CPLR 3121(a): Movant Need Not Prove His Case on the Merits in Order to Obtain Physical Examination of His Adversary

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation


This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
CPLR 3121(a): Movant need not prove his case on the merits in order to obtain physical examination of his adversary.

In Constantine v. Diello, the fourth department further clarified the words "in controversy" as contained in CPLR 3121(a)'s statement of when a physical or mental examination may be employed as a disclosure device. The case involved a wrongful death action arising from an automobile accident. At a prior motor vehicle hearing, defendant testified, inter alia, that his vision was unobstructed. An eye test conducted at the hearing disclosed that defendant's vision was, in fact, impaired. Subsequently, plaintiff sought to obtain an eye examination of the defendant in prosecution of her wrongful death action. In denying defendant's motion for a protective order, the court held that plaintiff's proof was sufficient to warrant the granting of her notice for an eye examination, i.e., that plaintiff had sufficiently placed the condition of defendant's vision in controversy.

In support of its holding, the court stated that the requirement of proof in a 3121 situation is not to be equated with that which is necessary to make out a prima facie case. Apparently, the requirement is that there be "some evidence" in order to place a matter in controversy.

It should be noted, however, that to place an adversary's physical or mental condition in controversy requires at least that there be some logical connection between the party's condition and the issue(s) of the case. Thus, where a defendant stated at an examination before trial that he had not seen the injured plaintiff, the court denied plaintiff's request for a physical examination, holding such a statement insufficient for purposes of placing defendant's physical condition in controversy.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(a)(4): Dismissal denied where pending action was instituted subsequent to the action sought to be dismissed.

In Izquierdo v. Cities Serv. Oil Co., the supreme court denied defendant's motion to dismiss the complaint on the ground that

109 Fisher v. Fossett, 45 Misc. 2d 757, 257 N.Y.S.2d 821 (Sup. Ct. Erie County 1965), decided by a lower court within the fourth department, also discussed the meaning of the words "in controversy." This case is treated in The Biannual Survey of New York Practice, 40 St. John's L. Rev. 122, 161 (1965).