

**SUPREME COURT OF THE STATE OF NEW YORK -  
NEW YORK COUNTY**

**PRESENT: EILEEN BRANSTEN**  
*Justice*

**PART 3**

**CPS 227 LLC**

**INDEX NO. 654378/2013**

- v -

**MOTION DATE 06/02/2015**

**BRODY, MARTIN**

**MOTION SEQ. NO. 007**

The following papers, numbered 1 to **3**, were read on this motion to/for **enforce conditional order**

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	No(s)	<b>1</b>
Answering Affidavits - Exhibits	No(s)	<b>2</b>
Replying Affidavits	No(s)	<b>3</b>
Cross Motion		<b>Yes</b>

**Upon the foregoing papers, it is ordered that this motion is**

**ORDERED** that Plaintiff's motion to enforce the Court's February 9, 2015 conditional order is granted for the reasons stated on the June 2, 2015 record (Bonnie Piccirillo, OCR); and it is further

**ORDERED** that Plaintiff's motion to strike Defendant Brody's answer and for default judgment is granted for the reasons stated on the June 2, 2015 record and the Clerk is directed to enter judgment in favor of Plaintiff CPS 227 LLC, maintaining an office for the transaction of business at c/o Extell Development Company, 805 Third Avenue, New York, New York 10022 and against Defendant Martin Brody a/k/a Mendell Brody, residing at 1419 49th Street, Brooklyn, New York 11219, in the sum of \$6.25 million, plus interest thereon at the statutory rate of 9% per annum from December 6, 2013 through the date of the decision on this motion, and thereafter at the statutory rate from the date of this order, as calculated by the Clerk, together with costs and disbursements as calculated by the Clerk upon submission of an appropriate bill of costs; and it is further

**ORDERED** that CPS 227 LLC's application for an award of costs and attorney's fees is granted and severed; and it is further

**ORDERED** that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the amount of costs and attorney's fees due to Plaintiffs; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry on defendant and that counsel for plaintiffs shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that Defendant's cross-motion for summary judgment is denied as moot.

DATED: 6/ 3 /2015

  
EILEEN BRANSTEN, J.S.C.

- 1. CHECK ONE :  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE : MOTION IS :  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE :  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TRIAL TERM PART 3

CPS 227 LLC,

Plaintiff,

- against -

INDEX NO.  
654378/13

MARTIN BRODY, also known as MENDEL BRODY,

Defendant.

60 Centre Street  
New York, New York  
June 2, 2015  
PROCEEDINGS

BEFORE:

HONORABLE EILEEN BRANSTEN,  
Justice

APPEARANCES:

SCHLAM STONE & DOLAN LLP  
Attorneys for the Plaintiff  
26 Broadway  
New York, New York 10004  
BY: RICHARD H. DOLAN, ESQ.  
NIALL D. O'MURCHADHA, ESQ.

WENIG SALTIEL LLP  
Attorneys for the Defendant  
26 Court Street, Suite 1200  
Brooklyn, New York 11242  
BY: CHARLES L. MESTER, ESQ.

Bonnie Piccirillo  
Official Court Reporter

Bonnie Piccirillo - Official Court Reporter

Proceedings

1  
2  
3 THE COURT: All right, we have for CPS 227 LLC, I  
4 have Schlam Stone & Dolan LLP firm, I have Richard Dolan.  
How are you?  
5 MR. DOLAN: Good afternoon, Judge.  
6 THE COURT: And Niall O'Murchadha.  
7 MR. O'MURCHADHA: Good afternoon, your Honor.  
8 THE COURT: For Martin Brody, also known as Mendel  
9 Brody, from the Wenig Saltiel LLP firm, I have Charles  
10 Mester.  
11 MR. MESTER: Present, your Honor.  
12 THE COURT: We have before me today Motion  
13 Sequence No. 004, No. 005, punish for contempt and No. 006,  
14 other reliefs.  
15 You can sit down.  
16 I basically have read all your papers. I have  
17 considered all your arguments. I have looked at all your  
18 exhibits, and I'm ready to give my decision.  
19 Let's go back over the facts a little bit so that  
20 we can get a background on the case.  
21 Non-party Cherry Street LLC -- we'll call it  
22 Cherry Street -- owned real estate located at 227 Cherry  
23 Street, New York. It was called the Cherry Street  
24 Property.  
25 Defendant, Martin Brody, owned a minority interest  
26 Bonnie Piccirillo - Official Court Reporter

