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CPLR 2211: Court Requires Attorney to Pay $1500 as a Condition for Granting Order

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service of a complaint for the purposes of entering a default judgment. The Supreme Court, Queens County, in *Gottlieb v. Edelstein,* further extended the ever-increasing liability of attorneys for improper conduct. As a condition to granting an adjournment requested by the defendant, the *Gottlieb* court required defendant's counsel to compensate the plaintiff in the amount of $1500 because he had deliberately impeded the progress of the litigation. In *Folgate v. Brookhaven Memorial Hospital,* the Supreme Court, Suffolk County, construed the disclosure provisions of the CPLR to permit full discovery by the plaintiff in an action based on medical malpractice of the number and amounts of prior claims against the defendant's liability policy. Finally, we have included a critical discussion of the legislature's extensive revision of the law relating to medical malpractice. In choosing these and other cases for analysis, it is hoped that *The Survey* has achieved its primary goal of calling significant developments in New York practice to the attention of the practitioner.

ARTICLE 22 — STAYS, MOTIONS, ORDERS AND MANDATES

CPLR 2211: Court requires attorney to pay $1500 as a condition for granting order.

The practice of imposing financial penalties upon attorneys whose neglectful conduct[1] has led to the dismissal of their clients' cases for want of prosecution is well established.[2] Courts frequently grant a motion to vacate a CPLR 3404[3] dismissal or refuse to grant a motion for a CPLR 3216[4] dismissal on condition that the attorney

[1] For a general discussion of law office neglect, see 7 CARMODY-WAIT 2d § 44:27, at 307 (1968); 4 WK&M ¶ 3216.07.

[2] *See, e.g.,* Cichorek v. Cosgrove, 47 App. Div. 2d 883, 367 N.Y.S.2d 7 (1st Dep't 1975) (per curiam) ($350 penalty); Schickler v. Seifert, 45 App. Div. 2d 816, 357 N.Y.S.2d 225 (4th Dep't 1974) (mem.) ($1000 penalty); Cohen v. Tucker, 44 App. Div. 2d 706, 354 N.Y.S.2d 691 (2d Dep't 1974) (mem.) ($250 penalty); Urban v. Maloney, 40 App. Div. 2d 531, 334 N.Y.S.2d 122 (2d Dep't 1972) (mem.) ($250 penalty); Moran v. Rynar, 39 App. Div. 2d 718, 332 N.Y.S.2d 138 (2d Dep't 1972) (mem.) ($250 penalty).

[3] Pursuant to CPLR 3404 a case which has been struck from the calendar and not restored within 1 year is deemed abandoned and will be automatically dismissed by the clerk for failure to prosecute. The court, however, has the power to vacate the dismissal and restore the case to the calendar. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 286 (4th ed. 1973). CPLR 3404 governs only cases in the supreme court and county courts. Other courts, however, such as the New York City Civil Court, the court of claims, and the district courts, have similar rules. 4 WK&M ¶ 3404.10 & n.19.

[4] CPLR 3216 enables the court, on its own initiative or upon motion, to dismiss a case because of failure to prosecute. A dismissal is only authorized, however, where 1 year has elapsed since the joinder of issue and the party against whom relief is sought has been served with a written demand for the resumption of prosecution. CPLR 3216(b). The defaulting party may avoid dismissal of the action by filing a note of issue within 45 days of receipt of the written demand for resumption of prosecution. *Id.* 3216(c). For a more

at fault personally pay a sum of money to the opposing party or counsel.[5] Recently, the Supreme Court, Queens County, in *Gottlieb v. Edelstein*,[6] extended this practice by approving the imposition of a financial penalty upon attorneys not for neglect of their client's case, but rather for an apparent attempt to deliberately impede the opposing party's prosecution.

In *Gottlieb*, the court approved conditioning an order[7] granting

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detailed discussion of CPLR 3216, see H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 326-28 (4th ed. 1973).

