CPLR 3126: Penalty Imposed on Attorney for Failure to Disclose

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CPLR 3126 prescribes the penalties that may be imposed on a party who refuses to disclose information either willfully or in disobedience of a court order. The court is not, however, confined to the sanctions specifically enumerated in this section: it may "make any such orders that are just." One alternative devised by the courts is to conditionally deny a motion seeking the harsh remedies listed under CPLR 3126 with a provision that the recalcitrant party or his attorney compensate the other party by the payment of costs and/or attorney's fees. As illustrated by Cotteral v. City of New Rochelle, this approach preserves the sanctity of a court order while it safeguards the defendant from prejudice due to the delay.

In Cotteral, the appellate division found that the conduct of plaintiffs' attorney in delaying an examination before trial was inexcusable; nevertheless, the court also recognized the severity of the lower court's order which dismissed the infant plaintiff's cause of action. Hence, the court conditioned its reversal upon the payment of $200 costs to defendant by the plaintiffs' attorney.

CPLR 3211(c): Conflict over propriety of pre-joinder motion for summary judgment.

A court may treat a motion to dismiss a cause of action or defense under CPLR 3211(c) as a motion for summary judgment. However, a conflict has arisen regarding whether such a motion should be granted before issue has been joined. Two recent cases nurture this controversy.

In Kronish, Lieb, Shainswit, Weiner, & Hellman v. John J. Reynolds, Inc. the First Department reasoned that a motion under 3211(c) is independent of the provisions contained in CPLR 3212. Hence, the prohibition against pre-joinder summary judgment contained in the latter section was deemed inapprropriate. However, in

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90 CPLR 3126 expressly provides that the court may issue a resolution order, a preclusion order, and a stay, dismissal or default order.
91 Id. See 7B McKinney's CPLR 3126, commentaries 1, 8-12, at 640, 649-55 (1970).
96 CPLR 3212 provides: "Except as provided in subdivision (d) . . . any party may move for summary judgment in any action, after issue has been joined."