St. John's Law Review

Volume 44, January 1970, Number 3 Article 23

CPLR 3121: Medical Report Not Based on Physical or Clinical Examination Is Not Subject to Disclosure

St. John's Law Review

by CPLR 3101(b) will not be available. Full disclosure will then be ordered pursuant to CPLR 3121. The Court's decision in *Koump* provides the practitioner with appellate guidelines he can utilize in seeking to determine whether or not his client's physical condition has been placed in controversy.

CPLR 3121: Second department puts bar on notice that it will strictly enforce rule governing notice of availability for physical examination.

In *Delgado v. Fogle*[118] the rights and obligations of parties under rule I of part 5 of the Rules of the Appellate Division, Second Department[119] were clearly delineated. In *Delgado*, which involved an action for personal injuries, the plaintiff served notice of availability for a physical examination on the defendant who neglected to appear at the specified time. Nevertheless, the trial court granted the defendant's subsequent motion to direct the plaintiff to appear for an examination.

In a strongly worded opinion, the court stated that the rule places an affirmative duty on the party served to proceed with the physical examination or to move to vacate the notice. If neither alternative is followed, the right to conduct the examination will be waived unless the defaulting party can demonstrate a reasonable excuse for its failure to appear. However, the court affirmed the trial court's liberal holding because the rule was being construed for the first time. Judge Martuscello, however, issued a strong warning to the bar, noting that the rule would be *strictly* enforced in the future.[120]

CPLR 3121: Medical report not based on physical or clinical examination is not subject to disclosure.

In *Edelman v. Homes Private Ambulances, Inc.*,[121] an action to recover damages for personal injuries, the plaintiff sought to preclude the use of the defendant's medical report because a copy of the report was not served on the plaintiff thirty days prior to trial pursuant to his request.[122] The court, however, held that the report was based solely upon hospital records, and not upon a physical or clinical examination of the plaintiff. Therefore, it was not available to the plaintiff as part

---

118 32 App. Div. 2d 85, 299 N.Y.S.2d 898 (2d Dep't 1969).
119 22 NYCRR 672.1 (1963).
120 32 App. Div. 2d 85, 87, 299 N.Y.S.2d 898, 900 (2d Dep't 1969).
121 32 App. Div. 2d 563, 300 N.Y.S.2d 372 (2d Dep't 1969).
122 CPLR 3121 requires an examining party, upon request, to furnish a copy of the examining physician's report to any party.

of the conventional exchange of medical information[123] in view of the conclusion reached in *Frieman v. Miller*,[124] wherein it was decided that such reports are protected by CPLR 3101(d) as material created in preparation for litigation. The medical report was thus held to be properly admissible.

CPLR 3140: Documents supporting appraisal report held not subject to disclosure.

In promulgating CPLR 3140 the legislature expressly gave each appellate division the power to disregard the prohibitions against disclosure found in CPLR 3101(c) and (d) when reviewing appraisals in proceedings for condemnation, appropriation, or review of tax assessments. By directing each appellate division to promulgate its own disclosure rules for such appraisals, the legislature recognized that the several districts within each appellate division have different needs since the volume of litigation varies significantly from district to district.[125]

The position of the fourth department was authoritatively set forth in *City of Buffalo v. Ives*,[126] wherein it was held that *all* appraisal reports made in preparation for a condemnation proceeding were subject to disclosure — not merely the highest or lowest appraisal which might be used by the interested party to his best advantage.[127] Although this is obviously the more desirable result for purposes of broad disclosure, it is difficult to justify under the specific language of the rule,[128] which presumably was intended to exclude from disclosure those reports *which the party did not intend to use at trial.*[129] This interpretation of the fourth department rule has led to a conflict among the departments as to the scope of CPLR 3140.[130]

---

123 *See* 3 WK&M ¶ 3121.18 (1969); *see also* Gugliano v. Levi, 24 App. Div. 2d 591, 262 N.Y.S.2d 372 (2d Dep't 1965), noted in *The Biannual Survey*, 40 ST. JOHN'S L. REV. 303, 335-36 (1966).

124 28 App. Div. 2d 1126, 284 N.Y.S.2d 225 (2d Dep't 1967); *cf.* Smith v. Schulman, 28 App. Div. 2d 922, 282 N.Y.S.2d 57 (2d Dep't 1967).

125 3 WK&M ¶ 3140.01 (1969).

126 55 Misc. 2d 730, 286 N.Y.S.2d 517 (Sup. Ct. Erie County 1968). *See The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 328-29 (1968).

127 As reported in a fourth department case prior to the enactment of CPLR 3140: "[A] party should not be permitted to obtain more than one appraisal and then use only the lower or lowest and withhold the other or others. . . ." Brummer v. State, 25 App. Div. 2d 245, 247, 269 N.Y.S.2d 604, 606 (4th Dep't 1964).

128 *See* 22 NYCRR § 1039.14. Paragraph a. of the rule requires disclosure "of *all* appraisal reports *intended to be used at the trial.*" (Emphasis added.)

129 *See* 7B MCKINNEY'S CPLR 3140, supp. commentary 176-77 (1968).

130 *Compare In re* Inwood, 55 Misc. 2d 806, 286 N.Y.S.2d 360 (Sup. Ct. Nassau County 1968) *with* City of Buffalo v. Ives, 55 Misc. 2d 730, 286 N.Y.S.2d 517 (Sup. Ct. Erie County 1968).