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 inapposite. However, in

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80 CPLR 3126 expressly provides that the court may issue a resolution order, a preclusion order, and a stay, dismissal or default order.
81 Id. See 7B McKinney’s CPLR 3126, commentaries 1, 8-12, at 640, 649-55 (1970).
84 See 3 WK&M ¶ 3126.14.
86 CPLR 3212 provides: "Except as provided in subdivision (d) . . . any party may move for summary judgment in any action, after issue has been joined."