Proceedings

1 in Cherry Street. In 2008, the predecessor to Plaintiff  
2 CPS 227 LLC contracted with Brody to purchase his minority  
3 interest in Cherry Street. Plaintiff's predecessor  
4 advanced \$6.25 million against the purchase price of  
5 defendant's shares.  
6 In 2012, allegedly with defendant's knowledge,  
7 plaintiff purchased Cherry Street Property directly from  
8 Cherry Street in an IRS 1031 Exchange. Plaintiff alleges  
9 that part of the agreement was that defendant, Martin  
10 Brody, would return the \$6.25 million advanced payment.  
11 Plaintiff's purchase of Cherry Street Property  
12 closed on March 15, 2013. Plaintiff allegedly agreed to  
13 allow defendant to defer repayment of the \$6.25 million  
14 until defendant received his share of the purchase price  
15 from Cherry Street.  
16 Plaintiff alleges that defendant should have been  
17 able to repay plaintiff on September 30, 2013, when Cherry  
18 Street took out a loan against the new property it  
19 purchased. Plaintiff alleges that defendant acknowledged  
20 that he owed the \$6.25 million on. December 6, 2013,  
21 plaintiff issued a written demand for repayment.  
22 There are three causes of action asserted in the  
23 complaint: One, the breach of contract; two, unjust  
24 enrichment; and three, money had and received.  
25 We have had a lengthy, lengthy continuous argument  
26 Bonnie Piccirillo - Official Court Reporter

Proceedings

1 on the issue of discovery, basically, because defendant has  
2 not produced any or very little discovery and only after  
3 pulling teeth, elephant teeth which are very hard to pull.  
4 On February 9, 2015, this Court issued a  
5 conditional order based on defendant Brody's willful  
6 failure to provide discovery as directed in the Court's  
7 amended PC order dated October 16, 2014.  
8 The conditional order required that defendant  
9 Brody (1) produce all documents responsive to plaintiff's  
10 discovery requests that were in his custody and control;  
11 and (2) execute an authorization allowing AOL to provide  
12 the entire contents of Martin Brody's e-mail address called  
13 bbunch120@aol.com account to defendant's counsel, such that  
14 the parties could meet and confer regarding the production  
15 of non-privileged e-mail.  
16 The deadline for compliance was March 6, 2015.  
17 I could read the conditional order, since I think  
18 it does have pertinence to this matter.  
19 The February 9, 2015, order states as follows:  
20 "Plaintiff CPS 227 LLC having established that  
21 Defendant Martin Brody has willfully failed to provide  
22 discovery as directed in the Amended Preliminary Conference  
23 Order of this Court so-ordered on October 16, 2014, in that  
24 Defendant Brody has failed to produce all documents  
25 responsive to Plaintiff's discovery requests that are in  
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Proceedings

1 his custody and control; it is hereby Ordered that the  
2 Plaintiff's motion for sanctions is granted and the answer  
3 of defendant, Martin Brody, is stricken unless by March 6,  
4 2015, Defendant Brody shall: (1) produce all documents  
5 responsive to plaintiff's discovery requests that are in  
6 his custody and control; and (2) execute an authorization  
7 allowing AOL to provide the entire contents of his  
8 bbunch120@aol.com account to defendant's counsel, such that  
9 the parties can meet and confer to review the production of  
10 non-privileged e-mails from the time periods set forth by  
11 the Court on the February 2, 2015, record."  
12 "See 2/2/15 transcript at page 18, lines 22 to  
13 page 20, line 13."  
14 "And, it is further Ordered that counsel shall  
15 appear for a status conference in Room 442 at 60 Centre  
16 Street on March 10, 2015, at 10:00 a.m."  
17 This deadline was extended to March 13th -- the  
18 March 6th deadline -- 2015 at the request of Brody's  
19 counsel who stated in a letter to the Court that his  
20 client, "recently returned to New York and needs one  
21 additional week to complete a thorough search for the  
22 requested records."  
23 On March 13, 2015, Defendant Brody completed a  
24 Jackson Affirmation stating that his search of the  
25 documents ordered to be produced in the Court's February 9,  
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Proceedings

1 2015, order was "thorough" and "conducted in good faith."  
2 "See Affirmation of Richard H. Dolan, Exhibit 4,  
3 Paragraph 1, Motion Sequence No. 007.

