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Article 26

CPLR 3123: CPLR 3103 Held Applicable to Notice to Admit

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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

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[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).

3123, notices to admit were not subject to preliminary attack.[92] Because the draftsmen of the CPLR did not *expressly* change this rule, it has, despite criticism,[93] been deemed applicable to CPLR 3123 as well.[94]

In *Nader v. General Motors Corp.*,[95] plaintiff's notice to admit consisted of more than three hundred items which the court stated made it "patently burdensome, unnecessarily prolix, and unduly protracted."[96] The court granted a protective order under CPLR 3103 in order to protect the defendant from the clear abuse of CPLR 3123. The broad language of 3103 was deemed to authorize a protective order *at any time* in advance of trial. It was stated that since the notice to admit is included in the disclosure article, and since 3103 applies to *any* disclosure device, a fortiori it was applicable to 3123.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3216: Departments differ as to retroactivity of amendment.

In *Kaprow v. Jacoby*,[97] the supreme court entered an order granting defendant's motion to dismiss the complaint for unreasonable neglect to proceed as provided in CPLR 3216. On appeal, the appellate division, second department, found the dismissal of plaintiff's complaint to have been an improvident exercise of discretion. One of the factors relied upon by the court was that the defendant had failed to make a demand upon plaintiff to serve and file a note of issue pursuant to CPLR 3216.

In 1964, the legislature amended CPLR 3216, apparently intending that no 3216 motion to dismiss could be made until the plaintiff had received a forty-five day demand to serve and file a note of issue. However, the Court of Appeals, in *Thomas v. Melbert Foods, Inc.*,[98] held, in effect, that if the defendant's 3216 motion were based on "general delay" rather than plaintiff's failure to file a note of issue, the defendant could circumvent the 1964 amendment to 3216, and the motion could be made without first serv-

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[92] Belfer v. Dictograph Prods., Inc., 275 App. Div. 824, 89 N.Y.S.2d 125 (1st Dep't 1949); Langan v. First Trust & Deposit Co., 270 App. Div. 700, 62 N.Y.S.2d 440 (4th Dep't 1946), *aff'd mem.*, 296 N.Y. 1014, 73 N.E.2d 723 (1947).

[93] 7B McKINNEY'S CPLR 3103, supp. commentary 59 (1965).

[94] Schwartz v. Macrose Lumber & Trim Co., 46 Misc. 2d 202, 259 N.Y.S.2d 289 (Sup. Ct. Queens County 1965). *But see* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 3103.04, 3123.09 (1963).

[95] 53 Misc. 2d 515, 279 N.Y.S.2d 111 (Sup. Ct. N.Y. County 1967).

[96] *Id.* at 516, 279 N.Y.S.2d at 112.

[97] 28 App. Div. 2d 722, 281 N.Y.S.2d 591 (2d Dep't 1967).

[98] 19 N.Y.2d 216, 225 N.E.2d 534, 278 N.Y.S.2d 836 (1967).