Freidman v Yakov
2013 NY Slip Op 33050(U)
December 4, 2013
Supreme Court, New York County
Docket Number: 650106/2011
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN **PART** 3

Justice

FREIDMAN, NAUM

INDEX NO. 650106/2011

MOTION DATE 6/12/2013

- V -

FAYENSON, YAKOV A/K/A JACOB

MOTION SEQ. NO. 006

The following papers, numbered 1 to 3 ,were read on this motion to/for compel + sanctions

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) 1

Answering Affidavits - Exhibits ..... No(s) 2

Replying Affidavits ..... No(s) 3

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

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

DATED: 12/4/2013

EILEEN BRANSTEN , J.S.C.

1. CHECK ONE : [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS : [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE : [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [X] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

NAUM FREIDMAN,

Plaintiff,

-against-

YAKOV a/k/a JACOB FAYENSON, and
JACOB FAYENSON REVOCABLE TRUST,

Defendants,

-and-

KORM REALTY INC.,

Nominal Defendant.

----------X

JACOB FAYENSON REVOCABLE TRUST,

Counterclaim Plaintiff,

-against-

NAUM FREIDMAN, EVGENY FREIDMAN, and
TENENBAUM BERGER & SHIVERS, LLP,

Counterclaim Defendants,

-and-

KORM REALTY INC.,

Nominal Defendant.

----------X

Index No. 650106/2011
Motion Date: 6/12/2013
Motion Seq. No.: 006

BRANSTEN, J.

This matter comes before the Court on Defendant Yakov a/k/a Jacob Fayenson ("Jacob Fayenson") and Defendant and Counterclaim Plaintiff Jacob Fayenson Revocable Trust's (the

"Trust," and, with Jacob Fayenson, "Movants") motion (1) to compel Counterclaim Defendant Tenenbaum Berger & Shivers, LLP (the "TB&S Firm") to produce its malpractice insurance policy pursuant to Section 3101(f) of the New York Civil Practice Law and Rules ("CPLR"); (2) for sanctions against the TB&S Firm and Counterclaim Defendant Evgeny Freidman ("Evgeny Freidman") for violations of Section 221 of the Uniform Rules for the Conduct of Depositions ("Uniform Rule" or "22 NYCRR 221"); (3) to compel Evgeny Freidman and Plaintiff and Counterclaim Defendant Naum Freidman ("Naum Freidman") to answer certain deposition questions; (4) to compel Evgeny Freidman and Naum Freidman to produce certain documents; and (5) for sanctions against Evgeny Freidman and Naum Freidman for spoliation of evidence.[1] Respondents oppose.[2] For the reasons that follow, Movants' motion to compel and for sanctions is granted in part and denied in part.

BACKGROUND

Nominal Defendant Korm Realty Inc. ("Korm") is a New York corporation with its principal place of business in Queens, New York. (Complaint ("Compl.") ¶ 6.) Korm owns and leases the commercial real property located at 33-01 37th Avenue, Long Island City, New York

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[1] Evgeny Freidman and Naum Freidman, together with the TB&S Firm, are hereinafter collectively referred to as "Respondents."

[2] Commercial Division Rule 17 provides, among other things, that "[u]nless otherwise permitted by the court . . . memoranda of law shall be limited to 25 pages each." 22 NYCRR 202.70(g). Respondents' memorandum of law in opposition to this motion is 43 pages long. In the future, the parties are directed to obtain permission from the Court prior to filing papers which exceed the limitations set forth in Commercial Division Rule 17.

11101. (Compl. ¶ 11.) Naum Freidman and the Trust are each 50% co-owners of Korm. (Answer at 7, ¶ 5.) Korm was previously co-owned in equal shares by Naum Freidman and Jacob Fayenson, until approximately January 2004, when Jacob Fayenson transferred his interest in Korm to the Trust. (Answer at 7, ¶ 7.) Jacob Fayenson is also Korm's president and one of its directors, as well as the trustee of the Trust. (Answer at 7, ¶ 5.)

Evgeny Freidman is Naum Freidman's son (Answer at 8, ¶ 10), and Respondents assert that in 1996, Evgeny Freidman obtained power of attorney to act on behalf of Naum Freidman with respect to the management of Korm. (Plaintiff/Counterclaim Defendants' Memorandum of Law in Opposition ("Respondents' Mem. Opp.") at 3.)

The business relationship between Jacob Fayenson, Naum Freidman, and Evgeny Freidman began to deteriorate in early 2009, as a result of a business dispute unrelated to Korm. (Answer at 8-9, ¶¶ 12-16; Respondents' Mem. Opp. at 3-4.) In December 2009, Evgeny Freidman contacted the TB&S Firm to commence a proceeding on Korm's behalf to evict Korm's three tenants. (Answer at 9, ¶¶ 17-18; Respondents' Mem. Opp. at 3-4.) The parties dispute the motivations behind that eviction proceeding, and Movants allege that "[t]he eviction actions were commenced for a bad faith purpose – to separate Fayenson from the income of Korm." (Answer at 9-10, ¶¶ 17-25; Respondents' Mem. Opp. at 4-7.)

On January 17, 2011, Respondents commenced this action derivatively on behalf of Korm, asserting causes of action against Movants for breach of fiduciary duty and seeking an equitable remedy of accounting. (Compl. ¶¶ 16-27.) Specifically, Respondents allege that Movants breached their fiduciary duty "by failing to account for funds to the Plaintiff,

withholding rents, and allowing the Premises to fall into disrepair." (Compl. ¶ 18.) On March 2, 2011, Movants filed their answer, which asserted both derivative and individual counterclaims. (Answer at 13-19.) On October 19, 2011, the Court issued an order dismissing the counterclaims asserted individually by Movants. (NYSCEF Doc. No. 21.) The remaining counterclaims are derivative in nature, also brought on behalf of Korm, and include causes of action against each of the Respondents, including the TB&S Firm, stemming from Respondents' commencement and prosecution of the Queens eviction proceeding. (Answer at 13-17, ¶¶ 37-68.)

As set forth above, the instant motion seeks to compel the production of documents and answers to deposition questions, as well as impose sanctions for alleged misconduct during depositions and spoliation of evidence. Each component of the relief sought is addressed in turn.

ANALYSIS

I. The TB&S Firm's Malpractice Insurance

Movants seek the entry of an order "compelling counterclaim Defendant Tenenbaum Berger & Shivers, LLP . . . to produce its malpractice policy pursuant to CPLR 3101(f)." (Defendants and Counterclaim Plaintiffs' Memorandum of Law in Support ("Movants' Mem. Supp.") at 1.)

CPLR 3101(f) provides in pertinent part that "[a] party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." CPLR 3101(f).