4 On March 17, 2015, the parties appeared for a  
5 status conference to update the Court on defendant's  
6 production.

7 At that hearing, defendant's lawyer -- the same  
8 lawyer as here today, Mr. Mester -- informed the Court that  
9 Brody had "produced documents that his personal attorney  
10 had in his possession."

11 See March 17, 2015, transcript at -- It's motion  
12 Sequence 4 as Exhibit 8.

13 Plaintiff's lawyer responded that "Mr. Brody has  
14 produced from his own file absolutely nothing, not one  
15 e-mail, not one financial document. His interrogatory  
16 answers say he doesn't even know whether he has received  
17 \$6.25 million from us."

18 Also, same citation at page 10.

19 Based on Brody's failure to produce any documents  
20 from his own files, the Court delineated several categories  
21 of responsive documents that should have been produced  
22 under the February 2015 conditional order. Brody was given  
23 extension of time to March 20, 2015, to produce these  
24 documents under the conditional order.

25 The categories of documents included:  
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Proceedings

1 One: All communications between defendant and  
2 co-owners of Cherry Street LLC and Little Cherry LLC  
3 regarding the transaction;

4 Two: All bank records for all accounts, both  
5 personal and belonging to entities under Brody's control;

6 Three: All communications between defendant and  
7 his tax advisors about the transaction;

8 Four: All relevant documents in the possession of  
9 defendant's counsel a Goldberg WeperIn;

10 Five: Corrected and accurate responses to all  
11 interrogatories;

12 Six: Defendant's tax returns from 2008 to the  
13 present, both personal and for any entities that he  
14 controls, and the production timeframe was from 2008 to the  
15 present.

16 The parties return to court on March 24, 2015.  
17 During the conference, defendant's counsel reported that  
18 the AOL e-mails were ordered and that bank records had been  
19 requested from HSBC. In addition, defendant's accountant  
20 would check his file for tax returns and respond within  
21 thirty days.

22 While defendant's counsel stated that the  
23 accountant could locate returns from 2009 to 2012, he  
24 stated that he could not find the 2008 return.

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Proceedings

1 In addition, as of March 2015, the 2013 return had  
2 not yet been filed.

3 With further prodding, counsel stated that Brody  
4 had just received the 2009 and 2010 tax returns by e-mail  
5 from the accountant and that the accountant had mailed the  
6 2011 and 2012 returns.

7 In addition, counsel stated that Brody was happy  
8 with his interrogatory responses and would not update them.

9 At the hearing, the Court directed the parties to  
10 return on April 16, 2015. If all responsive documents  
11 under the February 2015 conditional order and March 17th,  
12 2015 order were not produced, the Court stated that the  
13 answer would be stricken.

14 The court also required Brody to appear in person  
15 on April 16th.

16 Defendant's counsel came to the April 16, 2015,  
17 conference unprepared. He brought no documents with him  
18 and had produced no documents since the conference the  
19 month before.

20 Even though Passover ended a week before the  
21 conference, counsel admitted he failed to make any attempt  
22 to schedule and meet and confer regarding the AOL e-mails.

23 No tax returns were produced, despite the fact  
24 that counsel stated at the last hearing that tax returns  
25 had been e-mailed to Brody and placed in the mail by the  
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Proceedings

1 accountant.

2 Defendant's counsel then stated that the bank  
3 records and tax returns ordered to be produced was sitting  
4 in his home office, which if my memory serves me, was in  
5 New Jersey somewhere.

6 The Court directed counsel to retrieve the  
7 documents and return to court within two and a half hours.  
8 Counsel returned within that period of time, just in the  
9 nick of time with some documents. Not with everything.

10 I directed the parties to meet and confer in the  
11 courthouse the next day regarding the redactions.

12 Next, Brody took the stand and was questioned  
13 under oath by plaintiff's counsel. He affirmed; and after  
14 he took the affirmation under the penalties of perjury, he  
15 began his testimony by answering the very first question  
16 that -- by perjuring himself.

