

CPLR 3101(a): Disclosure of Identity of Non-Participant Eye-Witnesses Not Compelled at Examination Before Trial

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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).

Since the adoption of CPLR 3101(a), the courts have more leniently applied this disclosure device. In *Rivera v. Stewart*,⁸⁵ where a bicycle collided with an automobile in which three passengers were seated, the supreme court, Monroe County, compelled the disclosure of the identity not only of the passengers but of any other witnesses known by the defendant at the time of the accident. The court stated that had any witnesses been discovered subsequently through defendant's own efforts, this information would be protected by section 3101(d) as material prepared for litigation.⁸⁶

Recently, the Monroe County supreme court reached an opposite conclusion in *Coleman v. Kirksey*.⁸⁷ The court drew a distinction between active participants and witnesses. While the *Coleman* court recognized that a party must reveal the names of any active participants known to him,⁸⁸ it refused to follow *Rivera* and apply this rule to mere eye-witnesses.

Since both *Coleman* and *Rivera* originated in the same county, the conflict between them should be resolved when the appellate division decides the appeal from the latter case. It seems clear that the identity of witnesses, whether participants or not, is material and necessary, and, therefore, subject to disclosure under CPLR 3101(a). Thus, the resolution of the conflict appears to depend on the application of CPLR 3101(d) which protects material prepared for litigation. This immunity from disclosure applies unless the material cannot be duplicated and that withholding it will result in undue hardship. Under 3101(d) the distinction between participating witnesses and mere eye-witnesses is irrelevant. The inquiry should be whether the party knew the identity of the witness at the time of the accident; if he did, the identity should be disclosed. The information may be withheld if it was gathered through the party's own efforts. Such an approach to CPLR 3101(d), taken on a case-by-case basis, is sufficiently flexible to require disclosure where hardship would otherwise result.

CPLR 3101(d), Public Officers Law § 66-a: Photographs are public records and available where police department is non-party witness.

Section 66-a of the Public Officers Law provides that all reports and records of accidents maintained by the police department

⁸⁵ 51 Misc. 2d 647, 273 N.Y.S.2d 644 (Sup. Ct. Monroe County 1966).

⁸⁶ See *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁸⁷ 53 Misc. 2d 947, 279 N.Y.S.2d 803 (Sup. Ct. Monroe County 1967).

⁸⁸ *O'Dea v. City of Albany*, 27 App. Div. 2d 11, 275 N.Y.S.2d 687 (3d Dep't 1966); *Pistana v. Pangburn*, 2 App. Div. 2d 643, 151 N.Y.S.2d 742 (3d Dep't 1956).