[5] The penalty imposed has usually been small. *See, e.g.*, Urban v. Maloney, 40 App. Div. 2d 531, 334 N.Y.S.2d 122 (2d Dep't 1972) (mem.) ($250 penalty); Douglaston Estates, Inc. v. Consolidated Edison Co., 39 App. Div. 2d 705, 332 N.Y.S.2d 403 (2d Dep't 1972) (mem.) ($250 penalty); Springer v. Marangio, 38 App. Div. 2d 852, 330 N.Y.S.2d 100 (2d Dep't 1972) (mem.) ($100 penalty); Quinn v. Cohn, 37 App. Div. 2d 927, 326 N.Y.S.2d 161 (1st Dep't 1971) (per curiam) ($250 penalty). The Fourth Department, however, has imposed a rather substantial $1000 penalty on a neglectful attorney as a condition for vacating a CPLR 3404 dismissal. Schickler v. Seifert, 45 App. Div. 2d 816, 357 N.Y.S.2d 225 (4th Dep't 1974) (mem.), *discussed in The Survey*, 49 ST. JOHN'S L. REV. 792, 819 (1975). The court emphasized that the penalty was to be paid by the attorney personally, and that under no circumstances was he to include it in his fee or be otherwise reimbursed. 45 App. Div. 2d at 817, 357 N.Y.S.2d at 226. Whether the courts will follow *Schickler* and impose substantial penalties as a condition for vacating CPLR 3404 dismissals or refusing to grant CPLR 3216 dismissals remains to be seen. It is interesting to note that recent First and Second Department cases have imposed only small penalties. *E.g.*, Cichorek v. Cosgrove, 47 App. Div. 2d 883, 367 N.Y.S.2d 7 (1st Dep't 1975) (per curiam) ($350 penalty); Sommer v. Fucci, 47 App. Div. 2d 771, 365 N.Y.S.2d 249 (2d Dep't 1975) (mem.) ($100 penalty). This is unfortunate since a small penalty probably does not have the desired effect of deterring attorneys from neglectful prosecution. *See* 7B MCKINNEY'S CPLR 3216, commentary at 115 (Supp. 1975).

Because of the strong public policy favoring dispositions on the merits, courts are hesitant to dismiss a meritorious cause of action. The more equitable solution would appear to be penalization of the neglectful attorney, thus assuring a worthy litigant of his day in court. *See* Moran v. Rynar, 39 App. Div. 2d 718, 719, 332 N.Y.S.2d 138, 140 (2d Dep't 1972) (mem.); *cf.* Nomako v. Ashton, 22 App. Div. 2d 683, 253 N.Y.S.2d 309, 310 (1st Dep't 1964) (mem.).

[6] 375 N.Y.S.2d 532 (Sup. Ct. Queens County 1975).

[7] An order granted on condition is said to "hing[e] on events to take place in the future. Hence, it contemplates further action by the court . . . ." Wright v. Commissioner, 40 App. Div. 2d 1040, 1041, 339 N.Y.S.2d 9, 11 (2d Dep't 1972) (mem.) (citations omitted). The only caveat as to the terms stipulated is that they be reasonable. 2 CARMODY-WAIT 2d § 8:69, at 90 (1965). Failure to comply with the condition results in a denial of the motion. *Id.*, at 90-91. The fact that the court was able to deny the motion in the first instance supports its authority to condition the granting of a motion on compliance with stipulated terms. The flexibility of such a procedure enables the judiciary to render justice according to the particular situation.

Conditional orders frequently are granted with regard to the preclusion of evidence at trial for noncompliance with a demand for a bill of particulars. Pursuant to CPLR 3042(c), a party who fails to furnish a bill of particulars in response to such a demand may be precluded from giving any evidence at trial regarding the items for which particulars have not been delivered. The granting of the preclusion order is discretionary, and very often conditioned on the recalcitrant party's continued failure to serve the bill within a specified period of time. *See* CPLR 3042(e). *See also* Morris Oil Servs., Inc. v. Bergman, 37 App. Div. 2d 862, 326 N.Y.S.2d 821 (2d Dep't 1971) (mem.) (denial of defendant's motion to be relieved of preclusion order held an improvident exercise of discretion); Barone v. Gangi, 34 App. Div. 2d 889, 312 N.Y.S.2d 153 (4th Dep't 1970) (mem.) (preclusion order reversed because court in first instance granted absolute rather than conditional order of preclusion); 3 WK&M ¶¶ 3042.06, .12.

Courts are generally reluctant to grant preclusion orders against a litigant because they recognize that blame for the failure to provide a bill of particulars usually rests with the

an adjournment upon the payment of $1500 by the attorneys for one of the defendants.[8] The attorneys had indicated readiness to commence trial and had proceeded to select a jury even though they were aware that an administrator had not been appointed for their deceased client.[9] When the trial court directed that the parties proceed to trial, the attorneys moved for an adjournment, advising the court for the first time that the defendant was deceased and no administrator had yet been appointed. Unfortunately, by this time the plaintiff's attorney had spent 2 days in court attempting to obtain a settlement, and the plaintiff, an aged and infirm woman, had traveled from Florida to be present. As a condition for granting the application for an adjournment,[10] the court directed that the defendant's attorneys pay the plaintiff and her attorney the sum of $1500, not by way of costs,[11] but rather to compensate the

