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## CPLR 3140: Documents Supporting Appraisal Report Held Not Subject to Disclosure

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of the conventional exchange of medical information<sup>123</sup> in view of the conclusion reached in *Frieman v. Miller*,<sup>124</sup> 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.<sup>125</sup>

The position of the fourth department was authoritatively set forth in *City of Buffalo v. Ives*,<sup>126</sup> 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.<sup>127</sup> 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,<sup>128</sup> which presumably was intended to exclude from disclosure those reports *which the party did not intend to use at trial*.<sup>129</sup> This interpretation of the fourth department rule has led to a conflict among the departments as to the scope of CPLR 3140.<sup>130</sup>

<sup>123</sup> 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).

<sup>124</sup> 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).

<sup>125</sup> 3 WK&M ¶ 3140.01 (1969).

<sup>126</sup> 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).

<sup>127</sup> 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).

<sup>128</sup> 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.)

<sup>129</sup> See 7B MCKINNEY'S CPLR 3140, supp. commentary 176-77 (1968).

<sup>130</sup> 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).

The scope of §140, as it pertains to CPLR 3101(d),<sup>131</sup> was at issue in *County of Onondaga v. Lawson Acres, Inc.*<sup>132</sup> The parties in *Lawson Acres* had made the requisite exchange of appraisal reports envisaged by the appellate division rules. However, because the defendant's report allegedly relied upon, and incorporated plans for, subdivisions and development of the property, the plaintiff moved for disclosure of the maps and plans relating thereto.

In denying the motion the court in the instant case held that neither CPLR 3140 nor the fourth department rules mandated a finding

that the maps and plans which were created by the defendant [were] so integral a part of the appraisal report as to be considered part of the report itself and therefore subject to exchange.<sup>133</sup>

The court further held that the rule contemplated nothing more than the exchange of a report which was complete as to the experts' conclusions plus "the facts, figures and calculations by which the conclusions were reached."<sup>134</sup>

This result is rather difficult to accept. Apparently, it is a manifestation of the court's belief that *Ives* leaves no other way to keep any information undisclosed — even information which is not intended for use at the trial. Under the *Ives* rationale, anything done in the preparation of an appraisal report, whether or not the report is to be based at trial, is subject to disclosure. However, in the other departments, a litigant could avoid using any appraisal which alluded to sensitive information, and in that manner it would be undiscoverable by the other party.

Further problems are posed by the holding reached in *Lawson Acres*. First of all, it seems rather ludicrous to conclude that an appraisal report incorporates a map and yet, concomitantly, hold that the map is not an "integral part" of the report, or that the report states "facts, figures and calculations" from which conclusions may be drawn without necessarily relying upon the map. Moreover, disclosure would appear to be compelled by the fact that the existence of the map was put in issue by the very person who sought to exclude it.

If courts in the Fourth Department are required to arrive at decisions such as that in *Lawson Acres* in an effort to avoid the harshness

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131 CPLR 3101(d) provides *inter alia*: "The following shall not be obtainable. . . .  
1. any opinion of an expert prepared for litigation. . . ."

132 60 Misc. 2d 384, 303 N.Y.S.2d 107 (Sup. Ct. Onondaga County 1969).

133 *Id.* at 386, 303 N.Y.S.2d at 108.

134 *Id.*, 303 N.Y.S.2d at 109.

of *Ives*, the appellate division of that department or the Court of Appeals should seize upon the earliest opportunity to overrule or limit the case.

#### ARTICLE 32 — ACCELERATED JUDGMENT

*CPRL 3211(c): Second department disapproves of court's sua sponte treatment of motion to dismiss as one for summary judgment.*

In denying plaintiff's motion to dismiss the defense of lack of standing,<sup>135</sup> the supreme court in *Mareno v. Kibbe*<sup>136</sup> held that the defense as stated in the answer was valid, and, on its own motion, granted summary relief to the nonmoving party.<sup>137</sup> However, the appellate division reversed on the ground that the lower court had misinterpreted the substantive law relating to appellant's standing to sue. But what is perhaps more significant is the judicial chastisement of special term for its sua sponte treatment of plaintiff's motion to strike a defense under CPLR 3211(b) as a motion for summary judgment by the opposing party .

The commentators suggest that 3211(c) may be used sua sponte<sup>138</sup> by the courts and that it may be used "to direct judgment against the moving party in the absence of a cross-motion. . . ."<sup>139</sup> Furthermore, the revisors, in making an addition to this section, manifested the intention that it was meant to apply to motions made under 3211(b) as well as to those made under 3211(a).<sup>140</sup> Therefore, it should be

<sup>135</sup> See CPLR 3211(b): "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."

<sup>136</sup> 56 Misc. 2d 451, 289 N.Y.S.2d 6 (Sup. Ct. Westchester County 1968), *modified*, 32 App. Div. 2d 825, 302 N.Y.S.2d 324 (2d Dep't 1969).

In this taxpayers' action, plaintiffs sought certain equitable and monetary relief from defendants in the latters' official capacities as Supervisor and Councilmen of the Town Board of Yorktown. The defendants alleged as an affirmative defense the plaintiffs' lack of standing to sue. The substantive holding of the lower court was that while plaintiffs were taxpayers of the town, they were not taxpayers of the specific subdivision of the town affected by the action of the defendants, and so were not "interested parties" within the meaning of N.Y. GEN. MUNIC. LAW § 23 (McKinney 1965). Therefore, because the defendants had a valid defense to the action, the court, on its own motion, considered plaintiffs' motion to dismiss a defense as a cross-motion for summary judgment authorized by CPLR 3211(c).

<sup>137</sup> CPLR 3211(c) provides, *inter alia*, that:

Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment. . . .

<sup>138</sup> See 7B MCKINNEY'S CPLR 3211, *supp.* commentary 180, 191 (1965).

<sup>139</sup> 4 WK&M ¶ 3211.50 (1968).

<sup>140</sup> Compare FIRST REP. rule 31.1(b) at 85 with SIXTH REP. rule 3211(c) at 332.