

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

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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*,¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰

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.*,¹¹¹ the supreme court denied defendant's motion to dismiss the complaint on the ground that

¹⁰⁸ 24 App. Div. 2d 821, 264 N.Y.S.2d 153 (4th Dep't 1965).

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).

¹¹⁰ *Courtney v. Olsen*, 45 Misc. 2d 283, 256 N.Y.S.2d 748 (Sup. Ct. Westchester County 1965).

¹¹¹ 47 Misc. 2d 1087, 264 N.Y.S.2d 58 (Sup. Ct. Kings County 1965).