"The language of the statute is unambiguous," in that it "enabl[es] a plaintiff to discover the existence and contents of the [defendant's] insurance agreements." *Weiner v. Lenox Hill Hosp.*, 164 Misc. 2d 759, 761 (Sup. Ct. N.Y. County 1995), *aff'd*, 224 A.D.2d 299 (1st Dep't 1996). At least one court has characterized a plaintiff's entitlement under CPLR 3101(f) to information on coverage limits "as a matter of statutory right." *Peterson v. Long*, 136 Misc. 2d 725, 730 (Sup. Ct. Cattaraugus County 1987).

CPLR 3101(f)'s purpose is "'to accelerate the settlement of claims by affording the plaintiff the knowledge of the limits of the defendant's liability policy.'" *Bolton v. Weil, Gotshal & Manges LLP*, 14 Misc. 3d 1220(A), 1220A (Sup. Ct. N.Y. County 2005) (quoting *Spotlight Co., Inc. v. Imperial Equities Co.*, 107 Misc. 2d 124, 125 (App. Term. 1st Dep't 1981)). That is, it allows a "plaintiff suing the alleged tortfeasor . . . to learn whether or not defendant is insured, for how much and under what circumstances." *St. Paul Fire & Marine Ins. Co. v. Bernstein Management Corp.*, 158 Misc. 2d 1047, 1048 (Civ. Ct. N.Y. County 1993).

The First Department has explained that "[i]n interpreting any statute, we are required, first and foremost, to pay heed to the intent of the legislature, as reflected by the plain language of the text." *UMG Recs., Inc. v. Escape Media Group, Inc.*, 107 A.D.3d 51, 57 (1st Dep't 2013). Moreover, it is well-settled that "'resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning.'" *UMG Recs., Inc.*, 107 A.D.3d at 57 (quoting *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998)).

CPLR 3101(f), according to its plain language, permits a party to obtain a copy of another party's insurance policy, if the coverage provided under that policy "*may*" be used to "satisfy part or all of a judgment which *may* be entered" against the insured. CPLR 3101(f) (emphasis added). Movants contend, and Respondents do not dispute, that the TB&S Firm has a malpractice insurance policy under which the TB&S Firm's insurer could, at least in theory, be liable if a judgment were entered against the TB&S Firm.

Such a policy may be available to satisfy a judgment entered against the TB&S Firm, not withstanding Evgeny Freidman's purported agreement to indemnify the TB&S Firm. (Respondents' Mem. Opp. at 40.) Also, courts have held that "the disclosure of an insurance policy" under CPLR 3101(f) "includes all primary and excess coverage." *Bolton*, 14 Misc. 3d at 1220(A) (citing, among other things, *Love v. Meisner*, 107 Misc. 2d 1003, 1004 (Sup. Ct. Schenectady County 1981)). Thus, even if the TB&S Firm were indemnified by Evgeny Freidman, any additional malpractice insurance would arguably qualify as "excess coverage," and as such, that policy would be properly discoverable.

Similarly, the assertion that the TB&S Firm will not submit the claims asserted against it in this action is not dispositive. (Respondents' Mem. Opp. at 40.) As long as the policy is one under which the TB&S Firm's insurer may be liable to satisfy a judgment entered against the TB&S Firm, the policy is discoverable under CPLR 3101(f). *See* CPLR 3101(f). The question is not whether the policy *will* be available; rather, that the policy *may* be available is sufficient.

Respondents are correct that this Court's order dated October 19, 2011, dismissed the "counterclaim plaintiff's direct claims against" the TB&S Firm. (Respondents' Mem. Opp. at

41.) However, the Trust still asserts multiple causes of action derivatively on behalf of Korm against the TB&S Firm, including one for malpractice. (Answer at 13-17, ¶¶ 37-68.) Thus, Korm is an allegedly injured party that could make a claim on the TB&S Firm's insurance policy, if a judgment were entered.

Respondents are also correct that this Court's order dated March 5, 2013, denied Movants' "application for a temporary restraining order and preliminary injunction, based on a finding that the Trust failed to demonstrate a likelihood of success on the merits." (NYSCEF Doc. No. 171 at 2.) However, the Court of Appeals has held that "[t]he granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for." *J. A. Preston Corp. v. Fabrication Enterprises, Inc.*, 68 N.Y.2d 397, 402 (1986); *see Am. Para Prof'l Sys. v. Hooper Holmes, Inc.*, 13 A.D.3d 167, 168 (1st Dep't 2004) (citation omitted) (explaining that "a ruling on a preliminary injunction is not an adjudication of the merits"). Here, the denial of that application does not establish as a matter of law that the remaining counterclaims lack merit, and therefore does not provide a basis to deny this motion.

For all of the reasons stated above, the Court finds that Movants are entitled to "obtain discovery of the existence and contents of" the TB&S Firm's malpractice insurance policy or policies, pursuant to CPLR 3101(f).

II. Conduct During the Depositions of Naum Freidman and Evgeny Freidman

Movants contend that Attorney Michael Cohen of the TB&S Firm ("Attorney Cohen") and Evgeny Freidman committed multiple violations of Uniform Rule 221 and seeks the entry of an order (a) compelling answers to certain deposition questions and (b) awarding sanctions. Movants argue that Attorney Cohen improperly directed a deponent to not answer questions posed by Movants' attorney, Eric Wertheim ("Attorney Wertheim"), on nine separate occasions, in violation of Uniform Rule 221.2. Movants further argue that Attorney Cohen made multiple improper speaking objections, as well as other inappropriate statements during the depositions of Naum Freidman and Evgeny Freidman. Separately, Movants argue that Evgeny Freidman interrupted Naum Freidman's deposition and proceeded to "verbal[ly] assault" Attorney Wertheim. (Movants' Mem. Supp. at 9-11.)

A. *Attorney Cohen's Instruction Not to Answer*

Uniform Rule 221.2 addresses the limited context in which a deponent may refuse to answer a question posed at a deposition when an objection is made. *See* 22 NYCRR 221.2. It provides that "[a] deponent shall answer all questions at a deposition, except (I) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person." 22 NYCRR 221.2. Attorneys may not instruct a deponent not to answer unless CPLR 3115 or 22 NYCRR 221.2 provides a basis for doing so. 22 NYCRR 221.2. When a deponent refuses to answer a question, or an attorney instructs a deponent not to answer, such

refusal or instruction "shall be accompanied by a succinct and clear statement of the basis therefor." 22 NYCRR 221.2. Also, where a deponent does not answer a question, the deposition proceeds, and "the examining party shall have the right to complete the remainder of the deposition." 22 NYCRR 221.2.

