 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 31. Disclosure (Refs & Annos)

McKinney's CPLR § 3126

§ 3126. Penalties for refusal to comply with order or to disclose

Currentness

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

**Credits**
(L.1962, c. 308. Amended L.1978, c. 42, § 1; L.1993, c. 98, § 11.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARIES**

by Professor Patrick M. Connors

**2020**

**C3126:1. Sanctions for Nondisclosure, Generally.**

  

**Administrative Order AO/71/20 Encourages Parties to Agree to Extensions of Disclosure Deadlines During COVID-19 Disaster Emergency**

On March 7, 2020, Governor Cuomo issued Executive Order 202 declaring a disaster emergency for the entire State of New York due to the transmission of COVID-19. On March 20, he issued Executive Order 202.8, which tolls the running of several time periods, including any statute of limitations contained in the CPLR and other "procedural laws of the state." *See* David D. Siegel & Patrick M. Connors, New York Practice § 33 (Thomson 6th ed. 2018) (January 2021 Supplement) (discussing COVID-19 Toll). Shortly thereafter, on March 22, 2020, the Chief Administrative Judge issued Administrative Order AO/78/20, directing that "effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters" designated in an exhibit to the order. The order prohibited "both paper and electronic filings" and, in effect, halted a substantial amount of civil litigation in the New York State courts. *See* Siegel & Connors, New York Practice § 77 (January 2021 Supplement) (discussing limitations on filings in New York State Courts during COVID-19 Disaster Emergency).

In recognition of the standstill in litigation caused by the COVID-19 Disaster Emergency, the Chief Administrative Judge issued Administrative Order AO/71/20 on March 19, 2020. AO/71/20 declared that "[t]he prosecution of pending civil matters (including discovery) in a manner that requires in-person appearances or travel, or otherwise requires actions inconsistent with prevailing health and safety directives relating to the coronavirus health emergency, is strongly discouraged."

Regarding discovery, AO/71/20 directs:

Civil Discovery Generally: Where a party, attorney or other person is unable to meet discovery or other litigation schedules (including dispositive motion deadlines) for reasons related to the coronavirus health emergency, the parties shall use best efforts to postpone proceedings by agreement and stipulation for a period not to exceed 90 days. Absent such agreement, the proceedings shall be deferred until such later date when the court can review the matter and issue appropriate directives. In no event will participants in civil litigation be penalized if discovery compliance is delayed for reasons relating to the coronavirus public health emergency.

AO/71/20 applies to a "party, attorney or other person" who cannot "meet a discovery or other litigation schedule." That would include a party or nonparty witness.

AO/71/20 is discussed in detail in the 2020 Supplementary Practice Commentary to CPLR 3124, C3124:1 ("Compelling Disclosure by Order"). We note the administrative order here because while the issue of delayed disclosure during the COVID-19 Disaster Emergency will likely come before the court on a motion to compel under CPLR 3124 or a motion for a protective order under CPLR 3103, it might also be raised in a motion for penalties under CPLR 3126. If a CPLR 3126 motion is made, it will need to be accompanied by "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion," commonly known as a "good faith" affirmation. 22 N.Y.C.R.R. § 202.7(a); *see* 22 N.Y.C.R.R. § 202.7(c)(stating required contents of good faith affirmation); Commentary C3126:6 ("Sanction for Disobedience of Mere Notice and 'Good Faith' Affidavit Requirement").

The good faith affirmation should carefully document the steps taken to resolve the matter, including the steps taken to reach an agreement and stipulation as required under AO/71/20, and discuss whether the lack of compliance with a deadline was "related to the coronavirus health emergency." AO/71/20. AO/71/20 strongly pronounces that "[i]n no event will participants in civil litigation be penalized if discovery compliance is delayed for reasons relating to the coronavirus public health emergency." That would prohibit the imposition of penalties under CPLR 3126 or an

  

award of sanctions under Part 130 if the delay in providing disclosure can be traced to the coronavirus. *See* Siegel & Connors, New York Practice §§ 367, 414A.

Even though the courts are now accepting papers for filing and are on the road to standard operating procedures, they are not there yet. As of this writing, AO/71/20 is still on the books and parties should continue to follow its terms in negotiating disclosure disputes. Even after AO/71/20 is rescinded, the court will likely need to examine whether parties complied with its terms when resolving a motion under CPLR 3126.

**C3126:6. Sanction for Disobedience of Mere Notice and "Good Faith" Affidavit Requirement.**

**Appellate Decisions Emphasize Importance of Including an Affirmation of "Good Faith" with Any Motion Under CPLR 3126**

Appellate decisions continue to stress that a party moving under CPLR 3126 must submit an affirmation demonstrating that a good faith effort has been made to resolve the disclosure dispute. *See* 22 N.Y.C.R.R. § 202.7(a), (c); Siegel & Connors, New York Practice § 353 (discussing "good faith" affirmation requirement on disclosure motions). In *Belle-Fleur v. Desriviere*, 178 A.D.3d 993, 995, 116 N.Y.S.3d 317, 319 (2d Dep't 2019), for example, the Second Department affirmed supreme court's order denying defendant's motion under CPLR 3126(2) because defendants "failed to submit an affirmation of good faith indicating that efforts had been made to resolve the discovery issue prior to engaging in motion practice, as required by 22 NYCRR 202.7(a)(2)." Similarly, in *Mesiti v. Weiss*, 178 A.D.3d 1332, 1334, 116 N.Y.S.3d 109, 111 (3d Dep't 2019), supreme court granted defendants' motion under CPLR 3126 striking plaintiff's complaint. The Third Department reversed, holding that supreme court abused its discretion when it granted defendants' CPLR 3126 motion to strike the complaint because, among other things, defendants failed to include an affirmation of "good faith" with their CPLR 3126 motion as required by Uniform Rule 202.7 (a).

**2019**

**C3126:7 Disobedience Must Be Shown Willful.**

**Fourth Department Affirms CPLR 3126(3) Order Striking Plaintiffs' Complaints, Finding Disclosure Defaults to be "Willful and Contumacious"**

We note in the main Practice Commentary that it is frequently difficult to ascertain if a party has "willfully" failed to provide disclosure such that an award of sanctions is appropriate under CPLR 3126. The Fourth Department's decision in *Peterson v. New York Central Mutual Fire Insurance Company*, 174 A.D.3d 1386, 106 N.Y.S.3d 451 (4th Dep't 2019), cites some factors that are relevant to the determination and provides a roadmap of sorts for a party seeking to obtain an order under CPLR 3126.

In *Peterson*, defendant granted plaintiffs two extensions of time to provide the disclosure sought (30 days and 15 days), but plaintiffs never provided responses. Defendant then moved to compel plaintiffs' responses. The court granted defendant's motion and ordered plaintiffs to respond by May 31, 2017, but the court subsequently issued a scheduling order with a disclosure deadline of July 16, 2017. Plaintiffs failed to provide responses before the May or July deadline, and forwarded incomplete responses thereafter. Defendant then moved under CPLR 3126(3) to strike the complaints, and the court granted defendant's motions and dismissed the actions.

The Fourth Department once again observed that the trial courts have broad discretion in supervising disclosure and, unless there is a clear abuse of that discretion, their orders will not be disturbed. Acknowledging that the striking of a pleading under CPLR 3126(3) is only appropriate where the movant establishes that the failure to comply with

disclosure demands is "willful, contumacious, or in bad faith," the court found that standard satisfied. *Peterson*, 174 A.D.3d at 1388, 106 N.Y.S.3d at 453. The *Peterson* court ruled that "the conclusion that plaintiffs' conduct was willful and contumacious can be inferred from their repeated failure to comply with the court's scheduling orders, defendant's demands for discovery, and the motions to compel, despite defendant's good faith extensions of time to respond to the demands." *Id.* at 1388, 106 N.Y.S.3d at 453.

The burden then shifted to the plaintiffs to offer a reasonable excuse for the default, which they failed to do. Therefore, the Fourth Department affirmed the dismissal of plaintiffs' actions.

The *Peterson* decision sets forth a helpful guide to obtaining relief under CPLR 3126 when an adversary flouts the disclosure regime in Article 31. First, while it is often not palatable to a party playing by the rules, one should normally offer at least two extensions to an adversary before seeking relief from the court. These accommodations will help demonstrate reasonableness on the part of the party seeking disclosure and go a long way in meeting the "good faith" requirement imposed on a party making a motion related to disclosure. *See* 22 N.Y.C.R.R. § 202.7(a) & (c); Siegel & Connors, New York Practice § 353. Furthermore, if disclosure is not provided by the extended deadlines, that failure will often demonstrate willful and contumacious conduct by an adversary. While a CPLR 3124 motion to compel and resulting order should not be necessary in every situation involving an opponent's recalcitrance in disclosure, some courts will require it before imposing penalties under CPLR 3126. *See* Commentary C3126:6 ("Sanction for Disobedience of Mere Notice and 'Good Faith' Affidavit Requirement").

There is no indication that the CPLR 3126(3) order in *Peterson* was a conditional order, allowing the plaintiffs some additional time to satisfy their disclosure obligations before dismissing the actions. While a conditional order is in fact the most popular disposition under CPLR 3126, it is not required. *See Fish & Richardson, P.C. v. Schindler*, 75 A.D.3d 219, 220, 901 N.Y.S.2d 598, 599 (1st Dep't 2010) (affirming order of supreme court that unconditionally struck defendant's answer under CPLR 3126(3) after defendant refused to comply with numerous requests for disclosure and "multiple court orders"); Commentary C3126:10 ("Conditional Order Under CPLR 3126").

### C3126:8 Which Sanction to Impose?

#### CPLR 3126 Preclusion Order Reversed Because of Absence of "Willful and Contumacious" Conduct by Incarcerated Defendant and His Lawyer

The courts have consistently stressed that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion," but have cautioned that "[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious." *Crupi v. Rashid*, 157 A.D.3d 858, 859, 67 N.Y.S.3d 478 (2d Dep't 2018).

In *Crupi*, plaintiff commenced an action to recover on a promissory note by a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. The supreme court sua sponte precluded the defendant, who was incarcerated, from testifying at the trial. Relying on the above principles, the Second Department reversed the order of preclusion because "there [was] no evidence demonstrating either that the incarcerated defendant ... willfully and contumaciously failed to be deposed, or that his attorney failed to secure his deposition." *Id.*

#### Second Department Finds that Defendant who Failed to Appear at Four Scheduled Depositions Engaged in "Willful and Contumacious" Conduct, But Reverses Order Striking Answer Under CPLR 3126(3)

In *Chowdhury v. Hudson Valley Limousine Service, LLC*, 162 A.D.3d 845, 81 N.Y.S.3d 63 (2d Dep't 2018), the court applied the same principles outlined in the *Crupi* decision discussed in the entry above to reverse an order

  

striking defendant's answer under CPLR 3126(3). In *Chowdhury*, a defendant's deposition had been scheduled four different times pursuant to a preliminary conference order entered September 17, 2015, a compliance conference order entered December 14, 2015, and two so-ordered stipulations entered March 29, 2016 and July 14, 2016. After the defendant failed to appear on these multiple occasions, the codefendants and plaintiff moved pursuant to CPLR 3126 to strike his answer, to preclude him from testifying at trial, and/or to preclude him from offering any evidence at trial. In opposition to the motions, the defendant's attorney submitted an affirmation in which he stated that good-faith efforts had been made to contact defendant, including hiring an investigator, but they had been unsuccessful. The supreme court granted the motion.

The Second Department agreed that in light of the defendant's failure to comply with multiple court orders and so-ordered stipulations directing him to appear for a deposition, the supreme court properly ruled that defendant engaged in willful and contumacious conduct. The appellate court noted, however, that it is vested with the power to substitute its own discretion for that of the trial court, even in the absence of abuse. *See* CPLR 3101 Practice Commentaries, C3101:5A ("Appellate Review of Disclosure Orders"). Exercising this power after a review of the record, the appellate division ruled that "it was an improvident exercise of discretion to grant those branches of the motion and cross motion which were to strike [defendant's] answer in light of the fact that the court also granted those branches of the motion and cross motion which were to preclude [defendant] from offering any evidence at the time of trial." *Chowdhury*, 162 A.D.3d at 846-47, 81 N.Y.S.3d at 65.

The reversal in *Chowdhury* may appear to reflect an abundance of tolerance to a party bent on disregarding its disclosure obligations. Nonetheless, as we explain in the main Practice Commentaries in this section, a party moving pursuant to CPLR 3126 may be in a far better position if she obtains an order of preclusion under CPLR 3126(2) rather than an outright dismissal of the action under CPLR 3126(3).

**C3126:8B Sanction for Spoliation of Evidence.**

**Third Department Reverses Order Dismissing Action Due to Spoliation of Evidence and Remands for Development of Record**

In *LaBuda v. LaBuda*, 175 A.D.3d 39, 105 N.Y.S.3d 585 (3d Dep't 2019), plaintiff commenced a personal injury action alleging that defendant operated an all-terrain vehicle (ATV) on plaintiff's property without permission and, acting either negligently or intentionally, struck plaintiff twice. Defendant served plaintiff with disclosure demands seeking photographs or video recordings of the incident, including video stored on plaintiff's phone, and all related metadata. Furthermore, in a letter to plaintiff, defendant requested that "plaintiff ... preserve all evidence involved in the claimed loss, specifically including plaintiff's cell phone and any video taken on the date of the incident." *Id.* at 40, 105 N.Y.S.3d at 586.

Plaintiff did not respond to the disclosure demands or the preservation request and defendant moved for dismissal of the complaint. The Third Department ruled that because plaintiff failed to make a timely objection or application for a protective order within the time periods set forth in CPLR 3122(a)(1), its review of the dispute concerning the disclosure demands was limited to whether they were "palpably improper," and the court found them not to be so. *See* 2019 Supplementary Practice Commentaries, CPLR 3122, C3122:1 ("Procedure for Objecting to CPLR 3120 or 3121 Notice or Subpoena").

Addressing the issue of spoliation based on plaintiff's failure to comply with defendant's preservation request, the court noted that plaintiff sent defendant an email asserting that he possessed only one photo and one video concerning the incident, which he attached to the email. Defendant also asked plaintiff to make the cell phone available for inspection and testing, but plaintiff replied that he no longer had it because he had traded it in for a new phone five months after defendant requested it.

  

The Third Department noted that because neither party had pursued the issue of sanctions under CPLR 3126 based on a willful failure to provide disclosure, the supreme court concluded that dismissal of the action was not warranted based on plaintiff's failure to comply with defendant's disclosure demands. Rather, it granted the motion to dismiss based on the common law doctrine of spoliation.

The Third Department reviewed the order under some of the standards set forth for spoliation sanctions by the Court of Appeals in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 26 N.Y.S.3d 218 (2015), discussed in the main Practice Commentary under this heading. The court noted that it was undisputed that plaintiff was under an obligation to preserve the phone and any pertinent photos, video and metadata that it contained. In addition, the court concluded that the information contained on the phone was relevant because defendant claimed that he saw plaintiff using his phone during the incident to apparently take pictures and, therefore, asserted that additional photos and videos of the incident may exist. *See* Practice Commentary, CPLR 3101, C3101:18D ("Disclosure of Cellular/Smart Phone Records"). The court noted, however, that if the electronic information sought by defendant still exists in some form and can be made available, the loss of the actual phone "may be wholly immaterial." *LaBuda*, 175 A.D.3d at 42, 105 N.Y.S.3d at 588. Plaintiff alleged that the electronic information on the phone had been preserved and was available on several different platforms, including his new phone and in cloud storage that he could access.

The *LaBuda* court concluded that the appellate record did not permit full consideration of the factors that needed to be considered to impose spoliation sanctions. For example, the record did not clearly establish whether the electronic information sought by defendant was actually destroyed and whether, and to what extent, defendant had been prejudiced. Furthermore, the court stressed that while plaintiff's phone and the information stored on it might support defendant's defense, "they are not the instrumentalities of plaintiff's injury." *Id.* at 43, 105 N.Y.S.3d at 589. The court compared this case to others in which the actual item that caused plaintiff's injury was not preserved. *See Miller v. Weyerhaeuser Co.*, 3 A.D.3d 627, 628-29, 771 N.Y.S.2d 200, 201 (3d Dep't 2004) (answer stricken where a defendant's failure to preserve a brake chamber prevented the plaintiff from establishing causation); *Cummings v. Central Tractor Farm & Country*, 281 A.D.2d 792, 793-94, 722 N.Y.S.2d 285, 286-87 (3d Dep't 2001) (answer stricken where a defendant failed to preserve a chair that had caused the plaintiff's injuries); *Puccia v. Farley*, 261 A.D.2d 83, 86, 699 N.Y.S.2d 576, 578 (3d Dep't 1999) (complaint dismissed where a plaintiff's disposal of fire debris prevented determination whether wood stove had been negligently installed). It is important to note that all of these decisions were handed down well before the Court of Appeals issued its decision in *Pegasus* in 2015 and it does not appear that the *Pegasus* Court placed emphasis on this distinction.

The *LaBuda* court ruled that the sanction of dismissal imposed by supreme court was unwarranted at this stage of the litigation and remitted the matter to supreme court for the development of a complete record on the matter. If, on remand, the court finds that the information sought by defendant has been destroyed, it will also need to determine whether the evidence was destroyed with a "culpable state of mind," which would include negligence. *See Pegasus*, 26 N.Y.3d at 547, 26 N.Y.S.3d at 219.

**Third Department Affirms Order Imposing Spoliation Sanctions Even Though Evidence Was Destroyed Before Action Was Commenced or Any Demand Had Been Made for Preservation**

In *Gitman v. Martinez*, 169 A.D.3d 1283, 95 N.Y.S.3d 427 (3d Dep't 2019), plaintiff was injured when his vehicle was struck from behind on the New York Thruway by a tractor trailer, which was struck from behind by another tractor trailer. Plaintiff sued the owners and operators of these vehicles, who then asserted cross claims against each other. One defendant (D-1) successfully moved for an adverse inference charge based on the spoliation of evidence by another defendant (D-2). The evidence at issue was data from electronic recording devices in D-2's tractor trailer, including an engine control module.

  

The Third Department affirmed. The court relied on the pronouncements in the Court of Appeals decision in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 26 N.Y.S.3d 218 (2015), discussed in the main Practice Commentary under this section. The *Gitman* court also observed that "spoliation sanctions may be imposed 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation'." *Gitman*, 169 A.D.3d at 1286, 95 N.Y.S.3d at 431.

After the accident, D-2's tractor trailer was towed to a nearby storage yard, where it remained until it was removed by D-2's agent and placed back in service. Although the data sought was destroyed before plaintiff commenced the action or any demand had been made for preservation or production of the information, the Third Department ruled that D-2 "should have reasonably anticipated that a multi-vehicle accident resulting in personal injuries would likely result in litigation." *Id.* at 1287, 95 N.Y.S.3d at 432. Noting that the supreme court possesses broad discretion to impose an adverse inference charge when a party is deprived of lost or destroyed evidence, the Third Department found no abuse of that discretion and affirmed the ruling granting D-1 an adverse inference charge against D-2 at trial.

**Court Rules that Spoliation Sanctions May Be Imposed on Tort Plaintiff Who Undergoes Surgery Prior to Submitting to CPLR 3121 Exam**

In *Martinez v. Nelson*, 64 Misc.3d 225, 101 N.Y.S.3d 580 (Sup. Ct., Bronx County 2019), the court explored whether CPLR 3126 spoliation sanctions could be imposed on a personal injury plaintiff who undergoes non-emergency surgery prior to submitting to a CPLR 3121(a) exam. The *Martinez* court concluded that the condition of plaintiff's cervical spine before the non-emergency surgery was evidence that was capable of being spoliated. In determining if spoliation sanctions should be imposed in this action, the court reviewed the standards established by the Court of Appeals in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 26 N.Y.S.3d 218 (2015). *See* Siegel & Connors, New York Practice § 367. Under *Pegasus*, a party seeking sanctions for spoliation of evidence must show, among other things, that the evidence was destroyed with a "culpable state of mind," which would include negligence. In that this element could not be established without further disclosure, including plaintiff's deposition, the court denied the motion for spoliation sanctions with leave to renew upon the completion of disclosure.

The *Martinez* decision, and similar cases, are discussed in the Practice Commentaries to CPLR 3121, C3121:9 ("Remedies in Conjunction with CPLR 3121").

**C3126:10 Conditional Order Under CPLR 3126.**

**Failure to Serve Conditional Order Striking Defendant's Answer Under CPLR 3126(3) Results in Reversal of Order Granting Plaintiff Summary Judgment**

In the main Practice Commentary under this section, we note that the new time period for providing disclosure, set by the court in the order disposing of the 3126 motion, will usually run from the time a copy of the order is served on the recalcitrant party with notice of its entry. In *Wolf Properties Associates, L.P. v. Castle Restoration, LLC*, 174 A.D.3d 838, 106 N.Y.S.3d 313 (2d Dep't 2019), an action to recover damages for defendant's alleged breach of a lease, supreme court granted a conditional order striking defendant's answer unless it provided outstanding discovery responses by a date certain. *See* CPLR 3126(3); Siegel & Connors, New York Practice § 367. When defendant did not adhere to the deadlines in the conditional order, plaintiff moved for summary judgment arguing, among other things, that defendant's answer was stricken as a matter of law.

  

The Second Department reversed the supreme court's order granting plaintiff summary judgment. The court acknowledged that where a party fails to timely comply with the terms of a conditional order, it becomes absolute. *See Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 830, 860 N.Y.S.2d 417, 419 (2008); Siegel & Connors, New York Practice § 367; Commentary C3126:10 ("Conditional Order Under CPLR 3126"). Nonetheless, the court stressed that "[w]here the rights of a party are or may be affected by an order, the successful moving party, in order to give validity to the order, is required to serve it on the adverse party." *Wolf Props.*, 174 A.D.3d at 841, 106 N.Y.S.3d at 316.

Plaintiff argued that since the conditional order "did not specify that the plaintiff had to serve a copy of that order with notice of entry upon the defendant, the plaintiff did not have to do so before that order was enforceable against the defendant." *Id.* at 841, 106 N.Y.S.3d at 316. The Second Department deemed that argument to be "without merit," citing to CPLR 2220. In that the defendant did not have the required notice of the conditional order, the court deemed its failure to provide discovery responses by the date prescribed in that order was not "willful." Therefore, the Second Department ruled that supreme court should not have stricken the defendant's answer under CPLR 3126(3) and should have denied the plaintiff's motion for summary judgment. *See* Commentary C3126:7 ("Disobedience Must Be Shown Willful").

The *Wolf Properties* decision and issues related to service of orders with notice of entry are discussed in further detail in the 2019 Supplementary Practice Commentaries to CPLR 2220, Commentary 2220:5 ("Service of Order").

**PRACTICE COMMENTARIES**

by Professor Patrick M. Connors

**2018**


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C3126:11. Exacting Costs and Attorney's Fee as Sanction.

C3126:12. Other Conditions and Penalties.

C3126:13. Statute of Limitations and Res Judicata Issues Resulting from CPLR 3126 Dismissal.

### C3126:1 Sanctions for Nondisclosure, Generally.

Section 3126 governs the penalties for nondisclosure, which makes it a primary hub of all activity designed to implement the disclosure requirements. The penalties listed are illustrative, not exclusive. There are, in fact, several other important remedies devised by caselaw. These will be discussed below under separate headings, including treatment of whether contempt is an enforcement remedy for nondisclosure. *See* Commentaries C3126:3, C3126:4, below. The procedure for invoking a penalty for nondisclosure is a mere motion on notice to all parties.

If a nonparty witness is the one who has failed to disclose, the remedy is not a motion under CPLR 3126, whose penalties are designed to exact compliance of a party or someone controlled by a party. *See* Commentary C3126:2, below. Rather, a motion to punish for contempt is usually the appropriate remedy against a nonparty. CPLR 2308; *see* Commentary C3126:3, below.

### C3126:2 Person Controlled by Party.

Under Article 31, a nonparty from whom disclosure is sought is frequently put into the same category as a party if it can be shown that the nonparty is in some significant way controlled by the party. *See*, *e.g.*, CPLR 3101(a)(1); 3106(b); *see also* CPLR 3117(a)(2). This is also true of CPLR 3126. If the party is an entity, for example, such as a corporation, and the nonparty witness is its "officer, director, member, employee or agent" at the time the disclosure is sought, CPLR 3126 allows the court to exact disclosure from the nonparty by threat of a CPLR 3126 sanction to be invoked against the party.

