St. John's Law Review

Volume 49, Summer 1975, Number 4 Article 12

# CPLR 3101(a)(4): Court of Appeals Applies a Strcit Interpretation to "Special Circumstances" Requirement for Obtaining Disclosure from Nonparty Witness

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Additionally, the court invoked CPLR 3026 which grants pleadings a liberal construction absent prejudice to a party's substantial right and concluded that the plaintiff here suffered no such detriment.[112] It was determined that preclusion of the State from possible prosecution of defendant for perjury by permitting the service of an unverified pleading should not serve as a basis for a claim of prejudice.[113]

*McMahon* seems to have further illustrated that the CPLR is not to be regarded as a plethora of mere technicalites to be raised throughout various stages of the proceedings for the sole purpose of delay. CPLR 3026 is designed to streamline the mechanism of a civil lawsuit, not encumber it. Absent prejudice to a substantial right of a party, defects in pleadings must be ignored.[114] The *McMahon* court, in concluding that a liberal construction of the pleadings was warranted because precluding the plaintiff from subsequently prosecuting defendant for perjury did not constitute substantial prejudice, appears to have made a wise determination in not requiring verification of defendant's answer, especially since the issues had been adequately framed for trial.

## ARTICLE 31 — DISCLOSURE

*CPLR 3101(a)(4): Court of Appeals applies a strict interpretation to "special circumstances" requirement for obtaining disclosure from nonparty witness.*

Full disclosure of material and necessary evidence may be obtained from a nonparty witness under CPLR 3101(a)(4), provided "adequate special circumstances" are shown by the litigant seeking such disclosure.[115] Although the statute does not specify what may constitute ade-

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112 *Id.* at 389-90, 356 N.Y.S.2d at 936. *See* Kreiling v. Jayne Estates, Inc., 51 Misc. 2d 895, 897, 274 N.Y.S.2d 291, 293 (Sup. Ct. Suffolk County 1966) wherein the court, pursuant to CPLR 3026, ignored defendant's allegedly defective verification on the ground that plaintiff had shown no prejudice to a substantial right. *See also* 3 WK&M ¶ 3022.04, at 30-523 to -524 ("Irregularities in the verification will rarely result in prejudice to a party or affect the substance of the litigation.").

113 78 Misc. 2d at 389-90, 356 N.Y.S.2d 936. *See also* 7B MCKINNEY'S CPLR 3022, commentary at 399-400 (1974) (prospect of perjury coming out of a civil pleading is remote).

114 CPLR 3026; Capital Newspapers Div. — The Hearst Corp. v. Vanderbilt, 44 Misc. 2d 542, 543-44, 254 N.Y.S.2d 309, 311-12 (Sup. Ct. Albany County 1964); 3 WK&M ¶ 3022.04.

115 CPLR 3101(a) provides in pertinent part that:

> There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:
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> . . . .
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> (4) any person where the court on motion determines that there are adequate special circumstances.

With respect to the remainder of CPLR 3101(a), paragraphs (1) and (2) apply to disclosure by parties to an action and assignors of an action, respectively. Disclosure by a person who is about to leave the state, resides outside the state, resides more than 100 miles from the place of trial, or is so ill as to reasonably suggest that he will be unable to attend the trial may be obtained under paragraph (3).

quate special circumstances, both appellate and trial courts agree that special circumstances exist where a party seeks to examine an uncooperative or hostile witness.[116] In *Allen v. Crowell-Collier Publishing Co.*,[117] the Court of Appeals recommended that CPLR 3101(a) be given a liberal interpretation so as to permit disclosure whenever it is reasonable and useful to pending litigation.[118] Although *Allen* dealt with

