SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos PART 53

Justice

Harold Einstein,

INDEX NO. 604199/07

v

MOTION DATE

MOTION SEQ. NO. 007

352 LLC, et al.

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The decision and order in mot seq. 007 entered on 11/9/2009 is superceded and corrected with the following memorandum.

Dated: 11/12/2009

J.S.C.

HON. CHARLES E. RAMOS

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

----------X

HAROLD EINSTEIN and JENNIFER BOYD,

Plaintiffs,

-against-

357 LLC, A New York Limited Liability Company, ULTIMATE REALTY, ISAAC MISHAN, JEANETTE SABBAGH, JOSEPH SABBAGH, THE CORCORAN GROUP, ADAM PACELLI, CHRISTINA COATS, ANNE MARIE GATZ, DANIEL ALTER ARCHITECT, PPL, DANIEL ALTER, KUTNICKI-BERNSTEIN ARCHITECTS, PLLC, DANIEL BERNSTEIN, ANDREW KATZ, PETER MICELI, PETER MICELI PLUMBING, JOHN DOES "1", "2", AND "3",

Defendants,

and

THE 357 FOURTH STREET CONDOMINIUM,

A Nominal Defendant.

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INDEX NO. 604199/07

FINDINGS OF FACT AND CONCLUSIONS OF LAW (As corrected)

11-30-09
C-4

Charles Edward Ramos, J.S.C.:

Plaintiffs Harold Einstein and Jennifer Boyd ("Plaintiffs"), seek to strike the pleadings of The Corcoran Group ("Corcoran"), Adam Pacelli ("Pacelli"), Christina Coats ("Coats"), and Anne Marie Gatz ("Gatz") (collectively, the "Corcoran Defendants"), or alternatively, to compel the Corcoran Defendants' compliance with its discovery obligations.

FINDINGS OF FACT

This action arises out of the allegedly defective design, construction, development, and deceptive marketing of a condominium unit in Brooklyn, New York.

As against the Corcoran Defendants, the sponsor's brokers

involved with the sale of the allegedly defective condominium unit, the Plaintiffs have stated claims of fraudulent inducement, fraudulent concealment, and negligent misrepresentation, as well as violations of New York's Consumer Protection Act, N.Y. Gen. Bus. L. §§ 349-350 (McKinney's 2009), arising from statements and correspondence, including emails, sent by the brokers and relayed to the Plaintiffs by co-defendants.

The communications alleged by plaintiff as the basis for their suit against the Corcoran Defendants occurred between March 18, 2007 and June 8, 2007. (Paragraphs 4 and 30 of the complaint.)

On or about June 6, 2008, Plaintiffs served the Corcoran Defendants with a Notice of Discovery and Inspection (the "Document Demand"). (A copy of the Document Demand was entered into evidence as Plaintiff's Exhibit "3" on June 2, 2009.)

On or about October 10, 2008, the Corcoran Defendants responded to the Document Demand (the "Document Response").

On October 15, 2008, Plaintiffs moved seeking to strike the pleadings of the Corcoran Defendants or alternatively to compel full responses to Plaintiffs' discovery demands, "including but not limited to producing an image of the Corcoran Defendants' computer hard drives and emails to a third-party technology vendor for forensic data recovery." (Plaintiff's October 15, 2008 Order to Show Cause, at p. 2).

In their moving papers, the Plaintiffs indicated that the Document Response failed to produce certain emails, which

Plaintiffs themselves had already produced to the defendants, which failure the Plaintiffs contend was evidence of selective editing of discovery responses and/or spoliation of evidence. The Plaintiffs further stated that the Document Response failed to include any attachments associated with the emails that were produced. (Itkowitz Aff., Oct. 14, 2008, ¶¶ 10-12).

The Corcoran Defendants responded that "[t]he fact is that the Corcoran Defendants have in good faith produced all the responsive documents that they could locate, and where they had none, they said so." (Margolin Aff., Oct. 22, 2008, ¶ 3).

Plaintiffs' counsel requested that the individual Corcoran Defendants - Pacelli, Coats, and Gatz - also be compelled to produce their hard drives, given that such defendants "might have a computer that isn't the Corcoran computer that he [or she] is using, whether it be a BlackBerry, whether it be a laptop or whatever." Oct. 23, 2008 Tr., at 6:10-13. This Court asked counsel for the Corcoran Defendants whether "these individual defendants turned over their email traffic" and counsel responded, "We have, your Honor." (Id. at 6:20-22, 6:23).

Plaintiffs' counsel then pointed out that the Corcoran Defendants had failed to produce an email dated May 3, 2007, from Pacelli to co-defendant Isaac Mishan, stating, "[i]t is by the leader in the rear. We fixed it by doing the water test. We're installing a new portion of the leader and waterproofing the wall behind it as well as the area below." (Id. at 7:2-13 quoting the May 3, 2007 email) (A copy of the May 3, 2007 email is annexed as

Exhibit "6" to the Kroll Report).

Based on the Corcoran Defendants' conceded non-production of the May 3, 2007 email, which this Court finds to be clearly relevant to the instant litigation, this Court ordered that the Corcoran Defendants produce their hard drives. (Id. at 8:13 - 9:3).

