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CPLR 3041: Bills of Particulars and the Burden of Proof

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CPLR 3025(b) contains no limitation on the scope of an amendment of a pleading with court leave.[111] Cases under the CPA were generally liberal in the types of amendments permitted,[112] even to the extent of allowing the addition or substitution of an entirely new cause of action, changes in the legal theory of the action, or even adding new defenses or counterclaims.[113] However, under CPLR 3025(b), the requirement that leave to amend a pleading be freely given does not preclude the court from exercising its discretion and denying a motion to amend an answer. In *Ciccone v. Glenwood Holding Corp.*,[114] defendant's motion to amend his answer so that he could allege that the plaintiff was his employee was denied because plaintiff's right to workmen's compensation was lost by that law's statute of limitations.

The decision in *Stillwell* is well in accord with past cases, and reveals that under the CPLR, the freedom to amend the pleadings, while broadly given in the statute, is still restrained by the discretion of the court. As the court stated: "the branch of the motion for leave to amend would ordinarily be granted as a matter of course unless plaintiffs could show that they would be prejudiced in some way by the granting of such a motion."[115] The inability of a plaintiff to prosecute the action if defendant's motion is granted surely constitutes such prejudice.[116]

CPLR 3041: Bills of particulars and the burden of proof.

In *Jansen's Bottled Gas Serv., Inc. v. Warren Petro. Corp.*,[117] plaintiff sued for damages for breach of warranty arising from defendant's sale of a quantity of propane gas. The defendant moved to dismiss the complaint for failure to diligently prosecute the

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[111] CPLR 3025(b) provides, in part: "a party may amend his pleadings . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." For a discussion of what constitutes "such terms as may be just," see 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3025.21 (1965).

[112] For a good discussion of the many problems involved in the distinction between the terms "amendment" and "supplement" under the previous law (CPA § 245), see Ponticello v. Prudential Ins. Co., 281 App. Div. 549, 121 N.Y.S.2d 305 (4th Dep't 1953).

[113] See Renwick v. Town of Allegany, 18 App. Div. 2d 877, 236 N.Y.S.2d 902 (4th Dep't 1963); 1936 N.Y. LEG. DOC. No. 48, 2 N.Y. JUD. COUNCIL REP. 15; PRASHKER & TRAPANI, NEW YORK PRACTICE 416-18 (4th ed. 1959). See generally PETERFREUND & MCLAUGHLIN, NEW YORK PRACTICE 754 n.3 (1964).

[114] 44 Misc. 2d 273, 253 N.Y.S.2d 576 (N.Y. City Civil Ct. 1964).

[115] Stillwell v. Giant Supply Corp., 47 Misc. 2d 568, 569-70, 262 N.Y.S.2d 833, 835 (Sup. Ct. Nassau County 1965).

[116] 7B MCKINNEY'S CPLR 3025, supp. commentary 123-24 (1965).

[117] 47 Misc. 2d 461, 262 N.Y.S.2d 768 (Sup. Ct. Albany County 1965).

action pursuant to CPLR 3216, and for summary judgment under CPLR 3212. The court refused to dismiss the complaint for failure to diligently prosecute the action, but defendant's motion for summary judgment was granted. The court noted that the motion for summary judgment was "inextricably interwoven" with a cross-motion interposed by the plaintiff which sought relief from a preclusion order for failure to provide a bill of particulars. It was also observed that "if relief is granted from the preclusion order, factual questions exist and are of such substance as to defeat the motion for summary judgment."[118]

Because of the judicial tendency to impose serious consequences upon plaintiffs who ignore demands for bills of particulars and the orders affecting them,[119] the court found itself "troubled in attempting to determine what rule should be applied . . . for failure to comply with a conditional preclusion order."[120] In following what was said to be the rule in the third department, the court recognized that its conclusion was not based upon an exercise of discretion. Unless a plaintiff shows in factual detail an excuse proportionate to the neglect, the order of preclusion will not be vacated.[121] Since the court was not able to find any "exceptional factual situation and circumstances that would permit relief,"[122] the cross-motion for relief from the preclusion order was denied. Accordingly, defendant's motion for summary judgment was granted on the merits and without costs.

A disturbing aspect of the *Jansen* holding deals with the question of the burden of proof. It is well settled that the party who makes a material affirmation which is denied by the pleadings bears the burden of proof with respect to that issue. This burden of proof never shifts, but remains where the pleadings originally placed it, although the burden of going forward with the evidence may shift from time to time.[123]

To prove his cause in a civil action, the plaintiff must make out his case by a preponderance of the evidence. The demand for

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[118] *Id.* at 462, 262 N.Y.S.2d at 770.

[119] Mensh v. 12 Beekman Place, Inc., 11 App. Div. 2d 642, 201 N.Y.S.2d 286 (1st Dep't 1960); see Lehman v. Johnson, Drake & Piper of Vietnam, Inc., 19 App. Div. 2d 913, 243 N.Y.S.2d 1009 (3d Dep't 1963); Baumgarten v. Bratt, 13 App. Div. 2d 832, 216 N.Y.S.2d 386 (2d Dep't 1961).

[120] Jansen's Bottled Gas Serv., Inc. v. Warren Petro. Corp., 47 Misc. 2d 461, 462, 262 N.Y.S.2d 768, 770 (Sup. Ct. Albany County 1965).

