CPLR 3126 CONDITIONAL ORDERS REQUIRING DISCLOSURE "CAN'T GET NO RESPECT"

*Patrick M. Connors**

Any person reading this piece who reached the age of majority by 1980 surely remembers the great Rodney Dangerfield, with eyes bulging and legs shuffling, constantly tugging on his trademark red tie. He worked as a singing waiter, but was fired. He gave up show business for a career as an aluminum siding salesman. He accomplished so little in the trade that, after he quit, he recounted that he was the only one who knew he quit.

He eventually gave show business another try in the 1960s and became a huge success. Remember the one he told about the doctor who slapped his face when he was born? Then there was his old man, who never took him to the zoo. He told Rodney: "If they want you, they'll come and get you." Then there was his wife. When he told her that they needed a home improvement loan, she offered $1,000 and told him to move out.

As Mr. Dangerfield would surely agree, he got no respect!

Sadly, in the realm of New York civil procedure, the same can be said of conditional orders requiring disclosure. They've been issued in the New York State court system on countless occasions for the

* Patrick M. Connors is a Professor of Law at Albany Law School where he teaches a two-semester course in New York Practice and various courses in professional responsibility. He is the author of the McKinney's Practice Commentaries for CPLR Article 31 (Disclosure), and Articles 21 through 30 (forthcoming). He is also the author of the New York Practice column and the annual Court of Appeals Roundup on New York Civil Practice, which are both published in the New York Law Journal. He is a member of the Office of Court Administration's Advisory Committee on Civil Practice.

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last half-century, even before the enactment of the CPLR, to help light a fire under a party who has refused to provide disclosure or a bill of particulars. The conditional order's aim is to provide the recalcitrant party with one last chance to supply the requested disclosure and allow the case to proceed on the merits before penalties, such as the striking of a pleading or preclusion, are imposed. Too often, however, the New York State courts allow serial delay to persist even after the issuance of a conditional order and open up the doors to permit a party who has failed to comply with the order's terms an additional opportunity to set things right.

In *Kihl v. Pfeffer*, writing for a unanimous Court, former Chief Judge Judith Kaye declared 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."[1] She went on to observe 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."[2] Although these principles have since been repeated by the Court of Appeals in several important decisions that, read together, constitute as a crusade against sloppy practice,[3] New York courts still frequently forgive a party's failure to comply with a conditional order. As demonstrated below, this culture of leniency regarding the enforcement of conditional orders foments needless motion practice and causes prolonged delay in the prosecution of actions.

Despite the willingness of New York courts to forgive a party's

[1] 94 N.Y.2d 118, 122, 722 N.E.2d 55, 58, 700 N.Y.S.2d 87, 90 (1999) (citation omitted).

[2] *Id.* at 123, 722 N.E.2d at 58, 700 N.Y.S.2d at 90.

[3] *E.g.*, Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C., 5 N.Y.3d 514, 521, 840 N.E.2d 565, 569, 806 N.Y.S.2d 453, 457 (2005) (noting, in a case in which several deadlines and a conditional order were not satisfied, that "[l]itigation 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"); Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725, 726–27, 819 N.E.2d 995, 996, 786 N.Y.S.2d 379, 380 (2004) (citing to *Kihl* the Court observed that "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"); Brill v. City of N.Y., 2 N.Y.3d 648, 653, 814 N.E.2d 431, 435, 781 N.Y.S.2d 261, 265 (2004) (noting that untimely motions for summary judgment are "another example of sloppy practice threatening the integrity of our judicial system"). Professor David D. Siegel has frequently referred to the Court of Appeals pronouncements in these cases and others as a "crusade" against sloppy practice. *See* David D. Siegel, *Neglect to Prosecute Statute Again: Requirement That Court Dismissing for Neglect to Prosecute Show "General Pattern of Delay" Held Not Retroactive*, 214 SIEGEL'S PRAC. REV. 2 (Oct. 2009); David D. Siegel, *More on Time to Move for Summary Judgment: Court Can Allow Motion After Court-Set Time Expires, as Long as Motion Is Made Within the Statutory 120 Days*, 158 SIEGEL'S PRAC. REV. 1 (Feb. 2005).

failure to comply with a conditional order requiring disclosure, the grounds cited to support the relief, i.e., a reasonable excuse for the delay and an affidavit of merit of the claim or defense, have never been addressed by the Court of Appeals in any significant detail. Moreover, there is scant statutory support for granting relief on these grounds to parties who have failed to comply with the terms of a conditional order.

This article examines the events in litigation that typically result in a CPLR 3126 conditional order requiring disclosure, which require the expenditure of substantial time and expense for the parties and the court system. We then turn to recent decisions in which conditional orders have issued and examine the propriety and effect of those orders. The piece then discusses several established remedies available under the CPLR to a party subject to a CPLR 3126 conditional order. These broad remedies cast further doubt on the utility of the doctrine invoked by several courts that allows a court to vacate or modify a conditional order based merely on a reasonable excuse and affidavit of merit.

The Court of Appeals will likely have another opportunity to clarify the effect of a CPLR 3126 conditional order in the near future. It is respectfully submitted that New York State courts should conduct a comprehensive examination of the case law that allows a party to excuse a failure to comply with a conditional order requiring disclosure and ascertain whether existing procedural devices adequately address the problem.

I. EVENTS LEADING UP TO A CPLR 3126 CONDITIONAL ORDER

For a broader understanding of the serious nature of the problems in this area, it is important to trace the steps that traditionally lead up to the issuance of a conditional order. A conditional order is typically issued in a case in which a party seeks disclosure[4] or a bill of particulars.[5] While there are a myriad of avenues that can lead

[4] CPLR Article 31 provides for several disclosure devices, including "depositions upon oral questions or without the state upon written questions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission." N.Y. C.P.L.R. 3102(a) (McKinney 2010).

[5] *See* N.Y. C.P.L.R. 3041 (McKinney 1991) ("Any party may require any other party to give a bill of particulars of such party's claim, or a copy of the items of the account alleged in a pleading."). Technically, the bill of particulars is not classified as either a pleading or a form of disclosure. *See* DAVID D. SIEGEL, NEW YORK PRACTICE, § 238, at 401 (4th ed. 2005). It is, however, an important avenue for obtaining information concerning the nature of a party's

to the issuance of a conditional order, in the space below we will track the path leading up to the issuance of a conditional order after a party serves a request for production of documents. For purposes of this example, we will assume that the party seeking the disclosure never receives a response from the party in possession of the information, a scenario that occurs too frequently in New York State courts.[6]

A. Service of Disclosure Demand and Mandatory Good Faith Effort to Resolve Dispute

CPLR 3120(1)(i) provides one of the most popular disclosure devices in New York civil practice. It allows a party to an action to serve a notice on any other party[7] seeking, among other things, the production of documents "which are in the possession, custody or control of the party or person served."[8] The party served with a CPLR 3120 notice has twenty days to provide the requested documents and any objections to the disclosure sought.[9] If, for any reason, the recipient of the notice wishes to withhold a document that appears to be within the category of documents demanded by the other side, the recipient must serve a response on the seeking party reciting the fact that one or more of the documents sought are being withheld and setting forth the reasons that purport to justify

claims and affirmative defenses in an action. If a party "willfully fails to provide [a bill of] particulars . . . 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 section thirty-one hundred twenty-six of this chapter." N.Y. C.P.L.R. 3042(d) (McKinney 1991).

[6] *See, e.g.*, Pugliese v. Mondello, 67 A.D.3d 880, 881, 891 N.Y.S.2d 414, 415 (App. Div. 2d Dep't 2009) (affirming the supreme court's decision to "grant[] a conditional order striking the answer unless the defendant furnished the plaintiff with certain documents by a date certain" (citations omitted)); Suburban Graphics Supply Corp. v. Nagle, 5 A.D.3d 663, 664–65, 774 N.Y.S.2d 160, 162–63 (App. Div. 2d Dep't 2004) (affirming order striking the defendants' answers "for willful failure to comply with discovery"); Ross v. Johnson, No. 19280/06, 2010 WL 447065, at *2 (N.Y. Sup. Ct. Feb. 4, 2010) (holding that a plaintiff's disobedience of "three consecutive orders directing the plaintiff to comply with discovery constitutes precisely the sort of dilatory and obstructive, and thus contumacious, conduct warranting the dismissal of the complaint" (citation omitted)).

[7] CPLR 3120 also allows a party to serve a subpoena on a nonparty seeking production of documents. *See* Patrick M. Connors, *Practice Commentaries*, C3120:12, *in* N.Y. C.P.L.R. 3120 (McKinney 2005 & Supp. 2010) [hereinafter Connors, *Practice Commentaries*, CPLR 3120].

[8] N.Y. C.P.L.R. 3120(a)(i) (McKinney 2005). The documents sought must satisfy the relevancy requirements in CPLR 3101(a)(1). *See* Connors, *Practice Commentaries*, CPLR 3120, *supra* note 7, C3120:2 ("Whether the thing is disclosable, and therefore subject to production under CPLR 3120, is not determined by CPLR 3120. It is CPLR 3101(a) that determines the disclosability of any datum or thing regardless of the device used to get it.").

[9] N.Y. C.P.L.R. 3122(a) (McKinney 2005).

the withholding.[10]

If the recipient of the demand fails to provide a timely response, the party seeking the documents cannot immediately request the court to intervene.[11] Uniform Rule 202.7(a), applicable in supreme and county court actions, requires that any "motion relating to disclosure or to a bill of particulars [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."[12] This affirmation must be detailed and include "the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held."[13]

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[10] N.Y. C.P.L.R. 3122(b); Patrick M. Connors, *Practice Commentaries*, C3122:3, *in* N.Y. C.P.L.R. 3122 (McKinney 2005) [hereinafter Connors, *Practice Commentaries*, CPLR 3122]. This notice, commonly called a privilege log, must indicate the legal ground for withholding the document or documents and must also include four additional items: "(1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum." *Id.* If the party withholding the document claims that disclosing the above information "would cause disclosure of the allegedly privileged information," she can merely state that contention without revealing the four items noted above. *Id.*

[11] In *Barber v. Ford Motor Co.*, the First Department observed that the proper procedure when seeking documents is to first

> request their production pursuant to CPLR 3120, and make a good faith effort to bring about a non-judicial resolution of any remaining discovery disputes. If, at that juncture, the parties had been unable to resolve their differences, a motion pursuant to CPLR 3124 to compel further discovery would have been the appropriate means of proceeding.

250 A.D.2d 552, 552, 673 N.Y.S.2d 642, 643 (App. Div. 1st Dep't 1998) (citations omitted).

[12] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(e) (2008); *see* Eaton v. Chahal, 146 Misc. 2d 977, 982, 553 N.Y.S.2d 642, 645 (Sup. Ct. 1990) ("The 'good faith' requirement is intended to remove from the court's work load all but the most significant and unresolvable disputes over what has been the most prolific generator of pretrial motions: discovery issues.").