An order was settled on December 10, 2008, directing "that each of the Corcoran Defendants, including The Corcoran Group, Adam Pacelli, Christina Coats, and Anne Marie Gatz, were directed to produce their respective hard drives to a non-affiliated vendor, to be selected by the parties in advance, for inspection and deleted file recovery...[and] that the non-affiliated vendor will perform a keyword search of terms supplied by Plaintiffs, for extraction and production..." (Order, Dec. 10, 2008, p. 2).

On January 26, 2009, Plaintiffs' counsel wrote to the other parties to address several outstanding discovery issues, including the December 10, 2008 Order. The Plaintiffs pointed out that they had not received responses to their prior request for a statement of devices and email addresses containing potentially relevant electronically-stored information (Letter, Jan. 26, 2009, p. 2). The Plaintiffs then noted, among other things, that "[t]he Corcoran Defendants have not made any efforts to update their responses to Plaintiffs' Notice for Discovery and Inspection, which responses were dated October 10, 2008.

The Plaintiffs then brought an order to show cause, dated February 10, 2009, seeking to strike the pleadings of defendants

or alternatively to compel compliance with such defendants' discovery obligations. In response, counsel for the Corcoran Defendants submitted an affidavit of Terence Thomas, Director of Information Technology for the Corcoran Group, dated February 17, 2009. (The February 17 Thomas Affidavit is annexed to the Margolin Affirmation, dated February 17, 2009, as Exhibit "A" thereto.)

In his February 17 affidavit, Mr. Thomas stated that

> "[a]ll Corcoran e-mails, outgoing and incoming, are forwarded to a central server. As emails are sent and received, an exact replica of the central server is recorded on the hard drives of agents' individual computers. In October of 2008, in response to the request of Corcoran's counsel, Margolin & Pierce LLP, I retrieved from our central server, all e-mails that had been maintained for [the] period in question concerning the issues of this suit." (Thomas Aff., Feb. 17 2008, ¶ 2).

On February 19, 2009, the return date for the Plaintiffs' third order to show cause, the parties again appeared before this Court. Counsel for the Corcoran Defendants represented to this Court that

> "[w]hen in October production was made, this director of IT, corporate IT, had been instructed by us, had been earlier, that this is in litigation. You must preserve everything of record. Everybody knows that, it is classic in our business. He produced something like 48 or 50 e-mails which are part of our production in October 2008. They have everything we have of record." (Transcript, Feb. 19, 2009, 8:11-18).

Counsel for the Plaintiffs pointed out that they had no list of devices containing potentially relevant electronic data, despite requesting the same from the Corcoran Defendants. (Id. at 4:20 - 5:3; 6:23 - 7:3; 10:24 - 11:6). In response, counsel

for the Corcoran Defendants represented that "there are two devices in question." (Id. at 11:11-12).

The Corcoran Defendants thereafter produced, in open court, two hard drives, and this Court noted that "the representation has been made those hard drives have exactly what is on the server with regard to the these particular people. Now, there are no other devices that we are concerned with?" Id. at 15:11-20. Counsel for the Corcoran Defendants stated, "No other devices, the server and the two computers." (Id. at 15:21-22 [emphasis added]).

Following the proceedings on February 19, 2009, the Plaintiffs retained the services of Kroll OnTrack to perform a forensic search and analysis of the data on the two hard drives produced by the Corcoran Defendants. Kroll's findings are summarized in a report dated April 7, 2009, sworn to by Emmanuel Velasco, a Computer Forensics Expert (the "Kroll Report"). (The Kroll Report was submitted by the Plaintiffs as an affidavit of direct testimony, pursuant to this Court's Non-Jury Trial Rule 1 for evidentiary hearings and non-jury trials.) The Kroll Report indicates that the hard drives contained no current .pst or .ost files (Outlook Personal Folders and Outlook Offline Folders, respectively) for Pacelli; moreover, the hard drives contained no .pst or .ost files for Coats at all. Kroll Report, at 3. The Kroll Report indicated that an .ost file belonging to Gatz containing emails in the relevant time period was found on the hard drive and that emails were extracted from that drive by

using a list of keywords provided by the Plaintiffs. (Kroll Report, p. 3-5).

The Kroll Report further indicated that the Plaintiffs provided Kroll with certain emails (copies annexed to the Kroll Report as Exhibits "2" through "6") and asked Kroll to search for those emails on the hard drives. (Id. at p. 5). Kroll did not find those emails on the hard drives. (Id.)

Plaintiffs' counsel then requested that the emails from Gatz' .ost file responsive to the keyword list be turned over to them for review. Id. at 4. According to the Supplemental Affirmation of Jay B. Itkowitz, dated May 5, 2009, over 13,000 documents, consisting of over 33,000 pages, were contained in the search results. Plaintiffs' counsel then reviewed those documents for relevancy and determined that none of the documents were relevant. (Itkowitz Supp. Aff., ¶ 14).

On May 6, 2009, the parties appeared before this Court. Given that the emails were not on the hard drives but that Kroll apparently had not found proof of deletion, this Court ordered that a hearing take place to determine whether any emails had been deleted and whether the Corcoran Defendants had a valid explanation for why emails that apparently should have been in their production were not. (Transcript, May 6, 2009, 16:26 - 17:5).

