To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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STEPHEN F. GROTH and ANGELA Z. GROTH,

Plaintiffs,

-against-

RICHARD FERRANTE, EVEREST MERCHANT FUNDING, INC., and STUART SCHOEMAN,

Defendants.

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DECISION & ORDER

Index No. 70849/2018
Motion Seq. No. 2

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs seeking an order pursuant to CPLR 3124 compelling defendants to produce outstanding discovery, or pursuant to CPLR 3126 precluding defendants from introducing into evidence any information which they failed to produce together with an adverse inference on the issues as to which that information is relevant and pursuant to CPLR 2004 for an extension of time to file the note of issue until all discovery matters are resolved or granting such other and further relief as this Court deems just and proper:

Notice of Motion; Affirmation in Support; Exhibits A-I; Affirmation of Good Faith
Affirmation in Opposition; Exhibits A-D; Affirmation in Opposition by E.C. Grainger, III, Esq.
Affirmation in Reply; Exhibits A-S; Affirmation in Support by Carol Morris-Fox, Esq.; Exhibits T-Z
NYSCEF File

Upon the foregoing papers this motion is determined as follows:

Facts and Procedural History:

Plaintiffs originally commenced this action by the filing of a petition on December 27, 2018 as an enforcement proceeding pursuant to Article 52 of the CPLR. Defendants Richard Ferrante ("Ferrante") and Stuart Schoeman ("Schoeman") (hereinafter collectively referred to as

"defendants") filed a verified answer on April 3, 2019. The petition alleged inter alia that plaintiffs loaned Everest Merchant Funding, Inc. ("Everest") $150,000.00 which was secured by a note. Everest defaulted on the note on October 1, 2013. Plaintiffs commenced an action against Everest and a default judgment was entered in the amount of $235,354.60 on April 11, 2016 (*Stephen F. Groth and Angela Z. Groth v Everest Merchant Funding, Inc.*, 51678/2015). Plaintiffs now seek to recover the default judgment against defendants who were principals of Everest. Plaintiffs allege that Ferrante and Schoeman ignored corporate formalities and withdrew hundreds of thousands of dollars from Everest while it was insolvent in violation of the Debtor and Creditor Law. By Decision and Order (Loehr, J.) entered July 9, 2019, the special proceeding was converted into an action and the parties were directed to appear for a preliminary conference on July 29, 2019.

Pursuant to the so-ordered (Lefkowitz, J.) preliminary conference stipulation dated July 29, 2019 (the "Preliminary Conference Order"), plaintiffs' deposition was scheduled for November 14, 2019, defendants' deposition was scheduled for December 1, 2019, all discovery demands were to be served by September 2, 2019, and the completion of all discovery was to occur on or before December 28, 2019.

Plaintiffs served their first discovery demand on September 1, 2019. Plaintiffs served a supplemental discovery demand on October 8, 2019. At an unspecified date subsequent to the service of the supplemental demands, counsel discussed the discovery demands and agreed to limit the production of relevant emails to six years. However, and as was later discovered, counsel had differing interpretations as to which six years they had agreed. Plaintiffs contend that this period started in 2017 and included the preceding years, representing the last six years that Everest was operational. It is defendants' understanding that the six years represented the six calendar years preceding December 7, 2019. The substance of the discussion was never memorialized. However, in an email dated December 7, 2019, which included attached discovery responses, defense counsel, stated: "I will begin forwarding the emails, *which go back six years from this date as previously discussed*" (emphasis added).

The parties appeared for a compliance conference on December 12, 2019. The Order from that conference extended the previously ordered discovery deadlines by directing the completion of party depositions by January 17, 2020, and service of any post-deposition discovery demands within five days of the depositions. This issue concerning the emails was not raised at this conference. The Order warned that any disclosure demands not raised at the compliance conference were deemed waived. It is undisputed that these dates were not adhered to.

Schoeman was deposed on January 29, 2020. Later that day, defense counsel forwarded to plaintiffs' counsel the December 7, 2019 email highlighting the language "I will begin forwarding the emails, which go back six years from this date as previously discussed." Plaintiffs' counsel responded "I think we may have had a genuine misunderstanding about which

six years we were talking about. I had overlooked that point in your message."

