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CPLR 3215: A Defendant in Default Is Entitled to an Assessment of Damages on the Question of Reasonable Cover

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liberal disclosure policies expressed in CPLR 3101 against the effect that extensive discovery might have on the parties in a matrimonial action.

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ARTICLE 32—ACCELERATED JUDGMENT

CPLR 3215: A defendant in default is entitled to an assessment of damages on the question of reasonable cover

Under CPLR 3215, a default judgment may be obtained against a defendant who has failed to proceed in an action.[112] Once the defendant has conceded liability by defaulting, the plaintiff must apply to the court for a judgment, and an inquest must be conducted to determine damages.[113] If the plaintiff's claim is for a "sum certain," however, the statute authorizes the court clerk to enter a judgment without further hearing.[114] Recently, in *Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.*,[115] the Court of Appeals clarified the scope of the right to automatic entry of judgment, holding that a defaulting defendant in a contract action is entitled to an inquest when the plaintiff requests reimbursement for the

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[112] CPLR 3215(a) (1970) provides:

> When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest . . . . Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

[113] CPLR 3215(a) (1970). CPLR 3215(b) (1970) gives the court the authority to make findings of fact on the issue of damages or to direct the question to a jury or a referee. In order to establish his right to entry of judgment, the plaintiff must "file proof of service of the summons and the complaint, or a summons and notice . . . and proof by affidavit . . . of the facts constituting the claim, the default and the amount due." CPLR 3215(e) (1970). If a verified complaint was served, it may be used in place of an affidavit. *Id.* Where the statute requires the application for entry of judgment to be made to the court, a defendant who has appeared in the action must be given at least 5 days notice of the time and place of the application. If the defendant has not appeared, notice is required only if the defendant serves a written demand on the plaintiff. CPLR 3215(f)(1)-(2) (1970). Where the application can be made to the court clerk no form of notice is required, CPLR 3215(f)(1) (1970).

[114] *See* note 112 *supra*. Where the plaintiff's claim is for a sum certain, the court clerk may enter judgment without notice to the defendant upon the plaintiff's submission of proof of service of process and an affidavit or verified complaint supporting his request for damages. CPLR 3215(e)-(f) (1970).

[115] 44 N.Y.2d 568, 378 N.E.2d 106, 406 N.Y.S.2d 743 (1978), *rev'g* 57 App. Div. 2d 522, 393 N.Y.S.2d 568 (1st Dep't 1977).

reasonable cost of cover.[116] Significantly, the Court also stated that the general rule prohibiting discovery against a defaulting defendant[117] is not applicable when the defendant contests the extent of his liability for damages.[118]

In *Reynolds Securities,* the plaintiff brokerage firm had executed three separate sales of securities at the defendant's request.[119] When the defendant failed to deliver the stock certificates, plaintiff was forced to purchase equivalent securities in the open market to cover the transaction. Since the stock had appreciated in value during the intervening 2 months, the plaintiff suffered a net loss and sued the defendant for the difference between the price it paid for the stock and the amount it received on the sale.[120] After the defendant "willfully refused to comply with several discovery notices" and court orders directing him to appear for a deposition, the "plaintiff obtained an ex parte order striking the [defendant's] answer[121] and directing entry of a judgment for the full amount demanded in the complaint."[122] The defendant moved to vacate the judgment, arguing that he should have been permitted to contest the extent of the plaintiff's damages at a separate inquest.[123] The motion was denied and the Appellate Division, First Department, dismissed the defendant's appeal.[124]

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[116] 44 N.Y.2d at 573, 378 N.E.2d at 109, 406 N.Y.S.2d at 746.

[117] Generally, if all the issues in controversy are resolved by a default, discovery is not available against the defaulting party. *See, e.g.,* Kozuch v. Bachmann, 244 App. Div. 250, 278 N.Y.S. 950 (1st Dep't 1935); Syracuse Mortgage Corp. v. Kepler, 122 Misc. 95, 202 N.Y.S. 193 (Sup. Ct. Onondaga County 1923).

[118] 44 N.Y.2d at 573, 378 N.E.2d at 110, 406 N.Y.S.2d at 747.

[119] *Id.* at 570-71, 378 N.E.2d at 108, 406 N.Y.S.2d at 745.

