

To be Argued by:
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New York Supreme Court
Appellate Division – First Department

NORMAN GOLDSTEIN, as Executor of the Estate of ELLSWORTH GOLDSTEIN,

Plaintiff-Appellant,

– against –

CIBC WORLD MARKETS CORP. and GARY EMMERICH,

Defendants-Respondents,

– and –

TASIN & COMPANY,

Defendant.

BRIEF FOR DEFENDANTS-RESPONDENTS
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PRELIMINARY STATEMENT

This is a case about a plaintiff's willful failure, over an extended period, to perform the very basic functions the law requires of him in order to maintain a suit in New York State courts. Contrary to the plaintiff's misleading characterization on appeal, he was not capriciously punished for missing a deadline or two, or some other technical foul. Instead, Mr. Goldstein's claim was dismissed after he spent more than a year systematically, dishonestly, and blatantly ignoring a series of court orders requiring him to respond to minimal, proper discovery requests from his adversaries. Over the course of that year, his excuses for non-compliance changed every time he entered the courthouse. The only consistency was his steadfast refusal, even in the face of mounting threats of dismissal from the trial judge, to provide his adversaries with the basic documents they needed in order to prepare a defense against his meritless claim.

On appeal, Goldstein attempts to pin the blame for his admitted intransigence on the actions of a rogue lawyer, hobbled by illness. But as the trial judge noted in his order dismissing the case, the plaintiff's willful and contumacious discovery failures began many months before his lawyer ever claimed to have been ill. In addition, as the trial court also noted, the plaintiff was represented not by a sole practitioner, but by a law firm whose members were aware for many weeks that the attorney assigned to this case was shirking essential

duties. In any case, as the Court of Appeals made clear just last year, “it is often necessary *** to hold parties responsible for their lawyers’ failure to meet deadlines.”

In the end, the plaintiff does not dispute that he spent the better part of a year flouting every deadline his own misbehavior forced the trial court to impose. He also does not dispute that the CPLR permits the trial court to dismiss a case for precisely this type of behavior. He nonetheless asks this Court to reinstate his claim by holding that the dismissal was an abuse of discretion, even after seven separate compliance conferences, four written discovery orders, four separate oral warnings that noncompliance could lead to dismissal, and at least two separate written warnings to that effect. This Court should reject this request and affirm the dismissal.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Did the trial court abuse its discretion by dismissing the plaintiff’s complaint after the plaintiff, for more than a year, refused to comply with multiple court orders requiring document production and threatening dismissal as a consequence for non-compliance?

COUNTERSTATEMENT OF FACTS

The complaint in this case was filed on October 24, 2002. On April 30, 2003, at a hearing attended by both parties, the IAS Court directed the parties to begin discovery. Over the course of the next year, Goldstein completely ignored his discovery obligations. He refused to produce requested documents despite four separate discovery orders directing him to do so and explicitly warning him that further delays would result in sanctions or dismissal.

Goldstein gave various excuses for his behavior. The first came at a compliance conference held in September, 2003. At that conference, which had been requested by the defendants due to the plaintiff's failure to comply with the preliminary conference order, the plaintiff claimed to have been under the misimpression that discovery had been stayed because of a pending dispositive motion. The IAS judge found this claim "suspect" because the court had directed the parties to begin discovery "immediately after oral argument on that very dispositive motion." RA 16. The court nonetheless denied the defendants' request for sanctions, choosing instead to admonish the plaintiff that "no further delays in discovery would be tolerated." Id.

The plaintiff's second excuse came the following month. On October 6, 2003, the IAS court held a second compliance conference. Again, the plaintiff had yet to comply with his discovery obligations under the April 2003 order. His

October excuse was that he had not responded to discovery demands because he thought that the case was going to be transferred out of the Commercial Division. This assertion was also highly suspect, because although the court had indicated at the September conference that the case might be transferred, the court had contacted both parties the very next day to tell them that the case would in fact remain where it was. The defendants again requested sanctions or dismissal, and the court again denied the request, choosing instead to admonish plaintiff's counsel. As the court later summarized, "Plaintiff's counsel was warned by the Court that *strict compliance with the preliminary conference order was directed or sanctions would be imposed.*" RA 16 (emphasis in original).