In further support of their application, the Plaintiffs submitted the Affirmation of Simon W. Reiff. In his Affirmation, Mr. Reiff indicated that Plaintiffs' counsel paid Kroll $8,133 to

extract and produce documents responsive to the keyword list to Plaintiffs' counsel's offices; Mr. Reiff also indicated that Itkowitz & Harwood had rendered legal fees in the amount of $27,371.45 relating to the review of the electronic documents found on the hard drives. (Reiff Aff., ¶¶ 4-5).

In his May 14, 2009 affidavit, Mr. Thomas asserts that for

> "[e]mails sent or received by Corcoran agents from or at their respective offices are all processed in the first instance through a central server... At the inception of the case captioned above I was advised to retain and produce all emails to and from the Corcoran agents and brokers dealing with the sale of a condominium apartment to the plaintiffs herein. I accordingly extracted from our central server the 24 pages of emails [produced by the Corcoran Defendants in October 2008]...No email relating to the subject matter of this litigation was omitted, and none was deleted." (Thomas Aff., May 14, 2008, ¶¶ 2-3 [emphasis in original]).

Mr. Thomas further stated that "I produced for inspection by plaintiffs' expert exact duplicates of the hard drives of the office computers used by the individual Corcoran agents who worked on the apartment sale. Once again, nothing was omitted and nothing was deleted." (Id. at ¶ 4). Finally, Mr. Thomas stated that

> "[t]he reason for [the fact that several emails sent by the Corcoran Defendants were not included in the production] is simple and straightforward. Those few emails were missing as a result of the normal individual email mailbox cleanup performed by individual agents in order for new emails to be sent and received due to the email mailbox size limit restriction being imposed. If the email system performs its purge prior to the scheduled month-end backups, then the emails would not be recoverable during the email search." (Id. at ¶ 5 [emphasis added]).

By his affidavit, Mr. Pacelli stated that the fact that one particular email was not produced "would mean that it was sent from my home computer, which also reflects "@corcoran.com" as the sending address." (Pacelli Aff., at ¶ 4). Coats and Gatz similarly stated that the fact that certain emails were not produced indicate that those emails were sent from home computers. (See Coats Aff., ¶ 4; Gatz Aff., ¶ 3). Ms. Gatz also indicated that certain other emails would not have been produced because they were sent from her BlackBerry, which she "no longer owns." (Gatz Aff., ¶ 5).

The June 2, 2009 Hearing

Plaintiffs' counsel called Thomas as their only direct witness. Thomas testified that he has been employed by The Corcoran Group for over nine years, and that as the Director of IT for The Corcoran Group, he was in charge of the email servers, as well as any retention of emails, for the Corcoran employees. (Id. at 31:9-11; 32:10-16).

Thomas averred that Corcoran's policy regarding emails sent by brokers from home computers is that such brokers are required and trained to use Corcoran's email server; moreover, the Corcoran email server may be accessed either by using a Web-based email client or by using Outlook to connect to the Corcoran email server. (Id. at 33:14 - 34:23; 37:3-6). Thomas admitted that it was possible for a person to configure an email device such as a BlackBerry or smart phone to send an email that appeared to come from a Corcoran account. (Id. at 35:4 - 36:8).

As for emails sent to or from Corcoran accounts, whether from home or from office computers, Thomas testified during the hearing that all such emails should be directed to the central server, which in turn stores a copy and sends another copy to the user's local hard drive. (Id. at 37:24 - 38:13). Thomas also testified that emails sent from a BlackBerry, Treo, or Windows Smart Phone should be sent to the central server as well. (Id. at 52:6-12). Moreover, an email sent from another email account, such as AOL, Hotmail, or Gmail, should not ordinarily appear in a recipient's inbox as having originated from a Corcoran account. (Id. at 52:13-22).

According to Thomas, if an email is deleted from a computer in the Corcoran system, and the "deleted mail" box is emptied, the email is gone not only from the user's local computer but also from the server as well. (Id. at 56:4-11; 66:14-26). Only one limited method of recovering the email exists, and the method is limited to a two-week retention period. (Id. at 67:2-6; 67:8-10 ["So if I delete a file on June 1st and empty my deleted items, by June 15th or about, that is completely totally gone."]).

Thomas testified that Corcoran has a deletion policy due to the "limited e-mail server space that each person is allocated." (Id. at 38:24-26). Each broker is allocated 200 megabytes of space; once a user reaches that limit, the user cannot send or receive emails until space is "clear[ed] out" to make room for more emails. (Id. at 39:4-6; 39:17-23). The user is responsible

for manually deleting emails in the user's discretion, and in the ordinary course of business, all brokers delete their emails on a regular basis. (Id. at 40:10-14).

Thomas further indicated that Corcoran's policy with respect to document retention "is to retain whatever records we have electronically to be able to be presented." (Id. at 46:11-12; see also id., at 48:17-24). Thomas and his staff are responsible for implementing the document retention policy. (Id. at 46:16-20).