Because the key concept here is "control," it would have to be shown that the nonparty is under the party's control at the time the disclosure is sought. If that control does not exist at the time disclosure is sought, it would ordinarily be inappropriate to invoke a sanction against a party for a third person's refusal to disclose. Indeed, due process objections can arise on any other premise. A different conclusion would be in order if it is shown that the "loss" of control was contrived, for in such an instance the court may assume that the control continues in fact.

The "control" principle expressed in CPLR 3126 is not limited to an instance in which the party is an entity of some kind, corporate or otherwise. It applies to the natural person litigant as well, who might employ a nonparty individual. Nor need the nonparty have any formal connection with the party, such as by employment or agency. CPLR 3126 makes the party responsible for the nonparty's conduct whenever the latter is "otherwise under a party's control." The court and counsel must therefore direct their attention to the realities attending the relationship, with titles and formal arrangements playing a subordinate role.

In *MIA Acupuncture, P.C. v. Mercury Insurance Company*, 26 Misc.3d 39, 894 N.Y.S.2d 321 (App. Term, 2d Dep't 2009), the patient assigned to the plaintiff medical provider its first-party no-fault benefits, a common practice. The defendant served a notice of deposition on the plaintiff's assignor, which is authorized under CPLR 3101(a)(2). *See* Commentary C3101:20. When the assignor failed to appear for the deposition, the defendant moved to dismiss the medical provider's complaint under CPLR 3126(3), "arguing that, by virtue of the assignment, party status may be imputed to the assignor and, even if such status could not be so imputed, the assignor was under the plaintiff-assignee's control." *MIA Acupuncture,* 26 Misc.3d at 40, 894 N.Y.S.2d at 321 (citation omitted).

  

The Appellate Term affirmed the denial of the motion. The court noted that "[b]y virtue of their assignment of no-fault benefits to their providers, eligible injured persons have divested themselves of their interest in those benefits, and they are not parties to actions commenced by their assignees." *Id.* (citations omitted). Furthermore, the medical provider's status as a party could not be imputed to the assignor simply because of the assignment. In that the assignor was not under the control of the plaintiff assignee, the court could not impose CPLR 3126 sanctions on the assignee due to the assignor's failure to appear at the deposition. *See Bath Med. Supply, Inc. v. Allstate Indem. Co.*, 27 Misc.3d 92, 902 N.Y.S.2d 875 (App. Term, 2d Dep't 2010) ("[T]he sanctions provided by CPLR 3126(3) for nondisclosure cannot be imposed on plaintiff for failing to produce its assignor for an examination before trial....").

If a question arises in the moving party's mind as to whether a particular nonparty witness is so under the control of a party as to make a CPLR 3126 motion feasible for the witness's nondisclosure, the moving party might profitably make two motions returnable at the same time. If the witness is beyond a party's control, and a subpoena or order directing the witness's disclosure has been disobeyed, the remedy is a contempt application. CPLR 2308; *see* Commentary C3126:3, below. The movant can make that application returnable at the same time and place as a CPLR 3126 motion. If the court finds the witness to be within the party's control, it can impose a sanction on that party under CPLR 3126. If it finds the witness beyond such control, it can find the witness in contempt.

When the contempt application is brought on by order to show cause in a special proceeding, which is often the way such a proceeding is instituted, the movant can also seek to bring the CPLR 3126 motion on by order to show cause. *See* David D. Siegel & Patrick M. Connors, New York Practice § 484 (6th ed. 2018) ("Procedure to Punish for Contempt"). The order to show cause can articulate the remedies in the alternative and be addressed to both the party and the nonparty witness. *See id.* at § 248 (discussing order to show cause procedures).

### C3126:3 Contempt Remedy Against Nonparty.

As discussed in Commentary C3126:2, above, a nonparty witness who is in the control of a party at the time the disclosure is sought can be directed to make disclosure by that party. Recognizing this, CPLR 3126 and its sanctions are available against the party when the controlled nonparty refuses disclosure. If the nonparty witness is not under a party's control, however, it is impossible to exact compliance by any threat against a party. The remedy in such a case is an application to punish the nonparty witness for contempt of court.

The CPLR requires that the device used to seek disclosure from an uncontrolled nonparty witness be a subpoena. *See*, *e.g.*, CPLR 3106(b), CPLR 3120(1). The normal procedure of notice is not available against a nonparty witness. The fact that the witness's nonappearance or refusal to disclose follows a subpoena or order rather than a mere notice sets the stage for a contempt application. *See* Siegel & Connors, New York Practice § 385. The procedures for punishment for contempt are not set forth in the CPLR. They come from the Judiciary Law. *See* Jud. Law §§ 750-777; CPLR 2308; Siegel & Connors, New York Practice § 484.

### C3126:4 Contempt as Remedy Against Party.

It appears to be the intention of the legislature to make the punishment of contempt, at least as a general rule, unavailable against a party for a failure to disclose. The remedy of contempt is not included in CPLR 3126. The old Civil Practice Act counterpart did, however, permit the contempt punishment. *See*, *e.g.*, Civ. Prac. Act § 325.

There is no doubt that a nonparty witness is subject to punishment for contempt for a failure to disclose. That fact is spelled out in the simple requirement of CPLR 3106(b) and 3120(1) that a subpoena be served on the witness. The disobedience of the subpoena would constitute a contempt. CPLR 2308; Jud. Law § 753(A)(5). If the direction to the witness is contained in an order, the order should also be enforceable by contempt under the Judiciary Law. *See* Jud.

Law § 753(A)(3), (8); *see also* Jud. Law § 750(A)(3), (5), (7) (criminal contempt provisions). Even if these Judiciary Law provisions are presumed applicable to a party's disobedience of a disclosure order, the presumption would appear to be rebutted by CPLR 3126. The latter directs its attention only to a party and those under the control of a party, and the contempt punishment is conspicuous only by its absence from it.

Indeed, the Advisory Committee noted that nonparty witnesses are not treated in CPLR 3126 because "the general contempt power applies to them." 1st Rep. Leg. Doc. No. 6(b), p. 160 (1957). In addition, the civil remedies of CPLR 3126 are usually more than ample to punish a party's failure to disclose. The ultimate civil remedy is provided in CPLR 3126(3): "rendering a judgment by default against the disobedient party."

A further reason appears indicating that contempt is unavailable for the punishment of a party. CPLR 3126 is based on Rule 37(b) of the Federal Rules of Civil Procedure. *See* 1st Rep. Leg. Doc., No. 6(b), p. 159 (1957). While the federal rule provides expressly for the contempt punishment against a party, Fed. R. Civ. P. 37(b)(1), (2), that part of the rule was not adopted in CPLR 3126.

Unless it is clear that a given party is already in outright default in the action, which would render useless any threat to impose a CPLR 3126 sanction for nondisclosure, or that the party will accept a default judgment rather than disclose, the teeth of CPLR 3126 will ordinarily be quite sufficient and will need no aid from the contempt punishment. That should be so, in any event, where the defaulting party is the only party on that side of the litigation. A good illustration of the exceptional situation in which the usual remedies didn't suffice appears in *Quintanilla v. Harchack*, 259 A.D.2d 681, 686 N.Y.S.2d 854 (2d Dep't 1999), where P sued both D, a drunk driver, and the dram shop alleged to have furnished D the alcohol. P needed D's testimony to reflect on the shop's conduct but D, who reportedly had indicated that the shop had given him liquor while he was obviously drunk, ignored five court orders to depose. Instead of granting the shop's request to bar D from testifying at the trial, the court allowed P to seek the pressures of a contempt proceeding to compel D to depose.

Similarly, circumstances may arise where a party who refuses to disclose, A, is only one of two or more on that side, and A's omission to disclose will adversely affect a co-party, B, who is willing to make any reasonable disclosure. If the impact of a default order under CPLR 3126 directed against A would be unfair in the particular case to the amenable B, the court should be able to treat A as a nonparty witness in the action, thus making the contempt sanction available against A. It would be necessary that A's resistance be shown to have followed a subpoena or order. A's disobedience of a mere notice would not be a ground for a contempt citation. *See Mermelstein v. Kalker*, 294 A.D.2d 413, 741 N.Y.S.2d 904 (2d Dep't 2002) (holding that parties, including codefendant employer, were free to use contempt proceedings or warrant of commitment and arrest to secure defendant former employee's deposition or trial testimony).

If A appears to be recalcitrant from the start, those seeking disclosure from A should be able to treat A as a nonparty witness from the beginning, such as by seeking A's deposition by a subpoena under CPLR 3106(b) rather than by mere notice. Normally, a notice should be initially used to establish whether or not A is willing to disclose voluntarily, and its disobedience would then be followed by a subpoena for a rescheduled examination. Given the wasted time and effort that these out-of-court procedures can entail when it appears that a party is simply not going to make disclosure voluntarily, the seeking party, B, if B can establish this unwillingness to the court's satisfaction, would best move initially for a disclosure order against party A under CPLR 3124. This motion should be brought on by order to show cause, which should include a provision for personal service. *See* Siegel & Connors, New York Practice § 248. If it is clear that the party will not make disclosure unless directed to by the court under the threat of a contempt citation, the seeking party should not be compelled to indulge the useless "notice" procedure first. The burden of the party seeking disclosure would be a very high one in these instances.

Another example in which a plaintiff may need the testimony of a defaulting defendant appears in *Reynolds Securities, Inc. v. Underwriters Bank and Trust Company*, 44 N.Y.2d 568, 406 N.Y.S.2d 743 (1978). The defendant, D, was

  

subjected to a default judgment by refusing disclosure, but then insisted, as was his right, on a trial of the damages issues, which are not conceded by a default. *See* Siegel & Connors, New York Practice § 293 (discussing procedures for an inquest). It then appeared that on damages P might require disclosure from D, who, having refused disclosure before, was likely to refuse it again. Contempt should be available in that situation.

Any other remedy for P? P, in a situation like that in *Reynolds*, is forced to a trial of damages by D's insistence on the trial, only to meet D's refusal to give proof on the very issue to be tried. A damages trial is not thereby dispensed with, held the Court of Appeals in *Reynolds*. If recalcitrance continues, D can be precluded from adducing any evidence at the trial. Furthermore, if P's evidentiary basis for damages should show any weakness traceable to D's failure to disclose, the inexactness of the figure the court decides on should not be a basis for any complaint from D.

A defaulting defendant is entitled to an inquest on damages, but its rights at this proceeding are severely diminished from those available at a full trial. *See Suburban Graphics Supply Corp. v. Nagle*, 5 A.D.3d 663, 774 N.Y.S.2d 160 (2d Dep't 2004) (defendant found in default under CPLR 3126 can only offer proof in mitigation of damages, not liability). This is further demonstrated in *Dixon v. Globe Realty of New York, Inc.*, 2006 WL 2472671 (Sup. Ct., Kings Co. 2006). In *Dixon*, plaintiff obtained a default judgment after defendant failed to answer. After settling with several other parties, plaintiff proceeded against defendant at the inquest. The court refused to allow the defaulting defendant to obtain either a reduction in the judgment for the settlements under General Obligations Law section 15-108 or collateral source benefits under CPLR 4545. "While a court may consider evidence regarding a set off during an inquest on damages, 'the particular setoff under N.Y. Gen. Oblig. Law 15-108(a) is unavailable to defaulting defendants.' " *Id.* at *2 (citation omitted). The reduction allowed by the General Obligations Law is an affirmative defense that must be pleaded. Similarly, an application for a collateral source offset under CPLR 4545 must be pleaded as an affirmative defense. Obviously, a defaulting party cannot satisfy this pleading burden.

Although *Dixon* did not involve a default pursuant to CPLR 3126, its reasoning would apply to a defendant found in default for failing to comply with disclosure. In *Suburban Graphics Supply Corporation v. Nagle*, 5 A.D.3d 663, 774 N.Y.S.2d 160 (2d Dep't 2004), for example, the court ordered defendants' answers stricken based on their willful failure to comply with disclosure. *See* CPLR 3126(3). The court held that since plaintiff was deprived of disclosure, it only needed to allege enough facts to enable a court to determine the existence of a viable cause of action. *See Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727 (2003). In addition, since defendants were not entitled to introduce evidence to defeat plaintiff's causes of action at the inquest, it was inappropriate for the trial court to dismiss plaintiff's second cause of action against the defaulting defendant.

The plaintiff's second cause of action was based on illegal misappropriation of trade secrets and unfair competition. The fact that defendant participated in this alleged tortious conduct was established by the default. In addition, the court concluded that the issue of whether the plaintiff's customer lists constituted a trade secret or were readily ascertainable from public sources related to liability, not damages, and could not be considered by the court at the inquest. The only proof that could be properly considered at the inquest related to the measure of damages in a case based on unfair competition: the amount that the plaintiff would have made but for the defendant's wrong.

The *Suburban Graphics* case demonstrates that a failure to comply with disclosure during pretrial proceedings can have the same draconian effect as a failure to make any appearance in the action.

**C3126:5 Sanction for Disobedience of Order.**

A motion to impose a CPLR 3126 sanction is clearly available for the disobedience of an order directing disclosure. As will be seen in Commentary C3126:6, below, it is also available for the disobedience of a notice in certain instances.

  

The source of the power that enabled the court to issue the prior disclosure order is not relevant. The order will often have been made under CPLR 3124 upon an outright motion to compel disclosure. It could also have come about by any number of other provisions. It may be a protective order resulting from a motion under CPLR 3103, which motion may even have been made by the party resisting the disclosure. The order may be pursuant to a provision that requires a court order for disclosure in the first instance. *See*, *e.g.*, CPLR 3102 (c)-(e); 3106(c). The direction could also emanate from a scheduling order. *See Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 69 N.Y.S.3d 410 (3d Dep't 2018). Regardless of how the disclosure order came about, its disobedience is a foundation for a sanction motion under CPLR 3126.

If the party was directed to answer a given question by a "ruling" made by a judge during the course of a deposition, the ruling will not qualify as an "order" under CPLR 3126. *See* Commentary C3124:4. CPLR 3126 may nonetheless be invoked in such an instance under its "wilfully fails" provision. *See* Commentary C3126:6, below.

In *Liberty Advanced Medical, P.C. v. State Farm Mutual Automobile Insurance Company*, 2011 WL 4120726 (Dist. Ct., Nassau Co. 2011), defendant moved for an order striking plaintiff's complaint and dismissing the action due to plaintiff's failure to provide "stipulated" discovery. The stipulation in question resolved a previous motion by defendant to strike plaintiff's complaint and required plaintiff to provide defendant with complete and proper responses to defendant's demands for interrogatories, discovery and inspection, expert witness disclosure, and names and addresses of witnesses, within 60 days. The stipulation also provided that plaintiff shall "be precluded from offering such evidence not provided during the pendency of the action." *Id.* at *1.

Plaintiff waited almost six weeks after defendant served the motion to strike, and then supplied responses. The court concluded that the facts did not establish a "willful" or "contumacious" failure to provide discovery and, therefore, denied defendant's request for an order striking the complaint and dismissing the action pursuant to CPLR 3126(3).

While recognizing that the matter did not involve a failure to provide court ordered discovery, the court observed that plaintiff could not simply ignore the stipulation's "self-executing" preclusion provision. The court also emphasized that plaintiff's opposition made no attempt to establish a reasonable excuse for its delay and did not claim that it attempted to obtain an extension of time to respond before the deadline expired. "Had it done so, and had defendant refused to agree, a very different balance would be presented. Principles of civility, so critical to civil litigation, would normally dictate the routine granting of a requested extension of time, upon a timely request." *Id.*

Under the circumstances, the Court concluded that plaintiff was bound to the terms of the stipulation and, therefore, "precluded from offering such evidence not provided during the pendency of the action." *Id.* at *2; *see* CPLR 3126(2).

**C3126:6 Sanction for Disobedience of Mere Notice and "Good Faith" Affidavit Requirement.**

If a judge makes a "ruling" that a party must answer a given question at a deposition and the ruling is "willfully" disobeyed, CPLR 3126 will support a sanction motion notwithstanding that the ruling has not been reduced to a formal, written order. *See* Commentary C3124:4. Here, at least, the disobedience has been directed against an instruction of the court.

But prior to 1978, the question arose whether CPLR 3126 may be invoked upon the disobedience of a mere disclosure notice without any prior court application. The question was an important one because notice is the most common method of seeking disclosure and, indeed, is described by the CPLR as the "normal method." CPLR 3102(b). It has even been held, for this reason, that a motion for an order to compel disclosure under CPLR 3124 is premature if brought on before attempting to seek disclosure by mere notice. *See* Commentary C3102:2.

  

Some early cases held that the seeking party, after disobedience of the notice, would first have to get a disclosure order under CPLR 3124, waiting for disobedience of the order before moving to invoke a penalty under CPLR 3126. *See*, *e.g.*, *Gaffney v. City of New York*, 41 Misc.2d 1049, 247 N.Y.S.2d 419 (Sup. Ct., Queens Co. 1964). The First Department took the position at the outset that the "wilfully fails" clause of CPLR 3126 can support a sanction motion directly upon the disobedience of a mere notice, *Coffey v. Orbachs, Inc.*, 22 A.D.2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964), and the Second Department followed suit. *Goldner v. Lendor Structures, Inc.*, 29 A.D.2d 978, 289 N.Y.S.2d 687 (2d Dep't 1968). Caselaw thus settled quickly enough on the conclusion that the sanctions for nondisclosure offered by CPLR 3126 are available for the disobedience of a mere notice without the invariable necessity of first obtaining a court order directing the disclosure. In this instance, the movant will need to establish that a party "willfully" failed to disclose information which "ought to have been disclosed pursuant to ... article [31]." A party's repeated failure to comply with a deposition notice would be such an example.

A 1978 amendment codified the above caselaw by adding the phrase "pursuant to notice duly served" in the opening paragraph of CPLR 3126. The 1993 amendments to the disclosure article, which altered this language, muddied the waters in this area. CPLR 3101(h) was an item added as part of the 1993 amendments package. *See* Commentary C3101:49. The provision requires the supplementation of responses to disclosure in certain circumstances. *Id.* The supplementation requirement is imposed on each party automatically; no court order need be sought and no notice or demand need be made. Because the supplementation requirement is automatic, not depending on the invocation of any particular implementing tool--like a notice of some kind--it was thought that it might fall beyond the language of CPLR 3126 and, thus, not be able to rely on the penalties of that section to back it up. Although the 1993 amendment to CPLR 3126 struck out the reference to a disclosure that should have been made "pursuant to notice duly served," the statute now refers instead to any disclosure that should have been made "pursuant to this article." This broader language clearly picks up the supplementation disclosures called for by CPLR 3101(h), while still retaining the rule that sanctions under CPLR 3126 can be imposed for disobedience of a mere notice.

The 1993 amendments to the disclosure article also included amendments to CPLR 3122. As already noted elsewhere, the last sentence in CPLR 3122(a) now appears to provide two exceptions to the rule allowing sanctions to be imposed for violation of a disclosure notice. *See*, *e.g.*, Commentary C3124:6. It appears that a party seeking to compel compliance with a disclosure notice served pursuant to CPLR 3120 or 3121 must move under CPLR 3124 in the first instance. *Id.*

The Second Department has more recently held that a defendant is not entitled to dismissal of the complaint under CPLR 3126(3) "without first moving to compel the deposition she seeks, accompanied by an affirmation that she made a good faith effort to resolve the discovery dispute." *Diel v. Rosenfeld*, 12 A.D.3d 558, 784 N.Y.S.2d 379 (2d Dep't 2004) (citation omitted); *see Charter One Bank v. Houston*, 300 A.D.2d 429, 430, 751 N.Y.S.2d 573 (2d Dep't 2002) (defendants were not entitled to sanctions under CPLR 3126 without first moving to compel plaintiff to produce the bill of particulars, accompanied by an affirmation that a good faith effort was made to resolve the dispute). It is doubtful, however, that the Second Department has established a blanket rule in this regard. In *Cestaro v. Chin*, 20 A.D.3d 500, 799 N.Y.S.2d 143 (2d Dep't 2005), for example, the court reversed the trial court's order under CPLR 3126 dismissing the complaint against several defendants. The basis for the reversal was not the failure of defendants to move in the first instance under CPLR 3124, but rather the failure to support the CPLR 3126 motion with an affirmation of a good faith effort to resolve the discovery disputes as required by section 202.7 of the Uniform Rules. *See* Practice Commentaries C3102:2, C3103:3A, C3124:1 (discussing application of 22 N.Y.C.R.R. § 202.7 in various contexts). The affirmation must be detailed in nature, as the court stressed in *Chin*. *See* 22 N.Y.C.R.R. § 202.7(c).

Based on the above, it is apparent that if a party seeking disclosure resorts to CPLR 3126 in the first instance, she must support the motion with an affirmation under section 202.7 sufficiently detailing the efforts made to resolve the issues raised in the motion. If, however, the party has obtained an order under CPLR 3124 in the first instance, and supported the 3124 motion with an affirmation complying with section 202.7, is a second affirmation necessary to support the

  

subsequent motion under CPLR 3126? Section 202.7(a) appears to require the affirmation because the CPLR 3126 motion is one "relating to disclosure." The affirmation in these circumstances can likely satisfy the Uniform Rule by merely stating there is "good cause" why no conferral was made with opposing counsel to resolve the issues on the motion. If the affirmation supporting the CPLR 3126 motion references (1) the good faith effort made to resolve the dispute prior to the CPLR 3124 motion, (2) the service of the order emanating from that prior motion, and (3) the opponent's noncompliance with the order, there would generally be good cause for not making a further attempt to resolve the dispute with the recalcitrant party.

**C3126:7 Disobedience Must Be Shown Willful.**

The court will not impose a sanction under CPLR 3126 unless the party's omission to disclose can be shown to be a willful one. If the party can excuse the omission and show that it is impossible to make the particular disclosure, there will be no punishment imposed. If the excuse is a good one, but relates only to time, the court will postpone the disclosure, perhaps by making a conditional order. *See* Commentary C3126:10, below. The resisting party must in any event be prepared to show itself innocent of wrongdoing or complicity. A party who is itself responsible for making a previously possible disclosure impossible will face a sanction. *See* Commentary C3126:8B ("Sanction for Spoliation of Evidence"), below.

Although the adverb "willfully" in the statute relates to the disobedience of something other than a court order, as a practical matter it applies to a court order as well. If a disclosure directed by court order can be shown impossible to carry out, a sanction will often not be imposed under CPLR 3126, but this scenario is a rare one.

It is frequently difficult to ascertain if a party has "willfully" failed to provide disclosure such that an award of sanctions is appropriate under CPLR 3126. In *Mann v. Cooper Tire Corporation*, 33 A.D.3d 24, 816 N.Y.S.2d 45 (1st Dep't 2006), the First Department reviewed an order partially denying plaintiffs' motion to compel disclosure. The court considered plaintiffs' allegations that defendant's failure to comply with disclosure requests was part of a "programmed response to discovery" in other cases. *Id.* at 27, 816 N.Y.S.2d at 49. The plaintiffs produced five court orders in five different lawsuits in which both state and federal courts held that defendant engaged in "bad faith" and "wilful disobedience" during discovery. *Id.* The First Department noted that these other courts concluded that defendant had improperly withheld documents, willfully concealed evidence, willfully concealed the existence of discoverable information, and destroyed documents it knew or should have known would be material in litigation.

The decision in *Mann* apparently involved a motion to compel under CPLR 3124, not a motion for sanctions under CPLR 3126. In ruling that plaintiff was entitled to much of the information sought, the court appeared to be heavily influenced by the findings in other actions that defendant engaged in willful disobedience in the discovery process. *Mann*'s reasoning can logically be extended to motions under CPLR 3126 and it may therefore be appropriate to consider a party's abuse of the disclosure process in another similar action in determining if that party willfully failed to provide disclosure in the action before the court. In close cases, a party's repeated violations in other actions should tip the scales in favor of an order for penalties under CPLR 3126. In this age of the Internet and computerized legal research, discovery abuses in other cases will be easier to uncover.

