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CPLR 3126: Penalty imposed on attorney for failure to disclose.

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:⁹⁰ it may "make any such orders that are just."⁹¹ 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.⁹² As illustrated by *Cotteral v. City of New Rochelle*,⁹³ this approach preserves the sanctity of a court order while it safeguards the defendant from prejudice due to the delay.⁹⁴

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.*,⁹⁵ 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 section⁹⁶ was deemed inapposite.⁹⁷ However, in

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).

⁹² See, e.g., *Nomako v. Ashton*, 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964); *Warner v. Bumgarner*, 49 Misc. 2d 488, 267 N.Y.S.2d 825 (Sup. Ct. Monroe County 1966); *Di Bartolo v. American & Foreign Ins. Co.*, 48 Misc. 2d 843, 265 N.Y.S.2d 981 (Sup. Ct. Suffolk County 1966).

⁹³ 33 App. Div. 2d 791, 307 N.Y.S.2d 568 (2d Dep't 1970).

⁹⁴ See 3 WK&M ¶ 3126.14.

⁹⁵ 33 App. Div. 2d 366, 307 N.Y.S.2d 725 (1st Dep't 1969).

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."

⁹⁷ See also *Firestone v. First Dist. Dental Soc'y*, 24 App. Div. 2d 268, 265 N.Y.S.2d 525 (1st Dep't 1965).