Thomas testified that he never had any conversation with the Corcoran Defendants regarding how they send or receive emails. (Id. at 49:4 - 50:14). He further testified that he did not know what electronic devices the Corcoran Defendants use for business communications. (Id. at 51:6-17). He conceded that, although the individual brokers are obligated to delete their own emails in the regular course of business, at no time did he speak to any of the Corcoran Defendants or interview them regarding their email deletion policies. Id. at 53:4-15. He also admitted that at no time during his document retention activities did he ever advise anyone of the manual deletion policy controlled and implemented by the individual brokers; similarly, he did not ever tell anyone that there existed the possibility that relevant emails were being deleted, nor did anyone ever tell him to check to make sure that nothing was deleted. (Id. at 61:15 - 62:8).

Regarding backup tapes, Thomas testified, for the first time at the hearing, that he and his staff perform daily, weekly, and

monthly "snapshot" backups of the server, that the daily and weekly backup tapes are reused, and that the monthly tapes are preserved indefinitely. (Id. at 59:18 - 60:10; 77:7-9; 77:17-23; 78:2). However, he noted that if an email received during the month is also deleted during that month, the monthly backup will not capture the deleted email. Id. at 60:11-18. Thomas stated that his team searched four of the monthly backup tapes for relevant emails using forensic software, although he was unable to recall which months' tapes were searched. (Id. at 60:19 - 61:10; 78:4-12; 79:3-12). He also was unable to testify as to how the search was performed because he did not personally perform the search and did not watch his staff member perform the search either. (Id. at 79:7-12; 80:16-20). At no time were Plaintiffs' requests limited to four months of emails. (Cf. Document Demand ¶¶ 22-30 [requests for relevant communications not bound by any time period]).

With respect to the hard drives, Thomas did not review their contents; indeed, he testified that nobody on his staff reviewed the hard drives to confirm that any of the 24 or so pages of emails that previously had been produced in hard copy were on the hard drives. (Id. at 68:16-22). He confirmed that in October 2008, he did not produce the six emails annexed to the Kroll Report, notwithstanding the fact that they were sent from the Corcoran email accounts associated with defendants Pacelli, Coats, and Gatz (copies of the emails were collectively put into

evidence as Plaintiffs' Exhibit "2"). (Id. at 69:23 - 70:17; 71:2 - 72:20).

Thomas testified that at no time did anyone discuss "instruction number three" from the Document Demand, in sum or in substance, which instruction states that "[w]ith respect to any document that has been destroyed, identify each document in the manner detailed in the previous paragraph and state the date of destruction, manner of destruction, reason for destruction, person authorizing destruction and person destroying same." (Id. at 85:2-18 quoting Document Demand, at p. 6]). Thomas further conceded that he never discussed with anyone, including defendants Pacelli, Coats, and Gatz, whether any documents might have been deleted, which documents might have been deleted, or whether any of the Corcoran Defendants took any steps on their own to preserve any of the emails relevant to the litigation. (Transcript, June 2, 2009, 85:2 - 86:3).

As the finder of fact, this Court finds upon a preponderance of the evidence that Thomas' affidavits were materially incomplete, particularly with respect to the Corcoran Defendants' email deletion policy.

In his initial February 17 Affidavit, Thomas testified that "[a]ll Corcoran e-mails, outgoing and incoming, are forwarded to a central server. As emails are sent and received, an exact replica of the central server is recorded on the hard drives of agents' individual computers." (Thomas Aff., Feb. 17 2008, ¶ 2). No mention was made of the individual user deletion policy, the

backup tapes, or that emails deleted by users might not appear on the server. Indeed, the Plaintiffs (and this Court) reasonably could have relied upon the February 17 Thomas Affidavit to infer that a copy of the individual defendants' hard drives would have contained all Corcoran emails, sent or received.

In his May 14, 2009 Affidavit, however, Thomas stated that "[e]mails sent or received by Corcoran agents from or at their respective offices", were forwarded to the server, therefore suggesting that a snapshot of the server might not contain all potentially relevant emails. (Thomas Aff., May 14 2008, ¶ 2).

Moreover, in his May 14 Affidavit, Thomas states that any missing emails were not produced "as a result of the normal individual email mailbox cleanup performed by individual agents." (Id. at ¶ 5).

Thomas' affidavit was submitted on May 14, 2009, more than seven months after this Court directed counsel to "read [their] client the riot act" and almost a year after the Document Demand initially was served. This is the first time that the Corcoran Defendants mentioned their deletion policy either to the Plaintiffs or this Court, notwithstanding the Plaintiffs' June 6, 2008 Document Demand, the Court's June 30, 2008 Conference Order, the Plaintiff's multiple orders to show cause, and the Corcoran Defendants' multiple appearances before this Court on the very issue of deleted emails.

Thomas stated that the Corcoran policy with respect to document retention "is to retain whatever records [Corcoran]

ha[s] electronically to be able to be presented." (Transcript, June 2, 2009, 46:11-12). However, Thomas did not make even a minimal attempt to meet this standard.

