St. John's Law Review

Volume 42, January 1968, Number 3 Article 22

CPLR 3101: Examination Before Trial of Seider v. Roth Type Defendant Is Permissible

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In *Beach v. Lost Mountain Manor*,[71] defendant moved to quash a subpoena, served by mail on defendant's attorneys, directing defendant's general manager, a resident of Ohio, to appear as a witness in New York. After first stating that CPLR 2103(b) did not provide for the service of a subpoena on the attorney of a foreign defendant,[72] the court considered the applicability of CPLR 308(4) to service of the subpoena. The court recognized that CPLR 2303 permitted substituted service of a subpoena in a proper case, but said that Section 2-b of the Judiciary Law, which authorizes courts of record to issue subpoenas to persons *found in the state* requiring their attendance as witnesses in causes pending in such courts, was also applicable.[73] The court held that CPLR 2303 did not enlarge the court's authority under the Judiciary Law. The subpoena was quashed, since the prospective witness was not in New York and, therefore, not subject to a subpoena from a New York court. The court also disagreed with those authorities who maintain that a New York domiciliary may be subpoenaed to testify as a witness here by personal delivery of the subpoena to him anywhere in the world.[74]

The instant case appears to limit the utility of subpoena service which CPLR 2303 seeks to foster, by treating the Judiciary Law as a limitation on CPLR 2303 and the other applicable provisions of the CPLR. While the decision is not consistent with the expanding concept of the court's jurisdiction over parties not within the state, the practitioner should be aware of the limitation which this case makes on the applicability of CPLR 308(4) to CPLR 2303.

ARTICLE 31 — DISCLOSURE

CPLR 3101: Examination before trial of Seider v. Roth *type defendant is permissible.*

In *Gazerwitz v. Adrian*,[75] a New York plaintiff brought suit against a New Jersey resident for damages incurred in an automobile accident in New Jersey. The plaintiff acquired in rem jurisdiction, on the authority of *Seider v. Roth*,[76] by attaching defendant's automobile liability insurance policy. Plaintiff moved for an order

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[71] 53 Misc. 2d 563, 279 N.Y.S.2d 93 (Sup. Ct. Monroe County 1967).
[72] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 2103.02 (1964).
[73] N.Y. JUDICIARY LAW § 2-b.
[74] 7B McKINNEY'S CPLR 2303, supp. commentary 18 (1967).
[75] 28 App. Div. 2d 556, 280 N.Y.S.2d 233 (2d Dep't 1967) (memorandum decision).
[76] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

to conduct an examination before trial at the courthouse in which the case was being tried. Defendant opposed this motion and sought a protective order under CPLR 3103. The court held that although there was no personal jurisdiction over defendant, he was nevertheless a party to the action and consequently subject to disclosure proceedings. Despite his being a non-resident, an examination in the county in which the action was brought was proper procedure under CPLR 3110(1).

It is well established that statutory disclosure proceedings apply to both residents and non-residents [77] and, unless there is a showing of undue hardship, the proceeding may take place in the county in which the suit is pending.[78] However, under CPLR 320(c), a defendant "who proceeds with the defense" after asserting the objection to jurisdiction and the objection is ultimately denied has subjected himself to personal jurisdiction. The question then is whether a defendant who submits to an examination before trial "proceeds with the defense" so as to subject himself to personal liability in the event his objection is denied. Applicable authority is both remote and inconclusive.[79] The court in *Gazerwitz*, although it did not clearly answer this specific question, implied that no personal liability would result from the submission to an "EBT."

In the absence of clear authority on this point, it is advisable that the practitioner watch closely for subsequent developments at the appellate level.[80]

CPLR 3101: Examination of witness before trial available in order to oppose a motion.

Section 3101(a) provides for the "full disclosure of all evidence material and necessary" to the prosecution or defense of an action. On its face, the statute does not specify whether the term "evidence" is restricted to that relevant evidence admissible at trial or whether it comprises a wider range of material.

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[77] Wolf v. Union Waxed & Parchment Paper Co., 148 App. Div. 623, 133 N.Y.S. 239 (1st Dep't 1912); Wallace v. Baken, 143 App. Div. 211, 128 N.Y.S. 130 (1st Dep't 1911).

[78] Schoen v. Morgan Trucking Co., 13 App. Div. 2d 622, 213 N.Y.S.2d 1 (1st Dep't 1961) (memorandum decision); Drews v. Spencer, 274 App. Div. 802, 79 N.Y.S.2d 626 (2d Dep't 1948) (memorandum decision); Rosenberg v. Jewish Hosp., 219 N.Y.S.2d 556 (Sup. Ct. Kings County 1961).

[79] *See, e.g.*, Mittelman v. Mittelman, 45 Misc. 2d 445, 257 N.Y.S.2d 86 (Sup. Ct. Queens County 1965); Hayuk v. Hollock, 11 Misc. 2d 1086, 172 N.Y.S.2d 19 (Sup. Ct. Oneida County 1958).

[80] For further examples of the problems created by *Seider v. Roth* see 7B MCKINNEY'S CPLR 5201, supp. commentary 13-31 (1967).