

COMMERCIAL LITIGATION

Leveling the Playing Field for Chronic Non-Compliance

By Leo K. Barnes Jr.

In a recent column, we addressed recent Appellate Division authority concerning the ultimate sanction for failure to disclose, a CPLR 3126 Order striking a pleading. In December, the Court of Appeals issued *Gibbs v. St. Barnabas Hospital*, 2010 N.Y. Slip. Op. 09198 (2010) reversing a Supreme Court decision which refused to strike a pleading upon violation of the terms of a conditional order of preclusion. As per the authority cited in the January column, the result in *Gibbs* is hardly an anomaly; yet, *Gibbs* is significant for the court's recognition of the frustration that all members of the bar, litigants and the public encounter in response to "chronic" non-compliance. It provides additional guidance (and fodder) to counter non-cooperation, and the court's frustration is palpable:

The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago 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".

The factual background is straight forward. In June 2005, Gibbs commenced a medical malpractice action against the hospital and, *inter alia*, Dr. Vinces. In August 2005, Dr. Vinces served an answer and discovery demands. When no response followed, defense counsel for Dr. Vinces sent plaintiff's counsel a letter requesting compliance within 10 days, and another letter requesting compliance with some other outstanding discovery. Plaintiff failed to reply to either letter. Two additional letters demanding compliance followed on March 21 and May 26. Significantly, the *Gibbs* Court observed that plaintiff did not respond to any letter and did not request an extension of time to respond to the demands. Dr. Vinces moved to compel in June 2006 and, upon service of the bill of particulars in August 2006, withdrew the pending motion. The November 2006 Preliminary Conference Order directed plaintiff to serve a supplemental bill of particulars within 30 days; upon plaintiff's failure to do so, in January 2007, Dr. Vinces moved to strike pursuant to CPLR 3126. Supreme Court conditionally granted the motion on February 21, 2007, stating plaintiff would be barred from introducing evidence of the defendant's negligence if Plaintiff did not serve the supplemental Bill of Particulars within 45 days. Plaintiff failed to do so, and did not seek an extension of time or otherwise seek relief. In May 2007, Dr. Vinces moved to enforce the conditional order of preclusion and for summary judgment. Plaintiff served the supplemental bill of particulars in June 2007, approximately 75 days after the preclusion order deadline, and likewise served opposition to the motion,



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arguing that the plaintiff did not incur any prejudice in light of the fact that the supplemental bill of particulars had been served as of the return date of the motion, and likewise asserting that a reasonable excuse for the delay (law office failure) had been demonstrated; as for the meritorious defense, plaintiff asserted the motion to strike did "not suggest that plaintiff does not have a meritorious claim."

Supreme Court granted the motion, but only to the extent of imposing a \$500 sanction for the delay. The Appellate Division affirmed, concluding that the Supreme Court did not abuse its discretion in declining to enforce the conditional order of preclusion. Dr. Vinces appealed to the Court of Appeals.

The Court of Appeals observed that in order to obtain relief from a conditional order of preclusion, a party must show a reasonable excuse and meritorious defense, and noted that the Appellate Division "overlooked the two-part test in determining that Supreme Court's decision not to enforce the preclusion order was not an abuse of discretion warranting reversal. We certainly understand the Appellate Division's concern that courts be permitted to exercise discretion in their pre-trial management of their case-loads...."

But there is also a compelling need for courts to require compliance with enforcement orders if the authority of the courts is to be respected by the bar, litigants and the public.... [D]espite Dr. Vinces' written requests for compliance, plaintiff apparently ignored the applicable statutory time periods, without taking the simple step of contacting the opposing party to ask for an extension or seeking the assistance of Supreme Court to clarify or modify the requests.... Again,

no attempt was made to request an extension or seek some form of relief from the court prior to the expiration of time period set forth in the order.

The three justice dissent observed that the majority opinion effectively imposed a CPLR 3126 sanction despite the fact that the Supreme Court concluded that plaintiff's conduct was "dilatatory, but not intended and [did] not warrant the extreme measure of precluding." The Appellate Division likewise noted that absence of evidence to indicate that plaintiff's inaction was "willful, contumacious or the result of bad faith". The dissent concluded: "Thus, although the CPLR makes willfulness a prerequisite for preclusion, the majority here is imposing the sanction where there is an affirmed finding that Gibbs' behavior was not willful."

The *Gibbs*' progeny will reveal whether the dissent characterization that the *Gibbs*' majority goes so far as to effectively constitute a willfulness substitute is an accurate prediction. Nonetheless, *Gibbs* provides fodder to counsel seeking to level the playing field. Notwithstanding the fact that the Supreme Court found that the delay was not willful, the Court of Appeals nonetheless dismissed the claim. The opinion highlighted the fact that the plaintiff failed to respond to multiple letters requesting compliance with outstanding demands. The *Gibbs* Court recognized, and remedied, the universal frustration that judges, counsel and litigants encounter when cases stagnate due to unreasonable discovery delays. *Gibbs* levels the playing field by providing a basis for striking a pleading short of a willful noncompliance finding.

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