SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK P. NERVO **PART** IAS MOTION 4

Justice

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INDEX NO. 650250/2018

NEGRIL VILLAGE, INC.,MARVA LAYNE, CARLTON HAYLE,

MOTION DATE 10/02/2020

Plaintiff,

MOTION SEQ. NO. 005

- v -

PETER BEST, LILY BEST A-K-A LILLIAN TRUONG, KANETTA BAPTISTE A-K-A KANETTA JOSEPH, ASIM WALKER

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Plaintiffs move to reargue this Court's September 4, 2020 decision (NYSCEF Doc. Nos. 145 – 150) contending that the Court misstated the facts on page seven of the decision, in essence, conflating the claims made by plaintiffs as defendants'. Consequently, plaintiffs argue that once this misapprehension of fact is corrected, there is no basis to compel the disclosure of financial records. Defendants oppose, contending that plaintiffs' motion, although stylized as a reargument, improperly seeks to quash the subpoena motion. Defendants further contend the misstatement of fact does not bear on the relevance of the financial documents' disclosure.

The purpose of reargument is to provide "a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied principles of law" (*Foley v. Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see* CPLR § 2221[d][2]). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again

the very questions previously decided" (*id.*) Nor is reargument a proper forum to present arguments different from those originally asserted (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992] *lv. dismissed in part and denied in part* 80 NY2d 1005 [1992]).

Here, the Court misstated the claims made by plaintiffs and defendants. Notwithstanding, the Court does not find the misstatement material as to the subject financial discovery's relevance. Put simply, regardless of the party claiming misappropriation of funds, the financial records are material to such a claim. As the misstatement is not material, reargument is denied. However, the Court resettles its decision to correct the misstatement, as follows:[1]

[resettled decision and order appears on following page]

[1]As reargument is denied, the Court declines to extend the discovery deadline set forth in its original decision and order on mot. seq. 002, 003, and 004.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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MARVA M. LAYNE individually and as a shareholder of NEGRIL VILLAGE, INC., suing in the Right of NEGRIL VILLAGE INC., and as in individual and CARLTON L. HAYLE, individually and as a shareholder of NEGRIL VILLAGE INC., suing in the Right of NEGRIL VILLAGE INC., and as an individual,

Plaintiffs,

-against-

PETER BEST, LILLY BEST A/K/A LILLIAN TRUONG and KANETTA BAPTISTE A/K/A KANETTA JOSEPH

Defendants.

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DECISION AND ORDER

Index No. 650250/2018

Mot. Seq. 002, 003, 004

FRANK P. NERVO, J.S.C.:

Three successive discovery applications were made in this matter (motion sequences 002, 003, and 004). As the motions seek related relief, the Court has consolidated their disposition in this single decision and order.

Motion Sequence 002

Defendants move by order to show cause, dated February 3, 2020, for an order compelling plaintiffs' response to their October 25, 2019 and December 27, 2019 demands, sanctioning plaintiffs for their failure to provide the discovery sought in the demands, and conditionally precluding plaintiffs from presenting any evidence at trial due to their discovery noncompliance. Defendants move by order to show cause, dated February 3, 2020, for an order compelling plaintiffs' response to their October 25, 2019 and December 27, 2019 demands, sanctioning plaintiffs for their failure to provide the discovery sought in the demands, and conditionally precluding plaintiffs from presenting any evidence at trial, due to their discovery noncompliance. The application

was returnable February 21, 2020; however, the briefing schedule set by the Court was impacted by COVID-19, and the Court subsequently extended the time to file opposition papers to July 17, 2020 and provided plaintiffs the opportunity to file reply papers by the return date of August 14, 2020 (Court Notice – NYSCEF Doc. No 136). Defendants contend that plaintiffs violated this Court's November 22, 2019 conference order requiring plaintiffs respond to defendants' October 25, 2019 demand by January 24, 2020 (Defendants' affirmation in support at ¶ 7). They further contend, in essence, that plaintiffs have engaged in bad-faith non-disclosure in failing to respond to defendants' October 25, 2019 and December 27, 2019 demands.

Plaintiffs oppose, contending that the document discovery sought in defendants' October 25, 2019 demand is voluminous and a significant number of documents were destroyed, notwithstanding that defendants possessed these documents (Plaintiffs' opposition at ¶ 5). As such, plaintiffs contend, the recreation or reconstruction of these documents is time consuming (Plaintiffs' opposition at ¶ 4, 6, and 9). Plaintiffs aver that this process is ongoing, and they had preferred to provide all documents requested at once, rather than piecemeal (Plaintiffs' opposition at ¶ 6, 8, and 9). Plaintiffs do not address that portion of the application seeking to compel their response to defendants December 27, 2019 demand.