17 When asked if he had "been involved in litigation  
18 prior to this lawsuit," Mr. Brody answered after he had  
19 affirmed to tell the truth, No."

20 Brody also testified that he deleted all e-mails  
21 he receives as he receives them. "I check e-mails  
22 everyday. I delete them."

23 See the April 16, 2015, transcript at page 24  
24 attached to O'Murchadha Affirmation in opposition to Motion  
25 Sequence 004 as Exhibit 10.

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1 Proceedings

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3 Now, before I get to some more interesting things,

4 let's go over a little procedural history.

5 While the Court ordered defendant's tax returns

6 and bank records be produced by March 20, 2015, defendant

7 did not do so. He did not produce the documents by the

8 April 16th, 2015 hearing either.

9 Instead, on April 17, 2015, one day after the last

10 conference, defendant filed a motion to vacate that portion

11 of the Court's order compelling production of these

12 documents and updating defendant's interrogatory responses.

13 That motion to vacate is Motion Sequence No. 004.

14 Plaintiff then filed a contempt motion as to the

15 non-party Little Cherry LLC for failing to respond to

16 plaintiff's subpoena. The contempt motion is Motion

17 Sequence No. 005.

18 On May 4, 2015, plaintiff filed a motion to

19 enforce the Court's conditional order and strike

20 defendant's answer. Defendant then cross-moved for summary

21 judgment. That is Motion Sequence No. 006.

22 So, let's get to Motion No. 004: Defendant's

23 motion to vacate portions of the Court's March 17, 2015,

24 order.

25 First, defendant seeks vacatur of the bank

26 records, tax returns and interrogatory provisions of the

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1 Proceedings

2 Court's March 17, 2015, order.

3 Brody argues that "at this early stage of

4 discovery --" mind you, this is a 2013 case. "At this

5 early --" this is continuing the quote. "At this early

6 stage of discovery where depositions have not occurred,

7 there has been no showing by plaintiff and no finding by

8 the Court of any special circumstances requiring that these

9 confidential and private records be produced.

10 That's Mester's Affirmation at Paragraph 12.

11 He also -- Mr. Mester also contends or Brody also

12 contends that there is no provision of the CPLR that

13 requires the submission of updated interrogatory responses.

14 In his brief affirmation -- which I hope Mr.

15 Mester one day you read my rules. That is not permitted,

16 Mr. Mester. Mr. Mester, not permitted in this Court, brief

17 affirmations not permitted.

18 In his brief affirmation, counsel offers no legal

19 analysis. Instead, he states in a footnote that

20 "permission is hereby made to some basic legal principles

21 in this affirmation rather than file a more extensive

22 memorandum of law, although the affirmant will provide the

23 Court with such memorandum upon request."

24 Paragraph 12, note 3.

25 The problem is, if you had read my rules, Mr.

26 Mester, you would not even have dared to request that.

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1 Proceedings

2 The March 17, 2015, order provided an extension of

3 time to browse documents under the conditional order.

4 Further, the March 17, 2015 order listed certain

5 categories of documents to be produced, all of which were

6 encompassed in the February 2015 conditional order, which

7 required production of all documents responsive to

8 plaintiff's discovery requests that are in the defendant's

9 custody or control."

10 While dubbed a "motion to vacate," defendant in

11 fact brings this motion under CPLR 2221(a), which provides

12 for motions "with leave to renew or to reargue a prior

13 motion."

14 A motion to renew must be based upon "new facts

15 not offered on the prior motion that would change the prior

16 determination." CPLR 2221(e)(2). No new facts are

17 asserted here.

18 A motion for leave to reargue "shall be based upon

19 matters of fact or law allegedly overlooked or

20 misapprehended by the Court in determining the prior

21 motion. CPLR 2221 (d)(2).

22 Defendant does not argue that the Court

23 "overlooked" any area of law. Instead, through this

24 motion, defendant expresses his disagreement with the

25 Court's ruling.

26 See *Foley v. Roche*, 68 A.D.2d 558, at page 567, a

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1 Proceedings

2 First Department 1979 case, stating that the purpose of a

3 motion for reargument "is not to serve as a vehicle to

4 permit the unsuccessful party to argue once again the very

5 questions previously decided."

