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Article 31

Scope of Disclosure in Defamation Actions

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plaintiff). The time limitation established, thirteen months, was sufficiently in the future so that plaintiff would be able to comply with the order.

The result reached in the principal case seems to balance the interests of the parties in an equitable manner. The granting of a preclusion order against a diligent plaintiff who is unable at the time to provide the information requested would have been an unfair result. He would be prevented from establishing even his permanent injuries since the courts still prevent him from reserving the right in his bill of particulars to amplify his claim for permanent injuries that appear later.[115] His recourse is held to be a motion to amend his bill, which motion could be granted only if prejudice to the defendant would not result.[116]

On the other hand, if the court held a bill sufficient merely because a party states he is unable to furnish the particulars currently, the defendant, who has a right to know the permanency of the injuries claimed in order to prepare effectively for trial, would be seriously prejudiced. In short, the court, by taking the middle position between two extremes, has interpreted rule 3042(d) broadly and reached an equitable result.

DISCLOSURE

Scope of Disclosure in Defamation Actions

In *Nomako v. Ashton*,[117] the appellate division of the first department held that a pretrial examination will be granted in a slander action without requiring that any special circumstances be shown. Previously, first department cases held that special circumstances were required before a pretrial examination would be permitted in defamation actions.[118] The court in *Nomako* found that "there is no longer persuasive reason for a general policy against examinations in intentional tort cases, including defamation actions."

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[115] Brett v. Sinon, 277 App. Div. 890, 98 N.Y.S.2d 54 (2d Dep't 1950); see also Chimere v. Steinle, 237 N.Y.S.2d 49 (Sup. Ct. 1962).

[116] See, *e.g.*, Handsel v. Weltz, 13 App. Div. 2d 679, 213 N.Y.S.2d 795 (2d Dep't 1961); Overgaard v. Brooklyn Bus Corp., 237 App. Div. 829, 12 N.Y.S.2d 216 (2d Dep't 1939).

[117] 247 N.Y.S.2d 230 (1st Dep't 1964).

[118] *E.g.*, Murphy v. New York World-Telegram Corp., 8 App. Div. 2d 800, 188 N.Y.S.2d 271 (1st Dep't 1959); Kollsman Instruments Corp. v. Daily Mirror Corp., 7 App. Div. 2d 975, 183 N.Y.S.2d 525 (1st Dep't 1959); Olian v. Random House, 205 Misc. 878, 130 N.Y.S.2d 787 (Sup. Ct. 1954). The rule in the second department is that an examination before trial is permitted in a libel action without proof of special circumstances. *E.g.*, Milner v. Long Island Daily Press Pub. Co., 10 App. Div. 2d 519, 205 N.Y.S.2d 14 (2d Dep't 1960).

The court then reviewed generally the scope of disclosure under the CPLR in other categories of actions. The limitation on pretrial examinations will be continued in matrimonial actions unless need is shown. Similarly, in stockholders' derivative and other representative actions, and in accounting actions, a pretrial examination will be contingent upon a showing of a prima facie case on the merits by evidentiary allegations.[119] Except for those actions, the court was of the opinion that pretrial examination should be allowed unless the facts of a particular case would require the issuance of a protective order.

In another first department case, *Roma v. Newspaper Consol. Corp.*,[120] the defendant in a libel action moved to vacate a notice of examination before trial. The court denied the motion on the grounds that (1) the CPLR indicates a legislative intent to broaden pretrial disclosure proceedings, (2) the defendant's alleged privilege does not preclude such examination, and (3) the CPLR clearly makes no differentiation as to full disclosure based upon the type of action involved. Note should be taken, however, of the limitations imposed on disclosure in certain actions in the *Nomako* case.