CPLR §§ 3122(a)(1) and 3124 provide that a party seeking disclosure may move to compel compliance or a response to request, notice, interrogatory, demand or question pursuant to Article 31 of the CPLR if the responding party fails to comply or respond. CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and

necessary to the prosecution or defense of an action, regardless of the burden of proof" (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness and reason" (*id.*).

CPLR § 3216 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has "clearly shown that its opponent's nondisclosure was willful, contumacious or due to bad faith" (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness and failure to comply with court orders, can give rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v. Kase & Druker,* 19 AD3d 134 [1st Dept 2005]); *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]).

Here, the Court's November 22, 2019 conference order required plaintiffs to respond to defendants' October 25, 2020 demand within 60 days. Plaintiffs served an untimely response on February 10, 2020. Plaintiffs have provided a reasonable explanation for their failure to produce this discovery, namely, the destruction of these documents by a storage facility after defendants' apparent non-payment of storage fees. Plaintiffs aver they have continued their efforts to recreate these documents, but that the process is time-consuming. Notwithstanding plaintiffs' failure to timely serve their response, the Court deems moot that portion of motion sequence 002 which seeks to compel plaintiffs' response to the October 25, 2019 demand. To the extent that

defendants seek complete responses to this demand, without objection, that relief is addressed in motion sequence 003.

However, plaintiffs' opposition has not addressed defendants' December 27, 2019 demand, which seeks plaintiffs' addresses. The Court finds such material relevant and necessary to this action, and, as such, plaintiffs shall provide the material sought in this demand.

Motion Sequence 003

Defendants, after receiving plaintiffs' and David Dukoff, CPA, P.C.'s combined February 10, 2020 response objecting to portions of their October 25, 2020 demand and subpoena, brought motion sequence 003 seeking, complete responses and enforcement of their subpoena.

Defendants seek similar relief to motion sequence 002, they move to compel Mr. Dukoff, CPA to comply with their subpoena - seeking financial documents from plaintiffs' CPA; compel plaintiffs to provide their addresses in response to defendants' demand; and sanction plaintiffs for their bad-faith noncompliance with discovery. Plaintiffs' opposition is solely directed against enforcement of the subpoena, which they contend is overbroad, seeks irrelevant material, and seeks privileged material. As ordered in motion sequence 002 above, plaintiffs shall provide their addresses in response to defendants' December 27, 2019 demand. Consequently, that portion of motion sequence 003 is decided in accordance with motion sequence 002.

Addressing that portion of the motion seeking to compel compliance with defendants' subpoena first, the proper recourse to an improper or overbroad subpoena is an application to quash. CPLR § 2304 requires a motion to quash a subpoena be made "promptly," thus making the issue of timeliness *sui generis*. However, where a motion to quash is made returnable after the return date of the subpoena, the motion risks futility if the subpoena is obeyed (*Brunswick Hospital Center, Inc. v. Hynes*, 52 NY2d 333, 339, "a motion to quash or vacate no longer is available"; *see also Santangello v. People*, 38 NY2d 536, 539 "motion to quash ... should be made prior to the return date"). The moving party bears the burden of establishing a facially sufficient subpoena should be vacated (*Matter of Dairymen's League Coop. Assn. v. Murtagh*, 274 AD 591 [1st Dept 1978]); and vacatur is proper only where it is obvious nothing legitimate will be discovered or the information sought is irrelevant (*Kapon v. Koch*, 23 NY3d 32, 38 [2014] citing *Anheuser-Busch, Inc. v. Abrams*, 71 N2d 327, 331 [1988]). CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof" (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness and reason" (*id.*).

Here, neither plaintiffs nor Mr. Dukoff have sought to quash to the subpoena and the return date has long passed. Plaintiffs' counsel, after receiving the subpoena, purports to have begun representing Mr. Dukoff as well. In opposing this motion, plaintiffs contend that the subpoena seeks irrelevant material, is not limited appropriately temporally limited, and seeks privileged information. Defendants contend plaintiffs misappropriated/misused funds from 2011 through 2016, and

evidence of such may appear in the plaintiffs 2017 and 2018 financial documents. Plaintiffs' object, contending disclosure of 2017 and 2018 documents are not relevant. Plaintiffs further argue that if the Court were to adopt defendants' reasoning that evidence of financial impropriety may surface in later financial documents, documents from 2019 and 2020 would also be discoverable.