CPLR 3115(b), (c), and (d) provide certain limited bases for making objections during depositions including errors which might be obviated if known promptly, disqualification of the person taking the deposition, and competency of witnesses or admissibility of testimony. *See* CPLR 3115(b)-(d). However, despite its inclusion in Uniform Rule 221.2, CPLR 3115 does not provide any separate basis for refusing to answer questions or for an attorney to direct a deponent to not answer questions. *See* CPLR 3115; 22 NYCRR 221.2. Furthermore, Uniform Rule 221.1(a) provides that objections made at a deposition "shall be noted by the officer before whom the deposition is taken, *and the answer shall be given and the deposition shall proceed subject to the objections* and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR." 22 NYCRR 221.1(a) (emphasis added).

1. *The First Instruction Not to Answer*

Attorney Wertheim asked Evgeny Freidman about the number of instances in which the TB&S Firm had performed legal services for Naum Freidman and Evgeny Freidman. (Respondents' Ex. N at 12:18-24.) Evgeny Freidman asked Attorney Wertheim to clarify his question, stating, "I'm not confused. I want you to ask the correct question." (Respondents' Ex. N at 13:8-9.) Attorney Wertheim replied, "Tell me what the correct question is." (Respondents'

Ex. N at 13:10-11.) As Evgeny Freidman began to answer, Attorney Cohen interrupted by saying, "Stop. Proceed with your next fact question." (Respondents' Ex. N at 13:12-14.)

Respondents argue that this statement was made in an effort to stop bickering between Evgeny Freidman and Attorney Wertheim. (Respondents' Mem. Opp. at 17-18.) Notwithstanding Respondents' characterization, bickering is not an enumerated basis for directing a deponent not to answer. Respondents also contend that "[t]he record shows that this was, in fact, *not* an instruction not to answer." (Respondents' Mem. Opp. at 17.) The Court disagrees. Attorney Cohen's instruction to "[s]top" was made during Evgeny Freidman's answer, and was therefore an instruction to Evgeny Freidman not to answer.

Accordingly, the First Instruction Not to Answer was improper.

2. *The Second Instruction Not to Answer*

Attorney Wertheim asked Evgeny Freidman whether, prior to the deposition, he had searched for certain e-mails, and Evgeny replied that he had not. (Respondents' Ex. N at 169:25-170:6.) Attorney Wertheim asked Evgeny Freidman why he had not searched and as Evgeny Freidman was answering, Attorney Cohen objected and directed Evgeny Freidman not to answer, stating that the question was "not a fact question" and that "[d]iscovery issues are to be dealt with between counsel." (Respondents' Ex. N at 170:13-15.)

Respondents argue that the question was not "a factual one, but an improper question about current legal theory or strategy concerning the witnesses [sic] legal discovery obligations." (Respondents' Mem. Opp. at 18.) Respondents further argue that the objection and "qualified

instruction not to answer" are now moot because the e-mails at issue were subsequently produced in discovery. (Respondents' Mem. Opp. at 18-19.) Although Respondents assert that Attorney Wertheim's question "was improper as per Rule 221.2," (Respondents' Mem. Opp. at 18), they do not set forth authority establishing its impropriety, nor do they explain how that question "would, if answered, cause significant prejudice to any person." 22 NYCRR 221.2(iii). Moreover, it is not clear that the question impermissibly sought information regarding Respondents' legal strategy. The decision to not search for e-mails could well have been motivated by considerations distinct from the discovery process or the advice of counsel related thereto.

Accordingly, the Second Instruction Not to Answer was improper.

3. *The Third Instruction Not to Answer*

Attorney Wertheim asked whether Evgeny Freidman intended to take any steps to get new tenants for the Korm property. (Respondents' Ex. N at 184:5-10.) Attorney Cohen objected and said, "Stop. Once again, this issue has been dealt with most recently, and it's currently being dealt with between counsel." (Respondents' Ex. N at 184:9-16.) Respondents contend that Attorney Cohen "objected on the grounds that the matter was not factual, but a one [sic] based on current and future legal theory or strategy, and was at that time being discussed and addressed between the parties' respective counsel outside and apart from the depositions." (Respondents' Mem. Opp. at 20.) Respondents also assert, without citation to the deposition transcript, that Attorney Wertheim "admitted he was improperly using the deposition to circumvent that legal

process and to find out from the witness the Freidmans' legal strategy with respect to the evictions and replacements of the Korm's tenants." (Respondents' Mem. Opp. at 20.)

Here, the instruction not to answer does not fall within any of the three enumerated categories of Uniform Rule 221.2. To the extent that Respondents assert the third category, they have not articulated how Attorney Wertheim's question "would, if answered, cause significant prejudice to any person." 22 NYCRR 221.2(iii). Moreover, the mere use of the phrase "legal theory or strategy" does not necessarily make it the case that a line of questioning relates to legal theory or strategy, particularly where, as Movants observed, while Respondents' "'strategy' about how to manage this lawsuit is undoubtedly proprietary[,] . . . their strategy about how to manage Korm's tenants is not." (Movants' Reply Mem. at 6.) The Court concludes that the decision of whether to lease property or seek out new tenants, even as to property that is the subject of litigation, is a business decision related to that property, as opposed to a component of the legal strategy related to the litigation.

Accordingly, the Third Instruction Not to Answer was improper.

4. *The Fourth Instruction Not to Answer*

Attorney Wertheim asked Evgeny Freidman whether Naum Freidman owned a company which "managed New York City taxi medallions." (Respondents' Ex. N at 207:4-10.) Following Evgeny Freidman's question seeking to clarify during which periods of time Attorney Wertheim was asking about Naum Freidman's ownership, Attorney Cohen objected and explained that "without your establishing how this is in any way related to your client's

counterclaims, I'm going to instruct my witness, my client not to answer, and we can mark it for a ruling." (Respondents' Ex. N at 207:19-208:24.)

Respondents argue that the objection and instruction not to answer was justified by Attorney Wertheim "veer[ing] his questioning into a fishing expedition to question Evgeny Freidman about his father's businesses." (Respondents' Mem. Opp. at 20.) Respondents further argue that this line of questioning is unrelated to the pleadings and counterclaims and that a deposition is not "a device for unrestricted fishing expeditions." (Respondents' Mem. Opp. at 20-21.)

Uniform Rule 221.2 does not include fishing expeditions or relevance objections among the enumerated bases under which a deponent may refuse to answer or an attorney may instruct a deponent not to answer. While Respondents may believe that Attorney Wertheim's questions nonetheless fall into one or more of the enumerated bases under Uniform Rule 221.2, they have not specified which, if any, apply here, nor do their arguments otherwise indicate an applicable basis for an instruction not to answer.

Furthermore, the cases cited by Respondents in support of their arguments are inapposite, because they address document discovery and standards for quashing subpoenas, rather than the propriety of instructions not to answer during depositions. *See generally Charest v. K Mart of NY Holdings, Inc.*, 71 A.D.3d 471 (1st Dep't 2010); *Detroit Diesel Corp. v. Attorney General of New York*, 269 A.D.2d 1 (1st Dep't 2000); *Penn Palace Operating v. Two Penn Plaza Assocs.*, 215 A.D.2d 231 (1st Dep't 1995); *Oak Beach Inn Corp. v. Town of Babylon*, 239 A.D.2d 568 (2d Dep't 1997).

