

## CPLR 3126: Substantial Attorney's Fees Imposed

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

In *Gnoj v. City of New York*,<sup>110</sup> 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."<sup>111</sup>

*CPLR 3126: Substantial attorney's fees imposed.*

In spite of the liberal construction of disclosure provisions under the CPLR,<sup>112</sup> attorneys still engage in various dilatory tactics in order to avoid disclosing vital information to their adversaries.<sup>113</sup> Although severe penalties are available under CPLR 3126<sup>114</sup> for refusal to make disclosure, courts have been reluctant to impose them.<sup>115</sup>

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

<sup>111</sup> *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).

<sup>112</sup> *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).

<sup>113</sup> *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).

<sup>114</sup> 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.

<sup>115</sup> *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*,

In *Goldner v. Lendor Structures, Inc.*,<sup>116</sup> the appellate division, second department, conditionally granted plaintiff's motion to impose 3126 penalties on defendant for failing to appear at pre-trial examinations. The court's holding in *Goldner* is in conformity with the views of the first department,<sup>117</sup> i.e., 3126 penalties "apply to notices of examination as well as orders therefor."<sup>118</sup>

The cases arising out of CPLR 3126 have fallen into a pattern. Although CPLR 3126 contains unequivocal language, courts have made their 3126 penalty orders only on a *conditional* basis. While a litigant should not be deprived of his day in court because of his attorney's wrongdoing,<sup>119</sup> refusals to make disclosure impede the judicial process and consume substantial amounts of money. A practical solution to this dilemma would be the continued imposition of substantial attorney's fees as one of the conditions attached to an order pursuant to CPLR 3126.

*CPLR 3140: Interdepartmental conflict develops.*

CPLR 3140 mandates that "the appellate division in each judicial department shall adopt rules governing the exchange of appraisal reports intended for use at the trial in proceedings for condemnation. . . ." The rule of the appellate division, second department, adopted pursuant to CPLR 3140, provides that in "proceedings for condemnation . . . the attorneys for the respective parties shall file with the clerk of the trial court . . . any appraisal report *intended to be used at the trial* . . . together with a separate copy . . . for each adverse party to the claim." In *In re Inwood*,<sup>120</sup> claimant sought an exchange of appraisal reports covering the damaged parcel. The court granted the condemnor's motion to vacate claimant's notice to exchange appraisal reports holding that claimant could obtain only those appraisals which were *on file* with the clerk of the trial court.

In contrast, the fourth department's implementation of CPLR 3140 requires attorneys to "serve upon their adversaries . . . a copy of *all* appraisal reports intended to be used at the trial." This rule was recently construed in *City of Buffalo v. Ives*,<sup>121</sup>

41 Misc. 2d 1049, 247 N.Y.S.2d 419 (Sup. Ct. Queens County 1964) (held that 3126 penalties were impossible only after disobedience of "court order" for disclosure). See also *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 309 (1966).

<sup>116</sup> 29 App. Div. 2d 978, 289 N.Y.S.2d 687 (2d Dep't 1968).

<sup>117</sup> See *Coffey v. Orbachs, Inc.*, 22 App. Div. 2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964); *Nomako v. Ashton*, 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964).

<sup>118</sup> 29 App. Div. 2d at 979, 289 N.Y.S.2d at 689.

<sup>119</sup> 7B MCKINNEY'S CPLR 3126, supp. commentary 124 (1967).

<sup>120</sup> 55 Misc. 2d 806, 286 N.Y.S.2d 360 (Sup. Ct. Nassau County 1968).

<sup>121</sup> 55 Misc. 2d 730, 286 N.Y.S.2d 517 (Sup. Ct. Erie County 1968).