There are many decisions on the books, however, where the courts do not hesitate to find that a party "willfully" failed to comply with disclosure. The First Department in particular has rather candidly taken up the cudgels with the Court of Appeals in its crusade against sloppy practice and disclosure abuses, discussed in further detail below. *See* Commentary C3126:8A, below. In *Figdor v. City of New York*, 33 A.D.3d 560, 561, 823 N.Y.S.2d 385, 386 (1st Dep't 2006), the court concluded that defendant New York City's "response to the myriad discovery orders entered in this action over the course of some two years has been inexcusably lax." The court observed that even though responses "trickled in with the passage of each compliance conference, the cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence." *Id.* (citation omitted)

  

The First Department modified supreme court's denial of plaintiff's motion to strike defendant's answer for failure to comply with court ordered discovery and issued a conditional order granting the motion unless defendant paid plaintiff's attorney $10,000. That is a rather significant sum in this context.

The court concluded with a clarion call to the trial bench:

> We take this opportunity to encourage the IAS courts to employ a more proactive approach in such circumstances; upon learning that a party has repeatedly failed to comply with discovery orders, they have an affirmative obligation to take such additional steps as are necessary to ensure future compliance.

*Id.* There can be little doubt that the conditional order striking the defendant's answer, coupled with the hefty sanction, achieved this goal.

As demonstrated by a review of dozens of decisions citing to *Figdor*, the First Department's message is having an impact. This is particularly so in Bronx County Supreme Court, where several sanctions have been imposed against New York City in other actions. *See*, *e.g.*, *Young v. City of New York*, 104 A.D.3d 452, 960 N.Y.S.2d 116 (1st Dep't 2013) (issuing conditional order striking defendants' answer unless defendants paid plaintiffs' attorney $5,000); *Miller v. City of New York*, 2007 WL 1238601 (Sup. Ct., Bronx Co. 2007) (court grants motion striking defendant's answer and additional costs and fees of $2,500).

There are instances in which there is some cooperation from a party in the disclosure process, but a CPLR 3126 penalty is still imposed for noncompliance in another aspect of disclosure. For example, in *BDS Copy Inks, Inc. v. International Paper*, 123 A.D.3d 1255, 999 N.Y.S.2d 234 (3d Dep't 2014), the appellate court ruled that the supreme court did not abuse its discretion by striking plaintiffs' complaint under CPLR 3126(3). The record confirmed that during a period of twenty-one months, the court met with counsel for the parties on at least six occasions and issued at least two orders extending plaintiffs' time to comply with their disclosure obligations. Plaintiffs argued that they complied with defendant's demands by repeatedly offering the defendants the opportunity to search through documents contained in 60 to 80 banker's boxes stored in a warehouse. Plaintiffs continued to maintain that this response was adequate, even after the court made it clear that it was insufficient. The *BDS* court acknowledged that plaintiffs did provide some documents in response to the defendant's disclosure demands and produced its principal at a deposition. Nonetheless, the Third Department ruled that "[t]his limited cooperation does not necessarily preclude a finding of willful and contumacious behavior." *Id.* at 1256, 999 N.Y.S.2d at 237 (citation omitted).

Based on the above, the appellate division concluded that "[t]he record demonstrates '[a] pattern of noncompliance' sufficient to support Supreme Court's finding that plaintiffs' conduct was willful." *Id.* at 1257-58, 999 N.Y.S.2d at 236. This was especially so given the trial court's broad discretion to remedy disclosure violations. Noting that a disclosure sanction "is not disturbed in the absence of a clear abuse of discretion," the Third Department affirmed the order striking plaintiffs' complaint. Thus, plaintiffs' alleged damages in the amount of $1,500,000 were likely forfeited.

A more recent decision from the Third Department also involved a plaintiff who compromised their claim by failing to satisfy disclosure obligations and presents a helpful discussion on the "willfulness" standard. In *Citibank, N.A. v. Bravo*, 140 A.D.3d 1434, 34 N.Y.S.3d 678 (3d Dep't 2016), plaintiff bank commenced a foreclosure action on defendants' residential real property, which was mortgaged for approximately $82,600. Defendants' answer alleged that plaintiff was not the holder of the note, a common affirmative defense in the mortgage foreclosure world. The Third Department recounted "a series of delays resulting primarily from conduct by plaintiff and its attorneys which prompted two preclusion motions by defendants ...." *Id.* at 1435, 34 N.Y.S.3d at 679. The supreme court granted the second motion and issued an order under CPLR 3126(2) precluding plaintiff from offering proof of indebtedness as alleged in the complaint.

  

Quoting from its decision in *BDS*, the court again pronounced that "[w]here a trial court determines that a party has failed to comply with its discovery obligations, it has broad discretion to remedy the violation." *Id.* at 1435, 34 N.Y.S.3d 679-80 (citation omitted). With regard to establishing the "willfulness" required to impose sanctions under CPLR 3126, the court noted that "[a] pattern of noncompliance and delay can give rise to [such] an inference." *Id.* at 1435, 34 N.Y.S.3d 680. Among the facts demonstrating a pattern of noncompliance by plaintiff were: 1) its refusal to appear for a deposition, 2) the cancelling of depositions at the last minute, 3) a missed CPLR 3408 court-ordered mandatory settlement conference, 4) a failure to comply with a court-ordered deposition deadline, and 5) the confusion and delay caused by plaintiff's inadequate and unclear effort to substitute counsel.

That's quite a collection of disturbing facts, and it no doubt disturbed the supreme court, causing it to issue a CPLR 3126(2) order precluding plaintiff from offering proof of indebtedness as alleged in the complaint. In that the order was within the broad discretion possessed by trial courts in imposing penalties for a willful failure to disclose, the Third Department affirmed it. While the plaintiff's action was not dismissed, the writing was on the wall because plaintiff was now precluded from proving the facts necessary to establish its right to foreclosure. The defendants, armed with the affirmed order of preclusion, subsequently moved for summary judgement. The court granted the motion and the complaint was dismissed, with prejudice. Moreover, the mortgage was discharged and cancelled. *Citibank, N.A. v. Bravo*, 55 Misc.3d 879, 54 N.Y.S.3d 523 (Sup. Ct., Tompkins Co. 2017).

There is an important difference in the CPLR 3126 context between disobedience of a mere notice, and disobedience of a court order. If the disclosure was previously directed to be made by a court order, whether by motion under CPLR 3124 or 3103 or any other provision, the relevance of the datum or thing under the terms of CPLR 3101(a) and the feasibility of obeying the order were presumably decided on that application. Unless that order was made ex parte, or something occurring afterwards impeded the disclosure, the findings and conclusions that resulted in the order would not be reviewed again on the CPLR 3126 motion. An application under CPLR 3126 predicated on the disobedience of a mere notice, on the other hand, presents the issues of relevance under CPLR 3101(a) and feasibility to the court for the first time, diminishing the likelihood that a CPLR 3126 sanction will be imposed outright. It is highly probable that a conditional order will be issued in these circumstances. *See* Commentary C3126:10, below.

Finally, a party resisting disclosure must be reminded that it is important to raise all relevant objections to a disclosure device promptly. *See*, *e.g.*, CPLR 3122(a), 3133(a). If the disclosure is unwarranted or unfeasible, the resisting party should serve timely objections or promptly move for a protective order under CPLR 3103(a). *See BDS Copy*, 123 A.D.3d at 1257, 999 N.Y.S.2d at 236 (affirming order striking plaintiffs' complaint under CPLR 3126(3) where, among other things, the plaintiffs argued that defendants' document demand was overly broad, but failed to assert objections to the demand as required by CPLR 3122(a)). The resisting party who waits for the seeking party to move under CPLR 3126 before stating objections may forfeit them. *See* Commentaries C3103:3, C3122:1.

### C3126:8 Which Sanction to Impose?

The numbered subdivisions of CPLR 3126 contain various sanctions from which the court may choose. These include a resolution order (paragraph 1), a preclusion order (paragraph 2), and a stay, dismissal or default order (paragraph 3). The list is not exhaustive. The court is empowered to make such orders "as are just," and there is no priority even among the items explicitly set forth.

The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish, and go no further than that. *See Chowdhury v. Hudson Valley Limousine Service, LLC*, 162 A.D.3d 845, ___ N.Y.S.3d ___, (2d Dep't 2018). An outright default judgment against the resisting party under CPLR 3126(3), the equivalent of the death penalty in civil litigation, should be reserved only for those instances in which a party has refused to submit to any disclosure at all, such as where the party repeatedly refuses to appear for a deposition

  

or willfully fails to turn over any documents in response to a CPLR 3120 demand. There, the recalcitrance does not normally single out any particular item of disclosure and does not enable the court to construct a more specific (and more limited) resolving or preclusion order under paragraph 1 or 2 of CPLR 3126. When the resistance is that pervasive, affecting everything in that party's posture in the litigation, the ultimate remedy of a default under CPLR 3126 can be directed. This is so whether the resisting party is the plaintiff, where the default will take the form of a dismissal of the complaint, *e.g.*, *Laverne v. Incorporated Village of Laurel Hollow*, 18 N.Y.2d 635, 272 N.Y.S.2d 780 (1966), or the defendant, where the default will establish the liability and leave only the damages for assessment. *E.g.*, *James v. Powell*, 26 A.D.2d 525, 270 N.Y.S.2d 789 (1st Dep't 1966), *rev'd on other grounds* 19 N.Y.2d 249, 279 N.Y.S.2d 10 (1967).

But where only designated matters have been sought, and these do not go to the essence of the case but to only a part of it, the remedy should not normally be a default. Where, for example, a corporate defendant refused to produce certain books in response to a demand similar to a discovery notice or order under CPLR 3120, the court modified a lower court order striking out the defendant's answer and reshaped it into a preclusion order, with the defendant being precluded from maintaining that the value of certain stock was less than X dollars, to which datum the disclosure related. *Feingold v. Walworth Bros.*, 238 N.Y. 446, 144 N.E. 675 (1924); *see also Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 165-67, 476 N.Y.S.2d 269, 272-74 (1984).

Even if the resistance is directed to a single item, however, it may happen that a default will be in order in some cases, as where the entire case depends on that item. In *Feingold,* other and separable issues remained to which the disclosure did not relate and it was therefore feasible to construct a limited preclusion order as is now authorized under CPLR 3126(2). The question of which sanction to impose turned on the separability of the issue upon which disclosure was sought, and then improperly refused, from other issues in the case.

If the defendant is the refusing party, and the refusal goes to the whole case rather than a separable issue, an order "staying further proceedings until the [CPLR 3126] order is obeyed," as is authorized under CPLR 3126(3), would simply hold the plaintiff up. In these circumstances, only the default of paragraph 3 remains as a meaningful remedy. A stay may be appropriate, however, when the plaintiff is the recalcitrant party. If it is apparent that this remedy would only cause the case to hang fire indefinitely, it would not be fair to the defendant to have the cloud of this lawsuit lingering over its head. Default, here resulting in a dismissal, would also be the preferable remedy. These examples account for the fact that the stay sanction in CPLR 3126(3) is rarely, if ever, used.

A defendant may invoke the privilege against self-incrimination if the disclosure would lead to that, and a refusal by a defendant to submit to an examination on that ground will not invoke a sanction. *Cf.* CPLR 3123(a) (party need not answer admissions if party would be disqualified as witness concerning them based on privilege); *see* Commentary C3123:5. But that is not true of the plaintiff. The self-incrimination privilege does not relieve a plaintiff of the sanction because it was the plaintiff who invoked the court's jurisdiction in the first place and the privilege can't be used as a sword. *Levine v. Bornstein*, 6 N.Y.2d 892, 190 N.Y.S.2d 702 (1959); *see Batista v. City of New York*, 15 A.D.3d 304, 306, 790 N.Y.S.2d 445, 447 (1st Dep't 2005).

The first enumerated sanction listed in CPLR 3126(1) is a resolving order, which is an order designating "that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order." CPLR 3126(1). This sanction does not appear to be imposed with the same frequency as those authorized under CPLR 3126(2) and (3), but a slip and fall case, *Osterhoudt v. Wal-Mart Stores Inc.*, 273 A.D.2d 673, 709 N.Y.S.2d 685 (3d Dep't 2000), is a good example of its application. The key issue was whether the defendant, a store, had notice of the spilled substance which caused the plaintiff to fall. The plaintiff started efforts to get data reflecting on the notice issue by asking the defendant for the names of witnesses and any statements or reports reflecting on the accident. The defendant said there were none but that it would continue looking and tell the plaintiff if it found anything. Presumably it found nothing, because it didn't respond. Seven months later,

  

plaintiff served further notices with a similar mission, and a month later sent still another notice. No response was provided by the defendant. When the defendant's store manager testified at the trial, however, he had with him the very documents the plaintiff had been seeking all along.

The plaintiff moved for a mistrial and the court reserved ruling. Ultimately the plaintiff won a $125,000 verdict, and only after that did the trial court, finding the defendant guilty of bad faith in disclosure, grant the mistrial. It doesn't appear whether the plaintiff, having meanwhile won a $125,000 verdict based on the defendant's misconduct, still wanted the mistrial.

The important point for CPLR 3126 purposes is the appellate division's statement that the punishment that the trial court should have meted out during the trial, when that key moment arrived and the court was made aware of the defendant's recalcitrance, was not a mistrial. Rather, the court should have issued an order under CPLR 3126(1) establishing that the defendant did have notice of the spill, thereby relieving the plaintiff from having to prove it. The trial court could have imposed a money sanction on the defendant, but didn't because it said it would amount to "only paltry penance and deliver a sting unlikely to penetrate in proportion to its purpose." *Id.* at 674, 709 N.Y.S.2d at 687. On that point, one may respectfully disagree. The court could have imposed a money sanction under CPLR 3126, not as an alternative to the resolving order, but in addition to it. The sanction could have consisted of an assessment representing the time and effort of plaintiff's counsel in pursuing the disclosure and in establishing notice.

That would have been a compensatory sanction, clearly allowed by CPLR 3126 and its caselaw. And if a punitive sanction were needed, as on the facts it appeared to be, the court could have invoked the sanctions available under Rule 130-1 in addition to CPLR 3126. Rule 130-1 applies when a party has been guilty of frivolous conduct. *See* Siegel & Connors, New York Practice § 414A. Defendant's conduct in *Osterhoudt* surely qualified as "frivolous", 22 N.Y.C.R.R. § 130-1.1(c) (defining frivolous conduct), and the rule allows a punitive sanction of up to $10,000. 22 N.Y.C.R.R. § 130-1.2. That, plus the compensatory sanction, plus the resolving order, could start to make a little dent in any defendant, and when made the norm in all such cases, word will get around. One wonders if the defendant in *Osterhoudt* would have behaved in a federal action as it did in this state court action. The federal counterpart provision to Part 130 is Rule 11 of the Federal Rules of Civil Procedure, which has no cap, and has been known to make a dent of major significance.

Yet a further procedural tidbit in *Osterhoudt* is that before she had secured all the disclosure she needed, the plaintiff had filed a note of issue. The disclosure business should have been concluded before that, since the filing of the note of issue, accompanied by the required certificate of readiness, represents that disclosure is complete. *See* 22 N.Y.C.R.R. § 202.21; *see* Commentary C3102:3. The plaintiff should have first moved for a CPLR 3126 resolving order, and only afterwards filed the note of issue.

There is a big catch here, traceable to the court's very propensity, upon its first involvement in disclosure resistance, to give the resister a second chance in a conditional order. While the appellate division in *Osterhoudt* says the resolving order was the appropriate step, it is not unlikely, had the plaintiff moved for that step before filing the note of issue, that the trial judge would have refused it in favor of the second chance option in a conditional order.

This establishes a problem trial courts need to consider: should they stop making the second chance conditional order the standard option? At least on facts like those in *Osterhoudt*, strong arguments can be made that the immediate resolving order should be the standard. Consistent resort to that remedy could make the resolving order the "dentmaker-in-chief" in these disclosure skirmishes.

As will be seen below in Commentaries C3126:10 and C3126:11, the usual judicial reaction when a mere notice (as compared to a court order) has been disobeyed is to allow the party another chance to make the disclosure through a conditional order that may also include a money sanction. A dismissal under CPLR 3126 may ultimately result for

  

the disregard of a notice, however, when the circumstances warrant it. *See*, *e.g.*, *Wolfson v. Nassau County Med. Ctr.*, 141 A.D.2d 815, 530 N.Y.S.2d 27 (2d Dep't 1988) (plaintiff failed for more than two and one half years to respond to interrogatories).

While the proposition may appear to be a startling one, a party moving pursuant to CPLR 3126 may be in a far better position if she obtains an order of preclusion under CPLR 3126(2) rather than an outright dismissal of the action under CPLR 3126(3). Several Second Department decisions, discussed in detail in Commentary C3126:13, below, highlight the point. *See Daluise v. Sottile*, 40 A.D.3d 801, 837 N.Y.S.2d 175 (2d Dep't 2007); *Aguilar v. Jacoby*, 34 A.D.3d 706, 827 N.Y.S.2d 77 (2d Dep't 2006); *Kalinka v. Saint Francis Hosp.*, 34 A.D.3d 742, 827 N.Y.S.2d 75 (2d Dep't 2006). This paradox is perpetuated in *Rosen v. Levy*, 2008 WL 660435 (Sup. Ct., Bronx Co. 2008), where plaintiff's original suit for personal injuries was dismissed under CPLR 3126(3) for failure to provide disclosure. Plaintiff then commenced a second action against the same parties asserting identical claims. Predictably, defendants moved for an order under CPLR 3211(a)(5) dismissing the second action as barred by res judicata and collateral estoppel.

The *Rosen* court noted that "where an action is dismissed for a plaintiff's failure to provide discovery, said dismissal is not generally a dismissal on the merits and as such does not bar the commencement of a subsequent action." *Rosen*, 2008 WL 660435 at *4. In that the prior action did not conclude with an order precluding plaintiff from offering evidence at trial, the dismissal was not on the merits and did not bar the instant action on the grounds of res judicata and/or collateral estoppel.

This conclusion in *Rosen* is supported by the 1985 Court of Appeals decision in *Maitland v. Trojan Electric & Machine Company, Inc.*, 65 N.Y.2d 614, 491 N.Y.S.2d 147 (1985), in which the Court held that when "a plaintiff's noncompliance with a disclosure order does not result in a dismissal with prejudice, or an order of preclusion or summary judgment in favor of defendant so as to effectively close plaintiff's proof, dismissal resulting from the noncompliance is not a merits determination so as to bar commencement of a second action." *Id*. at 615-16, 491 N.Y.S.2d at 147.

*Maitland* and *Rosen* represent the rare situation in which a second action, commenced after a dismissal of a prior identical action under CPLR 3126(3), is not met by the statute of limitations defense. If the statute of limitations has expired in the interim and plaintiff must rely on CPLR 205(a)'s six-month extension to commence the second action, that safety net will now likely be out of reach after the Court of Appeals holding in *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 N.Y.3d 514, 806 N.Y.S.2d 453 (2005). In *Andrea*, the Court concluded that an action dismissed under CPLR 3126 for failure to comply with disclosure obligations is classified as a dismissal for "neglect to prosecute," which is denied CPLR 205(a)'s indulgence. *Id*. at 518, 806 N.Y.S.2d at 454. As discussed below, an amendment to CPLR 205(a) effective July 7, 2008 now requires that a judge dismissing plaintiff's action under CPLR 3126(3) "set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." *See* Commentary C3126:13, below.

There are several important lessons to be derived from the decisions discussed above. First, any plaintiff who allows a case to be dismissed pursuant to CPLR 3126 in the aftermath of the crusade waged by the Court of Appeals against sloppy practice is skating on very thin ice. *See* Commentary C3126:8A, below. No party, plaintiff or defendant, wants to be involved in the next battle on this front. If the Court has an opportunity to address this specific issue and to reexamine the 1985 holding in *Maitland*, strong arguments can be made that a different conclusion is warranted in this era. Furthermore, most cases dismissed under CPLR 3126 are personal injury cases, subject to a three-year statute of limitations. It is the extremely rare case in which time remains on the original statute after a CPLR 3126 dismissal and a plaintiff does not need to rely on CPLR 205(a) in the second action.

  

As for the defendant, any motion made under CPLR 3126 should include a request for preclusion under CPLR 3126(2), assuming such relief is warranted, and a request that the dismissal be "with prejudice." *See*, *e.g.*, *In re Estate of Porter*, 64 Misc.2d 1016, 316 N.Y.S.2d 504 (Sur. Ct., New York Co. 1970) (court dismissed petitioner's claim based on CPLR 3126(3) "with prejudice" where he refused to appear for examination or to answer certain interrogatories). If the order contains this form of relief, it will allow the defendant to raise the bar of res judicata in the second action, even if it is still timely under the original statute of limitations. If a party is moving under CPLR 3126(3) for an order dismissing the complaint based on a failure to comply with disclosure, she should also remind the judge that in addition to seeking an order of dismissal, she is requesting that the judge outline: 1) "the specific conduct constituting the neglect" and, 2) plaintiff's "general pattern of delay in proceeding with the litigation." CPLR 205(a). As noted in the discussion in Commentary C3126:13, below, that will satisfy the new requirements in CPLR 205(a). Furthermore, if the second action must rely on CPLR 205(a)'s six-month extension, the defendant must be sure to raise the defense of statute of limitations in a CPLR 3211(a) pre-answer motion to dismiss or as an affirmative defense in the answer. This defense was apparently not interposed in *Maitland*, *Aguilar* and *Rosen*, and one wonders if it was waived.

As Professor Siegel correctly observed, the reasoning in *Rosen* amounts "to a kind of topsy-turvy application of ... CPLR 3126," in which the seemingly most severe sanction of dismissal has far less utility than an order of preclusion. *See Res Judicata Does Not Bar Second Action Where First Was Dismissed for P's Disclosure Resistance*, 196 Siegel's Practice Review 2 (2008). In these situations, it may prove best for the defendant to take an inch, rather than a mile. An order of preclusion under CPLR 3126(2), or even an order deeming certain issues in the case to be resolved under CPLR 3126(1), can provide grounds for a motion for summary judgment on the merits. If such a motion is granted, it will pave the way for dismissal of any identical second action on res judicata grounds, regardless of when it is commenced.

**C3126:8A The Court of Appeals Crusade Against Sloppy Practice and Failure to Adhere to Deadlines.**

During the period bordering the turn of the century, the New York Court of Appeals demonstrated conviction in their position that statutes, court rules, and orders can rarely be ignored without significant consequences. After the first thirty years of the CPLR's reign, there were many who maintained that the New York State courts had been too lax in enforcing procedural rules and court orders, especially when compared to the federal courts. At the beginning of the twenty-first century, with the CPLR in the midst of its fifth decade, it appeared that the pendulum in the state courts was swinging back in the direction of stricter enforcement of deadlines, regardless of their source. *See, e.g., Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004) (holding that statutory deadlines, like court orders, cannot be ignored without significant consequences); *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 726-27, 786 N.Y.S.2d 379, 380 (2004) ("As we made clear in *Brill*, and underscore here, statutory time frames--like court-ordered time frames--are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored."); *Andrea,* 5 N.Y.3d at 521, 806 N.Y.S.2d at 457 ("Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated ...."). When a case involving a failure to provide disclosure made its way to the Court of Appeals during this period, a relatively rare event, it was usually a bad omen for the recalcitrant party.

One could trace the Court of Appeals' crusade to eradicate sloppy practice back to the 1999 decision in *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999), which calls for trial courts to take a stricter stand against a party who has been recalcitrant in providing disclosure. Most of the dispositions under CPLR 3126 determine the appropriate sanction to apply for resistance to disclosure requirements and are discretionary. This means that the appellate division is usually the court of last resort in these cases on these issues. For this reason, it is rare for a CPLR 3126 issue to reach the Court of Appeals. When such an issue does reach the Court, it can normally do no more than determine whether the appellate division disposition was within the outer borders of discretion. The CPLR 3126 determination will only be overturned if it falls beyond whatever the Court of Appeals finds to be the outer limits of discretion in the particular

  

situation. Passing the outer borders of discretion makes the exercise an "abuse" of discretion, and that's an issue of law that the Court of Appeals will review.

