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# CPLR 3025(b)&(c): Cases Illustrate Disagreement Over Whether To Grant a Motion To Amend Ad Damnum Clause

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*CPLR 3025(b)&(c): Cases illustrate disagreement over whether to grant a motion to amend ad damnum clause.*

A great number of cases containing a plethora of authorities have been decided concerning whether to allow a plaintiff to amend the ad damnum clause of his complaint.[63] Words such as "delay," "prejudice," "laches," "negligence," and "unfair advantages," have buttressed majority, as well as dissenting, opinions. Courts, themselves, have examined and reexamined decisions within their own departments in an effort to ascertain what principles are applicable. Several recent cases typify this nebulous area. In *Ryan v. Collins*,[64] the Appellate Division, Third Department, granted plaintiff's pre-trial motion to increase his ad damnum clause from $100,000 to $200,000. Approximately one month earlier, in *Wyman v. Morone*,[65] the same court denied a motion requested after the jury had returned its verdict. The Appellate Division, Second Department, in *Naujokas v. H. Frank Casey High School*,[66] also denied a post-trial amendment of plaintiff's demand from $50,000 to $250,000. And, finally, the Supreme Court, Erie County, in *Douglas v. Latona*,[67] granted a post-trial motion, but not without expounding for five pages on the recent cases of all four departments in an attempt to extract the controlling principles of law.

This ambiguity is further illustrated by the rationale underlying some of the previous holdings. In *Bird v. Board of Education*,[68] for example, the Third Department granted a pre-trial motion to increase the ad damnum clause from $25,000 to $100,000 because the plaintiff did not claim increased injuries, but merely sought to correct an under-evaluation. In direct conflict, the First Department, in *Gerard v. 331 Madison Avenue Corp.*,[69] denied the motion to amend on the ground that the plaintiff did not base the application upon injuries additional to those alleged in her bill of particulars.

Ironically, the source of the courts' seemingly ambivalent stance is CLPR 3025[70] which was intended to afford the widest discretion to

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63 For an extensive chronology of cases in this area, see Douglas v. Latona, 61 Misc. 2d 859, 306 N.Y.S.2d 992 (Sup. Ct. Erie County 1970).

64 33 App. Div. 2d 966, 306 N.Y.S.2d 777 (3d Dep't 1970).

65 33 App. Div. 2d 168, 306 N.Y.S.2d 115 (3d Dep't 1969).

66 33 App. Div. 2d 703, 306 N.Y.S.2d 195 (2d Dep't 1969).

67 61 Misc. 2d 859, 306 N.Y.S.2d 992 (Sup. Ct. Erie County 1970).

68 29 App. Div. 2d 812, 286 N.Y.S.2d 888 (3d Dep't 1968).

69 20 App. Div. 2d 776, 247 N.Y.S.2d 842 (1st Dep't 1964).

70 CPLR 3025 provides:

(b) A party may amend his pleading, or supplement it . . . at any time by leave of court. . . . Leave shall be freely given upon such terms as may be just. . . .

(c) The court may permit pleadings to be amended before and after judgment to conform them to the evidence, upon such terms as may be just. . . .

the courts in order to foster amendments in the interests of justice.[71] Consequently, it necessarily follows that the primary concern of the court should be whether the defendant will be prejudiced by the amendment. And, although prejudice is a vague term, it is generally accepted that in this context prejudice does not mean exposure to a greater liability or the possibility of the opposing party losing the action; instead, that the "defendant is deprived of taking some measures for his defense which he might have taken had the application been made on time."[72]

Viewed in this light, language in *Ryan* to the effect that exposure to liability in excess of insurance coverage is immaterial[73] should not be regarded as establishing a "no exception" rule. The rationale can easily be adhered to where, as in *Ryan*, the motion is made and defendant can still hire independent counsel, *i.e.*, pre-trial. But, it should be rejected where there is no likelihood that the individual defendant can avail himself of this right, *i.e.*, post-trial. Logically, therefore, the *Ryan* decision can be reconciled with *Naujokas*, *Douglas* and *Wyman*. And, *Douglas* differs from *Naujokas* and *Wyman* inasmuch as in *Douglas* there was no danger of the $500 amendment exceeding defendant's insurance coverage.