Almost two weeks later, in an email dated February 11, 2020 plaintiffs' counsel asserted that it was his understanding that their agreement referred to the last six operational years of Everest not the preceding six calendar years. Defense counsel responded "[g]iven the confusion here, I think supplemental demands would be a good idea. Notwithstanding, please let me know the precise dates of emails you are looking for and I will get the ball rolling."

Nearly a month later than it was directed to occur, Ferrante's deposition took place on February 13, 2020. On February 19, 2020 plaintiffs served post-deposition discovery demands.

The parties appeared for a compliance conference on February 21, 2020. The Order from that conference noted that "[T]he parties, having failed to proceed w/EBTs as previously ordered, are not entitled to a further extension for post-EBT discovery." The Order further directed the completion of all discovery by the "FINAL" date of March 9, 2020. This Order also warned that any discovery demands not raised at the conference were deemed waived. The parties were directed to appear for a final compliance conference on March 10, 2020. There is nothing in the record which indicates that plaintiffs raised the issue of outstanding emails at this conference.

By email dated February 24, 2020 plaintiffs' counsel stated that, among other things, plaintiffs were seeking authorizations to obtain Everest's files from "Steve Lee (Cypress Law Group), Kilgetty, Acocella Law Group, and Bowman (the South African law firm)." On February 25, 2020, defense counsel responded in part by asking plaintiffs' counsel to provide authorizations for those firms. Counsel exchanged several other emails on that date concerning the emails and reiterating their respective interpretation of the six years parameters.

In an email dated February 26, 2020, defendants stated that they would provide the outstanding emails, if recoverable, but were not sure that it would be possible to produce them by the March 9, 2020 deadline. Emails between counsel on February 26, 2020 continued the discussion, wherein defense counsel stated that he would obtain the remaining emails from Ferrante to the extent that they were recoverable.

By email dated March 4, 2020, plaintiffs' counsel offered to pay for an expert to attempt to recover the emails from Ferrante's computer. On March 5, 2020, defense counsel asked plaintiffs' counsel to explain what hiring an expert would entail.

The parties appeared for a conference on March 10, 2020. Plaintiffs' counsel states that although the issue of outstanding discovery was raised at this conference, the matter was certified as ready for trial. A Trial Readiness Order (Lefkowitz, J.) was entered on March 12, 2020, which provided that "all discovery has been completed or waived and the matter is ready for trial."

Subsequent to the issuance of the Trial Readiness Order, the parties continued to engage in discussions concerning discovery. In a March 21, 2020 email, plaintiffs' counsel sought nonparty authorizations, additional information about Schoeman's tax returns, and access by an expert to attempt to retrieve Ferrante's emails. In a March 25, 2020 email defense counsel requested that plaintiffs' counsel provide the authorizations plaintiffs were seeking and an explanation concerning what was involved in a professional search of Ferrante's emails. By an email dated March 30, 2020 defense counsel explained that the reason he suggested they agree to limit the emails to the preceding six calendar years was because Ferrante had advised that he could not access emails before that time. Defense counsel asked for clarification about what a professional search of Ferrante's email would entail.

In an April 6, 2020 email plaintiffs' counsel queried defense counsel about how Ferrante's emails were stored (on a computer, in a cloud, in a pst or ost file), whether there were any copies or backups of the emails, what applications he used to access his email, did he ever use his cellphone to access them, and if counsel could explain what they meant when they said Ferrante's email would freeze when he attempted to go back further than December 2013. Defense counsel replied in an email dated April 8, 2020 "I take it from these questions, and as a result in your delay in hiring an expert that you do not intend to do so … We consider discovery completed at this point. I will begin working on our summary judgment motions with the record before us."

The Contentions of the Parties:

Plaintiffs bring this motion seeking to compel discovery which they contend they have been seeking since service of their first discovery demands in September 2019 and which they contend defendants' counsel represented defendants would provide. Plaintiffs seek emails prior to December 2013 and authorizations from Everest's agents to obtain additional responsive information.

