply with discovery orders of the Court.

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55***); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]). However, the courts on the other hand recognized that "parties to a civil dispute are free to chart their own litigation course and, in so doing, they may stipulate away statutory, and even constitutional rights' " (***Astudillo v MV Transp., Inc.***, 136 AD3d 721, 721, 25 NYS3d 289, 290 [2d Dept 2016]). Thus it has often been said that for "the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (***Jones v LeFrance Leasing Ltd. Partnership***, 110 AD3d 1032, 1033, 973 NYS2d 798, 800 [2d Dept 2013]).

The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court. Public policy strongly favors the resolution of actions on the merits whenever possible' " and the drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful or contumacious (*see* ***Moray v. City of Yonkers***, 72 AD3d

766, 898 NYS2d 470; ***Pirro Group, LLC v. One Point St., Inc.***, 71 AD3d 654, 655, 896 NYS2d 152; ***Dank v. Sears Holding Mangt. Corp.***, 69 AD3d 557, 892 NYS2d 510; ***Palomba v Schindler El. Corp.***, 74 AD3d 1037, 1037, 903 NYS2d 137, 138 [2d Dept 2010]). On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a "clear showing" that the failure to comply was willful and contumacious (***Singer v Riskin***, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016][internal citations omitted]). "Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (***Javeed v 3619 Realty Corp.***, 129 AD3d 1029, 1033, 12 NYS3d 219, 223 [2d Dept 2015]; ***Mangru v Schering Corp.***, 90 AD3d 621, 622, 933 NYS2d 897 [2d Dept 2011]).

It is also clear that the willful and contumacious nature of a party's conduct may properly be inferred from repeated delays in complying with the plaintiff's discovery demands and the Supreme Court's discovery schedule, the failure to provide an adequate excuse for such delays, and the proffer of inadequate discovery responses, which otherwise evince a lack of a good-faith effort to address the requests meaningfully (***Studer v Newpointe Estates Condominium***, 152 AD3d 555, 557, 58 NYS3d 509, 512 [2d Dept 2017]; ***Henry v Datson***, 140 AD3d 1120, 1122, 35 NYS3d 383, 385 [2d Dept 2016]; ***Stone v Zinoukhova***, 119 AD3d 928, 929, 990 NYS2d 567, 568 [2d Dept 2014]).

The Second Department has clearly held that part compliance with discovery requests may be sufficient to prevent preclusion or striking of pleadings noting that substantial compliance "with outstanding discovery requests, and [the inability to]to produce certain documents because they did not exist or were not in its possession" militates against granting an application to strike a defendant's answer (***Maffai v County of Suffolk***, 36 AD3d 765, 766, 829 NYS2d 566, 567 [2d Dept 2007]: *see also* ***Euro-Cent. Corp. v Dalsimer, Inc.***, 22 AD3d 793, 794, 803 NYS2d 171, 173 [2d Dept 2005][response to plaintiff's notice for discovery and inspection asserting that the documents requested by the plaintiff do not exist, are not in his possession, or cannot be located suffices since defendant cannot be compelled to produce documents which do not exist or are not in his possession]; ***Sparks Assoc., LLC v N. Hills Holding Co. II, LLC***, 74 AD3d 1183, 1184, 904 NYS2d 157, 158 [2d Dept 2010][motion court providently exercised its discretion in denying motion to strike pleadings or to preclude offer of evidence at time of trial where defendant adequately established the documents sought by the either were already produced or were represented not to exist]).

Here, although plaintiff argues that several good faith efforts to secure complete document production have failed, plaintiff does not specify precisely what documents it has not received nor exactly what was produced in response to its discovery demands. Further complicating matters, plaintiff's counsel who originally prepared plaintiff's motion has withdrawn from the matter altogether. While plaintiff's application may accurately state the prevailing law of the Second Department concerning CPLR 3126, its conclusory statement that documents are outstanding and defendant has not provided responses to its demand for a bill of particulars is insufficient. Further, given that plaintiff has failed to appear before the Court and explain precisely what it is seeking at this point deprives the Court of clarity of what remains unproduced.

Thus, this Court is not persuaded that defendant's conduct during discovery in this

action constitutes willful or contumacious conduct sufficient to support striking of his answer, or an order of preclusion.

That said however, this Court will deem the balance of plaintiff's application to be one to compel discovery pursuant to CPLR 3124. In that vein, defendant is hereby directed to make a diligent search of its records and file, including but not limited to all of the pleadings, discovery demands and responses by all parties, and produce any and all outstanding discovery pertaining to the Preliminary Conference Order and subsequent stipulations in this matter. Defendant is further directed to make production of any and all outstanding discovery **no later than July 31, 2018.**

II. Dismissal of Plaintiff's Complaint for Neglect to Prosecute

Turning to defendant's corresponding motion to strike plaintiff's pleadings for default of her appearance before the Court.

Generally speaking, the courts bear in mind that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373).

Concerning a party's failure to appear before the Court for a scheduled conference, the New York State Uniform Rules for the Trial Courts provides that:

> At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:
>
> (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.