The Court finds the subpoena facially sufficient, as it provides the basis for the material sought and such material does not appear obviously irrelevant (*Kapon v. Koch*, 23 NY3d 32). Indeed, evidence of plaintiffs' alleged misappropriation may surface in financial documents following the operative time period.

Likewise, defendants' request for invoices from Mr. Dukoff's from 2017 through October 20, 2019 is relevant to the defense and prosecution of this matter. Plaintiffs argument that this request "defies any resemblance of relevance," is without merit (NYSCEF Doc. No. 139 at ¶ 10). Plaintiffs have alleged defendants misappropriated Negril's funds. Mr. Dukoff provided financial services to plaintiffs and the subject restaurant from which defendants are alleged to have misappropriated funds. Defendants contend that these invoices are relevant and material to their defense, proving they did not misappropriate funds. Thus, invoices for two years following the period of allege misappropriation are material. For the same reasons, identification information for Negril's bank accounts is also relevant and material. Consequently, Mr. Dukoff must provide the financial documents and discovery sought in the subpoena.

To the extent that plaintiffs' opposition is deemed an application to quash the subpoena duces tecum, their argument is rejected. Plaintiffs did not seek to challenge the validity of the subpoena until after defendants moved for judicial enforcement, instead affirmatively instructing Mr. Dukoff to ignore it (NYSCEF Doc. No. 143). Under these circumstances a motion to quash is improper (*see e.g., Brunswick Hospital Center, Inc. v. Hynes*, 2 NY2d at 339).

Turning to defendants' October 25, 2019 demand, CPLR §§ 3122(a)(1) and 3124 provide that a party seeking disclosure may move to compel compliance or a response to request, notice, interrogatory, demand or question pursuant to Article 31 of the CPLR if the responding party fails to comply or respond. CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof" (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness and reason" (*id.*).

CPLR § 3216 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has "clearly shown that its opponent's nondisclosure was willful, contumacious or due to bad faith" (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness and failure to comply with court orders, can give rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st

Dept 2005]); *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]).

Plaintiff has failed to oppose that portion of this motion seeking to compel complete responses to defendants' October 25, 2019 demands, or alternatively sanction plaintiffs for willful nondisclosure. The failure to provide a reasonable excuse on a motion pursuant to CPLR § 3126 gives rise to an inference of willful and contumacious conduct supporting sanctions (*Figiel v. Met Food*, 48 AD3d 330 [1st Dept 2008]). Defendants' October 25, 2019 demand seeks, inter alia, financial and tax documents which are entirely routine and appropriate in a matter alleging misappropriation of funds. The tax documentation included in plaintiffs' response, however, is wholly redacted, including redaction of the filing entities name, and is thus completely devoid of any probative value (NYSCEF Doc. No. 116). It is beyond cavil that a fully redacted document is akin to producing nothing at all. Plaintiffs offer no explanation for the redaction, or opposition to defendants' demand. Consequently, plaintiffs must provide complete responses and discovery sought in defendants' demand letter of October 25, 2019.

Finally, to the extent that plaintiffs' counsel contends any material sought in defendants' demand is protected by privilege, of any type, a proper privilege log is required stating: the date of the communication/document, the parties thereto, and the subject matter of the communication sufficient to establish the nature of the privilege. Failure to contemporaneously serve a completed privilege log with plaintiffs' response to

demands may result in sanctions pursuant to CPLR § 3126, including but not limited to striking pleadings, at the Court's discretion.

The Court, as an exercise of its discretion, will not impose sanctions, at this time, for noncompliance with the above subpoena or plaintiffs' incomplete untimely responses to defendants' demands. However, continued noncompliance may result in sanctions, at the Court's discretion, pursuant to CPLR §§ 2308 and 3126, including but not limited to the striking of pleadings.

Motion Sequence 004

Plaintiffs move by order to show cause, dated March 13, 2020, for an order extending the note of issue deadline, extending deposition deadlines, and compelling defendants to responded to their supplemental discovery demands of February 14, 2020. The application was returnable April 10, 2020; however, the briefing schedule set by the Court was impacted by COVID-19, and the Court subsequently extended the time to file opposition papers to July 17, 2020 and provided plaintiffs the opportunity to file reply papers by the return date of August 14, 2020 (Court Notice – NYSCEF Doc. No 137). Defendants have failed to appear or oppose this motion.

As stated above, CPLR §§ 3122(a)(1) and 3124 provide that a party seeking disclosure may move to compel compliance or a response to request, notice, interrogatory, demand or question pursuant to Article 31 of the CPLR if the responding party fails to comply or respond. CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an

action, regardless of the burden of proof" (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness and reason" (*id.*).