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attorney. *See* Gigliotti v. Morasco, 2 App. Div. 2d 653, 152 N.Y.S.2d 45 (4th Dep't 1956) (per curiam); Kamp v. Syracuse Transit Corp., 284 App. Div. 1028, 134 N.Y.S.2d 919 (4th Dep't 1954) (per curiam); Hersh v. Home Ins. Co., 284 App. Div. 428, 131 N.Y.S.2d 488 (1st Dep't 1954) (per curiam). Another reason for the reluctance of courts to grant preclusion orders is their desire to allow the litigant an opportunity to present his case in court. *Cf.* note 5 *supra.*

Conditional orders granted with regard to failure or refusal to disclose are based on similar policy considerations. For a more extensive discussion of conditional orders under CPLR 3126, see note 16 and accompanying text *infra.*

[8] 375 N.Y.S.2d at 536. In *Gottlieb,* both defendants moved pursuant to CPLR 8501(a) for an order requiring the plaintiff to post security for costs. The plaintiff cross-moved for an order striking the defendants' answers because of the failure of the attorneys for one of the defendants to comply with the court's prior direction that they pay plaintiff and her attorney the sum of $1500. The defendant-at-fault opposed plaintiff's cross-motion, disputing the propriety of the court's order. After finding the sum imposed to be entirely within the court's inherent equitable powers, Justice Finz denied the motion of the defendant-at-fault for security for costs. Noting that the defendant herself had died and an administrator had yet to be appointed, the court declared that "it is not clear whom these attorneys are representing and . . . it does not appear that they can move for security for the costs." *Id.* at 537. The other defendant's motion for similar relief was granted. Plaintiff's cross-motion was denied without prejudice to renew upon the appointment of an administrator for the deceased defendant. *Id.*

[9] The trial attorney for the defendant-at-fault admitted that his office had remained silent about the matter even though the plaintiff had made specific inquiry concerning their readiness to proceed. *Id.* at 534.

[10] It is questionable whether the *Gottlieb* court could have denied the application for an adjournment. CPLR 1015(a) states: "If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." Normally, all activity in a case involving a deceased person ceases pending substitution for the deceased. *See* 2 WK&M ¶ 1015.07. CPLR 5016(d) provides that "[n]o verdict or decision shall be rendered against a deceased party . . . ." Therefore, had the court not granted an adjournment to secure the appointment of a personal representative to be substituted for the deceased, the *Gottlieb* plaintiff presumably would have been unable to obtain any recovery until such an appointment was made. For more detailed discussion of CPLR 5016(d), see 5 WK&M ¶ 5016.14.

[11] One of the grounds on which the defendant-at-fault disputed the court's authority to order payment of the $1500 was that the amount was not authorized by CPLR 8202 or 8301. 375 N.Y.S.2d at 535. CPLR 8202 provides for costs on a motion, but limits the amount of the award to $40 in counties within the City of New York and to $20 in all other counties. CPLR 8301 fixes the amount of disbursements which a party may be awarded in an action or on an

plaintiff and her attorney for their loss of time and money.[12]

On a subsequent motion by the defendants for an order requiring the plaintiff to post security for costs, the plaintiff cross-moved to strike the defendants' answers for failure to pay the penalty required by the original order. The defendant-at-fault then challenged the validity of the original order. Proclaiming the court's "inherent power . . . to provide a remedy against those who impede justice in a civil case and cause great hardship and expense to opposing parties and their attorneys,"[13] Justice Finz concluded that it would have been a "perversion of justice"[14] to grant the application for adjournment unconditionally.

The *Gottlieb* court analogized the attorneys' lack of good faith to a failure to comply with disclosure orders.[15] CPLR 3126 provides that where there has been a failure to disclose relevant information or a refusal to obey an order for disclosure, "the court may make such orders with regard to the failure or refusal as are just . . . ."[16] In *Nomako v. Ashton*,[17] the First Department established

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appeal. For further discussion of these provisions, see 8 WK&M ¶¶ 8202.01, 8301.01. Citing the record made at the time of the order, the court noted that the $1500 had not been imposed by way of costs but as a condition for the granting of the motion for an adjournment. 375 N.Y.S.2d at 535.

The defendant's attorneys also argued that CPLR 5016 prohibited the rendering of a verdict or decision against their client since she was deceased. *Id.* at 535; *see* note 10 *supra*. The court responded by pointing out that the sum was not assessed against the deceased, but against the attorneys, "since they were the root cause of the difficulty described." 375 N.Y.S.2d at 536.

