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CPLR 3122: Failure to Timely Seek a Protective Order

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CPLR 3103: Examination of defendant allowed.

Under CPA § 300, an examination before trial of a resident party could be conducted *on notice* only in the county wherein the party resided, or wherein he had an office for the regular transaction of business in person. A *court order* was required to examine a party in any other location.[41] Its successor, CPLR 3110, modifies prior law by providing that a *party* may also be examined, *on notice*, in the county where the action is pending — a court order is no longer required. If this increased choice of locations imposes a severe inconvenience upon the party to be examined, he may move for a protective order under CPLR 3103 to stay the examination.

In *Dworsky v. Bennett*,[42] the plaintiff, a resident of Schenectady County, New York, brought an action to recover damages resulting from a motor vehicle accident which occurred near Naples, New York. Defendant, a resident of Naples, moved for a protective order under CPLR 3103(a) to prevent his deposition from being taken in Schenectady. In denying the defendant's motion to vacate the notice of examination, the court stated that "it is difficult to see . . . how the defendant will be annoyed, embarrassed or put to unnecessary expense as a result of an examination to be held 200 miles from his home." [43]

CPLR 3122: Failure to timely seek a protective order.

CPLR 3122 provides that a party may serve a notice of motion for a protective order within five days of being served with a discovery and inspection notice under CPLR 3120 or an examination notice under CPLR 3121. However, it is not specified whether a party will be prejudiced if a protective order is sought after the five-day period. Nor is it specified what will occur if he first attempts to avoid disclosure when the opposing party applies to the court to compel disclosure.[44]

In 1964, in *Coffey v. Orbachs, Inc.*,[45] the appellate division, first department, held that where a protective order was not applied for within the five-day period of 3122, the party *waived* his right to object to a 3120 discovery notice or a 3121 examination notice.

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routine and assembled for transmittal to an attorney are not—by such gathering and forwarding—changed in character to a thing 'created . . . in preparation for litigation.' "

[41] Lowsley v. Uretzky, 205 Misc. 610, 613, 129 N.Y.S.2d 742, 745 (Sullivan County Ct. 1954).

[42] 51 Misc. 2d 383, 273 N.Y.S.2d 211 (Sup. Ct. Schenectady County 1966).

[43] Dworsky v. Bennett, 51 Misc. 2d 383, 384, 273 N.Y.S.2d 211, 213 (Sup. Ct. Schenectady County 1966).

[44] See CPLR 3124 and 3126.

[45] 22 App. Div. 2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964).

The court, however, limited its holding by providing that even where a protective order was untimely moved for, "the notice to discover the documents . . . was intended to be impliedly limited by the provisions of CPLR 3101 (subds. [b], [c]), which respectively make privileged matter and the work product of an attorney unobtainable by discovery." [46] But, the court did not mention whether material conditionally immune from disclosure under 3101(d)—material prepared for litigation—would be obtainable if 3122 were not complied with.

In *Aldrich v. Catel Serv. Co.*,[47] it was held that where an application for a protective order was not timely made, *all* objections to disclosure were waived save those of CPLR 3101(b) and (c). The court, after citing *Coffey*, stated that it was precluded "from any inquiry into the question of whether or not such document is 'material prepared for litigation,' within the meaning of CPLR 3101 (subd. [d])." [48]

This opinion should be contrasted with *Weisgold v. Kiamesha Concord, Inc.*,[49] where the party seeking a protective order also failed to move within the time limitation of 3122. The court stated that because of this non-compliance, he "waives his right to object [to disclosure], but the failure to object by timely application does not enable the adversary to secure disclosure of items CPLR 3101 excludes [*i.e.*, subdivisions (b), (c) *and* (d)]. . . ." [50] Thus, not limiting itself, as did the *Aldrich* court, the court then went on to consider whether the specific matter sought to be disclosed was immune under subdivision (d) (material prepared for litigation).

In order to reconcile these two decisions one must examine the applicable CPLR provisions. CPLR 3101(a) provides that "there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action . . . ." There are two basic limitations to this edict for full disclosure. First, CPLR 3101(b), (c) and (d) provide that certain types of material shall be immune from disclosure. The second limitation upon disclosure, CPLR 3103(a), provides that a court may issue "a protective order denying, limiting, conditioning or regulating the use of any disclosure device." The section states that a protective order "shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice . . . ."

The *Coffey* decision apparently recognized this distinction between the limitations on disclosure imposed by 3101 and 3103

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[46] Coffey v. Orbachs, Inc., 22 App. Div. 2d 317, 320, 254 N.Y.S.2d 596, 599 (1st Dep't 1964).

[47] 51 Misc. 2d 16, 272 N.Y.S.2d 582 (N.Y.C. Civ. Ct. 1966).

[48] Aldrich v. Catel Serv. Co., *supra* note 29, at 17, 272 N.Y.S.2d at 584.

[49] 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Sup. Ct. Sullivan County 1966).

[50] Weisgold v. Kiamesha Concord, Inc., 51 Misc. 2d 456, 457, 273 N.Y.S.2d 279, 281 (Sup. Ct. Sullivan County 1966).

by holding that failure to move under CPLR 3122 did not waive objections based on CPLR 3101(b) and (c). It would seem, therefore, that since 3101(d) is part of the same provision as (b) and (c) it should also be available as an objection to disclosure. It may be argued that CPLR 3101(b) and (c) can be distinguished from (d), in that materials under (b) and (c) are absolutely immune, while those under (d) are conditionally immune from disclosure.[51] It is submitted, however, that this distinction does not justify a formalistic rule which causes the automatic disclosure of some but not all material which was heretofore immune from discovery. A resolution of this problem must await further judicial interpretation.

CPLR 3130: Inclusion of negligence causes of action not a bar to use of interrogatories on contract cause of action.

CPLR 3130 introduced to New York practice the use, between parties, of written interrogatories.[52] However, despite the recommendations of the Advisory Committee,[53] the section as enacted does not permit interrogatories in actions to recover damages for an injury to person or property resulting from negligence or wrongful death. Because of this, problems have arisen where interrogatories have been sought in actions where negligence and contract claims have been joined.

In *Ford Motor Co. v. O. W. Burke Co.*,[54] the plaintiff sought to recover damages allegedly caused as a result of floor tile purchased and installed in plaintiff's buildings. Three causes of action were asserted: negligence; breach of warranty; and reckless and negligent behavior. The court held that the inclusion of the negligence causes of action did not bar the use of interrogatories relating to the contract-based cause for breach of warranty, "at least where there exists a viable, substantial basis for the contractually based cause and its assertion is not due solely to artful pleading." [55] The court also stated that it would serve no

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[51] Material prepared for litigation (subdivision (d)) becomes obtainable when "the court finds that the material can no longer be duplicated because of a change in conditions *and* that withholding it will result in injustice or undue hardship. . . ."

[52] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3130.01 (1965).

[53] *Ibid.*

[54] 51 Misc. 2d 420, 273 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1966).

[55] Ford Motor Co. v. O. W. Burke Co., 51 Misc. 2d 420, 421, 273 N.Y.S.2d 269, 270 (Sup. Ct. N.Y. County 1966). A similar conclusion was reached in Fusco v. Enzo-Gutzeit O/Y, 42 Misc. 2d 101, 247 N.Y.S.2d 393 (Sup. Ct. Kings County 1964), where, in a maritime personal injury action, the court permitted the defendant to serve interrogatories upon a third-party defendant, provided the questions did not relate to the cause of action in negligence, but were germane only to the contractual claim of breach of warranty.