

New York Law Journal

ALM Properties, Inc.

Page printed from: [New York Law Journal](#)

[Back to Article](#)

Courts Won't Tolerate Discovery Abuses, Panel's Ruling Warns

John Caher

New York Law Journal

12-06-2012

A Brooklyn appellate panel yesterday sent a sharp reminder to the trial bar and trial judges: Discovery abuses "cannot and will not be tolerated in our courts," even if it means holding litigants responsible for the shortcomings of their lawyers.

The Appellate Division, Second Department, reversed a trial judge and said a Long Island law firm's "intentionally false and misleading" responses to discovery demands were not cured by belated disclosure. The ruling bars the defendant in a motor vehicle accident case from calling several key eyewitnesses and an expert witness or from introducing post-crash photographs and videos.

"As the Court of Appeals has noted, the failure of attorneys to comply with court-ordered deadlines has increasingly become a problem in our court system," the Second Department said in an opinion by Justice Leonard Austin ([See Profile](#)) and joined by Justices Mark Dillon ([See Profile](#)), Thomas Dickerson ([See Profile](#)), John Leventhal ([See Profile](#)) and Robert Miller ([See Profile](#)).

The panel noted that the Court of Appeals has said that "chronic noncompliance with deadlines breeds disrespect for the dictates of Civil Practice Law and Rules" ([Gibbs v. St. Barnabas Hospital](#), 16 NY3d 74, 2010) and stressed that court orders cannot be ignored with impunity ([Kihl v. Pfeffer](#), 94 NY2d 118, 1999). It said Suffolk County Supreme Court Justice Paul Baisley Jr. ([See Profile](#)) improvidently exercised his discretion in declining to sanction what was then Loccisano & Larkin in Hauppauge and is now Bello & Larkin.

[Arpino v. F.J.F. & Sons Electric](#), 2011-02636, is rooted in a June 2008 accident in which motorcyclist Dominick Arpino collided in Babylon with a Ford Explorer owned by the defendant. Although the police report referenced only the two drivers, it was later learned that there was a passenger in the Explorer.

Shortly after beginning an action against the company and the driver, the plaintiff's counsel, Phillip Nikolis of Pugatch & Nikolis in Garden City, served a discovery demand seeking information on any witnesses and photos within 20 days.

Loccisano & Larkin, however, did not respond within that time and several weeks later a paralegal told Nikolis in a letter that there were no photos and the firm was unaware of any witnesses other than the two drivers.

A year later, the Bello firm served notice that it planned to call four eyewitnesses and an expert and introduce 18 photos and a video, none of which had been provided under the discovery demand, according to Nikolis.

Nikolis promptly moved to preclude the defendant from using any of the belatedly provided witnesses or evidence, but Baisley rejected his motion, leading to an appeal that was submitted Sept. 7, 2011.

Yesterday, in a 12-page opinion, the Second Department flatly rejected the Loccisano firm's claim that it was merely careless. Rather, it said the firm's responses to the discovery demand were "intentionally false and misleading, and were interposed for the purpose of avoiding the defendants' obligation to provide timely and meaningful discovery

responses. The defendants' neglect of a court-ordered deadline and misrepresentation of their knowledge or possession of clearly discoverable material and information, without providing any excuse for doing so, must be deemed willful and contumacious."

Austin wrote that "contrary to the finding of the Supreme Court," the fact that discoverable material was "obviously available" to the defendant long before it was revealed to the plaintiff "demonstrates an ongoing pattern" of obstructionist conduct.

"Although perhaps an undesirable outcome, parties, where necessary, will be held responsible for the failure of their lawyers to meet court-ordered deadlines and provide meaningful responses to discovery demands and preliminary conference orders," Austin said. "The failure to abide by these basic rules governing compliance with disclosure orders cannot and will not be tolerated in our courts."

Nikolis said the ruling makes clear that "disclosure is an important responsibility and trial by ambush is what we are trying to avoid."

The defense firm, now Bello & Larkin, was represented by Matthew Naparty of Mauro Lilling Naparty in Great Neck. Naparty was not immediately available for comment.

Robert Larkin, a partner in the firm, said he had not seen the decision and declined to comment.

@| *John Caher can be contacted at jcaher@alm.com.*

Copyright 2012. ALM Media Properties, LLC. All rights reserved.