Plaintiffs state that they have offered to retain professional assistance to retrieve the Ferrante emails but that defendants have not provided authorizations providing access to Ferrante's emails or computer. Plaintiffs argue that defendants' interpretation of their agreement concerning the dates of the emails makes no sense since it would exclude from production emails from 2013 the year when the underlying loan and default occurred. Plaintiffs contend that it was at Ferrante's deposition that they first realized the earlier emails that had not been provided.

Plaintiffs contend that their conduct clearly evidences no intent to abandon their demands for the emails and that they took steps after Ferrante's deposition to obtain them.

Plaintiffs also contend that Ferrante failed to produce tax returns for 2013, 2014, and 2016 and although he produced returns for 2011, 2012, 2015, and 2017, those returns were

heavily redacted, or incomplete. Plaintiffs contend that Schoeman failed to produce any tax returns or authorization to obtain his tax returns. Plaintiffs argue the tax returns are necessary because they will show whether defendants used their financial control of Everest to their own benefit.

In opposition, defendants' counsel states that it was while defendants were compiling responses to plaintiffs' supplemental demands that Ferrante advised that his email program crashed when he attempted to open emails dated from 2013 and earlier. Defense counsel states that he then contacted plaintiffs' counsel to discuss discovery and it was during that conversation they agreed that production of emails would be limited to six years prior to December 7, 2019.

Defendants also contend that Ferrante's deposition was rescheduled as the result of plaintiffs' conduct. They state that the December 16, 2019 deposition could not go forward because plaintiffs had failed to respond to defendants' discovery requests leaving defendants without the necessary information to prepare for their deposition. Defendants state that the January 31, 2020 deposition was rescheduled at the request of plaintiffs' counsel. Defendants argue that it was because the depositions occurred after the court-ordered deadline that the Court determined that any post-deposition discovery had been waived and the matter was certified as ready for trial.

Defendants state that although they provided responses to the post-deposition demands they were unable to provide the requested emails from Ferrante because each time he attempted to access emails from that time period his email system crashed. Defense counsel states that defendants contacted several vendors in an attempt to retrieve the information but that these attempts were unsuccessful. Defense counsel argues that plaintiffs' position that they had agreed to produce emails from the last six years of Everest's operations is contradicted by the December 7, 2019 email. Defendants state that plaintiffs failed to raise the email issue at the December 12, 2019 conference and that it was not raised until Ferrante's deposition.

Defense counsel states that despite his repeated requests that plaintiffs send him the authorizations for execution plaintiff's' counsel never sent the authorizations. Defense counsel also states that, contrary to plaintiffs' assertions, there was never an agreement to allow plaintiffs' attorneys or experts access to Ferrante's hard drive or emails and that despite defense counsel's requests in emails dated March 5, 2020 and March 15, 2020, for more information about what this would entail, plaintiffs' counsel never responded.

Analysis:

It is axiomatic that under CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of 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" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Plaintiffs have failed to demonstrate their entitlement to relief pursuant to CPLR 3124 and CPLR 3126. Although plaintiffs rely heavily on the miscommunication between counsel concerning the date parameters for providing responsive emails, it was clear well prior to Ferrante's deposition that counsel were not in agreement on this issue. Even after this discrepancy was discovered plaintiffs failed to serve a supplemental demand clarifying their position and demanding emails prior to and including 2017. Although plaintiffs' counsel must have noticed that the emails produced did not include any emails from within this time period, this issue was never raised at the precertification conferences. Notably, this issue was not raised at conferences despite the cautionary language of the compliance conference orders and the clear directives therein. Additionally, having litigated the underlying action, plaintiffs and their counsel were well aware at the commencement of this action of the relevant time frames concerning the loan and the default. If plaintiffs wanted emails from 2013, it was incumbent upon them to ensure that these requests were clearly and unequivocally made. With respect to defendants' tax returns, these were first requested in the post-deposition demands which were served beyond the deadline set by the Court. There is no explanation for why these demands were not served earlier. The Court disagrees with plaintiffs' contention that these documents were "encompassed" in the December 2019 demands.