[120] *Id.* at 571, 378 N.E.2d at 108, 406 N.Y.S.2d at 745. The plaintiff also sought to recover unpaid brokerage commissions. *Id.*

[121] *Id.; see* 3A WK&M ¶ 3126.04. CPLR 3126 empowers the court to impose a number of sanctions upon a party who willfully refuses to obey an order for disclosure. Among the harshest of these penalties is the entry of a default judgment in favor of the plaintiff. *See* CPLR 3126(3) (1970). It has been suggested, however, that this "ultimate of CPLR 3126's sanctions . . . be reserved only for that instance in which a party has refused to submit to any disclosure at all, such as where he refuses to appear for a deposition." CPLR 3126, commentary at 649 (1970).

[122] 44 N.Y.2d at 571, 378 N.E.2d at 108, 406 N.Y.S.2d at 745. The lower court ordered entry of judgment for the full amount demanded despite the plaintiff's failure to submit an affidavit or verified complaint as required by CPLR 3215(e). 44 N.Y.2d at 573 n.3, 378 N.E.2d at 109 n.3, 406 N.Y.S.2d at 746 n.3; *see* W.T. Grant Co. v. Payne, 64 Misc. 2d 797, 799, 315 N.Y.S.2d 910, 913 (Steuben County Ct. 1970); note 114 *supra.*

[123] 44 N.Y.2d at 571, 378 N.E.2d at 108, 406 N.Y.S.2d at 745.

[124] 57 App. Div. 2d at 522, 393 N.Y.S.2d at 569. The appellate division stated that "[a]n inquest [is] not necessary . . . '[i]f the damages, though unliquidated, can be established by paper alone and do not require oral testimony . . . .'" *Id.,* 393 N.Y.S.2d at 569 (quoting CPLR 3215, commentary at 868 (1970)). In concluding that an inquest was not necessary, the

On appeal, the Court of Appeals reversed,[125] finding that cost of cover is not a "sum certain,"[126] since extrinsic proof is necessary

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appellate division appeared to assume that an affidavit or verified complaint will suffice as a basis upon which the court can fix a sum originally uncertain and order judgment in that amount without an inquest. Thus, the appellate division would seem to sanction the fixing of damages solely on the papers even where the defendant wishes to offer other opposing evidence at an inquest. *See* D. SIEGEL, NEW YORK PRACTICE 348 & n.11 (1978). It has been suggested that this aspect of the appellate division's decision in *Reynolds Securities* survives the Court of Appeals' decision to the extent that it allows an assessment on the papers only where "the defendant does not insist on a hearing of the damages issue." CPLR 3215, commentary at 180 (Supp. 1978-1979).

[125] At the outset, the Court ruled that the defendant's appeal was not precluded by CPLR 5511 (1970), 44 N.Y.2d at 571 n.1, 378 N.E.2d at 108 n.1, 406 N.Y.S.2d at 745 n.1, which provides that "[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." This determination appears consistent with earlier decisions permitting appeal of "the proceedings on a contested inquest [or] *intermediate order 'necessarily affecting' the final determination.*" James v. Powell, 19 N.Y.2d 249, 256 n.3, 225 N.E.2d 741, 744 n.3, 279 N.Y.S.2d 10, 15 n.3 (1967) (emphasis added) (citations omitted); McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, *modified mem. on other grounds*, 253 N.Y. 533, 171 N.E. 770 (1930); Hotel Martha Washington Management Co. v. Swinick, 71 Misc. 2d 982, 983, 337 N.Y.S.2d 976, 978 (Sup. Ct. App. T. 1st Dep't 1972); H. COHEN & A. KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 93, at 401-03 (1952); 7 WK&M ¶ 5511.11. *But cf.* Intrabartolo v. Intrabartolo, 38 App. Div. 2d 711, 329 N.Y.S.2d 646 (2d Dep't 1972) (defendant cannot appeal default judgment resulting from his nonappearance).