6 In addition, defendant's motion to reargue is

7 untimely. Since March 17, 2015 order compelled the

8 production of the same documents included in the

9 conditional order, defendant's motion is properly

10 considered in an attempt to reargue the February 2015

11 order.

12 The instant motion was filed on April 17, 2015,

13 more than thirty days after the conditional order was

14 entered. The notice of entry for the conditional order was

15 entered on February 18, 2015.

16 See CPLR 2221 (d)(3). "A motion for leave to

17 reargue shall be made within thirty days after service of a

18 copy of the order determining the prior motion and written

19 service of its entry."

20 Even if defendant's reargument were considered, it

21 would still fail.

22 Defendant is correct that production of tax

23 returns is disfavored. However, their production maybe

24 compelled where the information contained therein "is

25 indispensable to this litigation and unavailable from other

26 sources."

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## Proceedings

1 Cite is to Nanbar Realty Corp. versus Pater Realty  
2 Company, 242 A.D.2d 608, at page 608, First Department 1997  
3 case.

4 The tax returns are indispensable in this case  
5 since they may reflect payments received by Brody or  
6 companies under Brody's control from CPS. Brody has denied  
7 any personal knowledge of these payments and has claimed  
8 that he has destroyed all of his financial records.

9 Given Brody's representation regarding the  
10 destruction of these other financial records, Brody has  
11 demonstrated that this information is "unavailable from  
12 other sources."

13 Accordingly, the Court's order regarding  
14 production of tax returns stands.

15 Defendant makes no argument as to why the Court's  
16 order compelling production of the bank records should be  
17 considered. The one case cited in the counsel's moving  
18 brief affirmation pertains to tax records.

19 Regardless, the Court's production order would  
20 remain. The bank records are relevant insofar as they may  
21 bear on whether Brody or companies under his control  
22 received funds from CPS.

23 Finally, defendant's argument that it cannot be  
24 compelled to update his interrogatory arguments is  
25 specious, to say the very least.

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## Proceedings

1 permits the Court to fashion orders "as are just."

2 As the Court of Appeals stated in Gibbs versus St.  
3 Barnabas Hospital, 16 N.Y.3d 74, at page 79, Court of  
4 Appeals case of 2010:

5 "CPLR 3126 therefore broadly empowers a trial  
6 court to craft a conditional order, an order that grants  
7 the motion and imposes a sanction unless within a specified  
8 time the resisting party submits to the disclosure."

9 I'm not citing to the internal quotes in the Court  
10 of Appeals decision.

11 The Gibbs decision laid out in detail the reasons  
12 for requiring compliance with conditional orders, such as  
13 the one issued here:

14 "There is also a compelling need for courts to  
15 require compliance with enforcement orders if the authority  
16 of the courts is to be respected by the bar, litigants and  
17 the public. The failure to comply with deadlines not only  
18 impairs the efficient functioning of the courts and the  
19 adjudication of claims, but it places jurists unnecessarily  
20 in the position of having to order enforcement remedies to  
21 respond to the delinquent conduct of members of the bar,  
22 often to the detriment of the litigants they represent.  
23 Chronic noncompliance with deadlines breeds disrespect for  
24 the dictates of the Civil Practice Law and Rules and a  
25 culture in which cases can linger for years without  
26

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## Proceedings

1 Pursuant to 3101 (h): "A party shall amend or  
2 supplement a response previously given to a request for  
3 disclosure promptly upon the party's thereafter obtaining  
4 information that the response was incorrect or incomplete  
5 when made."

6 The language of this provision is mandatory.  
7 Where a party fails to amend or supplement his responses, a  
8 court order may be sought.

9 See CPLR 3101(h).

10 Now, we get to Motion Sequence No. 007:

11 Plaintiff's motion to enforce the conditional  
12 order and strike defendant's answer; defendant's  
13 cross-motion for summary judgment.

14 In light of defendant's continued failure to  
15 comply with the Court's discovery orders and his general  
16 campaign of obfuscation, plaintiff now seeks to enforce the  
17 Court's conditional order striking defendant's answer.

18 The motion to strike.

19 The CPLR empowers the Court to penalize a party  
20 who refuses to comply with discovery orders.

21 Pertinent to this case, CPLR 3126 applies to  
22 parties who "refuse to obey an order for disclosure or  
23 willfully fails to disclose information which the Court  
24 finds ought to have been disclosed."

