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New York City Considered One County for Taking Depositions

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duction of hospital records only in connection with a mental or physical examination of a party to an action. Since in this instance a decedent was involved, defendant could not seek a mental or physical examination. The court rejected plaintiff's argument and held that such a strict construction of CPLR 3121 would defeat the purpose and spirit of the disclosure provisions as expressed in CPLR 3101(a);[192] moreover, such authorizations might be obtained under CPLR 3120. Accordingly, defendant's motion for written authorizations was granted.

Though a literal reading of 3121 as to the persons to whom the section is applicable[193] would appear not to include a decedent in a wrongful death action, it is clear that the hospital records of a decedent are just as "material and necessary"[194] to the defense of a wrongful death action as they are to the defense of a personal injury action. The court's decision holding 3121 available is consonant with the liberal construction insisted upon by CPLR 104. Applying that construction provision to CPLR 3120 would require plaintiff-administrator to execute the authorizations. That section allows discovery of documents in the custody or control of an adverse party. Here the hospital records may be considered in the control of the plaintiff-administrator who would have to issue authorizations for their release.[195]

This decision implements the policy of the disclosure provisions of the CPLR which seek full and fair disclosure in order to afford each party a true evaluation of the merits of the case.

New York City considered one county for taking depositions.

CPLR 3110 designates the places for taking depositions within the state. It is designed for the convenience of the person sought to be examined without placing too great a burden on the party examining.[196]

In *Allen v. Brower,*[197] a negligence action pending in the Supreme Court of Kings County, defendant served a notice of disclosure upon plaintiff, a resident of Kings County, requiring him to appear for pre-trial examination at the office of defendant's attorneys in New York County. Plaintiff did not appear and

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[192] CPLR 3101(a) provides: "There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. . . ."

[193] See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3121.09 (1964).

[194] CPLR 3101(a).

[195] Estate of Lachman, 19 Misc. 2d 540, 192 N.Y.S.2d 707 (Surr. Ct., N.Y. County 1959); Matter of Rubin, 161 Misc. 374, 292 N.Y. Supp. 305 (Surr. Ct., Kings County 1936).

[196] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3110.01 (1964).

[197] 21 App. Div. 2d 876, 251 N.Y.S.2d 738 (2d Dep't 1964).

defendant appealed from an order of the lower court which, *inter alia,* denied his motion to conduct an examination of plaintiff in New York County and ordered the examination to take place in Kings County. The appellate division modified the order and held that plaintiff's examination should take place in New York County since a party who is subject to an examination in New York City may be required to appear for the taking of his pre-trial depositions in *any* of the counties of New York City.

Since the five counties of New York City cover a comparatively small area and there is an abundance of convenient transportation available, CPLR 3110 provides: "For the purposes of this rule New York City shall be considered one county." Under former law, a deponent residing or having an office in a county within New York City could be compelled to attend an examination in that county or the county where the action was pending.[198] The instant case makes it clear that under CPLR 3110 in order to compel attendance of a party within any of the counties of New York City, it is necessary only that he reside or have an office within the city, or that the action be pending within the city.[199] CPLR 3110 was intended to assist attorneys by permitting them to notice examinations at their offices.[200] In the event the examining party should abuse the privilege of selecting a county within the city by noticing an examination at an inconvenient place in order to harass a party, a protective order may be obtained under CPLR 3103(a).

ARTICLE 32 — ACCELERATED JUDGMENT

Lack of jurisdiction held waived where motion to vacate judgment based thereon joined with defense on merits.

In a recent supreme court case,[201] the defendant moved to vacate a judgment of foreclosure on two grounds: (1) that defendant was not served in the action and (2) that he had a valid defense on the merits. The court held that the joinder of the second ground, regarding the merits, constituted a waiver of the first ground, regarding jurisdiction.

That would very likely have been the case under the CPA, but it would appear to be an incorrect conclusion under the CPLR.

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[198] 12 App. Div. 2d 791, 209 N.Y.S.2d 856 (2d Dep't 1961).

[199] Similarly, a witness who resides, is employed or has an office, and a non-resident witness who is served, employed or has a place of business within New York City may have his deposition taken in any county within New York City. CPLR 3110.

[200] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3110.09 (1964).

[201] Mutual Home Dealers Corp. v. Alves, — Misc. 2d —, 252 N.Y.S.2d 726 (Sup. Ct. 1964).