In fact, in *Penn Palace Operating*, which is cited favorably by Respondents, the First Department distinguished between the appropriate scope of document discovery as compared to depositions, stating that "[t]his attempt to use document discovery as a means to test whether or not certain unknown documents exist is an impermissible fishing expedition, particularly since defendant has shown no attempt to probe this issue initially upon deposing knowledgeable parties." *Penn Palace Operating v. Two Penn Plaza Assocs.*, 215 A.D.2d 231, 231 (1st Dep't 1995) (citations omitted). The First Department's language indicates that depositions, as opposed to document discovery, are the appropriate means by which a party should determine whether "certain unknown documents exist[ed]," suggesting that the permissible scope of a deposition is, in fact, broader than document discovery and may allow for questions which might otherwise be categorized as a "fishing expedition." *Penn Palace Operating*, 215 A.D.2d at 231.

Accordingly, the Fourth Instruction Not to Answer was improper.

5. *The Fifth Instruction Not to Answer*

Attorney Wertheim asked Evgeny Freidman about the contents of certain letters, and Evgeny Freidman explained that the letters "refer to Mr. Fayenson being cute and sneaky with the fact that . . . if we don't both appear, that [rent checks] should be deposited into a bank account at which time he could take all of the monies and do as he wishes." (Respondents' Ex. N at 275:5-21.) Evgeny Freidman then stated that he could not recall whether the bank account in the letters was the account related to Korm based solely on the account number, Attorney Wertheim asked, "If it was the bank account of Korm, assume for argument's sake for purposes

of my question that it was the bank account of Korm, is there anything cute or sneaky about asking the tenants to deposit their rent payments into the bank account of Korm?" (Respondents' Ex. N at 276:10-16.) Before an answer was given, Attorney Cohen objected and directed Evgeny Freidman not to answer the question, stating that the question was "wholly improper based on his testimony that he does not know by heart the bank account number. Just rephrase the question." (Respondents' Ex. N at 276:17-25.)

Respondents now argue that the instruction not to answer was justified because Attorney Wertheim was asking "hypothetical questions" and "mischaracteriz[ing] the witness's testimony." (Respondents' Mem. Opp. at 21-22.)

Merely characterizing the question as improper when the instruction is made, without more, is insufficient to satisfy Uniform Rule 221.2(iii), which requires that the question be plainly improper and that answering the question would cause significant prejudice to any person. *See* 22 NYCRR 221.2(iii). Neither Attorney Cohen's statements made at the deposition nor the arguments made by Respondents in their briefs, explain how answering the question would cause significant prejudice to any person.

Moreover, as one court observed, objections are "not in accordance with the rules" when made at a deposition in response to a fact witness being asked "opinion and/or hypothetical questions" based on the witness's business experience. *Terzi v. Fortune Home Builders, LLC*, 2009 NY Slip Op. 30871(U), at *3 (Sup. Ct. N.Y. County Apr. 8, 2009). That court further held that "the witness should have been instructed to answer such questions." *Terzi*, 2009 NY Slip Op. 30871(U), at *3 (citing *Zambanini v. Otis Elevator et al.*, 242 A.D.2d 453, 453 (1st Dep't

1997)). Here, too, Respondents assert that in 1996, Evgeny Freidman obtained power of attorney to act on behalf of Naum Freidman as a 50% shareholder and co-manager of Korm. (Respondents' Mem. Opp. at 3.) The letters about which Attorney Wertheim was asking were dated May 7, 2009 (Respondents' Ex. N at 275-76), approximately 13 years after Evgeny Freidman assumed the role of co-manager of Korm. Accordingly, hypothetical questions based on the business experience acquired by Evgeny Freidman over that period, such as questions related to the practice of collecting rent from tenants of Korm's property, are permissible.

Accordingly, the Fifth Instruction Not to Answer was improper.

6. *The Sixth Instruction Not to Answer*

In response to a question about whether Jacob Fayenson and Naum Freidman had equal management power in the operation of Korm, Evgeny Freidman stated that "[t]hey were supposed to be equals. Right. We don't know what Mr. Fayenson did on his overtime. We don't know." (Respondents' Ex. N at 276:10-16.) Referring to the statement about "what Mr. Fayenson did on his overtime," Attorney Wertheim then asked, "What was the purpose of that statement?" (Respondents' Ex. N at 309:18-310:7.) Attorney Cohen objected and instructed Evgeny Freidman not to answer. (Respondents' Ex. N at 310:10-11.) Subsequent to that instruction, however, the deposition transcript shows that Evgeny Freidman answered Attorney Wertheim's question, and, in fact, elaborated on his answer. (Respondents' Ex. N at 310:12-313:8.)

Respondents' contention that "[t]here in fact was no instruction not to answer here," is simply incorrect. (Respondents' Mem. Opp. at 22.) The record shows that in response to Attorney Wertheim's question about the purpose of Evgeny Freidman's statement, Attorney Cohen stated, "Objection. Don't answer." (Respondents' Ex. N at 310:10-11.) Respondents have not established or otherwise identified a permissible basis under Uniform Rule 221.2 for that instruction not to answer.

Accordingly, the Sixth Instruction Not to Answer was improper.

7. *The Seventh Instruction Not to Answer*

Attorney Wertheim asked Naum Freidman a series of questions about whether payments that Naum Freidman received from Evgeny Freidman were deposited into a bank account, and, if so, into which account they were deposited. (Respondents' Mem. Opp. at 22-23; Respondents' Ex. D at 46-53.) When asked why, in response to Movants' discovery requests, Naum Freidman did not obtain bank records reflecting these deposits, Naum Freidman answered that he could not recall into which account they had been deposited or whether he had received the payments in cash or check. (Respondents' Ex. D at 56:19-58:3.) Attorney Wertheim then asked Naum Freidman to provide a list of bank accounts into which the payments could have been deposited. (Respondents' Ex. D at 59:3-4.) Before Naum Freidman was able to respond, Attorney Cohen objected, and a brief discussion between Attorneys Wertheim and Cohen followed, after which Attorney Cohen stated that "I believe [Naum Freidman] just testified that he does not specifically recall. If he deposited it into a specific bank account and if so which one. Based on that

testimony, you do not have a right to inquire of him to identify his personal bank accounts." (Respondents' Ex. D at 58:4-59:14.)