It is rare indeed for any appellate court to reverse a sanctions award under CPLR 3126 based on a party's failure to comply with disclosure obligations. The nature and degree of disclosure sanctions imposed under CPLR 3126 are vested in the broad discretion of the trial court, and the appellate courts have frequently cautioned that they will rarely disturb the exercise of that discretion. *See, e.g., Arts4All, Ltd. v. Hancock*, 54 A.D.3d 286, 286 863 N.Y.S.2d 193, 194 (1st Dep't 2008) ("[S]ubstantial deference should be accorded to the trial court's considerable discretion to compel compliance with discovery orders, and, absent clear abuse, a penalty imposed in accordance with CPLR 3126 should not readily be disturbed ...."), *aff'd* 12 N.Y.3d 846, 881 N.Y.S.2d 390 (2009). Yet in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Global Strat Inc.*, 22 N.Y.3d 877, 880, 976 N.Y.S.2d 678, 679 (2013), the Court found a clear abuse of that discretion and vacated a $98 million default judgment because the penalty "was not commensurate with the alleged disobedience, i.e., failure to produce documents that [plaintiffs] claimed were in the [defendant]s' possession ...." The Court emphasized that plaintiffs originally sought a far lesser penalty, the depositions of the individual defendants, to ascertain whether they complied with the disclosure demands. In addition, the Court found that the report of the referee to whom the matter was referred contained no basis for his conclusion that the individual defendants had willfully failed to comply with plaintiffs' disclosure demands. The Court remitted the matter to supreme court for "the imposition of an appropriate sanction, should it determine that a sanction is warranted."

In *Kihl*, however, there was no abuse of discretion. The appellate division found a plaintiff's excuses for prolonged delays in responding to court-ordered disclosure in a personal injury case to be inadequate and upheld the trial court's dismissal of the action. There being no abuse, the Court of Appeals affirmed. The significance of the decision is in the enthusiasm with which the Court did so, taking the rare occasion to address a CPLR 3126 disposition to warn the bar, in essence, that however attitudes may differ among the appellate division, and however infrequent the occasion may be for the Court of Appeals to get into the subject, it will, whenever the occasion is at hand, take a dim view of resistance to disclosure. The opinion indicates that the Court will do whatever is necessary to discourage such conduct, especially in a case involving court-ordered disclosure.

The Court in *Kihl* only had to affirm the appellate division dismissal. It could have done so in a mere memorandum referring to the appellate division decision, but, as indicated, it chose to make the case an example and a forum for the warning. The case was before the Court on an appeal as of right because there had been two dissents in the appellate division. *See* CPLR 5601(a); Siegel & Connors, New York Practice § 527. Had the case been the more usual situation in which it needed permission for leave to appeal under CPLR 5602(a), the Court would not likely have granted it because the appellate division determination did not present a novel issue. *See* Siegel & Connors, New York Practice § 528. Forced to hear the case because it was up as of right, the Court took the appeal as an occasion to put the writing on the wall, and with the desire that it would be read not only by litigants, but by the lower courts as well, hopefully generating a less indulgent attitude about a party's recalcitrance in disclosure proceedings.

The disposition in *Kihl* was of the worst possible kind for a plaintiff: (1) it was an invocation of the ultimate sanction under CPLR 3126, a dismissal, bypassing the other lesser penalties; and (2) it occurred when the original statute of limitations on the plaintiff's claim had now expired, assuring that a new action would be barred by time. A CPLR 3126 dismissal usually will not receive the six months that CPLR 205(a) might otherwise allow for a new action after the non-merits dismissal of an earlier one. *See* Commentary C3126:13, below. The result was the end of the case as against the defendant that secured the dismissal, here the Honda company, with a malpractice action against the plaintiff's attorneys lurking as a strong possible alternative.

Writing for the court in a unanimous opinion, Chief Judge Kaye declared that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." *Kihl*, 94 N.Y.2d at 123, 700 N.Y.S.2d at 90. With specific reference to disclosure orders, the Court added that "we underscore

  

that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully." *Id.*

The directions for disclosure in *Kihl* came from an order issued at a preliminary conference, a frequent source of such orders. *See* 22 N.Y.C.R.R. § 202.12(d); Siegel & Connors, New York Practice § 77D. It called for the plaintiff to respond to the defendant Honda's interrogatories within thirty days after receiving them. The court signed the order in March of 1996 and Honda served its interrogatories the same day. There was no response from the plaintiff for some five months. In September, Honda moved to compel compliance. When the plaintiff finally did respond, in December, it appeared that the answers to a number of the questions were evasive or useless. One question sought specificity with respect to the design defect that plaintiff claimed. Plaintiff merely reiterated that it claimed a design defect and purported to "reserve their right to supplement this response prior to trial." *Kihl*, 94 N.Y.2d at 121, 700 N.Y.S.2d at 89. The same form of response was submitted for other questions.

In March 1997, the trial court in *Kihl* issued an order dismissing the action under CPLR 3126(3) for nondisclosure, but gave the plaintiff still more rope by making the order conditional on the plaintiff's answering the questions properly within twenty days after service of a copy of the order. The plaintiff could have served the answers forthwith, without even waiting for the defendant to serve the new order, but the plaintiff stood on its formal right to await the service. This led to the embroilment of the court in issues about when the order was served and when the plaintiff received it, with conflicting affidavits on both sides. Finally, in February of 1998, the trial court dismissed the complaint, apparently adopting the defendant's version of the facts. That was the end of the plaintiff's case against Honda. The appeals to the appellate division and the Court of Appeals confirmed the interment. *See also* New York State Law Digest No. 480 (December, 1999).

In affirming the Second Department's dismissal of the complaint in this "all too familiar" scenario, the Court of Appeals noted that "when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint." *Kihl*, 94 N.Y.2d at 122, 700 N.Y.S.2d at 90.

**C3126:8B Sanction for Spoliation of Evidence.**

***Pegasus* and the Adoption of Federal Law on Sanctions for Spoliation**

In litigation today, parties commonly seek to impose penalties on an adversary based on the failure to preserve materials that are relevant to the litigation, such as "electronically stored information" (ESI). The First Department's pronouncements in *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 41, 939 N.Y.S.2d 321, 328 (1st Dep't. 2012), discussed below, relied heavily on federal law when outlining the penalties to be imposed on a party who fails to satisfy its preservation obligations in a New York State action. In *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547, 26 N.Y.S.3d 218, 219 (2015), the Court of Appeals essentially adopted the standards set forth by the *VOOM* court in concluding that a party seeking sanctions for spoliation of evidence must show: (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, (2) that the evidence was destroyed with a "culpable state of mind," which would include negligence, and (3) that the destroyed evidence was relevant to, or would have supported, the seeking party's claim or defense.

Furthermore, the *Pegasus* Court held that in resolving the second issue above, if the evidence is determined to have been "intentionally or wilfully destroyed," the relevancy of that evidence to the seeking party's claim is presumed under the third prong of the inquiry. *Id.* If, however, the evidence is determined to have been "negligently destroyed," the party seeking spoliation sanctions must establish that the destroyed materials were relevant to their claim or defense. *Id.* at 547-48, 26 N.Y.S.3d at 219; *see Atiles v. Golub Corp.*, 141 A.D.3d 1055, 1057, 36 N.Y.S.3d 533, 536 (3d Dep't 2016) (after determining that "plaintiffs failed to prove that defendants intentionally or willfully destroyed

[a portion of] the video while under obligation to preserve it," court applied *Pegasus* and ruled that video footage sought "was not 'relevant to [plaintiffs'] claim ....' ").

It is not always a simple task to apply the above standards to a set of facts. The procedural history in *Pegasus,* which includes two reversals and a dissent at both the appellate division and the Court of Appeals, makes the point. The decision is discussed in further detail in Siegel & Connors, New York Practice §§ 367, 528, 529, 638. We will focus here on the application of the above standards and the sanctions that can be imposed for spoliation.

The plaintiff in *Pegasus* sued a Brazilian air cargo company and, on an alter ego theory, the group that had been judicially appointed with responsibility to administer and manage the company, referred to as the "MP defendants." Constrained by its precedent, the *Pegasus* Court engaged in a relatively limited review of the appellate division order appealed from and concluded that the record comported more closely with the findings of the majority in the First Department than it did with supreme court's findings. *See id.* at § 529. The Court ruled that the failure to institute a litigation hold did not, standing alone, constitute gross negligence, as the supreme court held. "Rather, a party's failure to institute a litigation hold is but one factor that a trial court can consider in making a determination as to the alleged spoliator's culpable state of mind." *Pegasus*, 26 N.Y.3d at 553, 26 N.Y.S.3d at 223; *see also Chin v. Port Authority of New York and New Jersey*, 685 F.3d 135, 162 (2d. Cir 2012) ("We reject the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*.").

The Court stressed several factors considered by the appellate division in reaching its conclusion that the defendants' failure to preserve ESI did not constitute gross negligence, including: (1) when the MP defendants were appointed to manage the air cargo codefendant, there was no reason to believe that the company was not then receiving adequate advice regarding preservation obligations from its own counsel, (2) the MP defendants adequately responded to all disclosure requests served upon them, negating any inference that they were recklessly addressing plaintiff's demands, (3) although the MP defendants "exercised practical control" over the codefendant, the record evidence indicated that these parties "were separate entities, with each possessing their own offices, staff, operations and computer systems." *Id.* In sum, these "facts substantiated the Appellate Division's ultimate conclusion that, at most, the MP defendants' failures amounted to a 'finding of simple negligence.' " *Id.* (citation omitted).

As to the somewhat broader questions, the Court saw no reason to disturb the unanimous finding of the lower courts that the MP defendants had sufficient control over the codefendant to trigger an independent duty on its part to preserve the ESI being sought. Furthermore, there was no "basis to disturb the findings of fact by the Appellate Division that the MP defendants were negligent in failing to discharge that duty." *Id.* at 554, 26 N.Y.S.3d at 224.

Nonetheless, the Court did see fit to reverse and remit the matter to supreme court. The First Department erred, it concluded, to the extent that it ruled that plaintiff had not attempted to make a showing that the unpreserved information was relevant to its claims. The Court held that the appellate division "all but ignored" plaintiff's arguments regarding the relevance of the documents. *Id.* Therefore, the Court remitted the matter to supreme court "for a determination as to whether the negligently destroyed ESI was relevant to [plaintiff]'s claims against the MP defendants and, if so, what sanction, if any, is warranted." *Id.*

Finally, the Court addressed the adverse inference jury charge contained in NY PJI 1:77, entitled "General Instruction--Evidence--Failure to Produce Documents or Other Physical Evidence." This charge permits, but does not require, the jury to draw negative inferences from missing documents. Therefore, the Court noted that the First Department's conclusion that delivering this charge amounted to an award of summary judgment to the plaintiff was inaccurate. The Court also stressed that the charge was appropriate for cases in which the information has been negligently destroyed, even if intentional conduct or gross negligence was not on the scene.

  

The lengthy dissent in the Court of Appeals contained many points of agreement, including that the First Department's *VOOM* decision set forth the applicable standards governing a request for spoliation sanctions. The major point of disagreement centered on the issue of the defendant's "culpable state of mind." The dissent argued that the MP defendants were guilty of "gross negligence" in failing to preserve the information sought, rather than "simple negligence." Therefore, under *VOOM*, a presumption of relevance should arise as to the information that was destroyed due to the MP defendants' gross negligence, thereby opening the door to sanctions.

Given the limited scope of the Court's review in *Pegasus*, it is difficult to ascertain the precedential value of the decision. While the entire Court appeared to agree that the failure to impose a litigation hold is a factor that can be considered in the determination of whether discovery sanctions should issue, the decision does not address the circumstances under which the duty to impose a litigation hold arises. Furthermore, in a footnote, the majority in *Pegasus* noted that because the appellate division did not address the issue of the duty to preserve the paper records at issue, Court of Appeals analysis was limited to the missing ESI. *Pegasus*, 26 N.Y.3d at 551, n. 3, 26 N.Y.S.3d at 227, n.3. Would the standards enunciated in *Pegasus* be different for papers and other types of potential evidence?

It is interesting to note that *Pegasus* was handed down exactly two weeks after an important amendment to the Federal Rules of Civil Procedure relating to spoliation went into effect. A new Rule 37(e), entitled "Failure to Preserve Electronically Stored Information," became effective on December 1, 2015. The amendment was designed to address the somewhat draconian spoliation sanctions that developed in the decisional law in several circuits, which required litigants to expend excessive effort and money to preserve ESI to avoid the risk of severe penalties. Rule 37(e)(2) does not permit the court to use an adverse inference charge based merely on a finding of negligence, as the Court of Appeals authorized in *Pegasus*. Under the current version of Rule 37(e), the court can only impose penalties on a spoliator, including an adverse inference instruction, upon a "finding that the party acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2)(B); see Siegel & Connors, New York Practice § 638.

In sum, the *Pegasus* decision relies heavily on the First Department's decision in *VOOM* in setting forth when penalties can be imposed for spoliation of ESI. The *VOOM* court, in turn, quoted extensively from federal caselaw to support the conclusion that sanctions can be imposed on a party who has failed to preserve ESI due to negligence. Yet, the 2015 amendments to Rule 37(e) of the Federal Rules of Civil Procedure no longer permit the imposition of sanctions in the scenario where the spoliator has merely been negligent.

These are the sorts of problems that can arise when our state courts rely so heavily on another jurisdiction's law when establishing the law of New York. Unfortunately, *Voom* and *Pegasus* contain scant reference to CPLR 3126, with each decision merely citing the statute only once, and both failing to apply New York State's abundant caselaw interpreting it in a myriad of situations, including actions involving spoliation. *See, e.g., Ortega v. City of New York*, 9 N.Y.3d 69, 76, 845 N.Y.S.2d 773, 777 (2007) (noting "that '[o]ne traditional method of dealing with spoliation of evidence in New York has been CPLR 3126 where sanctions, including dismissal, have been imposed for a party's failure to disclose relevant evidence ....' "); *MetLife Auto & Home v. Joe Basil Chevrolet*, 1 N.Y.3d 478, 482-83, 775 N.Y.S.2d 754, 756 (2004) ("One traditional method of dealing with spoliation of evidence in New York has been CPLR 3126 where sanctions, including dismissal, have been imposed for a party's failure to disclose relevant evidence ....").

With the ink barely dry on the *Pegasus* decision, the First Department applied the standards set forth by the Court of Appeals therein to a legal malpractice action in *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D.3d 607, 36 N.Y.S.3d 2 (1st Dep't 2016). In *Arbor Realty*, it was undisputed that plaintiff's obligation to preserve ESI arose by at least June 2008, when it retained counsel in connection with its claims against the defendant law firm. Nonetheless, plaintiff did not issue a formal litigation hold until May, 2010.

  

Plaintiff commenced the action against its former law firm in 2011. After discovering that a substantial amount of ESI was destroyed, the defendant made a motion in June, 2014 seeking dismissal of the complaint as a sanction for plaintiff's failure to preserve the ESI, including the records of six key witnesses. The supreme court found that plaintiff's failure to preserve the ESI constituted ordinary negligence and only granted defendant's motion to the extent of permitting an adverse inference charge at trial. *See* NY PJI 1:77 ("General Instruction--Evidence--Failure to Produce Documents or Other Physical Evidence").

After the decision on the motion, plaintiff provided defendant with additional disclosure materials, including minutes of an important committee meeting that identified eight additional employees of plaintiff who were involved in the loan transaction. Defendant then moved to renew its spoliation motion based on plaintiff's identification of these additional witnesses whose electronic records had been destroyed by plaintiff, either due to its failure to timely institute a litigation hold or deliberately. The supreme court granted the motion to renew and, on the second go-around, dismissed the complaint as a spoliation sanction.

On appeal, the First Department cited to its decision in *VOOM*, which outlined the factors to be considered in reaching a finding of gross negligence when the duty to preserve ESI is triggered. While concluding that supreme court providently exercised its discretion in granting the motion to renew, the appellate division ruled that it improvidently exercised its discretion in then dismissing the complaint as a spoliation sanction.

Plaintiff's destruction of the ESI constituted, "at a minimum, gross negligence," because it: 1) failed to institute a formal litigation hold until approximately two years after it had an obligation to do so, 2) failed to identify all of the key players in the loan transaction that was the subject of the legal malpractice action, and 3) failed to preserve the ESI pertaining to those key players. Therefore, because the spoliation was the result of the plaintiff's intentional destruction or gross negligence, the decisions in *Pegasus* and *VOOM* warranted a presumption that the lost or destroyed ESI was relevant. The First Department concluded that although plaintiff failed to rebut that presumption, dismissal of the complaint was too severe a sanction.

The *Arbor Realty* court noted that dismissal of a complaint as a spoliation sanction is warranted only where: 1) "the spoliated evidence constitutes 'the sole means' by which the defendant can establish its defense[,]" 2) "the defense was otherwise 'fatally compromised[,]' " or 3) "defendant is rendered 'prejudicially bereft' of its ability to defend as a result of the spoliation." *Arbor Realty*, 140 A.D.3d at 609-10, 36 N.Y.S.3d at 5 (citations omitted). The record before the appellate court did not support these findings because there was still "mass document production" of other records, and several key witnesses were still available to testify. In this regard, the appellate division noted that defendant had not yet served interrogatories or deposition notices on these witnesses at the time it made its renewal motion.

Based on the above circumstances, the First Department modified the order of supreme court and ruled that an adverse inference charge was an appropriate sanction. Citing to the charge in NY PJI 1:77, the court observed that the adverse inference charge will:

> permit the jury to: (1) find that the missing emails and other electronic records would not have supported [plaintiff]'s position, and would not have contradicted evidence offered by [defendant], and (2) draw the strongest inference against [plaintiff] on the issues of whether [plaintiff] would have made the loans regardless of any potential zoning issues, and the measure of [plaintiff]'s damages taking into account its assignment of the loans and/or failure to mitigate its damages.

*Id.* at 610, 36 N.Y.S.3d at 5 (citation omitted).

To add insult to injury, the appellate division ordered plaintiff to pay discovery sanctions of $10,000 to defendant based on its failure to produce the committee meeting minutes until after supreme court decided the initial spoliation motion, citing to CPLR 3126. *See* Commentary C3126:11, below. The First Department sent out an additional warning

  

to the parties that its order was "without prejudice to [defendant] seeking dismissal of the complaint or other spoliation sanctions in the future, should there be further revelations making such a motion appropriate." *Arbor Realty*, 140 A.D.3d at 609-10, 36 N.Y.S.3d at 5.

Penalties will not result in every case in which evidence is lost or destroyed. "Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate." *Awon v. Harran Transp. Co., Inc.*, 69 A.D.3d 889, 890, 895 N.Y.S.2d 135, 136 (2d Dep't 2010) (citation omitted); *see Eksarko v. Associated Supermarket*, 155 A.D.3d 826, 829, 63 N.Y.S.3d 723, 726 (2d Dep't 2017) ("Since [defendant]'s loss of the video recording was negligent rather than intentional, and the loss of the recording does not completely deprive the plaintiff of the ability to prove her case, the appropriate sanction is to direct that an adverse inference charge be given at trial with respect to the unavailable recording...."); *Dyer v. City of Albany*, 121 A.D.3d 1238, 1239, 995 N.Y.S.2d 753, 755 (3d Dep't 2014) ("Supreme Court did not abuse its discretion in deciding not to impose any sanction against defendant pursuant to CPLR 3126" for destruction of park swing where plaintiff was not "particularly prejudiced" under the facts). Therefore, several design defect cases have recognized that "the loss of the specific instrumentality that allegedly caused the plaintiff's injuries is not automatically prejudicial to the manufacturer thereof because defects will be exhibited by other products of the same design." *Rios v. Johnson V.B.C.*, 17 A.D.3d 654, 795 N.Y.S.2d 62 (2d Dep't 2005) (citation omitted) (reversing order requiring employer, who made post-accident alterations to machine, to indemnify manufacturer); *see Lawson v. Aspen Ford, Inc.*, 15 A.D.3d 628, 791 N.Y.S.2d 119 (2d Dep't 2005) (affirming order denying preclusion because defendant inspec ted and tested vehicle prior to accident); *Klein v. Ford Motor Co.*, 303 A.D.2d 376, 756 N.Y.S.2d 271 (2d Dep't 2003) (reversing sanction of dismissal where, among other things, plaintiff's loss of product causing injury was inadvertent and defendant had opportunity to photograph and inspect product).

**The *VOOM* Decision and the Duty to Implement a Litigation Hold**

There are instances in which disputes occur as to when an obligation to preserve ESI arises. In *VOOM*, 93 A.D.3d 33, 939 N.Y.S.2d 321, the First Department addressed this and several other important issues that recur with some frequency in the age of electronic disclosure. Relying primarily on federal caselaw, the court declared that it is "well settled" that once litigation is reasonably anticipated, a party must preserve emails as part of a litigation hold, even if it requires suspension of a computer system's automatic-deletion function. Defendant's failure to adequately preserve the electronic information in *Voom* constituted "gross negligence at the very least," and warranted an adverse inference charge.

In its groundbreaking decision in *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 218 (S.D.N.Y. 2003), the court concluded that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/ destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." In *VOOM*, the First Department observed that this standard "has been widely adopted by federal and state courts[,] ... [and] is harmonious with New York precedent in the traditional discovery context, and provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered." As noted above, however, the Court of Appeals decision in *Pegasus*, while relying heavily on *VOOM*, did not address the circumstances under which the duty to impose a litigation hold arises.

The dispute in *VOOM* involved plaintiff, a cable television company that provided television programs, and defendant, a provider of satellite television. In 2005, the parties entered into an "affiliation agreement" whereby defendant agreed to distribute plaintiff's television programming to its satellite customers for fifteen years. Approximately two years later, the parties began to develop disputes under the agreement and defendant ultimately removed plaintiff's program channels from its most widely distributed high definition package. In June of 2007, defendant sent two letters to plaintiff advising that: (1) it intended to exercise its audit rights under the agreement, (2) it was entitled to terminate the agreement, and (3) it was reserving its rights and remedies. In July of 2007, after several additional exchanges

of correspondence manifesting the dispute, plaintiff became "extremely concerned" that the matter was going to be litigated and implemented a litigation hold that, among other things, automatically preserved emails.

On January 30, 2008, defendant formally terminated the agreement with plaintiff, which then commenced an action the next day. Defendant did not implement a litigation hold until after the lawsuit was instituted. Furthermore, the hold did not suspend defendant's automatic deletion of e-mails. Therefore, according to the court, "any e-mails sent and any e-mails deleted by an employee were automatically and permanently purged after seven days." *VOOM*, 93 A.D.3d at 39, 939 N.Y.S.2d at 326. The court also observed that "[i]t was not until June 1, 2008--four months after the commencement of the lawsuit, and nearly one year after [defendant] was on notice of anticipated litigation--that [defendant] suspended the automatic deletion of relevant e-mails." *Id.*

Plaintiff made a motion for spoliation sanctions regarding the deleted emails, arguing that defendant's conduct and correspondence demonstrated that it should have reasonably anticipated litigation prior to the commencement of the action. Plaintiff requested that the court strike defendant's answer and enter judgment in favor of plaintiff, or issue an adverse inference instruction at trial. The supreme court granted the motion, ruling that an adverse inference charge against defendant at trial was an appropriate sanction because other evidence remained available to defendant to defeat plaintiff's claims.

The First Department affirmed. Relying on the preservation obligations outlined in the Southern District's decision in *Zubulake*, the *VOOM* court emphasized that a party's preservation obligation is not merely limited to avoiding affirmative acts of destruction. In that most computer systems have automatic deletion functions that periodically purge electronic documents such as e-mail, the court concluded that "[o]nce a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data." *VOOM*, 93 A.D.3d at 41, 939 N.Y.S.2d at 328 (citation omitted).

The litigation hold required to be implemented by the *VOOM* decision is somewhat rigorous. The First Department concluded that the "hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee." *Id.* Furthermore, the hold should describe "with as much specificity as possible" the electronically stored information at issue in the potential litigation and direct the cessation of routine destruction operations such as auto-delete functions and rewriting over e-mails. As the court observed in a footnote, the information might exist in countless places, such as on employees' home computers, on flash drives or smartphones, in a cloud, or off site on a remote server or back-up tapes. A party who reasonably anticipates litigation must take affirmative action to preserve relevant information residing in any of those places.

