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CPLR 3024(c): Untimeliness Not a Bar to Motion to Strike Prejudicial Matter

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The test for pleadings is the avoidance of prejudice to the opposing party. The burden is expressly placed upon one who attacks a pleading to show that he is prejudiced.[60] The question, therefore, is whether the request for equitable relief will prejudice the defendant when plaintiff is entitled only to legal relief. Without more it will not. The "theory of the pleadings" idea has been slowly eroded and there is no longer a distinction in procedure between law and equity.[61] Furthermore, if it appears during the course of the trial that a legal remedy is appropriate, CPLR 4103 provides that either party may demand a jury.[62] Thus, these provisions presaged the instant case, which appears to finally lay to rest the law-equity distinctions for more expeditious dispositions of civil contests.

CPLR 3024(c): Untimeliness not a bar to motion to strike prejudicial matter.

CPLR 3024(b) provides that a party may move to strike scandalous or prejudicial matter unnecessarily inserted in a pleading, and 3024(c) states that notice of such a motion "shall be served within twenty days after service of the challenged pleading." Notwithstanding the mandatory language of this section,[63] the supreme court, in *Szolosi v. Long Island R.R.*,[64] held that a motion to strike prejudicial matter should not be denied solely because it is untimely.

The CPLR begins with the proviso that the statute "shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding."[65] Furthermore, it allows the court to permit correction of mistakes or defects upon such terms as are just,[66] or if no substantial right of a party is prejudiced, to entirely disregard the defect or mistake.[67]

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complaint was framed in equity, there was no authority to grant merely legal relief. *See also* 7B McKINNEY'S CPLR 3013, supp. commentary 71 (1966).

[60] Foley v. D'Agostino, 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

[61] CPLR 103.

[62] This pervading liberality is reflected in *Diemer v. Diemer*, 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960), where a lower court granted a separation on the ground of cruelty and the Court of Appeals affirmed on the ground of abandonment.

[63] WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 157 (1963); 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3024.16 (1965).

[64] 52 Misc. 2d 1081, 277 N.Y.S.2d 587 (Sup. Ct. Suffolk County 1967).

[65] CPLR 104.

[66] CPLR 2001.

[67] CPLR 3026.

The *Szolosi* court considered the above sections and added that if the material was prejudicial before the time period elapsed, it was just as prejudicial after. And, since a "paring" of the complaint would not prejudice the plaintiff, the court decided that untimeliness should not bar the motion to strike.

This case marks a further relaxation of strict rules of pleading: the disposition of such a motion will not depend on arbitrary time limits, but rather on the equities in issue. However, since avoidance of prejudice is the court's object, untimely 3024(c) motions will still be denied if plaintiff would be prejudiced by their being granted.

ARTICLE 31 — DISCLOSURE

CPLR 3101(d): Employee's accident report deemed material prepared for litigation.

Subsection (d) of CPLR 3101 conditionally exempts "material prepared for litigation" from the section's general mandate that there shall be full disclosure of all material evidence in civil actions in New York. The issue of whether or not accident reports qualify as "material prepared for litigation" has been a much disputed question, often giving rise to irreconcilable decisions and opinions.

The cases of *Kandel v. Tocher*[68] and *Finegold v. Lewis*[69] were the first major decisions to lend some clarity to this area. Both cases, recognizing that liability insurance companies, in effect, are but substitutes for attorneys, held that statements made by the insured to the liability insurer qualify as "material prepared for litigation" under CPLR 3101(d) unless such information can be "duplicated" elsewhere.[70] In effect, communications between the insured and the liability insurer enjoy a presumption that they are materials prepared for litigation.[71] But, if the recipient of an accident report is not a liability insurer, *e.g.*, a fire insurer, the presumption disappears because the fire insurer does not usually defend the insured. It must be shown in each such instance that the report was in fact prepared for litigation to be entitled to 3101(d) protection.[72]

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[68] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

[69] 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).

[70] For further discussion of these cases *see The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 154 (1965).

[71] 7B MCKINNEY'S CPLR 3101, supp. commentary 11 (1966).

[72] Brunswick Corp. v. Aetna Cas. & Sur. Co., 27 App. Div. 2d 182, 278 N.Y.S.2d 459 (4th Dep't 1967); Welch v. Globe Indem. Co., 25 App. Div. 2d 70, 267 N.Y.S.2d 48 (3d Dep't 1965).