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Article 32

CPLR 3140: Interdepartmental Conflict Develops

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In *Goldner v. Lendor Structures, Inc.*,[116] 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,[117] *i.e.*, 3126 penalties "apply to notices of examination as well as orders therefor." [118]

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,[119] 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*,[120] 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*,[121]

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41 Misc. 2d 1049, 247 N.Y.S.2d 419 (Sup. Ct. Queens County 1964) (held that 3126 penalties were imposable 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).

[116] 29 App. Div. 2d 978, 289 N.Y.S.2d 687 (2d Dep't 1968).

[117] *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).

[118] 29 App. Div. 2d at 979, 289 N.Y.S.2d at 689.

[119] 7B MCKINNEY'S CPLR 3126, supp. commentary 124 (1967).

[120] 55 Misc. 2d 806, 286 N.Y.S.2d 360 (Sup. Ct. Nassau County 1968).

[121] 55 Misc. 2d 730, 286 N.Y.S.2d 517 (Sup. Ct. Erie County 1968).

wherein the court, emphasizing the word "all," reasoned that the condemnor should not be allowed to have appraisals made, discard the highest, and submit the lowest.

Both the second and fourth department rules use the words "intended to be used at the trial." When is an appraisal report "intended to be used at the trial?" It logically follows from the disposition made by the *Inwood* court that only appraisal reports *on file* are "intended to be used at the trial." However, the decision in *Ives* seems to indicate that the mere preparation of an appraisal *ipso facto* makes it "intended to be used at the trial." The *Inwood* court seems to have reached the better result. An amendment to the fourth department's rule requiring *filing* of appraisals should bring about the better result achieved in *Inwood.*

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212(e): Entry of partial summary judgment proper despite outstanding counterclaims in excess of demands in complaint.

CPLR 3212(e) permits a court to grant summary judgment "as to one or more causes of action, or part thereof . . . on such terms as may be just." The court is further authorized to sever the cause of action in which summary judgment is granted from any remaining cause of action.[122]

In *Dalminter v. Dalmine*,[123] appellants contended that special term erred in granting partial summary judgment to plaintiffs, since meritorious counterclaims in excess of the amounts in the complaint and directly related thereto had not been tried.

The appellate division, first department, held that since the counterclaims were not inseparable from plaintiffs' causes of action, it was within the discretion of special term to enter partial summary judgment under CPLR 3212(e).[124] However, the court pointed out that the defendants were protected by a stay of execution until the remaining issues were tried.

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[122] It is interesting to note that this provision is somewhat redundant in light of CPLR 5012 which authorizes the court to order a severance and direct judgment "upon a part of a cause of action or upon one or more causes of action as to one or more parties." *See* 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 501201 *et seq.* (1967).

[123] 29 App. Div. 2d 852, 288 N.Y.S.2d 110 (1st Dep't 1968).

[124] It should be noted, however, that where there is but one cause of action and one or more counterclaims which raise triable issues, it would be improper to award summary judgment for an amount equal to or greater than the prayer for relief, since there can be no severance. *See* Illinois McGraw Elec. Co. v. Watters, Inc., 7 N.Y.2d 874, 164 N.E.2d 872, 196 N.Y.S.2d 1003 (1959); Dietz v. Glynne, 221 App. Div. 329, 223 N.Y.S. 221 (2d Dep't 1927).