[126] 44 N.Y.2d at 572-73, 378 N.E.2d at 109, 406 N.Y.S.2d at 746. The *Reynolds Securities* Court characterized the issue of what constitutes a sum certain as "seemingly commonplace, but a source of more controversy than one would expect." *Id.* at 570, 378 N.E.2d at 108, 406 N.Y.S.2d at 745. Since the source of the sum certain requirement is FED. R. CIV. P. 55(b), the interpretations of rule 55(b) may be helpful in interpreting CPLR 3215. 1965 OP. N.Y. ATT'Y GEN. 187. A sum certain under the federal rules requires more than "generalized statements of amount due." Anderson v. United States, 182 F.2d 296, 297 (1st Cir. 1950). *See generally* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2683 (1972). Moreover, the *Reynolds Securities* Court's determination that reasonable cost of cover is not a sum certain seems consistent with the traditional New York view. *See, e.g.*, McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, *modified mem. on other grounds*, 253 N.Y. 533, 171 N.E. 770 (1930) (damages for breach of employment contract not a sum certain); Card v. Polito, 55 App. Div. 2d 123, 389 N.Y.S.2d 696 (4th Dep't 1976) (damages in personal injury action not a sum certain); Maxwell v. First Port Jefferson Corp., 31 App. Div. 2d 813, 297 N.Y.S.2d 885 (2d Dep't 1969) (claim for quantum meruit not a sum certain); Merchants Mut. Ins. Co. v. Magee, 29 App. Div. 2d 841, 287 N.Y.S.2d 477 (4th Dep't 1968) (amount of commissions and charges not a sum certain); Geer, Du Bois & Co. v. O.M. Scott & Sons Co., 25 App. Div. 2d 423, 266 N.Y.S.2d 580 (1st Dep't 1966) (per curiam) (reasonable value of advertising work not a sum certain); Hotel Syracuse, Inc. v. Brainard, 256 App. Div. 1055, 10 N.Y.S.2d 892 (4th Dep't 1939) (per curiam) (damages equivalent to fixed sum plus percentage of profits not a sum certain); Strulson v. Pollack, 33 Misc. 2d 177, 230 N.Y.S.2d 395 (Sup. Ct. N.Y. County 1962) (amount of damages for failure to purchase bond not a sum certain); Davis v. Sisti, 3 Misc. 2d 132, 148 N.Y.S.2d 76 (Sup. Ct. Oneida County 1955) (amount due on note plus reasonable attorney's fees not a sum certain); *cf.* John Malasky, Inc. v. Mayone, 54 App. Div. 2d 1059, 388 N.Y.S.2d 943 (3d Dep't 1976) (rent arrears are a sum certain).

Additionally, the Court noted that even if the claim had been one for a sum certain, the clerk was without authority to enter judgment since the plaintiff did not submit either an

to establish that the covering purchase was commercially reasonable.[127] Thus, the Court concluded, the defendant should have been afforded an opportunity to contest the amount of damages.[128] Judge Fuchsberg, who authored the unanimous Court's opinion, then considered the plaintiff's right to use discovery in preparation for an inquest on the issue of damages. Noting that pretrial discovery ordinarily is not available against "a party whose default has left no issues to be tried,"[129] Judge Fuchsberg reasoned that such a rule should not be applied "where a defendant may intend to testify at an inquest or appears to possess highly pertinent evidence relevant to damages."[130] Moreover, in the event that the defaulting defendant continued his refusal to cooperate in discovery, Judge Fuchsberg suggested that, in addition to the sanction of contempt,[131] the

affidavit or a verified complaint. 44 N.Y.2d at 537 n.3, 378 N.E.2d at 109 n.3, 406 N.Y.S.2d at 746 n.3.

[127] 44 N.Y.2d at 572-73, 378 N.E.2d at 109, 406 N.Y.S.2d at 746 (citing N.Y.U.C.C. §§ 1-204(2), 2-712 (McKinney 1964)). In the Court's view, the defendant's allegation that the "plaintiff unduly delayed its purchase of the covering securities" raised sufficient factual issues to warrant an inquest on the extent of the plaintiff's damages. The Court also found that the defendant should have been given an opportunity to challenge the "correctness of the [plaintiff's] calculations of the commissions." 44 N.Y.2d at 572-73, 378 N.E.2d at 108-09, 406 N.Y.S.2d at 745-46.

[128] 44 N.Y.2d at 573, 378 N.E.2d at 109, 406 N.Y.S.2d at 746; *see* McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, *modified mem. on other grounds,* 253 N.Y. 533, 171 N.E. 770 (1930); Appeal Printing Co. v. Levine, 69 Misc. 2d 76, 329 N.Y.S.2d 110 (N.Y.C. Civ. Ct. N.Y. County 1971); Glove City Amusement Co. v. Smalley Chain Theatres, Inc., 167 Misc. 603, 4 N.Y.S.2d 397 (Sup. Ct. Madison County 1938); FIFTEENTH ANN. REP. N.Y. JUD. COUNCIL 301-03 (1949); 4 WK&M ¶ 3215.09.

