

CPLR 3132: Defendant's Right to Serve Interrogatories Without Leave of Court Five Days After Receiving Complaint Sustained Where Counterclaim Interposed

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CPLR 3122: Failure to promptly move for a protective order not fatal where adverse party fails to "designate with reasonable particularity."

CPLR 3122 provides that a party may, within five days after being served with a notice under CPLR 3120 or 3121, move for a protective order specifying his objections.

In *Hable v. Anderson*,¹⁵⁰ a personal injury action, plaintiff sought discovery and inspection of, *inter alia*, "any and all statements signed by the defendant . . . relating to the accident . . ." and "any inter-departmental and inter-office statements or reports or records . . . made contemporaneously and in the regular course of said defendant's business."¹⁵¹ The court stated that plaintiff's demand was truly a "fishing expedition" since it did not specifically designate any particular document sought to be inspected—disclosure was consequently disallowed. Thus, although failure to move promptly will require the party served to comply with his opponent's requests even though improper, this rule does not apply where, as here, such opponent has failed to designate, with reasonable particularity, the items sought to be inspected.

Although a demand for discovery and inspection is too broad, a party is not thereby barred from ever obtaining the items sought. He must narrow the scope of his demand to remove it from the realm of the vague and unreasonable. This can be accomplished through the use of an EBT as was pointed out by the instant court.

CPLR 3132: Defendant's right to serve interrogatories without leave of court five days after receiving complaint sustained where counterclaim interposed.

CPLR 3132 provides that before interrogatories may be served, leave of court *must* be obtained: (1) by plaintiff if he serves them within twenty days after service of the summons and complaint; and (2) by defendant if he serves them within five days thereafter. "The chief effect of the time sequence . . . is to provide the defendant with a priority in utilizing interrogatories similar to that in CPLR 3106."¹⁵² That is, the defendant is afforded an opportunity to serve interrogatories *without leave of court* before the plaintiff.

In *Rolnick v. Rolnick*,¹⁵³ plaintiff sued her husband for separation, and he interposed two counterclaims. Pursuant to CPLR 3130, he then served interrogatories upon plaintiff more than five

¹⁵⁰ 47 Misc. 2d 318, 262 N.Y.S.2d 555 (Sup. Ct. Monroe County 1965).

¹⁵¹ *Id.* at 320, 262 N.Y.S.2d at 556.

¹⁵² 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3132.01 (1965).

¹⁵³ 46 Misc. 2d 1012, 261 N.Y.S.2d 414 (Sup. Ct. Kings County 1965).

but less than twenty days after service of the complaint. In objecting thereto, plaintiff contended that since defendant had interposed counterclaims he should be treated as a *plaintiff* for purposes of CPLR 3132, and not receive the benefits which accrue to a defendant under that provision. The court, in denying the objection, found no reasonable grounds for holding contrary to the construction given a similar provision by the federal courts.¹⁵⁴

CPLR 3019(f) provides that a cause of action contained in a counterclaim will be treated, *as far as practicable*, as if it were contained in a complaint. This would seem to support the plaintiff's contention that defendant should be treated as a plaintiff for purposes of CPLR 3132 and appears to militate against the court's holding. However, this would lead to the anomalous result of both parties being required to wait twenty days before being able to serve interrogatories without leave of court. Certainly, the plaintiff could not logically claim that because defendant is to be *deprived* of his priority, she is to be *endowed* with such a priority (assuming arguendo that her original contention is correct). Consequently, when viewed in light of the foregoing, it would appear that the court's holding is correct. To hold otherwise would be to overcome the result which CPLR 3132 is intended to effect, viz., to afford one of the parties a priority in serving interrogatories.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3213: Withdrawal of moving papers by stipulation where action not discontinued equated to situation resulting from service of summons without complaint.

Under CPLR 3213, plaintiff may serve a notice of motion for summary judgment and supporting affidavits with a summons in lieu of a complaint. If the motion is denied, the moving and answering papers are deemed the complaint and answer. This shortened procedure originated under the CPLR and, in a recent case, a situation arose which apparently was not contemplated by the legislature. In *Reiche v. Schuster*,¹⁵⁵ the moving papers were withdrawn by stipulation but the action itself was not formally

¹⁵⁴ *Id.* at 1014, 261 N.Y.S.2d at 416. It should be noted that the court appears to have misstated the requirement of CPLR 3132 in stating: "interrogatories may be served *without leave of court* by a plaintiff within 20 days of the summons and complaint and by defendant within five days after such service upon him of the summons and complaint." (Emphasis added.) That provision expressly states that interrogatories may not be served within twenty days by a plaintiff and within five days by a defendant, after service of the summons and complaint *unless* leave of court is obtained.

¹⁵⁵ 47 Misc. 2d 782, 263 N.Y.S.2d 287 (Nassau County Dist. Ct.

¹⁵⁵ 47 Misc. 2d 782, 263 N.Y.S.2d 287 (Dist. Ct. Nassau County 1965).