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Recent Imposition of Sanctions Ensuring Compliance With NY Discovery Rules

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Any client who has found themselves in litigation has undoubtedly heard from their counsel that compliance with discovery obligations is paramount. Several recent decisions, including by the First Department, emphasize the importance of faithfully adhering to those obligations and highlight courts' willingness to impose sanctions in the face of noncompliance.

This article provides an overview of the rules that authorize courts to impose sanctions and examples of courts employing this power, particularly via monetary fines and other penalties, to deter discovery violations.

Section 3126 of the Civil Practice Law and Rules (CPLR) requires litigants to faithfully obey court's disclosure orders and produce material or relevant information. It also provides the court with broad discretion to impose sanctions and penalties on those who fail to comply with discovery demands and engage in obstructive or dilatory tactics. *See Cobo v. Pennwalt Corporation Stokes Division*, 185 A.D.3d 650, 652 (2d Dep't 2020); *see also Pfeiffer v. Shouela*, 206 A.D.3d 941, 942 (2d Dep't 2022).

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The range of permissible sanctions is broad: from preclusion of favorable evidence to imposition of adverse inference instructions to striking pleadings. CPLR §3126. In assessing whether to impose sanctions, courts consider a party's refusal to obey a disclosure order or any "willful or contumacious" failure to disclose requisite information. *Pezzino v. Wedgewood Health Care Center*, 175 A.D.3d 840, 841 (4th Dep't 2019).

"Willful and contumacious" conduct may be inferred by the repeated failure to respond to

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discovery demands or comply with discovery orders (awarding a $3,000 award to plaintiffs due to defendant's repeated failures to comply with discovery demands, despite plaintiff's own discovery violations).

Courts aim to impose sanctions proportionate to the misconduct. *See M.F. ex rel. Durivage*, 217 A.D.3d 103, 107 (3d Dep't 2023) ("In determining the appropriate sanction, courts should consider the facts on a case-by-case basis, balancing the strong public policy favoring resolution of cases on the merits with the court's interest in ensuring efficient litigation through court orders, deadlines and sanctions."); *see also Aldo v. City of New York*, 210 A.D.3d 833, 834 (2d Dep't 2022) ("Actions should be resolved on their merits whenever possible, and the drastic remedy of striking a pleading or the alternative remedy of precluding evidence should not be employed without a clear showing that the failure to comply with court-ordered discovery was willful and contumacious.").

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As such, courts often find that monetary sanctions can compensate litigants for time and costs incurred in connection with another party's failure to comply with court-ordered disclosures. *See, e.g.*, *Knoch v. City of New York*, 109 A.D.3d 459 (2d Dep't 2013) (increasing a sanction from $100 to $2,500 due to defendant's delay of over three years in producing crucial evidence); *Messer v. Keyspan Energy Delivery,* 56 A.D.3d 738, 738-39 (2d Dep't 2008) (upholding a monetary sanction resulting from defendant's failure to make witnesses available for depositions, notwithstanding later substantial compliance with discovery obligations).

Riverside Center Site 5 Owner v. Lexington Insurance, 225 A.D.3d 574 (1st Dep't 2024), provides a recent instance in which the First Department upheld the imposition of monetary sanctions pursuant to CPLR §3126.

Even though plaintiff produced approximately 19,000 responsive communications, it failed to produce 17 related material documents central to the parties' dispute. Plaintiff offered no explanation—let alone a reasonable excuse—for their failure to disclose the documents. *Riverside Center Site 5 Owner v. Lexington Insurance,* No. 650043/2019, 2023 N.Y. Slip Op. 32429(U) at *2-3 (Sup. Ct. N.Y. Cnty. July 17, 2023), *aff'd in part, modified in part*, 225 A.D.3d 574 (1st Dep't 2024).

Indeed, plaintiff offered no evidence as to where the subject records were kept, what efforts (if any) were made to access them or even whether searches were conducted in the location the records were ultimately found. *Riverside Center Site 5 Owner v. Lexington Insurance*, No. 2023-03596, 2024 WL 1706942, at *21 (Sup. Ct. N.Y. Cnty. Jan. 31, 2024), *aff'd in part, modified in part*, 225 A.D.3d 574 (1st Dep't 2024).

Thus, the First Department agreed with the trial court's assessment of the severity of the violation, the plaintiff's malintent and the actual harm caused by the failure to disclose these documents. And plaintiff's absence of an explanation suggested willful and intentional withholding, thereby warranting sanctions.

Thus, litigants should be mindful that they need to be able to explain their efforts to comply with their discovery obligations or risk a finding that their failure to disclose materials was willful and intentional.

Not only can courts use CPLR §3126, but they also have additional discretion to impose sanctions through section 130-1.1 of the New York Rules of the Chief Administrator of the Courts (22 NYCRR), which authorizes the imposition of costs and attorney's fees for litigants and attorneys who engage in "frivolous conduct." *150 Centreville v. Lin Associates Architects,* 39 Misc. 3d 513, 529 (Sup. Ct. Queens Cnty. 2013), *aff'd*, 151 A.D.3d 912 (2d Dep't 2017).

Conduct is considered frivolous if it is (1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false. 22 NYCRR §130-1.1.

Courts will assess the time available for investigating the legal or factual basis of the conduct and whether or not the conduct was continued when its lack of basis was apparent, should have been apparent or was brought to the attention of counsel or the party. 22 NYCRR §130-1.1(c); *Finkelman v SBRE, LLC*, 71 A.D.3d 1081 (2d Dep't 2010). And, under CPLR §3126 and 22 NYCRR §130-1.1, courts can award attorney's fees or sanctions against either a party or counsel even sua sponte. 22 NYCRR § 130-1.1; *see also Pellegrino v. Salzberg*, 270 A.D.2d 470 (2d Dep't 2000) (affirming a court may impose CPLR §3126 sanctions sua sponte).

Indeed, on the very same day it issued its decision in *Riverside*, the First Department upheld the imposition of 22 NYCRR §130-1.1 sanctions on defendants who delayed the disclosure of damaging documents. The First Department agreed that the failure to include these documents on a privilege log and the absence of a clawback provision in the confidentiality order underscored defendants' willful noncompliance. *Lis v. Lancaster*, Nos. 650855/2019, 595376/2019, 2023 N.Y. Slip Op. 30117(U), 4 (Sup. Ct. N.Y. Cnty. Jan. 12, 2023), *aff'd, appeal dismissed*, 225 A.D.3d 568 (1st Dep't 2024). But even though plaintiffs sought to strike the pleadings, the court determined that this behavior warranted an award of costs incurred in connection with prior discovery motions.

The First Department agreed and emphasized that such a drastic remedy would go too far but did impose costs and attorney's fees as appropriate penalties for frivolous conduct.

Courts expect parties to recognize the importance of complying with their discovery obligations. Not only do courts expect compliance, but they will impose sanctions—effectively assuming the worst—if a party does not provide an adequate explanation for its failure to produce the required documents. And if courts view a party's conduct as demonstrating a pattern of noncompliance, evasiveness or an intention to obstruct the discovery process, harsher penalties may be warranted.

Therefore, though courts may only resort to the most severe sanctions when absolutely necessary, litigants must remain vigilant in their discovery efforts to avoid the pitfalls of noncompliance or risk being punished as willfully disobedient.