

CPLR 3104(a): Court Declines To Supervise Disclosure Proceeding

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Service of a subpoena outside the state certainly should be valid, especially where there was personal jurisdiction in the main action which gave rise to the judgment. In *Underwriters Trust Co. v. Scala*,⁸⁸ wherein a subpoena was purportedly served within the state pursuant to CPLR 308(3), the court declared the mode of service proper, it "being authorized . . . by statute. . . ."⁸⁹ If CPLR 2303 adopts the qualifications embodied in CPLR 313, as both the statutory language and perhaps *Scala* indicate, it should be interpreted to authorize all of the beneficial provisions of that section.⁹⁰

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Court refuses motion to take deposition despite satisfaction of distance criterion.

A motion under CPLR 3101(a)(3) to take deposition before trial of a witness who resides more than one hundred miles from the place of the trial is addressed to the discretion of the court. Although the Court of Appeals had indicated that this section should be liberally construed,⁹¹ the Court of Claims of New York denied such a motion in *Winter v. State*.⁹² Although the requirements of the statute were satisfied,⁹³ the court decided that the personal appearance of the witness, allegedly an eyewitness, was crucial to the orderly conduct of the trial and to a just decision. Otherwise, the trial judge could not observe or interrogate the witness.⁹⁴

The exercise of discretion in *Winter* is clearly improper. That the witness's testimony may be crucial is precisely the reason to allow the taking of a deposition. The defense should not be surprised by this witness's testimony.

CPLR 3104(a): Court declines to supervise disclosure proceeding.

CPLR 3104(a) enables the court in which an action is pending to supervise disclosure proceedings either by a judge or a referee, upon its own motion or the motion of any party or witness.⁹⁵ Unfortunately, practical problems prevent full utilization of this provision. Calendar congestion precludes frequent assignment of judges to preside at dis-

⁸⁸ 62 Misc.2d 877, 311 N.Y.S.2d 454 (N.Y.C. Civ. Ct. N.Y. County 1970).

⁸⁹ *Id.* at 878, 311 N.Y.S.2d 454.

⁹⁰ See *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 354, 355 (1970).

⁹¹ *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 499 (1968); see 7B MCKINNEY'S CPLR 3101, commentary 21 at 24 (1970).

⁹² 65 Misc. 2d 587, 318 N.Y.S.2d 299 (Ct. Cl. 1971).

⁹³ *Id.*

⁹⁴ *Id.* at 588, 318 N.Y.S.2d at 230.

⁹⁵ See 3 WK&M ¶¶ 3104.01, 3104.03, 3104.04.

closure sessions, and use of referees can be costly.⁹⁶ Professor Siegel has observed that assignment of a judge or referee to preside over the taking of depositions "would take an unusual case, with relatively large sums or numerous parties involved. . . ."⁹⁷ The First Department has held that the power to appoint a referee under CPLR 3104(a) "should be exercised sparingly, particularly in advance of the actual commencement of proceedings."⁹⁸

The policy of judicial self-restraint concerning supervision of proceedings was followed by the Supreme Court, Erie County, in *In re Dietrich's Will*.⁹⁹ The court concluded that full supervision was not warranted under the circumstances but maintained continuing jurisdiction over the examination before trial.¹⁰⁰ The quotation by Professor Siegel stated in the preceding paragraphs was repeated approvingly.¹⁰¹

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212(e): No summary judgment when counterclaim inseparable from main claim exceeds main claim.

Technical impediments to summary judgments in cases involving counterclaims were eliminated by the Legislature in CPLR 3212(e).¹⁰² Summary judgment for the plaintiff is not barred by mere assertion of a counterclaim.¹⁰³ Additionally, when the counterclaim exceeds the damages demanded by the plaintiff, summary judgment may be granted and entry or execution stayed.¹⁰⁴ This procedure for partial summary judgment should be implemented whenever appropriate.¹⁰⁵

In *Seneca Trucking Co., Inc. v. D. H. Overmeyer Co., Inc.*,¹⁰⁶ the Supreme Court, Erie County, granted summary judgment for the plaintiff but allowed counterclaims to remain. The allegations of the

⁹⁶ See 7B MCKINNEY'S CPLR 3104, commentary 1, at 338 (1970).

⁹⁷ *Id.*

⁹⁸ *National Dairy Prods. Corp. v. Lawrence American Field Warehousing Corp.*, 23 App. Div. 2d 650, 257 N.Y.S.2d 471, 472 (1st Dep't 1965).

⁹⁹ 65 Misc. 2d 811, 318 N.Y.S.2d 72 (Sup. Ct. Erie County 1970).

¹⁰⁰ *Id.* at 812, 318 N.Y.S.2d at 74.

¹⁰¹ *Id.*

¹⁰² 7B MCKINNEY'S CPLR 3213, commentary 31, at 448 (1970).

¹⁰³ *M&S Mercury Air Conditioning Corp. v. Rodolitz*, 24 App. Div. 2d 873, 264 N.Y.S.2d 454 (2d Dep't 1965).

¹⁰⁴ *Dalminter, Inc. v. Dalmine, S.P.A.*, 28 App. Div. 2d 852, 288 N.Y.S.2d 110 (1st Dep't), *aff'd*, 23 N.Y.2d 653, 242 N.E.2d 488, 295 N.Y.S.2d 337 (1968); *Pease & Elliman, Inc. v. 926 Park Avenue Corp.*, 23 App. Div. 2d 361, 260 N.Y.S.2d 693 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 890, 218 N.E.2d 700, 271 N.Y.S.2d (1966). See 7B MCKINNEY'S CPLR 3213, commentary 31 at 449 (1970).

¹⁰⁵ *Janos v. Peck*, 21 App. Div. 2d 529, 251 N.Y.S.2d 254 (1st Dep't), *aff'd*, 15 N.Y.2d 509, 202 N.E.2d 560, 254 N.Y.S.2d 115 (1964).

¹⁰⁶ 36 App. Div. 2d 894, 320 N.Y.S.2d 314 (4th Dep't 1971) (mem.).