[129] 44 N.Y.2d at 573, 378 N.E.2d at 109, 406 N.Y.S.2d at 746; *see* note 117 *supra.*

[130] 44 N.Y.2d at 573, 378 N.E.2d at 110, 406 N.Y.S.2d at 747. A similar view was expressed in dictum in Bearman v. Bearman, 28 App. Div. 2d 673, 674, 280 N.Y.S.2d 988, 989 (1st Dep't 1967) (per curiam), wherein the court stated: "[W]e do not regard the default as per se prohibiting [the] examination [of the defendant] . . . ." *See* M. JACOBS, EXAMINATIONS BEFORE TRIAL 213 (1950); CPLR 3105, commentary at 345 (1970). Judge Fuchsberg observed that the rule prohibiting discovery against defaulting parties was based on the assumption that additional information was not "material and necessary" to the prosecution of the action. 44 N.Y.2d at 573, 378 N.E.2d at 109, 406 N.Y.S.2d at 746; *see* Kozuch v. Bachmann, 244 App. Div. 250, 278 N.Y.S. 950 (1st Dep't 1935). In cases like *Reynolds Securities,* however, where the "defendant may intend to testify at an inquest" or "possess[es] highly pertinent evidence relevant to damages," such a rule is inapplicable. 44 N.Y.2d at 573, 378 N.E.2d at 110, 406 N.Y.S.2d at 747. It should be noted that, in reviewing the background of this traditional rule, the *Reynolds Securities* Court suggested that it may not have "retained its efficacy under more modern practice statutes." *Id.*

[131] *See, e.g.,* Equitable Lumber Corp. v. Northeastern Constr. Corp., 43 App. Div. 2d 845, 351 N.Y.S.2d 21 (2d Dep't 1974); Burchell v. Cimenti, 38 App. Div. 2d 897, 329 N.Y.S.2d 347 (1st Dep't 1972) (per curiam). *But cf.* Glenmark, Inc. v. Carity, 17 App. Div. 2d 126, 232 N.Y.S.2d 444 (1st Dep't 1962) (per curiam) (defendant's failure to answer in examination before referee not contemptuous since referee not empowered to direct defendant to answer). The sanction of contempt against a party for failure to obey an order of disclosure is not specifically listed in CPLR 3126. Despite the apparent intent of the legislature to exclude

court could either exclude any evidence offered by the defendant,[132] or permit the plaintiff to rely on "lesser and more informal proofs."[133] Thus, the defendant would not be allowed to obstruct indefinitely the plaintiff's proof of damages.

The *Reynolds Securities* decision clarifies the rights and obligations of the parties under CPLR 3215 and leaves unchanged the defaulting defendant's right to litigate the issue of damages.[134] In

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contempt as a remedy, *see* CPLR 3126, commentary at 642 (1970), there are instances when contempt may be more effective than any of the other sanctions. Contempt might be used when there are multiple parties and only one fails to disclose. In such a case, the impact of default would be unfair to the cooperative parties. *Id.* at 643. Contempt, however, should be used only where other remedies are ineffective. *Id.* at 644.

[132] 44 N.Y.2d at 574, 378 N.E.2d at 110, 406 N.Y.S.2d at 747 (citing Brown v. Hilton Hotels Corp., 25 App. Div. 2d 646, 269 N.Y.S.2d 930 (1st Dep't 1966) (mem.); Burgin v. Ryan, 238 App. Div. 122, 263 N.Y.S. 242 (2d Dep't 1933) (per curiam)). CPLR 3126(2) permits the court to issue a preclusion order to prevent an uncooperative party from raising issues related to the material sought. The preclusion order often is used as an alternative to striking out pleadings when the information withheld is relevant to only one isolated issue in the case. *See, e.g.*, Feingold v. Walworth Bros., 238 N.Y. 446, 450, 144 N.E. 675, 676 (1924); *In re* Estate of Porter, 64 Misc. 2d 1016, 1017, 316 N.Y.S.2d 504, 506 (Sur. Ct. N.Y. County 1970).

[133] 44 N.Y.2d at 574, 378 N.E.2d at 110, 406 N.Y.S.2d at 747 (citing Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946); *In re* Estate of Rothko, 43 N.Y.2d 305, 323, 372 N.E.2d 291, 298, 401 N.Y.S.2d 449, 456-57 (1977); Randall-Smith, Inc. v. 43rd St. Estates Corp., 17 N.Y.2d 99, 106, 215 N.E.2d 494, 498, 268 N.Y.S.2d 306, 312 (1966); Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 209, 4 N.E. 264, 266 (1886)). The *Rothko* Court held that "where the conduct of wrongdoers has rendered it difficult to ascertain the damages suffered with the precision otherwise possible," the trial court may "resort to reasonable conjectures and probable estimates" to determine the damages. 43 N.Y.2d at 323, 272 N.E.2d at 298, 401 N.Y.S.2d at 457 (citations omitted). Moreover, in *Bigelow* the Supreme Court stated that, where the defendant's initial wrongdoing has damaged the plaintiff in a way that is not readily measured, the damages may be estimated. 327 U.S. at 264-65. The rule articulated in the *Bigelow* case is the exception to the general rule that damages in a contract action must be certain. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 14-8, at 531 (2d ed. 1977).

