

CPLR 3101: Examination of Witness Before Trial Available in Order to Oppose a Motion

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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-residents⁷⁷ 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.

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).

Prior to the CPLR, full discovery proceedings were not available to obtain testimony of a party to oppose a motion.⁸¹ The rule was otherwise with respect to a non-party witness who refused to make an affidavit of facts within his knowledge.⁸²

In *Gershuny v. Compagnia Italia Dei Grandi Alberghi*,⁸³ plaintiff had been injured while a guest at defendant's hotel in Rome, Italy. Jurisdiction over the defendant was obtained by service upon a New York corporation allegedly so related to defendant that defendant was engaged in business in New York. When defendant moved to dismiss for lack of personal jurisdiction, plaintiff sought to invoke CPLR 3101(a)(4), under which he would be permitted to examine any person where adequate special circumstances existed, including the president of the New York corporation. The court held that the circumstances of the case justified the examination of the non-party witness. Since an unfavorable resolution of the jurisdictional issue would result in the loss of plaintiff's action, the testimony sought was deemed to be material and necessary to the prosecution of the action. The court held that these proceedings should not be limited to discovery of evidence necessary for trial but should be available to disclose evidence required *in preparation for trial*.

By allowing the examination of non-party witnesses to oppose a motion, the court has reaffirmed the rule as applied under the CPA. It goes further by dispensing with the requirement of the witness' refusal to make an affidavit.

CPLR 3101(a): Disclosure of identity of non-participant eye-witnesses not compelled at examination before trial.

Under CPA 288, which required the disclosure of material and necessary evidence, it had been held that, at an examination before trial, a party would not be required to reveal the names and addresses of witnesses.⁸⁴ Compulsory disclosure of material and necessary evidence is incorporated in CPLR 3101.

⁸¹ *Waful v. Pitman Mfg. Co.*, 19 Misc. 2d 276, 188 N.Y.S.2d 1 (Sup. Ct. Onondaga County 1958); *Standard Foods Prods. Corp. v. Vinas Unidas, S.A.*, 200 Misc. 590, 104 N.Y.S.2d 596 (Sup. Ct. Kings County 1951); *Debrey v. Hanna*, 182 Misc. 824, 45 N.Y.S.2d 551 (Sup. Ct. N.Y. County 1943).

⁸² *First Nat'l Bank v. Alterman*, 253 App. Div. 740, 300 N.Y.S. 778 (2d Dep't 1937) (memorandum decision); *Johnson v. Beneficial Loan Soc., Inc.*, 251 App. Div. 839, 296 N.Y.S. 717 (2d Dep't 1937) (memorandum decision); *Standard Foods Prods. Corp. v. Vinas Unidas, S.A.*, 200 Misc. 590, 592, 104 N.Y.S. 596, 597-98 (Sup. Ct. Kings County 1951).

⁸³ 53 Misc. 2d 653, 279 N.Y.S.2d 504 (Sup. Ct. Westchester County 1967).

⁸⁴ *Martyn v. Braun*, 270 App. Div. 768, 59 N.Y.S.2d 588 (2d Dep't 1946) (memorandum decision); *Kosiur v. Standard-North Buffalo Foundations*, 255 App. Div. 930, 8 N.Y.S.2d 688 (4th Dep't 1938) (memorandum decision).