St. John's Law Review

Volume 42, January 1968, Number 3 Article 25

CPLR 3101(d), Public Officers Law § 66-a: Photographs Are Public Records and Available Where Police Department Is Non-Party Witness

St. John's Law Review

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).

shall be made available to any interested party for inspection. Section 144 of the Education Law defines public records as

> any written or printed book or paper, or map, which is the property of the state, or of any county, city, town or village or part thereof, and in or on which any entry has been made or is required to be made by law or which any city . . . has received. . . .

The sole issue in *Matter of Fox v. City of New York*[89] was whether optional photographs, taken by a police detective while investigating an automobile accident in which petitioner's client had been injured, constituted public records within the meaning of the above statutes and consequently could be procured by petitioner without a subpoena. The police department argued that since the taking of the photographs was discretionary they should not be considered public records. The appellate division, first department, held that the material was available for petitioner's use. The court presented several bases for its decision. The photographs could be viewed either as an extension of the phrase "records kept by law," or as analogous to a map under the Education Law, concededly within the ambit of section 66-a. Since the taxpayer bears the cost of the photograph initially, he should at least be entitled to have access to this material where it proves necessary. Further, here the police, who possessed the photographs, had no apparent interest in the outcome of the litigation.[90]

Certain problems may ensue as a result of the *Fox* decision. It is entirely plausible that the police will forego performing certain voluntary functions rather than submitting themselves to the potential annoyance of having to open their files to any interested parties. Since section 66-a stipulates that the police department may provide reasonable rules and regulations regarding the time and manner of the inspection of its reports and records, perhaps the costs of inspection may be borne by the party requesting the records, as suggested by the court in the present case.

CPLR 3123: CPLR 3103 held applicable to notice to admit.

The purpose of a notice to admit is to alleviate the burden placed upon each litigant to prove at trial every fact, including those not in dispute.[91] Under CPA 322, predecessor of CPLR

---

[89] 28 App. Div. 2d 20, 280 N.Y.S.2d 1001 (1st Dep't 1967).

[90] The court distinguished Brecht v. City of New York, 14 App. Div. 2d 790, 220 N.Y.S.2d 452 (2d Dep't 1961), where a police car had collided with the plaintiff's automobile. There the city was a party to the negligence action. In such an instance, the court noted, the photographs might be protected under CPLR 3101(d) as material prepared for litigation.

[91] Matter of Collins, 31 Misc. 2d 754, 222 N.Y.S.2d 89 (Sur. Ct. N.Y. County 1961); WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 264 (2d ed. 1966).