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## CPLR 8301: Taxation of Medical Expert's Actual Fee Disallowed

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## ARTICLE 83 — DISBURSEMENTS AND ADDITIONAL ALLOWANCES

*CPLR 8301: Taxation of medical expert's actual fee disallowed.*

In *Kiev v. Seligman & Latz of Binghamton, Inc.*,<sup>228</sup> the plaintiff sought to include, in his bill of costs, the actual fee paid to a medical expert who testified at the trial on plaintiff's behalf. Plaintiff contended that this amount was properly taxed under CPLR 8301(a)(1) and 8301(d).<sup>229</sup> Upon a review of prior law prohibiting taxation of items such as expert's fees, the court held that the medical expert's fee, in the instant case, could not be taxed.<sup>230</sup> The holding further pointed out that the CPLR effected only minor changes in the area of taxation leaving prior law basically unaltered,<sup>231</sup> and that no extension of the present rule should be made unless accomplished by legislative enactment.

The holding in the instant case reflects the restrictive judicial attitude, long prevalent in New York, toward disbursement statutes. There is, however, a provision<sup>232</sup> which apparently was designed to ameliorate this conservative approach.<sup>233</sup> CPLR 8301(a)(12) permits inclusion in a bill of costs such "reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court." The last six words in the above quoted statute were added to an otherwise identical CPA § 1518(10). Their "plain meaning . . . makes it clear that the court has wide discretion to allow taxation of items not expressly covered . . . [by statute]."<sup>234</sup> It has been indicated that the added language of 8301(a)(12) may be applied to expenses that, in the past, had been adjudged nontaxable because of a lack of statutory basis for taxation.<sup>235</sup>

It is therefore submitted that the court, operating within the liberal construction mandate of the CPLR,<sup>236</sup> could have exercised

<sup>228</sup> 47 Misc. 2d 364, 262 N.Y.S.2d 766 (County Ct. Broome County 1965).

<sup>229</sup> CPLR 8301(a)(1) provides for the taxation of legal fees of witnesses, referees and other officers. CPLR 8301(d) provides for the taxation of reasonable fees for services, other than searches by private persons, even if the fee is in excess of that allowed a public officer.

<sup>230</sup> *In re* South Schenectady-Mariaville State Highway, 174 Misc. 1089, 23 N.Y.S.2d 819 (County Ct. Schenectady County 1940); *People ex rel. Envoy Apartments, Inc. v. Miller*, 165 Misc. 943, 300 N.Y. Supp. 1327 (Sup. Ct. N.Y. County 1937), *aff'd*, 255 App. Div. 972, 8 N.Y.S.2d 1022 (1st Dep't 1938).

<sup>231</sup> See FOURTH REP. 324.

<sup>232</sup> CPLR 8301(a)(12).

<sup>233</sup> 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 8301.24 (1965).

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> CPLR 104.

the discretion given under 8301(a)(12) and could have allowed, as properly taxable, the medical expert's fee.<sup>237</sup>

*CPLR 8303(a)(2): Award of allowance in a difficult case.*

Under Sections 1513 and 1514 of the Civil Practice Act, the court had discretion to grant an additional allowance to a party only where the case was both difficult *and* extraordinary. CPLR 8303(a)(2), however, permits the court to award an additional allowance to a party in a difficult *or* an extraordinary case. The court may use its discretion in order to provide defendants with an incentive for a proper defense<sup>238</sup> and to reimburse plaintiffs for their difficulties in prosecuting, especially when the recovery in the action does not adequately compensate them.<sup>239</sup>

In *Italian Publications, Inc. v. Belli*,<sup>240</sup> defendants, after plaintiff's complaint was dismissed on the merits, moved for an additional allowance under CPLR 8303(a)(2) alleging difficulties in preparing a proper defense. Defendants, as Italian nationals, had to overcome a language barrier in communicating with their attorneys, and were compelled to travel to the United States to prepare their case. The most significant hardship, however, was the fact that they found it necessary to produce an Italian national whose testimony completely exonerated them. The court, in awarding an additional allowance on the ground that the case was difficult, stressed the fact that the defendants could be reimbursed for travel expense of their star witness only on the basis of CPLR 8303(a)(2).

Prior to this decision, the courts have awarded additional allowances based upon the time and effort demanded in the preparation of a case,<sup>241</sup> the length and number of trials,<sup>242</sup> the time and money spent by the defendant or his attorney in traveling to trial<sup>243</sup> and the use of numerous exhibits.<sup>244</sup> Indeed, the courts have broad discretion in this area since there is no clear-cut definition

<sup>237</sup> See 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 8301.24-8301.26 (1965).

<sup>238</sup> 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 8303.01 (1965).

<sup>239</sup> *Faulk v. Aware, Inc.*, 35 Misc. 2d 317, 231 N.Y.S.2d 270 (Sup. Ct. N.Y. County 1962); 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 8303.01 (1965).

<sup>240</sup> 47 Misc. 2d 862, 263 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1965).

<sup>241</sup> *Bank of United States v. National City Bank*, 152 Misc. 562, 563, 273 N.Y. Supp. 826, 828 (Sup. Ct. N.Y. County 1934).

<sup>242</sup> 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 8303.14 (1965).

<sup>243</sup> *Proctor v. Soulier*, 8 App. Div. 69, 71, 40 N.Y. Supp. 459, 461 (3d Dep't 1896).

<sup>244</sup> *Town of North Hempstead v. Oelsner*, 148 App. Div. 779, 780, 133 N.Y. Supp. 319, 320 (2d Dep't 1912), *aff'd without opinion*, 208 N.Y. 626, 102 N.E. 1115 (1913).