[121] Paris v. Poticha, 1 App. Div. 2d 277, 149 N.Y.S.2d 735 (3d Dep't 1956); see also Lang v. New York Cent. R.R., 4 App. Div. 2d 926, 166 N.Y.S.2d 804 (4th Dep't 1957); Goldstein v. Wickett, 3 App. Div. 2d 135, 158 N.Y.S.2d 599 (4th Dep't 1957).

[122] Jansen's Bottled Gas Serv., Inc. v. Warren Petro. Corp., *supra* note 120, at 463, 262 N.Y.S.2d at 770; see also Lang v. New York Cent. R.R., *supra* note 121.

[123] Farmers' Loan & Trust Co. v. Siefke, 144 N.Y. 354, 39 N.E. 358 (1895); see generally RICHARDSON, EVIDENCE §§ 95-101 (Prince ed. 1964).

a bill of particulars is a helpful procedural device to permit necessary facts to come to light before trial.[124] In *Jansen,* by denying plaintiff's motion for relief from the preclusion order, the court effectively prevented him from sustaining the burden of proof with respect to his cause of action. The court's decision, precluding the plaintiff from introducing at the trial evidence that should have been contained in the bill of particulars which he failed to serve, may have rendered the plaintiff powerless to present facts which might have been vitally necessary to sustain his cause of action.[125] Although it might reasonably be argued that the plaintiff placed himself in this unenviable position by failing to comply with the demand for a bill of particulars, it seems that the granting of defendant's motion for summary judgment *on the merits* wrought an excessively mechanical and stringent result. Though it may be technically true that summary judgment should be granted where, as a matter of law, a plaintiff is unable to sustain his cause of action,[126] the mere failure to provide a bill of particulars does not seem to be a sufficiently significant "matter of law" to entitle a defendant to a verdict notwithstanding the merits of his case. It is difficult to see how the granting of the defendant's motion for summary judgment on the merits could be warranted by a refusal to particularize the allegations on the part of the plaintiff.

Aside from the question of the burden of proof, there is another method by which a court could utilize the CPLR to deprive a plaintiff of his right to judgment where he has failed to serve a properly demanded bill of particulars. The failure of a plaintiff to adhere to the requirement of serving a properly demanded bill of particulars is tantamount to his failure to diligently proceed with the prosecution of his cause of action. As such, there seems to be no logical reason why a defendant's motion to dismiss for neglect to prosecute under CPLR 3216 should not be granted. The basic merit or lack of merit of a plaintiff's claim should logically play no part in a dismissal for neglect to prosecute.[127] This dismissal would be on the merits, as in the instant case, if the court so specified.[128] It would seem much wiser to dismiss a plaintiff's cause of action for his neglect, rather than awarding a judgment to the defendant. If a delay is without merit or excuse, dismissal on

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[124] CPLR 3041 provides that "any party may require any other party to give a bill of particulars of his claim, or a copy of the items of the account alleged in a pleading."

[125] See Dwyer v. Slattery, 118 App. Div. 345, 346, 103 N.Y. Supp. 433, 434 (1st Dep't 1907); Steinleger v. Frankel, 117 Misc. 693, 695-96, 192 N.Y. Supp. 74, 76 (App. Term, 1st Dep't 1922); PETERFREUND & MCLAUGHLIN, NEW YORK PRACTICE 1008 n.2 (1964).

[126] See CPLR 3212 (motion for summary judgment).

[127] 7B MCKINNEY'S CPLR 3012, supp. commentary 49-51 (1965).

[128] CPLR 3216 provides that a dismissal for neglect to prosecute is not on the merits unless the court order so specifies.

the merits does not seem inequitable. But, to award summary judgment on the merits to a defendant without a full examination and evaluation of the total concept of the burden of proof, at least on a theoretical basis, seems to be unsound. If the bill of particulars did request facts, the proof of which struck at the heart of plaintiff's cause of action, his practical inability under the order of preclusion to present such proof would be, in effect, granting a defendant summary judgment. The question still remains: Should a defendant prevail at judgment regardless of his ability, or inability, to counter a meritorious allegation which plaintiff is procedurally unable to prove?

ARTICLE 31 — DISCLOSURE

CPLR 3101: Disclosure against the state in other than the Court of Claims.

Under prior law, the state was able to obtain disclosure against an adversary regardless of where the action was pending, whereas disclosure was obtainable against the state *only* in the Court of Claims. In *State v. Master Plumbers Ass'n*,[129] after asserting defenses to the state's action, defendants served notices for an EBT and for discovery and inspection of various documents, which notices the state sought to vacate. The issue was whether the state was subject to all the disclosure provisions of Article 31. The court stated that there was no logical reason for not allowing disclosure against the state to the same extent that it is available to the state against any other party.

It is surprising, however, that in drawing such a close analogy between disclosure in the Court of Claims and in other courts, the court failed to require that, in the latter case, disclosure be obtainable only by court order. This would be appropriate, since CPLR 3102(f) (which treats disclosure in the Court of Claims) requires such a court order.

Prior to the decision in the instant case, a contrary result was reached in *State v. Boar's Head Provisions Co.*,[130] which *disallowed* disclosure against the state in a court other than the Court of Claims. The court reasoned that since prior law had been construed as forbidding such disclosure, and since the CPLR made no express change in those prior provisions, disclosure should be disallowed in a supreme court action. The court in the instant case failed to cite the *Boar's Head* case—probably because it had not yet been reported. The preceding illustrates that by no means

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[129] 47 Misc. 2d 187, 262 N.Y.S.2d 323 (Sup. Ct. Onondaga County 1965).

[130] 46 Misc. 2d 759, 260 N.Y.S.2d 418 (Sup. Ct. N.Y. County 1965).