

## CPLR 3122: Five-Day Limitation Inapplicable Where CPLR 3120 Notice Is Defective

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*CPLR 3122: Five-day limitation inapplicable where CPLR 3120 notice is defective.*

In *Mustapich v. Huntington Union Free School Dist. No. 3*,<sup>202</sup> plaintiff sought discovery of accident reports and statements, failing, however, to specify with reasonable particularity the documents sought to be inspected. Thereafter, defendant moved for a protective order pursuant to CPLR 3122 but not within the five-day period of limitation. In upholding defendant's motion, the court held that in order for the five-day limitation of 3122 to be applicable, the notice served under 3120 must comply with its (3120's) provisions. "If the notice is totally in disregard of the provisions of Rule 3120, it cannot be said to be a notice under the rule."<sup>203</sup>

*CPLR 3123: "Statement of readiness" rule inapplicable to a notice to admit.*

Recently the general rulemaking power of the appellate division<sup>204</sup> and CPLR 3123 came into conflict. In *Rovegno v. Lush*,<sup>205</sup> plaintiffs filed, pursuant to appellate division rules,<sup>206</sup> a statement of readiness and, long after, served a notice to admit the truth of certain facts under CPLR 3123. Defendant moved pursuant to CPLR 3103 for a protective order on the ground that plaintiffs waived their right to serve a notice to admit upon the filing of a statement of readiness. The defendant's motion was made in the face of 3123's unqualified provision permitting a party to serve a notice to admit up to twenty days before trial. Thus the court was faced with a conflict. The court resolved the conflict by stating that the rulemaking power of the appellate division may not be used to contravene existing statutory law, and that the construction sought to be placed on the rule in question would do just that, *i.e.*, amend and abridge the provisions of CPLR 3123 concerning a notice to admit.<sup>207</sup>

#### ARTICLE 32 — ACCELERATED JUDGMENT

*CPLR 3211(a)(7): Importance of proper pleadings.*

In *Infusino v. Pelnik*,<sup>208</sup> a real estate broker brought an action to recover commissions. The defendant moved to dismiss under

<sup>202</sup> 46 Misc. 2d 439, 260 N.Y.S.2d 39 (Sup. Ct. 1965).

<sup>203</sup> *Id.* at 441, 260 N.Y.S.2d at 41. See *Rios v. Donovan*, *supra* note 177, which defines the procedure to be followed with respect to notices to admit. "[S]pecify with particularity" are the key words.

<sup>204</sup> CPLR 3401 confers this rulemaking power.

<sup>205</sup> 45 Misc. 2d 579, 257 N.Y.S.2d 406 (Sup. Ct. Suffolk County 1965).

<sup>206</sup> N.Y. App. Div. R. II, pt. 7 (2d Dep't 1964).

<sup>207</sup> For an extensive treatment of this case, see 7B MCKINNEY'S CPLR 3123, *supp. commentary* 34 (1965).

<sup>208</sup> 45 Misc. 2d 333, 256 N.Y.S.2d 815 (Sup. Ct. Oneida County 1965).