

CPLR 3121: Party May Not Retain Adversary's Expert

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CPLR 3121: Party may not retain adversary's expert.

In *Gnoj v. City of New York*,¹¹⁰ a malpractice suit, the physical condition of plaintiff was in issue. Defendant hired an expert to assist it in determining whether or not it was negligent. At the trial, this expert was allowed to testify over defendant's objections, in behalf of plaintiff. The appellate division, first department, held that this constituted reversible error. The court stated that "where a party . . . does not lack expert testimony of his own choosing, an expert engaged by the opposing party should not be sought out and placed in the unethical position of accepting a retainer from both sides."¹¹¹

CPLR 3126: Substantial attorney's fees imposed.

In spite of the liberal construction of disclosure provisions under the CPLR,¹¹² attorneys still engage in various dilatory tactics in order to avoid disclosing vital information to their adversaries.¹¹³ Although severe penalties are available under CPLR 3126¹¹⁴ for refusal to make disclosure, courts have been reluctant to impose them.¹¹⁵

¹¹⁰ 29 App. Div. 2d 404, 288 N.Y.S.2d 368 (1st Dep't 1968).

¹¹¹ *Id.* at 407, 288 N.Y.S.2d at 371. See also *Gugliano v. Levi*, 24 App. Div. 2d 591, 262 N.Y.S.2d 372 (2d Dep't 1965).

¹¹² *Rios v. Donovan*, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964). The liberal views expressed in *Rios* were reaffirmed in *Allen v. Crowell-Collier Publishing Company*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

¹¹³ *Warner v. Bumgarner*, 49 Misc. 2d 488, 267 N.Y.S.2d 825 (Sup. Ct. Monroe County 1966) (defendant's attempt to avoid disclosure bordered on the tortious).

¹¹⁴ CPLR 3126 provides that "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that issues to which the information is relevant shall be deemed resolved . . . [in movant's favor] . . . or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . or
3. an order striking out pleadings or parts thereof . . . or dismissing the action . . . or rendering a judgment by default against the disobedient party.

While the statute uses the word "order" courts have held that a notice of disclosure is sufficient. See *infra*, note 117.

¹¹⁵ *Coffey v. Orbachs, Inc.*, 22 App. Div. 2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964); *Fleming v. Fleming*, 50 Misc. 2d 323, 270 N.Y.S.2d 352 (Sup. Ct. Queens County 1966); *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); *Burbell v. Burman*, 44 Misc. 2d 749, 255 N.Y.S.2d 56 (Sup. Ct. Bronx County 1964); *Mostow v. Shorr*, 44 Misc. 2d 733, 255 N.Y.S.2d 320 (Sup. Ct. Kings County 1964). Cf. *Gaffney v. City of New York*,