The court specifically noted that it is a "best practice" that litigation holds be reduced to writing and, given the broad requirements imposed by this opinion, it is hard to imagine that an oral litigation hold would ever suffice. Not only must the litigation hold identify the information at issue, it must "describe the consequences for failure to so preserve electronically stored evidence." *Id.* at 41-42, 939 N.Y.S.2d at 328. What "consequences" are these? Must the hold prescribe the consequences to be imposed on the employee for failure to preserve relevant information, such as a reprimand levied by the employer, or the consequences that will be imposed on the employer by a court for such failure, such as an adverse inference charge?

The level of knowledge required to impose a satisfactory litigation hold is substantial, and it will be exceedingly difficult for a person or entity to negotiate the requirements imposed by the *VOOM* decision without a lawyer. In fact, the First Department cautioned that "[i]n certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel." *VOOM*, 93 A.D.3d at 42, 939 N.Y.S.2d at 328 (citation omitted); *see also id.* at 44, 939 N.Y.S.2d at 330 ("In this case, [defendant's] reliance on

  

its employees to preserve evidence 'does not meet the standard for a litigation hold ....' "). This aspect of the court's holding imposes an affirmative obligation on counsel to assist the client, usually in advance of actual litigation, to preserve relevant information.

The decision in *VOOM* makes it clear that preservation obligations may be imposed before litigation is commenced, such as at the moment that litigation is reasonably anticipated. The court rejected the argument that such a standard is unworkable and refused to defer the imposition of preservation obligations until after litigation has been commenced or notice of a specific claim is provided. According to the *VOOM* court, which relies heavily on the *Zubulake* decision and its progeny on this point, a person or entity has a "reasonable anticipation of litigation" at "such time when a party is on notice of a credible probability that it will become involved in litigation." *Id.* at 43, 939 N.Y.S.2d at 329.

According to the court, which also relied on the Sedona Conference's Guidelines, the preservation obligation is imposed "at the point in time when litigation is *reasonably anticipated* whether the organization is the initiator or the target of the litigation." *Id.* (citation omitted) (quoting *The Sedona Conference, Commentary on Legal Holds: The Trigger and The Process,* 11 Sedona Conf. J. 265, 267 (2010)). According to the Sedona Legal Hold Guidelines, a "reasonable anticipation of litigation" can arise in at least three instances, such as when an organization or person: (1) is on notice of a credible probability that it will become involved in litigation, (2) seriously contemplates initiating litigation, or (3) takes specific actions to commence litigation.

There will be many instances in which a person or entity might reasonably anticipate litigation, but has not yet hired a lawyer. If relevant electronically stored information is not preserved prior to the retention of a lawyer, will these parties be subject to the same litigation sanctions as a party who was represented by in house counsel all the while? That's an issue that will likely occupy the courts' attention in the future, but it was not of concern in *VOOM*, where defendant's senior corporate counsel was involved from the outset.

Applying the above standards, the court concluded that defendant should have reasonably anticipated litigation in June of 2007 when it sent the letters to plaintiff advising that it intended to exercise its audit rights under the agreement and stating it was entitled to terminate the agreement. Despite the level of contention between the companies, which was also manifest in subsequent correspondence, defendant failed to issue an effective litigation hold on electronically stored information until well after the action was commenced some seven months later, in January of 2008.

There was a further wrinkle in *VOOM* that added to the equation. In concluding that the imposition of sanctions for spoliation was appropriate, both the supreme court and the First Department relied on the fact that defendant had been previously found guilty of "gross spoliation" of evidence for failing to implement a proper litigation hold in a federal action. This analysis is reminiscent of the First Department's decision in *Mann*, where the court considered defendant's failure to comply with disclosure requests in other actions when determining a discovery motion in an action in New York State courts. *See* Commentary C3126:7, above. In *Mann*, the plaintiffs produced five court orders in five different lawsuits in which both state and federal courts held that defendant engaged in "bad faith" and "wilful disobedience" during discovery. *Mann*, 33 A.D.3d at 27, 816 N.Y.S.2d at 49.

While the decision in *Mann* apparently involved a motion to compel under CPLR 3124, and not a motion for sanctions under CPLR 3126, we noted above that the First Department's reasoning could logically be extended to motions under CPLR 3126. *See* Commentary C3126:7, above. The *VOOM* decision vividly makes this point and highlights that it may be appropriate to consider a party's abuse of the disclosure process in another similar action in determining if that party willfully failed to provide disclosure in a New York State court action.

In the absence of pending litigation or notice of a specific claim, a party will not be sanctioned for discarding items in good faith pursuant to its normal business practices. *See Tanner v. Bethpage Union Free School District*, 161 A.D.3d 1210, ___ N.Y.S.3d ___ (2d Dep't 2018); *Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068, 693

  

N.Y.S.2d 787 (4th Dep't 1999). In *Conderman*, defendant utility company removed several utility poles to a landfill immediately after they were downed by a storm. Plaintiff sought sanctions based on spoliation of this evidence. The court distinguished cases where a party destroys evidence, noting that defendants removed the utility poles when responding to an emergency situation that affected public safety. It would be unreasonable to impose a duty to preserve evidence in these circumstances.

**The Duty of an Insurer to Preserve Information**

The decision in *Hartford Fire Insurance Company v. Regenerative Building Construction Inc.*, 271 A.D.2d 862, 706 N.Y.S.2d 236 (3d Dep't 2000), shows how an insurer can become embroiled in what amounts to a spoliation issue in its own subrogation action. Pipes froze in a structure, apparently because the heating was defective. The insurer paid the homeowner $500,000 and later sued the contractors. One of the contractors sought discovery of the allegedly ruptured line, but all the damaged goods had apparently been discarded when the repairs were made years earlier. Because no bad faith or negligence was shown, the court would not impose any sanction. It is still wiser, of course, for an insurer to preserve allegedly defective materials, if possible, especially when there's any prospect at all of a subrogation claim against the wrongdoer who caused the damage that the insurer paid out on.

That point is demonstrated in *Standard Fire Insurance Company v. Federal Pacific Electric Company*, 14 A.D.3d 213, 786 N.Y.S.2d 41 (1st Dep't 2004), where plaintiff insurer paid its insured for fire loss sustained as a result of an allegedly defective electrical panel and circuit breakers. The insurer's engineer inspected the premises after the fire and concluded in a report that the electrical panel may have been a substantial cause of the fire. Based on the inspection, the insurer commenced a subrogation action against the manufacturer of the panel and breakers and the company who installed them.

The manufacturer obtained two court orders requiring the insurer to produce the electrical panel at issue and satisfy other outstanding disclosure demands. After the insurer failed to respond, the manufacturer obtained an order, apparently under CPLR 3126, conditionally dismissing the complaint unless the insurer complied with all outstanding disclosure requests. The First Department reversed supreme court and struck the complaint, noting that the insurer had defaulted on the conditional order of preclusion, rendering it absolute. *See Lopez v. City of New York*, 2 A.D.3d 693, 768 N.Y.S.2d 621 (2d Dep't 2003). The court noted that the insurer "should have foreseen that preservation of the panel and circuit breakers was absolutely essential to the assertion of any claim based upon a defect in the electrical equipment." *Standard Fire Insurance*, 14 A.D.3d at 217, 786 N.Y.S.2d at 44. The insurer "had the authority, means and opportunity to safeguard the equipment, but inexplicably failed to do so." *Id.* at 217, 786 N.Y.S.2d at 45.

**CPLR 3126 Preclusion v. Common Law Doctrine of Spoliation**

Some courts have noted a distinction between CPLR 3126 penalties for spoliation and the common-law doctrine of spoliation. *See Klein*, 303 A.D.2d at 377, 756 N.Y.S.2d at 272-73; *Sage Realty Corp. v. Proskauer Rose L.L.P.*, 275 A.D.2d 11, 16, 713 N.Y.S.2d 155, 159 (1st Dep't 2000). A CPLR 3126 sanction can only be imposed if a party "refuses to obey an order for disclosure or wilfully fails to disclose information...." *See Klein*, 303 A.D.2d at 378, 756 N.Y.S.2d at 274 ("Dismissal is also unwarranted pursuant to CPLR 3126, as there has been no showing that the plaintiff intentionally disobeyed [a prior court] order"). If, for example, a party destroys material after being served with a CPLR 3120(1)(i) demand to produce it, preclusion under CPLR 3126 would be appropriate. If litigation has not yet been instituted, but a person or entity on notice of another's claims destroys relevant evidence in bad faith, there would still be authority under CPLR 3126 to preclude. Destruction of this nature prior to the litigation could be construed to be a willful failure to disclose information that "ought to have been disclosed" pursuant to Article 31. CPLR 3126.

  

If a party admits at the outset of litigation or in response to the original disclosure demand that the item sought has been lost or negligently destroyed, a court would not likely order its production under CPLR 3124. In addition, one cannot "wilfully" fail to disclose an object that cannot be obtained for these reasons. *See Mylonas v. Town of Brookhaven*, 305 A.D.2d 561, 759 N.Y.S.2d 752 (2d Dep't 2003) (finding that there was no showing that defendant, which destroyed vehicle involved in accident prior to litigation, acted willfully, contumaciously or in bad faith); *Foncette v. LA Express*, 295 A.D.2d 471, 744 N.Y.S.2d 429 (2d Dep't 2002) (holding that where defendants attributed loss of hydraulic jack delivered to their liability insurer to insolvency of liability insurer, conduct was not willful, contumacious or in bad faith). Therefore, if a party promptly provides a reasonable basis on which it is unable to comply with a disclosure request, a sanction for a violation of CPLR 3126 should not be imposed. The common law doctrine of spoliation might, however, require dismissal of the action if it is necessary as a matter of "fundamental fairness." Short of dismissal, the party who has lost or destroyed evidence may be subject to an adverse inference charge. *Mylonas*, 305 A.D.2d at 563, 759 N.Y.S.2d at 754.

If relevant evidence has been lost or destroyed for any reason prior to litigation, the party ultimately under an obligation to produce it must be careful to respond in a timely and accurate fashion. In many cases involving dismissal on spoliation grounds, there has not only been loss or destruction of evidence, but a failure to timely respond to a notice to produce under CPLR 3120(1)(i). The failure to respond then leads to a motion to compel production under CPLR 3124, followed by a motion for preclusion under CPLR 3126. *See, e.g., Standard*, 14 A.D.3d at 215, 786 N.Y.S.2d at 43. This type of laxity provides two possible grounds for preclusion: CPLR 3126 and the common law doctrine of spoliation.

If relevant evidence has been lost or destroyed, the lawyer will already have an uphill battle in convincing the court that the action should proceed without it. A history of delay or neglect in responding to legitimate disclosure demands will render that task even more burdensome. The Second Department's decision in *Neal v. Easton Aluminum, Inc.*, 15 A.D.3d 459, 790 N.Y.S.2d 70 (2d Dep't 2005), demonstrates the point. In *Neal*, plaintiff alleged he was injured when the fork on his bicycle broke. Prior to commencing the action, plaintiff retained an engineer who photographed and inspected the bicycle and generated a report concluding that the fork was negligently manufactured and designed. A preliminary conference order required the plaintiff to produce the bicycle for inspection by the defendants who manufactured, designed and distributed it. The plaintiff's original response to the order was incomplete, but a supplemental response noted that the bicycle was stolen from plaintiff's attorney's office one year prior to the action's commencement.

The trial court denied defendants' motions to dismiss the complaint pursuant to CPLR 3126, but the Second Department reversed "based on the plaintiff's negligent loss of a key piece of evidence which is crucial to the defense of this matter." *Id.* at 460, 790 N.Y.S.2d at 71. The court held that the photos and the engineer's report could not "adequately substitute for an inspection and testing of the bicycle by the defendants' own experts." *Id.* (citation omitted).

One wonders if the result in *Neal* would have been the same if, at the outset of the action, the plaintiff disclosed that the bicycle had been stolen. The decision in *Klein v. Seenauth*, 180 Misc.2d 213, 687 N.Y.S.2d 889 (N.Y. City Civ. Ct. 1999), presented a remarkably similar set of facts. In *Klein*, the court refused to dismiss the action and ordered a hearing to determine if, instead of dismissing the action, a monetary sanction should be levied against the plaintiff's lawyer, personally, for his misrepresentation regarding the existence of the bicycle that caused the injuries in that case. The *Klein* decision, while noting the conflicting approaches taken by the courts in spoliation cases, cited to an "abundant number" of cases that have denied sanctions where there is "insufficient evidence in the record of a wilful, contumacious or bad-faith failure to comply with discovery ...." *Id.* at 218, 687 N.Y.S.2d at 893.

The *Klein* court also based its holding on the principle that an attorney's neglect should not be visited on the client in the form of an outright dismissal of the action. That consideration may have been appropriate in *Klein*, where the

  

plaintiff was an infant. In *Neal*, the plaintiff was an adult, but the subject bicycle was actually stolen from his lawyer's office. The court dismissed the case even though there was no showing of wilfulness on the part of the plaintiff. The plaintiff in *Neal* may have been able to pursue a second case to obtain relief against his lawyer, assuming the lawyer failed to adequately safeguard the bicycle. *See* New York Rules of Professional Conduct, Rule 1.15 (c)(2) ("A lawyer shall ... identify and label ... properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable ...."). This assumption is warranted from the court's decision, which based the dismissal on a "negligent loss of a key piece of evidence." *Neal*, 15 A.D.3d at 460, 790 N.Y.S.2d at 71.

**C3126:9 Impact on Innocent Party.**

In cases in which there are multiple parties with, for example, A and B as co-defendants, it may happen that A will refuse disclosure while B participates in the process willingly. If a penalty, whether a default or otherwise, can be rendered against A without adverse effect on B, it should be imposed. But it should not be imposed if it will adversely affect the interests of the amenable B. In *Quintanilla v. Harchak*, 259 A.D.2d 681, 682, 686 N.Y.S.2d 854, 855 (2d Dep't 1999), the Second Department expressed this principle by observing that "[i]t is incumbent upon the trial court to protect the rights of any innocent party whose cause of action or defense would be unfairly impaired by the imposition of a CPLR 3126 penalty on another, contumacious party."

Such a situation appeared in *Rogonia v. Ferguson*, 52 Misc.2d 298, 275 N.Y.S.2d 195 (Sup. Ct., Westchester Co. 1966), where A was the driver, and could not be located, and B was the owner. The rendition of a default judgment in favor of the plaintiff against A would have been, in the court's view, unfair to B. The sanction was therefore denied. *See also Jardin v. A Very Special Place, Inc.*, 138 A.D.3d 927, 930, 30 N.Y.S.3d 270, 274 (2d Dep't 2016) (order of preclusion prohibiting third-party defendant from offering any testimony or evidence in the matter did not prohibit defendants from offering evidence, including an affidavit from the third-party defendant's president); *Quintanilla*, 259 A.D.2d at 682, 686 N.Y.S.2d at 855 (court refused to impose 3126 penalty on driver where codefendant owner would be harmed). Although not mentioned by the *Rogonia* court, an additional factor justifies its holding. Unless a disclaimer can be upheld, the default judgment against the driver, A, who is ordinarily an insured person under the policy, would enable the plaintiff to demand the proceeds of the insurance policy before the owner, B, has been given a chance to defend on the merits. Moreover, it is B who has paid the premiums on the policy and whose rates are sure to be affected by the judgment.

As discussed in Commentary C3126:4, above, the court can treat A, if and when A is found, as a nonparty witness in such a case, thus making the contempt remedy available against the defaulting A, against whom the civil sanctions of CPLR 3126 would no longer be meaningful because of the default. *See also Quintanilla*, 259 A.D.2d at 682, 686 N.Y.S.2d at 854-855 (affirming supreme court decision allowing plaintiff to pursue defaulting defendant with contempt proceedings and warrant of commitment and arrest).

Some recent caselaw from the First Department indicates that the courts may not be very sympathetic where an insurer, who is not a party to the action, will be the one harmed by a default rendered against its insured. In *Reidel v. Ryder TRS., Inc.*, 13 A.D.3d 170, 786 N.Y.S.2d 487 (1st Dep't 2004), two defendants disobeyed three successive court orders directing them to appear at a deposition. The Supreme Court denied plaintiffs' motion under CPLR 3126(3) to strike the defendants' answers, apparently because the defendants could not be located. The First Department reversed and granted a conditional order striking the answers. The defendants never offered a reasonable excuse for not appearing at the depositions and "[t]he fact that their whereabouts are unknown is no bar to plaintiffs' requested sanction." *Id.* at 171, 786 N.Y.S.2d at 488 (citation omitted).

The lawyer representing these two missing persons, apparently hired by an insurance company, alleged that a good faith effort had been made to locate their whereabouts. The lawyer failed, however, to submit an affidavit from the

  

investigator detailing the nature of his efforts to locate the defendants or any other particulars of the search. *See also Wong v. Kim*, 17 A.D.3d 128, 792 N.Y.S.2d 435 (1st Dep't 2005) (conditional order striking answer was proper where affidavits of attorney and investigators hired to locate defendant failed to demonstrate that an adequate search had been performed).

In both *Reidel* and *Wong*, it appears that an insurer, who is not a party to the action, is the real party in interest. A somewhat older case involving similar facts, *Heyward v. Benyarko*, 82 A.D.2d 751, 440 N.Y.S.2d 21 (1st Dep't 1981), delicately balances the interests of the insurer with those of the plaintiff in need of disclosure. The *Heyward* court concluded that "the real party in interest (presumably the insurance company) should [not] be precluded from defending the action if the client cannot be located." *Id.* at 751, 440 N.Y.S.2d at 22. The *Heyward* decision recited the fact that defense counsel made a good faith effort to locate the defendant through an investigator, a point emphasized in *Reidel*. The plaintiff in *Heyward* was, however, entitled to an order preventing the defendant from testifying at trial unless he submitted to a deposition. *See* CPLR 3126(2).

**C3126:10 Conditional Order under CPLR 3126.**

Since the court is empowered to make such orders "as are just" under CPLR 3126, and the sample orders listed in the statute are not exhaustive, it can make its order a conditional one. The conditional order is in fact the most popular disposition under CPLR 3126. A conditional order is one that grants the motion and imposes the sanction "unless" within a specified time the resisting party provides the disclosure. The new time period, set by the court in the order disposing of the 3126 motion, will usually run from the time a copy of the order is served on the recalcitrant party with notice of its entry. The order may itself set the time and place of the disclosure, or leave that to the movant, perhaps with only an outside date set as a warning to the resisting party.

While the conditional order is in fact the most popular disposition under CPLR 3126, it is not the only one. In *Fish & Richardson, P.C. v. Schindler*, 75 A.D.3d 219, 220, 901 N.Y.S.2d 598, 599 (1st Dep't 2010), the supreme court did not issue a conditional order, but rather unconditionally struck defendant's answer under CPLR 3126(3) after defendant refused to comply with numerous requests for disclosure and "multiple court orders ...." Defendant argued, without citing to any authority, that it was an abuse of discretion to strike the answer "in the absence of a conditional order or a specific warning by the court that he faced imminent dismissal." *Id.* at 222, 901 N.Y.S.2d at 600.

The First Department noted that CPLR 3126 permits the court to "make such orders ... as are just" and, therefore, "it may, in an appropriate case, determine that the pattern of noncompliance is so significant that a severe sanction is appropriate." *Id.* Given the defendant's "pattern of disobeying court orders and failing to provide discovery[,]" this was an appropriate case to issue an unconditional order of preclusion. *Id.* at 220, 901 N.Y.S.2d at 599. In sum, "defendant's continuing disregard of his discovery obligations warranted the court's striking the answer, and no further warning was required." *Id.* at 223, 901 N.Y.S.2d at 601. Furthermore, the court emphasized that "a penalty imposed pursuant to CPLR 3126 should not be readily disturbed absent a clear abuse of discretion[,]" which was not present under these facts. *Id.* at 222, 901 N.Y.S.2d at 600.

CPLR 3042(d), which supplies penalties for a party's willful failure to supply a bill of particulars, is somewhat more expansive in this regard. *See* Siegel & Connors, New York Practice § 241. It states that if a party "willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule, the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in [CPLR 3126]." CPLR 3042(d). This is an implied recognition of the fact that relief under CPLR 3126 need not always be conditional.

As has been discussed, in certain circumstances a motion can be made for a sanction under CPLR 3126 for the disobedience of a disclosure notice without an intervening application for an order under CPLR 3124 directing

  

disclosure. *See* Commentary C3126:6, above. The "willfully" disobeyed notice is a sufficient foundation. But if it is a mere notice rather than a disclosure order that grounds the CPLR 3126 motion, the disposition is all the more likely to be conditional. The imposition of an outright and unconditional penalty under CPLR 3126 is generally reserved for the disobedience of a disclosure order.

The conditional order concept strives to make but a single court application necessary. When a notice is disobeyed, for example, the seeking party will move under CPLR 3126 and, assuming the statute's standards are satisfied, that will be the only application needed. The theory is that, if the condition set down in the order disposing of the motion is not met, the sanction will automatically be visited upon the resister. That, however, is not always the case.

Frequently, the resisting party thinks it has some excuse for not carrying out the order and will assume that the sanction has not taken effect. Meanwhile, the seeking party will assume that the excuse has no merit and that the sanction is in force. Each one has a conflicting assumption and neither can safely go to trial with it. A subsequent court application is often necessary, therefore, either by the resisting party under CPLR 3103(a) to cancel the sanction, or by the seeking party to clarify that it is in force. When that occurs, it is plain that the conditional order under CPLR 3126 is no more economical than the procedure that first entails a motion under CPLR 3124 and then a motion under CPLR 3126, unless that procedure also requires a follow-up motion.

The Court of Appeals addressed the problem of self-executing conditional orders in its memorandum decision in *Wilson v. Galicia Contracting & Restoration Corporation*, 10 N.Y.3d 827, 860 N.Y.S.2d 417 (2008), involving a defendant's failure to comply with such an order. In *Wilson*, the infant plaintiff alleged he was seriously injured when a piece of material fell from a scaffold assembled by defendant and struck him in his left eye. Plaintiff commenced an action against the defendant and six others, asserting various theories of liability. The tale of delay in *Wilson* was a familiar one. Defendant failed to comply with plaintiff's formal and informal discovery demands and with the terms of a preliminary conference order. Upon plaintiff's motion, the supreme court issued a self-executing conditional order on May 14, 2002 directing defendants to comply with the disclosure requests by July 1, 2002, or have their answers stricken.

In its decision, the Court of Appeals noted that because defendant failed to comply with the conditional order, its "answer was stricken as of July 1, 2002." *Id.* at 829, 860 N.Y.S.2d at 418. This, in effect, left unrebutted plaintiff's assertion that the cause of his injury was "a dangerous, defective and/or unsafe condition" existing on defendant's premises, paving the way for a liability determination against the defendant. *Id.*

In August 2002, there was an interesting development in the case. At the request of another defendant, plaintiff produced the object that had been removed from his eye. That defendant's expert opined that the object appeared to be a lead air-gun pellet that was "fired into his eye by the power of an air gun." *Id.* Plaintiff thereafter discontinued his claims against the other six defendants with prejudice. In an order dated June 18, 2003, the supreme court granted plaintiff's motion for an inquest against the remaining defendant after denying that defendant's motion to dismiss.

During the next two years, defendant moved three times to vacate the order striking its answer and the order granting the inquest. Each application was denied, including a motion to set aside the order because it was procured by means of fraud, misrepresentation, or other misconduct. *See* CPLR 5015(a)(3); Siegel & Connors, New York Practice § 429. After an inquest on damages, the supreme court awarded the infant plaintiff $300,000 for past pain and suffering and $750,000 for future pain and suffering. The Second Department reduced the judgment by one-third, but otherwise affirmed.