The reality as described by Thomas is starkly different from any kind of reasonable retention policy. Neither Thomas nor his staff made any attempt to investigate the basic methods of business communication or identify the electronic communications devices used by the Corcoran Defendants. Indeed, Thomas admitted candidly that he never even communicated with the individual Corcoran Defendants about this litigation. It goes without saying that The Corcoran Group is responsible for the acts of its agents, including the named defendants. Therefore, The Corcoran Group was obligated to investigate whether defendants Pacelli, Coats, and Gatz possessed business communications on their home computers and/or other devices, and if so, to disclose their existence, and to take reasonable steps to preserve the same.

Most egregiously, Thomas never advised anyone that in the ordinary course of business, individual users not only may, but must, delete emails from their inbox as the inbox capacity reaches its 200 megabyte capacity. Moreover, Thomas' testimony incredibly demonstrates that when litigation commences, the Corcoran IT department takes no steps to prevent users, even those named as parties to such litigation, from deleting potentially relevant emails, relying instead solely upon the discretion of such users to select which emails to save and which to delete.

Thomas did not tell anyone that the backup tapes used by Corcoran do not capture emails received and then deleted in the same month prior to the monthly backup. Although Thomas, as the Director of Information Technology at Corcoran and the individual tasked with implementing the retention policy, is to blame for failing to communicate with anyone about the deletion policy and the consequences of maintaining the ordinary-course user practices with respect to deletions, counsel for the Corcoran Defendants is also to blame for failing to investigate. Thomas testified that nobody ever discussed with him the company's deletion policy. June 2, 2009 Tr., at 85:2 - 86:3.

Thomas testified that such emails are deleted not only from the user's hard drives but also from the server. Actually, prior to June 2, 2009, Thomas did not tell the Plaintiffs or this Court that such backup tapes even existed, only hinting in his May 14 Affidavit that the Corcoran Defendants conduct monthly backups. See (Thomas Aff., May 14 2008, ¶ 5).

This Court cannot credit Thomas' testimony to the extent he asserted that, upon the emptying of a user's "deleted mail" containing any deleted emails, such emails are permanently gone, save for a two-week limited recovery tool. Given Thomas' admissions that he did not know and never attempted to ascertain the electronic devices used by the Corcoran Defendants, including but not limited to BlackBerrys and home computers, the Court is not persuaded that deleted emails are permanently lost. He has no personal knowledge of whether such emails exist on home

computers or on any other devices, or even how many other such devices exist.

This Court finds, upon a preponderance of the evidence that Corcoran failed to implement any change in its policy upon the commencement of this litigation, upon being served with a discovery demand, or even upon Plaintiffs filing multiple orders to show cause to compel the Corcoran Defendants to produce emails responsive to the Document Demand.

This Court finds, upon a preponderance of the evidence, that the Corcoran Defendants continued to delete emails according to their ordinary business practices even after the commencement of litigation, because neither Thomas nor counsel implemented any change in the manual deletion policy upon the commencement of litigation. The Court notes that none of the Corcoran Defendants' affidavits of direct testimony aver that such defendants ceased deleting emails related to this litigation after being put on notice of this litigation. Thomas candidly admitted that at no time did he speak to the Corcoran Defendants about their email deletion policies, even though they remained obligated to delete their own emails in order to continue to receive and send email. See June 2, 2009 Tr., at 53:4-15.

This Court finds, upon a preponderance of the evidence that the Corcoran Defendants failed to submit any evidence that they produced any correspondence among each other. (Cf. Transcript, Feb. 19, 2009, 6:10-12 ["We have no e-mails intra-Corcoran..."]; Transcript, May 6, 2009, 5:3-16 ["And here we have no e-mails

produced within Corcoran between each other, Pacelli, Coats and Gatz...We never received any intra-office e-mails..."]) Although the Corcoran Defendants and their co-defendants produced emails in which one or more of the Corcoran Defendants were recipients, other persons and/or parties were invariably recipients to such emails. The Corcoran Defendants have not produced even a single exclusively intra-Corcoran email.

The Court additionally finds, upon a preponderance of the evidence, that the emails produced by the Corcoran Defendants were selective in nature. In particular, the Court notes that an email from Coats to Rhea Cohen (the purchaser's broker) dated April 16, 2007, at 8:08 a.m. (that was produced by the Corcoran Defendants) states, "Hi Rhea, Anne-Marie or myself must accompany you for this apt. We are not available Tuesday but could do Thursday or Friday afternoon." Less than an hour later, Coats sent an email (not produced by the Corcoran Defendants) at 8:44 A.M. to several of the co-defendants, stating, "The buyers for [the] duplex want to get in to measure for cabinets, windows etc. I have pushed this appt to Thursday due to heavy rain…." The Court finds by a preponderance of evidence that since all three Corcoran Defendants should have had a copy of the 8:44 A.M. email in their individual inboxes, the Corcoran Defendants collectively and individually deleted that email which is relevant to the water issues, while Coats and/or Gatz retained a copy of the 8:08 A.M email.

Finally, the Court finds that counsel for the Corcoran Defendants made numerous statements to the Plaintiffs and this Court that were materially false, including the fact is that the Corcoran Defendants have in good faith produced all the responsive documents that they could locate, and where they had none, they said so." (Margolin Aff., October 22, 2008, ¶ 3).

