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CPLR 3120: Examination Before Trial Prerequisite to Obtaining Discovery

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whether the term, *any party,* is broad enough to allow a defendant to use his prior deposition to contradict his present testimony, *i.e.,* can a prior deposition be used as evidence in chief.

In *Mravlja v. Hoke,*[200] the court held that it was error to permit the defendant to contradict his own testimony by his prior deposition. However, since the defendant had corrected his testimony to conform to the deposition the error was not prejudicial. Thus the term, *any party,* was held not broad enough to allow a party to contradict his own testimony by his deposition.

Under the CPA, prior contradictory statements did not constitute affirmative evidence; they were not admissible as evidence in chief.[201] The *sole ground* upon which such deposition was admissible was to impeach the testimony of the deponent. This philosophy has been incorporated into CPLR 3117(a)(1).[202] Thus a party cannot, under the CPLR, use a deposition to "impeach" himself.

CPLR 3120: Examination before trial held prerequisite to obtaining discovery.

Under CPA § 324, where discovery could only be had upon a court order,[203] it was generally held that an examination before trial was a prerequisite to discovery.[204] Then, if the inspection permitted during the examination was inadequate, discovery would be allowed.

In disallowing discovery, the court in *Ossandon v. New York City Transit Authority,*[205] cited *Battaglia v. New York City Transit Authority,*[206] a case decided under the CPA. "[I]t was not proper to direct a discovery and inspection . . . before the conclusion of the examination before trial. . . ." [207] The court thus adhered to the doctrine established under the CPA.

The CPLR has changed the law. Discovery may now be had without motion, on notice alone. CPLR 3120 requires, however, that the objects of discovery be "specified with reasonable particularity in the notice. . . ." [208]

When the party seeking discovery under CPLR 3120 has not sufficient information to particularly specify the object of dis-

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[200] 22 App. Div. 2d 848, 254 N.Y.S.2d 162 (3d Dep't 1964).

[201] Roge v. Valentine, 280 N.Y. 268, 276, 20 N.E.2d 751, 754 (1939); *cf.* Rosati v. H.W.E. Inc., 81 N.Y.S.2d at 412 (Sup. Ct. 1948).

[202] See FINAL REP. 450.

[203] See, *e.g.,* Gross v. Price, 2 App. Div. 2d 707, 153 N.Y.S.2d 424 (2d Dep't 1956).

[204] See, *e.g.,* City Messenger Serv., Inc. v. Powers Photoengraving Co., 7 App. Div. 2d 213, 181 N.Y.S.2d 888 (1st Dep't 1959).

[205] 44 Misc. 2d 256, 253 N.Y.S.2d 442 (Sup. Ct. 1964).

[206] 2 App. Div. 2d 985, 157 N.Y.S.2d 797 (2d Dep't 1956).

[207] *Id.* at 986, 157 N.Y.S.2d at 799.

[208] CPLR 3120; see SIXTH REP. 321.

closure such information may be obtained by a bill of particulars, or other article 31 procedure. After the information is obtained a notice under CPLR 3120 would be proper. However, since a motion is no longer required, and the only prerequisite is particularity, where the party can sufficiently identify the object, an examination before trial would *not* appear to be a condition precedent to discovery under 3120.[209] In the final analysis the determination as to whether the notice is sufficiently particular must lie within the discretion of the court.

CPLR 3120(1): Discovery limited to parties.

The question in *Avila Fabrics, Inc. v. 152 West 36th St. Corp.*[210] was whether CPLR 3120(1) permits discovery of a document in the exclusive possession of one not a party to the litigation. Under the CPA, discovery and inspection were limited to parties.[211] The majority commented that the Revisers based CPLR 3120 on Federal Rule of Civil Procedure 34 which is specifically limited to parties. The court then held that since the legislative history of CPLR 3120 shows no intention of changing the doctrine of the CPA, discovery may not be had against non-parties. In an excellent dissenting opinion, Justice Eager pointed out that in view of the liberal policy enunciated in CPLR 3101(a) the discovery provisions in CPLR 3120 should not be limited to parties.

CPLR 3101(a) provides: "There shall be full disclosure of all evidence. . . ." Consequently the four subdivisions of CPLR 3101(a) are not restricted to parties. In addition, the disclosure devices enumerated in CPLR 3102(a) include not only depositions, but also "discovery and inspection of documents." [212] It would, therefore, appear that discovery, as one form of disclosure under 3101(a) and 3102(a), is not limited to a party to the action. On the other hand, CPLR 3120 pertaining to discovery provides: "After commencement of an action, any party may serve on any other party notice. . . ." Thus an obvious ambiguity exists. CPLR 3120 in relation to discovery refers to a party to the action, while CPLR 3101(a) and 3102(a) lead to the conclusion that discovery, a disclosure device, is not restricted to parties.

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[209] This position is strengthened by the FIRST REP. 121:

"Parties are not limited in their choice to one or more disclosure devices. Nor is there any express limit on the number of times a device may be used. However, abuse either willful or due to incompetence, may be checked by [CPLR 3103] . . . ."

[210] 22 App. Div. 2d 238, 254 N.Y.S.2d 609 (1st Dep't 1964).

[211] CPA §§ 324, 327, 328; Lipsey v. 940 St. Nicholas Ave. Corp., 12 App. Div. 2d 414, 212 N.Y.S.2d 205 (1st Dep't 1961); Goldstein v. Kaye, 2 App. Div. 2d 889, 156 N.Y.S.2d 238 (2nd Dep't 1956).

[212] FIRST REP. 151.