[12] 375 N.Y.S.2d at 535. Plaintiff's attorney had requested $1500 as compensation for three days of his time, $500 per day being his usual billing for supreme court work, plus $3000 to compensate his client for her "aggravation." The court ordered the payment of $1500, which amount was said to include out-of-pocket expenses as well as punitive costs. *Id.* at 536.

[13] *Id.* at 533.

[14] *Id.* at 534.

[15] *Id.* at 536.

[16] CPLR 3126 enumerates three possible penalties:

> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The enumerated penalties, however, are not exclusive. The court may make such other orders "as are just." CPLR 3126. *See* Bredin v. Buchman, 32 App. Div. 2d 518, 298 N.Y.S.2d 748, 749 (1st Dep't 1969) (mem.) (judgment against defendant vacated in the "interests of justice," giving him final opportunity to comply with disclosure orders); Stockman v. Marks Polarized Corp., 25 App. Div. 2d 883, 270 N.Y.S.2d 223, 225 (2d Dep't 1966) (mem.) (citations omitted) (further proceedings ordered to "make such an order as may be just under the circumstances"); 3A WK&M ¶ 3126.06; 7B McKINNEY'S CPLR 3126, commentary at 653-54 (1970).

that costs and attorneys' fees could be imposed as a sanction pursuant to CPLR 3126. Courts in the Second[18] and Fourth[19] Departments have followed the reasoning of *Nomako* by imposing similar sanctions.

The *Gottlieb* decision indicates the court's unwillingness to tolerate the conduct of attorneys who deliberately inconvenience the other party and delay resolution of the case.[20] That the amount involved was substantial demonstrates the extent of the court's displeasure with this kind of conduct.[21] The practitioner should be aware that courts may well continue to impose similarly substantial penalties on attorneys who "impede justice,"[22] particularly if the amount is calculated not only to serve as a form of judicial reprimand, but also to compensate the other parties for expenses and/or attorneys' fees incurred by reason of such conduct.[23]

The penalties authorized by CPLR 3126 closely parallel those in FED. R. CIV. P. 37(b)(2). Moreover, the enumerated penalties in the federal rule are also nonexclusive: the court "may make such orders in regard to the failure [to comply with its orders] as are just . . . ." *Id. See generally* Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (6th Cir. 1949); Campbell v. Johnson, 101 F. Supp. 705 (S.D.N.Y. 1951).

[17] 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964) (mem.). *Accord,* Lindner v. Witty, 35 App. Div. 2d 693, 314 N.Y.S.2d 976 (1st Dep't 1970) (mem.); Jefferson v. City of New York, 26 App. Div. 2d 931, 275 N.Y.S.2d 77 (1st Dep't 1966) (mem.).

[18] *See* Askinazy v. Jacobson, 40 App. Div. 2d 860, 337 N.Y.S.2d 971 (2d Dep't 1972) (mem.); Cascone v. Campanale, 28 App. Div. 2d 873, 282 N.Y.S.2d 963 (2d Dep't 1967) (mem.); Di Bartolo v. American & Foreign Ins. Co., 26 App. Div. 2d 992, 275 N.Y.S.2d 805 (2d Dep't), *aff'g mem.* 48 Misc. 2d 843, 265 N.Y.S.2d 981 (Sup. Ct. Suffolk County 1966). As *Nomako* and *Di Bartolo* indicate, imposition of fees and costs is a sanction available against either side. 7B MCKINNEY'S CPLR 3126, commentary at 654 (1970).

[19] *See* Warner v. Bumgarner, 49 Misc. 2d 488, 267 N.Y.S.2d 825 (Sup. Ct. Monroe County 1966). The *Warner* court determined that unless defendants paid the plaintiffs a full bill of costs and an attorney's fee of $500, plaintiffs would be granted judgment by default. In expressing its impatience with conduct which impedes the resolution of the case, the court stated:

> That defendants may have a meritorious defense and eventually win the lawsuit affords no justification for their conduct in this proceeding. By reason of that conduct, the examinations to date have been unduly prolonged and substantially fruitless.

Id. at 492, 267 N.Y.S.2d at 829. The *Gottlieb* court expressed a similar intolerance with conduct which delayed the resolution of the case. 375 N.Y.S.2d at 536, *quoting* Warner v. Bumgarner, 49 Misc. 2d 488, 492, 267 N.Y.S.2d 825, 829 (Sup. Ct. Monroe County 1966).

