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CPLR 3106(b): Subpoena Must Be Served to Obtain Deposition from Agent or Non-Party Witness

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CPLR 3101(e): Plaintiff entitled to obtain a copy of defendants' statement when incorporated by reference in his own statement.

Under CPLR 3101(e), a party may obtain his own statements without the burden of showing or proving those special circumstances [147] required by prior case law.[148]

In *Masone v. Paull*,[149] defendants' insurer obtained a written statement from the plaintiff. Within his statement, the plaintiff stated that he had read the defendants' statements and agreed with them. In considering plaintiff's motion to compel defendants to furnish her copies of their statements, the court noted that ordinarily these statements would be considered material prepared for litigation and, thus, conditionally privileged from disclosure under CPLR 3101(d)(2).

In granting plaintiff's motion, the court held that a party is entitled to a copy of his *complete* statement. In this instance, plaintiff was entitled to a copy of defendants' statements since they were incorporated by reference in his statement.

Thus, CPLR 3101(e) creates another exception to the rule of CPLR 3101(d) that material prepared for litigation is not discoverable.

CPLR 3106(b): Subpoena must be served to obtain deposition from agent or non-party witness.

Under prior law, a party to an action desiring to take a deposition was only required to give reasonable notice to his adversary or to the adversary's attorney.[150] CPLR 3106(b) now provides that when the person to be examined is a non-party witness, agent, or prior holder of a claim, he must be served with a subpoena before the examination.

In *Spector v. Antenna & Radome Research Associates Corp.*,[151] plaintiff, seeking to examine an independent accountant retained by defendant, served a notice to take the accountant's deposition on defendant's counsel. He did not, however, serve a subpoena on the accountant. The appellate division held that the clear lan-

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[147] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.56 (1965).

[148] *E.g.*, Sacks v. Greyhound Corp., 18 App. Div. 2d 747, 235 N.Y.S.2d 669 (3d Dep't 1962); Palmer v. Liberty Mut. Life Ins. Co., 36 Misc. 2d 325, 232 N.Y.S.2d 439 (Sup. Ct. Steuben County 1962). See CPA § 324.

[149] 48 Misc. 2d 939, 266 N.Y.S.2d 317 (Sup. Ct. Queens County 1965).

[150] CPA § 290. See also RCP 121-a which limited the taking of testimony by deposition upon notice to parties in an action, their agents or employees. Witnesses are not within the purview of such section. Augenblick v. Augenblick, 203 Misc. 360, 117 N.Y.S.2d 69 (Sup. Ct. Queens County 1952).

[151] 25 App. Div. 2d 569, 267 N.Y.S.2d 843 (2d Dep't 1966).

guage of CPLR 3106(b) required the subpoena to be served, whether the accountant was determined to be the defendant's agent or a non-party witness, since by such service an agent or non-party witness is given an opportunity to avail himself of his right to move for a CPLR 3103 protective order.

It is now clear that the practitioner is required to comply with the literal language of the statute in serving the subpoena as a condition precedent to an examination of a non-party witness or agent.

CPLR 3126: Penalties imposed for non-compliance with an order to disclose.

CPLR 3126 imposes harsh penalties for failure to comply with a disclosure order.[152] The harshness of these penalties has made the courts reluctant to apply them. In *Nomako v. Ashton*,[153] the court denied the plaintiff's motion to strike defendant's answer and, instead, entered an order of dismissal, conditional upon non-compliance with the disclosure order, and compelled payment of plaintiff's court costs and attorney's fees. Thus, the court avoided applying the more severe penalties imposed by CPLR 3126.

Cases subsequent to *Nomako* have seemingly approved of the action taken by the first department. They have exercised judicial restraint in applying the direct sanctions authorized under CPLR 3126.[154] For example, in *DiBartolo v. American & Foreign Ins. Co.*,[155] where the plaintiff failed to appear on an adjourned date, the court refused to dismiss the complaint unconditionally. The order did provide that if costs and counsel fees were paid within twenty days *and* if the plaintiff appeared within a specified time, the motion to dismiss would not be granted. Noting the recent trend toward ordering this type of punishment for willful non-disclosure, the court reasoned that the action, though harsh, was justified because:

[W]e cannot altogether condone irresponsible action (or inaction) to the detriment of a party properly attempting to bring an action through disclosure to trial and the ultimate resolution of the issues involved.[156]

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[152] With regard to failure to disclose the court may issue such orders as are just. This includes, but is not limited to, orders: (1) resolving the issue to which the information sought is relevant; (2) prohibiting the disobedient party from supporting or opposing designated claims or defenses; (3) striking out pleadings or parts thereof; (4) staying proceedings; (5) dismissing the action; (6) rendering a default judgment against the disobedient party.

[153] 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964).

[154] See 7B McKINNEY'S CPLR 3126, supp. commentary 76, 79 (1965).

[155] 48 Misc. 2d 843, 265 N.Y.S.2d 981 (Sup. Ct. Suffolk County 1966).

[156] *Id.* at 844, 265 N.Y.S.2d at 983.