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It should be noted that although CPLR 3101(a)(4) clearly contemplates the use of a motion, there is authority to the effect that disclosure under the statute may proceed by way of notice. *See* Muss v. Utilities & Indus. Corp., 61 Misc. 2d 642, 305 N.Y.S.2d 540 (Sup. Ct. Nassau County 1969) (mem.) (under CPLR, disclosure in first instance is anticipated to be by stipulation or notice); Bush Homes, Inc. v. Franklin Nat'l Bank, 61 Misc. 2d 495, 305 N.Y.S.2d 646 (Sup. Ct. Nassau County 1969) (mem.) (CPLR 3101(a)(4) does not set forth the procedure for obtaining disclosure; it only establishes the scope of disclosure). *See also* Spector v. Antenna & Radome Research Associates Corp., 25 App. Div. 2d 569, 267 N.Y.S.2d 843 (2d Dep't 1966) (mem.) (purpose of CPLR art. 31 is to permit maximum disclosure with a minimum of judicial supervision). Assuming it is permissible to proceed on notice under CPLR 3101(a)(4), the party seeking disclosure would serve a subpoena upon the witness in accordance with CPLR 3106(b) and, if an oral examination is sought, such party would also, pursuant to CPLR 3107, serve a notice of the examination upon his adversary. If examination of documents in the possession of a nonparty is sought, notice to all adverse parties would apparently be required. CPLR 3120(b).

In addition, it has been suggested that the motion requirement embodied in CPLR 3101(a)(4) can also be dispensed with if all persons concerned with the disclosure proceeding stipulate to the examination of the nonparty witness. *See* H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 1028 n.4 (3d ed. 1973).

116 Among other grounds, CPA 288, the predecessor of CPLR 3101, permitted the examination of a nonparty witness if "special circumstances render it proper." This provision was held to authorize the examination of witnesses who were available for trial but likely to be hostile to the party seeking the examination. *See, e.g.*, Ortner v. Bankers Sec. Life Ins. Soc'y, 17 App. Div. 2d 325, 235 N.Y.S.2d 59 (1st Dep't 1962); Harrington v. Albany, 8 App. Div. 2d 545, 183 N.Y.S.2d 376 (3d Dep't 1959) (mem.). Courts have taken the same approach under CPLR 3101(a)(4). *See, e.g.*, O'Riordan v. Northern Westchester Hosp., 19 App. Div. 2d 899, 244 N.Y.S.2d 880 (2d Dep't 1963) (mem.); Flanigen v. Mullen & Gunn, Inc., 45 Misc. 2d 944, 258 N.Y.S.2d 609 (Sup. Ct. Erie County 1965). *See generally* 7B MCKINNEY'S CPLR 3101, commentary at 25 (1970).

Examination of a nonparty witness under CPA 288 was also permitted where that person was found to have special or exclusive knowledge of the facts in issue. *See* Southbridge Finishing Co. v. Golding, 2 App. Div. 2d 430, 156 N.Y.S.2d 542 (1st Dep't 1956). This rule continues under CPLR 3101(a)(4). *See* McDonald v. Gore Mt. Ski Lift Corp., 30 App. Div. 2d 931, 293 N.Y.S.2d 553 (3d Dep't 1968) (mem.).

117 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 324 (1968).

118 21 N.Y.2d at 406-07, 235 N.E.2d at 432, 288 N.Y.S.2d at 452. The defendant in *Allen* maintained that the legislature intended "to permit disclosure only of evidence directly related to issues raised by the pleadings . . . ." *Id.* at 408, 235 N.E.2d at 433, 288 N.Y.S.2d at 453. In rejecting this argument, the Court stated that a liberal view with respect to pretrial disclosure had even been adopted under CPA 288 since it was believed that such an approach would assist trial preparation. *Id.* at 407, 235 N.E.2d at 432, 288 N.Y.S.2d at 452, *citing* Southbridge Finishing Co. v. Golding, 2 App. Div. 2d 430, 156 N.Y.S.2d 542 (1st Dep't 1956); Cornell v. Eaton, 286 App. Div. 1124, 146 N.Y.S.2d 449 (3d Dep't 1955) (per curiam); Dorros, Inc. v. Dorros Bros., 274 App. Div. 11, 80 N.Y.S.2d 25 (1st Dep't 1948).

