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CPLR 3212: Unconditional Summary Judgment May Not Be Granted Against Unpleaded Cause of Action Asserted in Plaintiff's Submissions in Response to Motion

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generous construction normally accorded motions for disclosure,[127] this inclusive definition makes it highly unlikely that an examining attorney's motion will be denied. Thus, the protection afforded a nonparty witness under the *Kurzman* rule appears minimal.[128] The intention of the CPLR draftsman would seem to be better served by shifting the burden of coming forward to the adverse party or potential witness. By adjudicating a motion for a protective order, the court can effectively and efficiently determine the adequacy of the special circumstances.[129] In this light, the *Kurzman* court's interpretation dictating a pre-subpoena motion appears too rigid.

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ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Unconditional summary judgment may not be granted against unpleaded cause of action asserted in plaintiff's submissions in response to motion

Under CPLR 3212, summary judgment must be denied upon a showing sufficient to require a trial on any factual issue.[130] Whether

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[127] *See* note 107 *supra;* SIEGEL § 344, at 421; 3A WK&M ¶¶ 3101.04, .07, .08.

[128] Since a motion for a subpoena usually will be granted, *see* note 107 *supra,* it appears that dispensing with the motion will be the most economic mechanism for articulating complaints and correcting abuses. The *Kurzman* court's reading of CPLR 3101(a)(4) to require a court order in every instance, however, seems wastefully nonselective in its breadth. *See* CPLR 3101, commentary at 28 (1970). The protective order, on the other hand, appears to be a better mechanism for judicial review because, by its nature, it would be invoked discriminately.

[129] *See* note 128 *supra.*

[130] CPLR 3212(b) (Supp. 1979) provides:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit . . . shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.

To move successfully under CPLR 3212(b) a party must show all the necessary evidentiary facts and prove that, as a matter of law, no defense is available to preclude relief in his favor. In order to defeat the summary judgment motion, the opposing party must show facts "having probative value sufficient to demonstrate an unresolved material issue." 4 WK&M ¶ 3212.12; *see, e.g.,* Piedmont Hotel Co. v. A.E. Nettleton Co., 263 N.Y. 25, 188 N.E. 145 (1933); Cattonar v. Edward Ermold Co., 279 App. Div. 564, 107 N.Y.S.2d 269 (1st Dep't 1951).

Where damages is the only triable issue, or the basis of the motion is one of the grounds set forth in CPLR 3211(a) or (b), the court may order an immediate trial on those issues.

a denial of summary judgment is warranted where facts are submitted to support an unpleaded cause of action, however, has generated conflicting lower court decisions.[131] Recently, in *Alvord & Swift v. Stewart M. Muller Construction Co.*,[132] the Court of Appeals, in dictum, declared that where a plaintiff's submissions in response to a defendant's motion provide evidentiary facts showing a cause of action not stated in the pleadings, unconditional summary judgment should not be granted.[133]

CPLR 3212(c) (1979). Where the complaint does not state a cause of action, *id.* 3211(a)(7) (1979), or a defense of merit, *id.* (b), a party may move for dismissal prior to joinder of issue. If a motion to dismiss pursuant to CPLR 3211(a) or (b) is supported by extrinsic evidence, it may be treated as a motion for summary judgment. *Id.* 3211(c) (1979).