[13] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(c); *see generally* Cerreta v. N.J. Transit Corp., 251 A.D.2d 190, 190 675 N.Y.S.2d 858, 858 (App. Div. 1st Dep't 1998) ("[A]ttorneys' affirmations that were submitted in support of the motion . . . contain no indication of good faith efforts in [telephone] conversation to set up the depositions."). A good faith effort requires "more than an exchange of computer generated form letters or cursory telephone conversations. Significant, intelligent and expansive contact and negotiations must be held between counsel to resolve any dispute and such efforts must be adequately detailed in an affirmation." *Eaton*, 146 Misc. 2d at 982, 553 N.Y.S.2d at 645–46; *see* Nikpour v. City of N.Y., 179 Misc. 2d 928, 930, 686 N.Y.S.2d 920, 921 (Sup. Ct. 1999). Courts will often deny a motion relating to disclosure or a bill of particulars if it is not accompanied by an affirmation of good faith effort. *See* Quiroz v. Beitia, 68 A.D.3d 957, 960, 893 N.Y.S.2d 70, 74 (App. Div. 2d Dep't 2009) (denying a motion to dismiss due to a failure to provide a good faith affirmation); Diel v. Rosenfeld, 12 A.D.3d 558, 558, 784 N.Y.S.2d 379, 379 (App. Div. 2d Dep't 2004); Dennis v. City of N.Y., 304 A.D.2d 611, 613, 758 N.Y.S.2d 661, 664 (App. Div. 2d Dep't 2003); Fanelli v. Fanelli, 296 A.D.2d 373, 373, 745 N.Y.S.2d 435, 435 (App. Div. 2d Dep't 2002).

Under Uniform Rule 202.8(f), applicable in supreme and county courts, if a motion relates to disclosure or a bill of particulars, and a preliminary conference has not been held, "the court shall notify all parties of a scheduled date to appear for a preliminary conference, which shall be not more than 45 days from the return date of the motion unless the court orders

B. CPLR 3124 Motion to Compel Compliance with Disclosure Demand

If the required consultation does not resolve the dispute, the party who served the request for documents can now make a motion under CPLR 3124[14] seeking an order from the court compelling the production. Assuming the adversary has refused to produce relevant documents, which are not otherwise privileged or protected as work product,[15] that motion will usually result in an order

otherwise." The parties can then agree to a timetable for the completion of disclosure within one year, and attempt to resolve any other issues raised by the motion. Any agreement must be embodied in a form stipulation and order provided by the court, prescribed by the chief administrator of the courts. If all parties agree to the relevant terms, sign the form, and return it to the court before the return date of the motion, the stipulation shall be "so ordered" by the court, and the motion shall be deemed withdrawn.

If a stipulation is not returned by all parties, the preliminary conference is held on the assigned date. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12 (entitled "Preliminary Conference"). "Issues raised by the motion and not resolved at the conference shall be determined by the court." N.Y. COMP. CODES R. & REGS. tit. 22, § 202.8(f); *see* David D. Siegel, *Amendments Made on Motion Practice and Preliminary Conference; Main Effect Is on Disclosure and Bill of Particulars*, 3 SIEGEL'S PRAC. REV. 3 (May 1993) (discussing 1993 rule changes affecting motion practice and the preliminary conference).

Uniform Rule 202.8(f) actually requires a second effort to resolve the issues raised in the motion pertaining to disclosure or a bill of particulars. While the rule does not appear to require the same level of effort necessary to satisfy the "good faith effort" required by Uniform Rule 202.7(c), which must be documented in an affidavit submitted with the motion, the parties will at least need to consider whether they can agree to terms that will be resolved in the motion.

[14] CPLR 3124 states that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." N.Y. C.P.L.R. 3124 (McKinney 2005). CPLR 3124 grants authority to the court to order the disclosure, but not to impose sanctions on the recalcitrant party. *See also* Patrick M. Connors, *Practice Commentaries*, C3124:6, *in* N.Y. C.P.L.R. 3124 (McKinney 2005) [hereinafter Connors, *Practice Commentaries*, CPLR 3124] (noting that while CPLR 3124 does not grant courts authority to impose sanctions, "[i]f the party resisting disclosure is doing so primarily to delay or prolong the resolution of the litigation, for example, sanctions can be imposed under Part 130 of the Uniform Rules" (citation omitted)). Sanctions can be imposed under CPLR 3126, but many courts have concluded that a party is not entitled to sanctions under CPLR 3126 without first moving to compel the disclosure under CPLR 3124, accompanied by an affirmation of a good faith effort to resolve the disclosure dispute. *E.g.*, Holohan v. Amity Nissan Superstore, No. 9318-07, 2008 WL 2489500 (N.Y. Sup. Ct. June 9, 2008).

Under a 1993 amendment to CPLR 3122(a), "the remedy for a party seeking disclosure under CPLR 3120 or 3121 from a party who has not responded to a notice is a motion under CPLR 3124." Connors, *Practice Commentaries*, CPLR 3124, *supra*, C3124:6 (citing N.Y. C.P.L.R. 3122(a)). "This provision does not, however, make reference to CPLR 3126. The amendment seems to take away the option to move directly under CPLR 3126 if the failure to disclose relates to a notice under CPLR 3120 or 3121." *Id.* (citation omitted).

[15] *See* N.Y. C.P.L.R. 3101(b) (McKinney 2005) (granting absolute immunity to privileged information); N.Y. C.P.L.R. 3101(c) (granting absolute immunity to attorney's work product materials); N.Y. C.P.L.R. 3101(d)(2) (granting qualified immunity to materials prepared in

requiring the production of the documents by a certain date, usually within thirty to sixty days from service of the order. The prevailing party on the motion must serve the order with notice of entry to give effect to the order.[16]

C. CPLR 3126 Motion for Penalties and Resulting Conditional Order

If, after service of the CPLR 3124 order compelling production, the documents are still not produced within the time prescribed by the court, the party seeking disclosure will now be entitled to move for penalties and sanctions under CPLR 3126.[17] While there is some debate on whether a party seeking disclosure can move for penalties and sanctions under CPLR 3126 in the first instance without initially moving under CPLR 3124,[18] there is no doubt that the party who has obtained an order under CPLR 3124 can move under CPLR 3126 if the opposing party "refuses to obey [the] order."[19] A party moving under CPLR 3126 will likely need to accompany the motion with another affidavit of good faith effort to resolve the dispute as this motion also relates to disclosure.[20]

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anticipation of litigation).

[16] *See* N.Y. C.P.L.R. 2220(b) (McKinney 1991) (requiring service of an order); SIEGEL, NEW YORK PRACTICE, *supra* note 5, § 250, at 425.

[17] *See* N.Y. C.P.L.R. 3126 (McKinney 2005) (stating that on failure to produce, "the court may make such orders with regard to the failure or refusal as are just").

[18] *See supra* note 14; *see generally* Connors, *Practice Commentaries*, CPLR 3124, *supra* note 14, C3124:6; Patrick M. Connors, *Practice Commentaries*, C3126:6, *in* N.Y. C.P.L.R. 3126 (McKinney 2005 & Supp. 2010) [hereinafter Connors, *Practice Commentaries*, CPLR 3126].

[19] N.Y. C.P.L.R. 3126 (authorizing penalties and sanctions if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to" CPLR Article 31).

[20] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(a) (2008). If 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, it is debatable whether a second good faith effort must be made to resolve the issues raised by the CPLR 3126 motion, especially if there has been no response to the service of the CPLR 3124 order. Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:3. Section 202.7(a) appears to require a good faith affirmation because a CPLR 3126 motion is one "relating to disclosure." N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(a); Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:3. The affirmation in these circumstances, however, 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. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(c); Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:3. 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. Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:3.

The party moving under CPLR 3126 will frequently request that the recalcitrant party's pleading be stricken. This drastic relief is authorized by CPLR 3126(3),[21] but will only be invoked where "the party's failure to comply with a disclosure order was the result of willful and contumacious conduct."[22] If disclosure has not been produced after a CPLR 3124 order requiring the production, and the recalcitrant party has offered no legitimate excuse, the striking of that party's pleading may be appropriate under CPLR 3126.[23] It must be noted, however, that New York courts have repeatedly expressed the "strong preference in our law that actions be decided on their merits" and are therefore hesitant to "resort to the drastic remedy of striking a pleading for failure to comply with discovery directives unless the noncompliance is established to be both deliberate and contumacious."[24]

Surprisingly, the most common CPLR 3126 order in situations involving repeated and deliberate noncompliance with disclosure is not an order striking a pleading outright, but rather a conditional order giving the recalcitrant party one more chance to make things

[21] CPLR 3126(3) provides that if a party "refuses to obey an order for disclosure or willfully 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," including "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." N.Y. C.P.L.R. 3126(3). CPLR 3126 also authorizes the court to order that the issues encompassed by the disclosure demand "be deemed resolved," or that the recalcitrant party be precluded from introducing certain evidence or from supporting or opposing certain claims. N.Y. C.P.L.R. 3126(1), (2). This latter sanction is commonly referred to as an order of preclusion. *See* SIEGEL, NEW YORK PRACTICE, *supra* note 5, § 367, at 609. Since CPLR 3126 empowers the court to make such orders "as are just," the sample orders listed in the statute are merely illustrative and not exhaustive. N.Y. C.P.L.R. 3126.

[22] Diel v. Rosenfeld, 12 A.D.3d 558, 559, 784 N.Y.S.2d 379, 379 (App. Div. 2d Dep't 2004); *see* Roman v. City of N.Y., 38 A.D.3d 442, 443, 832 N.Y.S.2d 528, 529 (App. Div. 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 willful, contumacious or in bad faith." (citation omitted)); Cestaro v. Chin, 20 A.D.3d 500, 501–02, 799 N.Y.S.2d 143, 144 (App. Div. 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 . . . ." (citations omitted)).

[23] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:10.

[24] Marks v. Vigo, 303 A.D.2d 306, 306–07, 756 N.Y.S.2d 568, 568 (App. Div. 1st Dep't 2003); *see* Corsini v. U-Haul Int'l, Inc., 212 A.D.2d 288, 291, 630 N.Y.S.2d 45, 47 (App. Div. 1st Dep't 1995) ("Because of the strong public policy in this state against limiting audience before the court, and in favor of resolving disputes on the merits . . . courts have reserved dismissal for rare cases where the extreme nature of the abuse warrants depriving a party of the opportunity to litigate the claim." (citations omitted)); *see also* Adzer v. Rudin Mgmt. Co., 50 A.D.3d 1070, 1071–72, 856 N.Y.S.2d 674, 676 (App. Div. 2d Dep't 2008) ("[T]here is a strong public policy which favors a determination on the merits.").

right.[25] A conditional order is usually "self-executing," meaning that it grants the motion and imposes the sanction unless within a specified time the resisting party complies with the disclosure order.

