St. John's Law Review

Volume 42, April 1968, Number 4 Article 14

CPLR 3101(a): Disclosure of Names and Addresses of Witnesses Present at the Accident Not Required for Pre-Trial Hearing

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In *Bogucki v. Mednis*,[57] defendant-insured moved under this section to have an action by his insurer for a declaration of non-coverage on his insurance policy joined with two personal injury actions pending against him. The Supreme Court, Monroe County, denied the motion, holding that the facts of the accident had nothing in common with the question of timely notice to the insurer.

The present tendency is to permit consolidation whenever possible, irrespective of the diversity of the issues.[58] For example, consolidation is allowed where both actions arose from the same accident, involve substantially the same questions of law or fact except as to damages, and the same witnesses would testify in both actions.[59] Despite the desirability of avoiding multiplicity of suits and mitigating costs and expenses, however, consolidation will not be allowed where there is no substantially similar question of law or fact. As in *Bogucki*, consolidation was denied in *Gibbons v. Groat*,[60] where the only common factor was the similarity of parties.

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Disclosure of names and addresses of witnesses present at the accident not required for pre-trial hearing.

In *Alongis v. City of New York*,[61] the Supreme Court, Kings County, held that a party is not required to furnish the names and addresses of witnesses to the City in a hearing that is preliminary to the commencement of an action. Although the decision was based on an interpretation of Section 93d-1.0 of the Administrative Code of the City of New York and Section 50-h of the General Municipal Law, an analogy to the CPLR may be drawn.

CPLR 3101(a) allows for the disclosure of names and addresses of witnesses only where the identity of such witnesses is "material and necessary in the prosecution or defense of an action. . . ." Even if it is material and necessary, a further limitation exists. CPLR 3101(c) and (d) respectively make non-attainable the work product of an attorney and, qualifiedly, any material prepared for litigation unless that material can no longer be duplicated and withholding it will result in injustice or undue

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[57] 54 Misc. 2d 342, 282 N.Y.S.2d 814 (Sup. Ct. Monroe County 1967).
[58] Dasheff v. Bath, 25 Misc. 2d 13, 15, 206 N.Y.S.2d 733, 736 (Sup. Ct. N.Y. County 1959) (two negligence actions consolidated).
[59] Berger v. Long Island R.R., 24 App. Div. 2d 509, 261 N.Y.S.2d 575 (2d Dep't 1965).
[60] 22 App. Div. 2d 996, 254 N.Y.S.2d 843 (3d Dep't 1964) (mem.).
[61] 54 Misc. 2d 771, 283 N.Y.S.2d 301 (Sup. Ct. Kings County 1967).

hardship.[62] Thus, with respect to CPLR 3101(d), disclosure has been allowed where the witness was present at the time of the occurrence,[63] was an active participant,[64] or where there were special circumstances necessitating disclosure so that a party could substantiate his claim.[65]

Although in the *Alongis* case the witnesses were present at the time of the occurrence, the court held that disclosure of the names was not required. The court distinguished the cases allowing disclosure on the ground that they involved examinations before trial *after* an action had been commenced, and declared that it was not prepared to extend disclosure to a preliminary hearing, particularly where the requirement for the examination was unilateral, *i.e.*, only the City and not the plaintiff could compel disclosure. The court then distinguished the instant case from that of *Costello v. City of New York.*[66] In that case, disclosure was allowed in a preliminary hearing similar to the hearing in the instant case. The difference noted was that in *Costello* the names and addresses of witnesses were not otherwise available, while in the instant case the names and addresses could easily have been obtained from the police. In short, there were special circumstances in *Costello* and none in the instant case.

An exegesis of the two cases gives the general rule that the limitations on the privilege of CPLR 3101(d), *e.g.*, furnishing the names of witnesses present at the occurrence, will not apply to a preliminary hearing without the showing of special circumstances. The soundness of applying a different rule to hearings before commencement and hearings after commencement is, however, questionable. The basic purpose of the preliminary hearing in cases such as these is to enable the City to obtain information as to the relative merits of the claim, ultimately with the hope that there will be an expedient and satisfactory settlement. A denial of disclosure could very well subvert this goal.

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[62] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.11 (1966). It should be noted that it might be possible to circumvent these privileges by asking for the names and addresses of *persons* present at the occurrence, not *witnesses.* Rio v. Donovan, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964).

[63] Votey v. New York City Transit Auth., 46 Misc. 2d 554, 260 N.Y.S.2d 124 (Sup. Ct. N.Y. County 1965).

[64] *Id.*

[65] Majchrzak v. Hagerty, 49 Misc. 2d 1027, 268 N.Y.S.2d 937 (Sup. Ct. Erie County 1966).

[66] 54 Misc. 2d 885, 283 N.Y.S.2d 673 (Sup. Ct. Bronx County 1967).