The Court of Appeals affirmed. The Court declined to review defendant's argument that CPLR 3215(f), which requires "proof of the facts constituting the claim" on an application for a default judgment, rendered the judgment a nullity. *See* Siegel & Connors, New York Practice § 295. The defendant failed to preserve this argument in the courts below,

  

which placed it beyond the Court's reach. As for the conditional order, the Court noted it was "self-executing" and, therefore, defendant's failure to produce the requested items on or before July 1, 2002 rendered it "absolute." *Wilson*, 10 N.Y.3d at 830, 860 N.Y.S.2d at 419. The Court of Appeals also observed that the courts below correctly held that, because of this failure, defendant was precluded from introducing any evidence at the inquest tending to defeat the plaintiff's cause of action. Consequently, the Court concluded that the defendant was deemed to admit "all traversable allegations in the complaint, including the basic allegation of liability." *Id.*

The Court's 2008 decision in *Wilson* seemed to have a significant impact. Several appellate decisions have since concluded that conditional orders are self-executing and, if not satisfied, become absolute, paving the way for summary judgment against the recalcitrant party. *See, e.g., Sweney v. County of Niagara*, 122 A.D.3d 1432, 1433, 997 N.Y.S.2d 886, 887 (4th Dep't 2014); *Willis v. Keeler Motor Car Co.*, 121 A.D.3d 1373, 1374, 995 N.Y.S.2d 343, 345 (3d Dep't 2014); *AWL Industries, Inc. v. QBE Ins. Corp.*, 65 A.D.3d 904, 905, 885 N.Y.S.2d 71, 73 (1st Dep't 2009). While many courts had been hesitant to stand by conditional orders issued in response to a party's willful failure to comply with demands for a bill of particulars or disclosure, there were further indications from the Court of Appeals that the tide was turning in this area. *See Arts4All, Ltd. v. Hancock,* 54 A.D.3d 286, 863 N.Y.S.2d 193 (1st Dep't 2008) (affirming order striking pleadings issued under CPLR 3126(3) after parties "offered no excuse for their repeated noncompliance with the court's disclosure orders" and their conduct throughout the litigation had been " 'dilatory, evasive, obstructive and ultimately contumacious ....' "), *aff'd* 12 N.Y.3d 846, 881 N.Y.S.2d 390 (2009).

Yet in *Gibbs v. St. Barnabas Hospital*, 16 N.Y.3d 74, 917 N.Y.S.2d 68 (2010), the Court of Appeals expressed some ambivalence about strictly enforcing self-executing conditional orders. In a 4-3 decision, the *Gibbs* Court ruled that the trial court erred as a matter of law in excusing the plaintiff's failure to serve a supplemental bill of particulars before the deadline set by a conditional order of preclusion "without requiring plaintiff to establish both a reasonable excuse for his noncompliance and a meritorious cause of action." *Gibbs*, 16 N.Y.3d at 77, 917 N.Y.S.2d at 69. Therefore, the Court reversed the order of the First Department allowing the action to proceed and granted the motion of defendant to enforce the conditional order of preclusion and for summary judgment dismissing the complaint against him.

Nonetheless, the *Gibbs* holding improperly provides the recalcitrant party with one more bite at the apple to excuse compliance with a self-executing conditional order which, according to the Court's decision in *Wilson*, became absolute on the specified date if the condition had not been met. *Wilson*, 10 N.Y.3d at 830, 860 N.Y.S.2d at 419. The history in *Gibbs* and the numerous problems surrounding the enforcement of conditional orders is explored in detail in Patrick M. Connors, *CPLR 3126 Conditional Orders Requiring Disclosure 'Can't Get No Respect'*, 73 Alb. L. Rev. 853, 888 (2010). The inexcusable failure of the New York State courts to strictly enforce conditional orders, which in their own right are the product of repeated noncompliance, results in a significant drain of time and energy in litigation for the judge, the lawyers, and the litigants. *Id.*; *see* Commentary C3126:10A, below.

Regardless of a court's view on adhering to conditional orders, when the facts allow it, it's always the better practice for the party whose notice has been disobeyed to move directly under CPLR 3126 rather than 3124. The order threatening a sanction, even conditionally, is better than one which threatens no sanction at all.

If a conditional order has been made imposing the ultimate remedy of default against the resisting party, the seeking party who deems the condition breached can try, on affidavit proof of the subsequent default, to get a default judgment entered. *See* CPLR 3215; Siegel & Connors, New York Practice §§ 293-96. If the resisting party deems the condition met, this procedure may not do the job either. The application, which has to be on notice since the other side has appeared in the action, *see* CPLR 3215(g)(1); Siegel & Connors, New York Practice § 296, will likely be resisted and the matter will once again be brought to court through some procedural expedient, such as a motion to vacate the default judgment or to direct that the clerk not enter a default judgment in the first instance.

Other conditions to which the court may resort in making a CPLR 3126 order are discussed in ensuing Commentaries.

  

**C3126:10A Challenging a Conditional Order Imposed under CPLR 3126.**

While courts are now more willing to enforce the terms of a self-executing conditional order in the wake of the Court of Appeals holding in *Wilson*, many also grant the recalcitrant party one more bite at the apple, as demonstrated in the subsequent discussion of *Gibbs*. *See* Commentary C3126:10, above. Applying *Gibbs*, courts recognize that a party who fails to comply with a conditional order that has become "absolute" can still seek to escape the order's consequences by demonstrating both a reasonable excuse for the failure to comply with the order and a potentially meritorious claim or defense in the action. *See, e.g., Henry v. Lenox Hill Hosp.*, 159 A.D.3d 494, 73 N.Y.S.3d 147 (1st Dep't 2018); *Piemonte v. JSF Realty, LLC*, 140 A.D.3d 1145, 1146, 36 N.Y.S.3d 146, 148 (2d Dep't 2016). The Fourth Department has also held that a party who fails to comply with the terms of a conditional order can move under CPLR 5015(a)(1) to vacate the "default." *Lauer v. City of Buffalo*, 53 A.D.3d 213, 862 N.Y.S.2d 675 (4th Dep't 2008).

These appellate courts are providing the recalcitrant party with yet another opportunity to seek forgiveness for its sins. In the typical case in which a court issues a conditional order under CPLR 3126, a party: (1) has failed to comply with the initial disclosure demand, (2) has failed to comply with the movant's good faith effort to resolve the discovery dispute, *see* 22 N.Y.C.R.R. § 202.7; Siegel & Connors, New York Practice § 353, and (3) has failed to comply with a court's order under CPLR 3124 to provide the disclosure. The above decisions support the proposition that even after these three failures, and a court's subsequent determination on a contested CPLR 3126 motion that the failure to disclose was "willful," the disobedient party can still provide a "reasonable excuse" for the fourth dereliction, i.e., the failure to timely satisfy the conditional order.

In *Lauer*, the Fourth Department concluded that "a party who has failed to comply with a conditional order striking its answer as a discovery sanction pursuant to CPLR 3126(3) may seek relief from its default in failing to comply by a motion to vacate that order pursuant to CPLR 5015(a)(1)." *Lauer*, 53 A.D.3d at 214, 862 N.Y.S.2d at 676. This holding, while raising many questions, is an important one within the realm of penalties for disclosure abuses as it offers an additional opportunity for a recalcitrant party to set things right. Given the relatively large number of defaults entered on CPLR 3126 motions and the high stakes that accompany them, the alternative laid out in *Lauer* will likely be attempted with some frequency and is worthy of detailed examination.

In *Lauer*, plaintiff sued numerous municipal entities claiming false arrest, unlawful imprisonment, assault and battery, malicious prosecution, intentional infliction of emotional distress, and defamation. Several defendants failed to respond to her disclosure demands. Rather than moving pursuant to CPLR 3124 in the first instance, *see* Commentary C3126:6, above, plaintiff moved for an order striking these defendants' answers under CPLR 3126(3) or, in the alternative, a 30-day conditional order. The attorney representing the defendants at the time did not submit answering papers and did not appear at the oral argument of the motion, but subsequently requested in a letter that plaintiff's attorney " 'agree to a conditional 30-day order that will allow time for the substitution of counsel and the preparation of responses to your demands.' " *Lauer*, 53 A.D.3d at 314, 862 N.Y.S.2d at 676.

The supreme court ultimately issued a conditional order providing that unless the defendants produced the discovery responses within 30 days of service of the order with notice of entry, the defendants' answers would be stricken "without further order of this court." *Id*. at 215, 862 N.Y.S.2d at 676. Prior to the substitution of counsel, the conditional order was served on defendants' attorney, who failed to provide any disclosure responses within 30 days.

Approximately seven weeks after the conditional order took effect, the defendants' new attorney moved to be relieved from the default under CPLR 5015(a)(1), which allows a court to vacate a prior order or judgment entered upon a default "upon such terms as may be just." CPLR 5015(a)(1); *see* Siegel & Connors, New York Practice § 427. A motion under this provision requires a dual showing that: (1) there was a reasonable excuse for the default, and (2) the existence of a meritorious defense. *Id.* The supreme court, finding a reasonable excuse for the default and a

  

meritorious defense, granted the motion, reinstated the defendants' answer, imposed a monetary sanction, and ordered that the defendants provide discovery responses within two weeks.

Plaintiff appealed, contending that relief from the conditional order was not available pursuant to CPLR 5015(a)(1) and that defendants were required to appeal from the conditional order if they disputed the relief granted under CPLR 3126(3). Plaintiff relied on the Fourth Department's prior holding in *Banner Service Corporation v. Hall*, 185 A.D.2d 613, 587 N.Y.S.2d 872 (4th Dep't 1992), which concluded that while a judgment entered pursuant to a CPLR 3126(3) order is frequently characterized as a "default judgment," it is "directly appealable." *Id*. at 613, 587 N.Y.S.2d at 872. Furthermore, the *Banner* court observed that allowing a party who has defaulted in its disclosure obligations "to proceed by way of CPLR 5015(a)(1) would grant him an extension of time in which to appeal, a result anathema to the legislative intent of CPLR 5513[,]" the provision that establishes the time periods for taking an appeal. *Id*., 587 N.Y.S.2d at 873. Therefore, the Fourth Department concluded in *Banner* that the appropriate vehicle for challenging a default judgment entered pursuant to a CPLR 3126(3) order is an appeal, not a CPLR 5015 motion.

The conditional order in *Banner* provided that the plaintiff would be entitled to a default judgment if defendant failed to comply with its terms, but it is not clear from the opinion whether the defendant appeared in opposition to the CPLR 3126 motion. While CPLR 3126(3) allows the court to issue an order "rendering a judgment by default against the disobedient party[,]" the order and resulting judgment are not necessarily taken due to a default in appearance, but rather due to a default in complying with disclosure obligations. *See* Siegel & Connors, New York Practice § 427; Commentary C5015:6 (noting that "the imposition of a specific penalty under CPLR 3126(3), ... although captioned a 'default' by that provision, ... is not such for CPLR 5015(a)(1) purposes. What the latter contemplates is a situation in which the defendant has not yet been heard. In this case the defendant has had a full hearing, and if he was aggrieved by the disposition his obvious remedy was to appeal it.").

In *Lauer*, the Fourth Department abandoned the reasoning espoused in *Banner*, noting that when a motion is granted upon a default, the defaulting party is barred by CPLR 5511 from taking an appeal from the resulting order since, "having permitted the default to occur, the defaulter is not aggrieved by the occurrence." *See* Commentary C5511:1; Siegel & Connors, New York Practice § 525. *Lauer* similarly concludes that when a conditional order under CPLR 3126(3) is entered upon consent, the defendant is not aggrieved and, therefore, is precluded from taking an appeal. In both instances, the court concludes that the sole remedy for the defaulting party is a motion under CPLR 5015(a)(1) to vacate the order entered upon its default. Upon an examination of the merits of the CPLR 5015(a)(1) motion, the Fourth Department concluded that supreme court did not abuse its discretion in granting the motion to vacate the default as the defendants demonstrated a reasonable excuse for the default and a meritorious defense.

The *Lauer* court does, however, discuss and apparently agree with prior decisions holding that when a CPLR 3126(3) order striking the answer was obtained on a "noticed and contested motion[,]" relief under CPLR 5015(a)(1) is foreclosed because it " 'would permit relitigation of the very issue previously contested and decided, to wit, whether there was an excusable failure on [the] defendant's part to comply with the disclosure orders.' " *Lauer*, 53 A.D.3d at 216, 862 N.Y.S.2d at 677 (*quoting Pergamon Press v. Tietze*, 81 A.D.2d 831, 832, 438 N.Y.S.2d 831, 832 (2d Dep't 1981) ("Since the striking of defendant's amended answer and entry of the order and judgment followed a contest on the issue of whether the prior orders of the court were deliberately disobeyed, to permit defendant to obtain relief under CPLR 5015 (subd. [a], par. 1) would permit relitigation of the very issue previously contested and decided, to wit, whether there was an excusable failure on defendant's part to comply with the disclosure orders.").

The language of the opinion in *Lauer* leaves some doubt surrounding this conclusion. The *Lauer* court noted in dicta that "even where a motion for a conditional order to strike a pleading has been opposed, if the motion is granted and the conditional order by its terms is self-executing upon the failure to comply with its conditions, there likewise has been no opportunity to present an excuse for that default or a meritorious claim or defense, and thus there likewise is no record on those issues." *Lauer*, 53 A.D.3d at 216, 862 N.Y.S.2d at 678. The court appears to conclude that when

there has been no opportunity to explain the failure to comply with the conditional order, even after the conditional order is obtained on a contested motion under CPLR 3126(3), the recalcitrant party should be offered an additional opportunity under CPLR 5015 to explain the continued failure to comply with disclosure. *See, id.* at 214, 862 N.Y.S.2d at 676 ("The primary issue presented on this appeal is whether a party who has failed to comply with a conditional order striking its answer as a discovery sanction pursuant to CPLR 3126(3) may seek relief from its default in failing to comply by a motion to vacate that order pursuant to CPLR 5015(a)(1). We conclude that such relief is available ....").

For purposes of this discussion, we will assume that the holding in *Lauer* permits a party to resort to a motion under CPLR 5015(a)(1) to vacate an order entered under CPLR 3126(3) in three circumstances: 1) when that party defaulted in appearing on the CPLR 3126 motion, 2) when that party appeared and contested a CPLR 3126 motion, which resulted in a self-executing conditional order that was not fulfilled, or 3) when that party consented to the entry of a conditional order. These three scenarios are treated separately below.

**1) CPLR 5015 Motion after a Failure to Appear in Response to a CPLR 3126 Motion**

If a CPLR 3126 motion is met with no appearance in opposition, *Lauer* soundly concludes that relief from any order emanating from this default must be pursued through CPLR 5015's machinery. Technically, the "default" that must be excused in the context of a CPLR 5015 motion is the default in appearing in opposition to the motion that gave rise to the order, and not the default in complying with the disclosure required by the conditional order. If the court finds that there was a reasonable excuse for the failure to appear in opposition to the motion, and a meritorious defense to the action, it can then reexamine whether the relief granted under CPLR 3126(3), such as the imposition of a default judgment, should be vacated, now with the benefit of defendant's opposing papers.

The fact that the failure to appear in opposition to the motion is excused will not necessarily mean that the CPLR 3126 order should be vacated. In fact, it should be the rare case in which a motion under CPLR 5015(a)(1) will succeed in this context. Although the original order may have been granted without opposition, presumably the moving papers made the necessary showing that the party had "willfully" failed to provide disclosure and, therefore, that an award of sanctions under CPLR 3126(3) was appropriate. *See* Commentary C3126:7 ("Disobedience Must Be Shown Willful"), above. As a general rule, the courts do not grant this drastic form of relief lightly. *See, e.g.*, *Roman v. City of New York*, 38 A.D.3d 442, 443, 832 N.Y.S.2d 528, 529 (1st Dep't 2007) ("The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith."); *Cestaro*, 20 A.D.3d at 501-02, 799 N.Y.S.2d at 144 ("[T]he extreme sanction [under CPLR 3126(3)] ... is not warranted because it does not appear that the plaintiff willfully and contumaciously failed to appear for an examination before trial and provide complete responses to the discovery demands ..."); *cf. Liberty Taxi Management, Inc. v. Gincherman*, 32 A.D.3d 276, 820 N.Y.S.2d 49 (1st Dep't 2006) (failure of the opposing party to respond to a summary judgment motion does not mandate a grant of the motion); Siegel & Connors, New York Practice § 281. In most instances, it will be difficult for a party to convince the trial judge in a subsequent motion that the original finding of a willful failure to disclose, which triggered the sanction under CPLR 3126(3), should now be undone.

*Lauer* is precisely one of those rare cases, as the Fourth Department concluded that the trial court properly exercised its discretion in finding that "law office failure" was a reasonable excuse for both the failure to respond to plaintiff's CPLR 3126 motion and for the subsequent failure to timely comply with the conditional order. It must be stressed, however, that the excuse for the default proffered in *Lauer* in support of the CPLR 5015 motion, and accepted by the supreme court and the Fourth Department, is suspect and might not be persuasive in other cases. The Fourth Department noted that the defendants submitted the affidavit of their original attorney "in which he explained that his failure to respond to plaintiff's CPLR 3126(3) motion and his failure to comply with the conditional order in a timely manner were inadvertent and were due to the closure of his law office and his having taken a position with another firm." *Lauer*, 53 A.D.3d at 217, 862 N.Y.S.2d at 678. This, "together with the prompt motion of the NFTA defendants for relief, the absence of prejudice to plaintiff, and 'the strong public policy in favor of resolving cases on

  

the merits,' "convinced the Fourth Department that the supreme court did not abuse its discretion in determining that the defendants had established a reasonable excuse for their default. *Id*., 862 N.Y.S.2d at 678. It is important to note that several other courts have refused to find a "reasonable excuse" in similar circumstances. *See, e.g.*, *Huggins v. Parkset Supply, Ltd.*, 24 A.D.3d 610, 611, 807 N.Y.S.2d 112, 114 (2d Dep't 2005) ("[B]are allegations of incompetence on the part of prior counsel" are insufficient to establish an excusable default under CPLR 5015(a)(1)) (citations omitted); *Spatz v. Bajramoski*, 214 A.D.2d 436, 624 N.Y.S.2d 606 (1st Dep't 1995).

While the bounds of discretion are certainly wide, it is also difficult to reconcile *Lauer*'s conclusion in this regard with the Court of Appeals crusade against "sloppy practice." *Brill*, 2 N.Y.3d at 653, 781 N.Y.S.2d at 265; *see* Commentary C3126:8A, above. When addressing similar lapses by counsel in *Andrea*, the Court observed:

Supreme Court was of course correct in thinking it undesirable to punish plaintiffs for the failures of their counsel. But what is undesirable is sometimes also necessary, and it is often necessary, as it is here, to hold parties responsible for their lawyers' failure to meet deadlines. Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Kihl v Pfeffer*, 94 NY2d 118 [1999]).

*Andrea*, 5 N.Y.3d at 521, 806 N.Y.S.2d at 457.

**2) CPLR 5015 Motion by a Party Who Contested a CPLR 3126 Motion That Resulted in a Self-Executing Conditional Order That Was Not Fulfilled**

As noted above, the Fourth Department concluded in dicta that when there has been no opportunity to explain the failure to comply with a conditional order, even after it is obtained on a contested motion under CPLR 3126(3), the recalcitrant party should be offered an additional opportunity to explain the continued failure to comply with disclosure. There are also several statements in the *Lauer* opinion that support the proposition that a party may seek relief from the failure to comply with a conditional order through a CPLR 5015(a)(1) motion. *See, e.g.*, *Lauer*, 53 A.D.3d at 214, 862 N.Y.S.2d at 676 ("The primary issue presented on this appeal is whether a party who has failed to comply with a conditional order striking its answer as a discovery sanction pursuant to CPLR 3126(3) may seek relief from its default in failing to comply by a motion to vacate that order pursuant to CPLR 5015(a)(1). We conclude that such relief is available...."); *id.* at 215, 862 N.Y.S.2d at 677 ("We conclude that, where a pleading is stricken based on a self-executing conditional order, the appropriate vehicle for relief is a motion to vacate the conditional order pursuant to CPLR 5015(a)(1), not an appeal from the conditional order ...."); *id.,* at 217, 862 N.Y.S.2d at 678 ("[W]e conclude that the court properly granted the motion of the NFTA defendants for relief from their default in failing to comply with the conditional order striking their answer ....").

*Lauer* premises this conclusion on the fact that the party against whom the self-executing conditional order was entered "has had no opportunity to offer a reasonable excuse for the default" and has not "had the opportunity to establish a meritorious claim or defense, the additional prerequisite to relief under CPLR 5015(a)(1)." *Id*. at 216, 862 N.Y.S.2d at 677 (citation omitted). In reaching this conclusion, the *Lauer* court provides the recalcitrant defendant with yet another opportunity to seek forgiveness. As noted above, in the typical case in which a court issues a conditional order under CPLR 3126, a party: (1) has failed to comply with the initial disclosure demand, (2) has failed to comply with the movant's good faith effort to resolve the discovery dispute, and (3) has failed to comply with a court's order under CPLR 3124 to provide the disclosure. *See* Commentary C3126:10, above. While there is no indication in *Lauer* that the plaintiff moved under CPLR 3124 in the first instance, she apparently made a convincing showing in her CPLR 3126 motion that the defendants' failure to provide disclosure was willful.

*Lauer* supports the proposition that even after these three failures, and a court's subsequent determination on a contested CPLR 3126 motion that the failure to disclose was "willful," the disobedient party can still resort to CPLR

5015(a)(1) to provide a "reasonable excuse" for the fourth dereliction, i.e., the failure to timely satisfy the conditional order.

A party who has appeared in opposition to a motion under CPLR 3126 should not be permitted to contest the CPLR 3126 order through a CPLR 5015(a)(1) motion. Furthermore, that party should not be provided with an opportunity to excuse the failure to comply with the resulting conditional order through a motion under CPLR 5015. If a party is seeking to challenge the imposition of a CPLR 3126 order after a contested motion, the sole remedy should be an appeal from the order, or a motion for reagument or renewal pursuant to CPLR 2221. *See Clarke v. United Parcels Serv., Inc.*, 300 A.D.2d 614, 752 N.Y.S.2d 395 (2d Dep't 2002) (plaintiffs could not obtain relief under CPLR 5015(a)(1) where judgment dismissing their complaint based upon their failure to comply with a conditional order of preclusion was product of motion made on notice); *Achampong v. Weigelt*, 240 A.D.2d 247, 247-48, 658 N.Y.S.2d 606, 607 (1st Dep't 1997) ("Where, as here, a party appears and contests an application for entry of a default judgment, CPLR 5511, prohibiting an appeal from an order or judgment entered upon default, is inapplicable, and the judgment predicated upon the party's default is therefore appealable ....") (citation omitted); *Pinapati v. Pagadala*, 244 A.D.2d 676, 677, 664 N.Y.S.2d 161, 162 (3d Dep't 1997) (reversing supreme court's grant of CPLR 5015(a)(1) motion and noting that "where the default is predicated upon CPLR 3126, an appeal of that order or judgment is the proper and sole remedy for the defaulting party...."); *see also* John R. Higgitt, OUTSIDE COUNSEL, *Laxness Dismissal Survival Guide: Restoring Actions*, N.Y.L.J. Nov. 1, 2006, p. 5, col. 1 ("Relief pursuant to [CPLR 5015] should only be available to a party who was not heard before the court acted. A party who contests a motion by submitting opposition papers or participating in oral argument may not move to vacate the resulting order.").

A motion for reargument will require the movant to establish that the court "overlooked or misapprehended" specific "matters of fact or law ... in determining the prior motion ...." CPLR 2221(d)(2). A motion for reargument, like the notice of appeal, must be served within thirty days of service of the order with notice of entry. CPLR 2221(d)(3). A motion for renewal must "be based upon new facts not offered on the prior motion that would change the prior determination or [must] demonstrate that there has been a change in the law that would change the prior determination ...." CPLR 2221(e)(2). While there is no specific time frame to move for renewal, the motion "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(3); *see* Siegel & Connors, New York Practice § 254 ("Motion to Reargue or Renew").

The standards outlined above for motions to reargue or renew, and the time frames governing these motions, are dissimilar to those governing motions to vacate under CPLR 5015(a)(1). As noted above, a motion to vacate under this provision requires a dual showing that: (1) there was a reasonable excuse for the default, and (2) the existence of a meritorious defense. CPLR 5015(a)(1). Furthermore, a motion to vacate under CPLR 5015(a)(1) can be made within a year from service of the order with notice of entry.

If, instead of attempting to challenge the CPLR 3126 conditional order itself, a party seeks the opportunity to excuse the failure to timely comply with the terms of the order, that can be accomplished on a motion under CPLR 2004. *See* Siegel & Connors, New York Practice § 6. One of the most commonly cited provisions in civil practice, this provision allows the court to "extend the time fixed by any ... order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." CPLR 2004. For example, if a party encounters unforeseen difficulties and is unable to timely assemble and forward the documents necessary to comply with a 30-day conditional order, it could make a motion to the court that issued the order and seek an extension of the period within which to comply. CPLR 2004 even allows the motion for an extension to be made after the expiration of the relevant time period. *See* Siegel & Connors, New York Practice § 6.