[131] Despite the assertion of an unpleaded cause of action, some courts have granted an unconditional summary judgment, *e.g.*, Central State Bank v. American Appraisal Co., 33 App. Div. 2d 1009, 307 N.Y.S.2d 708 (1st Dep't 1970), *aff'd mem*, 28 N.Y.2d 578, 268 N.E.2d 329, 319 N.Y.S.2d 615 (1971); Connors v. Hoare, 18 App. Div. 2d 992, 238 N.Y.S.2d 523 (1st Dep't 1963), while many others have granted summary judgment with leave to replead, *e.g.*, Raymond Babtkis Assocs. v. Tarazi Realty Co., 34 App. Div. 2d 754, 310 N.Y.S.2d 343 (1st Dep't 1970); Wolfson v. Mandell, 13 App. Div. 2d 760, 215 N.Y.S.2d 658 (1st Dep't 1961), *aff'd*, 11 N.Y.2d 704, 181 N.E.2d 217, 225 N.Y.S.2d 961 (1962); Fobare v. Mohawk Nat'l Bank, 77 Misc. 2d 210, 352 N.Y.S.2d 138 (Sup. Ct. Schenectady County 1974); Mandracchia v. McKee, 8 Misc. 2d 965, 171 N.Y.S.2d 602 (Sup. Ct. Nassau County 1957). Conversely, some unpleaded claims have withstood a defendant's summary judgment motion. *See, e.g.*, Bailey v. Diamond Int'l Corp., 47 App. Div. 2d 363, 367 N.Y.S.2d 107 (3d Dep't 1975); Crane v. Perfect Film & Chem. Corp., 38 App. Div. 2d 288, 329 N.Y.S.2d 32 (1st Dep't 1972); Wolf v. Wolf, 47 Misc. 2d 756, 263 N.Y.S.2d 195 (Sup. Ct. N.Y. County 1965), *modified*, 26 App. Div. 2d 529, 271 N.Y.S.2d 154 (1st Dep't 1966) (per curiam). Still other courts have granted a plaintiff summary judgment on a unpleaded cause of action. *E.g.*, Dampskibsselskabet Torm A/S v. P.L. Thomas Paper Co., 26 App. Div. 2d 347, 274 N.Y.S.2d 601 (1st Dep't 1966); Annutto v. Town of Herkimer, 56 Misc. 2d 186, 288 N.Y.S.2d 79 (Sup. Ct. Oneida County 1968), *appeal dismissed mem.*, 24 N.Y.2d 820, 248 N.E.2d 499, 300 N.Y.S.2d 596 (1969). *Contra*, Lefft v. Canada Life Assurance Co., 40 App. Div. 2d 641, 336 N.Y.S.2d 478 (1st Dep't 1972) (per curiam); Peripheral Equip. Inc. v. Farrington Mfg. Co., 29 App. Div. 2d 11, 285 N.Y.S.2d 99 (1st Dep't 1967).

This conflict apparently was generated by the Court of Appeals' refusal to permit an unpleaded cause of action to defeat summary judgment in Cohen v. City Co., 283 N.Y. 112, 27 N.E.2d 803 (1949). In *Cohen*, the plaintiff sued in quasi-contract for money had and received. The defendants moved for summary judgment on the ground that the statute of limitations had expired. *Id.* at 114, 27 N.E.2d at 804. In opposing the motion, the plaintiff for the first time indicated that his cause of action lied in fraud. *Id.* at 116, 27 N.E.2d at 805. The fraud action would have been timely commenced since the statute of limitations does not begin to run until the plaintiff's discovery of the fraud. CPA § 48(5) (current version at CPLR 213(8) (1979)). The Court of Appeals, however, affirmed the grant of summary judgment, stating that if a plaintiff were allowed to recover on a cause of action not pleaded, there would be no need for pleadings at all. 283 N.Y. at 117, 27 N.E.2d at 805.

Commentators criticized *Cohen* as defeating the purpose of summary judgment. It was argued that because the affidavits showed a possible triable issue, the defective pleading did not justify a grant of summary judgment. *See, e.g.*, B. SHIENTAG, SUMMARY JUDGMENT 67-73 (1941).

[132] 46 N.Y.2d 276, 385 N.E.2d 1238, 413 N.Y.S.2d 309 (1978).

[133] *Id.* at 280, 385 N.E.2d at 1240, 413 N.Y.S.2d at 311.

In *Alvord & Swift,* the plaintiff subcontracted with the defendant general contractor, Stewart M. Muller Construction Company, to perform work on the renovation of a facility owned by the codefendant, New York Telephone Company.[134] The subcontract provided that the sole recourse available to the plaintiff for breach of contract was against the general contractor.[135] When Alvord & Swift incurred substantial losses on the subcontract because construction was completed 3 years behind schedule, the general contractor's insolvency prompted the plaintiff to name New York Telephone Company in its action to recover the expenses caused by the delay.[136] Deeming the action as one for breach of contract, the Supreme Court, New York County, granted New York Telephone's motion for summary judgment based on its lack of contractual privity with the plaintiff.[137] The Appellate Division, First Department, affirmed.[138]

The Court of Appeals affirmed, holding that the appellate division correctly found that no factual issues existed.[139] Chief Judge Breitel, writing for the majority,[140] recognized, however, that the plaintiff made out in its submissions an additional cause of action for tortious interference with contract.[141] Thus, if the plaintiff's sub-

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[134] *Id.* at 279-80, 385 N.E.2d at 1239, 413 N.Y.S.2d at 310.