The warning did not work. In late October 2003, the defendants once again informed the court that the plaintiff had failed to respond to the defendants' document requests, and asked that new deadlines be set. The plaintiff responded by letter, promising that he would serve responses to the defendants' production requests by October 27, 2003. He did not.

The defendants once again made an application to the IAS court for sanctions or dismissal. Once again, the court denied the application and set new deadlines for document production and the close of discovery. The Court later wrote that it "did not sanction the Plaintiff and dismiss the complaint as it is

mindful of the First Department's preference that a matter be litigated on its merits." RA 17.

The plaintiff ignored the court's revised deadlines, which passed unceremoniously in mid-November, 2003. The case was referred to a special master, who held a compliance conference on January 8, 2004. After that conference, the court issued a third discovery order, which directed the plaintiffs to produce four separate specific categories of documents by February 27, 2004. RA 78. No such documents were produced.

The parties returned to court for another compliance conference on March 25, 2004. By this time, one month after the latest extended deadline, the plaintiff still had not complied with the January 8 order. The court once again issued an order extending the deadlines – this time to April 5. The court's order directed the plaintiff to comply, in writing, with all previous orders. It also listed various specific categories of additional documents that were to be produced by the revised deadline. If no responsive documents existed, the court wrote, the plaintiff was to submit an affidavit attesting to that fact. Finally, the March order specified that "if [plaintiff] fails to comply with the order *** the court shall either assess monetary sanctions or strike [plaintiff's] complaint as the court deems appropriate." RA 82.

The April 5 deadline came and went with no response from the plaintiff. Meanwhile, during this period, the plaintiff also failed to appear for argument in

this Court on his interlocutory appeal from the IAS court's original decision to dismiss various claims in the complaint. RA 54. The defendants informed the court of these developments by letter, and made yet another application for sanctions or dismissal. The special master held a third compliance conference on April 29, 2004, at which time plaintiff's counsel represented (for the first time) that he had been ill and therefore unable to comply with the various pending discovery requests. The court then entered an order directing the parties to appear the following week for a conference at which the court would consider sanctions. The Special Master directed plaintiff's counsel to produce proof of his illness and to bring that proof to the conference.

The sanctions conference took place on May 4, 2004. The plaintiff was represented at that conference by Michael Calvey – the lawyer who had been representing him throughout the litigation – and by Harry Wise, who asserted to the court that he was “of counsel” to Mr. Calvey's law firm and that he had been working with Mr. Calvey on the Goldstein case for six months. At the conference, Mr. Calvey again asserted that he had been ill for approximately three weeks. To verify this illness, he produced a page from a doctor's prescription pad, on which there was a handwritten note asserting that Mr. Calvey was under the doctor's care. RA 18, 53. Mr. Wise, meanwhile, asserted to the court that Mr. Calvey had not shown up to work in over three weeks. RA 55.

Plaintiff's excuses at the May 4 conference ran the gamut. In addition to claiming that he had missed the court's latest (thrice-extended) discovery deadlines because of a three-week old illness, he also asserted (falsely) that the *defendants* had failed to conduct discovery, and that this justified his lack of production. RA 48 (emphasis added). Later in the conference, plaintiff's counsel conceded that this was not true. RA 50.

The defendants once again requested dismissal. The court adjourned the matter to the following week and directed counsel to bring their clients to the next conference. The parties returned to court on May 11, 2004. This time, plaintiff was represented not by Mr. Calvey, but by his partner, Thomas Amon. Mr. Wise also appeared for the plaintiff.

At the May 11 conference, Mr. Amon apologized for the actions of his partner and stated that in the week since the May 4 conference, his firm had complied with all outstanding discovery orders. Counsel for the defendants disputed that characterization, informing the court that the plaintiff had produced certain documents that had been listed in the court's March 25 order, but that others had not been produced. In addition, the defendants informed the court that part of the plaintiff's belated production was non-responsive. RA 60.