[134] The *Reynolds Securities* decision represents the first time that the Court of Appeals has addressed directly the CPLR's default procedures. The CPLR's predecessor, the CPA, however, contained essentially the same provisions for defaults, *see* CPA 485 to 494-a (1962); FIRST REP. 93, 96, and the case law under the CPA allowed a defendant in default to appear at an inquest and oppose damages. *See, e.g.*, McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, *modified mem. on other grounds*, 253 N.Y. 533, 171 N.E. 770 (1930); Gise v. Brooklyn Soc'y for Prevention of Cruelty to Children, 236 App. Div. 852, 259 N.Y.S. 562 (2d Dep't 1932) (per curiam); Glove City Amusement Co. v. Smalley Chain Theatres, Inc., 167 Misc. 603, 4 N.Y.S.2d 397 (Sup. Ct. Madison County 1938). In addition, prior to *Reynolds Securities*, several lower New York courts interpreting CPLR 3215 concluded that a defaulting defendant has a right to appear and oppose the plaintiff's proof of damages. *See* Schutzer v. Berger, 40 App. Div. 2d 725, 337 N.Y.S.2d 71 (2d Dep't 1972); Appeal Printing Co. v. Levine, 69 Misc. 2d 76, 329 N.Y.S.2d 110 (N.Y.C. Civ. Ct. N.Y. County 1971); *see* 4 WK&M ¶ 3215.26, at 32-274.

One of the primary differences between the CPA and the default sections of the CPLR lies in the former statute's provisions governing a plaintiff's right to automatic entry of judgment. Unlike CPLR 3215, CPA 485 specified the situations in which the court clerk could enter judgment without an inquest to determine the amount of damages. An inquest was

recognizing this right, the Court appears to have adopted the position that a default judgment is designed not to punish, but rather to aid the plaintiff in establishing the liability of a defendant who fails to proceed.[135] Moreover, the Court appears to have rejected any possible arguments for distinguishing between default for failure to comply with discovery orders and default for other reasons. Significantly, the opinion also suggests realistic procedures which may be invoked if the defendant remains uncooperative during the inquest phase of the proceedings.[136]

The *Reynolds Securities* opinion, however, has created some uncertainty concerning the defaulting defendant's right to depose the plaintiff on the issue of damages. In stating that "as a result of his default, the defendant has now forfeited his right to take the

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unnecessary, for example, when the plaintiff sought damages for breach of an express contract to pay money fixed by the terms of the contract or capable of being ascertained therefrom by computation. Similarly, automatic entry of judgment was available when the underlying cause of action was for breach of express or implied contract to pay a sum received or disbursed, the value of property delivered, services rendered, or for a sum of money only. CPA 485 (1962). Thus, the cases decided under the CPA focused on whether a particular demand for relief was listed in the statute, and not whether the demand was for a "sum certain." *See, e.g.*, Sobel v. Sobel, 254 App. Div. 203, 4 N.Y.S.2d 194 (1st Dep't 1938); Kearns v. Ceretta, 139 N.Y.S.2d 3 (Sup. Ct. Queens County 1955); Rappazzo v. Nardacci, 20 Misc. 2d 301, 198 N.Y.S.2d 357 (Albany City Court 1959).