[135] *Id.* at 280, 385 N.E.2d at 1240, 413 N.Y.S.2d at 311. Muller Construction Company's prime contract with New York Telephone Company contained a provision stating that " '[n]othing contained in the Contract Documents shall create any contractual relations between the Owners . . . and any Subcontractor.' " *Id.*, 385 N.E.2d at 1239, 413 N.Y.S.2d at 310-11. This provision was incorporated by reference into Alvord & Swift's subcontract. *Id.*

[136] *Id.* at 280, 385 N.E.2d at 1240, 413 N.Y.S.2d at 311.

[137] *Id.*

[138] 56 App. Div. 761, 391 N.Y.S.2d 1012 (1st Dep't 1977) (mem.), *aff'd,* 46 N.Y.2d 276, 385 N.E.2d 1238, 413 N.Y.S.2d 309 (1978).

[139] 46 N.Y.2d at 279, 385 N.E.2d at 1239, 413 N.Y.S.2d at 310.

[140] Judges Jasen, Jones, and Wachtler joined Chief Judge Breitel in the majority. Judge Cooke voted to affirm in a separate opinion in which Judge Gabrielli concurred, and Judge Fuchsberg concurred in part and dissented in part.

[141] 46 N.Y.2d at 280, 385 N.E.2d at 1240, 413 N.Y.S.2d at 311. As its sixth cause of action, the plaintiff alleged in its complaint that the owner " '*actively* interfered with and disrupted job progress and caused delays and damage to Alvord.' " *Id.* at 286, 385 N.E.2d at 1243, 413 N.Y.S.2d at 315 (Fuchsberg, J., concurring in part and dissenting in part) (emphasis added by Judge Fuchsberg). On this basis, Alvord & Swift argued in its submissions that its action included a claim for tortious interference with contract. *Id.* Tortious intentional interference with contractual relations arises when "[o]ne . . . intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract." RESTATEMENT (SECOND) OF TORTS § 766 (1977).

The plaintiff in *Alvord & Swift* failed to show in its affidavits that New York Telephone had acted intentionally to interfere with the contract, a material element of the alleged tort. 46 N.Y.2d at 282, 385 N.E.2d at 1241, 413 N.Y.S.2d at 312. Additionally, the Court observed that although an owner may have a legal duty to refrain from interfering with the work of

missions had raised a question of fact concerning the unpleaded claim, the Court declared that the failure to plead the tort claim would have constituted an insufficient basis upon which to award unconditional summary judgment.[142] The majority observed that deficient pleadings did not constrain pre-CPLR courts from discovering "the nature of the case,"[143] and reasoned that the liberal policies underlying the CPLR militated against further restrictive application of "archaic" pleading rules.[144] Since the gravamen of a motion for summary judgment is not the sufficiency of the pleadings, it was concluded that a court may inquire into whether an unpleaded cause of action is made out.[145]

Judge Cooke, concurring in the result, refused to recognize any unpleaded cause of action.[146] Observing that the notice requirement in the pleadings continues under the liberalized pleading rules of the CPLR,[147] Judge Cooke maintained that a distinction exists between a defective pleading and a cause of action not pleaded. The concurrence concluded, therefore, that when a defendant does not receive the requisite notice, an unpleaded cause of action should not defeat summary judgment.[148]

It is suggested that while a defendant is entitled to notice in the pleadings of all causes of action alleged,[149] a failure to plead the

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subcontractors, the duty can only be contractually imposed upon the owner. *Id.; accord,* Cauldwell-Wingate Co. v. State, 276 N.Y. 365, 12 N.E.2d 443 (1938); Peckham Road Co. v. State, 32 App. Div. 2d 139, 300 N.Y.S.2d 174 (3d Dep't 1969), *aff'd mem.*, 28 N.Y.2d 733, 269 N.E.2d 825, 321 N.Y.S.2d 117 (1971). In the absence of such a contractual relationship between the plaintiff and the defendant in *Alvord & Swift,* the plaintiff was precluded from invoking a theory of legal duty to refrain from interference. 46 N.Y.2d at 282, 385 N.E.2d at 1241, 413 N.Y.S.2d at 312.

