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Article 30

CPLR 3101: Disclosure Against the State in Other Than the Court of Claims

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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).

is the law in this area completely settled. The decision in *Master,* however, points the way for further appellate clarification.

CPLR 3101(a): Full pretrial examination of codefendants inter sese despite absence of cross-claims.

Recently, the second department, in *Lombardo v. Pecora,*[131] unified the law (at least in its own department)[132] with respect to the examination of codefendants. The case involved a personal injury action arising out of a two-car automobile accident. Plaintiff was a passenger in car 1; defendants were the owner of car 1, the owner of car 2 and the driver of car 2 respectively. Defendant Pecora (the owner of car 1) sought to examine the two co-defendants (the owner and driver of car 2). Special term denied the request. The second department reversed, overruling a prior case to the contrary.[133] It stated that the CPLR provision which provides for full disclosure without regard to the burden of proof[134] rendered obsolete the decision in *Johansen v. Gray*[135] and that the interest of achieving uniformity of practice within the several judicial departments also supported its holding. "[F]ull pretrial examinations of codefendants *inter sese* should be allowed with respect to all evidence which is material and necessary, even in the absence of a cross-claim by the moving codefendant against the codefendant sought to be examined."[136]

It should be noted that this decision has significant impact in the area of third-party practice. For example, in *Ciaffone v. Manhattantown, Inc.,*[137] it was held that a third-party (impleaded) defendant could not examine a defendant other than the one who impleaded him (third-party plaintiff). In an earlier installment of the *Survey,* it was argued that the court had not decided the case within the spirit of the CPLR,[138] and the instant case would seem to indicate an overruling of the doctrine of the *Ciaffone* case.

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[131] 23 App. Div. 2d 460, 262 N.Y.S.2d 201 (2d Dep't 1965).

[132] The first and third departments have already arrived at the result achieved in the instant case. Henshel v. Held, 17 App. Div. 2d 806, 233 N.Y.S.2d 14 (1st Dep't 1962); Frost v. Walsh, 195 Misc. 391, 90 N.Y.S.2d 174 (Sup. Ct. Rensselaer County), *aff'd,* 275 App. Div. 1017, 91 N.Y.S.2d 689 (3d Dep't 1949).

[133] Johansen v. Gray, 279 App. Div. 108, 108 N.Y.S.2d 35 (2d Dep't 1951).

[134] CPLR 3101(a).

[135] *Supra* note 133.

[136] Lombardo v. Pecora, 23 App. Div. 2d 460, 462, 262 N.Y.S.2d 201, 202 (2d Dep't 1965).

[137] 20 App. Div. 2d 641, 246 N.Y.S.2d 298 (2d Dep't 1964) (memorandum decision).

[138] *The Biannual Survey of New York Practice,* 38 ST. JOHN'S L. REV. 406, 432-33 (1964).