COMMERCIAL LITIGATION

The Ultimate Remedy for Willful Failure to Disclose

CPLR 3126(3)

By Leo K. Barnes Jr.

In two opinions issued on the same day this spring, the First and Second Departments continued a trend of affirming trial court rulings striking pleadings pursuant to CPLR 3126 once a willful failure to disclose is documented. Although the result is severe, both the trial and appellate courts are universally refusing to perpetually provide "one more chance" to comply with unqualified obligations to disclose.

The CPLR 3126(3) motion to strike a pleading is premised upon establishing a willful failure to disclose; obviously, a movant's regular and documented efforts to coax compliance must found the motion. Opposition to a CPLR 3126 motion is often premised upon a misunderstanding regarding disclosure obligations, arguing that violation of an order to disclose, or violation of a conditional order of preclusion, must serve as a predicate for a 3126 motion. To the contrary, the relevant and controlling authority explicitly confirms that striking a pleading is permissible even when no prior court order is violated. In *Wolfson v. Nassau County Medical Center*,[1] after an extensive failure to respond to defendant's first set of interrogatories, defendant moved pursuant to CPLR 3126. *Despite the fact that the plaintiff's failure to respond did not violate any prior court order*, the Second Department affirmed the CPLR 3126 dismissal and denied a subsequent motion by Plaintiff to reargue and vacate:

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A court may dismiss an action if the plaintiff "willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126). **The sanction of dismissal may be warranted even where, as in the present case, the plaintiff committed no violation of a prior court order** (*see, Goldner v. Lendor Structures,* 29 A.D.2d 978, 289 N.Y.S.2d 687; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 7B, CPLR C3126:6, at 645-646).

In the present case, **the extensive nature of the plaintiffs' delay in responding to the defendant's interrogatories permits an inference that the delay was willful**. The plaintiffs' current attorneys allege absolutely no excuse for this delay and state only that they were not substituted for the plaintiffs' former attorneys until after, or shortly before, the defendant made the motion pursuant to CPLR 3126. This circumstance neither explains nor excuses the unconscionable delay in prosecuting this action. **The default can therefore be considered willful and no error as a matter of law was committed when the Supreme Court imposed the sanction of dismissal**.

Furthermore, we find that the refusal of the court to exercise its discretionary power to impose a lesser sanction (*see, e.g., Applied Elec. Corp. v. City of New York [Museum of Natural History],* 101 A.D.2d 795, 476 N.Y.S.2d 323) was neither abusive nor improvident [emphasis added].

In that same vein, Justice Kaye, writing for a unanimous majority in *Kihl v. Pfeffer*,[2] (which affirmed the dismissal of a complaint for failure to respond to interrogatories) confirmed as follows:

If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders * * * as are just," including dismissal of an action (CPLR 3126). **Finally, 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** [emphasis added].

Five years later, again writing for the majority, Justice Kaye ruled in *Brill v.*

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City of New York[3] that statutory deadlines, like court orders, cannot be ignored without significant consequences.

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The First Department's decision in *Fish & Richardson P.C. v. Schindler*[4] rejected the "one more chance" argument as a basis for an abuse of discretion reversal.

Defendant argues that it was an abuse of discretion for the court to strike the answer in the absence of a conditional order or a specific warning by the court that he faced imminent dismissal. **Defendant points to no authority holding that a court must issue such a "last chance" warning or order in all cases before exercising its discretion to strike a pleading**. CPLR 3126 permits the court to "make such orders ... as are just," and it may, in an appropriate case, determine that the pattern of noncompliance is so significant that a severe sanction is appropriate. Such a determination should not be set aside absent a clear abuse of discretion (*see Arts4All,* 54 A.D.3d at 286, 863 N.Y.S.2d 193) [emphasis added].

The Second Department's opinion in *Xiao Yang Chen v. Fischer*[5] was also premised upon a CPLR 3126 motion after plaintiff's spoliation of evidence violated several orders to disclose (ruling that the Supreme Court improvidently exercised its discretion in denying that branch of the defendant's motion which was to dismiss certain other personal injury causes of action after the plaintiff willfully defied discovery orders by deleting from her computer's hard drive materials that she had been directed to produce).

Compilation Should Start at Engagement

It is good practice to ready the client for disclosure obligations at the time that counsel is engaged by the party for representation. An overview of the anticipated discovery proceedings (documented in a follow up letter) will avoid unnecessary delays. Explain to the client that inasmuch as certain deadlines for production will be imposed by the court, counsel must impose ancillary obligations upon the client so that production obligations are achieved on a timely and proactive basis. After the Supreme Court struck the defendant's answer in *Fish & Richardson* the client attempted to turn the table on his former counsel by blaming the former counsel for the disclosure failure. To his credit, former counsel successfully avoided criticism for failure to disclose because counsel documented his effort to encourage the client to comply with the disclosure obligations.

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1 141 A.D.2d 815, 530 N.Y.S.2d 27 (2nd Dep't 1988).
2 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).
3 2 N.Y.3d 648, 781 N.Y.S.2d 261 (2004).
4 75 A.D.3d 219, 901 N.Y.S.2d 598 (1st Dep't 2010).
5 73 A.D.3d 219, 901 N.Y.S.2d 598 (2nd Dep't 2010).