St. John's Law Review

Volume 41
Number 4 *Volume 41, April 1967, Number 4*

Article 18

April 2013

CPLR 3101(b): Accident Reports Made by Self-Insurer to Independent Firm of Private Investigators May Be Privileged Matter

St. John's Law Review

supreme court case, *Kaminsky v. Abrams*,[22] ruled that an order denying the plaintiff's motion for summary judgment, made after the sixty-day period, would not be void, since the provisions of CPLR 2219(a) were merely precatory.[23] In arriving at this result, the court reasoned that, as a matter of general statutory interpretation, a provision directing action by a public officer within a stated time, in the absence of negative words restraining action thereafter, should be regarded as merely directory, rather than as a limitation on the officer's authority.

The court also stated that the plaintiff was estopped from attacking the order, since one entitled to the relief here sought, *i.e.*, the vacating of the order denying plaintiff's motion for summary judgment and the granting of summary judgment to defendants, should not await an unfavorable disposition before moving for such relief.

It has been suggested that a party considering himself aggrieved by a court's unwarranted delay might, by mandamus, compel the court to render a decision.[24] However, such a course is usually inadvisable since the court might not be favorably inclined towards the party seeking mandamus. Also, where, as in *Kaminsky*, the motion was decided only three days after the expiration of the sixty-day period, mandamus would be an ineffective and meaningless remedy in preventing such a minor delay.

The general purpose of time provisions, such as those found in CPLR 2219(a), is to provide system, uniformity, and promptness in the conduct of public business.[25] Since a party has no effective control over a court's action, it would be a harsh construction which would deprive him of the benefits of an order because of the *court's* failure to decide a motion by a particular day.

ARTICLE 31 — DISCLOSURE

CPLR 3101(b): Accident reports made by self-insurer to independent firm of private investigators may be privileged matter.

Holding that accident reports made to a liability insurer were material prepared for litigation, and therefore immune from disclosure under CPLR 3101(d), the appellate division, first department, in *Kandel v. Tocher*,[26] did not find it "necessary . . . to determine whether reports, investigation, and statements received

---

[22] 51 Misc. 2d 5, 272 N.Y.S.2d 530 (Sup. Ct. N.Y. County 1965).

[23] See also Leumi Financial Corp. v. Richter (Sup. Ct. N.Y. County), 153 N.Y.L.J., March 29, 1965, p. 15, col. 4.

[24] See Fallon v. Hattemer, 229 App. Div. 397, 342 N.Y. Supp. 93 (2d Dep't 1930).

[25] *Ibid.*

[26] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

or created by an automobile liability insurer would also involve the other preclusive provisions of CPLR 3101 [*i.e.*, privileged matter, or attorney's work product] . . . ." [27]

In what appears to be an extension of *Kandel*, the court, in *Aldrich v. Catel Serv. Co.*,[28] stated that accident reports made by a self-insurer to an independent firm of private investigators *might*, under the proper circumstances, be entitled to immunity from disclosure under CPLR 3101(b)'s provision for privileged matter.[29] In *Aldrich*, an employee of the self-insured defendant made a report to an independent corporation which was investigating the accident he was involved in. In holding that this report *should* be disclosed, the court determined: (1) that the report could not be rendered immune from disclosure as material prepared for litigation, because that objection had been waived;[30] (2) that the matter was not attorney's work product because it was not prepared by an attorney acting as an attorney; [31] and (3) that while the report *might* be a *privileged* communication between attorney and client, the facts adduced were insufficient to enable the court to so categorize them.[32]

Whether matter sought to be disclosed is immune under CPLR 3101(b) is determined by whether the information would be privileged *at trial* (CPLR Article 45); if privileged at trial, then the material is also immune from 3101 disclosure.[33] In *Aldrich*, the fact that the accident report was given to a party concededly not acting as an attorney does not compel the conclusion that the report may not be embraced by the attorney-client privilege. A communication may fall within this privilege though made to a third party, if the party is an agent of the attorney [34] or a necessary agent of the client.[35] This, therefore, tends to substantiate the court's conclusion that these reports might, under the proper circumstances, be privileged.

---

[27] Kandel v. Tocher, 22 App. Div. 2d 513, 517, 256 N.Y.S.2d 898, 901 (1st Dep't 1965).

[28] 51 Misc. 2d 16, 272 N.Y.S.2d 582 (N.Y.C. Civ. Ct. 1966).

[29] Aldrich v. Catel Serv. Co., 51 Misc. 2d 16, 19-20, 272 N.Y.S.2d 582, 586 (N.Y.C. Civ. Ct. 1966).

[30] *Id.* at 17, 272 N.Y.S.2d at 584.

[31] *Id.* at 18, 272 N.Y.S.2d at 585.

[32] *Id.* at 20, 272 N.Y.S.2d at 587.

[33] FIRST REP. 119. See also 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.38 (1965).

[34] 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4503.09 (1965).

[35] *Id.* at ¶ 4503.10.