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Article 31

CPLR 3106(a): Priority with Respect to Counterclaims

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be admitted at the trial.[51] Under these rules, disclosure of the appraisal is obtainable to impeach the credibility of the condemnor's expert witness, or where the appraisals constitute admissions against interest on the part of the condemnor, *i.e.*, statements which amount to a prior acknowledgement that a relevant fact is not as now claimed.

The Judicial Conference recommended the amendment of CPLR 3101(d) to "enable court rules to provide for free disclosure, in condemnation and real estate tax certiorari proceedings, of each party's appraisals and their bases." [52] The reason for this amendment was to provide for the expeditious review and disposal of a great number of those cases by requiring the exchange of appraisal reports before trial. However, this amendment was vetoed by the Governor on the ground that this procedure would lead to a wide variance of court rules in this area.

CPLR 3106(a): Priority with respect to counterclaims.

Under prior law, many courts established their own rules as to the priority of the examination before trial. The first department had adopted as its rule an approach which gave the plaintiff priority in all cases except tort actions other than for fraud and conversion.[53] However, in the second department, the practice followed was that whoever served the notice for examination first, examined first, unless special circumstances dictated the contrary.[54]

In superceding these court rules, CPLR 3106(a) permits a defendant to obtain disclosure of a party by mere notice within 20 days after the complaint is served. A plaintiff seeking disclosure under this section, however, must obtain leave of the court for an examination within this 20 day period. The defendant, therefore, has 20 days in which to obtain the first examination before trial unless the plaintiff obtains leave of the court to serve his notice of examination. The reason for this priority is to give the defendant a reasonable time to examine the complaint, to find out why he is being sued, and to plead or move to the complaint.[55]

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[51] *Id.* at 480-81, 270 N.Y.S.2d at 707.

[52] N.Y. Sess. Laws 1966, Legislative Reports, § 3101(e) (proposed change). See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.52a (1965).

[53] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3106.03 (1965). See Graziano, *Priority of Examination of Parties Before Trial—New Special Rule in the First Department*, 17 QUEENS B. BULL. 181 (1954).

[54] Desiderio v. Gabrielli, 284 App. Div. 976, 135 N.Y.S.2d 1 (2d Dep't 1954).

[55] Van Valkenburgh, Nooger & Neville, Inc. v. John F. Rider Publisher, Inc., 24 App. Div. 2d 437, 260 N.Y.S.2d 691 (1st Dep't 1965). See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3106.02 (1965).

Modern Fibers, Inc. v. Puro [56] held, in accordance with this section, that the defendant has priority to the extent that he may first examine the plaintiff with respect to all "material and necessary" evidence. The plaintiff may then examine the defendant. The court also noted that a defendant-by-counterclaim [57] should be accorded priority with respect to examinations concerning "matters which are material and relevant solely by reason of the allegations of the counterclaims." [58] However, since, in the instant case, certain defendants-by-counterclaim had not yet been served with process, since certain of them were objecting to the jurisdiction of the court, and since issue had not been completely joined on the counterclaims, the court held that it would be improper to provide for examinations by or of such defendants. The court's decision with respect to the priority to be accorded the defendants-by-counterclaim seems to be a logical extension of 3106(a), since the defendant in the original action becomes, in effect, the plaintiff as to the counterclaims.

CPLR 3116(a): Amendment.

CPLR 3116(a) has been amended to require that any alteration which the witness wishes to make in a deposition be placed "at the end of the deposition." This rule, as amended, makes it clear that the original deposition is not to be altered no matter how defective the witness might claim it to be. Prior to this amendment, corrections were often made by striking out the original and inserting new language between the lines or at the foot of the page in which the defective matter appeared. This procedure will no longer be acceptable. Now, the most convenient way to make the changes would be to footnote the point where a correction is desired and then at the *end* of the deposition to spell out the correction keyed to the footnotes.

For a more detailed discussion of this amendment, see Professor David D. Siegel's *1966 Commentary* in McKinney's CPLR.

CPLR 3120: Amendment.

The rules of CPLR 3120 concerning discovery have been extended to apply to non-party witnesses as well as to parties. Before the amendment, a person seeking discovery against a non-party witness had to resort to a 3111 EBT of the non-party.

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[56] 26 App. Div. 2d 527, 271 N.Y.S.2d 81 (1st Dep't 1966).

[57] If *B*, the defendant in the original action, serves a counterclaim on the plaintiff and on *C* and *D* and serves them with process they become defendants-by-counterclaim.

[58] Modern Fibers, Inc. v. Puro, 26 App. Div. 2d 527, 527-28, 271 N.Y.S.2d 81, 82 (1st Dep't 1966).