The court granted the motion to dismiss from the bench. RA 62. In a letter dated the following day, the plaintiff urged the court to "reconsider" its decision.

RA 39-40. The court declined, issuing a written order granting judgment to the defendants on June 10, 2004. RA 14. The order was filed on June 24, 2004.

The plaintiff filed a notice of appeal from the final judgment and subsequently filed a motion requesting “reargument or renewal” of the dismissal order. The court denied this motion by written order dated December 16, 2004. The court noted in its order that the motion, though labeled one for reargument “and renewal,” was actually just a motion for re-argument, because it did not assert any change in law or any “new facts,” as required by the CPLR.

This appeal followed. It was perfected more than four months late and upon an incomplete record. This Court denied, without prejudice, the defendants-respondents’ motion to dismiss the appeal on those grounds. In order to hear the appeal on the merits, this Court granted the plaintiff-appellant’s cross motion to cure, retroactively, the delay and the improper record.

SUMMARY OF ARGUMENT

Goldstein does not dispute that the trial judge has the authority, under the CPLR, to dismiss a complaint as punishment for exactly the type of behavior Goldstein displayed here. He argues, however, that the court nonetheless abused its discretion by exercising this authority because it was likely that the plaintiff’s lawyer (or that lawyer’s illness) was responsible for the violation. But counsel’s illness cannot excuse the year’s worth of sanctionable behavior that took place

before illness allegedly struck. See, e.g., *Borgia v. Interboro Gen. Hosp.*, 59 N.Y.2d 802, 803 (1983). More generally, the Court of Appeals has just recently reiterated that parties must be held responsible for their lawyers' failures to meet deadlines. Otherwise, "[l]itigation cannot be conducted efficiently." *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 N.Y.3d 514, 521 (2005).

The plaintiff also claims that dismissal was an abuse of discretion because his year's worth of discovery failures were purportedly cured in the week leading up to dismissal. But the law is clear that late compliance does not excuse willful and contumacious discovery violations – particularly when those violations have stretched on for a very long time. In any case, as the defendant informed the court during the dismissal hearing, and as the record on appeal reflects, the plaintiff's belated production was inadequate to cure the prejudice he had created.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE COMPLAINT.

There is no dispute that the trial court had the authority to dismiss Goldstein's complaint. CPLR 3126 states that

If any party *** refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed *** the court may make such orders with regard to the failure or refusal as are just, among them:

[***]

an order *** 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). As the plaintiff recognizes, the exercise of this authority is reviewed by this court for abuse of discretion. *Gross v. Edmer Sanitary Supply Co.*, 201 A.D.2d 390, 391 (1st Dep't 1994).

When deciding whether a trial court has abused its discretion by either granting or denying a motion to dismiss pursuant to CPLR 3126, this court looks to whether the failure to comply with discovery directives was “willful” and “contumacious.” *Merchs. T & F, Inc. v. Kase & Druker*, 19 A.D.3d 134 (1st Dep't 2005). There is, of course, “a strong preference in our law that matters be decided on their merits,” *Catarine v. Beth Israel Med. Ctr.*, 290 A.D.2d 213, 215 (1st Dep't 2002), as the trial court noted in support of its multiple denials of the defendants' early requests for dismissal. But where there are “long-standing patterns of default, lateness, and failure to comply with court orders,” *Merchs.*, 19 A.D.3d at 134, this Court and the Court of Appeals routinely hold that dismissal is an appropriate remedy. See, e.g., *Andrea*, 5 N.Y.3d at 521; *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122-23 (1999); *Merchs.*, 19 A.D.3d at 134; *John R. Souto Co. v. Coratolo*, 293 A.D.2d 288, 288 (1st Dep't 2002). Indeed, this Court and its sister departments routinely hold that *failure* to dismiss a plaintiff's complaint

constitutes an abuse of discretion, when confronted with the sort of systematic intransigence displayed by Goldstein. See, e.g., *Cano v. BLF Realty Holding Corp.*, 243 A.D.2d 390 (1st Dep't 1997); *Mendez v. City of New York*, 7 A.D.3d 766, 767 (2d Dep't 2004); *Espinal v. City of New York*, 264 A.D.2d 806 (2d Dep't 1999).