In response to an inquiry from this Court as to whether the Corcoran Defendants had produced all "email traffic", counsel responded, "We have, your Honor." (Transcript, Oct. 23, 2008, 6:20-23).

In addition, Counsel for the Plaintiffs were told that the defendants' counsel had no list of devices containing potentially relevant electronic data. (Id. at 4:20 - 5:3; 6:23 - 7:3; 10:24 - 11:6). Now, counsel for the Corcoran Defendants represents that "there are two devices in question." (Id. at 11:11-12).

CONCLUSIONS OF LAW

Four issues of law are raised by the Plaintiffs' Order to Show Cause and by the June 2, 2009 hearing: (1) whether the Corcoran Defendants engaged in spoliation by selective deletions and by failing to implement an effective "litigation hold," (2) assuming the answer to question number 1 is yes, what the appropriate sanction is, (3) whether the Plaintiffs' review of the more than 13,000 documents found on the hard drives was "necessary" (see Transcript June 2, 2009, 99:10-14; 101:11-12), and (4) whether Plaintiffs are entitled to attorneys' fees and costs.

Discovery sanctions are employed against parties that had an opportunity to safeguard evidence but failed to do so. (See *Ortega v City of New York*, 9 NY3d 69, 76 n.2 [2007] citing *Amaris v Sharp Elecs. Corp.*, 304 AD2d 457 [1st Dept 2003], lv. denied, 1 NY3d 507 [2004]). It is settled in New York that "[e]ven without intentional destruction, a party's negligent loss of evidence can be just as fatal to an adversary's ability to present a case[.]" (*Adrian v Good Neighbor Apartment Associates*, 277 AD2d 146, 146 [1st Dept 2000] citing *Squitieri v City of New York*, 248 AD2d 201, 202-03 [1st Dept 1998]). Indeed, "under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading[.]" (*Davydov v Zhuk*, 23 Misc.3d 1129(A), 2009 WL 1444638, at *6 [N.Y. Sup. Ct., Kings Cty. 2009] quoting *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2d Dept 2007]). In general, the intentional destruction of evidence after being put on reasonable notice that such evidence must be preserved warrants striking the offending party's pleading. (Squitieri, at 202; see also *Kirkland v New York City Housing Authority*, 236 AD2d 170, 173 [1st Dept 1997]; *Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning Corp.*, 221 AD2d 243, 243 [1st Dept 1995]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 53 [2d Dept 1998]).

Typically, the duty to preserve evidence attaches as of the date the action is initiated or when a party knows or should know that the evidence may be relevant to future litigation. (See, e.g., *Arista Records LLC v Usenet.com, Inc.*, 2009 WL 185992, at *15 [SD NY Jan. 26, 2009]; accord, *Fujitsu Ltd. v Fed. Express Corp.*, 247 F.3d 423, 436 [2d Cir 2001]).

The CPLR and New York case law are silent on the obligations of parties and their counsel to effectuate a "litigation hold".[1] In similar contexts, New York courts have turned to the Federal Rules of Civil Procedure and the case law interpreting them for guidance. (See, e.g., *Delta Financial Corp. v Morrison*, 13 Misc3d 604, 608 [N.Y. Sup. Ct. Nassau Cty. 2006]; *Weiller v New York Life Ins. Co.*, 6 Misc3d 1038(A), at *7 [N.Y. Sup. Ct. N.Y. Cty. 2005]; *Ball v State*, 101 Misc2d 554, 558 [N.Y. Ct. Cl. 1979]; *Travelers Indemnity Co. v C.C. Controlled Combustion Insulation Co., Inc.*, 2003 WL 22798934, at *1-2 [N.Y. Civ. Ct. N.Y. Cty., Nov. 19, 2003]).

It is well established that the "utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent." (*Hang Chan v Triple 8 Palace, Inc.*, 2005 WL 1925579, at *7 [SD NY Aug. 11, 2005]; see also Zubulake, 229 FRD. 422, 432 [SD NY 2004]) ("[I]t is not sufficient to notify all

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[1] "Litigation hold" is a term of art generally used to mean the suspension of any routine document "retention and destruction policy" and the implementation of additional steps to ensure the preservation of relevant documents; typically, however, the term is used in the context of preserving electronically-stored documents such as emails. (*See generally Zubulake v UBS Warburg LLC*, 220 FRD 212, 217-18 [SD NY 2003]).

employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."). A showing of gross negligence is "plainly enough to justify sanctions at least as serious as an adverse inference." (Hang Chan, at *7).

Moreover, when a party establishes gross negligence in the destruction of evidence, that fact alone suffices to support a finding that the evidence was unfavorable to the grossly negligent party. (See *Reilly v Natwest Markets Group Inc.*, 181 F3d 253, 268 [2d Cir 1999]); see also *Arista Records LLC*, at *23 [noting that, by contrast, when the destruction of evidence is merely negligent, the party seeking sanctions must show through extrinsic evidence that the destroyed evidence was relevant]). Similarly, if evidence is destroyed after such evidence has been requested by another party or after a party has requested that such evidence be preserved, New York State courts have found such destruction to be contumacious. (See *Cataldo v Budget Rent A Car*, 170 AD2d 475 [2d Dept 1991]).

