St. John's Law Review

Volume 40
Number 2 *Volume 40, May 1966, Number 2*

Article 33

April 2013

CPLR 3101(d): Protection Accorded to Statements Made to a Municipality by Its Employees

St. John's Law Review

—whether this was an attorney's work product or material prepared for litigation.

CPLR 3101(d): Protection accorded to statements made to a municipality by its employees.

In *Donnelly v. County of Nassau,*[143] plaintiff and a Nassau County police officer were involved in an automobile accident. Plaintiff sought discovery of: (1) a memorandum made by the police officer; and (2) a memorandum and report of investigation of a police sergeant, which had been forwarded to the county attorney. The court held that these items were analogous to the reports made in *Finegold v. Lewis*[144] and *Kandel v. Tocher,*[145] and that they were, therefore, exempt from disclosure pursuant to CPLR 3101(d).[146]

In analogizing a municipality to an insurance carrier, the court classified the former as a self-insurer.[147] In *Kandel,* "insured to insurer" reports were distinguished from those "resulting from the regular internal operations of an enterprise," the latter being held not to fall within the purview of CPLR 3101(d).

The underlying consideration in *Kandel,* in exempting these reports from disclosure, was that liability insurance is essentially litigation insurance. The court evidently was concerned with preventing the problem of information being withheld by the insured from his liability insurer.

Certainly, in the instant case, it appears that the reports were made in the regular course of defendant's business—by police officers to their superiors—despite the fact that defendant was also a self-insurer. Furthermore, the result which the court in *Kandel* was most interested in effectuating, *i.e.,* the disclosure of all relevant and pertinent information to the liability insurer, would, in all likelihood, occur without the aid of 3101(d)'s protection. The withholding of information by the employee is not likely to occur when weighed against the possibility of consequent termination of employment.

However, it should be noted that a report made in the regular course of business might, under certain instances, also be material prepared for litigation. This dual classification of a report, as illustrated in *Donnelly,* with its consequent legal effects in the area

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143 46 Misc. 2d 895, 261 N.Y.S.2d 192 (App. Term 2d Dep't 1965).
144 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).
145 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).
146 These two cases are analyzed in *The Biannual Survey of New York Practice,* 40 ST. JOHN'S L. REV. 122, 154 (1965).
147 A self-insurer is exactly what the name imports, *i.e.,* it bears the risk of its own possible liability, rather than contracting therefor with an insurance carrier.

of disclosure, has not been discussed by the courts. Under *Kandel*'s rationale, reports prepared *solely* "for litigation purposes" are exempt. This interpretation appears to be unjustified due to the absence of any exclusive or singular purpose in CPLR 3101(d).

Finally, there is the argument that if the county is acting in the capacity of an insurer, albeit a self-insurer, it seems only just that it receive all the privileges which are accorded to any other insurer.[148]

The foregoing demonstrates the difficulties which the courts may be faced with in applying *Finegold* and *Kandel*—difficulties which, it seems, the court in the instant case did not treat. And from an examination of both arguments, it is submitted that the case was incorrectly decided, for the considerations which led to the holdings in *Finegold* and *Kandel* were not present in the instant case.

CPLR 3122: Affidavits necessary in opposition to a notice to produce to negate any presumption of possession, custody or control.

In *Fugazy v. Time, Inc.*,[149] a libel action, defendant moved for disclosure of various items under CPLR 3120. In opposition thereto, the sole objection of plaintiff, a corporate officer, was that he did not have possession of the items in question (corporate and personal records). However, no affidavit was submitted by plaintiff in support thereof, and no objection was made with respect to the relevancy or materiality of the materials sought. The court deemed the objection invalid and allowed disclosure.

It would appear, therefore, that it is incumbent upon a party who is served with a notice to produce to negate and support by affidavit any presumption of possession, custody or control. It seems only logical to presume that a corporate officer would have one of the three, *i.e.*, possession, custody, or control (of the corporate records), and, if he is seeking to avoid the provisions of CPLR 3120, he should negate any such presumption. The burden should be upon such a party, not upon his adversary who in all likelihood has less knowledge concerning the whereabouts of the corporate records.

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[148] This position finds support in the treatise of Professor Weinstein wherein, commenting on *Donnelly*, he states: "Certainly, a self-insurer should be given no advantage over an entity that buys insurance. If the court believes that substantially the same kind of report would have been made for internal purposes of the municipality, whether or not it was self-insured, the document should be treated as an accident report and disclosure should be required." 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.50b (1965). Ironically, he was the very person who, as county attorney, successfully argued for exactly the opposite result.

[149] 24 App. Div. 2d 443, 260 N.Y.S.2d 853 (1st Dep't 1965).