25 The nonexclusive list of sanctions in CPLR 3126

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## Proceedings

1 resolution."

2 "For these reasons, it is important to adhere to  
3 the position be declared a decade ago that 'if the  
4 credibility of the court orders and the integrity of our  
5 judicial system are to be maintained, a litigant cannot  
6 ignore court orders with impunity.'"

7 Gibbs at 16 N.Y.3d at page 81.

8 Defendant argues that the its should not be  
9 stricken because they have "substantially complied" with  
10 the conditional order.

11 This argument is factually incorrect, since  
12 defendant's has failed to produce any relevant documents.

13 For example, defendant stated that he did not have  
14 access to any of his e-mails since he deleted them all  
15 immediately after reading them.

16 However, AOL was able to produce e-mails from  
17 defendant's account, which contains many responses,  
18 relevant documents from 2013 and earlier.

19 See affirmation of Richard Dolan at Exhibit 20.

20 Indeed, an AOL Assistant General Counsel, Abigail  
21 Gail Abraham states that "for a number of years now AOL  
22 keeps e-mail as long as the subscriber does. If a user  
23 deletes the e-mail, it is gone from the AOL server within  
24 24 to 48 hours and is not recoverable."

25 Dolan Affirmation, Exhibit 21.

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## Proceedings

1 Based on Ms. Abraham's e-mail, the fact that many  
2 e-mails from 2013 were recoverable demonstrates that they  
3 were not deleted.

4 If they had been deleted, they would have been  
5 expunged from the server within 24 to 48 hours.

6 Based on this information, the Court concludes  
7 that defendant retained access to the e-mails, but made  
8 misrepresentations to the Court to avoid his discovery  
9 obligations.

10 In addition, the AOL account review revealed that  
11 defendant has two additional e-mail accounts that he failed  
12 to disclose to plaintiff and from which he has not produced  
13 documents.

14 See Dolan Affirmation, Exhibit 22 and 23.

15 The e-mails are bbunch120@koshemet.com and  
16 bbunch120@gmail.com.

17 Brody has failed to produce tax returns from 2008  
18 and 2013.

19 Brody has not produced all communications from his  
20 accountant and tax advisors regarding his transactions with  
21 plaintiff.

22 He has not produced bank records, aside from the  
23 bank statements of two of his business entities.

24 Finally, Brody has not produced all communications  
25 from with his co-owners of Cherry Street LLC and Little  
26 Bonnie Piccirillo - Official Court Reporter

## Proceedings

1 conditional order, defendant's answer is hereby stricken.

2 Now, as to default judgment.

3 Entry of an order striking an answer is equivalent  
4 to a default in answering, and a plaintiff's right to  
5 recover upon the defendant's default in answering is  
6 governed by CPLR 3215.

7 See Reynolds Sec., Inc. versus Underwriters Bank &  
8 Trust Company, 44 N.Y.2d 568, at page 572, a Court of  
9 Appeals 1978 case.

10 After a party's default, CPLR 3215(b) authorizes  
11 the court to refer the assessment of damages to a referee,  
12 or, to indeed find a judgment. 3215(b) further authorizes  
13 the court to direct that judgment be entered by the clerk  
14 in accordance with the report without any further  
15 application to the court.

16 And now I turn to the demand made in plaintiff's  
17 complaint at page 4. It's paragraph 19, where the  
18 following statement is made:

19 "On December 2, 2013, plaintiff served written  
20 notice on defendant demanding repayment in full of the  
21 \$6.25 million together with interest thereon as allowed by  
22 law no later than December 6, 2013."

23 A true copy of said notice annexed hereto.

24 So the Court finds that there is no need for a  
25 damage inquest to be done in this matter.

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## Proceedings

1 Cherry LLC regarding these transactions.

2 Even if it could be said that defendant  
3 substantially complied, he fails to cite to any case in  
4 which a conditional order was satisfied through substantial  
5 compliance.

6 While both lower courts in Gibbs permitted the  
7 defaulting party to escape from the mandate of the  
8 conditional order, the Court of Appeals reversed and did  
9 not allow for any "substantial compliance" exception.