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 simply supply only an outside date for compliance by the resisting party.[26]

D. Delay Caused by Recalcitrance

It is important to note that at this juncture in the action, six to nine months have likely passed since the original CPLR 3120 notice to produce was served. The party from whom documents are sought will routinely have twenty-five days to produce the documents.[27] CPLR 3122(a) requires a response to a CPLR 3120 document demand within twenty days.[28] Five days is usually added to the response time because the CPLR 3120 notice is normally served via first class mail.[29] If production is not forthcoming, there is the time required for the good faith effort to resolve the matter.[30] This endeavor could easily occupy the thirty day period after the response is due, especially if the recalcitrant party fails to answer any communications forwarded in an attempt to resolve the issue.[31] If the good faith effort is not successful, it will likely take at least another thirty days to assemble and serve the motion papers and secure a return date for the CPLR 3124 motion.[32] The court then

[25] *See generally* Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:10.

[26] *Id.*

[27] *See supra* note 19 and accompanying text.

[28] N.Y. C.P.L.R. 3122(a) (McKinney 2005).

[29] N.Y. C.P.L.R. 2103(b)(2) (McKinney 1991) (stating that when the period within which to perform an act is measured from the service of a document, and service is via mail, five days are added to the period).

[30] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(a), (c); *see supra* notes 12, 13, 20.

[31] Uniform Rule 202.7(c) requires the party moving to compel disclosure to "indicate good cause why no such conferral with counsel for opposing parties was held." N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(c). To meet this standard, the movant will likely be required to allege that a reasonable period of silence passed after the movant attempted to confer with opposing counsel.

[32] CPLR 2214(b) requires a minimum of eight days notice when making a motion. N.Y. C.P.L.R. 2214(b) (McKinney 1991). The eight days become thirteen if the motion is served via first class mail, the usual method of service. *See* N.Y. C.P.L.R. 2103(b); *see also* David D. Siegel, *Practice Commentaries*, C2214:8, *in* N.Y. C.P.L.R. 2214 (McKinney Supp. 2010) [hereinafter Siegel, *Practice Commentaries*, CPLR 2214]. More typically, however, a party will serve a motion via first class mail twenty-one days before the return date to obtain the answering papers seven days before the return date and to secure the right to submit a reply

has sixty days from the return date to issue a decision in the matter.[33] As noted above, the order emanating from the CPLR 3124 motion will likely give the recalcitrant party thirty to sixty days to comply.[34] If the recalcitrant party fails to comply with the order emanating from the CPLR 3124 motion, the party seeking disclosure will likely need another thirty days to assemble and serve the motion papers and secure a return date for the CPLR 3126 motion.[35] As with the CPLR 3124 motion, the court has sixty days from the return date of the CPLR 3126 motion to issue a decision in the matter.[36] Finally, the conditional order emanating from the CPLR 3126 motion will likely afford the recalcitrant party thirty to sixty days from service of the order to produce the documents before the pleading is stricken.

In sum, 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;[37] (2) has failed to comply with the movant's good faith effort to resolve the discovery dispute;[38] and (3) has failed to comply with a court's order under CPLR 3124 to provide the disclosure.[39] Yet, even after these three failures, and a court's subsequent determination on a contested CPLR 3126 motion that the failure to disclose was "willful," there is a substantial body of New York law that allows the party to excuse the fourth dereliction, i.e., the failure to timely satisfy the conditional order.[40]

II. *LAUER V. CITY OF BUFFALO*—A CLASSIC EXAMPLE OF COURTS FORGIVING RECALCITRANCE IN DISCLOSURE

One of the more recent examples of judicial leniency toward

one day prior to the return date. N.Y. C.P.L.R. 2214(b); *see also* Siegel, *Practice Commentaries*, *supra*, C2214:9.

[33] N.Y. C.P.L.R. 2219(a) (McKinney 1991) (an order determining any motion, other than a motion for a provisional remedy, "shall be made within sixty days, after the motion is submitted for decision").

[34] *See supra* note 16 and accompanying text.

[35] *See supra* note 20 and accompanying text.

[36] N.Y. C.P.L.R. 2219(a); *see supra* notes 21–24 and accompanying text.

[37] *See supra* note 9 and accompanying text.

[38] *See supra* note 13 and accompanying text; *cf.* Amherst Synagogue v. Schuele Paint Co., 30 A.D.3d 1055, 1057, 816 N.Y.S.2d 782, 783 (App. Div. 4th Dep't 2006) (reversing the supreme court's granting of a CPLR 3126 order because the defendants "'failed to demonstrate that they made a diligent effort to resolve this discovery dispute'" (quoting Baez v. Sugrue, 300 A.D.2d 519, 521, 752 N.Y.S.2d 385, 387 (App. Div. 2d Dep't 2002))).

[39] *See supra* notes 15 and 16 and accompanying text. The party may also have failed to comply with the movant's good faith effort to resolve the dispute concerning compliance with the CPLR 3124 order. *See supra* note 20 and accompanying text.

[40] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

disclosure recalcitrance is styled *Lauer v. City of Buffalo*.[41] In *Lauer*, the 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 the plaintiff's disclosure demands. Rather than moving pursuant to CPLR 3124 in the first instance,[42] the plaintiff moved for an order striking these defendants' answers under CPLR 3126(3) or, in the alternative, a thirty 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.'"[43]

The supreme court ultimately issued a conditional order providing that unless the defendants produced the discovery responses within thirty days of service of the order with notice of entry, the defendants' answers would be stricken "without further Order of this Court."[44] Prior to a substitution of counsel, the conditional order was served on the defendants' original attorney, who failed to provide any disclosure responses within thirty days.[45]

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."[46] 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.[47] The supreme court, finding both of these prerequisites met, granted the motion, reinstated the defendants' answers, imposed a monetary sanction, and ordered that the defendants to provide the discovery responses within two weeks.[48]

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[41] 53 A.D.3d 213, 862 N.Y.S.2d 675 (App. Div. 4th Dep't 2008).

[42] *See supra* note 14.

[43] *Lauer*, 53 A.D.3d at 214, 862 N.Y.S.2d at 676.

[44] *Id.* at 214–15, 862 N.Y.S.2d at 676.

[45] *Id.* at 215, 862 N.Y.S.2d at 676.

[46] N.Y. C.P.L.R. 5015(a)(1) (McKinney 2007).

[47] *E.g.*, Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., 67 N.Y.2d 138, 141, 492 N.E.2d 116, 118, 501 N.Y.S.2d 8, 10 (1986) ("A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action.").

[48] *Lauer*, 53 A.D.3d at 217, 862 N.Y.S.2d at 678.

The plaintiff appealed, contending that relief from the conditional order was not available pursuant to CPLR 5015(a)(1) and that the defendants were required to appeal from the order if they disputed the relief granted under CPLR 3126(3).[49] The plaintiff relied on the Fourth Department's prior holding in *Banner Service Corp. v. Hall*,[50] which concluded that a judgment entered pursuant to a CPLR 3126(3) order is "directly appealable," even though it is frequently characterized as a default judgment.[51] 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," which establishes the time periods for taking an appeal.[52] 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.[53]

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."[54] *Lauer* similarly concluded that when a conditional order under CPLR 3126(3) is entered upon consent the defendant is not aggrieved and,

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[49] *Id.* at 215, 862 N.Y.2d at 676.

[50] 185 A.D.2d 613, 587 N.Y.S.2d 872 (App. Div. 4th Dep't 1992).

[51] *Id.* at 613, 587 N.Y.S.2d at 872.

[52] *Id.* at 613, 587 N.Y.S.2d at 873. CPLR 5513(a) provides that:

> An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

N.Y. C.P.L.R. 5513(a) (McKinney 1997).

[53] *Banner*, 185 A.D.2d at 613, 587 N.Y.S.2d at 873. The conditional order in *Banner* provided that the plaintiff would be entitled to a default judgment if the 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. *See* Connors, *Practice Commentaries*, CPLR 3126, *supra* note 16, C3126:13. 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* David D. Siegel, *Practice Commentaries*, C5015:6, *in* N.Y. C.P.L.R. 5015 (McKinney 2007) ("[T]he 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.").

[54] *Lauer*, 53 A.D.3d at 215, 862 N.Y.S.2d at 676–77; *see* David D. Siegel, *Practice Commentaries*, C5511:1, *in* N.Y. C.P.L.R. 5511 (McKinney 1997).

therefore, is precluded from taking an appeal.[55] In both instances, the court held that the sole remedy for the defaulting party whose pleading is stricken based on a self-executing conditional order is a motion under CPLR 5015(a)(1) to vacate the order entered upon its default.[56] Upon an examination of the merits of the CPLR 5015(a)(1) motion, the Fourth Department concluded that the 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.[57]

The end result in *Lauer* is that several defendants who completely failed to respond to initial disclosure demands, and who then failed to comply with the terms of a self-executing conditional order, were permitted to excuse their delinquency seven weeks after the conditional order took effect.[58] *Lauer* is but one of many cases

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[55] *Lauer*, 53 A.D.3d at 215, 862 N.Y.S.2d at 676–77; *see* Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13 (discussing the limited relief available after a party has consented to the entry of a CPLR 3126 conditional order).

[56] *See Lauer*, 53 A.D.3d at 215, 862 N.Y.S.2d at 677. The *Lauer* court seemingly agrees 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.'" *Id.* 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 (App. Div. 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 also 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.

Id. 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 a more detailed discussion of the issue, see Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

[57] *Lauer*, 53 A.D.3d at 216–17, 862 N.Y.S.2d at 678.

[58] *Id.* at 214–15, 862 N.Y.S.2d at 676. *Lauer* is not an isolated decision. There are many reported cases in which a recalcitrant party has been successful in escaping from the terms of a conditional order that has taken effect. *See infra* note 59 and accompanying text.

demonstrating the casual approach taken by New York courts towards parties who have failed to comply with their disclosure obligations.[59] There are indications, however, that this attitude may no longer continue to prevail.

III. THE COURT OF APPEALS'S PRONOUNCEMENTS IN *WILSON* MARK A SHIFT IN JUDICIAL ATTITUDES REGARDING COMPLIANCE WITH A CONDITIONAL ORDER

When a case involving a failure to provide disclosure makes its way to the Court of Appeals, a relatively rare event, it is usually a bad omen for the recalcitrant party.[60] The Court's memorandum decision in *Wilson v. Galicia Contracting & Restoration Corp.*,[61] involving a defendant's failure to comply with a conditional order, makes the point once again.[62] While it is a relatively brief, unsigned memorandum decision, the Court's opinion in *Wilson* may represent a significant departure from the casual attitude New York State courts have displayed when confronting a party's failure to satisfy disclosure obligations in conditional orders.[63]

In *Wilson*, the infant plaintiff alleged he was seriously injured when a piece of material fell from a scaffold, assembled by the defendant, and struck him in his left eye.[64] The plaintiff commenced an action against the defendant and six others, asserting various theories of liability.[65] The tale of delay here is by now a familiar one. The defendant failed to comply with the plaintiff's formal and informal discovery demands and with the

[59] *See, e.g.*, Shure v. N.Y. Cruise Lines, Inc., 59 A.D.3d 292, 293–94, 874 N.Y.S.2d 42, 43 (App. Div. 1st Dep't 2009) (finding that a dismissal of the plaintiff's complaint was "too harsh a penalty" for failure to comply with discovery where the plaintiff was in poor health); Pangea Farm, Inc. v. Sack, 51 A.D.3d 1352, 1354, 858 N.Y.S.2d 477, 478–79 (App. Div. 3d Dep't 2008) (holding that the supreme court "did not abuse its discretion in denying plaintiff's motion to strike defendant's answer" for failure to comply with a discovery order); Torres v. N.Y. City Hous. Auth., 298 A.D.2d 207, 207–08, 748 N.Y.S.2d 147, 147–48 (App. Div. 1st Dep't 2002) (holding that an order dismissing the plaintiff's complaint for failure to comply with disclosure obligations was properly vacated where the plaintiff showed that noncompliance was not willful, despite the plaintiff's failure to explain the egregious delay in filing the motion to vacate).

