

CPLR 3017: Fiduciary Relationship Not Necessary for an Accounting?

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the elimination of 3015(d), thus posing a question as to how far this requirement was to go.

The second department answered the question recently in *Von Ludwig v. Schiano*,¹⁵⁵ where it held that the "itemization of special damages may be obtained by a bill of particulars." The omission from the complaint would only render a cause of action insufficient where special damages are an integral part of the cause of action itself, *e.g.*, a prima facie tort.¹⁵⁶

CPLR 3017: Fiduciary relationship not necessary for an accounting?

An accounting has traditionally been a creature of equity. Lacking the appropriate equitable grounds, *i.e.*, a fiduciary relationship between the plaintiff and the defendant, this remedy was unavailable to plaintiff.

The appellate division has recently taken a more liberal approach to this problem. In *Kaminsky v. Kahn*,¹⁵⁷ the court observed that it might grant a legal or an equitable remedy to afford complete relief to a party. It appears, therefore, that the lack of a fiduciary relationship will not impede the availability of an accounting. Although there is no direct holding in *Kaminsky* that an accounting may be granted in a law action, the case indicates a trend toward such a determination.¹⁵⁸

CPLR 3024(b): Motion to strike unavailable where material in complaint is relevant at trial.

In *Guiliana v. Chiropractic Institute*,¹⁵⁹ manipulation of the plaintiff's spine by a student of the defendant Institute resulted in severe injury. In the complaint, the plaintiff sought, *inter alia*, to place in issue the lack of chiropractic skill and knowledge of the student body of defendant Institute. In granting the defendant's motion to strike those paragraphs under CPLR 3024(b), the court quoted with approval the statement of a pre-CPLR case that "matter, though possibly pertinent as proof, has no place in a pleading if it is unnecessary to a statement of a cause of action."¹⁶⁰

However, under CPLR 3024(b) a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a

¹⁵⁵ 23 App. Div. 2d 789, 258 N.Y.S.2d 661 (2d Dep't 1965).

¹⁵⁶ For a thorough discussion of this problem, see 7B MCKINNEY'S CPLR 3015, *supp.* commentary 82 (1965).

¹⁵⁷ 23 App. Div. 2d 231, 259 N.Y.S.2d 716 (1st Dep't 1965).

¹⁵⁸ For a further study of *Kaminsky* and its implication, see 7B MCKINNEY'S CPLR 3017, *supp.* commentary 92 (1965).

¹⁵⁹ 45 Misc. 2d 429, 256 N.Y.S.2d 967 (Sup. Ct. Kings County 1965).

¹⁶⁰ *Newton v. Livingston County Trust Co.*, 231 App. Div. 355, 362 N.Y. Supp. 121 (4th Dep't 1931).