Courts have held that "[a] party seeking an adverse inference instruction or other sanctions based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'[;] and (3) that

the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." (Zubulake, 229 FRD 422, 430 [SD NY 2004]).

There is no dispute that the Corcoran Defendants intentionally discarded emails in the ordinary course of business. While the deletion of emails is not per se improper, particularly when such deletions occur in the ordinary course of business, the matter is quite different when litigation has commenced or is reasonably anticipated. At that point, a party must take additional steps to preserve potentially relevant emails. (See, e.g., *Kronisch v United States*, 150 F3d 112, 126 [2d Cir. 1998]).

The Corcoran Defendants' inboxes were configured so that the individual users were obligated to delete emails on a regular basis in order to maintain the use of their email systems. As indicated above, this Court has found that the Corcoran Defendants made no effort to stop this deletion policy or to make an image of the Corcoran Defendants' inboxes or computer hard drives, instead relying solely upon the backup tapes even though those tapes indisputably would not capture all deleted emails.

The Corcoran Defendants' attorneys and IT Director failed to investigate the basic mechanics of the Corcoran email system, including the manual deletion policy, until, at earliest, May 2009, when Mr. Thomas admitted for the first time to the Plaintiffs and to the Court that the individual Corcoran

Defendants delete emails from their inboxes in the ordinary course in order to make room for more emails.

The Corcoran Defendants had ample notice that the contents of their emails would be relevant to this litigation. The Complaint itself cites the May 3, 2007 email sent by defendant Pacelli. See Complaint at ¶ 39; see also ¶ 58 (alleging that by a letter dated August 16, 2007, Plaintiffs' counsel advised the defendants, including the Corcoran Defendants, that the Plaintiffs intended to file a claim involving the defective condominium unit).

This Court repeatedly warned counsel for the Corcoran Defendants that the failure to make a complete production of emails caused the Court great concern and needed to be remedied promptly. Yet, the Plaintiffs, and this Court, only learned about the manual deletion policy in May 2009. In addition, the most reasonable inference one may draw from Thomas' testimony is that the manual deletion policy was still in place as of June 2, 2009, the date of the hearing.

A party seeking sanctions for spoliation, including the failure to implement a litigation hold, must show that "(1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind', and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." Zubulake, at 430.

could do Thursday or Friday afternoon." However, the Corcoran Defendants did not produce an email from Coats to defendants Mishan, Gatz, Sabbagh, and Pacelli, also dated April 16, 2007, at 8:44 A.M., stating, "The buyers for duplex want to get in to measure for cabinets, windows etc. I have pushed this appt to Thursday due to heavy rain…."[2] Certainly, this email is relevant, and a reasonable fact finder could conclude that the email supports the Plaintiffs' assertion that the Corcoran brokers knew that the apartment leaked during periods of heavy rain and concealed that fact from the Plaintiffs.

The actions of the Corcoran Defendants entitle Plaintiffs to an adverse inference that any deleted emails were unfavorable to the Corcoran Defendants. The failure to suspend the deletion policy or to investigate the basic ways in which emails were stored and deleted constitutes a serious discovery default on the part of the Corcoran Defendants and their counsel rising to the level of gross negligence or willfulness.

This the record supports an adverse inference against the Corcoran Defendants, assuming their utter failure to implement a litigation hold was merely negligent, because the extrinsic evidence introduced at the June 2, 2009 hearing is sufficient for a reasonable fact-finder to conclude that at least some of the deleted emails were relevant to this litigation and favorable to the Plaintiffs. (See *Treppel v Biovail Corp.*, 249

[2] The 8:44 A.M. email was produced by one of the co-defendants in the litigation and was entered into evidence as Exhibit "3" to the Kroll Report.

FRD. 121, 122 [SD NY 2008]). The April 17, 2007, 8:44 A.M. email, which was deleted by the Corcoran Defendants and produced by one of their co-defendants, suggests that since the Corcoran Defendants cancelled the scheduled open house for the Plaintiffs due to "heavy rain", a fact not shared with the Plaintiffs in Coats' 8:08 A.M. email, the Corcoran Defendants knew that heavy rain caused the condominium unit to leak and intentionally or negligently concealed that fact from the Plaintiffs. The extrinsic evidence adduced at the hearing clearly establishes a likelihood that emails in support of the Plaintiffs' claims were destroyed due to the Corcoran Defendants' failure to implement a litigation hold.

The Plaintiffs have established that the Corcoran Defendants should be sanctioned for their failure to implement a litigation hold.

Striking a pleading is appropriate if the movant makes a clear showing that the failure to comply with discovery obligations is willful, contumacious, or in bad faith. (See *Palmenta v Columbia University*, 266 AD2d 90, 91 [1st Dept 1999][citations omitted]). Furthermore, "Plaintiff, as the moving party, must show that defendant willfully failed to comply with discovery demands." (*Pimental v City of New York*, 246 A.D.2d 467, 468 [1st Dept 1998] citing *Herrara v City of New York*, 238 AD2d 475, 476 [2d Dept. 1997]). Willfulness may be established by repetitive failures to comply with discovery demands and/or orders. (See *Cespedes v Mike & Jac Trucking*

Corp., 305 AD2d 222, 222-23 [1st Dept. 2003] citing *Hudson View II Associates v Miller*, 282 AD2d 345 [1st Dept 2001]). Moreover, "[a] complete failure to disclose is not a prerequisite to the imposition of sanctions pursuant to CPLR 3126, the relevant fact being whether the failure to disclose relevant documents at issue was willful and contumacious." (*Waltzer v Tradescape & Co., LLC*, 31 AD3d 302, 303 [1st Dept 2006]).

