St. John's Law Review

Volume 47, March 1973, Number 3 Article 16

CPLR 3124: Statute Does Not Mandate Immediate Ruling on Dispute at Examination Before Trial

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The policy of the drafters of the CPLR was to broaden disclosure against the state and against litigants in general.[86] The Court of Appeals' sound construction in *Kaplan* reinforces the liberalization intended by the present disclosure article.

CPLR 3124: Statute does not mandate immediate ruling on dispute at examination before trial.

When a deponent declines to answer a question in a disclosure proceeding, the party taking the deposition may (1) file a formal motion on notice to compel disclosure after completing the remainder of the deposition,[87] or in certain courts, (2) seek an immediate informal ruling from the presiding judge of the *ex parte* motion part.[88]

In *Cohen v. Heine & Co.*,[89] the defendants, who had not sought an immediate ruling on disputed questions by the presiding judge, who was available, moved to strike the case from the calendar. The Supreme Court, Nassau County, denied the motion and held that the defendants had waived their right to seek disclosure of the controverted questions. The Appellate Division, Second Department, affirmed without prejudice to the defendants' right to move at special term for further disclosure.[90] Deeming it error to interpret CPLR 3124 as mandating that "in chambers" rulings be sought, the court indicated that the CPLR contemplates a single post-disclosure motion.[91]

This decision correctly construes CPLR 3124. A party is entitled to make an omnibus motion for formal rulings as to all disputed questions. The informal procedure offers speed and convenience, but a formal motion better assures the formulation of a record for pos-

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(1953). In construing the words "any . . . person," other than a party, subject to disclosure under CPA 288, the Court therein stated:

> Courts should not strain to limit the availability of such an important remedy, by narrowly circumscribing the reach of words so inclusive as "any . . . person," whose very generality bespeaks a legislative design that the provision be accorded a very broad content. Of exceeding significance is the consideration that the "testimonial duty to disclose knowledge needed in judicial investigation" is essentially one that rests upon all persons alike, upon public officers and agents, as well as upon private individuals.

305 N.Y. at 377, 113 N.E.2d at 524.

86 *See* Tely v. State, 49 Misc. 2d 418, 267 N.Y.S.2d 865 (Ct. Cl. 1966); Chester v. Zima, 41 Misc. 2d 676, 246 N.Y.S.2d 144 (Sup. Ct. Erie County 1964); Roma v. Newspaper Consol. Corp., 40 Misc. 2d 1085, 244 N.Y.S.2d 723 (Sup. Ct. N.Y. County 1963).

87 This procedure is authorized by CPLR 3124.

88 CPLR 3124 does not expressly provide for this procedure although it is commonly practiced in certain areas. *See* 7B McKINNEY'S CPLR 3124, commentary at 629 (1970).

89 39 App. Div. 2d 563, 331 N.Y.S.2d 751 (2d Dep't 1972) (mem.).

90 *Id.*, 331 N.Y.S.2d at 752.

91 *Id.*, *citing* 7B McKINNEY'S CPLR 3124, commentary at 628-31 (1970).

sible appeal.[92] Failure to utilize the informal procedure is not a waiver of the right to a formal ruling.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Court of Appeals affirms that prior judgment establishing freedom from negligence does not establish freedom from contributory negligence.

In *Nesbitt v. Nimmich*,[93] the Court of Appeals recently affirmed without opinion an Appellate Division, Second Department, decision which held that the doctrine of collateral estoppel does not operate to establish the plaintiff's freedom from contributory negligence where his freedom from negligence as a defendant was determined in a prior action. The case involved a personal injury action between parties who were co-defendants in the prior suit. The Second Department's refusal to grant the plaintiff's motion for summary judgment was based on the difference in the burden of proof accompanying the movant's change in status from defendant to plaintiff. The plaintiff's inability to establish the defendant's negligence in the prior action should not permit the inference that the defendant can overcome his burden of proving freedom from contributory negligence in a subsequent action in which he is the plaintiff.

ARTICLE 71 — RECOVERY OF CHATTEL

CPLR 7102: Due process protects all types of property.

Since the 1969 Supreme Court decision in *Sniadach v. Family Finance Corp.*,[94] there have been important developments in replevin law. In *Sniadach*, the Court set the direction by declaring that a hearing or an opportunity to defend a replevin action before the garnishment of one's salary was necessary to satisfy the requirements of due process. While *Sniadach* was concerned with wages, a "specialized type of property"[95] the deprivation of which may cause great personal

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92 7B MCKINNEY'S CPLR 3124, commentary at 630 (1970), *citing* Tri-State Pipe Lines Corp. v. Sinclair Ref. Co., 26 App. Div. 2d 285, 273 N.Y.S.2d 976 (1st Dep't 1966), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 142 (1967).

93 30 N.Y.2d 622, 282 N.E.2d 328, 331 N.Y.S.2d 438 (1972), *aff'g mem.* 34 App. Div. 2d 958, 312 N.Y.S.2d 766 (2d Dep't 1970) (mem.), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 521 (1971).

94 395 U.S. 337 (1969). For extended discussion of *Sniadach*, see Note, *Provisional Remedies in New York Reappraised Under* Sniadach v. Family Finance Corp.: *A Constitutional Fly in the Creditor's Ointment*, 34 ALBANY L. REV. 426, 433 (1970); Note, *Some Implications of* Sniadach, 70 COLUM. L. REV. 942 (1970); *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

95 395 U.S. at 340.