[60] *See supra* notes 1–3 and accompanying text (discussing the Court of Appeals recent crusade against sloppy practice).

[61] 10 N.Y.3d 827, 890 N.E.2d 179, 860 N.Y.S.2d 417 (2008).

[62] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:10 (discussing *Wilson* in additional detail).

[63] *Id.*

[64] *Wilson*, 10 N.Y. 3d at 828, 890 N.E.2d at 179, 860 N.Y.S.2d at 417.

[65] *Id.* at 828, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

terms of a preliminary conference order.[66] Upon the plaintiff's motion, the supreme court issued a self-executing conditional order on May 14, 2002, directing the defendants to comply with the disclosure requests by July 1, 2002, or have their answers stricken.[67]

The Court of Appeals noted that because the defendant failed to comply with the conditional order, its "answer was stricken as of July 1, 2002."[68] This, in effect, "left unrebutted plaintiff's assertion that the cause of his injury was 'a dangerous, defective and/or unsafe condition' existing on the defendant's premises," paving the way for a liability determination against the defendant.[69]

In August 2002, there was an interesting development in the case. "[A]t 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.'"[70] As a result, the "[p]laintiff thereafter discontinued his claims against the [six] other defendants with prejudice," but continued the prosecution of the claim against the defendant who assembled the scaffold, who was subject to the conditional order striking its answer.[71] "[In an] order dated June 18, 2003, the [supreme] court granted [the plaintiff's] motion for an inquest against [the remaining defendant]," after denying that defendant's motion to dismiss.[72]

During the next two years, the defendant "moved three times to vacate the order striking its answer and the order granting the inquest."[73] Each application was denied, including a motion to set aside the order because it was procured by means of fraud, misrepresentation, or other misconduct.[74] 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.[75] The appellate division reduced the judgment by one-

[66] *Id.*

[67] *Id.* at 828–29, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

[68] *Id.* at 829, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*; Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:10.

[73] *Wilson*, 10 N.Y.3d at 828, 890 N.E.2d at 180, 860 N.Y.S.2d at 418.

[74] *Id.*; *see* N.Y. C.P.L.R. 5015(a)(3) (McKinney 2007) (allowing vacatur of judgment or order based upon "fraud, misrepresentation, or other misconduct of an adverse party").

[75] *Wilson*, 10 N.Y.3d at 832, 890 N.E.2d at 182, 860 N.Y.S.2d at 420 (Pigott, J., dissenting).

third, "but otherwise affirmed."[76]

The Court of Appeals affirmed.[77] The Court declined to review the 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.[78] The defendant failed to preserve this argument in the courts below, which placed it beyond the Court of Appeals's powers of review.[79]

As for the conditional order, the Court noted that it was "self-executing" and, therefore, the defendant's "failure to produce [the requested] items on or before" July 1, 2002 rendered the order striking the defendant's answer "absolute."[80] The Court of Appeals also observed that "the courts below correctly held that," because of the failure to satisfy the conditional order, "defendant was precluded from introducing any evidence at the inquest 'tending to defeat the plaintiff's cause of action.'"[81] Consequently, the Court concluded that the defendant "was deemed to admit 'all traversable allegations in the complaint, including the basic allegation of liability.'"[82]

Judge Pigott authored a dissenting opinion, joined by Judge Smith, arguing that the supreme court erred in holding that it could not consider the evidence of fraud on the defendant's CPLR 5015(a)(3) motion to vacate the order directing an inquest.[83] Judge Pigott would have "remit[ted] the matter to [the trial court] for reconsideration of [the defendant's] motion, and if deemed necessary, [granted the defendant] a hearing whereby [it] would be permitted to attempt to prove, by the clear and convincing evidence standard, that plaintiff procured the judgment by fraud."[84] The majority addressed the dissent, noting that the trial court's alleged

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[76] *Id.* at 829, 890 N.E.2d at 180, 860 N.Y.S.2d at 418 (majority opinion); *Id.* at 832, 890 N.E.2d at 182, 860 N.Y.S.2d at 420 (Pigott, J. dissenting).

[77] *Id.* at 829, 890 N.E.2d at 180, 860 N.Y.S.2d at 418 (majority opinion).

[78] *Id.* at 829–30, 890 N.E.2d at 180, 860 N.Y.S.2d at 418; N.Y. C.P.L.R. 3215(f) (McKinney 2005).

[79] *Wilson*, 10 N.Y.3d at 828, 890 N.E.2d at 180, 860 N.Y.S.2d at 418; Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:10. For further discussion on this issue, see John R. Higgitt, *A Nullity or Not?—The Status of a Default Judgment Entered Absent Compliance with CPLR 3215(f)*, 73 ALB. L. REV. 807 (2010).

[80] *Wilson*, 10 N.Y.3d at 830, 890 N.E.2d at 181, 860 N.Y.S.2d at 419 (citations omitted).

[81] *Id.* (citations omitted); *see* Suburban Graphics Supply Corp. v. Nagle, 5 A.D.3d 663, 664–65, 774 N.Y.S.2d 160, 162–63 (App. Div. 2d Dep't 2004) (stating that a defendant found in default under CPLR 3126 can only offer proof in mitigation of damages, not liability); Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:4.

[82] *Wilson*, 10 N.Y.3d at 830, 890 N.E.2d at 181, 860 N.Y.S.2d at 419 (citation omitted).

[83] *Id.* at 831, 833, 890 N.E.2d at 181, 183, 860 N.Y.S.2d at 419, 421 (Piggott, J. dissenting).

[84] *Id.* at 834, 890 N.E.2d at 183–84, 860 N.Y.S.2d at 421–22 (Piggott, J. dissenting).

noncompliance with CPLR 5015(a)(3) was not presented to the Court.[85]

The Court's 2008 decision in *Wilson* is already having 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.[86] It must be emphasized, however, that many courts will still allow a recalcitrant party to excuse a failure to comply with the terms of a conditional order, even after the order has become "absolute."[87] One of the most prominent cases exhibiting this leniency, *Gibbs v. St. Barnabas Hospital*,[88] is currently on the Court of Appeals docket, and will likely provide the Court with another opportunity to address the effect of a conditional order emanating from a CPLR 3126 motion.

IV. THE FIRST DEPARTMENT DEVIATES FROM *WILSON* IN *GIBBS*

The First Department's decision in *Gibbs* highlights, once again, just how much New York courts are willing to tolerate the recalcitrant conduct that results in a conditional order under CPLR 3126, and just how little respect these conditional orders often receive. In *Gibbs*, a case alleging medical malpractice and lack of

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[85] *Id.* at 830, 890 N.E.2d at 181, 860 N.Y.S.2d at 419.

[86] Santiago v. City of N.Y., 894 N.Y.S.2d 873, 873 (App. Div. 1st Dep't 2010) ("The complaint was properly dismissed for persistent, unexplained noncompliance with four disclosure orders, including a self-executing conditional order of dismissal that was granted on default and became absolute."); AWL Indus., Inc. v. QBE Ins. Corp., 65 A.D.3d 904, 905, 885 N.Y.S.2d 71, 73 (App. Div. 1st Dep't 2009) ("[The defendant] did not dispute that it had failed to comply with the conditional order. Thus, the self-executing conditional order [striking the defendant's answer] became absolute on December 8, 2006[, and entitled the plaintiff to judgment in its favor]." (citations omitted)); Foster v. Dealmaker, SLS, LLC, 63 A.D.3d 1640, 1641, 881 N.Y.S.2d 250, 251 (App. Div. 4th Dep't 2009) (noting that the conditional order precluding the plaintiffs from introducing any evidence with respect to items sought in the defendants' demand for a verified bill of particulars, in the event the plaintiffs did not comply with those demands, "was self-executing and [the plaintiffs'] failure to produce [requested] items on or before the date certain rendered it absolute," entitling the defendant to summary judgment dismissing the complaint); Hesse Const., LLC v. Fisher, 61 A.D.3d 1143, 1144, 876 N.Y.S.2d 251, 252 (App. Div. 3d Dep't 2009) (concluding that the supreme court did not abuse its discretion in enforcing the conditional order of preclusion, stipulated to by the parties, which was "self-executing" and became absolute when the defendant did not produce the items on or before the date in the order, entitling the plaintiff to summary judgment on its claim and dismissal of the defendant's counterclaim).

[87] Panagiotou v. Samaritan Vill., Inc., 66 A.D.3d 979, 980, 886 N.Y.S.2d 806, 807 (App. Div. 2d Dep't 2009) (noting that, even after a conditional order of preclusion became "absolute," the recalcitrant party could "avoid the adverse impact of the conditional order . . . [by] demonstrat[ing] a reasonable excuse for their failure to comply and a meritorious cause of action").

[88] 61 A.D.3d 599, 878 N.Y.S.2d 38 (App. Div. 1st Dep't 2009).

informed consent, the defendant moved to compel the plaintiff to provide a bill of particulars and other disclosure responses after three letters seeking the requested information were ignored.[89] The plaintiff had, however, "already served bills of particulars [on] two other defendants" in the litigation.[90] The motion to compel was withdrawn when the plaintiff finally served a bill of particulars on the defendant in August 2006.[91] In a preliminary conference order dated November 30, 2006, however, the supreme court determined that the bill of particulars was "unsatisfactory" and, without specifying a date by which compliance was necessary, directed the plaintiff to serve a supplemental bill particularizing his claim that the defendant was vicariously liable for the negligence of the other defendants, the dates of the alleged malpractice, and the specific allegations of negligence against the defendant.[92]

In January 2007, the plaintiff had still not served the supplemental bill of particulars, and the defendant moved under CPLR 3126(3) for an order dismissing the complaint.[93] In an order dated February 21, 2007, the supreme court directed the plaintiff to provide the defendant with, among other things, the supplemental bill of particulars required by the preliminary conference order.[94] The order was conditional in nature, prescribing that the plaintiff would be precluded from offering any testimony unless he provided the materials within forty-five days.[95]

The defendant's attorney forwarded a letter to the plaintiff on March 7, 2007 demanding compliance with the February 21 order.[96] Still not having received the material, the defendant moved to enforce the order on May 21, 2007, "asserting that plaintiff failed to

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[89] *Id.* at 600, 878 N.Y.S.2d at 40 (McGuire, J., dissenting). This piece relies heavily on the dissent for the facts and procedural history, as the three-paragraph memorandum opinion does not discuss them in detail.

