

CPLR 3126: Penalties Imposed for Non-Compliance with an Order to Disclose

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guage of CPLR 3106(b) required the subpoena to be served, whether the accountant was determined to be the defendant's agent or a non-party witness, since by such service an agent or non-party witness is given an opportunity to avail himself of his right to move for a CPLR 3103 protective order.

It is now clear that the practitioner is required to comply with the literal language of the statute in serving the subpoena as a condition precedent to an examination of a non-party witness or agent.

CPLR 3126: Penalties imposed for non-compliance with an order to disclose.

CPLR 3126 imposes harsh penalties for failure to comply with a disclosure order.¹⁵² The harshness of these penalties has made the courts reluctant to apply them. In *Nomako v. Ashton*,¹⁵³ the court denied the plaintiff's motion to strike defendant's answer and, instead, entered an order of dismissal, conditional upon non-compliance with the disclosure order, and compelled payment of plaintiff's court costs and attorney's fees. Thus, the court avoided applying the more severe penalties imposed by CPLR 3126.

Cases subsequent to *Nomako* have seemingly approved of the action taken by the first department. They have exercised judicial restraint in applying the direct sanctions authorized under CPLR 3126.¹⁵⁴ For example, in *DiBartolo v. American & Foreign Ins. Co.*,¹⁵⁵ where the plaintiff failed to appear on an adjourned date, the court refused to dismiss the complaint unconditionally. The order did provide that if costs and counsel fees were paid within twenty days and if the plaintiff appeared within a specified time, the motion to dismiss would not be granted. Noting the recent trend toward ordering this type of punishment for willful non-disclosure, the court reasoned that the action, though harsh, was justified because:

[W]e cannot altogether condone irresponsible action (or inaction) to the detriment of a party properly attempting to bring an action through disclosure to trial and the ultimate resolution of the issues involved.¹⁵⁶

¹⁵² With regard to failure to disclose the court may issue such orders as are just. This includes, but is not limited to, orders: (1) resolving the issue to which the information sought is relevant; (2) prohibiting the disobedient party from supporting or opposing designated claims or defenses; (3) striking out pleadings or parts thereof; (4) staying proceedings; (5) dismissing the action; (6) rendering a default judgment against the disobedient party.

¹⁵³ 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964).

¹⁵⁴ See 7B MCKINNEY'S CPLR 3126, supp. commentary 76, 79 (1965).

¹⁵⁵ 48 Misc. 2d 843, 265 N.Y.S.2d 981 (Sup. Ct. Suffolk County 1966).

¹⁵⁶ *Id.* at 844, 265 N.Y.S.2d at 983.

It is also to be noted that the court in *DiBartolo* punished the plaintiff even though defendant had not made a motion to compel disclosure under CPLR 3124.¹⁵⁷

Another recent case in the third department has also applied similar penalties where the defendant willfully refused to comply with disclosure orders in connection with an examination before trial.¹⁵⁸ However, it is to be noted that here the plaintiff had moved to punish the defendants for contempt. In denying the motion the court added that such motion may be renewed if more drastic punishment is necessary to secure defendant's compliance with the disclosure orders.¹⁵⁹ Accordingly, the court ordered the imposition of court costs and counsel fees, in addition to requiring that the disclosure proceedings be continued. Although the court indicated it would not adjudge the defendant to be in contempt, it clearly stated that such remedy was available if future conduct justified its use.¹⁶⁰

As a result of these cases, the courts now seem to be willing to apply more stringent penalties for refusing to obey a court order for disclosure. However, the question of whether the courts will impose a contempt penalty for violation of CPLR 3126 remains unanswered. Due to the heavy amount of litigation in this area, it is to be expected that the question will soon be resolved.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3213: Defendant's failure to answer motion for summary judgment does not allow a default judgment in action prior to return date of motion.

As originally enacted, CPLR 3213¹⁶¹ limited a defendant to a twenty-day answering period subsequent to service of a summons and notice of motion for summary judgment. Since such an inflexible time period was inconsistent with the variety of answering

¹⁵⁷ CPLR 3103; *Mostow v. Shorr*, 44 Misc. 2d 733, 255 N.Y.S.2d 320 (Sup. Ct. Kings County 1964).

¹⁵⁸ *Warner v. Bumgarner*, 49 Misc. 2d 488, 267 N.Y.S.2d 825 (Sup. Ct. Monroe County 1966).

¹⁵⁹ *Id.* at 493, 267 N.Y.S.2d at 830.

¹⁶⁰ *Ibid.* One commentator believes that the remedy of contempt is available under this section, 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3126.06 (1965), whereas another believes that CPLR 3126 is "a pre-emptive statement of the remedies that may be sought for a party's failure to disclose," 7B MCKINNEY'S CPLR 3126, *supp. commentary* 76, 82 (1964), and that contempt is not available.

¹⁶¹ Originally CPLR 3213 provided: "When an action is based upon a judgment or instrument for the payment of money only, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of complaint, *returnable at least twenty days after service.*" (Emphasis added.)