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CPLR 3120(1): Discovery Limited to Parties

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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.

In *Williams v. Sterling Estates, Inc.*,[213] the court suggested that the ambiguity could be reconciled by restricting discovery on mere notice to parties, and requiring a motion as against non-parties, with the caveat that in the latter instance there must be a showing of a special circumstance within the meaning of CPLR 3101(a)(4). This resolution seems to be in accord with the "primary purpose of Article 31 [which] is to require maximum disclosure of facts with minimum resort to the courts." [214]

It should be noted that although the majority opinion in *Avila* could have been more liberal, it did not leave the defendant without remedy. The court suggested that the defendant might require the production of the records at an examination before trial pursuant to CPLR 3111. Therefore by using CPLR 3111 and an examination before trial the defendant could accomplish that which he could not do under CPLR 3120(1). Since the effect of CPLR 3120(1) can be achieved against non-parties through CPLR 3111; since the philosophy of the CPLR is liberality; and since an adequate protective order can be employed (under CPLR 3103) to prevent abuse, it is submitted that CPLR 3120(1) should not be interpreted so as to restrict discovery to parties.

Notwithstanding local court rules to the contrary, disclosure may be had in malpractice cases.

Where the mental or physical condition of a party is in issue CPLR 3120 and 3121 provide for discovery, inspection and a medical examination on notice. There are no specified exceptions to this rule. On the other hand, Rule XI of the New York and Bronx County Supreme Court provides for such discovery, *except* in malpractice cases. The issue presented in *Kromanik v. Twiss*,[215] a malpractice case, was whether the CPLR takes precedence over the local court rules. The court held that it does.

CPLR 101 provides that the CPLR "shall govern the procedure in civil judicial proceedings in all courts of the state . . . except where the procedure is regulated by inconsistent statute." By the plain meaning of this language the local court rules (which are not statutory enactments) are subservient to the provisions of CPLR 3120 and 3121, and malpractice cases are not without the ambit of discovery proceedings.

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[213] 41 Misc. 2d 692, 245 N.Y.S.2d 777 (Sup. Ct. 1963).

[214] 7B MCKINNEY'S CPLR art. 31, practice commentary 4; see also CPLR 104.

[215] 44 Misc. 2d 627, 254 N.Y.S.2d 718 (Sup. Ct. 1964).