[135] The opinion implicitly recognizes that a defendant is not to be adversely affected on the damages issue merely because he defaulted on liability. Historically, a default constituted an admission of all traversable allegations in the complaint. Since an allegation of damages is not a traversable allegation, however, a default is not tantamount to an admission on the damages issue. *E.g.*, McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 351, 169 N.E. 605, 606-07, *modified mem. on other grounds*, 253 N.Y. 533, 171 N.E. 770 (1930); Emery v. Baltz, 94 N.Y. 407, 412 (1884); Wine Antiques, Inc. v. St. Paul Fire & Marine Ins. Co., 40 App. Div. 2d 657, 336 N.Y.S.2d 550 (1st Dep't 1972) (per curiam), *aff'd mem.*, 34 N.Y.2d 781, 315 N.E.2d 813, 358 N.Y.S.2d 773 (1974); 4 WK&M ¶ 3215.25. A similar approach is reflected in modern practice principles which allow the defendant to concede liability while preserving the right to offer proof on the question of damages when the amount due is the only issue in dispute. It is submitted that the same approach should be followed in cases such as *Reynolds Securities*, where the defendant's liability was established by default rather than concession or stipulation. Although in many instances the defendant's refusal to proceed or obey discovery orders may be designed to hamper the proof of the plaintiff's case, his motive also may be "to concede liability but keep abreast of the progress of the litigation, perhaps as concerns codefendants or an assessment of damages." CPLR 3105, commentary at 345 (1970). In such cases, the defendant would be more likely to default by reason of failure to proceed or comply with discovery than by reason of failure to appear, since, if he opted for the latter course, he would not be entitled to notice otherwise required by the CPLR. CPLR 3105 (1970). It therefore seems unduly harsh to penalize a defendant who appears but elects not to cooperate in discovery by extending the consequences of his default and foreclosing his right to contest damages.

[136] 44 N.Y.2d at 574, 378 N.E.2d at 110, 406 N.Y.S.2d at 747; *see* notes 131-133 and accompanying text *supra*.

plaintiff's deposition,"[137] the Court appears to have retreated from the position that default procedures are not intended to be punitive and that proof of damages should be separate from proof of liability.[138] It is submitted that the defaulting defendant should be able to examine the plaintiff on the question of the extent of damages.[139] A contrary view would undermine the *Reynolds Securities* holding by preventing the defendant from fully utilizing his right to appear and oppose plaintiff's proof of damages.[140] It is therefore suggested that, when the issue is squarely presented, the Court should reject the *Reynolds Securities* dictum in favor of a more equitable rule giving the defendant full discovery rights for purposes of any post-judgment damages inquest.

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CRIMINAL PROCEDURE LAW

CPL § 190.52: Statute amended to give grand jury witnesses limited right to counsel

Historically, counsel for a grand jury witness was excluded from the grand jury room[141] in order to preserve the secrecy of grand jury

[137] 44 N.Y.2d at 573, 378 N.E.2d at 109, 406 N.Y.S.2d at 746. The Court cited no authority in support of its position that the defendant was precluded from deposing the plaintiff. It is possible, however, that the Court was referring to CPLR 3102(d) (1970), which prohibits examinations during and after the trial, except by order of the trial court or to aid in the execution of judgment. CPLR 3102, commentary at 267 (1970). Nevertheless, the cases decided before *Reynolds Securities* indicated that such a rule might not be applicable when a defendant is seeking information to assist him in a post-judgment damages inquest. *See* note 140 *infra*. *See generally* 3A WK&M ¶ 3102.19.

[138] *See* notes 134-135 and accompanying text *supra*.

[139] *See* CPLR 3102(d) (1970); note 137 *supra*.

[140] Although the New York courts have not specifically ruled that the defaulting defendant may examine the plaintiff, it has been held that where plaintiff's motion for summary judgment has been granted, defendant may examine the plaintiff prior to the assessment of damages. *See, e.g.*, Appeal Printing Co. v. Levine, 69 Misc. 2d 76, 329 N.Y.S.2d 110 (N.Y.C. Civ. Ct. N.Y. County 1971); Shemitz v. Junior Center, Inc., 74 N.Y.S.2d 34 (N.Y.C. City Ct. N.Y. County 1947); CPLR 3102, commentary at 65 (Supp. 1978-1979). In Glove City Amusement Co. v. Smalley Chain Theatres, Inc., 167 Misc. 603, 4 N.Y.S.2d 397 (Sup. Ct. Madison County 1938), the court suggested that the defendant would have the right to examine the plaintiff prior to an inquest resulting from a default. The *Glove City* court observed: "[T]he procedure in proving damages upon an assessment . . . on a default . . . seems to be substantially the same as upon a trial . . . . [A bill of particulars] is as necessary and useful upon an assessment of damages as upon a trial." *Id.* at 604-05, 4 N.Y.S.2d at 400.

[141] Absent a specific statutory provision, a grand jury witness does not have a right to the presence of an attorney. *See, e.g.*, United States v. Scully, 225 F.2d 113, 118 (2d Cir. 1955); *In re* Black, 47 F.2d 542, 543 (2d Cir. 1931); People v. Waters, 27 N.Y.2d 553, 555, 261 N.E.2d