Although not mentioned by *Allen*, it should be noted that the draftsmen of CPLR 3101 stated that the scope of disclosure afforded under CPA 288 should be continued under CPLR 3101. SIXTH REP. at 43. This statement, taken in conjunction with the

disclosure between parties to an action,[119] the expansive language used by the Court in describing the scope of CPLR 3101(a)[120] suggested to some that the term adequate special circumstances also be construed in a liberal fashion.[121]

Arguing that the "general tenor [of the *Allen* decision] makes it almost irrelevant that 3101(a)(4) was not directly involved," one practice commentator has urged that disclosure against a nonparty witness in New York be just as permissive as it is in federal practice.[122] Indeed, post-*Allen* decisions at both the appellate division and trial levels reflect an increasing willingness on the part of the courts to view the special circumstances requirement liberally in ordering disclosure by a nonparty witness.[123] Perhaps the most sweeping application of the *Allen* reasoning is found in *Kenford v. County of Erie*,[124] where the Appellate Division, Fourth Department, adopted the liberal construction suggested by Professor David D. Siegel: "A mere showing by the lawyer that he needs such witness's pretrial deposition in order to

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increasingly liberal interpretation given CPA 288 by the courts, leads to the conclusion that the legislature, in enacting CPLR 3101, intended to create a liberal disclosure device.

119 Plaintiffs in *Allen*, pursuant to CPLR 3101(a)(1), sought answers to certain interrogatories. 21 N.Y.2d at 405, 235 N.E.2d at 431, 288 N.Y.S.2d at 451.

120 Writing for the *Allen* Court, Chief Judge Fuld stated that:

> The words, "material and necessary", are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. CPLR 3101 (subd. [a]) should be construed . . . to permit discovery of testimony "which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable". . . .

*Id.* at 406-07, 235 N.E.2d at 432, 288 N.Y.S.2d at 452, *quoting* 3A WK&M ¶ 3101.07, at 31-24.

121 *See* 3A WK&M ¶ 3101.32. As Professor David D. Siegel has observed:

> A rigid construction of paragraph (4) will surely detour the clear direction set by the Allen decision. It seems to this writer that an implementation of the tenor of the Allen decision demands a very liberal construction of paragraph (4).

7B McKINNEY'S CPLR 3101, commentary at 26 (1970).

122 7B McKINNEY'S CPLR 3101, commentary at 27 (1970).

123 *See, e.g.*, Kenford Co. v. County of Erie, 41 App. Div. 2d 586, 340 N.Y.S.2d 300 (4th Dep't 1973) (mem.); Nussdorf v. Howell, 79 Misc. 2d 801, 361 N.Y.S.2d 122 (Sup. Ct. Queens County 1974) (mem.); Gates v. State, 72 Misc. 2d 844, 339 N.Y.S.2d 568 (Ct. Cl. 1972).

It should be noted that many decisions under CPLR 3101(a)(4) involve the application of the hostile witness rule. *See* note 116 *supra*. Such cases are often resolved without any reliance upon the *Allen* decision. *See, e.g.*, Sherwood v. Eli Lilly & Co., 36 App. Div. 2d 533, 318 N.Y.S.2d 636 (2d Dep't 1971) (mem.) (in a wrongful death action examination of decedent's parents permitted where neither would speak except under compulsion of subpoena); McDonald v. Gore Mt. Ski Lift Corp., 30 App. Div. 2d 931, 293 N.Y.S.2d 553, 554 (3d Dep't 1968) (mem.) (special circumstances exist "when it is established that the witness is hostile, or where the witness has special or exclusive knowledge of the facts in issue.").

124 41 App. Div. 2d 586, 340 N.Y.S.2d 300 (4th Dep't 1973) (mem.).

prepare fully for the trial should suffice as a 'special circumstance.' "[125] Notwithstanding *Kenford*, the Court of Appeals, in *Cirale v. 80 Pine Street Corp.*,[126] refused to apply the liberal policy enunciated in *Allen* to CPLR 3101(a)(4).

In *Cirale*, a steampipe in a building located in New York City exploded, causing the death of plaintiff's intestate. A board of inquiry was convened by the City's Commissioner of Buildings to investigate the accident.[127] Following the commencement of the instant wrongful death action, both plaintiff and defendants moved separately to obtain the records of the board relating to the accident.[128] Since the City was not a party to the action, all movants proceeded under CPLR 3101(a)(4). It is unclear whether the parties made any independent effort to obtain information concerning the explosion prior to their respective motions; they merely alleged that "since [the Board's] investigation was the only one taken . . . , its results and contents [were] *material and necessary* to the proof of [their] case."[129] The Supreme Court, New York County, concluding that "the Board of Inquiry has special and exclusive knowledge of the events surrounding the explosion," agreed and therefore granted the motion for disclosure.[130] The Appellate Division, First Department, affirmed the court's order.[131]

