

CPLR 3016(c): Specificity of Pleading Requirement Applied to Counterclaim in Divorce Action

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reversed, holding that the defendant's general denial was sufficient to put all the plaintiff's allegations in issue. The Court reasoned that the particularity requirement was inapplicable because the plaintiff had already specified the pertinent conditions in his complaint, and thus the essential purpose of the requirement — *i.e.*, to give the plaintiff notice of that which he must prove at trial — was satisfied.⁷⁰

CPLR 3016(c): Specificity of pleading requirement applied to counterclaim in divorce action.

CPLR 3016(c) requires that the complaint in an action for separation contain the nature, circumstances, time, and place of each act allegedly constituting the defendant's misconduct. In *Deane v. Deane*,⁷¹ the Supreme Court, Westchester County, applied this pleading requirement to the defendant's counterclaim⁷² for divorce, reasoning that since the ground pleaded, cruel and inhuman treatment, is identically worded for separation and divorce,⁷³ "[n]o distinction is made between the nature or the level of proof required to establish [this ground] insofar as it may relate to [either action]."⁷⁴ Thus, the court concluded, the same standards of pleading should apply.

CPLR 3016(c) was created at a time when multiple grounds existed for separation, while the only ground for divorce was adultery, and the pleading requirements for the latter were less than for the former. When the grounds for divorce were expanded in 1967,⁷⁵ no pleading provision corresponding to CPLR 3016(c) was created.⁷⁶ This legislative inactivity prompted the Supreme Court, Delaware County, in *Houck v. Houck*,⁷⁷ to conclude that a complaint for divorce should be given a more liberal reading than one for separation on identical grounds.

Although the *Deane* court indicated that the consequences of failing to satisfy this section will be minimal — the delinquent party may have to file an amended pleading or supply a bill of particulars,⁷⁸

⁷⁰ 30 N.Y.2d at 233, 282 N.E.2d at 603, 331 N.Y.S.2d at 641.

⁷¹ 69 Misc. 2d 1024, 332 N.Y.S.2d 302 (Sup. Ct. Westchester County 1972).

⁷² CPLR 3019(f) provides: "A cause of action contained in a counterclaim . . . shall be treated, as far as practicable, as if it were contained in a complaint . . ."

⁷³ Compare DRL 200(1) with DRL 170(1).

⁷⁴ 69 Misc. 2d at 1025, 332 N.Y.S.2d at 304.

⁷⁵ DRL 170.

⁷⁶ See 3 WK&M ¶ 3016.08.

⁷⁷ 59 Misc. 2d 1070, 300 N.Y.S.2d 999 (Sup. Ct. Delaware County 1968).

⁷⁸ There is a disagreement as to whether a bill of particulars may be utilized for this purpose. Several cases have stated that this device must be held inappropriate if CPLR 3016(c) is to retain its effectiveness. See *Pustilnik v. Pustilnik*, 24 App. Div. 2d 868, 264 N.Y.S.2d 400 (2d Dep't 1965) (mem.), discussed in *The Quarterly Survey*, 41 St. JOHN'S

this minor gap in the symmetry of the CPLR should be rectified by the Legislature.

ARTICLE 31 — DISCLOSURE

CPLR 3120: Discovery and inspection available against the state as nonparty witness.

In *Kaplan v. Kaplan*,⁷⁹ the Court of Appeals decided whether the state is immune from disclosure as a nonparty witness. The state is subject to discovery by court order under CPLR 3102(f) when it is a party to an action.⁸⁰ In *Butironi v. Putnam County Civil Service Commission*,⁸¹ the Appellate Division, Second Department, held that the state was not required to make disclosure as a witness. The court reasoned that when the Legislature amended CPLR 3102(f) to make clear that disclosure was available against the state as a party, it had foregone the opportunity of similarly broadening CPLR 3120(b) to permit disclosure against the state as a witness.⁸²

In *Kaplan*, the defendants applied under CPLR 3120 for discovery and inspection of documents in the possession of the State Department of Health. The department resisted the application on the ground that it was not a party to the action and was not "a person not a party" made equally subject to disclosure under CPLR 3120(b) as a party is under CPLR 3120(a).⁸³ The Supreme Court, New York County, ordered disclosure, and the Appellate Division, First Department, unanimously affirmed. The Court of Appeals unanimously affirmed, construing the word "person" in CPLR 3120(b) to include the state.⁸⁴ The Court rejected the *Butironi* rationale, reasoning that the Legislature did not amend CPLR 3120(b) because it was decided under the CPA that the state could be examined as a witness.⁸⁵

L. Rev. 121, 141 (1966); *Kurcz v. Kurcz*, 13 App. Div. 2d 954, 216 N.Y.S.2d 736 (1st Dep't 1961) (mem.); *Glick v. Glick*, 63 Misc. 2d 944, 311 N.Y.S.2d 623 (Sup. Ct. Nassau County 1970). The more liberal view of the *Deane* case, which allows its use, is endorsed by Professor Siegel. 7B MCKINNEY'S CPLR 3016, supp. commentary at 172 (1972).

⁷⁹ 31 N.Y.2d 63, 286 N.E.2d 691, 334 N.Y.S.2d 379, *affg* 38 App. Div. 2d 691, 327 N.Y.S.2d 543 (1st Dep't 1971).

⁸⁰ However, the state cannot be required to answer interrogatories or to make admissions.

⁸¹ 29 App. Div. 2d 474, 288 N.Y.S.2d 734 (2d Dep't 1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 325 (1968).

⁸² *Id.* at 476, 288 N.Y.S.2d at 737.

⁸³ CPLR 3120(a) provides for the discovery and production of documents and things for inspection, copying, testing, or photographing.

⁸⁴ 31 N.Y.2d at 69, 286 N.E.2d at 262, 334 N.Y.S.2d at 381.

⁸⁵ *Id.*, *citing* *City of Buffalo v. Hanna Furnace Corp.*, 305 N.Y. 369, 113 N.E.2d 520