[142] 46 N.Y.2d at 280, 385 N.E.2d at 1240, 413 N.Y.S.2d at 311.

[143] *Id.* at 281, 385 N.E.2d at 1240, 413 N.Y.S.2d at 311.

[144] *Id.* The Court noted that where a defendant has been granted summary judgment based on a deficiency in the plaintiff's pleading, the courts have freely permitted the plaintiff to replead. *Id.; see* note 157 *infra.*

[145] 46 N.Y.2d at 281, 385 N.E.2d at 1240, 413 N.Y.S.2d at 312.

[146] *Id.* at 282-85, 385 N.E.2d at 1241-43, 413 N.Y.S.2d at 312-14 (Cooke, J., concurring).

[147] *Id.* at 283-84, 385 N.E.2d at 1242, 413 N.Y.S.2d at 313 (Cooke, J., concurring).

[148] *Id.* at 285, 385 N.E.2d at 1243, 413 N.Y.S.2d at 314 (Cooke, J., concurring).

In a dissenting opinion, Judge Fuchsberg declared that granting summary judgment prior to discovery constituted an abuse of discretion. *Id.* at 287, 385 N.E.2d at 1244, 413 N.Y.S.2d at 316 (Fuchsberg, J., concurring in part and dissenting in part), and contended that the plaintiff's pleading sufficiently indicated a cause of action for tortious interference to warrant such discovery, *id.* at 286, 385 N.E.2d at 1243-44, 413 N.Y.S.2d at 315 (Fuchsberg, J., concurring in part and dissenting in part).

[149] CPLR 3013 (1979). Designed to abolish the strict requirements of "code pleading," *see* 3 WK&M ¶ 3013.01, at 30-212, CPLR 3013 requires that the pleadings give notice of all transactions and occurrences that will be proved and contain all "the material elements of

proper cause of action should not alone be fatal to the plaintiff on a motion for summary judgment.[150] Initially, a defendant generally would be far less prejudiced by a lack of notice than would a plaintiff by non-recognition of an unpleaded claim. Denying summary judgment merely submits the issue to the trier of fact.[151] Granting summary judgment, on the other hand, invokes the doctrine of res judicata, thus precluding the plaintiff from repleading the poorly articulated or omitted cause of action and permanently depriving him of a favorable judgment.[152] In such cases, the courts should use

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each cause of action or defense" asserted, CPLR 3013 (1979); *see* CPLR 3013, commentary at 611-12 (1974). Although the courts must liberally construe the pleadings and concern themselves with substance over form, Foley v. D'Agostino, 21 App. Div. 2d 60, 64, 248 N.Y.S.2d 121, 126 (1st Dep't 1964), the requirement of notice is viewed as essential, *see, e.g.*, Jerry v. Borden Co., 45 App. Div. 2d 344, 346-47, 368 N.Y.S.2d 426, 430 (2d Dep't 1974); Shapolsky v. Shapolsky, 22 App. Div. 2d 91, 92-93, 253 N.Y.S.2d 816, 817 (1st Dep't 1964).

[150] In a situation converse to the one in *Alvord & Swift*, where a viable unpleaded defense to the action has been proffered in response to the plaintiff's motion, summary judgment has been denied, *see* Curry v. Mackenzie, 239 N.Y. 267, 272, 146 N.E. 375, 376 (1925). In *Curry*, Judge Cardozo reasoned that a motion for summary judgment is not an attack on the pleadings but a challenge that the claim or defense is groundless as a matter of law. The *Curry* Court maintained, therefore, that a technical failure to state a defense in the answer should not allow summary judgment to be granted where affidavits indicate the existence of a viable defense. *Id.* at 272, 146 N.E. at 376. Most lower courts continue to follow *Curry* and refuse to grant a plaintiff summary judgment where there exists an unpleaded defense available to the defendant. *See, e.g.*, Gem Drywall Corp. v. Scialdo & Sons, 34 App. Div. 2d 1063, 312 N.Y.S.2d 737 (3d Dep't), *appeal dismissed*, 27 N.Y.2d 739, 263 N.E.2d 388, 314 N.Y.S.2d 990 (1970); Furlo v. Cheek, 20 App. Div. 2d 939, 248 N.Y.S.2d 947 (3d Dep't 1964); Cardinal Lumber Co. v. Lincoln Park Builders Supply, Inc., 8 App. Div. 2d 839, 190 N.Y.S.2d 207 (2d Dep't 1959).