Once the movant makes an affirmative showing of willful non-compliance, however, the burden shifts to the non-movant to provide a reasonable excuse for its default. (Herrara, at 476 [citations omitted]). A "reasonable excuse" for non-compliance can be shown by "unusual or unanticipated circumstances." (*Quintanna v Rogers*, 306 AD2d 167 [1st Dept. 2003]). Absent such a showing, however, the Court has the discretion to strike the pleadings of parties that repeatedly and willfully fail to comply with outstanding discovery obligations. (See *Arts4All v Hancock*, 54 AD3d 286 [1st Dept. 2008]; *Corsini v U-Haul International, Inc.*, 212 AD2d 288, 291 [1st Dept. 1995]).

This Court concludes that the failure to disclose the manual deletion policy until May 2009, after the Court's multiple Orders and after the Plaintiffs paid tens of thousands of dollars to review the hard drives, was an egregious, additional default by the Corcoran Defendants. Had the Plaintiffs and this Court known that the individual brokers were continuing to delete emails throughout the course of this litigation, a preservation solution could have been implemented. By disclosing this fact for the

first time 18 months into the litigation, however, the Corcoran Defendants willfully and unnecessarily caused extensive motion practice and delay without any reasonable justification. In addition, this Court has found that the utter failure to implement a litigation hold constitutes a separate discovery violation warranting sanctions.

During the June 2, 2009 hearing, counsel for the Corcoran Defendants asserted that no review of the hard drives' contents was warranted or "necessary," but rather that the Plaintiffs needlessly demanded the hard drives, therefore requiring the Corcoran Defendants to produce them upon this Court's December 10, 2008 Order. (See Transcript, June 2, 2009, 99:10-14; 101:11-12). This argument is without merit.

This Court's Order dated December 10, 2008, clearly directs each of the Corcoran Defendants "to produce their respective hard drives" (not limited to office computers) to a technology vendor for forensic imaging and deleted file recovery. See Dec. 10, 2008 Order, at 2. Moreover, that Order incorporates the October 23, 2008 Transcript, in which this Court's order to produce hard drives was in direct response to a colloquy in which the Corcoran Defendants' counsel admitted that he had not produced an email that this Court found was clearly relevant. (See Transcript, Oct. 23, 2008, 7:17-22).

The Corcoran Defendants have adduced absolutely no evidence to support a sua sponte reversal of the December 10, 2008 Order. On the contrary, the Corcoran Defendants asserted that the hard

drives produced in open court on February 19, 2009, would contain all emails sent to or from the individual brokers' Corcoran email accounts. Since this Court had directed production of the hard drives precisely because the Corcoran Defendants had failed to produce all emails sent to or from such accounts, it inevitably follows that the Plaintiffs were obligated to conduct a review of all potentially relevant documents, culled by keywords, from the hard drives.

Therefore, this Court concludes under this Court's prior orders and given any practical interpretation of the proceedings through February 19, 2009, the date upon which the hard drives were produced, the Plaintiffs' review of the hard drives was "necessary."

The Plaintiffs also moved this Court for attorneys' fees and costs arising from the review of documents extracted from the hard drives produced by the Corcoran Defendants. In light of the Corcoran Defendants' contumacious conduct, the Court agrees that the Plaintiffs are entitled to attorneys' fees in the amount of $27,371.45, and costs in the amount of $8,133.00, as indicated in the Reiff Affirmation dated May 12, 2009. Furthermore, the Court finds that the Plaintiffs are entitled to attorneys' fees and costs incurred in bringing the October 15, 2008 and February 10, 2009 orders to show cause.

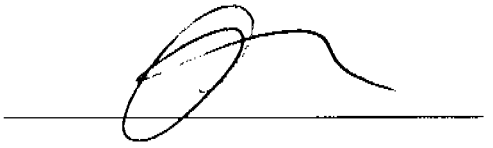
CONCLUSION

In lieu of striking the Corcoran Defendants' answers, this Court sanctions the Corcoran Defendants by finding that they are

deemed to have known of the water infiltration problem and to have willfully misled the Plaintiffs by concealing that condition from them during the sales process.

The Plaintiffs are awarded attorneys' fees and costs in connection with the review of the "hard drives" produced together with the fee charged by Kroll OnTrack. Plaintiffs are also entitled to counsel fees and costs expended in connection with this pending motion for discovery and sanctions, such fees to be determined pursuant to a submission by Plaintiff's counsel together with opposition, if any. If this Court determines a further hearing on counsel fees is necessary, the Court will so advise the Parties. The parties shall settle an order.

Dated: November 12, 2009



J.S.C.

HON. CHARLES E. RAMOS