Plaintiffs had sufficient opportunity to obtain the discovery they seek. Their failure to properly ensure that the discovery they sought was properly demanded or to advise the Court at conferences of any issues relative thereto cannot be used to enlarge their time for discovery past the issuance of the Trial Readiness Order. It is noted that defendants were willing to cooperate in the discovery process even after the issuance of the Trial Readiness Order when they were no longer required to do so. However, despite defendants' repeated requests for the authorizations and for information concerning utilizing a professional to access the emails from Ferrante's computer, there is nothing in the record to show that plaintiffs provided the information defendants were requesting so that they could assist plaintiffs in obtaining the discovery they sought. Any willingness by defendants to assist plaintiffs in obtaining discovery beyond the

issuance of the Trial Readiness Order should not now work to their disadvantage. Additionally, as stated by the Court, it was the failure to adhere to court-ordered discovery deadlines that resulted in the Court's determination that all discovery had been completed or waived. Notably, the deadlines for taking party depositions came and went on several occasions as did the deadline for the completion of discovery contained in the Preliminary Conference Order.

As noted by the Court of Appeals in *Kihl v Pfeffer* (94 NY2d 118 [1999]), "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Id.* at 123; *see Gibbs v St. Barnabas Hospital*, 16 NY3d 74, 81 [2010]). "The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic non-compliance with deadlines also breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution" (*Id.* at 81). In February 2016, the Chief Judge of the State of New York, Hon. Janet DiFiore, announced the "Excellence Initiative" for the New York State Unified Court System. The Excellence Initiative seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on "Standards and Goals" as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge's Excellence Initiative and delivering justice to all that enter our courts in a timely and efficient manner. [1]

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

> "As we made clear in *Brill,* and underscore here, statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored" (*Miceli v State Farm Mut. Automobile Ins. Co.*, 3 NY3d 725, 726–727 [2004][internal citations omitted]).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

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[1] In 2009, the Differentiated Case Management (DCM) protocol was introduced in Westchester County Supreme Court to ensure effective case management. The DCM protocol was designed to ensure the timely prosecution of cases from inception to trial and facilitate settlements. As implemented, the DCM protocol limits adjournments and delays and requires that the parties actively pursue the prosecution and defense of actions. Deadlines are enforced in Westchester Supreme Court civil cases pursuant to the DCM protocol.

> "As this Court has repeatedly emphasized, 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 the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct 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. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago 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" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010][internal citations omitted]).

While CPLR 2004 permits the court, in the exercise of its discretion, to grant an extension of time fixed by statute, rule or court order, upon a showing of good cause, plaintiffs have shown no good cause for their failure to timely seek this discovery.

If counsel are serious about their cases, they should pursue discovery in a timely manner. Permitting plaintiffs to pursue additional discovery here would result in the circumvention of the Part Rules established by the Court and reward non-compliance with court deadlines. Under the circumstances, plaintiffs' failure to raise the issue of the outstanding discovery until the final certification conference, despite having multiple opportunities to seek this discovery and to seek a remedy from the Court, can only be deemed to be a waiver of this discovery.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, it is:

ORDERED that plaintiffs' motion is denied and plaintiffs shall file a note of issue within 20 days of entry of this order; and it is further

ORDERED that the matter is referred to the Settlement Conference Part. Due to the coronavirus health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference; and it is further

ORDERED that in the event that plaintiff fails to file the note of issue as directed, the parties shall appear for a virtual conference with Chief Court Attorney Diane Clerkin by Skype Business or Microsoft Teams, as the Court shall direct, in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District, on October 23, 2020 at 10:30 a.m. If this appearance is necessary, the parties will be contacted by the Court with further instructions; and it is further

ORDERED that plaintiffs shall serve a copy of this Order with notice of entry upon defendants within three (3) days of entry, with proof of such service filed to NYSCEF within three (3) days thereof, or as the Court shall further direct due to the COVID-19 health emergency.

The foregoing constitutes the Decision and Order of this Court.

DATED: White Plains, New York
October 2, 2020

HON. JOAN B. LEFKOWITZ, J.S.C.

To: Service upon all counsel via NYSCEF

CC: Compliance Part Clerk
Settlement Part Clerk