[151] CPLR 3212(b) (1979). *See* Werfel v. Zivnostenska Banka, 287 N.Y. 91, 93, 38 N.E.2d 382, 382 (1941) (per curiam).

[152] Ugarriza v. Schmieder, 46 N.Y.2d 471, 474, 386 N.E.2d 1324, 1325, 414 N.Y.S.2d 304, 305 (1979); Eidelberg v. Zellermayer, 5 App. Div. 2d 658, 662-63, 174 N.Y.S.2d 300, 304 (1st Dep't 1958), *aff'd*, 6 N.Y.2d 815, 159 N.E.2d 691, 188 N.Y.S.2d 204 (1959). *See generally* SIEGEL § 287. Judge Fuchsberg suggested in his dissent that the Court's "abuse of discretion" in granting summary judgment prevented the plaintiff from discovering the necessary facts to sustain his cause of action and, therefore, through the effects of res judicata, denied the plaintiff any relief. 46 N.Y.2d at 287, 385 N.E.2d at 1244, 413 N.Y.S.2d at 315-16 (Fuchsberg, J., concurring in part and dissenting in part). Furthermore, the doctrine of res judicata prevents relitigation of any issue that "might have been . . . litigated," Schuylkull Fuel Corp. v. Nieberg, 250 N.Y. 304, 306, 165 N.E. 456, 457 (1929), when the second cause of action is based on the same facts and a different judgment would "destroy or impair rights or interests established by the first [cause of action]," *id.* at 307, 165 N.E.2d at 457. Consequently, in the case of summary judgment, if a plaintiff fails to plead the proper theory he cannot subsequently seek relief on another theory. Eidelberg v. Zellermayer, 5 App. Div. 2d 658, 663, 174 N.Y.S.2d 300, 304 (1st Dept 1958), *aff'd*, 6 N.Y.2d 815, 159 N.E.2d 691, 188 N.Y.S.2d 204 (1959).

It should be noted that many courts, although granting summary judgment notwithstanding the assertion of an unpleaded claim, have restricted the force of the orders to the pleaded causes of action and have permitted the plaintiff to amend his complaint and assert

CPLR 3212(e)(1) to grant partial summary judgment on the claims in which factual issues are absent,[153] and should direct the plaintiff to amend the complaint.[154]

It is submitted that the direction taken in *Alvord & Swift,* albeit in dictum, should serve to prevent additional conflicting lower court dispositions of unpleaded claims in the summary judgment setting.[155] Of greater import is the Court's promulgation of a rule consistent with both the purposes of CPLR 3212 and the liberal construction principles that govern interpretation of the CPLR.[156] Since the tenor of a summary judgment motion under CPLR 3212 requires the court to go beyond the pleadings and to consider the submissions of the parties,[157] it appears reasonable as a general rule not to restrict a plaintiff to his pleadings when opposing a defendant's motion for summary judgment, despite the inartistic framing of the complaint.[158]

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the formerly unpleaded claim. *See* note 131 *supra.* Furthermore, the *Alvord & Swift* Court noted that such relief could be granted a plaintiff provided the new cause of action would have been timely at the time the action was commenced. 46 N.Y.2d at 280, 385 N.E.2d at 1240, 413 N.Y.S.2d at 311; *see* CPLR 203(e) (1979). Indeed, the majority's position on this issue implies a judicial cognizance of these discretionary steps taken by the lower courts. It would appear, therefore, that permitting a meritorious unpleaded cause of action to defeat a defendant's summary judgment motion would be a more direct method to achieve the same result of allowing the plaintiff to go to trial.

[153] *See* CPLR 3212(e)(1)(1979). CPLR 3212(e)(1), in pertinent part, provides that "summary judgment may be granted as to one or more causes of action, or part thereof . . . . The court may also direct: (1) that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action . . . ." *See* CPLR 3212, commentary at 447-48 (1970).