Respondents argue that the instruction not to answer was appropriate because "Mr. Wertheim . . . mischaracterized Mr. [Naum] Freidman's testimony as having definitely been deposited by Mr. Freidman into his bank account and asked him improperly to list all his personal bank account numbers." (Respondents' Mem. Opp. at 23.) Respondents further assert that the issue is now moot because Naum Freidman later recalled that the payments were made in cash and that they were deposited in a safe deposit box. (Respondents' Mem. Opp. at 24.)

Once again, the Court finds that the instruction not to answer was improper. The basis for Attorney Cohen's objection does not fall within one of the enumerated categories in Uniform Rule 221.2.

Moreover, as discussed above, the First Department has indicated that depositions, as opposed to document discovery, are the appropriate means by which a party should determine whether "certain unknown documents exist." *Penn Palace Operating*, 215 A.D.2d at 231. Thus, Attorney Cohen's question regarding possible deposit locations for the payments at issue would be permissible because the answer might lead to document discovery, such as account statements referencing these deposits.

Furthermore, Attorney Wertheim's question to Naum Freidman before Attorney Cohen's instruction not to answer was "[l]ist the bank account that this money could have been deposited in." (Respondents' Ex. D at 59:3-4.) The use of the word "could" indicates that the money could have, but need not have been, deposited into any one of the accounts that Naum Freidman might

have identified, had he been allowed to answer. As a result, that question does not mischaracterize Naum Freidman's prior testimony.

Lastly, with respect to Respondents' mootness argument, Movants contend that Naum Freidman's subsequent recollection of the disposition of the cash that he received from Evgeny Freidman is part of a "calculated effort . . . to recant damaging testimony about a central issue" in a related proceeding which is pending in New York State Supreme Court, Queens County, bearing index number 700021/2011. (Movants' Mem. Supp. at 10; Respondents' Mem. Opp. at 8.)

Accordingly, the Seventh Instruction Not to Answer was improper.

8. *The Eighth Instruction Not to Answer*

Following the exchange discussed with respect to the Seventh Instruction Not to Answer, Attorney Wertheim asked Naum Freidman whether he had reported any of the cash payments that he received from Evgeny Freidman to the Internal Revenue Service. (Respondents' Ex. D at 68:9-10.) Attorney Cohen objected and directed Naum Freidman not to answer the question, stating that Attorney Wertheim was "not an agent for the IRS" and that the question had "been covered [that] morning" such that "[f]urther inquiry along those lines [was] improper." (Respondents' Ex. D at 68:11-15.)

Here, the instruction not to answer was improper. The enumerated bases for such an instruction under Uniform Rule 221.2 do not apply. Notably, the fact that Attorney Wertheim is

"not an agent for the IRS" does not provide a basis for an instruction not to answer or a speaking objection.

Also, while Respondents contend that the question was answered by Naum Freidman earlier in his deposition, the prior question and answer to which respondents refer was whether Naum Freidman had "declare[d] these deposits into [his] checking account as income on [his] tax returns," to which Naum Freidman replied that he "declar[ed] all the money which [he] received during the year to [his] accountant and he do [sic] his job." (Respondents' Ex. D at 53:17-54:11.) That question and answer is distinct from the one at issue here, namely, whether Naum Freidman reported any of the cash payments that he received from Evgeny Freidman to the Internal Revenue Service, particularly in light of Naum Freidman's correction to his testimony based on his recollection during the lunch break that he had, in fact, received cash from Evgeny Freidman and had deposited that cash in a safe deposit box. (Respondents' Ex. D at 66:14-69:7.)

Accordingly, the Eighth Instruction Not to Answer was improper.

9. *The Ninth Instruction Not to Answer*

In the final instruction not to answer, Attorney Cohen objected and stopped Naum Freidman from answering a question about whether he had reviewed any documents in preparation for his deposition, asserting an objection on the basis of attorney/client privilege. (Respondents' Ex. D at 72:15-73:11.)

Privilege is a recognized basis for instructing a deponent not to answer a question under Uniform Rule 221.2. However, courts have held that parties "are entitled to ask questions

regarding what documents [a deponent] reviewed prior to his deposition and when such documents were reviewed." *City of Rochester v. E & L Piping*, 2001 NY Slip Op. 40156U, at *4 (Sup. Ct. Monroe County Aug. 29, 2001). While there is certainly a question as to whether such documents, if any, are privileged and therefore undiscoverable, *see, e.g.*, *Beach v Touradji Capital Mgt., LP*, 99 A.D.3d 167, 171-72 (1st Dep't 2012) (finding that while "the conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony. . . . the attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony"), the question as to whether any documents were reviewed is permissible.

Accordingly, the Ninth Instruction Not to Answer was improper.

B. *Speaking Objections and Other Statements*

Uniform Rule 221.1(a) sets forth the general rule regarding objections made during depositions and provides that "[n]o objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule." 22 NYCRR 221.1(a). Section (a) further provides that objections made at a deposition "shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR." 22 NYCRR 221.1(a).

Uniform Rule 221.1(b) addresses the manner in which spoken objections are made at depositions and provides that "[e]very objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity." 22 NYCRR 221.1(b). That section also addresses statements made at a deposition which are not objections and provides that "[e]xcept to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning." 22 NYCRR 221.1(b).

Uniform Rule 221.3 governs communications by an attorney with a deponent during a deposition, and provides that "[a]n attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules." 22 NYCRR 221.3. Moreover, in the event of such a communication, "the reason for the communication shall be stated for the record succinctly and clearly." 22 NYCRR 221.3.

Movants argue that Attorney Cohen made improper speaking objections, instructed the deponents to leave the room on several occasions, helped deponents answer questions, and made other inappropriate statements during the depositions. (Movants' Mem. Supp. at 3.)

Respondents, in turn, argue that their offers to send deponents out of the room were made "so that the clarification of the reasoning behind an objection or instruction not to answer would not suggest an answer to the witness." (Respondents' Mem. Opp. at 25.) Respondents also

argue that Attorney Cohen did not attempt to help deponents answer questions. (Respondents' Mem. Opp. at 25-26.) In addition, Respondents argue that Attorney Wertheim has been uncivil, unprofessional, and abusive at various junctures throughout this case. (Respondents' Mem. Opp. at 25-26.)

