

# CPLR 3211(a)(4): Stay Granted upon Condition

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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*,<sup>64</sup> 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.'<sup>65</sup>

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.<sup>66</sup>

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*,<sup>67</sup> 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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<sup>64</sup> 50 Misc. 2d 323, 270 N.Y.S.2d 352 (Sup. Ct. Queens County 1966).

<sup>65</sup> *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).

<sup>66</sup> *Id.* at 326, 270 N.Y.S.2d at 356.

<sup>67</sup> 50 Misc. 2d 385, 270 N.Y.S.2d 295 (Sup. Ct. Nassau County 1966).

defendant. Defendants in the state court action moved for a stay until disposition of the federal action. This motion was denied.

The court noted that although neither the state nor the federal court had jurisdiction over all three causes of action, many of the issues were common to both proceedings, so that, on the basis of collateral estoppel, an adjudication of the state court action would foreclose relitigation of these common issues in the federal action. In addition, the defendants failed to show that conveniences would be served by giving the federal action precedence, or that added expenses would be involved in permitting the state action to proceed to trial. Therefore, the court denied the motion for a stay, *on condition* that, in the federal action, the plaintiff stipulate that any beneficial collateral estoppel effect which the state court judgment would have on the state court defendants would also be fully accorded to the additional defendant in the federal action.<sup>68</sup>

The decision in *Gallo* is illustrative of the broad discretionary powers exercised by courts deciding motions to stay under CPLR 3211(a)(4).<sup>69</sup> This section provides that, where another related action is pending between the same parties, the court, in lieu of a dismissal, may issue "such order as justice requires." This broad authorization for judicial discretion is clearly justifiable, for in instances of parallel litigation, the requirements and circumstances of any particular case will determine what order the court should issue.<sup>70</sup>

*CPLR 3211(a)(5): Statute of limitations in annulment action.*

Statutes of limitations are statutes of repose<sup>71</sup> which compel the exercise of a right of action within a designated time. When affirmatively pleaded, these statutes bar stale claims by denying a remedy; they do not extinguish the cause of action, right or obligation.<sup>72</sup>

Distinguishable from statutes of limitations are statutes which create a right of action and annex conditions to that right. Such an enactment makes the time limitation an essential part of the statute out of which the right in question arises, so that a lapse of the statutory period operates to extinguish the right altogether. Such time qualifications annexed to a statutory cause of action, therefore, become jurisdictional elements that cannot be waived merely because they were not specially pleaded by the parties.<sup>73</sup>

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<sup>68</sup> *Id.* at 388, 270 N.Y.S.2d at 299-300.

<sup>69</sup> 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3211.25 (1965).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Shoemaker v. Benedict*, 11 N.Y. 176 (1854).

<sup>72</sup> *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 582 (1910).

<sup>73</sup> *United States v. Wardwell*, 172 U.S. 48 (1898).