22 NYCRR 202.27 [McKinney's 2017]

The Second Department in this area of the law has held that "[t]he nature and degree of a penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court (*see* ***Harris v. City of New York***, 117 AD3d 790, 985 NYS.2d 711; *see also* ***Apladenaki v. Greenpoint Mtge. Funding, Inc.***, 117 AD3d 976, 986 NYS2d 589; ***Fishbane v. Chelsea Hall, LLC***, 65 AD3d 1079, 1081, 885 NYS2d 718). "If any party ... refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed," the court may issue an order to sanction that party and any such sanctions may include an order striking that party's pleading (*see* CPLR 3126; ***Gutman v Cabrera***, 121 AD3d 1042, 1043, 995 NYS2d 180, 181 [2d Dept 2014]).

Generally speaking it has been previously held that a party's repeated failure to provide disclosure and to appear at multiple court conferences supports an inference of willful

and contumacious conduct sufficient to warrant dismissal (*see* ***Black v Little,*** 5 AD3d 520, 722 NYS2d 868 [2d Dept 2004]; *see also* ***Gruber v Central Truck Equipment, Inc.,*** 298 AD2d 360, 751 NYS2d 392 [2d Dept 2002], citing ***Brandes v Pirnie-Baker,*** 288 AD2d 413, 733 NYS2d 905; ***Ranfort v Peak Tours,*** 250 AD2d 747, 672 NYS2d 918; ***Frias v Fortini,*** 240 AD2d 467, 658 NYS2d 435; ***Yin Kuen Chan Tang v Hong Kong Chinese Herbal Co.,*** 235 AD2d 282, 652 NYS2d 37).

A trial court has broad discretion to oversee discovery (*see* ***Roug Kang Wang v. Chien–Tsang Lin,*** 94 AD3d 850, 851, 941 N.Y.S.2d 717). In the exercise of that discretion, the court may strike pleadings or parts of pleadings as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; *see* ***Mironer v. City of New York,*** 79 AD3d 1106, 1107, 915 NYS2d 279). The drastic remedy of striking a pleading is inappropriate, however, absent a clear showing that the failure to comply with discovery obligations was willful and contumacious (*see* ***Barnes v. City of New York,*** 43 AD3d 1094, 841 NYS2d 793; ***Patel v. DeLeon,*** 43 AD3d 432, 432–433, 840 NYS2d 632; ***Delaney v. Automated Bread Corp.,*** 110 AD2d 677, 678, 487 NYS2d 402; ***Liang v Yi Jing Tan,*** 98 AD3d 653, 654, 949 NYS2d 761, 763 [2d Dept 2012]).

CPLR 3216 permits a court to dismiss an action for want of prosecution only after the court or the defendant has served the plaintiff with a written notice demanding that the plaintiff resume prosecution of the action and serve and file a note of issue within 90 days after receipt of the demand. Moreover, case law provides that the failure to comply with the demand will serve as the basis for a motion to dismiss the action. Since CPLR 3216 is a legislative creation and not part of a court's inherent power, the failure to serve a written notice that conforms to the provisions of CPLR 3216 is the failure of a condition precedent to dismissal of the action (***Wasif v Khan,*** 82 AD3d 1084, 1084–85, 919 NYS2d 203, 204 [2d Dept 2011]).

For an action to be dismissed pursuant to CPLR 3216, three requirements must be satisfied: (1) issue must have been joined, (2) one year must have elapsed following joinder, and (3) party seeking such relief must have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand." However, the Court of Appeals has since instructed that while CPLR 3216 ordinarily requires service by registered or certified mail as a condition precedent to dismissal movant's failure to comply with this requirement is merely a procedural irregularity, that without a showing of prejudice to a substantial right of the plaintiff, should not interpedently exist as a jurisdictional defect warranting dismissal of defendant's motion to dismiss for neglect to prosecute (***Michaels v Sunrise Bldg. and Remodeling, Inc.***, 65 AD3d 1021, 1022, 885 NYS2d 110, 111 [2d Dept 2009][interpreting CPLR 3216[b]; *see also* ***Bokhari v Home Depot U.S.A., Inc.***, 4 AD3d 381, 381–82, 771 NYS2d 395, 396 [2d Dept 2004][movant's failure to serve a CPLR 3216 90–day notice by certified or registered mail determined to constitute a procedural irregularity, that absent a showing of prejudice to a substantial right of the plaintiff, should not result in vacating a dismissal of the action]).

Here, since neither a Certification Order issued or a Note of Issue was ever filed in this matter, no order has issued containing a directive to plaintiff to file a Note of Issue within ninety days, thus serving as the equivalent of a CPLR § 3216 notice (*see* ***Hoffman v. Kessler***, 28

AD3d 718 [2nd Dept. 2006]; ***Hamilton v. Nassau Suffolk Home Health Care, Inc.***, 1 AD3d 474 [2nd Dept. 2003]; ***Lu v. Scaduto***, 303 AD2d 750 [2nd Dept. 2003]). Because this Court has not issued any orders containing the directive to plaintiff to file a Note of Issue within 90 days, it is mandated by CPLR § 3216(b)(3) that defendant demand of plaintiff to resume prosecution *and to serve and file a Note of Issue within ninety (90) days after receipt of such demand.* At the present time, defendant has failed to demonstrate that he has complied with this provision, and as such, defendant's application pursuant to § 3216 must be **denied without prejudice with leave to renew** on the proper submission of papers in accord with this decision and order.

The remaining branches of either parties' applications for costs, fees or sanctions are **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: May 15, 2018
Riverhead, New York

HON. WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**