Section 3101(a) of the CPLR provides that "there shall be full disclosure . . . in the prosecution or defense of an action, regardless of the burden of proof. . . ." It can readily be seen that this section does not by its terms distinguish scope of disclosure based upon the type of action involved. The old Rule of Civil Practice 121-a also provided for pretrial examination "in any action." Nevertheless, the courts engrafted exceptions onto rule 121-a in certain types of actions. Pretrial examinations were originally precluded, in the absence of special circumstances, in negligence, the intentional torts (including defamation), stockholders' derivative, accounting and matrimonial actions on the ground of public policy.[121] It was the intent of the Committee to abolish these exceptions.[122]

Since the publication of a libel may subject one to criminal prosecution, a defendant may claim his privilege against self-incrimination at a pretrial examination. Hence, the defendant in

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[119] This appears to be a carry-over from the prior case law, which held that plaintiffs were not entitled to a pretrial examination as to the details of an account until the plaintiffs first established their right to an accounting. *E.g.*, Moffat v. Phoenix Brewery Corp., 247 App. Div. 552, 288 N.Y. Supp. 281 (4th Dep't 1936); De Rapalie v. Gavin, 209 App. Div. 883, 205 N.Y. Supp. 578 (2d Dep't 1924); Lundberg v. Potter, 193 App. Div. 885, 183 N.Y. Supp. 87 (2d Dep't 1920); Burns v. Hayes, 193 Misc. 501, 84 N.Y.S.2d 277 (Sup. Ct. 1949).

[120] 40 Misc. 2d 1085, 244 N.Y.S.2d 723 (Sup. Ct. 1963).

[121] FIRST REP. 117, 443; 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.14, at 31-19 (1963).

[122] FIRST REP. 117.

the principal case contended that the granting of a pretrial examination would, in effect, be a futile procedure.[123] The court, however, did not wish to be so restrictive and held that, hereafter, pretrial examinations will be granted in defamation actions despite the possibility that the defendant might claim his privilege. It was felt that the existence of such a possibility should not preclude any examination at all; the defendant may take advantage of his privilege when the privileged matter itself is sought.

Scope of Disclosure in Matrimonial Actions

In *O'Donovan v. O'Donovan*,[124] the complaint contained four causes of action. The plaintiff sought a judgment declaring the defendant's Mexican divorce invalid, a separation on the grounds of abandonment and adultery and a divorce. The defendant moved to vacate or modify the plaintiff's notice, which sought to examine him before trial upon all the relevant and material facts put in issue by the pleadings. The court granted the defendant's motion, limiting the plaintiff to an examination of the defendant upon factual issues material and necessary to plaintiff's cause of action to establish the invalidity of the Mexican decree, which matters do not strictly relate to the relations between the parties during their marriage.

Under the CPA, there were general limitations on disclosure based upon distinctions: (1) between witnesses and parties; (2) between admissible evidence and information leading to admissible evidence on the one hand, and necessary and material evidence on the other; and (3) between categories of actions.[125] In matrimonial actions, pretrial examinations were generally denied on the ground that such an examination might prevent a reconciliation of the parties.[126] Pretrial examinations were not permitted in divorce actions,[127] or in separation actions, unless special circumstances were shown.[128] However, examinations were allowed in annulment

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[123] See Corbett v. De Comeau, 44 Super. Ct. 306 (N. Y. 1878), wherein it was held that a pretrial examination would not be granted in a libel action because it would be a waste of time.

[124] 41 Misc. 2d 82, 244 N.Y.S.2d 996 (Sup. Ct. 1963).

[125] FIRST REP. 118.

[126] Hunter v. Hunter, 10 App. Div. 2d 291, 294, 198 N.Y.S.2d 1008, 1012 (1st Dep't 1960).

[127] *E.g.*, Simmons v. Simmons, 182 Misc. 860, 49 N.Y.S.2d 929 (Sup. Ct. 1944).

[128] *E.g.*, Wightman v. Wightman, 7 App. Div. 2d 859, 182 N.Y.S.2d 31 (2d Dep't 1959); Augustin v. Augustin, 277 App. Div. 777, 97 N.Y.S.2d 430 (2d Dep't 1950); Tavalin v. Tavalin, 13 Misc. 2d 909, 179 N.Y.S.2d 137 (Sup. Ct. 1958).