[20] The conduct of the attorneys at fault in *Gottlieb* wasted the time not only of the plaintiff and her attorney but of the court as well. Courts have in the past indicated their intolerance of attorneys who hinder tribunal efficiency. For example, in Waldman v. Posner, 171 N.Y.L.J. 30, Feb. 13, 1974, at 19, col. 1 (N.Y.C. Civ. Ct. Kings County), the court criticized the conduct of an attorney who had wasted the court's time by submitting, in opposition to well-settled law, a brief which cited cases inapplicable and irrelevant to the issue. Similarly, in Garcia v. Silverman, 167 N.Y.L.J. 120, June 21, 1972, at 18, col. 7 (Sup. Ct. N.Y. County), the court reprimanded an attorney for deliberately omitting important and necessary information from papers submitted to the court.

[21] Quoting from the record made at the time the order in question was entered, the *Gottlieb* court noted that because the court found that the attorney had acted with " 'callous indifference' " it had included as part of the $1500 an amount " 'addressed to what could be described as punitive costs . . . .' " 375 N.Y.S.2d at 536.

[22] *Id.* at 533.

[23] *See* note 12 and accompanying text *supra.* Interestingly, the cases imposing smaller

ARTICLE 31 — DISCLOSURE

CPLR 3101(f): Court allows discovery of prior claims satisfied out of defendant doctor's malpractice insurance policy.

CPLR 3101(f), a verbatim adoption of rule 26(b)(2) of the Federal Rules of Civil Procedure,[24] significantly broadens the scope of discovery allowed in New York by permitting a party to obtain disclosure of the existence and contents of any insurance agreement whose proceeds may be used either in satisfaction of a judgment that may be entered in the action or for indemnification or reimbursement of payments made to satisfy such a judgment.[25] It further provides that information so obtained is not, by the mere reason of its disclosure, admissible at trial.[26] The apparent purpose of CPLR 3101(f) is to facilitate and encourage negotiations between counsel, thereby augmenting the chances for settlement.[27]

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penalties for attorney neglect make no reference to expenses incurred. *See* cases cited note 5 *supra*.

[24] 7B MCKINNEY'S CPLR 3101, commentary at 8 (Supp. 1975).

[25] CPLR 3101(f) states:

> 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. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement.

Prior to the recent enactment of CPLR 3101(f), ch. 668, § 1, [1975] N.Y. Laws 1072, the discoverability of insurance policies was wholly dependent upon a finding pursuant to CPLR 3101(a), formerly CPA 288, that such disclosure was "material and necessary in the prosecution or defense of [the] action." Consequently, disclosure was limited to two situations. *See* 3A WK&M ¶ 3101.58, at 31-156.1. Discovery was permitted if relevant to an essential issue in the case. *See, e.g.*, Guilianelle v. Brownell, 7 App. Div. 2d 691, 179 N.Y.S.2d 344 (3d Dep't 1958) (mem.) (insurance policy of alleged employer disclosed to prove agency relationship); Martyn v. Braun, 270 App. Div. 768, 59 N.Y.S.2d 588 (2d Dep't 1946) (mem.) (policy discoverable to prove defendant's ownership of property causing injury). Discovery was also allowed where jurisdiction was predicated upon the attachment of an insurance policy. *See, e.g.*, Tickel v. Oddo, 66 Misc. 2d 386, 320 N.Y.S.2d 268 (Sup. Ct. Nassau County 1971); Day v. State Farm Mut. Ins. Co., 63 Misc. 2d 497, 311 N.Y.S.2d 647 (Sup. Ct. Monroe County 1969); Mirabile v. Fitzmaurice, 59 Misc. 2d 239, 298 N.Y.S.2d 568 (Sup. Ct. Kings County 1969). With the exception of these rare situations, disclosure of insurance policies was usually disallowed. *See, e.g.*, Mosca v. Pensky, 42 App. Div. 2d 708, 345 N.Y.S.2d 606 (2d Dep't 1973) (mem.), *aff'd mem.*, 35 N.Y.2d 764, 320 N.E.2d 864, 362 N.Y.S.2d 148 (1974).

[26] CPLR 3101(f) effects no change in the rules of evidence regarding the admissibility at trial of insurance coverage. For a synopsis of the New York law on the admissibility of such coverage, see W. RICHARDSON, EVIDENCE § 169 (10th ed. J. Prince 1973).

[27] 7B MCKINNEY'S CPLR 3101, commentary at 8 (Supp. 1975); 3A WK&M ¶ 3101.58. Three years before the adoption of FED. R. CIV. P. 26(b)(2), in a case where he reluctantly disallowed pretrial disclosure of insurance coverage, the then United States District Judge Mansfield explained why permitting such disclosure might facilitate and encourage settlements:

> This Court has witnessed the dismal waste of time and effort, both on the part of the parties and the court, in cases where an early disclosure of limited policy limits would have led to prompt settlements that were not reached until the eve of trial, when such information was first revealed after needless pretrial discovery and