Based on a review of the deposition transcripts, the Court finds that Attorney Cohen committed multiple violations of Uniform Rules 221.1 and 221.3. For example, at one point during Evgeny Freidman's deposition, Attorney Cohen objected to a question, stating, "Objection. If you understand the question you can answer." (Respondents' Ex. N at 15:19-20.) Similarly, during Naum Freidman's deposition, Attorney Wertheim asked, "Do you recall whose account the checks were drawn on?" (Respondents' Ex. D at 53:9-10.) After a clarifying question and answer, Naum Freidman began to say, "From which account, so . . . ," at which point Attorney Cohen stated without objecting, "If you recall," and Naum Freidman then answered, "No, I don't recall." (Respondents' Ex. D at 53:11-15.) Courts have characterized statements and objections of this type as "suggestive" or "coaching," and have found them to be improper. *See, e.g.*, *City of New York v. Coastal Oil N.Y., Inc.*, 2000 WL 97247, at *2 (S.D.N.Y. Jan. 27, 2000) (finding that "objections which had the appearance of coaching the witness by continually reminding the witness by stating 'if you know' or 'if you remember,'" were improper); *see also Pinson v. Northern Tool & Equip. Co.*, 2012 WL 5286933, at *1 (S.D. Miss. Oct. 24, 2012) (quoting *In re Neurontin Antitrust Litig.*, 2011 WL 253434, at *12 (D.N.J. Jan. 24, 2011) ("'[O]bjections should be concise, non-argumentative, and non-suggestive, and hence . . . counsel should not (1) make speaking, coaching or suggestive objections; (2) coach or change

the witness's own words to form a legally convenient record; (3) frustrate or impede the fair examination of a deponent during the deposition by, for example, making constant objections and unnecessary remarks; (4) make speaking objections such as 'if you remember,' 'if you know,' 'don't guess,' 'you've answered the question,' and 'do you understand the question'; or (5) state that counsel does not understand the question.'")). While these cases are not binding upon this Court, they are instructive in that they indicate a consensus among courts across the country that statements, such as those made by Attorney Cohen and at issue here, are inappropriate when made during a deposition.

Each of the statements above violates Uniform Rule 221.1(b) because each is suggestive of the answer that the deponent does not understand the question or does not recall the answer. Moreover, neither statement provides a basis for an objection, and neither statement is permissible under Uniform Rule 221.3.

At another point, following Evgeny Freidman's answer, Attorney Cohen said, "Hold it. Wait a second," and a discussion ensued during which Attorney Cohen stated that "[a]s long as there is no open question it's not inappropriate for my client to confer with me." (Respondents' Ex. N at 19:18-19, 20:7-9.) Uniform Rule 221.3 clearly provides that an attorney may not interrupt a deposition, without reference to whether a question is pending, to speak with his or her client, except to determine whether the question should not be answered on the grounds set forth Uniform Rule 221.2 or with consent of all parties. *See* 22 NYCRR 221.3. There is no indication that Attorney Cohen's interruption was made for the purpose of determining whether a question should not be answered under Uniform Rule 221.2, and based on Attorney Wertheim's

subsequent statement, "[y]ou can't caucus every few minutes to gather your thoughts about the question whether there is a question pending or not," the interruption was not made with consent of all parties. (Respondents' Ex. N at 21:4-7.)

In a similar example during the same deposition, Attorney Cohen requested a recess and one was taken, and the record shows that during the recess, Evgeny Freidman spoke with his attorney. (Respondents' Ex. N at 8:14-19.) Upon their return, Attorney Wertheim asked whether Evgeny Freidman wished to clarify his testimony based on his meeting with Attorney Cohen, and Evgeny Freidman replied that he did not wish to do so, and Attorney Cohen said nothing. (Respondents' Ex. N at 8:20.) Here too, Attorney Cohen violated Uniform Rule 221.3 which requires that when an attorney interrupts a deposition to speak with his or her client, "the reason for the communication shall be stated for the record succinctly and clearly." 22 NYCRR 221.3.

These examples, among others, lead the Court to conclude that Respondents violated Uniform Rules 221.1 and 221.3.

C. *Evgeny Freidman's Conduct During Naum Freidman's Deposition*

Movants contend, and the record shows, that Evgeny Freidman interrupted Naum Freidman's deposition with a series of profane remarks after Attorney Wertheim refused to accede to Evgeny Freidman's request that the parties take a lunch break. (Respondents' Ex. D at 64:9-65:5.) Specifically, Evgeny Freidman requested a break because Naum Freidman had been examined for two hours and needed to eat because of his medical condition. (Respondents' Mem. Opp. at 27; Respondents' Ex. D at 61:12-25, 64:9-14.) After being instructed not to speak,

Evgeny Freidman interrupted Attorney Wertheim as he prepared to resume his questioning of Naum Freidman, challenging Attorney Wertheim to call the Court, referring to Attorney Wertheim as a "[f]ucking wimp" and a "pussy," and stating that Attorney Wertheim should "[p]ick up the fucking phone and call the Court." (Respondents' Ex. D at 64:16-25.)

Despite Respondents' characterization to the contrary (Respondents' Mem. Opp. at 26-27), Evgeny Freidman's conduct and statements violate Uniform Rule 221.1(b), which provides that "[e]xcept to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning." 22 NYCRR 221.1(b).

D. *The Appropriate Remedy for Respondents' Violations*

For the violations described above, Movants seek the entry of an order compelling the continuation of the depositions under the Court's supervision. (Movants' Mem. Supp. at 14.) In addition, Movants seek the imposition of sanctions, arguing that Respondents' pleadings should be stricken and that monetary sanctions should be awarded. (Movants' Mem. Supp. at 11, 14.)

Respondents argue succinctly that sanctions should be "commensurate with the particular disobedience [that they are] . . . designed to punish," and that because there has been no such conduct in this case, sanctions are wholly inappropriate. (Respondents' Mem. Opp. at 27.)

Uniform Rule 130-1.1 provides:

> The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable

> attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

22 NYCRR 130-1.1(a). "The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both." 22 NYCRR 130-1.1(b).

1. *Whether Respondents' Conduct Was Frivolous*

Uniform Rule 130-1.1 defines conduct as "frivolous" if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

22 NYCRR 130-1.1(c).

As discussed above, Attorney Cohen's instructions not to answer, as well as certain objections and statements made during depositions in this case, were made in violation of Uniform Rules 221.1-221.3 and are therefore without merit in law. Moreover, Respondents have not offered any arguments for extension, modification or reversal of existing law.

The Court can find no other purpose for Evgeny Freidman's outburst during Naum Freidman's deposition other than "to harass or maliciously injure" Attorney Wertheim. 22 NYCRR 130-1.1(c)(2). More troubling, however, is that Evgeny Freidman's statements on the

record confirm that Evgeny Freidman is an attorney admitted to practice law in the State of New York. (Movants' Mem. Supp. at 10; Respondents' Ex. N at 6, 162.) As one court explained, "[o]ffensive and abusive language by attorneys in the guise of zealous advocacy is plainly improper, unprofessional, and unacceptable." *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 18 Misc. 3d 1130(A), 1130A (Sup. Ct. N.Y. County 2007) (citation omitted). Furthermore, "[a]n attorney who demonstrates a lack of civility, good manners and common courtesy taint[s] the image of the legal profession and, consequently, the legal system, which was created and designed to resolve differences and disputes in a civil manner." *Laddcap Value Partners, LP*, 18 Misc. 3d at 1130A. While the Court is mindful of Evgeny Freidman's concern for his father's health, that concern does not excuse Evgeny Freidman's conduct in this case.

