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Article 44

Discovery of Names and Addresses of Witnesses and Statements of Witnesses in the Possession of an Adverse Party

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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).

accident, rather than by seeking a list of their names under the discovery provisions of 3120.

Although cases under the CPA have said that a party does not have the right to obtain names of witnesses through disclosure,[133] there was no absolute rule against it.[134] In fact, whether the identities of witnesses were obtainable through pre-trial disclosure depended on two considerations: first, names of witnesses had to be material and necessary for prosecution of the action; and, second, their disclosure could not be sought solely for the purpose of prying into an adversary's case.[135] Thus, the rule allowed disclosure of the names of witnesses known to an adversary if the witnesses participated in, or were responsible for the accident complained of.[136] This rule also allowed discovery of the names of witnesses who alone could describe the accident and without whose testimony the party's case would fail.[137] A more recent trend under the CPA was to compel the divulgence of the identity of a witness when in the course of an examination before trial his identity became relevant in connection with the questions asked the deponent during the deposition.[138]

Under federal practice a party may, as a matter of right, require disclosure of the names of all persons having knowledge of the facts pertaining to the occurrence out of which the action arose.[139] The federal rules are based on the principle that persons having knowledge of relevant facts are not necessarily the witnesses of any particular party.[140] Moreover, a party in a federal action may compel disclosure of all witnesses known by his adversary by simply requesting a list of such witnesses through the use of an interrogatory.[141]

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[133] Kosiur v. Standard-No. Buffalo Foundries, Inc., 255 App. Div. 930, 8 N.Y.S.2d 688 (4th Dep't 1938); Gavin v. N.Y. Contracting Co., 122 App. Div. 643, 107 N.Y. Supp. 272 (1st Dep't 1907).

[134] Weinstein & Bergman, *New York Procedures to Obtain Information in Civil Litigation*, 32 N.Y.U.L. REV. 1066, 1086 (1957).

[135] Weinstein & Bergman, *supra* note 134; *but see* Giamberdino v. Mileo, 10 App. Div. 2d 814, 197 N.Y.S.2d 873 (4th Dep't 1960).

[136] Milberg v. Lehrich, 2 App. Div. 2d 861, 156 N.Y.S.2d 74 (2d Dep't 1956); Arbuckle v. Loew's Theatre & Realty Corp., 200 Misc. 642, 108 N.Y.S.2d 135 (Sup. Ct. 1951), *modified*, 280 App. Div. 945, 116 N.Y.S.2d 135 (2d Dep't 1952).

[137] McMahon v. Hayes-73rd Corp., 197 Misc. 318, 98 N.Y.S.2d 85 (Sup. Ct. 1950).

[138] Rios v. Donovan, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.11 (1964).

[139] FED. R. CIV. P. 26(b); B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959); Klop v. United Fruit Co., 18 F.R.D. 310 (S.D.N.Y. 1955).

[140] 2A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 650, at 91 (1961).

[141] FED. R. CIV. P. 33, 26(b).

CPLR 3101 contains the general guidelines for disclosure and, therefore, governs disclosure of names of witnesses. This section is essentially a continuation of the scope of disclosure contained in CPA § 288.[142] Under 3101(a) discovery of the identities of witnesses should be allowed only if they are "material and necessary."[143] Discovery should be denied under 3101(d) where names are sought solely to pry into an opponent's case.[144]

The court has set forth a sound rule in requiring the plaintiff to seek divulgence of unspecified witnesses through oral depositions as to the event itself. By requiring the use of the deposition device, the names of those witnesses who are material and essential to plaintiff's case will be brought out by the questions asked during the depositions. Their identities should be divulged by the deponent. An opposing attorney should no longer answer "declined" when the name of a witness is requested. If the deponent refuses to disclose the identity of a witness the plaintiff may ask the court to compel disclosure.[145] The court is now in a position to look at the testimony taken at the deposition and make a determination as to whether the identity of the witness sought is material. If the identity of the witness is material, the court can order disclosure; if not, the court can deny it. This procedure protects persons who are not material to a party's case from vexatious depositions. Furthermore, the rule encourages an attorney to conduct his own investigation; he cannot merely wait for his opponent to complete his investigation and then simply ask for a list of witnesses acquired by his opponent.

It should be noted that the allowance of a liberal disclosure of witnesses' names permits the parties to make a thorough assessment of the case and the possibilities of success on trial. To the extent that disclosure of names of witnesses results in the settlement of cases before trial which otherwise would have gone to trial, disclosure will result in a great saving of precious time and expense. Hence, a major purpose of the CPLR will have been realized.

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[142] 7B McKINNEY'S CPLR 3101, commentary 6.

[143] It should be noted that the identity of an expert witness as distinguished from a factual witness should be disclosed. See Miller v. United States, 192 F. Supp. 218 (D.C. Del. 1961). The weight and value of an expert's testimony depends largely upon the qualifications of the expert; therefore, his qualifications may be the subject of intensive investigation by the opposing counsel, which investigation can only be conducted after a timely ascertainment of the name of the proposed expert witness.

[144] This would be considered "material prepared for litigation." Identity of witnesses should not be excluded under CPLR 3101(c) as in such case this would constitute an absolute preclusion to their disclosure. There was no absolute rule against disclosure of witnesses' names under the CPA and none was contemplated under the CPLR.

[145] CPLR 3124. Penalties may be invoked under CPLR 3126.

Problem II:——Disclosure of statements by witnesses in the possession of an adverse party.

In his notice to discover pursuant to CPLR 3120, plaintiff in the instant case requested inspection of all statements obtained prior to the commencement of the action by defendants or their agents from persons possessing knowledge of the accident. The court did not presently decide what it termed the "perennially thorny problem" of obtaining statements by witnesses, but it held that the notice to discover under CPLR 3121 requires specification "with reasonable particularity" of the documents sought to be discovered. Since plaintiff's "blunderbuss" notice to discover all statements by witnesses did not specify which statements he sought, he should first ascertain through depositions or otherwise what statements were made and then specify those he wishes to inspect. It is only when a party has specified the documents he seeks that the court can intelligently decide whether the statements are immune from disclosure because they are privileged matter, attorney's work product, or material prepared for litigation.[146]

Conclusion

The court's resolution of each problem, discovery of a list of unspecified witnesses and discovery of all statements of witnesses, was based on the same theory. As the court said: "While the policy of the CPLR is to broaden disclosure procedures, discovery should not be permitted to substitute for independent investigation of facts which are equally available to both parties." [147] However, the court continued: "we do not suggest that under the CPLR discovery and inspection can be obtained only after the taking of oral or written depositions." [148] The court indicated that under the circumstances of the instant case, the taking of depositions was necessary in order to ascertain which witnesses were material to plaintiff's case and to identify documents in the possession and control of an adverse party.

Prior inspection of records during examination before trial does not preclude reinspection by discovery under CPLR 3120.

In *Lindenman v. Thompson,*[149] a personal injury action, defendant moved pursuant to CPLR 3120 for discovery and inspection of the plaintiff's income tax returns. Plaintiff in opposition to defendant's motion contended that because these

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[146] CPLR 3101.
[147] Rios v. Donovan, *supra* note 138, at 413, 250 N.Y.S.2d at 822.
[148] *Id.* at 414, 250 N.Y.S.2d at 823.
[149] 43 Misc. 2d 30, 249 N.Y.S.2d 919 (Sup. Ct. 1964).