

CPLR 3021: Mere Allegation of Improper Verification Does Not Mandate Rebuttal

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1972) "CPLR 3021: Mere Allegation of Improper Verification Does Not Mandate Rebuttal," *St. John's Law Review*: Vol. 47 : No. 1 , Article 21.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol47/iss1/21>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

settlement. Indeed, the defendant never contested the existence or the terms of the agreement in question.⁸⁵

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3015: Particularity as to special damages.

Subdivision (d), which required the itemization of special damages in the pleadings, has been repealed and subdivision (e) has been re-lettered as subdivision (d). Itemization of special damages is left to the bill of particulars.

A caveat to the bar: Special damages must still be pleaded where they are an essential element of a cause of action.⁸⁶

CPLR 3021: Mere allegation of improper verification does not mandate rebuttal.

In 1965, section 741 of the RPAPL was amended to require verified petitions in proceedings to regain possession of real property. Thus, such petitions must be verified pursuant to CPLR 3021⁸⁷ to avoid the possible penalty for improper verification contained in CPLR 3022, viz., that such pleadings may be treated as a nullity if the adverse party so notifies opposing counsel.

In *Gould v. Pollack*,⁸⁸ the defendant contended that the petition had not been properly verified and sought to raise an issue of fact as to whether the petition had actually been verified. In rejecting these allegations, the New York City Civil Court, New York County, noted that the instant affidavit followed the form required by CPLR 3021.⁸⁹ Moreover, where no issue of fact as to the authenticity of the verification was shown, the plaintiff had "no duty . . . to call the Notary Public as a witness."⁹⁰

The lack of any proof of irregularity concerning the petition's verification clearly justifies the instant decision, which forestalls the delay of summary proceedings which an opposite holding would have produced. Moreover, assuming *arguendo* that the petition was defectively verified, the CPLR states that "[d]efects [in pleadings] shall be ignored if a substantial right of a party is not prejudiced."⁹¹

⁸⁵ 38 App. Div. 2d at 814, 328 N.Y.S.2d at 902.

⁸⁶ CPLR 3013.

⁸⁷ Note that the wording of the section is not mandatory. See 3 WK&M ¶ 3021.02. In addition the Court of Appeals has adopted a "substantial compliance" test for determining whether verification is proper. *In re Macaulay*, 94 N.Y. 574, 577-78 (1884).

⁸⁸ 68 Misc. 2d 670, 327 N.Y.S.2d 808 (N.Y.C. Civ. Ct. N.Y. County 1971).

⁸⁹ *Id.* at 676, 327 N.Y.S.2d at 815.

⁹⁰ *Id.*

⁹¹ CPLR 3026. For a case adopting this approach, see *Capital Newspapers Div.-Hearst*

CPLR 3041: A demand in a bill of particulars for identification of witnesses is permissible under special circumstances.

Generally, the purposes of a bill of particulars are amplification of the pleading, prevention of surprise at trial, and limitation of the scope of proof.⁹² The bill was not intended as a means of eliciting evidence or obtaining the names of witnesses.⁹³ However, courts will allow a demand for such information under special circumstances.⁹⁴

Such circumstances were found in *Block v. Fairbairn*,⁹⁵ where the plaintiff, a dog-bite victim, was required to furnish the identity of persons who were with him at the time of the incident.⁹⁶ In so holding, the Supreme Court, Ulster County, advocated the expansion of the scope of the bill of particulars as a means of reducing the expense of litigation, citing the increasing cost of the record of examinations before trial, the usual device by which such information is obtained.

It has been argued that the bill of particulars "imposes burdens on the parties and the court that far outweigh the modicum of added intelligence that may be afforded by [its] use. . . ."⁹⁷ Nevertheless, the idea that the scope of the bill of particulars should be expanded in this regard certainly has merit. It mirrors a welcome judicial inclination toward making the courts more accessible to many litigants for whom the cost of the record of an examination before trial would otherwise be prohibitive.

CPLR 3042: Attorney personally fined for ignoring a demand for a bill of particulars.

*Blanchfield Storage, Inc. v. State*⁹⁸ involved a motion to vacate a conditional preclusion order which had been granted to the State after

Corp. v. Vanderbilt, 44 Misc. 2d 542, 254 N.Y.S.2d 309 (Sup. Ct. Albany County 1964). Therein, the court held that a complaint demanding injunctive relief would not be dismissed for defective verification where the defendant would not be substantially prejudiced if the defect were ignored.

⁹² *Elman v. Ziegfeld*, 200 App. Div. 494, 193 N.Y.S. 133 (1st Dep't 1922).

⁹³ *W. R. Simmons & Assocs. Research, Inc. v. Ziff-Davis Publishing Co.*, 37 Misc. 2d 62, 234 N.Y.S.2d 991 (Sup. Ct. N.Y. County 1962); *Slawson v. Murphy*, 37 N.Y.S.2d 930 (Sup. Ct. Nassau County 1942). See generally 6 CARMODY-WAIT 2d § 36:3 (1968).

⁹⁴ H. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 230-31 (3d ed. 1970). See *In re Cohn's Estate*, 41 Misc. 2d 36, 244 N.Y.S.2d 669 (Sur. Ct. N.Y. County 1963).

⁹⁵ 68 Misc. 2d 931, 328 N.Y.S.2d 497 (Sup. Ct. Ulster County 1972).

⁹⁶ The court also allowed, *inter alia*, the defendant's demand for information as to whether the dog was claimed to have bitten anyone in the past, stating that it "would prevent surprise at the trial and would permit the defendants to investigate such claim prior to trial." *Id.* at 933, 328 N.Y.S.2d at 500. Three other dog-bite cases have similarly permitted the use of the device for the identification of previous victims. *Diskin v. St. Martin's Roman Catholic Church*, 2 App. Div. 2d 901, 157 N.Y.S.2d 144 (2d Dep't 1956); *Drake v. Hess*, 281 App. Div. 1074, 122 N.Y.S.2d 32 (4th Dep't 1953) (*per curiam*); *Robson v. Driscoll*, 278 App. Div. 847, 104 N.Y.S.2d 334 (2d Dep't 1951).

⁹⁷ 3 WK&M ¶ 3041.05.

⁹⁸ 69 Misc. 2d 487, 330 N.Y.S.2d 139 (Ct. Cl. 1972) (*mem.*).