A. Plaintiff's Discovery Failures Were "Willful And Contumacious."

Goldstein's behavior in this case was a paradigm of "willful and contumacious" violations. This was not a case of one or two missed deadlines, or an incomplete or partial production. This was a year's worth of consistent, stubborn, dishonest foot-dragging.

The trial court issued a preliminary conference order on April 30, 2003. The first deadline (for discovery and document-inspection demands) was one month later: May 30, 2003. The plaintiff ignored that deadline and every other one. By May of 2004, the plaintiff had still produced almost no documents to the defendants. He had attended the first day of his own deposition and then failed to show up for the second day. Over the intervening year, the court's original deadlines were extended four times. The plaintiff ignored each and every extended deadline.

It is well settled that "long-standing patterns of default, lateness, and failure to comply with court orders [give] rise to an inference of willful and contumacious

conduct.” *Merchs.*, 19 A.D.3d at 134 (citing *Wilson v. W. Hempstead Generals Football Club*, 286 A.D.2d 438 (2d Dep’t 2001)); *Martin v. Brooks*, 270 A.D.2d 538 (3d Dep’t 2000)). See also, e.g., *DuValle v. Swan Lake Resort Hotel, LLC*, 26 A.D.3d 616, 618 (3d Dep’t 2006) (“[A]n overall pattern of noncompliance gives rise to an inference of [willful, deliberate and contumacious] conduct.”); *Maneti v. Ariana Realty Co.*, 19 A.D.3d 463, 464 (2d Dep’t 2005) (“Given the plaintiff’s repeated failures to provide timely and good faith responses to court-ordered disclosure, the Supreme Court providently exercised its discretion in dismissing the complaint.”); *Cavanaugh v. Russell Sage Coll.*, 4 A.D.3d 660, 661 (3d Dep’t 2004) (“The two-year period of noncompliance gives rise to an inference of willful and contumacious conduct on the part of plaintiff. Plaintiff has offered no suitable excuse for her dilatory conduct, which effectively denied defendant a speedy resolution, thereby impacting the integrity of the judicial system.”). Once such an inference is drawn, the burden shifts to the noncompliant party to provide an adequate excuse for his behavior. See, e.g., *Mendez*, 7 A.D.3d at 766; *Espinal*, 264 A.D.2d at 806.

B. Goldstein’s Excuses Were Inadequate.

Goldstein proffered a new excuse for his noncompliance at every conference. First, he claimed to have believed that discovery had been stayed. Next, he said he thought that the case was being transferred. Third, he claimed that

his counsel had recently taken ill. Finally, at the dismissal conference, he claimed that it was the defendants' fault for not providing their own witnesses for deposition. (As the trial court noted at the time, of course, the conference order called for the deposition of plaintiff's witnesses to be completed before defense witnesses would be deposed.) On appeal, Goldstein simply cites counsel's illness as his excuse.

None of these excuses hold water. Certainly, the court did not abuse its discretion by rejecting the three excuses not related to counsel's illness. As the dismissal order details, these excuses were barely plausible: (1) Goldstein was fully aware that discovery had not been stayed and that a conference order was issued in April 2003; (2) Goldstein was informed by the Court that the case was not being transferred (and in any case, it is unclear why a transfer to a different division would obviate the plaintiff's discovery obligations); and (3) the conference order itself specified the order in which depositions were to be taken. Faced with a pattern of willful and contumacious behavior and a string of changing, inadequate excuses, the court would have been justified in dismissing the complaint even before the alleged onset of counsel's illness in April of 2004. See, e.g., *Merchs.*, 19 A.D.3d at 134; *Wilson*, 286 A.D.2d at 438; *Martin*, 270 A.D.2d at 538-39.

