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CPLR 3103: Inapplicable to CPLR 3123 in Advance of Trial

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Massachusetts, requested that the place of an EBT be changed to Massachusetts and, in addition, that plaintiff and co-defendant pay his attorney's expenses. The court denied these requests [190] since defendant Aronson was subject to examination in New York as a party to the action pursuant to CPLR 3110(1), and since there were no unusual circumstances present which would work a hardship on him.[191] However, the court did require reimbursement to defendant of his travel expenses incurred in attending the EBT since he neither stood in the shoes of a plaintiff nor interposed a counterclaim. That this was ordered by the court on its own initiative is not unusual since implied authority is provided therefor in CPLR 3101(a).

CPLR 3103: Inapplicable to CPLR 3123 in advance of trial.

In *Schwartz v. Macrose Lumber & Trim Co.*,[192] defendant sought a protective order [193] so as not to be required to answer questions in plaintiff's notice to admit.[194] The court in denying defendant's motion held that CPLR 3103 was inapplicable to CPLR 3123 in advance of trial. It stated that 3123 is virtually a re-enactment of CPA § 322 and that the cases interpreting the latter section precluded an attack on a notice to admit.[195] Therefore, the court reasoned that the same conclusion would have to be reached under the CPLR.[196] It would appear from an examination of 3103(a) that a strong argument can be made for granting a protective order to prevent the testing of a notice to admit in advance of trial.[197] The subdivision is broadly worded:

> The court may *at any time* . . . make a protective order denying, limiting, conditioning or regulating the use of *any* disclosure device.[198]

Such wording would not appear to warrant the unequivocal statement made by the court that 3103 does not permit such an attack upon a notice to admit. On the contrary, the language of 3103(a)

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[190] CPLR 3110(1) renders any party to an action subject to examination "where the action is pending."

[191] CPLR 3103(a) governs such situations.

[192] 46 Misc. 2d 202, 259 N.Y.S.2d 289 (Sup. Ct. Queens County 1965).

[193] The protective order was sought pursuant to CPLR 3103.

[194] Plaintiff's notice to admit had been served pursuant to CPLR 3123.

[195] As authority for this statement, the court cited Belfer v. Dictograph Prods., Inc., 275 App. Div. 824, 89 N.Y.S.2d 125 (1st Dep't 1949), and Langan v. First Trust & Deposit Co., 270 App. Div. 700, 62 N.Y.S.2d 440 (4th Dep't 1946), *aff'd without opinion*, 296 N.Y. 1014, 72 N.E.2d 723 (1947).

[196] See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3123.09 (1964).

[197] See 7B McKINNEY'S CPLR 3123, supp. commentary 41 (1965).

[198] CPLR 3103(a). (Emphasis added.)

would appear to call for some qualification by the court with respect to such a pervasive holding. With respect to the contention that there is authority in the Advisory Committee's Report for *granting* the protective order, it would appear that the court in rejecting such contention reasoned to a logical conclusion. There is in fact (as the court noted)[199] nothing contained in the report which would support such a contention.[200] Thus the (apparently) broad language of the statute was given a narrow interpretation because of the expressed intention of the Advisory Committee. This conflict is one which should be resolved by the legislature—whether it will choose to do so and prevent the apparent injustice which may result from the holding in the instant case is quite another matter.

CPLR 3121(a): Physical condition need not be placed "at issue" by pleadings in order to examine hospital records.

In *Fisher v. Fossett*,[201] the scope of disclosure available under CPLR 3121(a) was clarified. The section permits the service of a notice on any party to submit to a physical or mental examination, when that party's condition is *in controversy*. Defendant's car struck plaintiff's house. An official accident report which defendant had signed stated that "driver blacked out [and] struck house. . . ." Plaintiff moved for an order to compel disclosure of an examination report contained in certain hospital records pursuant to 3121(a), and defendant sought a 3122 protective order in opposition to such motion.

In denying defendant's protective order, the court held that the failure to raise *the issue* of defendant's physical condition in the pleadings would not warrant the preclusion of the right to examine hospital records. It stated that 3121(a) only requires that the party's condition be *in controversy*—not *at issue*. The court also stated that the primary question at the trial will be the defendant's physical condition and whether or not the condition would excuse what would otherwise constitute negligence.

If there *is* any difference between something being "at issue" or "in controversy" it is one which is very slight. However slight that distinction may be, the court's holding stresses a broad interpretation of CPLR 3121(a).

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[199] Schwartz v. Macrose Lumber & Trim Co., 46 Misc. 2d 202, 204, 259 N.Y.S.2d 289, 291 (Sup. Ct. Queens County 1965).

[200] FIRST REP. 154.

[201] 45 Misc. 2d 757, 257 N.Y.S.2d 821 (Sup. Ct. Erie County 1965).