A party moving under CPLR 2004 must demonstrate "good cause" warranting the extension, and the caselaw interpreting the statute instructs courts to consider factors such as the length of delay, the reason given for the delay, any prejudice to opposing parties caused by the delay, whether the moving party was in default before seeking the

  

extension, law office failure, and whether an affidavit of merit was proffered. *See, e.g.*, *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 12-13, 550 N.Y.S.2d 572, 577 (1989); *In re Estate of Burkich*, 12 A.D.3d 755, 755, 785 N.Y.S.2d 137, 138 (3d Dep't 2004); *Saha v. Record*, 307 A.D.2d 550, 551, 762 N.Y.S.2d 693, 695-96 (3d Dep't 2003); *see also Grant v. City of New York*, 17 A.D.3d 215, 217, 793 N.Y.S.2d 35, (1st Dep't 2005); Patrick M. Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, 71 Brook.L.Rev. 1529, 1557-58 (2006). While some of the factors to be considered on a motion under CPLR 2004 overlap with those to be considered on a motion to vacate under CPLR 5015(a)(1), the scope of the inquiry under CPLR 2004 is far broader.

As noted above, if the party defaulted on the motion and can convince the court, after a showing of a reasonable excuse and a meritorious defense, that the conditional order should be vacated, that relief would be appropriate under CPLR 5015. Furthermore, a CPLR 5015(a) motion should be available in those situations in which the movant reasonably contends that the conditional order issued on a prior CPLR 3126 motion has been satisfied and, therefore, that any default judgment entered should be vacated. *See* Commentary C3126:10, above. CPLR 5015 should not, however, be available to seek relief from an admitted failure to comply with a conditional order. *Andrea*, 5 N.Y.3d at 520, 806 N.Y.S.2d at 456 (to allow plaintiffs to proceed with the litigation, after they failed to comply with numerous orders compelling disclosure, "would be to convert the dismissal itself into just one more opportunity to try again--and plaintiffs have already had at least as many opportunities to try again as they could reasonably expect").

**3) CPLR 5015 Motion after a Movant Has Consented to the Entry of a CPLR 3126 Conditional Order**

*Lauer* also concluded that when a CPLR 3126(3) conditional order is entered upon consent, the defendant is not aggrieved and, therefore, is precluded from taking an appeal. Therefore, *Lauer* appears to hold that the sole remedy for challenging a CPLR 3126 conditional order entered on consent is through a CPLR 5015(a)(1) motion to vacate.

When a party stipulates to the entry of an order on a motion, it is generally precluded from appealing that order because it cannot demonstrate that it is "aggrieved." *See* CPLR 5511; *Matter of Forbus v. Stolfi*, 300 A.D.2d 852, 752 N.Y.S.2d 158 (3d Dep't 2002), *appeal dismissed* 99 N.Y.2d 642, 643, 760 N.Y.S.2d 92, 92 (2003) (appeal from Family Court's order, which was entered upon consent, was dismissed because "appellant is not an aggrieved party within the meaning of CPLR 5511"); *Sterling v. Dyal*, 52 A.D.3d 894, 860 N.Y.S.2d 234 (3d Dep't 2008) (no appeal lies from an order entered on consent of the appealing party); Siegel & Connors, New York Practice § 525.

While an order entered on consent may not be appealable, that does not inexorably lead to the conclusion that it can be challenged on a CPLR 5015(a)(1) motion. If a party has consented to the entry of an order on a motion, it will likely be unable to establish a necessary prerequisite to a motion under CPLR 5015(a)(1): a default in appearance. *Eagle Ins. Co. v. Soto*, 254 A.D.2d 483, 679 N.Y.S.2d 621 (2d Dep't 1998) (where movant failed to refute contention that it not only appeared at the framed issue hearing before the referee, but also that its attorney conceded coverage of the allegedly offending vehicle, a motion to vacate a default was not an available form of relief).

It is difficult to ascertain whether the order entered by the supreme court in *Lauer* was on consent. After failing to appear in opposition to the motion, but before entry of the conditional order, the defendants' attorney did request that plaintiff's attorney agree to a 30-day conditional order. This was precisely the order subsequently entered by the supreme court, but there is no indication it was entered upon a stipulation of the parties. In any event, the Fourth Department's opinion in *Lauer* notes that its holding that conditional orders entered on default can only be contested by a motion to vacate the default "applies equally where a conditional order is entered upon the consent of the appealing party." *Lauer*, 53 A.D.3d at 215, 862 N.Y.S.2d at 677.

**C3126:11 Exacting Costs and Attorney's Fee as Sanction.**

  

In making such orders under CPLR 3126 "as are just," the court is not limited to the remedies listed in the numbered paragraphs of the section. As noted above, it can take any other reasonable course consistent with the demands of the case and the purpose of CPLR 3126. *See* Commentary C3126:10, above.

One course is to deny an otherwise meritorious CPLR 3126 motion for a listed sanction on the condition that the recalcitrant party or attorney pay to the seeking party the costs of bringing the motion and/or an attorney's fee to compensate the seeking party for the time and effort expended by its lawyer in seeking a disclosure that should not have required court application at all. Such power is within the court's arsenal under the flexible CPLR 3126.

The party who has been relieved of a civil sanction, such as an outright default under CPLR 3126, and directed instead to pay attorneys' fees to the seeking party, can deem itself fortunate. It seems most unwise to appeal such a disposition on the theory that the court lacks power to impose such a money punishment. Even though the argument is devoid of merit under caselaw discussed below, the appellant runs the risk that the appellate court will agree, canceling the attorneys' fee as beyond the court's power, but imposing instead the more drastic remedy of a civil default, which is explicitly among the court's powers under CPLR 3126. Thus, in any instance where the disobedience has been such as to justify one of the listed penalties of CPLR 3126, the resister is lucky to get off with paying only costs and attorneys' fees.

Nonetheless, early in the life of the CPLR, appeals were taken from such dispositions, not just to review the discretion exercised by the trial court, but apparently on the further ground that the court lacked power to impose such an attorney's fee at all. *See*, *e.g.*, *Di Bartolo v. American & Foreign Ins. Co.*, 26 A.D.2d 992, 275 N.Y.S.2d 805 (2d Dep't 1966) (the appellant was lucky: the decision was affirmed); *see also Sutton v. Cobb*, 50 A.D.2d 995, 377 N.Y.S.2d 236 (3d Dep't 1975) (trial court properly exercised its discretion under CPLR 3126 in awarding costs and attorneys' fees).

The supreme court's decision in *Di Bartolo*, 48 Misc.2d 843, 265 N.Y.S.2d 981 (Sup. Ct., Suffolk Co. 1966), was one of the trendsetters. The First Department had established in *Nomako v. Ashton*, 22 A.D.2d 683, 253 N.Y.S.2d 309 (1964), that costs and attorneys' fees may be imposed in lieu of an expressly listed civil sanction under CPLR 3126, but *Nomako* was a lonely decision on that point for a time. *Di Bartolo* followed suit in January of 1966, and its affirmance by the Second Department in November of 1966, *see* 26 A.D.2d 992, 275 N.Y.S.2d 805 (2d Dep't 1966), overruled contrary holdings in that department and began a uniform trend. *Nomako* applied the fee sanction against the defendant, *Di Bartolo* against the plaintiff. Between them the sanction is shown to be available for either side. The fee, plus costs, in *Di Bartolo* was $100; in *Nomako* the fee and costs totaled $250. The dollar in those early years obviously had more value. It takes more dollars to do the job today, and the figures in more recent years are often in the thousands rather than in the hundreds.

The rule is ensconced in all departments today that costs and attorneys' fees, as set by the court, are a fair exaction from a party who has generated unnecessary effort by the other side in seeking court assistance with disclosure when it should not have been necessary. *See, e.g., Maxim, Inc. v. Feifer*, 161 A.D.3d 551, ___ N.Y.S.3d ___ (1st Dep't 2018) ("Plaintiffs' discovery abuses warrant the imposition of a $10,000 monetary sanction pursuant to CPLR 3126."); *Knoch v. City of New York*, 109 A.D.3d 459, 970 N.Y.S.2d 270 (2d Dep't 2013). The monetary imposition is usually an adjunct of the conditional order: the resister is precluded, or defaulted, etc., "unless," within X days, the disclosure is forthcoming and the resister pays Y dollars to the other side.

**3126 Money Sanction Distinguished from "Frivolity" Sanction**

In Part 130 of the Uniform Rules, which is the "frivolity" sanctions rule adopted in the late 1980s, it is explicitly provided that a money sanction may be imposed for a frivolous litigation practice. *See* 22 N.Y.C.R.R. § 130-1.1(a); Siegel & Connors, New York Practice § 414A. The sanctions offered by CPLR 3126, including the money punishments spelled out under its "such orders ... as are just" clause, are to be distinguished. CPLR 3126's sanctions

  

do not depend in any measure on frivolous conduct addressed by Part 130 and, therefore, are not subject to its restraints. They are an aspect of the court's powers that become activated when a party is in default, with a default for nondisclosure under CPLR 3126 being one example. Positioned to grant an outright default against the party, the court can excuse the default conditionally, and the condition can include a money sanction. That's what is happening under CPLR 3126 when the court elects to excuse the default, but makes the party pay something to balance the equation. Therefore, when costs and attorney's fees are imposed as a sanction under CPLR 3126, the court is not required to make a finding that the conduct is "frivolous" under Part 130. *See* 22 N.Y.C.R.R. § 130-1.1(a); *Maxim*, 161 A.D.3d at 554, ___ N.Y.S.3d at ___; *Vandashield Ltd. v. Isaacson*, 146 A.D.3d 552, 555, 46 N.Y.S.3d 18, 24 (1st Dep't 2017) (court imposed sanctions on defendants (as opposed to their counsel) pursuant to both CPLR 3126 and Part 130; "[t]o the extent sanctions were imposed pursuant to the former, the court was not required to find that defendants' behavior was frivolous ....").

**Money Sanction Against Government Lawyer**

A monetary sanction under CPLR 3126 may be imposed on the lawyer or client, whoever the court finds guilty of the recalcitrant conduct. This is also true under Part 130 of the Uniform Rules. *See* 22 N.Y.C.R.R. § 130-1.1(b); Siegel & Connors, New York Practice § 414A. All lawyers in the case are subject to monetary sanctions under CPLR 3126, including those representing government agencies. In one case, for example, a money sanction was imposed on an assistant attorney general for misconduct in respect of disclosure. *Kulers v. State*, 141 Misc.2d 1079, 535 N.Y.S.2d 931 (Ct. Cl. 1988). The attorney had refused to submit two state troopers to a deposition unless the claimant was excluded from the deposition room. This was found to be "willful beyond reason" and CPLR 3126 sanctions of $137.50 for a stenographic fee and $150 for an attorney's fee were imposed and made payable to the claimant's lawyer. *Id.* at 1086, 535 N.Y.S.2d at 935. A "government agency" and its attorneys are also subject to sanctions under Part 130. *See* Siegel & Connors, New York Practice § 414A.

**C3126:12 Other Conditions and Penalties.**

The flexibility of CPLR 3126 that opened the door to the imposition of attorneys' fees in lieu of applying a specifically listed sanction can be cited to support the imposition of other conditions and penalties. As demonstrated in the cases allowing attorneys' fees, the fees are not all that is allowable. *See* Commentary C3126:11, above. Statutory costs may be included, as may the costs and disbursements of an appeal and disbursements for referee and court reporter fees. These are only illustrative. The emerging rule should permit as a monetary sanction any actual and reasonable expense to which the seeking party has been put because of the adverse party's willful refusal to disclose.

It is even permissible for the court, in a conditional order under CPLR 3126 giving a resisting defendant a new opportunity to disclose, to require the defendant to file a bond to secure the plaintiff in some phase of the litigation, or, indeed, to cover the potential recovery on the merits. *Bredin v. Buchman*, 32 A.D.2d 518, 298 N.Y.S.2d 748 (1st Dep't 1969).

The courts need not deem themselves restricted to the remedies already devised by decisional law. CPLR 3126 designs to leave the matter in the court's hands, which constitutes an invitation to the court to shape a penalty in each case to its own particular facts.

In *CDR Créances S.A.S. v. Cohen*, 23 N.Y.3d 307, 991 N.Y.2d 519 (2014), the Court affirmed an order imposing civil procedure's version of the death penalty: a striking of the pleadings and the imposition of a default judgment as prescribed in CPLR 3126(3). This severe sanction was imposed on a finding, "by clear and convincing evidence," that defendants had engaged in conduct that constituted a fraud on the court. *Id.* at 311, 991 N.Y.2d at 522.

  

*CDR* was an extreme case involving egregious conduct by several defendants in two New York State court actions seeking to recover the proceeds of a loan agreement that were wrongfully diverted and concealed. The defendants were accused of perjury, witness tampering, and falsification of documents. During the discovery phase of the New York action, the federal government arrested two of the defendants and charged them with tax evasion and conspiracy to commit fraud on the New York courts. The allegations in the criminal action included forging documents and suborning perjury at depositions in the New York action which corroborated their own perjurious testimony. The defendants were convicted of tax evasion in federal court and were sentenced to ten years in prison.

After defendants were sentenced, the plaintiff moved for an order under CPLR 3126(3) to strike defendants' pleadings and for a default judgment based on the fact that the defendants perpetrated a fraud on the court. The trial court conducted a full evidentiary hearing during which much of the testimony from the federal criminal action was repeated, including the allegations of suborning perjury at several depositions. Based on the proof submitted, supreme court determined that plaintiffs established by clear and convincing evidence that defendants had perpetrated a fraud on the court and granted plaintiff's motion, basing its authority on the court's inherent power to take action to preserve the integrity of the judicial process. The First Department affirmed.

The Court of Appeals noted that in addition to the sanctions under CPLR 3126, "a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice." *Id.* at 318, 991 N.Y.2d at 527. These types of actions constitute a "[f]raud on the court" and "involve[ ] wilful conduct that is deceitful and obstructionistic" and that "injects misrepresentations and false information into the judicial process 'so serious that it undermines ... the integrity of the proceeding.' " *Id.* (citation omitted). Relying on several federal decisions, the Court ruled that a party seeking to strike an adverse party's pleading based on a claim of fraud on the court must demonstrate by clear and convincing evidence "that the offending 'party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action.' " *Id.* at 320, 991 N.Y.S.2d at 529 (citation omitted).

The Court concluded that the record before it supported the existence of such evidence as to all but one defendant, whose statements and denials during the disclosure process "were not central to the success of the scheme to hide information from the court and the plaintiff." *Id.* at 324, 991 N.Y.S.2d at 532. As to the other defendants, the record contained "numerous instances of perjury, subornation of perjury, witness tampering and falsification of documents by defendants." *Id.* at 323, 991 N.Y.S.2d at 530. Therefore, the Court affirmed the order striking the answers of those defendants and entering a default judgment against them.

While the *CDR Créances* Court cites to CPLR 3126, and contains a brief discussion of the statute, the relief afforded appears to lie under the distinct inherent power of the courts to impose appropriate sanctions in actions involving a fraud on the court. Therefore, we suspect that the decision will have little impact on the more common issues arising under CPLR 3126, where a party has failed to obey an order requiring disclosure. While many actions in which CPLR 3126 sanctions are imposed involve lazy, neglectful, or dilatory conduct, they thankfully do not involve fraud.

That observation raises another issue. If the motion for sanctions is based solely on the authority of CPLR 3126, it would not appear that the "clear and convincing" standard articulated by the Court in *CDR Créances* need be met. On such a motion, the movant should be able to satisfy her burden by establishing through a preponderance of the evidence that the opponent "refuse[d] to obey an order for disclosure or wilfully fail[ed] to disclose information which the court finds ought to have been disclosed ...." CPLR 3126. Moreover, a party's compliance with a court order pertaining to disclosure will be a cut and dry issue in most cases involving a motion under CPLR 3126. In those cases in which a motion under CPLR 3126 does not present a straightforward violation of a court's order, one would hope that a movant will not be held to a standard requiring clear and convincing evidence of a refusal to comply.

  

**C3126:13 Statute of Limitations and Res Judicata Issues Resulting from CPLR 3126 Dismissal**

When the complaint is dismissed under CPLR 3126 for the plaintiff's refusal to make required disclosure, the question arises whether the plaintiff will be entitled to the six-month period offered by CPLR 205(a) for a new action. CPLR 205(a) supplies that gift when the earlier action was dismissed without reaching the merits, but it excepts, among other things, a "dismissal ... for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise ...." The formal dismissal for neglect to prosecute results from the defendant's motion for that specific relief under CPLR 3216. *See* Siegel & Connors, New York Practice § 375. But several other categories of dismissal, carrying other captions, have also been held to qualify as a "dismissal ... for neglect to prosecute" under the "or otherwise" language in CPLR 205(a) and therefore don't qualify for the six-month extension. *See id.* at § 52. The courts had been ambivalent about whether a dismissal under CPLR 3126 qualified as one for "neglect to prosecute" under CPLR 205(a), thereby preventing the plaintiff from obtaining the statute's 6-month gift. The issue was resolved in *Andrea v. Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects*, 5 N.Y.3d 514, 806 N.Y.S.2d 453 (2005), with bad news for plaintiffs. Some background here is appropriate.

The composition of the New York Court of Appeals at the beginning of the twenty-first century demonstrated conviction in their position that statutes, court rules, and orders can rarely be ignored without significant consequences. One could trace the Court's crusade to eradicate sloppy practice back to the 1999 decision in *Kihl*, 94 N.Y.2d 118, 700 N.Y.S.2d 87. *See* Commentary C3126:8A, above. In *Kihl*, Chief Judge Kaye authored a unanimous opinion concluding that the trial court did not abuse its discretion in ultimately dismissing plaintiff's complaint under CPLR 3126 for failure to serve responses to interrogatories as required by a preliminary conference order. The plaintiff was given several opportunities to comply with the order, but ultimately failed to do so. In affirming the appellate division's dismissal of the complaint in this "all too familiar" scenario, the Court noted that "when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint." *Kihl*, 94 N.Y.2d at 122, 700 N.Y.S.2d at 90 (citation omitted).

A remarkably similar set of facts, with an interesting procedural twist, appeared on the Court's docket in the fall of 2005. In *Andrea*, sixty plaintiffs commenced four lawsuits against more than twenty defendants alleging that they had been injured by toxic substances released during defendants' renovation of a school. *Andrea*, 5 N.Y.3d at 518, 806 N.Y.S.2d at 454. Despite the serious nature of these lawsuits, plaintiffs failed to comply with at least four deadlines imposed by scheduling orders and orders entered in response to motions to dismiss the actions. The Supreme Court gave plaintiffs four separate chances to provide the required disclosure, and ultimately dismissed the actions when none of the deadlines were satisfied. Relying on *Kihl*, a case virtually on all fours, the Fourth Department unanimously affirmed the dismissal. *Andrea v. E.I. Du Pont De Nemours & Co.*, 284 A.D.2d 921, 725 N.Y.S.2d 904 (4th Dep't 2001), *lv. denied* 731 N.Y.S.2d 136 (4th Dep't 2001).

The procedural twist occurred when thirty-four of the same plaintiffs brought two more actions based on the same events as the four suits previously dismissed by supreme court. They did so in reliance on one of the last refuges of the scoundrel, CPLR 205(a). The *Andrea* Court, resolving a conflict that had existed in the caselaw, in broad terms held that the "dismissal of an action for failure to comply with discovery orders is a dismissal 'for neglect to prosecute the action' within the meaning of CPLR 205(a)." *Andrea*, 5 N.Y.3d at 518, 806 N.Y.S.2d at 454. Therefore, the six-month extension was not available in these two actions. After recounting the plaintiffs' "ongoing laxity" in the prior actions, the Court held that "[t]he plain purpose of excluding actions dismissed for neglect to prosecute from those that can be, in substance, revived by a new filing under CPLR 205(a) was to assure that a dismissal for neglect to prosecute would be a serious sanction, not just a bump in the road." *Andrea*, 5 N.Y.3d at 521, 806 N.Y.S.2d at 456-57. Acknowledging that it is "undesirable to punish plaintiffs for the failures of their counsel," the Court observed that "what is undesirable is sometimes also necessary," and dismissed the second set of actions. *Id.*, at 521, 806 N.Y.S.2d at 457. Citing to *Kihl*, the Court repeated its clarion call that "[l]itigation cannot be conducted efficiently if deadlines are not taken seriously, and ... disregard of deadlines should not and will not be tolerated." *Id.* (citation omitted).

  

The fact pattern in *Andrea* is not the only one that can lead to a dismissal under CPLR 3126. There has been a proliferation of orders within actions that pertain to disclosure. For example, pursuant to Uniform Rule section 202.12, which governs preliminary conferences, the parties frequently enter into a timetable for disclosure that is reduced to the form of a stipulation and order. 22 N.Y.C.R.R. § 202.12(b); *see* Siegel & Connors, New York Practice § 77D. If a party violates such an order by failing to meet disclosure deadlines and the case is ultimately dismissed on these grounds, a strong argument can be made that, under *Andrea*, this is a dismissal for neglect to prosecute and may not be entitled to the benefits of CPLR 205(a).

The disclosure time frames in a case management order and scheduling order were disregarded in *Andrea*, but the trial court initially denied the motion to dismiss based on these failures. In an outpouring of generosity, the court extended those deadlines on four separate occasions. It was only after this fourth set of deadlines was breached that the Supreme Court dismissed the action. What if a court dismissed the action after only two sets of deadlines were missed?

The failure to satisfy deadlines in a case management order or scheduling order will normally be challenged by an adversary through a motion pursuant to CPLR 3126. There would be no requirement to move under CPLR 3124 in the first instance because either of these orders will normally qualify as "an order for disclosure" under CPLR 3126. *See* Commentary C3126:5, above. The court will not impose a sanction under CPLR 3126, however, unless the party's failure to disclose can be shown to be willful. *See* Commentary C3126:7, above.

There is no reference to CPLR 3126 in the Court's decision in *Andrea*, but it is likely that defendant's three separate motions to dismiss were based on this statute. As noted above, the trial court was very patient, granting four separate extensions of deadlines for disclosure, and then only dismissing after plaintiffs failed to comply with a conditional order. *Andrea*, 5 N.Y.3d at 518, 806 N.Y.S.2d at 455. Therefore, the willfulness required under CPLR 3126 was certainly present in *Andrea*. Another court might not be so patient and, in the spirit of the Court of Appeals' crusade against sloppy practice, could grant a motion to dismiss after two or three deadlines have expired. Would a dismissal under these facts be justified?

The court is vested with broad discretion on a motion under CPLR 3126, a point the Court of Appeals has stressed on more than one occasion. *See*, *e.g.*, *Kihl*, 94 N.Y.2d at 122, 700 N.Y.S.2d at 90; Commentary C3126:8, above. In *Kihl*, the Court expressly stated that "when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint." *Id.*

The combination of *Kihl* and *Andrea* is a frightening one for lawyers who habitually fail to adhere to disclosure deadlines. *Kihl* holds that the judge has the discretion under CPLR 3126 to dismiss the complaint of a party who has willfully failed to provide disclosure. Moreover, if such a finding is made at the trial level, there are scant grounds for a reversal. *See* Commentary C3126:8, above. That limits the option of a successful appeal. On another front, *Andrea* holds that a case dismissed for failure to comply with disclosure orders is not entitled to CPLR 205(a)'s six-month extension to start over again. Therefore, unless it is an extremely rare situation in which the statute of limitations has not expired on the claim, the prospect of starting all over again is not available.

Less than three years after *Andrea* was handed down, CPLR 205(a) was amended, effective July 7, 2008, adding a new final sentence providing that:

Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

  

This requirement is an odd one and its placement in Article 2 of the CPLR, which pertains to the statute of limitations, is perplexing. CPLR 205(a) does not provide grounds for moving to dismiss an action if there has been a neglect to prosecute and, in most instances, it is doubtful that a judge's attention will be drawn to this provision on such a motion.