The plaintiff's claim that his violations should be excused because his attorney was ill fares no better. For one thing, the only proof of Mr. Calvey's purported illness was an un-authenticated and cryptic hand-written note on a doctor's prescription pad. Much more important, the plaintiff does not even allege that his attorney took ill until April of 2004 – a full 11 months after the first missed deadline in this case. While it is true that in certain limited circumstances, an attorney's illness may obviate the imposition of sanctions under CPLR 3126, it is equally clear, both as a matter of law and of simple logic, that an attorney's illness cannot serve to avoid dismissal where it does not explain or justify a party's default. See, e.g., *Borgia*, 59 N.Y.2d at 803 (affirming dismissal of complaint where an attorney's illness did not explain the plaintiff's failure to properly serve the complaint); *Reed v. Friedman*, 117 A.D.2d 661, 661-62 (2d Dep't 1986) (dismissing complaint where illness of plaintiff's attorney did not justify the delay at issue); *Ryder Truck Rental, Inc. v. Lewis*, 88 A.D.2d 788 (4th Dep't 1982) (dismissing action for failure to properly serve a complaint where attorney's allegation of illness was unsupported by medical documentation and "[t]he bulk of the delay appears to have been caused by a shortage of secretarial staff").

Moreover, even if Mr. Calvey's illness truly *did* preclude him from tending to this case during the month leading up to dismissal, the plaintiff has offered no explanation why his other lawyers – Mr. Amon and Mr. Wise – could not have

tended to the outstanding discovery matters during that period. Both attorneys were apparently aware of Mr. Calvey's incapacitation for weeks prior to the Special Master's final compliance conference on April 29. Mr. Wise informed the Court on May 4 that Mr. Calvey "ha[d] not been in the office" for "three weeks" prior to the hearing. RA 55. He also told the court that Mr. Calvey's illness had prevented him from showing up for oral argument in this Court – on this very case – in mid-April. Mr. Amon asserted in an affidavit that he first learned Mr. Calvey was ill "in April of this year," and that "Mr. Calvey had been absent for several weeks" prior to the hearing. Goldstein does not explain why Mr. Amon and Mr. Wise, armed for weeks with this information about Mr. Calvey's apparent incapacitation, did not endeavor even to inquire about any looming deadlines until the May 4 conference.

Ultimately, however, Goldstein's argument on appeal is broader than the mere contention that an attorney's unconfirmed illness should excuse a year's worth of discovery failures. Even if counsel's illness does not explain the plaintiff's violations, Goldstein's argues, there is no evidence that those violations were the plaintiff's fault, as opposed to his lawyer's. "This should suggest," Goldstein argues, "that any penalty should be directed at the person responsible, the attorney, and not the innocent client." Br. 15.

That argument should be rejected. To begin, there is no evidence in the record that Mr. Goldstein was unaware of his lawyer's failures to meet deadlines. At the very least, Goldstein must have been aware of the fact that he himself (along with his lawyer) failed to show up for the second day of his own deposition. In any event, none of this matters. New York law is clear that litigants are responsible to ensure that their cases are being prosecuted. As the Court of Appeals noted last year, it is of course

undesirable to punish plaintiffs for the failures of their counsel. But what is undesirable is sometimes also necessary, and it is often necessary *** to hold parties responsible for their lawyers' failure to meet deadlines. ***Litigation cannot be conducted efficiently if deadlines are not taken seriously***, and *** disregard of deadlines should not and will not be tolerated.

Andrea, 5 N.Y.3d at 521 (emphasis added). This is not a minor admonition. Over the last several years, the Court of Appeals has stressed repeatedly that "a litigant cannot ignore court orders with impunity," and that "when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint." *Kihl*, 94 N.Y.2d at 122-23. See also *Andrea*, 5 N.Y.3d at 521; *Miceli v. State Farm Auto. Ins. Co.*, 3 N.Y.3d 725 (2004); *Brill v. City of New York*, 2 N.Y.3d 648 (2004).

The violations in this case are neither technical nor complex. The plaintiff actively flouted a year-long string of requests for simple, foundational documents.

Even a lay plaintiff could reasonably have been expected to understand the consequences of these actions.¹

C. Goldstein’s Discovery Failures Prejudiced The Defendants.

CPLR 3126 does not require a showing of prejudice in order to justify a dismissal. Rather, as the Court of Appeals has repeatedly made clear, dismissal is an appropriate remedy for a litigant’s willful flaunting of discovery obligations even where there is no specific prejudice to his adversary. “If the credibility of court orders and the integrity of our judicial system are to be maintained,” the Court of Appeals wrote in *Kihl*, “a litigant cannot ignore court orders with impunity.” 94 N.Y.2d at 123.

