St. John's Law Review

Volume 43
Number 3 *Volume 43, January 1969, Number 3*

Article 25

CPLR 3140: Court Orders Disclosure Although Appraisals Not Intended for Trial

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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.

It is interesting to note that the court's additional reliance on CPLR 3140 was unnecessary because the appraisals were not within CPLR 3101(d) to begin with. They were not, therefore, in need of the release-from-immunity provided by CPLR 3140.[83]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3216: Court disavows Cohn *holding and finds rule constitutional.*

Under CPLR 3216, a court may dismiss an action for failure to prosecute. The conditions precedent to such dismissal, however, are that issue must have been joined, one year must have elapsed since the joinder, and movant must serve a written demand upon the dilatory party requiring that prosecution be resumed and a note of issue be filed within 45 days of the demand.

Recently, the appellate division, first department, in *Cohn v. Borchard Affiliations*,[84] held 3216 unconstitutional on the ground that it unreasonably interfered with a court's inherent power to control its calendars. However, Justices Stevens and Tilzer dissented, pointing out that the legislative rule-making power, exercised here, merely imposed a modest restriction on a court's powers that alone was insufficient to render the rule unconstitutional.

In a recent case, *Johnson v. Parrow*,[85] defendant moved to dismiss for neglect to prosecute under 3216. Because defendant failed to serve a 45 day demand upon plaintiff, as is required under 3216, the motion was denied. In express repudiation of the *Cohn* holding, the Court sustained the validity of 3216 on the authority of article VI, section 30 of the New York State Constitution.[86]

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[83] *See* 7B McKINNEY'S CPLR 3140, supp. commentary 162, 163 (1968).

[84] 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968). For a detailed discussion of this holding, see 7B McKINNEY'S CPLR 3216, supp. commentary 304 (1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 330 (1968).

[85] 56 Misc. 2d 863, 291 N.Y.S.2d 175 (Sup. Ct. Ontario County 1968).

[86] Article VI, section 30 provides, *inter alia*:

> The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may . . . delegate . . . any power possessed by [it] . . . to regulate practice and procedure in the courts.

While the rule-making power, therefore, rests ultimately in the legislature, the Judicial Conference has, in fact, been delegated the power to make "Rules" for the CPLR (as distinguished from "Sections," which only the legislature can enact) subject to legislative veto and control. See N.Y. JUDICIARY LAW § 229. For a discussion of the rule-making power, vis-à-vis article VI, section 30, in which the constitutionality of 3216 is urged, see 7B McKINNEY'S CPLR 3216, supp. commentary 304, 307-09 (1968).