St. John's Law Review

Volume 45, October 1970, Number 1 Article 20

CPLR 3042: Court Vacates Preclusion Order upon Condition That Delinquent Party Pay $100 Costs

St. John's Law Review

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

---

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.*

conditional upon payment of costs avoids the severe remedy of preclusion while assuring that a request for a bill of particulars is not lightly regarded.

CPLR 3101(a): Income tax returns deemed "material and necessary."

Guided by the test of usefulness and reason,[83] courts continue to implement the Court of Appeals decision[84] which equated the phrase "material and necessary" found in CPLR 3101 with the relevancy standards utilized by the federal courts.[85] And, the criterion for what is disclosable remains the same irrespective of the disclosure device employed.[86] For example, in *J.R. Miller Co. v. Drew*,[87] the production of income tax returns pursuant to CPLR 3120[88] was required on the ground that they were material and necessary to the preparation of a defense.

In *Miller*, the plaintiff alleged that it sustained a $100,000 loss as a result of the defendant's negligence while painting plaintiff's clothing store. Originally, defendant sought a copy of bills, vouchers, and statements which would indicate the purchase and resale price of the clothing, but plaintiff had destroyed these items pursuant to corporate policy. Defendant thereupon sought, successfully, production of plaintiff's tax return, reasoning that it would reflect the extent of plaintiff's uninsured loss.

Previous cases ordering the production of income tax returns have involved the issue of lost earnings.[89] Thus, the *Miller* court reasoned that the same approach should be used in lost profits cases. Undoubtedly, the tax returns were material and necessary to the preparation of a defense, especially since the plaintiff had destroyed the best evidence.

---

83 *See, e.g.*, Peretz v. Blekicki, 31 App. Div. 2d 934, 298 N.Y.S.2d 805 (2d Dep't 1969); Beyer v. New York Tel. Co., 61 Misc. 2d 222, 305 N.Y.S.2d 265 (N.Y.C. Civ. Ct. Queens County 1969).

84 Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S. 2d 449 (1968).

85 *See* FED. R. CIV. P. 26(b): "the deponent may be examined regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action. . . ." (Emphasis added.)

86 7B MCKINNEY'S CPLR 3101, commentary 9, at 14 (1970).

The converse is also true; a protective order under CPLR 3103 is not affected by the device utilized. 7B MCKINNEY'S CPLR 3103, commentary 2, at 299 (1970).

87 61 Misc. 2d 638, 306 N.Y.S.2d 244 (Sup. Ct. Jefferson County 1969).

88 CPLR 3120(a)(1)(i) provides that a party may demand the opportunity to "inspect, copy, test or photograph any specifically designated documents or any things which are in the possession, custody, or control of the party served. . . ."

89 Yocum v. Gordon A. Davies, Inc., 10 App. Div. 2d 597, 195 N.Y.S.2d 401 (4th Dep't 1960); Elmer v. Byrd, 32 Misc. 2d 408, 220 N.Y.S.2d 985 (Sup. Ct. Monroe County 1961).