That being said, the discovery failures in this case *did* prejudice the defendants. This baseless case was filed in October of 2002. The claims are dubious – indeed, nearly all the asserted causes of action were dismissed by the trial court in 2003. That dismissal was affirmed – and an additional cause of action dismissed – by this Court in 2004. 2004 N.Y. Slip Op. 03010. Had the plaintiff complied with the original discovery plan, the trial, if any, could have commenced in early 2004. Instead, this meritless case dragged on throughout 2004. Even at the time of dismissal – after the plaintiff had allegedly “cured” the lingering

¹ It should also be noted that even though Goldstein has forfeited his right to pursue this claim against CIBC, he is not left without recourse. As the IAS justice intimated, Goldstein may well be permitted to pursue a claim against his counsel for the manner in which his case was handled. But he cannot blame CIBC for his current predicament.

discovery violations – the parties still had only conducted one day’s worth of depositions.

Not only were the defendants forced to expend time, effort, and money in a drawn-out and ultimately unsuccessful attempt to force the plaintiff to comply with basic discovery orders, but they were also denied the opportunity to move this case along to a speedy resolution. The defendants are a public company and an individual. Both of these defendants have had their reputations for honest dealings called into question by this lawsuit. The law entitles them to present a defense in an efficient and speedy manner, and it also entitles them to demand from their accusers the very basic materials that would allow them to clear their names.

The plaintiff’s last-minute disclosures do not cure this prejudice, nor do they convert the trial court’s ruling into an abuse of discretion. Goldstein asserts that in the week between the May 4 and May 11 conferences, his attorneys were finally able to provide the documents they had withheld for the year leading up to dismissal. “Plaintiff’s compliance,” Goldstein argues, “is some evidence of good faith and lack of willfulness that cuts against dismissal.” Br. 11.

Even if it were true that the plaintiff managed to fulfill his discovery obligations in a mad scramble after being informed by the court that dismissal was imminent, that would not excuse his year’s worth of misconduct. Indeed, dismissals under CPLR 3126 are routinely affirmed even where full disclosure is

eventually made. *See, e.g., Cavanaugh*, 4 A.D.3d at 661 (affirming sanctions under CPLR 3126 even though the misbehaving party had eventually provided the requested documents, because “[t]he two-year period of noncompliance gives rise to an inference of willful and contumacious conduct on the part of plaintiff”); *Martin*, 270 A.D.2d at 538-39 (affirming dismissal under CPLR 3126 even though the plaintiff had provided all responsive documents to the defendant but had “inadvertent[ly]” done so slightly late).

More importantly, the record reveals that Goldstein’s eve-of-dismissal disclosures were at least partially inadequate. As counsel explained at the final sanctions hearing, a key requested document – proof that the named plaintiff in this case had the authority to act on behalf of the estate that had allegedly been defrauded – was not provided, even during that final week. The *ex parte* letter testamentary forwarded to the defendants’ counsel is insufficient to demonstrate the plaintiff’s standing. RA 60.

D. There Were No Procedural Irregularities.

Finally, Goldstein asserts that the dismissal of his complaint was “procedurally flawed” because it was entered “sua sponte” and “without requiring defendant to make a formal motion.” Br. 13-14. This argument is grossly unpersuasive and deeply misleading. There was no “procedural flaw,” nor was the plaintiff somehow caught off guard by dismissal. CPLR 3126 does not require a

dismissal to be made only in response to a motion made on notice, and the plaintiff has cited no case that recognizes such a requirement. Indeed, there is nothing to prevent the court from entering a dismissal order on its own motion, if it feels such an order would be “just.” N.Y. C.P.L.R. 3126.