While the new language added to CPLR 205(a) does not specifically refer to dismissals under CPLR 3126(3), it applies to any dismissal for neglect to prosecute under CPLR 3216 "or otherwise." Therefore, the new requirement was likely intended to apply to the full panoply of dismissals grounded upon a neglect to prosecute, including those based on a failure to comply with disclosure. *See* Siegel & Connors, New York Practice § 52 (discussing a battery of provisions in the CPLR and Uniform Rules that can lead to a dismissal for "neglect to prosecute"). After the Court's holding in *Andrea*, a dismissal under CPLR 3126(3) is most certainly a dismissal "for neglect to prosecute" under CPLR 205(a).

If a party is moving under CPLR 3126(3) for an order dismissing the complaint based on a failure to comply with disclosure, she should remind the judge that in addition to seeking an order of dismissal, she is requesting that the judge outline: 1) "the specific conduct constituting the neglect" and, 2) plaintiff's "general pattern of delay in proceeding with the litigation." CPLR 205(a); *see Lopez v. State*, 2008 WL 4239017 (Ct. Cl. 2008) (decision handed down shortly after amendment to CPLR 205(a) setting forth new requirements on the record in case dismissed for neglect to prosecute under CPLR 3216). That should not be a difficult task because the moving papers on a meritorious motion under CPLR 3126(3) must, in any event, establish that the plaintiff or defendant "willfully" failed to provide disclosure. *See, e.g.*, *BDS Copy*, 123 A.D.3d at 1257-58, 999 N.Y.S.2d at 237 (in affirming order dismissing complaint under CPLR 3126, court noted that "the record demonstrates '[a] pattern of noncompliance' sufficient to support Supreme Court's finding that plaintiffs' conduct was willful ...."); *Roman*, 38 A.D.3d at 443, 832 N.Y.S.2d at 529 ("The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith."); *see also* Commentary C3126:7, above. The "specific conduct constituting the neglect" and plaintiff's "general pattern of delay in proceeding with the litigation" will almost certainly follow from the finding that the "failure to disclose was wilful, contumacious or in bad faith ...." In this respect, the 2008 amendment to CPLR 205(a) does not affect the Court of Appeals ruling in *Andrea*, but merely imposes an additional technical requirement on the trial court if it grants a CPLR 3126 motion to dismiss.

In the typical case in which a court orders a dismissal under CPLR 3126, a party has: (1) failed to comply with the initial disclosure demand, (2) failed to comply with the movant's good faith effort to resolve the discovery dispute, *see* 22 N.Y.C.R.R. § 202.7; Siegel & Connors, New York Practice § 353, (3) failed to comply with a court's order under CPLR 3124 to provide the disclosure, and (4) failed to comply with a 30 or 60-day conditional order. *See generally*, Patrick M. Connors, *CPLR 3216 Conditional Orders Requiring Disclosure "Can't Get No Respect' "*, 73 Alb. L. Rev. 853 (2010) (discussing steps that lead to issuance of CPLR 3126 conditional order). Therefore, it is difficult to conceive of an action properly dismissed pursuant to CPLR 3126 that will not also provide a basis for the court to outline the new requirements in CPLR 205(a). If a judge cannot set forth "specific conduct constituting the neglect" and plaintiff's "general pattern of delay in proceeding with the litigation," the case is most probably not a candidate for dismissal under CPLR 3126. CPLR 205(a). The case may, however, warrant the imposition of other penalties under CPLR 3126.

Assume the trial court dismissed the case under CPLR 3126(3), but failed to outline the "specific conduct constituting the neglect" and plaintiff's "general pattern of delay in proceeding with the litigation." CPLR 205(a). Could the omission be corrected on appeal? We think so. If the plaintiff appealed from the dismissal of the action and the appellate court deemed that the relief under CPLR 3126(3) was appropriate, it could set forth the additional detail required in CPLR 205(a) in its order of affirmance. CPLR 205(a) states that a judge who dismisses a case for neglect to prosecute "*shall set forth on the record* the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." CPLR 205(a) (emphasis added). The failure to comply with this mandate can be treated like any other error at the trial level and corrected on appeal. In this instance, the prevailing party should appeal or cross appeal, claiming that she is aggrieved by the trial court's failure to set forth

the new requirements of CPLR 205(a) on the record. *See* Siegel & Connors, New York Practice § 525 (discussing situations in which a prevailing party may still be aggrieved in some respect).

Alternatively, the prevailing party should make a motion for reargument and respectfully remind the trial court that it overlooked the requirement to set forth the "specific conduct constituting the neglect" and plaintiff's "general pattern of delay in proceeding with the litigation," as prescribed by CPLR 205(a). *See* CPLR 2221(d) (detailing requirements for motion for reargument); Siegel & Connors, New York Practice § 254.

Strangely, these questions arising from the amendment to CPLR 205(a) will all likely be issues for another judge at another time. The court assigned to hear the new action commenced after the statute of limitations has expired, and relying on CPLR 205(a)'s indulgence, will need to determine if "the record" in the prior action that was dismissed for neglect to prosecute sufficiently states "specific conduct constituting the neglect" and plaintiff's "general pattern of delay in proceeding with the litigation." If the record in the prior action satisfies these requirements, the plaintiff should be collaterally estopped from arguing that the prior court erred in making its determination. Any argument in that regard should be raised by a motion for reargument or appeal in the prior action. *See* Siegel, *Amendment Bars "Neglect to Prosecute" Dismissal*, N.Y.L.J., September 15, 2008, p. 4 ("If the first court clearly found a 'general pattern of delay', however, and recited as much on the record, it would apparently be binding on the second court as res judicata and make the CPLR 205(a) six months unavailable."). If the record in the prior action does not satisfy these requirements, the second court will also be obligated to ascertain if the omission opens the door to the six-month gift in CPLR 205(a).

In *Stora v. City of New York*, 24 Misc.3d 906, 879 N.Y.S.2d 904 (Sup. Ct., New York Co. 2009), plaintiff's original action was dismissed after plaintiff failed to oppose the defendants' motions to dismiss based on plaintiff's alleged failure to comply with disclosure orders. Although plaintiff moved to vacate the order, the motion was denied "due to the failure of any party to appear for oral argument." Plaintiff commenced a new action against the defendants, raising the same claim asserted in the prior action, relying on the six-month extension in CPLR 205(a). Defendants moved to dismiss the second action on statute of limitations grounds, claiming that plaintiff was not entitled to the six-month extension in CPLR 205(a) because the first action was dismissed based on a "neglect to prosecute." *See Andrea*, 5 N.Y.3d 514 at 518, 806 N.Y.S.2d at 454. Plaintiff countered that, based on the 2008 amendment to CPLR 205(a), it was entitled to the extension because the trial court's order dismissing the first action did not "set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." CPLR 205(a).

The supreme court in *Stora* observed that if, in lieu of instituting a new action, plaintiff made a second application to vacate the order entered on default dismissing action number 1, "he would have been required to demonstrate the usual requirements of excusable neglect and the existence of a meritorious claim." *Stora*, 24 Misc.3d at 908, 879 N.Y.S.2d at 906; *see* CPLR 5015(a)(1); Siegel & Connors, New York Practice § 427; *see, e.g., Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986) (noting that a motion under CPLR 5015(a)(1) requires a dual showing that: (1) there was a reasonable excuse for the default, and (2) the existence of a meritorious defense).

In *Stora*, the second action commenced pursuant to CPLR 205(a) was coincidentally assigned to the same judge who adjudicated the original action, a practice apparently common in some counties. The judge acknowledged that he dismissed the original action without making any finding of a pattern of delay under CPLR 205(a), but concluded that "a judge hearing the second action can review the record of the initial action to determine such issue when no adjudication thereon was made in that action." After examining the papers submitted on the various motions made in the first action, the court concluded that it "does not appear that plaintiff's defaults were wilful or in bad faith and rose to the level of conduct that warrants the type of sanction imposed in *Andrea*." Therefore, the court denied defendants' motion to dismiss the second action based on the statute of limitations and concluded that the CPLR 205(a) six-month extension was available to plaintiff.

  

The holding in *Stora* is troubling for several reasons. The court dismissed the first action based on plaintiff's default in failing to oppose motions seeking dismissal arising out of plaintiff's alleged failure to comply with discovery orders. Although this relief may have been granted without opposition, presumably the moving papers made the necessary showing that the plaintiff had "willfully" failed to provide disclosure in response to discovery orders and, therefore, that an award of sanctions under CPLR 3126(3) was appropriate. *See* Commentaries C3126:7 and C3126:10A, above. As a general rule, the courts do not grant this drastic form of relief lightly. *See, e.g., Roman*, 38 A.D.3d at 443, 832 N.Y.S.2d at 529 ("The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith."); *Cestaro v. Chin*, 20 A.D.3d 500, 799 N.Y.S.2d 143 (2d Dep't 2005) ("[T]he extreme sanction [under CPLR 3126(3)] ... is not warranted because it does not appear that the plaintiff willfully and contumaciously failed to appear for an examination before trial and provide complete responses to the discovery demands....").

Nonetheless, the court saw fit to reexamine the basis for the dismissal of the first action pursuant to CPLR 3126(3) and concluded that it did "not appear that plaintiff's defaults [in the first action] were wilful or in bad faith...." *Stora*, 24 Misc.3d at 909, 879 N.Y.S.2d at 906. If that is so, it may very well be that the order dismissing the first action was not properly granted because, as the caselaw in the preceding paragraph demonstrates, a dismissal under CPLR 3126(3) should only be awarded if a party willfully fails to comply with a disclosure order. The method for challenging the determination in the first action should not, however, be through a second action commenced pursuant to CPLR 205(a). Rather, plaintiff should be required to move to vacate the default in the original action and, if such motion is unsuccessful, appeal the denial of the motion to vacate. *See* Commentary, C3126:10A, above; Siegel & Connors, New York Practice § 525.

The holding in *Stora* also stands for the proposition that a dismissal of an action under CPLR 3126(3) does not necessarily constitute a dismissal for "neglect to prosecute." Citing the Second Department's 2007 decision in *Daluise*, 40 A.D.3d 801, 837 N.Y.S.2d 175, the court noted that "whether delinquent conduct by a party warrants a conclusion that dismissal was for neglect to prosecute depends on the facts of the case." In the Court of Appeals decision in *Andrea*, however, the opening paragraph states unequivocally "that dismissal of an action for failure to comply with discovery orders is a dismissal 'for neglect to prosecute the action' within the meaning of CPLR 205(a)." *Andrea*, 5 N.Y.3d at 518, 806 N.Y.S.2d at 454. To the extent that the decisions in *Daluise* and *Stora* stand for the proposition that certain dismissals under CPLR 3126(3) constitute a dismissal for "neglect to prosecute," while others do not, they appear to be contrary to the holding and spirit of *Andrea*.

Furthermore, the *Stora* court concluded that a judge hearing the second action commenced pursuant to CPLR 205(a) can review the record of the initial action, even if the decision, order, and/or judgment in the prior action is silent on the point, and determine if the plaintiff engaged in "conduct constituting ... neglect ... demonstrat[ing] a general pattern of delay in proceeding with the litigation." CPLR 205(a). That will prove to be problematic, and possibly chaotic, especially if the judge assigned to the case commenced under CPLR 205(a) is not the same judge who dismissed the prior action. Given New York's venue rules, which generally allow the plaintiff to commence the action in any county in which a party resides or where the claim accrued, there will be many instances in which a judge entertaining the second action is a complete stranger to the first. *See* CPLR 503(a) (containing venue rules); Siegel & Connors, New York Practice § 118. It will often be difficult and impractical for that judge to ascertain whether the conduct in the prior action fell within the "neglect" standards set forth in the amended CPLR 205(a). *See* "The 'General Pattern Of Delay' Amendment of CPLR 205(a): If Judge Dismissing Earlier Action Didn't Consider It Neglect to Prosecute, Plaintiff does Get Six Months of CPLR 205(a) for New Action," 210 Siegel's Practice Review 1 (2009) (describing the holding in *Stora*, Professor Siegel notes that "[h]ere the fact that judge two and judge one are the same may make that step possible, but wouldn't it be awkward at best for the second judge to do that when the judges are not the same? Is the whole record in the first action to be submitted to the judge in the second? Is that permissible?").

  

The lawyer moving to dismiss an action based on any form of neglect to prosecute must foresee that CPLR 205(a) may offer an opportunity to recommence the action after the dismissal and should request that the judge make specific findings regarding neglect in an attempt to put an end to the litigation. An article in the New York Law Journal discusses several provisions under which a plaintiff's claim can be dismissed for neglect to prosecute and whether such dismissals normally involve conduct constituting neglect and a "general pattern of delay in proceeding with the litigation." CPLR 205(a); *see* Patrick M. Connors, "A Second Bite at the Apple Under CPLR 205(a) Extension," N.Y.L.J., Sept. 20, 2010, at 3. In this regard, the *Stora* decision contains some sage advice for defendants moving under any statute or rule that could result in a dismissal for "neglect to prosecute":

any defendant concerned about a plaintiff obtaining the benefit of a section 205(a) extension after a dismissal on any grounds that could be deemed to be a neglect of prosecution would be wise to request at the time of dismissal that the court issue an adjudication on the issue of general delay.

*Stora*, 24 Misc.3d at 910, 879 N.Y.S.2d at 907.

It may be, however, that a case dismissed for neglect to prosecute that does not contain the required findings should not open the door for a second action under CPLR 205(a). The plain language of the statute has always denied the six-month extension to any action so dismissed. The 2008 amendment adding a new last sentence to CPLR 205(a) might be construed to facilitate appellate review of the dismissal of the prior action. If the original action is dismissed based on a neglect to prosecute, but the judge never sets forth the specific conduct constituting the neglect, it would seem that this type of error is more appropriately cured through a motion for reargument or appellate review in the original action.

There are certain decisions applying CPLR 205(a) that appear to depart from the reasoning and result in the Court of Appeals decision in *Andrea*. In *Daluise*, 40 A.D.3d 801, 837 N.Y.S.2d 175, for example, plaintiffs failed to comply with a preliminary conference order, several discovery demands by the defendant, and a stipulation regarding disclosure. The supreme court granted plaintiff's motion under CPLR 3126(3) to strike the complaint, but did not indicate whether the dismissal was on the merits. After unsuccessfully moving to vacate the order and for reargument, which required at least two separate motions and one appeal, plaintiffs commenced a second action that contained many of the same causes of action. The supreme court granted defendant's pre-answer motion to dismiss the second action on res judicata and statute of limitations grounds, *see* CPLR 3211(a)(5), rejecting the argument that CPLR 205(a)'s six-month grace period allowed a second action.

The Second Department reversed, holding that " '[w]here a plaintiff's noncompliance with a disclosure order does not result in a dismissal with prejudice, or an order of preclusion or summary judgment in favor of defendant so as to effectively close plaintiff's proof, dismissal resulting from the noncompliance is not a merits determination so as to bar commencement of a second action.' " *Daluise*, 40 A.D.3d at 802-03, 837 N.Y.S.2d at 177 (*quoting Maitland*, 65 N.Y.2d at 615-16, 491 N.Y.S.2d at 148). The appellate division concluded that the supreme court's order on the CPLR 3126(3) motion and its own order on appeal from that determination in the first action did not grant preclusion, but merely struck the complaint. *Id.* at 803, 837 N.Y.S.2d at 177. Therefore, the *Daluise* court reasoned, the doctrine of res judicata did not bar the second action because the dismissal of the first action was not on the merits and the plaintiff was entitled to implement CPLR 205(a). The court acknowledged *Andrea*, which held that dismissal of an action for failure to comply with discovery orders is a dismissal for neglect to prosecute within the meaning of CPLR 205(a), but concluded that plaintiff's conduct did not rise to that level. *Id.* at 804, 837 N.Y.S.2d at 178.

In *Aguilar v. Jacoby*, 34 A.D.3d 706, 827 N.Y.S.2d 77 (2d Dep't 2006), a case relied upon in *Daluise*, plaintiffs commenced an action against defendants for injuries arising from a motor vehicle accident. The defendants moved to dismiss the complaint under CPLR 3126(3) for plaintiffs' failure to comply with discovery requests and court orders. The supreme court dismissed the action after plaintiffs' default in opposing it. The plaintiffs moved to vacate the

  

default and successfully demonstrated a reasonable excuse for the default, but the court denied the motion based on their failure to establish the existence of a meritorious cause of action.

Resorting to CPLR 205(a), the plaintiffs timely commenced a second action during the next six months seeking the same relief that was the subject of the prior action. The defendants moved to dismiss the second action under CPLR 3211(a)(5) on the grounds of res judicata and collateral estoppel, but the court denied the motion because the prior action was not dismissed on the merits. The Second Department affirmed, concluding that:

[t]he dismissal of the prior action on the ground of noncompliance with discovery requests and certain court orders was not a determination on the merits so as to bar commencement of the instant action as the prior dismissal was not preceded by an order of preclusion and there was no indication that the dismissal was with prejudice.

*Aguilar*, 34 A.D.3d at 707, 827 N.Y.S.2d at 78 (citation omitted). In support of this conclusion, the court cited to CPLR 205(a) and several cases that predate the Court of Appeals pronouncement in *Andrea*. In addition, the court noted that an order entered upon a party's default in appearing in response to the CPLR 3126 motion is not upon the merits.

It is instructive to compare *Daluise* and *Aguilar* with the Second Department's 2006 decision in *Kalinka*, 34 A.D.3d 742, 827 N.Y.S.2d 75, a case handed down with *Aguilar*. In *Kalinka*, the supreme court dismissed the first action against the defendants after each was awarded an order of preclusion apparently under CPLR 3126(2). The supreme court concluded that the plaintiff in the first action had "willfully and contumaciously failed to comply with disclosure." *Id.* at 744, 827 N.Y.S.2d at 77. Plaintiff commenced a second action against the same defendants for the same relief, apparently relying on CPLR 205(a)'s six-month grace period. The Second Department concluded that the dismissal of the first action should be given res judicata effect, thereby requiring dismissal of the second action because of the unavailability of CPLR 205(a). Paradoxically, under *Kalinka*'s holding, a party moving pursuant to CPLR 3126 may be in a far better position if she obtains an order of preclusion under CPLR 3126(2) rather than an outright dismissal under CPLR 3126(3). *See* Commentary C3126:8, above.

It is difficult to reconcile the Second Department's holdings in *Daluise* and *Aguilar* with the Court of Appeals decision in *Andrea*. The generous gifts afforded by CPLR 205(a) are denied to cases that fall into one of four categories: (1) those terminated through voluntary discontinuance, *see* CPLR 3217, (2) those dismissed based on a lack of personal jurisdiction, (3) those terminating in a final judgment on the merits, which are barred by the doctrine of res judicata, and (4) those dismissed for a neglect to prosecute. *See* Siegel & Connors, New York Practice § 52. The third and fourth exceptions are the only ones pertinent to our discussion here. *Daluise*, *Aguilar* and *Kalinka* focus primarily on the third exception to CPLR 205(a), examining whether the first action was dismissed "on the merits," thereby invoking the doctrine of res judicata and precluding a second action. In this regard, *Daluise* correctly notes that the Court of Appeals previously held that when a plaintiff's noncompliance with a disclosure order does not result in a dismissal with prejudice, or an order of preclusion or summary judgment in favor of defendant so as to effectively close plaintiff's proof, the dismissal is not on the merits and does bar a second action under CPLR 205(a). *Maitland*, 65 N.Y.2d at 615-16, 491 N.Y.S.2d at 148.

There is a paradox built into this situation. The imposition of a preclusion order under CPLR 3126(2) can, as the court acknowledges in the *Maitland* decision, work the equivalent of a res judicata bar against a second action, while what is presumably the ultimate CPLR 3126 sanction--the outright dismissal under paragraph 3--may not. *See* Commentary C3126:8, above. It all depends, apparently, on what the dismissing judge intended the dismissal to be in the first action. If the dismissal was intended to be "with prejudice," or "on the merits," the judge should have said so. In *Maitland,* the judge didn't.

After *Andrea*, however, if a plaintiff's case has been dismissed pursuant to CPLR 3126 and she invokes CPLR 205(a) to commence a second action, she must overcome both the third and fourth exceptions listed above. The plaintiff must

  

prove that the dismissal of the first action was not on the merits and, additionally, that it was not based on a neglect to prosecute. As noted above, in *Andrea*'s opening paragraph, the court "hold[s] that dismissal of an action for failure to comply with discovery orders is a dismissal 'for neglect to prosecute the action' within the meaning of CPLR 205(a)." *Andrea*, 5 N.Y.3d at 518, 806 N.Y.S.2d at 454. In *Daluise*, plaintiffs' first action was dismissed, in part, for failing to comply with a preliminary conference order and a stipulation regarding disclosure, which may have been "so ordered" by the court. *See* CPLR 2104 (recognizing three types of stipulations, including agreements reduced to the form of an order and entered). Similarly, the CPLR 3126 dismissal in *Aguilar* was based in part on plaintiffs' failure to comply with "certain court orders." *Aguilar*, 34 A.D.3d at 707, 827 N.Y.S.2d at 78. Therefore, based on the holding in *Andrea*, it appears that the initial actions in *Daluise* and *Aguilar* were dismissed for neglect to prosecute.

The *Andrea* Court makes clear that the question of whether a prior dismissal is one for neglect to prosecute is generally a question of law and that an appellate court need not defer to a trial court's assessment in this regard. If a case is dismissed for failure to comply with discovery deadlines and court orders, the Court concludes:

> it is not acceptable to permit plaintiffs to start all over again, after the statute of limitations has expired. To countenance that result would be to convert the dismissal itself into just one more opportunity to try again-and plaintiffs have already had at least as many opportunities to try again as they could reasonably expect.

*Andrea*, 5 N.Y.3d at 521, 806 N.Y.S.2d at 456.

In both *Daluise* and *Aguilar*, plaintiffs were allowed the equivalent of a mulligan in the game of golf. They were permitted to commence a second action after their initial actions were dismissed under CPLR 3126 for failure to comply with disclosure requests and court orders. These decisions appear to conflict with the spirit of the Court of Appeals decision in *Andrea*, if not its holding.

The blockbuster amendment to CPLR 205(a) has presented many perplexing issues during its first decade. Given the large number of dismissals for "neglect to prosecute" in New York State courts, it is likely that judges will continue to grapple with the 2008 amendment to CPLR 205(a), at least until the Court of Appeals addresses it. While many of these dismissals fall under CPLR 3126(3), there are a number of other provisions that can result in death due to a neglect to prosecute. *See, e.g.,* CPLR 3216 (dismissal for failing to file and serve note of issue); CPLR 3404 (failure to restore case to trial calendar within a year after being marked "off" constitutes a "neglect to prosecute"); CPLR 3012(b) (dismissal for failure to timely serve complaint in response to demand); *see* Siegel & Connors, New York Practice § 52 (discussing several provisions in the CPLR and Uniform Rules that can lead to a dismissal for "neglect to prosecute"). Parties may find the caselaw addressing the application of CPLR 205(a) to dismissals under these other provisions to be of aid in determining the statute's application to a motion under CPLR 3126.

The above discussion, while certainly lengthy, contains a critically important lesson. Under the current state of the law, the lawyer who fails to adhere to disclosure deadlines is now in a very tight spot. The warning for the plaintiff's bar is that it is at best perilous to suffer a first-action dismissal with disclosure refusals on the assumption that CPLR 205(a) will offer salvation.

## LEGISLATIVE STUDIES AND REPORTS

According to the First Report, this section is based on Rule 37(b), Federal Rules of Civil Procedure, 28 U.S.C.A. Under § 299 of the civil practice act, if a party ignores a notice, his pleading may be stricken on motion. Under this section, the court will, on motion, make a conditional order that if the party does not appear or does not answer certain questions the penalties in (1) to (3) will automatically be visited upon him. No separate treatment of non-party witnesses is required since the general contempt power applies to them. Cf. Civ.Prac.Act §§ 299, 325; R.Civ.P. 9-a (last par.), 115(c), 137; Note, 7 Vand.L.Rev. 272 (1954).

  

Official Reports to Legislature for this section:

1st Report Leg.Doc. (1957) No. 6(b), p. 159.

5th Report Leg.Doc. (1961) No. 15, p. 479.

6th Report Leg.Doc. (1962) No. 8, p. 327.

Notes of Decisions (1743)

McKinney's CPLR § 3126, NY CPLR § 3126
Current through L.2021, chapters 1 to 313. Some statute sections may be more current, see credits for details.

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