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Article 26

CPLR 3026: Pleading Saved Where Cause of Action Can Be Culled from Complaint

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could not save a pleading which failed to supply the detail sought to be included therein. Both of these decisions seem consistent with the instant case in requiring that a complaint satisfy the requirements of *both* CPLR 3013 and CPLR 3016(c).

However, it appears highly doubtful, when viewing the general approach of the revisers respecting pleading, that the best interests of justice would be served by dismissing a pleading for any CPLR 3016 omission, provided that the basic CPLR 3013 requirements are satisfied. It is submitted that a complaint may provide sufficient *notice* to apprise a defendant of a separation action against him, and still not specifically indicate the exact time and place of the acts complained of. It seems that a pleading should not be dismissed for an omission if it can be supplied by a bill of particulars, by affidavits opposing a motion to dismiss, by a disclosure device or by other means calculated to supply the omitted information. However, it should be remembered that the basic *notice* requirements of CPLR 3013, as portrayed in the *Foley* case, must always be satisfied. If the purpose of CPLR 3016(c) is to ensure that the defendant receives the information specified therein, the means by which he obtains such information should not be a critical issue.[93] Such a view would serve to implement the requirements of CPLR 3016, and it would also adhere to the mandate of CPLR 104 which provides that the CPLR shall be "liberally construed to secure the just, speedy and inexpensive determination" of every action.

CPLR 3026: Pleading saved where cause of action can be culled from complaint.

In *Barrick v. Barrick*,[94] the appellate division, second department, although concurring with the lower court that a cause of action for reformation was not stated, reversed on the ground that a valid cause of action could be gathered from the averments of the complaint. In so holding, the court relied upon CPLR 3026 which mandates a liberal construction of pleadings.

The second sentence of CPLR 3026 states that "defects shall be ignored if a substantial right of a party is not prejudiced." The revisers, consistent with the modern attitude toward procedure, inserted this directive to discourage unnecessary attacks against a pleading which are designed principally to harass an opponent.[95]

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[93] In the first department, it was indicated that a pleading is not necessarily to be dismissed where the required information can be supplied by other means. Pernet v. Peabody Eng'r Corp., 20 App. Div. 2d 781, 248 N.Y.S.2d 132 (1st Dep't 1964).

[94] 24 App. Div. 2d 895, 264 N.Y.S.2d 888 (2d Dep't 1965).

[95] FIRST REP. 79.

Therefore, if a pleading requirement imposed by Article 30 is violated, prejudice as well as the violation itself must be shown.[96]

There is evidence that the liberal spirit of CPLR 3026 has been adopted by the judiciary. It has been held that regardless of how imperfectly stated, a complaint attacked for insufficiency is deemed to allege whatever can be fairly implied from its contents.[97] Thus, if *any* cause of action cognizable by the law can be fairly gathered from *all* the averments, the complaint will be sustained.[98] It should be noted, however, that poorly drawn and inartistic pleadings are not viewed favorably, and may be subject to a corrective motion.

ARTICLE 31 — DISCLOSURE

CPLR 3101: Court sanctions disclosure under CPLR 3111 of an item apparently protected by CPLR 3101(d).

The protection from disclosure which CPLR 3101(d) accords to "material prepared for litigation" is to be withheld *only* if "the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship." Both conditions must be satisfied to obtain disclosure.

In *Gunther v. Roaman's, Inc.*,[99] an action by an administrator against a corporation, plaintiff sought an examination of the manager of defendant's store, and also the production of an accident report which the manager had prepared on a form supplied by defendant's insurer. Discovery of the report was apparently sought pursuant to CPLR 3120. The court held that the report constituted "a writing created for or by a party or his agent in preparation for litigation . . . ," [100] and that it was conditionally immune from disclosure.[101]

While such a holding seems sound, the court ordered that the report be produced pursuant to CPLR 3111 to be used in conjunction with the examination of the store manager. The query which

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[96] 7B McKINNEY'S CPLR 3026, supp. commentary 129-30 (1965).

[97] 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

[98] *Id.* at 63-65, 248 N.Y.S.2d at 125-27; see also Dulberg v. Mock, 1 N.Y.2d 54, 56, 133 N.E.2d 695, 696, 150 N.Y.S.2d 180, 181 (1956); Condon v. Associated Hosp. Serv., 287 N.Y. 411, 414, 40 N.E.2d 230, 231 (1942); FIRST REP. 68; 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3026.02 (1965).

[99] 24 App. Div. 2d 738, 263 N.Y.S.2d 486 (1st Dep't 1965).

[100] Gunther v. Roaman's, Inc., 24 App. Div. 2d 738, 739, 263 N.Y.S.2d 486, 487 (1st Dep't 1965).

[101] See, *e.g.*, Kandel v. Tocher, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965); Finegold v. Lewis, 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965); *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 154-58 (1965).