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CPLR 3101(d): Where Statements Are Material Prepared for Litigation They Are Not Available for Disclosure

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quiry in an examination before trial when the witnesses were witnesses to the event itself.[133]

However, the Supreme Court, Erie County, in *Majchrzak v. Hagerty*,[134] has stated that the *Rios* case did *not* so hold. The court here asserted that *Rios* was "merely concerned with the procedure to be followed in attempting to obtain such disclosure." [135]

Majchrzak involved a suit for damages sustained by plaintiff in an automobile accident. Plaintiffs examined defendant before trial, at which time defendant stated that he knew the names of witnesses, but that he refused to disclose them. Plaintiffs then sought an order directing defendant to supply this information.

The court noted that plaintiff's injuries prevented her from obtaining the names of any witnesses to the accident. Also, an extensive investigation by plaintiff failed to provide any information. Therefore, the court held that where the information is necessary to establish what occurred, *and* where the party seeking it was or is unable with due diligence to obtain it, the names of witnesses should be disclosed.[136]

Thus, the court, while not accepting *Rios* as authority for the position it takes, nevertheless arrives at the same conclusion.

CPLR 3101(d): Where statements are material prepared for litigation they are not available for disclosure.

Kandel v. Tocher[137] and *Finegold v. Lewis*[138] held that accident reports made by an insured to his insurance company were material prepared for litigation and, thus, were conditionally privileged from disclosure under CPLR 3101(d).

In *Parker v. New York Tel. Co.*,[139] the appellate division, third department, joined the first and second departments in stating that where statements are material prepared for litigation, they are not available for disclosure, unless they can no longer be duplicated and their withholding will result in injustice and undue hardship. The court followed *Kandel* despite the fact that that case involved reports made to an insurance company, while *Parker* involved reports prepared for a self-insured.

Another third department case, *Welch v. Globe Indem. Co.*,[140] however, while approving of the reasoning in *Kandel* and *Finegold*,

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[133] Votey v. N.Y.C. Transit Authority, 46 Misc. 2d 554, 260 N.Y.S.2d 124 (Sup. Ct. N.Y. County 1965); 7B McKINNEY'S CPLR 3120, supp. commentary 58, 59 (1965).

[134] 49 Misc. 2d 1027, 268 N.Y.S.2d 937 (Sup. Ct. Erie County 1966).

[135] Majchrzak v. Hagerty, 49 Misc. 2d 1027, 1028, 268 N.Y.S.2d 937, 938 (Sup. Ct. Erie County 1966).

[136] *Id.* at 1028, 268 N.Y.S.2d at 939.

[137] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

[138] 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).

[139] 24 App. Div. 2d 1067, 265 N.Y.S.2d 740 (3d Dep't 1965).

[140] 25 App. Div. 2d 70, 267 N.Y.S.2d 48 (3d Dep't 1965).

nevertheless allowed disclosure under CPLR 3101(a) of reports made by the insured to his insurer. The court distinguished *Kandel* by pointing out that it involved automobile *liability* insurance, while the situation before it involved *non-liability* fire insurance. As Justice Breital had noted in *Kandel*,[141] the reports there came within the purview of 3101(d) because automobile liability insurance was essentially bought in contemplation of litigation. Fire insurance, on the other hand, was not so bought.

Thus, where there is a non-liability insurer, it appears that the party seeking to preclude disclosure must show that such statements or reports were in fact prepared *expressly* for the litigation and did not arise merely out of the regular course of business.

CPLR 3101(d): State's authority to examine not barred.

Court of Claims Rule 25(a)(1) provides that within six months from the date of filing an appropriation claim, the parties shall file copies of their appraisals with the clerk of the court. The purpose of this rule is to encourage the early settlement of these claims and to compel a full and adequate disclosure so as to enable all parties to prepare for the trial of the issues.[142]

In *Route 304 Realty Corp. v. New York*,[143] the state gave notice of an examination before trial wherein it sought additional information to aid it in making an appraisal. Claimant thereupon moved for an order vacating the state's notice and for an associated protective order pursuant to CPLR 3103.[144] Plaintiff contended that rule 25(a) limited the scope of authority of the state to examine under Section 17(1) of the Court of Claims Act.[145] However, the court dismissed this argument and held that rule 25(a) did not usurp the rights of the state to seek examination "for any cause whatever" when it would help them arrive at a more accurate and realistic appraisal.[146]

Thus, while material prepared for litigation is conditionally privileged from disclosure under CPLR 3101(d), the court in the instant case held that the state may examine such material pursuant to Section 17(1) of the Court of Claims Act, and that Court of Claims Rule 25(a) did not limit the state's power to obtain such disclosure.

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[141] Kandel v. Tocher, 22 App. Div. 2d 513, 515, 256 N.Y.S.2d 898, 899-900 (1st Dep't 1965).

[142] 29A McKINNEY'S CT. CL. ACT 25a(8) (Supp. 1965).

[143] 49 Misc. 2d 438, 267 N.Y.S.2d 530 (Ct. Cl. 1965).

[144] *Ibid.*

[145] This section provides that upon the filing of a notice of claim *for any cause whatever*, the attorney-general may require the claimant "to answer orally as to any facts relative to the justness of such claim."

[146] Route 304 Realty Corp. v. New York, 49 Misc. 2d 438, 439, 267 N.Y.S.2d 530, 532 (Ct. Cl. 1965).