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Article 18

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CPLR 3025(b): Leave To Amend Answer Denied Because Plaintiff Would Be Prejudiced Thereby

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could be used followed by the attorney acting for it."[86] Although this procedure has not yet been adopted, *Teichman* seems to suggest that verification in this manner would be permissible. However, a second suggestion of the Advisory Committee,[87] which would permit attorneys to merely certify, has not been adopted by the legislature, and the courts lack the power to implement it. The purpose of this latter technique would be to place greater emphasis upon the client's veracity.[88]

The *Teichman* court's holding will undoubtedly be welcomed by the busy practitioner who is often out of town and unable to perform the mechanical function of signing a verification. The question remains, however, whether this practice can be extended to affirmations made pursuant to CPLR 2106. Since 2106 is intended to save an attorney time and trouble,[89] it would seem that the courts might be inclined to approve this procedure as well. However, since the sanction for false swearing is conviction for perjury,[90] the signature of an associate should not suffice under such circumstances.

CPLR 3025(b): Leave to amend answer denied because plaintiff would be prejudiced thereby.

Leave to amend pleadings shall be freely given.[91] However, a court may, in its discretion, impinge upon this statutory latitude.[92] In *James-Smith v. Rottenberg*,[93] an action for breach of a contract for the sale of realty, the defendant's answer contained only a general denial. However, two years later he moved to amend his answer so as to include the affirmative defenses of fraud and illegality. The appellate division, reversing the trial court, denied the motion. The court found that the bases of the affirmative defenses were known, or should have been known, at the time the original complaint was served.[94]

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86 FIRST REP. 73-74.

87 *Compare* FINAL REP. A-426 *with* SIXTH REP. 43, 277-78.

88 7B MCKINNEY'S CPLR 3020, supp. commentary 175, 176 (1969). For a severe criticism of the verification process as it exists in New York see Professor Siegel's remarks. *Id.* at 175-77.

89 2A WK&M ¶ 2106.01 (1969).

90 N.Y. PENAL LAW § 210.40 (McKinney 1967).

91 CPLR 3025(b).

92 *See* 7B MCKINNEY'S CPLR 3025, supp. commentary 191, 193 (1969): "3025(b) intends the 'widest possible discretion' to be lodged in the court. . . ."

93 32 App. Div. 2d 792, 302 N.Y.S.2d 355 (2d Dep't 1969).

94 *See* 3 WK&M ¶ 3025.15 (1969) wherein it is noted that:

> [S]ome cases have held that leave will be denied if the moving party knew or should have known of the facts or the cause of action sought to be added at the time of the original pleading and cannot satisfactorily explain his failure to plead them at that time.

Leave to amend is generally denied where the opposing party would be prejudiced.[95] In the instant case the plaintiff, who was elderly and in ill-health, had prepared her case on the basis of the general denial. Therefore, the court recognized that to permit the amendment would clearly be prejudicial. The decision is in accord with prior case law[96] and serves as a good example of the type of prejudice that would be a basis for a denial of a motion to amend pleadings.

ARTICLE 31 — DISCLOSURE

CPLR 3101(d): Evidence gathered by insurer in preparation for defense of insured is not "material prepared for litigation" in separate action against the insurer.

The scope of CPLR 3101(d), which grants a conditional privilege for material created in preparation for litigation, has recently been narrowed. *Collins v. Jamestown Mutual Insurance Co.*[97] involved an action by an injured plaintiff against an insurer. The "insured" had defaulted in an earlier action brought against him by the plaintiff after the insurer had disclaimed coverage and refused to defend. The "insured" then assigned to the plaintiff all rights he might have against the defendant-insurer. The court compelled the defendant to disclose any evidence relating to its investigation of the accident.[98] The court did not have to respond to the insurer's contention that the material sought was absolutely privileged from disclosure by virtue of an "insurer-insured" relationship since there was no showing that any statements from the insured to the insurer were involved. Moreover, since this privilege would presumably belong solely to the insured,[99] the plaintiff might have successfully argued that even if such statements were involved, any privilege attaching to them was impliedly waived

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95 *See, e.g.*, Ciccone v. Glenwood Holding Corp., 44 Misc. 2d 273, 253 N.Y.S.2d 576 (N.Y.C. Civ. Ct. Kings County 1964) (defendant's motion to amend answer to allege plaintiff was an employee denied because plaintiff's right to workmen's compensation, his sole remedy as an "employee," was barred by statute of limitations).

96 *See* Winslow v. Bellaire, Inc., 232 N.Y.S.2d 295 (Sup. Ct. Kings County 1962); Kamen v. State, 34 Misc. 2d 380, 228 N.Y.S.2d 749 (Ct. Cl. 1962). *Cf.* De Fabio v. Nadler Rental Service, Inc., 27 App. Div. 2d 931, 278 N.Y.S.2d 723 (2d Dep't 1967) holding that where a party who wishes to amend has or should have knowledge of facts at the time of original pleading, and does not amend for a long period of time, his motion will be denied because of gross laches.

97 32 App. Div. 2d 725, 300 N.Y.S.2d 391 (3d Dep't 1969).

98 It can be assumed that these materials, under normal circumstances, would be considered "materials prepared for litigation." *See* Kandel v. Tocher, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

99 *Cf.* W. RICHARDSON, EVIDENCE, § 434 (J. Prince 9th ed. 1964).