[90] *Id.* at 600, 878 N.Y.S.2d at 39.

[91] *Id.* at 601, 878 N.Y.S.2d at 40.

[92] *Id.*

[93] *Id.* The CPLR authorizes the court to impose penalties under CPLR 3126 if a party willfully fails to provide relevant particulars. N.Y. C.P.L.R. 3042(d) (McKinney 1991) ("If a party served with a demand for a bill of particulars 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 section thirty-one hundred twenty-six of this chapter."); *see supra* notes 17–22 and accompanying text.

[94] *Gibbs*, 61 A.D.3d at 601, 878 N.Y.S.2d at 40 (McGuire, J., dissenting).

[95] *Id.*; *see* N.Y. C.P.L.R. 3126(2) (McKinney 2005).

[96] *Gibbs*, 61 A.D.3d at 601, 878 N.Y.S.2d at 40 (McGuire, J., dissenting). The dissent calculated that "plaintiff had until April 9 to comply with the February 21, 2007 order." *Id.* at 601 n.2, 878 N.Y.S.2d at 40 n.2. *See infra* note 108 and accompanying text.

serve a supplemental bill of particulars within [forty-five] days of the [conditional] order and, [therefore,] that the . . . order had become absolute, precluding plaintiff from offering any testimony as to the alleged malpractice of [the defendant]."[97] Based on the claimed preclusion, the defendant also moved for summary judgment dismissing the complaint on the ground that the plaintiff could not make out a prima facie case against him.[98] The defendant alternatively moved for dismissal of the complaint under CPLR 3126(3).[99]

The plaintiff opposed the motion, "arguing that his conduct was not willful and contumacious and therefore the penalty of precluding him from offering testimony against [the defendant] was not warranted."[100] Additionally, the plaintiff emphasized the fact "that he served a supplemental bill of particulars on [the defendant] on June 21, 2007, one day before he served his opposition to the motion [to enforce the conditional order,] and approximately 75 days after the court-ordered deadline."[101]

The supreme court granted the defendant's motion, but only to the extent of requiring the plaintiff to pay the defendant $500 in costs for the plaintiff's delay in providing the subject disclosure.[102] The defendant appealed, arguing that the supreme court erred in failing to enforce the conditional order.

In an unsigned memorandum decision over a one-judge dissent, the First Department affirmed.[103] It concluded that while the plaintiff did not timely comply with the deadlines imposed by the supreme court, the delay was not lengthy and the defendant could not "claim prejudice because of the tardy supplemental bill of particulars that plaintiff ultimately furnished."[104] Furthermore, the majority found "no evidence that plaintiff's inaction was willful, contumacious, or the result of bad faith."[105] Therefore, the court reasoned that the striking of the complaint against the defendant "would have been an overly drastic remedy for plaintiff's delay in

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[97] *Id.* at 601–02, 878 N.Y.S.2d at 40 (McGuire, J., dissenting).

[98] For a discussion on the distinction between an order of preclusion under CPLR 3126(2) and an order striking a pleading under CPLR 3126(3), see Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:8.

[99] *Id.* at 602, 878 N.Y.S.2d at 40–41.

[100] *Id.* at 602, 878 N.Y.S.2d at 41.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 599–600, 878 N.Y.S.2d at 39 (majority opinion).

[104] *Id.* at 600, 878 N.Y.S.2d at 39 (citation omitted).

[105] *Id.*

complying with discovery."[106] The majority cited the Court of Appeals's decision in *Wilson*, but appeared to view the enforcement of a self-executing conditional order as a discretionary matter. It noted that the supreme court's decision not to enforce the conditional order in *Gibbs* did not constitute "such an abuse of discretion as to warrant reversal."[107]

Justice McGuire authored a detailed dissent. Relying on the Court of Appeals's decision in *Wilson*,[108] the dissent concluded that the February 21, 2007 conditional order became absolute on April 9, 2007, as per the court's direction requiring service of a supplemental bill of particulars within forty-five days.[109] The plaintiff acknowledged that he did not serve the supplemental bill until seventy-five days after the deadline in the conditional order had passed.[110] Justice McGuire noted that "plaintiff could not avoid the consequences of his failure to comply timely with the conditional order merely by serving the supplemental bill of particulars after the court-imposed deadline."[111]

Justice McGuire cited numerous appellate division decisions holding that a party must "demonstrate both a reasonable excuse for [the] failure to comply with the order and a meritorious claim" to be relieved of the consequences of a conditional order that has become absolute.[112] The dissent did not decide whether the plaintiff had a reasonable excuse for failing to satisfy the conditional order, but cast doubt on the existence of same while noting that "[t]he majority ma[de] no attempt at all to defend plaintiff's excuse as

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[106] *Id.* The majority also observed that "[t]he law strongly prefers that matters be decided on their merits," but failed to specifically state why that principle should control in this case. *Id.* at 599, 878 N.Y.S.2d at 39; *see supra* note 24 and accompanying text (describing New York's strong preference to determine actions on the merits).

It is interesting to note that the majority appears to conclude that the supreme court abused its discretion by issuing a CPLR 3126 order striking the plaintiff's pleading. That order, however, was not the subject of the appeal and was not subject to review. The order on appeal, entered January 16, 2008, was the one that granted the defendant's motion "to enforce a conditional order of preclusion to the extent of directing plaintiff to pay $500 as costs for his delay in complying with discovery." *Gibbs*, 61 A.D.3d at 599, 878 N.Y.S.2d at 39.

[107] *Id.*

[108] 10 N.Y.3d 827, 890 N.E.2d 179, 860 N.Y.S.2d 417 (2008).

[109] *Gibbs*, 61 A.D.3d at 601–02 n.2, 878 N.Y.S.2d at 40–41 n.2 (McGuire, J., dissenting); *see supra* note 96 and accompanying text.

[110] *Gibbs*, 61 A.D.3d at 602, 878 N.Y.S.2d at 41.

[111] *Id.* (citations omitted).

[112] *Id.* (citing Callaghan v. Curtis, 48 A.D.3d 501, 852 N.Y.S.2d 275 (App. Div. 2d Dep't 2008); G.D. Van Wagenen Fin. Servs., Inc. v. Sichel, 43 A.D.3d 1104, 841 N.Y.S.2d 790 (App. Div. 2d Dep't 2007); Gilmore v. Garvey, 31 A.D.3d 381, 818 N.Y.S.2d 534 (App. Div. 2d Dep't 2006)).

reasonable."[113] Justice McGuire did conclude that "plaintiff failed to demonstrate that he ha[d] a meritorious claim against" the defendant because he "failed to submit the [necessary] affidavit of a medical expert suggesting that [the defendant was] liable for plaintiff's injuries."[114]

The dissent went on to note that under the terms of the February 21 conditional order, which it deemed absolute, the plaintiff was "precluded from offering testimony at trial with respect to the issues he was obligated to address in the supplemental bill of particulars."[115] Therefore, "plaintiff c[ould not] establish a prima facie case against [the defendant at trial] and summary judgment in [the defendant's] favor dismissing the complaint against him [wa]s warranted."[116] Justice McGuire argued that his conclusion in this regard was "consonant with the Court of Appeals' direction that court-ordered deadlines are to be taken seriously by the parties and enforced by the courts."[117] Furthermore, he noted that "the majority's position is indefensible" in light of the Court of Appeals's recent pronouncements in *Wilson v. Galicia Contracting & Restoration Corp.*[118]

As to the majority's implied contention that, after *Wilson*, the enforcement of a self-executing conditional order is a discretionary matter,[119] Justice McGuire proclaimed that

> [n]owhere in its opinion [in *Wilson*] did the Court come close to suggesting the remarkable proposition that either Supreme Court or the Appellate Division enjoys some undefined and broad discretion not to follow the rule of law, i.e., not to enforce a conditional order of preclusion that had become absolute even when the requisite dual showing of a reasonable excuse for the party's failure to comply with the order and a meritorious claim has not been met.[120]

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[113] *Id.* at 603 n.3, 878 N.Y.S.2d at 41 n.3.

[114] *Id.* at 603, 878 N.Y.S.2d at 41–42 (citations omitted); *see, e.g.*, *Gilmore*, 31 A.D.3d at 382, 818 N.Y.S.2d at 536 ("In a medical malpractice action, expert medical opinion evidence is required to demonstrate merit. The plaintiff's failure to provide an affidavit of merit from a medical expert was fatal to his application for relief from his default." (citations omitted)).

[115] *Gibbs*, 61 A.D.3d at 603, 878 N.Y.S.2d at 42 (McGuire, J., dissenting).

[116] *Id.* (citations omitted).

[117] *Id.* (citing Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C., 5 N.Y.3d 514, 521, 840 N.E.2d 565, 569, 806 N.Y.S.2d 453, 457 (2005); Kihl v. Pfeffer, 94 N.Y.2d 118, 123, 722 N.E.2d 55, 58, 700 N.Y.S.2d 87, 90 (1999)).

[118] *Id.* at 604–05, 878 N.Y.S.2d at 42–43; Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:10.

[119] *See supra* notes 106–07 and accompanying text.

[120] *Gibbs*, 61 A.D.3d at 604, 878 N.Y.S.2d at 43 (McGuire, J., dissenting).

V. COURTS CONTINUE TO IMPROPERLY ALLOW A PARTY WHO HAS BEEN RECALCITRANT IN DISCLOSURE TO OBTAIN A FOURTH BITE AT THE APPLE AND AVOID THE CONSEQUENCES OF A SELF-EXECUTING CPLR 3126 CONDITIONAL ORDER THAT HAS BECOME ABSOLUTE

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*,[121] many also grant the recalcitrant party one more bite at the apple, as demonstrated in the discussion of the *Gibbs* decision. In addition, several courts continue to recognize that a party who fails to comply with a conditional order 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.[122] The Fourth Department's decision in *Lauer* 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.[123]

The courts in *Gibbs* and *Lauer* are providing the recalcitrant party with yet another opportunity to seek forgiveness for its sins. 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.[124] The decisions in *Gibbs* and *Lauer* support the proposition that even after these three lapses, and a court's subsequent determination on a contested CPLR 3126 motion that the failure to disclose was "willful," the disobedient party can still

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[121] 10 N.Y.3d 827, 890 N.E.2d 179, 860 N.Y.S.2d 417 (2008); *supra* note 108 and accompanying text.

