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Effectiveness of Bill of Particulars Limited by Permitting Proof of Allegations Not Included Therein

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not whether he gives a name to the cause of action at all or even that he gives it a wrong name."[124]

Today the explicit grant of power contained in the last sentence of section 3017(a) permits the court to grant relief that is "appropriate to the proof." It is therefore clear that a court possesses the power to award legal or equitable relief whenever it is "within its jurisdiction" to do so.[125] This section has the effect of eliminating the law-equity distinction espoused in *Jackson* and followed in many subsequent decisions.[126] This is one of the important changes wrought by the CPLR.

There is no danger of the right to trial by jury being lost here, if such right exists. To the extent that the right to legal relief appears at a later juncture of the action—it having been assumed up to then that only equitable relief was being sought so that trial by jury was neither demanded nor demandable—the court must at that time afford to the party against whom the legal relief is sought "an opportunity to demand a jury trial of such issues."[127]

Effectiveness of bill of particulars limited by permitting proof of allegations not included therein.

In the case of *Pogor v. Cue Taxi Serv., Inc.*,[128] the only allegation of negligence appearing in the bill of particulars was that the defendant's cab driver went through a stop sign. When it later became clear that the stop sign in issue did not in fact exist, plaintiff gave evidence of other acts of purported negligence. Objections to the testimony were overruled on the basis that the additional allegations were, in fact, implied amendments to the pleadings that served to conform the pleadings to the proof.

"The object of a bill of particulars is to amplify a pleading, to limit proof and to prevent surprise. . . ." [129] As a result of the purpose of avoiding surprise at trial, the bill of particulars, of necessity, adds rigidity to the amendment of pleadings. "Restriction of a party to the legal theory . . . stated in a bill of particulars seems antithetical to the elimination of the theory-of-the-pleadings doctrine, which was one of the purposes of CPLR 3013."[130] Perhaps it was for that reason that the bill of particulars was eliminated from federal practice in 1948.

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[124] *Id.* at 212, 168 N.E.2d at 658, 203 N.Y.S.2d at 834.

[125] *Supra* note 121.

[126] See Nelson v. Schrank, 273 App. Div. 72, 75 N.Y.S.2d 761 (2d Dep't 1947).

[127] CPLR 4103.

[128] — Misc. 2d —, 251 N.Y.S.2d 635 (Civ. Ct. 1964).

[129] Elman v. Ziegfeld, 200 App. Div. 494, 497, 193 N.Y. Supp. 133, 136 (1st Dep't 1922).

[130] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3041.22 (1963).

It is clear that the policy allowing liberal amendment of pleadings is inconsistent with a strict interpretation of the function of a bill of particulars. When the two come into conflict, a court will have to choose that which affords the better tool for implementation of the substantive rights involved.

If the edict of CPLR 104 is to be given effect, *i.e.*, that the CPLR is "liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding," the instant case is palatable indeed. If it be said that the case diminishes the utility of the bill of particulars, let it be noted that it was the plan of the CPLR's draftsmen to do away with that device altogether.[131] The court at bar felt that permitting the bill of particulars so to limit the proof that nothing in the occurrence other than the passing of a stop sign could be litigated was too technical a reading. If the proof could be in any way expanded without substantial prejudice to the other party, as the court might in the context of the case determine, it would appear that the expansion, though a technical deviation from the underlying theory of the bill of particulars, was nonetheless a specific execution of the CPLR's yet broader underlying theory as enunciated in CPLR 104.

ARTICLE 31 — DISCLOSURE

Discovery of names and addresses of witnesses and statements of witnesses in the possession of an adverse party.

In *Rios v. Donovan*,[132] a personal injury action, two problems concerning the scope of disclosure were before the court. One concerned the question of whether the names and addresses of witnesses to an accident known by the adverse party may be the subject of pre-trial discovery. The other involved the question of the discovery of statements made by witnesses which are in the possession of an adverse party. Each problem shall be dealt with separately herein.

Problem I:— Disclosure of names and addresses of witnesses.

Plaintiff sought to discover, pursuant to CPLR 3120, the names and addresses of all persons who witnessed the accident and all persons having knowledge of facts concerning the accident who had given statements to defendant or his attorney. The defendant moved for a protective order under CPLR 3013. The court held that proper procedure required plaintiff to ascertain the names of witnesses through his examination of the defendant or other persons during the taking of oral depositions concerning the

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[131] 7B MCKINNEY'S CPLR 3015, supp. commentary 57 (1964).
[132] 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964).