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CPLR 3106: Special Circumstances Not Necessary To Obtain Pre-Trial Examination Before Joinder of Issue

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that withholding it would cause undue hardship. However, material prepared in the regular course of business is not exempt from disclosure under 3101(d), even though the reports are also designed to provide information in some possible litigation.[84]

In *Haire v. L.I.R.R.*[85] the plaintiff in a wrongful death action sought the production of certain records and reports pertaining to the physical condition of one of the defendants. The defendant claimed that the materials sought were subject to exemption under CPLR 3101(d). However, the appellate division, second department, ruled that the records be produced so that the court could determine whether they were made in preparation for litigation or in the regular course of business.[86]

The decision of the court directing the defendant to produce the material in order to determine whether or not such material was protected by CPLR 3101(d) is logical. Without being able to examine the material, the court would be operating under a severe handicap when determining whether or not the material was protected. However, care should be taken to keep the materials in question out of the hands of the party seeking disclosure, until it has been determined that the material is subject to disclosure.

CPLR 3106: Special circumstances not necessary to obtain pre-trial examination before joinder of issue.

Prior to the enactment of the CPLR, a party could only seek an examination before trial after joinder of issue.[87] However, CPLR 3106 places no such restriction on the taking of pre-trial depositions,[88] and has been construed as permitting an examination before trial to take place before the serving of an answer.[89]

In 1965, the appellate division, second department, in *In re Estate of Welsh*,[90] held that pre-trial examinations were allowed

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[84] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3101.50 (1967).

[85] 29 App. Div. 2d 553, 285 N.Y.S.2d 717 (2d Dep't 1967).

[86] If the records or reports are prepared in the regular course of business, they are not subject to the exemption of CPLR 3101(d). *See, e.g.*, Bloom v. New York City Transit Authority, 20 App. Div. 2d 687, 246 N.Y.S.2d 414 (1st Dep't 1964) in which the court held that certain accident reports were not made in preparation for trial and were thus proper items for discovery.

[87] RCP 121-a provided for an examination before trial after joinder of issue.

[88] CPLR 3106 allows an examination before trial "[a]fter an action is commenced. . . ." *See* Revesz v. Geiger, 40 Misc. 2d 818, 243 N.Y.S.2d 744 (Sup. Ct. N.Y. County 1963).

[89] *See, e.g.*, Nathanson & Co. v. Macfadden-Bartell Corp., 46 Misc. 2d 126, 259 N.Y.S.2d 54 (Sup. Ct. N.Y. County 1965).

[90] 24 App. Div. 2d 986, 265 N.Y.S.2d 198 (2d Dep't 1965) (mem.).

prior to the joinder of issue, even in accounting proceedings. In the action below, the surrogate, while recognizing that CPLR 3106(a) did not require joinder of issue, would not allow such an examination in the accounting proceeding for fear that such liberality would lead to "fishing expeditions." However, the appellate division did not think that such a reason was sufficient to deny the pre-trial examination, especially in light of the safeguards provided by CPLR 3103(a).[91]

The rule of the *Welsh* case has recently been adopted in the first department. In *William V. Griffin & Co. v. Sperling S.S. & Trading Corp.*,[92] the first department, citing the *Welsh* case, held that pre-trial examination may proceed prior to the serving of an answer without a showing of any special circumstances. The decision in this case provides for liberal disclosure before trial, in keeping with the intent of the CPLR.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3216: Second department continues retroactive application of amendment.

Prior to the amendment of CPLR 3216, a defendant could circumvent the 45-day notice required before moving to dismiss for failure to prosecute by merely basing his motion on a "general delay" rather than on a failure to file a note of issue. Under the recent amendment, this loophole was eliminated, and the 45-day notice requirement is now a condition precedent to any motion made under CPLR 3216.[93]

While the effective date of the amendment was September 1, 1967, some courts have applied it to motions made prior to that date.[94] In *Kaprow v. Jacoby*,[95] the appellate division, second department, held that a dismissal for "unreasonable neglect to proceed" dated October 5, 1966, where no 45-day notice was given to the plaintiff, was an improvident exercise of the dismissing

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[91] In order to avoid unreasonable annoyance or expense, etc., "[t]he court may . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." Under CPLR 3103(a) the court can regulate such things as when the deposition can be taken; who can be questioned; and what may or may not be inquired into. 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3103.01 (1967).

[92] 28 App. Div. 2d 976, 283 N.Y.S.2d 449 (1st Dep't 1967).

[93] For a thorough discussion of the purpose and effect of the amendment, see 7B McKINNEY'S CPLR 3216, supp. commentary, 246 (1967) and *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 456-58 (1968).

[94] 7B McKINNEY'S CPLR 3216, supp. commentary 246, 247 (1967).

[95] 28 App. Div. 2d 722, 281 N.Y.S.2d 591 (2d Dep't 1967).