10 Gibbs, 16 N.Y.3d at page 79.

11 Indeed, the Gibbs court stated that "we have made  
12 clear that to obtain relief from the dictates of a  
13 conditional order, the defaulting party must demonstrate  
14 (1) a reasonable excuse for the failure to produce the  
15 requested items; and (2) the existence of a meritorious  
16 claim or defense."

17 Gibbs, 16 N.Y.3d at 80.

18 Therefore, the sole path of extrication available  
19 to defendant is not to argue "substantial compliance," but  
20 rather to show both a reasonable excuse for not producing  
21 the documents and a meritorious defense to the claims in  
22 the complaint.

23 Defendant has shown neither.

24 Accordingly, plaintiff's motion to enforce the  
25 conditional order is granted. And pursuant to the

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1 The Court directs that a judgment be entered in  
2 the amount of \$6.25 million plus interest at the statutory  
3 rate from the date of December 6, 2013; and after the  
4 judgment is filed, that interest should continue at the  
5 statutory rate at a rate of nine percent up to the time  
6 that judgment is paid.

7 However, as it concerns the request for fees and  
8 costs, as to that, the Court pursuant to 20 NYCRR Section  
9 130-1.1, which grants the Court the power to award  
10 plaintiff "costs in the form of reimbursement for actual  
11 expenses reasonably incurred and reasonable attorney's fees  
12 resulting from frivolous conduct."

13 Conduct is frivolous under Rule 130.1.1 if "(1) It  
14 is completely without merit in law and cannot be supported  
15 by reasonable argument for an extension, modification or  
16 reversal of existing law; (2) It is undertaken primarily to  
17 delay or prolong the resolution of the litigation or to  
18 harass or maliciously injure another; or (3) It asserts  
19 material factual statements that are false."

20 Brody's testimony before this Court on April 16th,  
21 2015, contained not one, but a multitude of falsehoods,  
22 including that he had never been involved in a litigation  
23 before and deleted all e-mails immediately after reading  
24 them when, of course, as we heard at the mini hearing we  
25 had on that day, he had had -- I can't count how many

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litigations. I'm sure plaintiff's counsel could tell me how many, but more than fifteen as far as I could tell. Maybe more than twenty.

So, his lie to the Court -- his very first statement to the Court was a boldface lie.

MR. MESTER: Your Honor, I believe he clarified that on the record. I don't have it in front of me, but I believe he did.

THE COURT: I don't think so. And you stand up when you talk to the Court.

MR. MESTER: He didn't understand the essence of that question, your Honor. I believe he clarified that.

THE COURT: He did not, and you can look at the transcript, if you ever bothered to order it.

The Court further determines that his discovery conduct and refusal to obey the court orders was conduct "undertaken primarily to delay or prolong the resolution of the litigation or to harass another."

In determining whether to award sanctions, the First Department has considered whether there is a "continuous pattern of conduct."

Matter of Grayson versus New York City Department of Parks and Recreation, 99 A.D.3d 418, at page 419, First Department 2012, citing to Levy versus Carol Management Corporation, 260 A.D.2d 27, at pages 33 to 34, First

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Department 1999 case.

In addition, to being "retributive," sanctions "are goal oriented" and are intended to "deter future frivolous conduct."

Levy at 260 A.D.2d at page 34.

The Court concludes that defendant engaged in a continuous pattern of conduct aimed at evading his obligation under the discovery orders of this Court, as well as the CPLR.

Accordingly, the Court grants plaintiff's motion and awards attorneys's fees and costs to plaintiff from defendant Brody relating to the briefing and argument of the motion to enforce the conditional order.

The matter will be referred to a special referee for a determination of the amount of fees and costs award and as such, the Court severs from the previous judgment the issue of attorneys fees and costs.

As to the remaining motion, defendant's cross-motion for summary judgment and plaintiff's motion for contempt as to Little Cherry LLC are both denied as moot; and that constitutes the decision and order of the Court.

MR. DOLAN: Thank you, Judge. We'll order the transcript.

THE COURT: Yes, please do so. The moment I do

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get that, you'll be getting gray sheets; but I'm giving you fair warning, you won't get a gray sheet until I come back from vacation. You're going to have to wait.

MR. DOLAN: Thank you, Judge.

THE COURT: All right.

CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPT

*Bonnie Piccirillo*

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OFFICIAL COURT REPORTER

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