Accordingly, the Court finds that Attorney Cohen and Evgeny Freidman's conduct discussed above is frivolous, as that term is used in Uniform Rule 130-1.1.

2. *Whether Costs or Sanctions Should Be Awarded*

In determining whether to award sanctions, the First Department has considered whether there is a "continuous pattern of conduct." *Matter of Grayson v. New York City Dept. of Parks & Recreation*, 99 A.D.3d 418, 419 (1st Dep't 2012) (citing *Levy v. Carol Mgmt. Corp.*, 260 A.D.2d 27, 33-34 (1st Dep't 1999)). In addition to being "retributive," sanctions "are goal oriented" and are intended to "deter[] future frivolous conduct." *Levy*, 260 A.D.2d at 34.

The First Department has observed that "the harsh remedy of striking a pleading should not be employed without a clear showing of deliberate and willful refusal to disclose, *i.e.*, 'where

the refusal to obey an order for disclosure or failure to disclose pursuant to notice is clearly contumacious or deliberate.'" *Rich & Rich Trading Co. v. Theodore, Ltd.*, 225 A.D.2d 307, 308 (1st Dep't 1996) (citations omitted). For example, a "pattern of noncompliance with court-ordered disclosure over a period of over two years" was found to have "created an inference of willful and contumacious conduct warranting the sanction of striking the answer." *Bryant v. New York City Hous. Auth.*, 69 A.D.3d 488, 489 (1st Dep't 2010) (citations omitted). The record in this case simply does not support such harsh relief.

At this juncture, Movants have not demonstrated a pattern of conduct which warrants striking Respondents' pleadings. However, the Court finds the following relief is appropriate based on the conduct described above.

First, the Court directs that within 30 days of the service of a copy of this decision and order with notice of entry, Evgeny Freidman and Naum Freidman shall appear for continued depositions (the "Continued Depositions"). The scope of the Continued Depositions shall be limited to the nine questions to which the improper instructions not to answer were given by Attorney Cohen, as well as "those questions that flow from [the deponents'] responses" to those nine questions. *Lunt v. Mt. Sinai Hosp.*, 2010 NY Slip Op. 32468(U), at *5 (Sup. Ct. N.Y. County Sept. 8, 2010). *See Koch v. Sheresky, Aronson & Mayefsky LLP*, 33 Misc. 3d 1228(A), 1228A (Sup. Ct. N.Y. County 2011) (directing the continuation of a deposition as a remedy for violations of Uniform Rule 221.2); *Terzi*, 2009 NY Slip Op. 30871(U), at *3 (finding that further depositions were warranted where counsel's conduct violated Uniform Rule 221.2).

Second, having determined that Attorney Cohen and Evgeny Freidman have engaged in frivolous conduct as defined by Uniform Rule 130-1.1(c), the Court shall award Movants the costs and attorneys' fees associated with (1) making this motion and with (2) the Continued Depositions, to be paid in equal parts by Attorney Cohen and Evgeny Freidman. *See* CPLR 8202; 22 NYCRR 130-1.1(a); *Terzi*, 2009 NY Slip Op. 30871(U), at *4. To the extent that Movants, by this motion, request an award of any additional costs, fees, or monetary sanctions, such request is denied.

III. Movants' Document Requests

A. *Document Request Number 16*

Movants seek the entry of an order compelling the production of documents responsive to Document Request Number 16, and sanctioning Respondents for failure to respond and for spoliation. Document Request Number 16 seeks the production of "[d]ocuments concerning or reflecting any unresolved violations of the New York City Building Code at the Premises." (Movants' Ex. 10 at 5.) "'Premises' refers to the commercial real estate located at 33-01 37th Avenue, Long Island City, New York 11101," which is the property owned and leased by Korm (Movants' Ex. 10 at 3.)

Movants also assert that responsive documents were lost by Respondents when the location at which they were stored was damaged during Hurricane Sandy, and that the loss of such documents constitutes sanctionable gross negligence on the part of Respondents. (Movants' Mem. Supp. at 17-18.) "Under New York law, spoliation sanctions are appropriate where a

litigant, intentionally or negligently, disposes of crucial items of evidence . . . before the adversary has an opportunity to inspect them." *Kirkland v. New York City Housing Authority*, 236 A.D.2d 170, 175 (1st Dep't 1997).

Respondents argue that there are no responsive documents because there are no unresolved violations at the Premises, and Respondents should not be compelled to produce documents which are available as a matter of public record. (Respondents' Opp. Mem. at 35-36.) Respondents also argue that Attorney Cohen was mistaken when he informed Movants that documents responsive to this request had been lost during Hurricane Sandy. (Respondents' Opp. Mem. at 36.) Rather, the lost documents were related to work done on another property and were in the possession of a third party. (Respondents' Opp. Mem. at 35-36.)

Here, Respondents contend, and the record shows, that presently there are no unresolved violations at the Premises. (Respondents' Opp. Mem. at 35-36; Affirmation of Michael Cohen in Opposition ¶ 29; Respondents' Ex. U.) Therefore, at this time there are no documents that are responsive to Document Request Number 16. Also, in light of Respondents' clarification regarding the lost documents, and because there are no documents which are responsive to Document Request Number 16, Movants have not established that the alleged spoliation occurred, and, accordingly, there is no basis for the imposition spoliation sanctions.

B. *The Remaining Document Requests*

Movants seek the entry of an order generally compelling the production of documents responsive to Movants' requests, and sanctioning Respondents for their alleged failure to produce such documents.

Movants assert that after a series of delays and extensions, their document requests were responded to in January 2013. (Movants' Mem. Supp. at 16.) Movants further assert that Respondents "did not produce a single responsive document and objected to each and every request" on a variety of different grounds. (Movants' Mem. Supp. at 16.) Movants argue that the response indicates bad faith on the part of Respondents. (Movants' Mem. Supp. at 16.)

In addition, Movants identify several categories of documents with respect to which they seek production. The first category includes invoices from and payments to the TB&S Firm related to "certain lawsuits." (Movants' Mem. Supp. at 17.) The second category includes documents "reflecting management actions taken by" Naum Freidman "unilaterally on behalf of Korm, which actions have been threatened . . . during the course of this litigation." (Movants' Mem. Supp. at 17.)

Movants separately allude to a category of documents "concern[ing] very recent, secretive actions by Naum to seize control of Korm," (Movants' Reply Mem. at 14), and also seek documents related to "$1,601.30 that was in Korm's bank account before Naum closed the account in 2009 and withdrew all of the money," and $1,156.35, which was allegedly embezzled by Naum Freidman from another account. (Movants' Reply Mem. at 13, 13 n.9.)