[122] *See, e.g.*, AWL Indus., Inc. v. QBE Ins. Corp., 65 A.D.3d 904, 905, 885 N.Y.S.2d 71, 73 (App. Div. 1st Dep't 2009) ("[The defendant] was required to demonstrate both a reasonable excuse for its failure to comply with the order and a potentially meritorious defense to the action." (citations omitted)); Foster v. Dealmaker, SLS, LLC, 63 A.D.3d 1640, 1641, 881 N.Y.S.2d 250, 251 (App. Div. 4th Dep't 2009) ("To avoid the adverse impact of the conditional order of preclusion, the plaintiff[s were] required to demonstrate an excusable default and a meritorious cause of action." (citations omitted)); Ragubir v. 44 Court St., LLC, 60 A.D.3d 833, 834, 875 N.Y.S.2d 255, 256 (App. Div. 2d Dep't 2009) (noting that, even after the conditional order of preclusion became "absolute," the recalcitrant party could avoid the adverse impact of such an order by demonstrating a reasonable excuse for their default in providing the disclosure and the existence of a meritorious claim); *supra* note 87 and accompanying text.

[123] Lauer v. City of Buffalo, 53 A.D.3d 213, 215, 862 N.Y.S.2d 675, 676–77 (App. Div. 4th Dep't 2008) (citations omitted); *supra* notes 46–57 and accompanying text; *see* Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

[124] *See supra* notes 37–39 and accompanying text.

provide a "reasonable excuse" for the fourth dereliction, i.e., the failure to timely satisfy the conditional order."[125]

Despite the willingness of New York courts to forgive a party's failure to comply with a CPLR 3126 conditional order requiring disclosure, the grounds cited to support the relief, i.e., a reasonable excuse for the delay and an affidavit of merit of the claim or defense, have never been addressed by the Court of Appeals in any significant detail. Moreover, there is scant statutory support for granting relief on these grounds to parties who have failed to comply with the terms of a conditional order.

VI. THE COURT OF APPEALS HAS NEVER EXPRESSLY HELD THAT A PARTY CAN EXCUSE A FAILURE TO COMPLY WITH A CPLR 3126 CONDITIONAL ORDER THAT HAS BECOME ABSOLUTE

There is a legion of appellate division authority holding that a party can excuse a failure to comply with the terms of a CPLR 3126 conditional order that has become absolute by demonstrating a reasonable excuse for the failure to comply with the order and a meritorious cause of action or defense.[126] Research has failed to uncover any Court of Appeals case that expressly supports the proposition, and there does not appear to be any statutory basis for this doctrine.

It appears that the Court of Appeals's closest brushes with the doctrine have come in memoranda opinions affirming an order of the appellate division holding that a party could not escape the terms of a conditional order.[127] For example, in *Smith v. Lefrak Organization*, after the plaintiffs failed to respond to the

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[125] *See* Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13. While the conditional order in *Gibbs* was apparently the product of a motion on notice, see *supra* notes 89–95 and accompanying text, it is not clear whether the conditional order in *Lauer* was entered on a default in appearance or upon the terms of the plaintiff's stipulation. In any event, the *Lauer* 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 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 . . . .").

[126] *See supra* note 121 and accompanying text.

[127] *See, e.g.*, Smith v. Lefrak Org. (*Smith II*), 60 N.Y.2d 828, 830, 457 N.E.2d 799, 799–800, 469 N.Y.S.2d 693, 693 (1983); Canter v. Mulnick (*Canter II*), 60 N.Y.2d 689, 691, 455 N.E.2d 1257, 1258, 468 N.Y.S.2d 462, 463 (1983); LaBuda v. Brookhaven Mem'l Hosp. Med. Ctr., 62 N.Y.2d 1014, 1016, 468 N.E.2d 675, 675–76, 479 N.Y.S.2d 493, 493–94 (1984).

defendants' demand for a bill of particulars, "defendants moved for an order of preclusion."[128] The trial court granted a conditional order mandating preclusion, "unless the plaintiffs served the bill of particulars within [thirty] days after service of a copy of the order upon the attorney for the plaintiffs."[129] Over two months after the conditional order required compliance, the plaintiffs served a bill of particulars, which was rejected by the defendants as untimely.[130] The defendants then "moved for summary judgment, dismissing the complaint on the ground that," under the terms of the conditional order, "plaintiffs were precluded from proving their case."[131]

The Second Department concluded that the preclusion order was properly served and had taken effect.[132] Therefore, "plaintiffs were bound to demonstrate an excusable default and the existence of a meritorious claim" to escape the terms of the order.[133] In that "[n]either a reasonable excuse nor meritorious claim was proffered," the Second Department ruled that "defendants' motion for summary judgment should have been granted."[134] The Court of Appeals affirmed the order of summary judgment "for the reasons stated in the memorandum at the Appellate Division."[135]

In *Canter v. Mulnick*, the plaintiffs "ignored a demand for a bill of particulars for five years after joinder of issue."[136] The defendant moved for a conditional order of preclusion, which was entered on the plaintiffs' default, requiring "plaintiffs [to] serve[] their bill [of particulars] within ten days."[137] The plaintiffs failed to satisfy the conditional order and, approximately three years after the order required production of the bill of particulars, the defendant moved for summary judgment, contending that the conditional order "preclude[d] plaintiffs from proving a *prima facie* case."[138] Only at that juncture, "nearly five years after the demand for a bill of

[128] Smith v. Lefrak Org. (*Smith I*), 96 A.D.2d 859, 859, 465 N.Y.S.2d 777, 777 (App. Div. 2d Dep't 1983), *aff'd*, 60 N.Y.2d 828, 457 N.E.2d 799, 469 N.Y.S.2d 693 (1983). The Second Department did not state the specific statutory grounds for the motion, but it was likely based on CPLR 3126(2), which authorizes an order of preclusion for failure to comply with a disclosure order. *See supra* note 21 and accompanying text.

[129] *Smith I*, 96 A.D.2d at 859, 465 N.Y.S.2d at 777.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 860, 465 N.Y.S.2d at 777–78.

[133] *Id.* (citations omitted).

[134] *Id.* at 860, 465 N.Y.S.2d at 778.

[135] *Smith II*, 60 N.Y.2d at 830, 457 N.E.2d at 799–800, 469 N.Y.S.2d at 693.

[136] Canter v. Mulnick (*Canter I*), 93 A.D.2d 751, 751, 461 N.Y.S.2d 305, 306 (App. Div. 1st Dep't 1983).

[137] *Id.*

[138] *Id.*

particulars, [that the] plaintiffs respond[ed] with a proposed bill and an explanation that the expert periodontist had been unable to render a statement of possible malpractice because of unavailability of x-rays or records from the defendant."[139]

The First Department concluded that the trial court abused its discretion in denying the defendant's motion for summary judgment and vacating the conditional order.[140] The court ruled that "[p]laintiffs were not entitled to be relieved of the consequences of the default in the light of their five-year delay in making even this half-hearted effort at compliance with the demand for a bill of particulars."[141] While acknowledging that the plaintiffs' neglect could have been excused with "an adequate explanation for the delay as well as an affidavit of merit from a person with knowledge about the matter," the court ruled that the plaintiffs failed to sufficiently excuse the delay or show any merit to the claim.[142]

In a memorandum decision, the Court of Appeals affirmed, noting that the appellate division "correctly held that plaintiffs' affidavit failed to establish the merit of their case, and that the motion to dismiss should have been granted unconditionally."[143]

In sum, research has failed to uncover a Court of Appeals case in which the Court vacated a conditional order requiring disclosure, or excused a party's noncompliance with its terms, after the period within which to satisfy the conditional order had expired. While the Court has affirmed orders of the appellate division that refused to excuse a party's failure to comply with a conditional order, it has never fully embraced the doctrine that such orders can be overcome with a showing of a reasonable excuse and an affidavit of merits.

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[139] *Id.*

[140] *Id.* at 752, 461 N.Y.S.2d at 306.

[141] *Id.*

[142] *Id.* (citation omitted). The court observed that "[i]n seeking to excuse the failure to serve a medical malpractice bill of particulars in a timely fashion, a plaintiff must establish the legal merits of his case by an affidavit from a physician competent to attest to the meritorious nature of his claim." *Id.*, 461 N.Y.S.2d at 307 (citation omitted).

[143] Canter v. Mulnick (*Canter II*), 60 N.Y.2d 689, 691, 455 N.E.2d 1257, 1258, 468 N.Y.S.2d 462, 463 (1983); *see also* Fiore v. Galang, 64 N.Y.2d 999, 1000, 478 N.E.2d 188, 188–89, 489 N.Y.S.2d 47, 48 (1985) ("We agree that absent a sufficient affidavit of merits it was error, as a matter of law, not to grant defendant Hospital's motion for summary judgment" after the plaintiff failed to satisfy a conditional order requiring production of a bill of particulars (citations omitted)); La Buda v. Brookhaven Mem'l Hosp. Med. Ctr., 62 N.Y.2d 1014, 1016, 468 N.E.2d 675, 675, 479 N.Y.S.2d 493, 493 (1984) (affirming award of summary judgment granted on basis of order of preclusion, and noting that it "was not an abuse of discretion as a matter of law to dismiss the complaint [where the p]laintiff failed to submit an affidavit of merit in opposition to defendants motion for summary judgments" (citations omitted)).

Its opinions on the subject merely affirm appellate division orders without any extensive or substantive discussion of the doctrine and its origins.

VII. LACK OF STATUTORY BASIS FOR THE DOCTRINE PERMITTING A PARTY TO EXCUSE NONCOMPLIANCE WITH A CPLR 3126 CONDITIONAL ORDER

Decisions holding that a party in noncompliance with a CPLR 3126 conditional order requiring disclosure may still escape the consequences of the order by setting forth a reasonable excuse and demonstrating the merit of the claim or defense predate the CPLR, which took effect on September 1, 1962.[144] In *D'Antonio v. Fitzgerald*, for example, the Second Department reversed the trial court's order granting the plaintiffs' motion to direct the defendant to accept service of the plaintiffs' bill of particulars, which were served after the date set in the conditional order of preclusion.[145] The court noted that the record lacked an adequate basis "for the exercise of the court's discretion in opening plaintiffs' default under the preclusion order."[146] No facts "establishing an excusable default for plaintiffs' inordinate delay in serving the bill of particulars" or "showing the merits of the action" were set forth.[147] The appellate division remitted the matter to the supreme court "without prejudice to renewal upon proper affidavits reciting *facts* showing a meritorious cause of action and a meritorious excuse for plaintiffs' failure to serve the bill of particulars in accordance with the terms of the preclusion order of March 6, 1959."[148]

The early decisions in this area appear to ground the power to excuse a party's noncompliance with a conditional order in the court's discretionary powers. There have been surprisingly few cases that explain the basis for this power, which does not appear to emanate from any statute. CPLR 3126 empowers the court to make such orders "as are just," so the sample orders listed in the

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[144] *See* SIEGEL, NEW YORK PRACTICE, *supra* note 5, § 2, at 2.

[145] D'Antonio v. Fitzgerald, 11 A.D.2d 804, 804, 204 N.Y.S.2d 908, 909 (App. Div. 2d Dep't 1960).