The Court of Appeals reversed, stating that the special circumstances requirement in paragraph (4) imposed limitations on the otherwise sweeping language of CPLR 3101(a).[132] Without mentioning *Allen*, Judge Jasen, speaking for the majority, stated that an assertion by a movant that the information sought was "material and necessary"

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125 *Id.*, 340 N.Y.S.2d at 302, *quoting* 7B McKINNEY's CPLR 3101, commentary at 27 (1970).

126 35 N.Y.2d 113, 316 N.E.2d 301, 359 N.Y.S.2d 1 (1974), *rev'g* 41 App. Div. 2d 1030, 344 N.Y.S.2d 973 (1st Dep't 1973) (mem.).

127 The board had three responsibilities: (1) to determine the facts surrounding the explosion; (2) to ascertain if there was any violation of the building code or relevant regulations; and, (3) to study the causes of the accident in order to develop remedial legislation. 35 N.Y.2d at 115, 316 N.E.2d at 302, 359 N.Y.S.2d at 2-3.

128 Plaintiff motioned for discovery and inspection of the following: (1) the names and addresses of witnesses called by the board whose testimony related to the explosion; (2) statements concerning the explosion made by witnesses appearing before the board; (3) documents, reports, records, and papers which the board had access to and which related to the explosion; and, (4) the contents of the board's report. Defendants filed a cross-motion for the same purpose. *Id.* at 115-16, 316 N.E.2d at 302, 359 N.Y.S.2d at 3.

129 *Id.* at 116, 316 N.E.2d at 303, 359 N.Y.S.2d at 4 (emphasis in original).

130 *Id.* at 116, 316 N.E.2d at 302, 359 N.Y.S.2d at 3. *See also* note 116 *supra*.

131 41 App. Div. 2d 1030, 344 N.Y.S.2d 973 (1st Dep't 1973) (mem.). Appeal was taken to the Court of Appeals by the City of New York on a certified question of law. 35 N.Y.2d at 116, 316 N.E.2d at 302, 359 N.Y.S.2d at 3.

132 35 N.Y.2d at 116, 316 N.E.2d at 302, 359 N.Y.S.2d at 3.

could not be considered a special circumstance.[133] Nor, the Court observed, is it sufficient to merely allege in a motion under CPLR 3101 (a)(4) that special circumstances exist: any such claim must be accompanied by specific support.[134] Accordingly, in the instant case, the Court would require that the movant demonstrate that he had conducted an independent investigation of the explosion. In passing on a 3101(a)(4) motion, a trial court then might consider plaintiff's inability to obtain, through his own devices, sufficient evidence to establish a cause of action against defendants, a "circumstance" warranting an order granting disclosure.[135]

In his dissenting opinion, Judge Gabrielli stated that there was "no particular authority for the majority's insistence that respondents show their inability otherwise to obtain the sought after information."[136] Conceding that such a rule might be applicable if the information sought had been gathered through the efforts of another party to the action,[137] the Judge emphasized that in this case, the public agency investigating the explosion was not a party and was unlikely to be made one. Given the seriousness of the explosion and the duplication inherent in an investigation carried out by any of the movants, the dissent concluded that the special circumstances test had indeed been met.[138]

In refusing to apply to CPLR 3101(a)(4) the liberal reasoning it

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133 *Id.* at 116-17, 316 N.E.2d at 303, 359 N.Y.S.2d at 3-4.

134 *Id.* at 117, 316 N.E.2d at 303, 359 N.Y.S.2d at 4.