But whether or not the trial court has this power, that is not what happened here. The dismissal was not made on the court’s own motion; it was entered in response to repeated written requests by the defendants. See, e.g., RA 85 (letter of September 19, 2003) (“CIBC respectfully requests that the Court set a briefing schedule for defendant to make a motion pursuant to CPLR 3126 seeking, *inter alia*, dismissal of plaintiff’s claims for failure to comply with the discovery deadlines set forth in the Court’s Order.”); RA 75 (letter of April 16, 2004) (“We ask that the Court, as it has indicated it would do on prior occasions *** dismiss the Complaint with prejudice.”); RA 71 (letter of May 3, 2004) (“Pursuant to CPLR 3126, this Court is empowered to sanction a party who refuses to comply with discovery orders. Where noncompliance is willful, contumacious, or due to bad faith, the extreme sanction of dismissal is warranted.”).

Far more important, the *court* had threatened this sanction, at status conferences and in written orders, *months* before it actually dismissed the case. See, e.g., RA 16 (“Plaintiff’s counsel was warned by the Court that *strict compliance with the preliminary conference order was directed or sanctions would*

be imposed.”) (emphasis in original); RA 82 (“If [plaintiff] fails to comply with the order of 3/25/04, the court shall either assess monetary sanctions or strike [plaintiff’s] complaint as the court deems appropriate.”).

It is dishonest for Goldstein to imply that his lawyers were unfairly caught off guard because the defendants’ dismissal requests were not made via a “formal motion.” This was not a case of the defendant simply requesting dismissal at a status conference and the court granting the request without affording the plaintiff an opportunity to respond or cure the discovery failure. This was a last-resort dismissal entered after months of requests from the defendant and warnings from the court.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING REARGUMENT.

Goldstein also appeals from a second order denying what the plaintiff has termed a motion to “reargue or renew” the dismissal of his complaint. As the trial court recognized, this motion, though labeled one for “renewal,” met none of the statutory requirements for such a motion, because it did not argue that there had been a change in governing law and it contained no “new” facts that had not been presented to the court on the original motion. See N.Y. C.P.L.R. 2221(e). For that reason, the IAS judge concluded that the motion was simply one for reargument. As this court has recognized many times, orders denying reargument are not appealable. See, e.g., *Fontanez v. St. Barnabas Hosp.*, 24 A.D.3d 218 (1st Dep’t

2005); *Rosen v. Rosenholc*, 303 A.D.2d 230 (1st Dep’t 2003). For that reason, the appeal from the subsequent order should be dismissed “as taken from a non appealable paper.” *Fontanez*, 24 A.D.3d at 218; see also *Haberman v. Wright*, 295 A.D.2d 142, 142 (1st Dep’t 2002); *Cross v. Cross*, 112 A.D.2d 62, 62 (1st Dep’t 1985).²

More importantly, even if the subsequent filing had been a proper renewal motion (as the plaintiff argues at 17-19), the trial court did not abuse its discretion by adhering to its earlier decision to dismiss the complaint. As we explain above, the plaintiff spent the better part of a year – before the plaintiff even alleges that his attorney had taken ill – systematically flouting a series of court orders and ignoring a mounting string of increasingly stern warnings. The plaintiff’s “renewal” motion did not alter or question that fact.

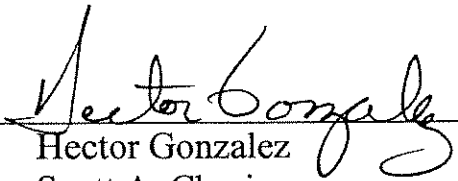
² CIBC presented this argument in a motion to dismiss this appeal, which was originally perfected from the order denying reargument and renewal – and not from the judgment itself. This Court subsequently granted Goldstein’s cross-motion to deem the perfected appeal to encompass the judgment. It therefore denied the motion to dismiss, “without prejudice to defendants’ raising an argument in their respondent’s brief seeking dismissal of the two appeals on any applicable grounds.”

CONCLUSION

The Supreme Court's order dismissing the complaint and granting judgment to the defendants should be affirmed.

Dated: New York, New York
April 19, 2006

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I, Scott A. Chesin, attorney for the defendant-respondent CIBC World Markets Corp., hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2002. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). The brief contains 5280 words counted by the word-processing program.

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