[146] *Id.*

[147] *Id.*

[148] *Id.*; *see also* Baumgarten v. Bratt, 13 A.D.2d 832, 216 N.Y.S.2d 386 (App. Div. 2d Dep't 1961) (holding that the papers submitted did not assert "*facts* showing a meritorious cause of action and a meritorious excuse for plaintiff's failure to serve the bill of particulars in accordance with the terms of the [trial court's] preclusion order" and reversing an order requiring the defendant to accept the plaintiff's bill of particulars served after the time period contained in the conditional order (citations omitted)).

provision are not exhaustive.[149] This statutory language grants the court authority to issue conditional orders,[150] or to relieve the recalcitrant party of a civil sanction, such as an outright default, if it instead pays costs and/or attorneys' fees to the party seeking relief under CPLR 3126.[151] While "[a] certain amount of discretion is reserved to the . . . court in crafting conditional orders to encourage the cooperation of neglectful parties so that their claims can be litigated on the merits,"[152] this does not necessarily mean that courts possess similarly broad discretion to forgive a party's failure to comply with a conditional order after it has been entered.[153] Furthermore, it is well settled that trial courts generally cannot sit in review of their own orders and modify their terms.[154] That is the province of the appellate court.

It is interesting to note that CPLR 3126 is based on Federal Rule of Civil Procedure 37, entitled "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions."[155] Research under the Federal Rules of Civil Procedure also failed to reveal any case law or statutory support for the proposition that a party can seek relief from an order under Rule 37 imposing sanctions for violations of discovery orders merely through a showing of a reasonable excuse and an affidavit of merit of the claim or defense. To the contrary, the Eleventh Circuit has observed that "the probable merit of a litigant's case does not preclude the imposition of a default judgment sanction against that litigant. 'Discovery orders must be obeyed even by those foreseeing ultimate success in the district court.'"[156]

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[149] N.Y. C.P.L.R. 3126 (McKinney 2005).

[150] *See supra* notes 21, 25 and accompanying text.

[151] *In re* John H., 60 A.D.3d 1168, 1169, 876 N.Y.S.2d 169, 171 (App. Div. 3d Dep't 2009) ("Although not specifically listed, a monetary sanction, including costs and counsel fees, may be imposed under the statutory language permitting any order that the court finds 'just.'" (citing Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:11)).

[152] Becerril v. Skate Way Roller Rink, Inc., 184 A.D.2d 365, 366, 584 N.Y.S.2d 844, 845 (App. Div. 1st Dep't 1992); *see also* Granibras Granitos Brasileiros, Ltda. v. Farber, 34 A.D.3d 230, 823 N.Y.S.2d 390 (App. Div. 1st Dep't 2006) (quoting *Becerril*, 184 A.D.2d at 366, 584 N.Y.S.2d at 845); *see supra* note 24 and accompanying text.

[153] The Dykman Committee Report notes that "the court will . . . make a conditional order that if the party does not appear . . . the penalties will automatically be visited upon him." ADVISORY COMM. ON PRACTICE AND PROCEDURE, TEMPORARY COMMISSION ON THE COURTS 160 (1957) [hereinafter DYKMAN COMMITTEE REPORT] (on file with author).

[154] *See* N.Y. CPLR 5701(a)(2) (1995).

[155] *See* DYKMAN COMMITTEE REPORT, *supra* note 153, at 159; FED. R. CIV. P. 37.

[156] Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1544 (11th Cir. 1993) (citing United States v. $239,500 in U.S. Currency, 764 F.2d 771, 773 (11th Cir. 1985)); *see also* Diapulse Corp. of Am. v. Compagnie Nationale Air France, 1973 WL 154185, at *3 (E.D.N.Y. Oct. 19, 1973) ("Denying relief here will deprive plaintiff of its day in court on what may be a

VIII. REMEDIES AVAILABLE TO PARTY SEEKING TO OBTAIN RELIEF FROM CONDITIONAL ORDER

There are several established remedies available to a party subject to a CPLR 3126 conditional order under the CPLR. These broad remedies cast further doubt on the utility of the doctrine, invoked by several courts, that allows a court to vacate or modify a conditional order based merely on a reasonable excuse and affidavit of merit.[157]

It is submitted that neither a trial court nor an appellate court should be permitted to allow a party to escape the effect of a self-executing CPLR 3126 conditional order that has been rendered absolute on a mere showing of a reasonable excuse and an affidavit of merit. If a party is seeking to challenge the imposition of a CPLR 3126 conditional order after a contested motion, and/or seeks an extension of time within which it can comply, the sole remedies should be an appeal from the order, a motion for reargument or renewal to the trial court pursuant to CPLR 2221, or a motion to the trial court for an extension of time under CPLR 2004.

A. Appeal from Conditional Order

If a contested CPLR 3126 motion gives rise to a conditional order, the aggrieved party can certainly appeal the order and seek appellate review.[158] This method of seeking review should be accompanied by a motion for a stay of the conditional order in the event that the appellant loses the appeal.[159] This will still allow the appealing party to comply with the terms of the conditional order if the appellate division does not grant relief. The motion for a stay can be made to the trial court that issued the order or to the appellate court.[160]

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meritorious cause of action. This is a severe sanction. But at some point failure to conform to the rules of discovery must result in dismissal even of a claim that may be meritorious." (citations omitted)).

[157] *See supra* note 122 and accompanying text.

[158] Clarke v. United Parcel Servs., Inc., 300 A.D.2d 614, 615, 752 N.Y.S.2d 395, 396 (App. Div. 2d Dep't 2002) ("Since the order and subsequent judgment arose from a motion made on notice by the defendants . . . the plaintiffs' property remedy was by way of appeal . . . ." (citations omitted)); Pinapati v. Pagadala, 244 A.D.2d 676, 677–78, 664 N.Y.S.2d 160, 162–63 (App. Div. 3d Dep't 1997) ("Here, defendant fully opposed and contested plaintiff's . . . motion" and "defendant's sole remedy for the default judgment was an appeal . . . .").

[159] N.Y. C.P.L.R. 2201 (McKinney 1991) ("Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.").

[160] *Id.*; N.Y. C.P.L.R. 5519(c) (McKinney 1995) ("The court from or to which an appeal is

B. Motion to Vacate Conditional Order Under CPLR 5015(a)(1)

1. Instances in Which Party Has Not Appeared in Opposition to CPLR 3126 Motion

It is not surprising that the party who has refused to provide disclosure up through the issuance of a CPLR 3124 order to compel the production will often not even appear in opposition to a motion under CPLR 3126.[161] If a CPLR 3126 motion is met with no opposition, the Fourth Department's decision in *Lauer* soundly concludes that relief from any order emanating from this default must be pursued through CPLR 5015's machinery.[162] Technically, the "default" that must be excused in the context of a CPLR 5015 motion is the one caused by the party's failure to appear in opposition to the motion that gave rise to the order, rather than the failure to comply with disclosure as 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,[163] it can then reexamine whether the relief granted under CPLR 3126, such as the imposition of a default judgment, should be vacated, but now with the benefit of the defendant's opposing papers.[164]

The fact that the failure to appear in opposition to the CPLR 3126 motion is excused will not necessarily mean that the resulting 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 defendant had "willfully" failed to provide disclosure and, therefore, that an award of sanctions under CPLR 3126 was appropriate.[165] As a general rule, the courts do not grant

taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in [CPLR 5519(a) or (b)].").

[161] *See, e.g.*, Lauer v. City of Buffalo, 53 A.D.3d 213, 214, 862 N.Y.S.2d 675, 676 (App. Div. 4th Dep't 2008); Liberty Taxi Mgmt. v. Gincherman, 32 A.D.3d 276, 276–77, 820 N.Y.S.2d 49, 50 (App. Div. 1st Dep't 2006).

[162] *Lauer*, 53 A.D.3d at 214, 862 N.Y.S.2d at 676.

[163] *See* N.Y. C.P.L.R. 5015(a)(1) (McKinney 2007) (allowing the court to vacate a default judgment based on a reasonable excuse and an affidavit of merit).

[164] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

[165] *See* Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:7; *cf. Liberty Taxi Mgmt., Inc.*, 32 A.D.3d at 277 n.*, 820 N.Y.S.2d at 50 n.* (App. Div. 1st Dep't 2006) ("A summary judgment motion should not be granted merely because the party against whom

this drastic form of relief lightly.[166] Therefore, in most instances, it will be difficult for the defendant to convince the trial judge that the original finding of a willful failure to disclose, which triggered the sanction under CPLR 3126, should now be undone.[167]

Lauer is 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 the plaintiff's CPLR 3126 motion and for the subsequent failure to timely comply with the conditional order.[168] It should be noted, 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."[169] This, "together with the prompt motion of the . . . 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 . . . defendants had established a reasonable excuse for their default."[170] It is important to recognize that several other courts have refused to find a "reasonable excuse" in similar circumstances.[171]

While the bounds of discretion on a CPLR 5015(a)(1) motion to vacate are certainly wide, it is difficult to reconcile *Lauer*'s conclusion in this regard with the Court of Appeals's ongoing crusade against "sloppy practice."[172] In addressing similar lapses by

judgment is sought failed to submit papers in opposition to the motion (i.e., 'defaulted')." (citations omitted)).

166 *See supra* note 24 and accompanying text.

167 Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

168 Lauer v. City of Buffalo, 53 A.D.3d 213, 217, 862 N.Y.S.2d 675, 678 (App. Div. 4th Dep't 2008) (citation omitted).

169 *Id.*

170 *Id.* (citations omitted).

171 Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13; *see, e.g.*, Huggins v. Parkset Supply, Ltd., 24 A.D.3d 610, 611, 807 N.Y.S.2d 112, 114 (App. Div. 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, 436–37, 624 N.Y.S.2d 606, 607 (App. Div. 1st Dep't 1995).

172 Brill v. City of N.Y., 2 N.Y.3d 648, 653, 814 N.E.2d 431, 435, 781 N.Y.S.2d 261, 265 (2004); *see supra* notes 1–3 and accompanying text.

counsel in *Andrea v. Arnone*,[173] 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.[174]

2. Instances in Which Party Has Appeared in Opposition to CPLR 3126 Motion

It must be emphasized that if a party appears in opposition to a CPLR 3126 motion, it should not be permitted to contest the resulting order through a motion to vacate under CPLR 5015. In *Lauer*, 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.[175] There are also several statements in the *Lauer* opinion that support the proposition that a party may seek relief from failing to comply with a conditional order through a CPLR 5015(a)(1) motion.[176]

Lauer premises these troublesome conclusions on the fact that the party against whom the self-executing conditional order was

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[173] 5 N.Y.3d 514, 521, 840 N.E.2d 565, 569, 806 N.Y.S.2d 453, 457 (2005).

[174] *Id.* (citing Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725, 726–27, 819 N.E.2d 995, 996, 786 N.Y.S.2d 379, 380 (2004); *Brill*, 2 N.Y.3d 648, 652–53, 814 N.E.2d 431, 435, 781 N.Y.S.2d 261, 265 (2004); Kihl v. Pfeffer, 94 N.Y.2d 118, 122–23, 722 N.E.2d 55, 58, 700 N.Y.S.2d 87, 90 (1999)); Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

[175] *Lauer*, 53 A.D.3d at 216, 862 N.Y.S.2d at 677 (citations omitted).