CPLR 3124 provides that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR 3124. Courts have held that in a motion to compel production under CPLR 3124, the burden is on the moving party to establish a basis for the production sought. *Dabrowski v. ABAX Inc.*, 2012 NY Slip Op. 31652(U), at *6 (Sup. Ct. N.Y. County June 19, 2012); *Miller v. Cnty. of Nassau*, 2012 NY Slip Op. 30765(U), at *2 (Sup. Ct. Nassau County Mar. 18, 2012).

Except for Document Request Number 16, Movants' papers lack references to the specific document request numbers. That is, Movants have not identified where, specifically, each of the remaining categories of documents were requested. Moreover, it appears that Movants have paraphrased or combined document requests in the papers related to this motion.

For example, Movants refer to "[i]nvoices from and payments to the T&B Firm in connection with certain lawsuits, the files of which the Court ordered them to turn over on August 22, 2012 without any exception for billing and payment records."[3] (Movants' Mem.

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[3] On August 22, 2012, the Court made the following statement on the record:

> [Y]ou have an order of this court and the order includes my usual practices. . . . that if you are representing one of the officers and directors of a corporation, and you bring an action on behalf of that person against another officer and director of a corporation, and you're representing one versus the other person, the other person, because you're representing the corporation, you have to also turn over every single file, the litigation files, for the actions that you took on behalf of one person in the corporation against an action versus the other. . . . [I]f you want to hide behind attorney-client privilege, and [sic] you have to produce what's called a proper privilege log. . . . pursuant to the CPLR . . . ."

(NYSCEF Doc. No. 94, Tr. 24:2-19.)

Supp. at 17.) The excerpted language above does not appear in Defendants' First Demand for Production of Documents Pursuant to CPLR Sections 3101, 3102 and Rule 3120 (the "Fayenson Demand"). (Movants' Ex. 10 at 4-5.)

As noted above, CPLR 3124 begins with the condition, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand question or order under this article . . . ." CPLR 3124. Here, with the exception of Document Request Number 16, the demands referenced in Movants' moving papers do not match the demands in the Fayenson Demand. Therefore, the Court cannot properly compel production because Movants are, in effect, seeking to compel the production of documents that were not requested.

In addition, Movants have not otherwise specified for which of the numbered document requests in the Fayenson Demand production should be compelled, with the exception of Document Request Number 16. Movants' broad, sweeping references to the Fayenson Demand as a whole will not suffice. Rather, Movants must identify the document request or requests at issue, establish that such documents have not been produced, and, finally, establish a basis under which this Court may issue an order compelling the production of such documents.

Based on the foregoing, the Court finds that Movants have not established a basis for this Court to compel the production of documents responsive to Document Request Number 16 and the Remaining Document Requests, and, accordingly, this motion is denied to the extent that Movants seek such relief. For the same reasons, Movants' request for sanctions with respect to Document Request Number 16 and the Remaining Document Requests is denied. However,

denial is without prejudice to Movants' right to seek such relief by a subsequent motion which sets forth the basis for granting such relief in sufficient detail.

CONCLUSION

Accordingly, it is hereby

ORDERED that, within 15 days of the entry of this order, Defendant Yakov a/k/a Jacob Fayenson and Defendant and Counterclaim Plaintiff Jacob Fayenson Revocable Trust's (collectively, "Movants") shall file and serve a copy of this decision and order with notice of entry on all parties (the "Service"); and it is further

ORDERED, that, within 10 days of the Service, Counterclaim Defendant Tenenbaum Berger & Shivers, LLP (the "TB&S Firm"), shall produce to Movants a copy of its malpractice insurance policy or policies; and it is further

ORDERED, that, within 30 days of the Service, Counterclaim Defendant Evgeny Freidman ("Evgeny Freidman") and Plaintiff and Counterclaim Defendant Naum Freidman (together, with the TB&S Firm, "Respondents") shall appear for continued depositions which shall be limited to the nine questions to which the improper instructions not to answer were given by Respondents' attorney Michael Cohen ("Attorney Cohen"), as well as those questions that flow from their responses (the "Freidman Depositions"); and it is further

ORDERED, that the Freidman Depositions shall be held at a location and on a date and time that are mutually agreeable and convenient for the parties, except that such date must be within 30 days of the Service, as set forth above; and it is further

ORDERED, that the Court having determined that Attorney Cohen and Evgeny Freidman have engaged in frivolous conduct as defined in Section 130-1.1(c) of the Rules of the Chief Administrative Judge as set forth above, the movants are awarded the costs and attorneys' fees associated with making this motion and the costs and attorneys' fees associated with the Freidman Depositions, to be paid in equal parts by Attorney Cohen and Evgeny Freidman; and it is further

ORDERED, that Movants shall prepare an affirmation detailing the costs and attorneys' fees associated with making this motion and the costs and attorneys' fees associated with the Freidman Depositions, and provide it to Respondents' counsel within 14 days of the conclusion of the Freidman Depositions; and it is further

ORDERED, that Movants, in consultation with Respondents, shall prepare an Information Sheet (which can be accessed on the website of the Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures") containing all of the information called for therein; and it is further

ORDERED, that within 30 days of the conclusion of the Freidman Depositions, Respondents' counsel shall serve a copy of this decision and order with notice of entry, as well as the completed Information Sheet, on the Special Referee Clerk (60 Centre Street, Room 119M, 646-386-3028 (phone), 212-401-9186 (fax), spref@courts.state.ny.us), who, in accordance with the rules of the Special Referees Part (which are also available at the "References" link on the Court's website), shall set the matter down for a hearing concerning the costs and attorneys' fees

associated with making this motion and the costs and attorneys' fees associated with the Freidman Depositions (the "Reference Hearing"); and it is further

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

ORDERED, that the parties shall appear for the Reference Hearing, including with all witnesses and evidence they 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 Referees Part in accordance with the Rules of that Part; and it is further

ORDERED, that the hearing shall be conducted in the same manner as a trial before a justice without a jury (CPLR 4320(a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED, that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED, that Respondents' failure to serve a copy of this decision and order with notice of entry, as well as the completed Information Sheet, on the Special Referee Clerk within 30 days of the conclusion of the Freidman Depositions shall result in a judgment in favor of Movants in the amount set forth in Movants' affirmation related to costs and attorneys' fees; and it is further

ORDERED, that Movants' failure to serve a costs/fees affirmation on Respondents' counsel within 14 days of the conclusion of the Freidman Depositions will result in a waiver of recovering costs and fees by Movants; and it is further

ORDERED, that this motion is denied in all other respects; and it is further

ORDERED, that the parties shall appear for a status conference in Courtroom 442, 60 Centre Street, New York, NY 10007, on February 4, 2014, at 10:30 a.m.

Dated: New York, New York
December 4, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.