[154] *See* note 152 *supra.* CPLR 3025(b) (1979) provides: "[a] party may amend his pleading . . . at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just . . . ." *See* CPLR 3025, commentary at 476-78 (1974).

[155] *See* note 131 *supra.*

[156] CPLR 104 (1979) provides that the CPLR "shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." *See* Governor's Memorandum of Approval of chs. 308-318, N.Y. Laws (April 4, 1962), *reprinted in* [1962] N.Y. LEGIS. ANN. 331, 332; Hesson, *The New York Civil Practice Law and Rules,* 27 ALB. L. REV. 175 (1963). *See also* Weinstein, *Proposed Revision of New York Civil Practice,* 60 COLUM. L. REV. 50 (1960).

[157] CPLR 3212(b) (1979). On motion for summary judgment, the movant attempts to establish that no issues of fact exist through the submission of all "available proof" including, but not limited to, affidavits, written admissions and depositions. *Id.*

[158] CPLR 3026 (1979) provides that "[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." Presaging a willingness to depart from *Cohen, see* note 131 *supra,* the Court of Appeals, in Dulberg v. Mock, 1 N.Y.2d 54, 133 N.E.2d 695, 150 N.Y.S.2d 180 (1956), denied the defendant's motion to dismiss where, although the pleadings were "inartistically drawn," the facts established a cause of action.

ARTICLE 45 — EVIDENCE

CPLR 4503(a): Notwithstanding claim of attorney-client privilege, attorney may be compelled under exigent circumstances to reveal client's address in collateral proceeding to enforce a judgment

The attorney-client privilege, as embodied in CPLR 4503(a), prevents the disclosure of confidential communications made by a client to his attorney in the course of the professional relationship, unless the client has waived the privilege.[159] During the pendency of a civil litigation, CPLR 3118 permits one party to compel another party to disclose his address.[160] Recently, the issue arose whether,

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Id. at 56, 133 N.E.2d at 695-96, 150 N.Y.S.2d at 181-82. The *pro se* status of the plaintiff, *id.* at 56, 133 N.E.2d at 695, 150 N.Y.S.2d at 181, may have influenced the *Dulberg* Court, however.

There may be cases where a defendant will be severely prejudiced by denying summary judgment and allowing the plaintiff an opportunity to replead. *Cf.* DeFabio v. Nadler Rental Serv., Inc., 27 App. Div. 2d 931, 278 N.Y.S.2d 723 (2d Dep't 1967) (party waits an "inexcusably long period of time"); Ciccone v. Glenwood Holding Corp., 44 Misc. 2d 273, 253 N.Y.S.2d 576 (Civ. Ct. Kings County 1964) (lapse of time bars plaintiff relief from another party). *See also* CPLR 3025, commentary at 477-78 (1974).

[159] CPLR 4503(a) provides in pertinent part:

> Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action . . . or . . . proceeding . . . .

CPLR 4503(a) (Pam. 1979).

The attorney-client privilege against nonconsensual disclosure of confidential communications is considered necessary to promote full disclosure between an attorney and his client. E. FISCH, NEW YORK EVIDENCE § 516, at 336-38 (2d ed. 1977); 8 J. WIGMORE, EVIDENCE § 2290, at 543 (McNaughton rev. 1961); Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CAL. L. REV. 487 (1928); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,* 91 HARV. L. REV. 464 (1977). The privilege has been deemed to exist:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

J. WIGMORE, *supra,* § 2292, at 554 (emphasis and footnote omitted). An attorney-client relationship must exist before the privilege of confidentiality may attach. *Id.* §§ 2300-2304, at 580-87; E. FISCH, *supra,* § 519, at 341-42; *see* People *ex rel.* Vogelstein v. Warden of County Jail, 150 Misc. 714, 718, 270 N.Y.S. 362, 368 (Sup. Ct. N.Y. County), *aff'd,* 242 App. Div. 611, 271 N.Y.S. 1059 (1st Dep't 1934).

[160] CPLR 3118 states in part:

> A party may serve on any party a written notice demanding a verified statement setting forth the post office address and residence of the party . . . and of any person who possessed a cause of action or defense asserted in the action which has been assigned.

CPLR 3118 (1970).