[176] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13; *see, e.g.*, *Lauer*, 53 A.D.3d at 214, 862 N.Y.S.2d at 676–78 ("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 . . . [;]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 . . . [; and] 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 . . . .").

entered "has had no opportunity to offer a reasonable excuse for the default" in complying with the order and has not "had the opportunity to establish a meritorious claim or defense, the additional prerequisite to relief under CPLR 5015(a)(1)."[177] In reaching this conclusion, the *Lauer* court provides the recalcitrant defendant with yet another opportunity to seek forgiveness for its lapses. 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.[178] *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.[179]

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.[180] 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.[181] If a party is seeking to challenge the imposition of a

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[177] *Lauer*, 53 A.D.3d at 216, 862 N.Y.S.2d at 677 (citations omitted).

[178] *See supra* notes 37–39 and accompanying text.

[179] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13. 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. *Id.*; *see Lauer*, 53 A.D.3d at 217, 862 N.Y.S.2d at 678.

[180] For a discussion of the limited relief available when after a party has consented to the entry of a CPLR 3126 conditional order, see Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

[181] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13; *see* Clarke v. United Parcel Servs., Inc., 300 A.D.2d 614, 614–15, 752 N.Y.S.2d 395, 396–97 (App. Div. 2d Dep't 2002) (noting that the plaintiffs could not obtain relief under CPLR 5015(a)(1) where the judgment dismissing their complaint based upon their failure to comply with a conditional order of preclusion was a product of a motion made on notice); Achampong v. Weigelt, 240 A.D.2d 247, 247–48, 658 N.Y.S.2d 606, 607 (App. Div. 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 160, 162 (App. Div. 3d Dep't 1997) (reversing the 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" (citations omitted)); *see also* John R. Higgitt, *Laxness Dismissal Survival Guide: Restoring Actions*, N.Y. L.J., Nov. 1, 2006, at 4 ("Relief pursuant to [CPLR 5015] should only be available to a party who was not heard before the

CPLR 3126 order after a contested motion, the sole remedy should be an appeal from the order, or a motion for reargument or renewal pursuant to CPLR 2221.[182]

C. Motion for Reargument or Renewal of CPLR 3126 Motion That Produced a Conditional Order

If a party has appeared in opposition to a motion under CPLR 3126, it can move under CPLR 2221 for reargument and/or renewal of the motion.[183]

1. Motion for Reargument of CPLR 3126 Motion

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."[184] A motion for reargument, like the notice of appeal, must be served within thirty days of service of the conditional order with notice of entry.[185] It is doubtful that a party who has engaged in prolonged delay in providing disclosure will make a timely and successful motion for reargument, but the remedy is nonetheless available.[186] The court may have overlooked or misapprehended the scope of the disclosure already provided to the moving party, which could provide a basis for the court to grant a motion for reargument and reconsider the propriety of a conditional order.[187]

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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.").

[182] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13; *see infra* notes 183–90 and accompanying text.

[183] N.Y. C.P.L.R. 2221(d) (McKinney 1991) (leave to reargue); N.Y. C.P.L.R. 2221(e) (leave to renew).

[184] N.Y. C.P.L.R. 2221(d)(2).

[185] N.Y. C.P.L.R. 2221(d)(3); Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13. A party that also intends to appeal from the conditional order should promptly serve a notice of appeal in the event the motion for reargument is denied. *See* N.Y. C.P.L.R. 5513(a) (McKinney 1997) (requiring service and filing of notice of appeal within thirty days of service of order with notice of entry). A denial of a motion for reargument is not appealable. *See* SIEGEL, NEW YORK PRACTICE, *supra* note 5, § 254, at 434. The cases are in conflict as to whether a party can make a motion for reargument beyond the thirty day period in CPLR 2221(d)(3) if there has been a timely filing and service of a notice of appeal. *Id.*

[186] *See* Adzer v. Rudin Mgmt. Co., 50 A.D.3d 1070, 1071, 856 N.Y.S.2d 674, 676 (App. Div. 2d Dep't 2008) (concluding that "the Supreme Court providently exercised its discretion in granting the . . . defendants leave to renew and reargue under the circumstances of this case," and in ultimately vacating the CPLR 3126 order striking the defendants' answer).

[187] *See, e.g.*, Donskoi v. Donskoi, 38 A.D.3d 708, 830 N.Y.S.2d 919 (App. Div. 2d Dep't 2007). The court can grant a motion for reargument and still adhere to its earlier decision imposing a conditional order under CPLR 3126. *See* Guang Jing Chen v. Goldstein, 246

2. Motion for Renewal of CPLR 3126 Motion

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."[188] 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."[189] It is conceivable that a party subject to a CPLR 3126 conditional order might subsequently learn that the documents required to be produced were destroyed by fire or, in this world of electronic storage, erased by a computer crash. Such an event might weigh in favor of granting a motion for renewal, assuming that there was a reasonable justification for failing to present these facts in the answering papers to the original CPLR 3126 motion.[190]

D. CPLR 2004 Motion to Extend the Time for Compliance Required by the Conditional Order

CPLR 2004, one of the most commonly invoked statutes in the CPLR, allows the court to "extend the time fixed by any statute, rule or 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."[191] This provision could be invoked by a party seeking an extension of time to comply with the terms of the conditional order, even after the time for compliance has expired.[192]

A.D.2d 407, 407–08, 667 N.Y.S. 2d 717, 717 (App. Div. 1st Dep't 1998).

[188] N.Y. C.P.L.R. 2221(e)(2).

[189] N.Y. C.P.L.R. 2221(e)(3); Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

[190] *See, e.g.*, Shapiro v. Kurtzman, 50 A.d.3d 771, 772, 855 N.Y.S.2d 610, 611–12 (App. Div. 2d Dep't 2008).

[191] N.Y. C.P.L.R. 2004 (McKinney 2005).

[192] While CPLR 2004 grants the courts authority to extend the time fixed by an order "whether the application for extension is made before or after the expiration of the time fixed," the court has greater discretion to grant an application for an extension if the motion is made before the time period has expired. *Id.*; *see generally* A & J Concrete Corp. v. Arker, 54 N.Y.2d 870, 872, 429 N.E.2d 412, 413, 444 N.Y.S.2d 905, 906 (1981) ("We would note that the courts enjoy a somewhat broader range of discretion when considering a motion for an extension of time under CPLR 2004 which precedes any motion to dismiss than when considering a motion to dismiss pursuant to CPLR 3012 (subd. [b]), whether or not countered

A party moving under CPLR 2004 must demonstrate "good cause" warranting the extension.[193] The case law interpreting the statute instructs courts to "consider factors such as the length of delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay, whether the moving party was in default before seeking the extension," law office failure, "and whether an affidavit of merit [was] proffered."[194] CPLR 2004 requires a far broader inquiry than that conducted by courts ascertaining whether the moving party has demonstrated a reasonable excuse for the delay and an affidavit of merits.[195]

IX. CONCLUSIONS AND RECOMMENDATIONS

The standards outlined above governing motions to reargue or renew under CPLR 2221, and for extensions of time under CPLR 2004, are far more specific than those currently used by appellate courts in ascertaining whether a party's failure to comply with a CPLR 3126 conditional order can be forgiven. Furthermore, research has failed to uncover a case from the Court of Appeals holding that a party can avoid the consequences of a now-absolute CPLR 3126 self-executing conditional order by merely showing a reasonable excuse for the failure to comply with the order and a potentially meritorious claim or defense in the action. This additional basis for allowing a recalcitrant party to avoid the consequences of a conditional order has apparently been created through appellate division case law, but research has failed to uncover an extensive discussion of the genesis of the power. One wonders, however, if this basis is needed in light of the other remedies expressly recognized in the CPLR.[196]

In sum, if a party that opposed a CPLR 3126 motion believes that a conditional order should not have been issued because there was not a sufficient showing that it "refuse[d] to obey an order for disclosure or willfully fail[ed] to disclose information

by a motion for extension of time." (citation omitted)).

[193] N.Y. C.P.L.R. 2004.

[194] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13; *see* Tewari v. Tsoutsouras, 75 N.Y.2d 1, 12–13, 549 N.E.2d 1143, 1148, 550 N.Y.S.2d 572, 577 (1989); *In re* Burkich, 12 A.D.3d 755, 755, 785 N.Y.S.2d 137, 138 (App. Div. 3d Dep't 2004); Saha v. Record, 307 A.D.2d 550, 551, 762 N.Y.S.2d 693, 695–96 (App. Div. 3d Dep't 2003); Grant v. City of N.Y., 17 A.D.3d 215, 217, 793 N.Y.S.2d 35, 38 (App. Div. 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).

[195] *See supra* notes 100–03, 122 and accompanying text.

[196] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

which . . . ought to have been disclosed,"[197] that party can challenge the determination through an appeal of the order. If, however, a party has not satisfied a conditional order and requests additional time within which to comply, or did not appear in opposition to the CPLR 3126 motion, it should be directed to seek relief before the trial court in the first instance. If the trial court denies a motion to vacate or modify the conditional order—which will usually be sought through a motion to vacate under CPLR 5015, a motion for reargument or renewal pursuant to CPLR 2221, or a motion for an extension of time under CPLR 2004—that order will then usually be subject to appellate review.[198] Following this procedural path will ensure that a full record is developed on the grounds supporting an extension, and will better assist the appellate court in making its determination.[199]

It appears that we will ultimately reap the benefits of the Court of Appeals's insights on the matter. The First Department granted leave in *Gibbs* on July 14, 2009.[200] The case will be scheduled for oral argument in the fall of 2010. Before the leave grant, Professor Siegel observed in his discussion of the case that "[i]t is likely, if *Gibbs* on the same facts were before the Court of Appeals, that based on *Wilson* the Court would have applied those fatal sanctions [of preclusion and summary judgment]."[201] We will soon find out. It is also hoped that the Court will address whether it is appropriate to grant relief from a self-executing conditional order imposed under CPLR 3126 merely upon a showing of reasonable excuse and an affidavit of merit of the claim or defense.

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[197] N.Y. C.P.L.R. 3126 (McKinney 2005).

[198] The denial of a motion for reargument is not appealable. *See supra* notes 182, 186 and accompanying text.

[199] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13.

[200] It will not surprise the reader to learn that the Court of Appeals dismissed the *Gibbs* appeal based on the plaintiff's failure to timely file and serve a brief. Gibbs v. St. Barnabas Hosp., 13 N.Y.3d 857, 920 N.E.2d 96, 891 N.Y.S.2d 691 (2009) (unreported table decision). The appeal was subsequently reinstated in an order dated January 12, 2010. *Gibbs*, 13 N.Y.3d 917, 922 N.E.2d 882, 895 N.Y.S.2d 295 (2010).

[201] Connors, *Practice Commentaries*, CPLR 3126, *supra* note 18, C3126:13; David D. Siegel, *Violating Conditional Orders*, 209 SIEGEL'S PRAC. REV. 3 (May 2009).