

## CPLR 3101(a)(4): Fourth Department Allows Disclosure Against Nonparty Witness Where It Will Aid Preparation for Trial

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party, by service of notice,<sup>71</sup> may take the deposition of an adverse party without a showing of special circumstances.<sup>72</sup> CPLR 3101, unlike CPA 288, however, does not expressly permit a party to perpetuate his own testimony by self-deposition. Case law has construed the statute as permitting this practice without a showing of special circumstances.<sup>73</sup> *Boyo v. New York City Transit Authority*<sup>74</sup> reaffirms the validity of this practice.

In *Boyo*, the defendant opposed the plaintiff's motion to perpetuate her testimony pursuant to CPLR 3101 on the ground that the plaintiff, a 75-year-old woman, failed to submit a medical affidavit proving that illness, likelihood of death, or other special circumstances mandated the deposition. The Supreme Court, Kings County, held that the plaintiff was entitled to perpetuate her testimony solely on the basis of her advanced age,<sup>75</sup> relying on the legislative intent expressed in CPLR 3403, which provides for a trial preference as a matter of right "in any action upon the application of a party who has reached the age of seventy-five years."

Such a motion should be granted regardless of the absence of special circumstances.<sup>76</sup> Clearly, the intent of the CPLR is to liberalize disclosure. Moreover, CPLR 3117,<sup>77</sup> by restricting the use of depositions at trial, discourages needless self-depositions. Where this practice would be burdensome to the adverse party, he may seek a protective order under CPLR 3103.

*CPLR 3101(a)(4): Fourth Department allows disclosure against non-party witness where it will aid preparation for trial.*

CPLR 3101(a)(4) provides that a nonparty witness may be required to disclose information material and necessary to a party's claim or defense provided that there exist adequate special circumstances. When the nonparty witness might have been unavailable for trial, or was

<sup>71</sup> CPLR 3107.

<sup>72</sup> *In re Estate of Keljikian*, 44 Misc. 2d 176, 253 N.Y.S.2d 238 (Sur. Ct. Westchester County 1964).

<sup>73</sup> *Lapensky v. Gordon*, 41 Misc. 2d 958, 246 N.Y.S.2d 442 (Sup. Ct. Kings County 1964), discussed in *The Biannual Survey*, 38 ST. JOHN'S L. REV. 406, 433 (1964) (72-year-old plaintiff permitted to take her own deposition without a showing of special circumstances). See 7B MCKINNEY'S CPLR 3101, commentary at 18, 22 (1970); 7 CARMODY-WARR 2d, § 42:79, at 132 (1966); 3 WK&M ¶ 3101.22. Cf. *Shaw v. Hospital Ass'n*, 57 Misc. 2d 461, 292 N.Y.S.2d 984 (Sup. Ct. Schenectady County 1968).

<sup>74</sup> 72 Misc. 2d 165, 339 N.Y.S.2d 501 (Sup. Ct. Kings County 1972).

<sup>75</sup> *Id.* at 166, 339 N.Y.S.2d at 502.

<sup>76</sup> See note 73 *supra*. Cf. CPLR 104, 3101(a)(1).

<sup>77</sup> CPLR 3117 requires that a party seeking to introduce a deposition at trial show that the witness is either: (1) dead; (2) more than 100 miles from the courtroom; (3) unavailable because of age, sickness, infirmity, or imprisonment; (4) unavailable despite diligent efforts to procure his attendance; or that exceptional circumstances exist.

hostile, or had special or exclusive knowledge of the facts, the special circumstances rule has been held satisfied and disclosure permitted.<sup>78</sup> Courts have been reluctant, however, to allow pretrial examinations in other than these well-settled cases, for example, if the examination would only assist the moving party in his trial preparation.<sup>79</sup>

In *Kenford Co. v. County of Erie*,<sup>80</sup> a contract action, the defendants intended to interpose the affirmative defenses of fraud and misrepresentation, and in order to aid their preparation, moved to examine three nonparty witnesses without showing any of the traditional special circumstances. The Appellate Division, Fourth Department, modified the trial court's order allowing the examination of two of the nonparty witnesses, unanimously holding that the mere involvement of one of them in transactions which led to the formation of the subject contract constituted sufficient special circumstances to justify his examination.<sup>81</sup> The other nonparty witness was excused since the defendants sought to interrogate him only with respect to his activities after the execution of the contract.<sup>82</sup>

*Kenford*, in effectively assimilating the special circumstances requirement as to nonparty witnesses within the general rule calling for "full disclosure of all evidence material and necessary in the prosecution or defense of an action . . .," is a laudable step toward removing the last remnants of distinction between parties and nonparties at the pretrial disclosure stage.

*CPLR 3101(d): Names of eyewitnesses, even if obtained by investigation, are discoverable if they are material and necessary.*

Generally, under the CPA, a party was not entitled to disclosure of the names of witnesses which the other party intended to use at

<sup>78</sup> See, e.g., *Brooklyn Express Co. v. Key Food Stores Cooperative, Inc.*, 40 App. Div. 2d 608, 335 N.Y.S.2d 1009 (2d Dep't 1972) (mem.); *General Bldg. Supply Corp. v. State*, 63 Misc. 2d 520, 312 N.Y.S.2d 215 (Ct. Cl. 1970), discussed in *The Quarterly Survey*, 45 St. JOHN'S L. REV. 500, 520 (1971); *Williams v. Sterling Estates, Inc.*, 41 Misc. 2d 692, 245 N.Y.S.2d 777 (Sup. Ct. Nassau County 1963); 7 CARMODY-WAIT 2d §§ 42:83-85 (1966); 3 WK&M ¶ 3101.31; cf. *Southbridge Finishing Co. v. Golding*, 2 App. Div. 2d 430, 156 N.Y.S.2d 542 (1st Dep't 1956).

<sup>79</sup> See *Pearson v. Pouthier*, 33 App. Div. 2d 531, 314 N.Y.S.2d 302 (4th Dep't 1969) (mem.); *McDonald v. Gore Mt. Ski Lift Corp.*, 30 App. Div. 2d 931, 293 N.Y.S.2d 553 (3d Dep't 1968) (mem.); 3 WK&M ¶ 3101.33.

<sup>80</sup> 41 App. Div. 2d 586, 340 N.Y.S.2d 300 (4th Dep't 1973) (mem.).

<sup>81</sup> *Id.* at 587, 340 N.Y.S.2d at 302, citing 7B MCKINNEY'S CPLR 3101, commentary at 25-27 (1970). In his commentary, Professor Siegel states:

If a witness holds the key, or merely a key, to any substantial fact involved in the case, how can any lawyer in this day and age be compelled to go to trial without knowing intimately what that witness is going to say?

*Id.* at 27.

<sup>82</sup> 41 App. Div. at 587, 340 N.Y.S.2d at 302.