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Article 34

CPLR 3126: Attorney Fees Not Given as Penalty for Failure to Disclose

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Such a procedure required an undesired EBT with much wasted time, effort and expense which resulted in a more restricted discovery than the one now given under CPLR 3120.

The amendment retains the content of the previous section concerning the party but places this material under subdivision (a). Subdivision (b) is completely new and permits discovery and production of information from a non-party witness by referring directly back to subdivision (a). However, there are important differences between (a) and (b).

For a full discussion of this amendment, see Professor David D. Siegel's *1966 Commentary* in McKinney's CPLR.

CPLR 3126: Attorney fees not given as penalty for failure to disclose.

Under CPLR 3126, if a party refuses to comply with an order for disclosure, or wilfully fails to disclose information which a court finds should have been disclosed, the court may, *inter alia,* strike out the defendant's pleadings until the order is obeyed, or render a default judgment against the disobedient party.[59] In order to provide for an alternative to the harsh sanctions contained in CPLR 3126, the Judicial Conference in 1966 recommended the addition of a new section to the CPLR. This section would permit courts to require parties who make disclosure motions necessary, *i.e.,* parties who ignore a *notice* of disclosure, to pay costs and expenses. This penalty would be imposed unless failure to disclose was "unavoidable" or "justifiable." [60] This recommendation was never acted upon by the legislature. However, case law has provided its own alternatives to the provisions expressed in CPLR 3126. In *Nomako v. Ashton,*[61] the court refrained from implementing the drastic penalties of CPLR 3126, but only upon the condition that the wrongdoer pay his adversary's full bill of costs, including costs and disbursements on appeal and counsel fees.

In *Nomako,* the defendant failed to obey a *court order* for disclosure. Since *notice* is also a method of obtaining disclosure, the question arose whether CPLR 3126 was applicable to the disregard of a disclosure notice.[62] In *Gaffney v. City of New York,*[63] the court held that mere notice of disclosure is not enough.

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[59] CPLR 3126(3).

[60] 1966 N.Y. LEG. DOC. No. 90, ELEVENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE 195.

[61] 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964). See also 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).

[62] See 7B McKINNEY'S CPLR 3126, supp. commentary 160-69 (1965).

[63] 41 Misc. 2d 1049, 247 N.Y.S.2d 419 (Sup. Ct. Queens County 1964).

The party is required to have obtained a court order under CPLR 3124 in order to utilize the penalties of CPLR 3126. However, it has recently been held, in *Fleming v. Fleming*,[64] that notice of disclosure is sufficient to enforce the penalties of CPLR 3126. There the court said:

> To invite disregard of a notice for an examination or a discovery and inspection by effectively removing any real sanctions would, to all intents and purposes 'import into the disclosure practice of the CPLR the abuses against which our courts inveighed under bills of particulars practice under the CPA.'[65]

Although *Fleming* upheld the notice of disclosure, it refused to grant attorney fees since there was no express statutory provision for this sanction, and the proposals for the attorney fee provision had been rejected by the Advisory Committee in 1961 and again in 1966.[66]

The question thus arises as to whether a court may require the payment of attorney fees without an express statutory mandate. Under CPLR 3126, the court is empowered to "make such orders with regard to the failure or refusal as are just. . . ." This section lists several of the sanctions which the court may enforce. The language of the section seems to indicate that the enumerated sanctions are not the exclusive remedies which a court may impose. Since the courts are hesitant to impose the harsh penalties stated in CPLR 3126, the wrongdoer actually receives a benefit. Instead of being punished, he will be warned that if he does not submit to an EBT, a 3126 motion will be granted against him. Thus, by not actually imposing a penalty, CPLR 3126 apparently loses its effect. The middle ground would seem to be the imposition of costs and counsel fees, thus retaining the effectiveness of CPLR 3126 while mitigating the harshness of the penalties imposed.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(a)(4): Stay granted upon condition.

In *Gallo v. Mayer*,[67] plaintiff, after commencing a state court action for breach of contract and common-law fraud, instituted a federal court action, based on the same facts, for a violation of the Securities Exchange Act. The federal action included an additional

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[64] 50 Misc. 2d 323, 270 N.Y.S.2d 352 (Sup. Ct. Queens County 1966).

[65] *Id.* at 325, 270 N.Y.S.2d at 355. See also 1966 N.Y. LEG. DOC. No. 90, ELEVENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE 372-73; 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3126.02 (1965).

[66] *Id.* at 326, 270 N.Y.S.2d at 356.

[67] 50 Misc. 2d 385, 270 N.Y.S.2d 295 (Sup. Ct. Nassau County 1966).