As an initial matter, COVID-19 and the breadth of document discovery in this matter necessitate extending the Note of Issue deadline. Consequently, the deadline is extended to December 31, 2020.

The Court notes that plaintiffs' February 14, 2020 demand is untimely. Plaintiffs were ordered to serve supplemental demands within 60-days of this Court's November 22, 2020 conference order. However, defendants have failed to oppose this motion. Thus, defendants have not offered any excuse for their failure to respond to plaintiffs' demand, nor have they sought to vacate the demand as overbroad or as otherwise improper (*see c.f. Kiernan v. Booth Memorial Medical Center*, 175 AD3d 1396 [2d Dept 2019]).

Consequently, and notwithstanding the untimeliness of plaintiffs' demand, plaintiffs' motion is granted, as defendants have failed to oppose the motion or establish the demand is overbroad *(see generally, Trabanco v. City of New York*, 81 AD3d 490 [1st Dept 2011]).

Conclusion

The parties' failure to respond to demands, provide reasonable discovery sought therein, provide detailed objections to demands, and appropriately challenge a subpoena has culminated in a flurry of largely avoidable motion practice. As the Court

of Appeals has repeatedly underscored, "our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution" (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]).

Accordingly, it is

motion sequence 002

ORDERED that motion sequence 002 is granted solely to the extent of directing plaintiffs provide the material sought in defendants' December 27, 2019 demand, and otherwise denied as academic; and it is further

motion sequence 003

ORDERED that motion sequence 003 is granted and David Dukoff, CPA P.C. shall comply with defendants' December 17, 2019 subpoena within 20 days of notice of entry of this decision and order; and to the extent such material sought is protected by privilege, counsel shall contemporaneously serve a privilege log, as described above, stating the date of the communication/document, the parties thereto, and the subject matter of the communication sufficient to establish the nature of the privilege including the period of the attorney-client relationship, if applicable; and it is further

ORDERED that plaintiffs shall provide the discovery sought in defendants' October 25, 2019 demand, including unredacted tax and financial information for the years requested within 20 days of notice of entry of this decision and order; and it is further

ORDERED that to the extent that plaintiffs' assert material sought in the October 25, 2019 and December 27, 2019 demands does not exist, is not in plaintiffs' control, or is in the process of being reconstructed, plaintiffs shall submit an affidavit[2] of same within 20 days of notice of entry of this order; and that as plaintiffs recreate/reconstruct destroyed documents sought in the October 25, 2019 demand, plaintiffs shall serve such documents on defendants within 20 days of the material's recreation, subject to privilege as stated above; and it is further

ORDERED that to the extent material sought in defendants' October 25, 2019 demand protected by privilege, plaintiffs' counsel shall contemporaneously serve a privilege log with plaintiffs' discovery responses, as described above, and such log shall state the date of the communication/document, the parties thereto, and the subject matter of the communication sufficient to establish the nature of the privilege including the period of the attorney-client relationship, if applicable; and it is further

ORDERED that the failure to provide a complete timely response to defendants' October 25, 2020 demand, including a privilege log and affidavit for documents that cannot be

[2]Affidavit shall comply with *Jackson v. New York*, 185AD2d 768 [1st Dept 1992], including setting forth the efforts undertaken to secure destroyed or unavailable material.

located, as ordered above, may result in sanctions, as permitted by CPLR § 3126, in the Court's discretion; and it is further

motion sequence 004

ORDERED that motion sequence 004 is granted to the extent of extending the Note of Issue deadline to December 31, 2020; and it is further

ORDERED that outstanding depositions shall be completed by October 30, 2020, and shall proceed either in-person or by electronic means; and it is further

ORDERED that post-deposition demands shall be served by November 20, 2020; and it is further

ORDERED that responses to post-deposition demands shall be served by December 18, 2020; and it is further

ORDERED that defendants shall respond to plaintiffs' supplemental discovery demand of February 14, 2020 within 20 days of notice of entry of this decision and order, and failure to respond may result in sanctions, in the Court's discretion, including striking pleadings; and it is further

[remainder of page intentionally blank]

ORDERED that requests for further Court conferences in this matter shall comply with this Court's Notice of April 16, 2020 (NYSCEF Doc. 135).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: September 4, 2020

ENTER:

Hon. Frank P. Nervo, J.S.C.

and it is further

ORDERED that the Court's September 4, 2020 decision and order is resettled as above; and it is further

ORDERED that to the extent plaintiffs' motion seeks to quash the subpoena, that relief is denied for the reasons set forth in the resettled order.

10/26/2020
DATE

FRANK P. NERVO, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

650250/2018 NEGRIL VILLAGE, INC. vs. BEST, PETER
Motion No. 005