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Article 24

CPLR 3123: Court Excuses Failure to Respond to Notice to Admit

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a conflict between the Rules and the CPLR, the CPLR would govern.[71]

CPLR 3123: Court excuses failure to respond to notice to admit.

Under CPLR 3123, notice to admit, a party may serve his adversary with a written request to admit matters of fact so as to expedite the trial by eliminating the necessity of proving matters not in dispute.[72] If no reply is made within twenty days, or at a time set by the court, the matters contained in the notice to admit are deemed admitted. If the answering party finds it difficult to categorically admit or deny, he can so state in a sworn statement specifying his claim.[73] Under subdivision (b) a party may apply to the court to amend or withdraw his admission,[74] and any admissions made are subject to all pertinent objections to admissibility which may be interposed at trial.

In *Marguess v. City of New York*,[75] defendant city failed to respond to plaintiff's notice to admit but, the appellate division, first department, nevertheless affirmed dismissal of the complaint. Relying heavily on that portion of subdivision (b) which allows an objection to admissibility to be made, the majority excused the defendant's total failure to respond on the ground that plaintiff's demands, relating to questions of ultimate liability, were not attuned to any reasonable belief that they were free from substantial dispute, and thus, admissible matter.[76]

The dissent interpreted the provisions of 3123 to mean that defendant's failure to respond to the notice to admit established a prima facie case against it. Deeming the trial court to lack the power to excuse a total failure to comply with the demand, subdivision (b) was construed as intended merely to reserve for the trial court questions as to relevancy, materiality and competency of

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[71] CPLR 101 states that the CPLR "govern[s] the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."

[72] *In re* Collins, 31 Misc. 2d 754, 222 N.Y.S.2d 89 (Surr. Ct. N.Y. County 1961); WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 264 (2d ed. 1966).

[73] *See* Sidclair Realty Co. v. Schor, 95 N.Y.S.2d 839 (App. T. 1st Dep't 1950); *In re* Luckenbach, 196 Misc. 782, 96 N.Y.S.2d 244 (Surr. Ct. Kings County 1949); Solof v. City of New York, 181 Misc. 956, 49 N.Y.S.2d 921 (App. T. 2d Dep't 1944).

[74] CPLR 3103 is also applicable to 3123 so that the answering party can attack the notice to admit in this way. *See The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 455-56 (1968).

[75] 30 App. Div. 2d 782, 291 N.Y.S.2d 956 (1st Dep't 1968).

[76] *See In re* Kelly, 33 Misc. 2d 16, 19, 225 N.Y.S.2d 896, 898 (Surr. Ct. N.Y. County 1962).

facts admitted,[77] and not as a means for excusing defendant's total failure to respond.

Viewing section 3123 as a whole it seems clear that the dissenting opinion gives meaning to all of its provisions while the majority's construction of subdivision (b)'s "admissibility" clause renders some of the language in the statute sterile.

CPLR 3140: Court orders disclosure although appraisals not intended for trial.

CPLR 3101(a) provides for "full disclosure of all evidence material and necessary[78] in the prosecution or defense of an action. . . ." The work product of an attorney and material prepared for litigation, however, is not obtainable for disclosure.[79]

In a recent condemnation case, *City of Binghamton v. Arlington Hotel, Inc.*,[80] defendant-respondent moved for an order directing discovery and inspection of appraisals made for appellant in order to obtain Urban Renewal funds. Since the appraisals were not "material prepared for litigation" under CPLR 3101(d), they were not protected by its immunity from disclosure.

In affirming the supreme court's order allowing discovery and inspection, the court cited CPLR 3140, as additional authority for its holding. Under this section, the appellate divisions are authorized to adopt rules governing the exchange of appraisal reports *intended for use at trial.*[81] It was found that section 3140 manifests the legislative intent "to permit wider disclosure of all matters material to the litigation of these matters and permit the equitable and speedier disposition thereof."[82]

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[77] *See* Rowland v. State, 10 Misc. 2d 825, 172 N.Y.S.2d 420 (Ct. Cl. Albany County 1957); Rusnak v. Doby, 267 App. Div. 122, 123, 44 N.Y.S.2d 730, 731 (2d Dep't 1943). These cases were decided under CPA 322, the predecessor of CPLR 3123. 7B McKINNEY'S CPLR 3123, commentary 294 (1964). In Emery v. Maryland, 28 App. Div. 2d 631, 280 N.Y.S.2d 199 (3d Dep't 1967) the court construed similar language in the special proceeding provisions of the CPLR in accord with the dissent in the instant case.

[78] The Court of Appeals, in Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), has liberally construed the phrase "material and necessary" so that disclosure is required "of any facts . . . which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is usefulness and reason." *Id.* at 406-07, 235 N.E.2d at 432, 288 N.Y.S.2d at 452. *See also* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.07 (1967); 7B McKINNEY'S CPLR 3101, supp. commentary 3 (1968); *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 324 (1968).

[79] CPLR 3101(c) and (d).

[80] 30 App. Div. 2d 585, 290 N.Y.S.2d 330 (3d Dep't 1968).

[81] All four departments have adopted such rules; however, they are not uniform, and the result has been conflicting supreme court decisions construing the rules. *See* 7B McKINNEY'S CPLR 3140, supp. commentary 162 (1968).

[82] 30 App. Div. 2d at 587, 290 N.Y.S.2d at 332-33.