135 *Id.* at 116, 316 N.E.2d at 302-03, 359 N.Y.S.2d at 3-4. The majority did not, however, state that in the instant case the mere inability of plaintiff to obtain such evidence would automatically satisfy the "special circumstances" test. *See id.*

In addition to the question of whether movants had met the "special circumstances" requirement of CPLR 3101(a)(4), the Court of Appeals also considered a second issue, *viz*, whether the City's common law privilege of confidentiality with respect to communications made to its employees in the course of their official duties would bar disclosure of the board's records. Although the Court did not answer the question, it did say that the City could raise the issue if movants sought further discovery proceedings. *Id.* at 119, 316 N.E.2d at 304, 359 N.Y.S.2d at 6. In his dissent, Judge Gabrielli argued that since the trial court had specifically rejected such a claim of confidentiality and the City did not directly challenge that ruling on appeal, it was inappropriate for the Court to consider the issue. *Id.* at 120, 316 N.E.2d at 305, 359 N.Y.S.2d at 6 (Gabrielli & Stevens, JJ., dissenting).

136 *Id.* at 119, 316 N.E.2d at 304, 359 N.Y.S.2d at 6 (Gabrielli & Stevens, JJ., dissenting).

137 *Id., citing* Hickman v. Taylor, 329 U.S. 495 (1947). In *Hickman*, plaintiffs sought to compel defendant's attorney to produce all statements he had taken from third parties who had witnessed an accident involving plaintiffs' decedent. The Supreme Court refused to grant plaintiff's motion for disclosure, holding that a party seeking such disclosure must himself examine the nonparty witness before he can compel disclosure of information possessed by such witness from another party. *Id.* at 509.

138 35 N.Y.2d at 120, 316 N.E.2d at 304-05, 359 N.Y.S.2d at 6 (Gabrielli & Stevens, JJ., dissenting). Notably, the dissent did not rely upon the *Allen* decision in reaching this conclusion.

had enunciated in *Allen*,[139] the Court of Appeals has embarked upon a highly questionable course. The Court has indeed imposed a heavy burden on litigants by requiring that they conduct an independent investigation in an attempt to discover evidence already possessed by a nonparty. This investigation very often may amount to nothing more than an unnecessary, costly, and time-consuming duplication of a completed investigation. Moreover, depending upon the subject matter of the investigation, a party may be put at a serious disadvantage if he is forced to litigate his claim without the aid of evidence obtained by a nonparty investigatory body. In a situation such as *Cirale*, for example, the investigation of a public agency with superior skills and manpower is likely to be more thorough than that of an ordinary litigant. The stringent requirements in New York for disclosure against a nonparty will most likely be given, therefore, serious consideration by the practitoner choosing a forum for his action.

### ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

*CPLR 3404: Fourth Department vacates a dismissal for abandonment upon condition that neglectful attorney pay $1000 in costs.*

CPLR 3404 provides for the dismissal of cases which have been struck from the calendar and not restored within one year.[140] The purpose and principal advantage of rule 3404 is that it prevents cases *actually* abandoned from "haunting litigants" years later.[141] Unlike

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139 Professor Siegel has expressed the fear that trial judges who have "accumulated their experience under the much more restrictive approach (to disclosure) of the old Civil Practice Act" would not implement "the Court of Appeals' aim in Allen . . . ." 7B McKINNEY'S CPLR 3101, commentary at 27 (1970). Ironically, a number of trial judges did apply the *Allen* reasoning to CPLR 3101(a)(4), *see* note 123 *supra*, while the Court of Appeals in *Cirale* did not. *See* text accompanying notes 132-34 *supra*.

140 CPLR 3404 states:

> A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

The Court of Appeals, in vacating the dismissal of an action which was litigated for 25 years, construed the phrase "deemed abandoned" as suggesting "a presumption rather than a fixed and immutable policy of dismissal . . . [which] was never intended to apply to a case where litigation in a cause was *actually* in progress." Marco v. Sachs, 10 N.Y.2d 542, 550, 181 N.E.2d 392, 395, 226 N.Y.S.2d 353, 358 (1962) (emphasis added). In Tactuk v. Freiberg, 24 App. Div. 2d 503, 261 N.Y.S.2d 438 (2d Dep't 1965), the Appellate Division, Second Department, held that a CPLR 3404 dismissal was unjustified where a motion was pending at the time of the dismissal and the parties were actively negotiating matters related to the action, noting there had been no abandonment *in fact*.

CPLR 3404 is limited to the supreme court and the county courts. Other courts, however, such as the Court of Claims, the district courts, and the New York City Civil Court, have similar rules. *See* 4 WK&M ¶ 3404.10 n.19.

141 4 WK&M ¶ 3404.01.