St. John's Law Review

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

Article 22

April 2013

CPLR 3130: Inclusion of Negligence Causes of Action Not a Bar to Use of Interrogatories on Contract Cause of Action

St. John's Law Review

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

---

[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.

purpose to direct the exclusion of one disclosure device and the use of the other where the party to be examined was an Alabama resident, and where the use of interrogatories might obviate the need for later depositions.[56]

It is submitted that refusal to permit interrogatories to be used concurrently with depositions may serve to avoid harrassment. However, as in *Ford*, it appears that courts will allow such concurrent use where the facts of the particular case warrant it.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(a)(8) and (9): Defendant allowed further objection where basis of jurisdiction uncertain.

In *Kelly v. Stanmar, Inc.*,[57] plaintiff sought damages for breach of contract from defendant, a foreign corporation. The defendant moved, under CPLR 3211(a)(8), to dismiss the complaint on the ground that the court lacked in personam jurisdiction. The court held that since defendant was not authorized to engage in business in New York, and since performance of the contract was to be in Vermont, it did not have in personam jurisdiction. However, the court noted that the complaint stated a cause of action against the defendant for an in rem judgment under CPLR 314(2), which could divest defendant of its interest in a bond and promissory note executed by plaintiff in New York and held in New York by the other defendant, a New York bank. The court, therefore, granted the plaintiff the right to amend his complaint to include this in rem cause of action.

The court then noted that since only one motion to dismiss is permitted under CPLR 3211, and since the defendant had moved under 3211(a)(8), he was technically precluded from urging that the court lacked jurisdiction under CPLR 314(2) or (3). However, under the circumstances, since the plaintiff himself was uncertain as to the type of jurisdiction that he was asserting, the court said that it would overlook the defendant's error, "since the moving papers described the alleged defect sufficiently clearly to apprise the plaintiff of its nature and thus will not result in any prejudice to him."[58]

The defendant could, therefore, move under 3211(a)(9), to dismiss for lack of jurisdiction. However, it would appear that since the court has already stated that the plaintiff has a valid in

---

[56] Ford Motor Co. v. O. W. Burke Co., *supra* note 55, at 421, 273 N.Y.S.2d at 271. *But see* Katz v. Posner, 23 App. Div. 2d 774, 258 N.Y.S.2d 508 (2d Dep't 1965).

[57] 51 Misc. 2d 378, 273 N.Y.S.2d 276 (Sup. Ct. Albany County 1966).

[58] Kelly v. Stanmar, Inc., 51 Misc. 2d 378, 380, 273 N.Y.S.2d 276, 278 (Sup. Ct. Albany County 1966).