That delay alone should not constitute grounds for the denial of a motion to amend is evident by an examination of *Mirabella v. Banco Industrial de la Republica Argentina*,[74] which demonstrates the various court sanctions available if the moving party is tardy with his motion.[75] In *Mirabella*, the defendant sought to interpose the additional defense of state doctrine eight years after the action was commenced. The court granted the motion, imposed $1,000 costs, and allowed the plaintiff the opportunity to complete any further pretrial proceedings necessitated by the late motion. Thus, the expense occasioned by the delay was assuaged by the costs imposed.

In the final analysis, the courts should freely grant amendments to the ad damnum clause where the interests of justice so dictate, and interests of justice, by its very terms, excludes that which would

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71 *See* 3 WK&M ¶ 3025.11.

72 Burden v. Cadillac Developers Massapequa Corp., 34 Misc. 2d 37, 38, 227 N.Y.S.2d 453, 454 (Sup. Ct. Nassau County 1962), *rev'd on other grounds*, 19 App. Div. 2d 716, 242 N.Y.S.2d 425 (2d Dep't 1963).

73 33 App. Div. 2d 996, 306 N.Y.S.2d 777, 779 (3d Dep't 1970).

74 34 App. Div. 2d 630, 309 N.Y.S.2d 400 (1st Dep't 1970). *See also* Belitsky v. Herman, 215 N.Y.S.2d 297, 298 (Sup. Ct. Kings County 1961), wherein it was held that any attempt by the defendant to inject a "sterile and formalistic claim of laches" should not, in itself, suffice as grounds for the denial of the motion.

75 CPLR 3025(b)&(c) specifically provide that the granting of a motion to amend may be contingent upon the payment of costs or the imposition of a continuance. *See also* 7B McKINNEY'S CPLR 3025, supp. commentary at 194 (1969).

be prejudicial to a substantial right of the opposing party. Anything short of prejudice should be allowed with the court retaining the sanctions of costs and continuance.

*CPLR 3042: Court vacates preclusion order upon condition that delinquent party pay $100 costs.*

CPLR 3042 governs the procedure for obtaining a bill of particulars. If a request properly made under this section is not complied with, the court is empowered by subdivision (c) to preclude the delinquent party from giving evidence at the trial as to the items for which the particulars were requested. Preclusion is doubtless a severe remedy and, although the CPLR is silent as to the court's authority to vacate such an order, it is not uncommon for vacatur to be allowed[76] when it is evident that the parties would not be prejudiced thereby[77] and that the noncompliance with the request for the bill of particulars was excusable.[78] Occasionally, a situation arises whereby the court recognizes that the noncompliance was "excusable" (or at least adequately explained) but nevertheless feels that the delinquency cannot be completely ignored and therefore conditions the vacatur upon payment of specified costs.[79] Such a situation was recently dealt with by the Appellate Division, First Department in *Magieri v. Saks*.[80] There, the court modified the vacatur of a preclusion order to the extent that it be conditioned upon the payment of $100 in costs by the plaintiff.

The *Magieri* outcome is sound. If the delinquency of the party can be adequately explained and neither party is prejudiced, vacatur should be allowed. To hold otherwise would oppose the very purpose upon which the bill of particulars is founded: to "give each party all reasonable opportunity to produce his own proofs, and to meet and sift those of his adversary."[81] Yet, even the aforestated purpose is founded on the omnipresent striving "to reach exact justice between the parties"[82] and to grant the delinquent party a vacatur with no penalty attached would hardly seem just. The use of the vacatur made

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76 *See* 3 WK&M ¶ 3042.13.

77 *See, e.g.*, Groon v. Yonan, 32 Misc. 2d 518, 228 N.Y.S.2d 23 (Sup. Ct. Westchester County 1962).

78 *See, e.g.*, Abramowitz v. Berger, 20 App. Div. 2d 903, 248 N.Y.S.2d 936 (2d Dep't 1964).

79 *See, e.g.*, Mittleman v. Koffler, 248 App. Div. 889, 291 N.Y.S. 159 (2d Dep't 1936) (mem.). It should be noted that in *Mittleman* the delinquent party's attorney was *personally* required to pay the opposing party a sum of $100.

80 33 App. Div. 2d 898, 306 N.Y.S.2d 479 (1st Dep't 1970).

81 Dwight v. Germania Life Ins. Co., 84 N.Y. 493, 503 (1881).

82 *Id.*