

Disclosure with Respect to Third-Party Actions

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actions,¹²⁹ actions for separate maintenance¹³⁰ and actions to set aside separation agreements.¹³¹

In the instant case the court states that no change in the former procedure regarding examinations before trial in matrimonial actions has been effected by the CPLR. Although the court concedes that the Revisers originally intended to abolish the limitations on disclosure,¹³² the opinion points out that substantial changes were later (and prior to enactment of) made in section 3101(a) and that, as finally enacted, that section was intended to continue the scope of disclosure that existed under prior practice.¹³³

Disclosure With Respect to Third-Party Actions

In *Ciaffone v. Manhattantown, Inc.*,¹³⁴ the third-party defendant moved for a pretrial examination of a defendant other than the third-party plaintiff. The requested pretrial examination sought to encompass all the issues of the main action. The court denied the motion but held that the third-party defendant may examine the codefendant in the main action only as to those matters which were material and necessary to the third-party action.

In most of the instances involving pretrial examinations in third-party actions, it is the original plaintiff who seeks to conduct an examination of the third-party defendant and vice versa. Early CPA cases held that unless the original plaintiff amended his claim so as to assert a claim against the third-party defendant or the third-party defendant denied the allegations of the main complaint so as to become an adverse party as to the plaintiff, the demand by either the original plaintiff or the third-party defendant

¹²⁹ *E.g.*, *Grinnell v. Grinnell*, 15 App. Div. 2d 468, 222 N.Y.S.2d 144 (1st Dep't 1961); *Mook v. Mook*, 13 App. Div. 2d 465, 212 N.Y.S.2d 21 (1st Dep't 1961); *O'Connor v. O'Connor*, 12 App. Div. 2d 627, 208 N.Y.S.2d 343 (2d Dep't 1960); *Sefranka v. Sefranka*, 190 Misc. 541, 74 N.Y.S.2d 519 (Sup. Ct. 1947).

¹³⁰ *E.g.*, *Berlin v. Berlin*, 17 Misc. 2d 768, 187 N.Y.S.2d 553 (Sup. Ct. 1959).

¹³¹ *E.g.*, *Vose v. Vose*, 250 App. Div. 883, 295 N.Y. Supp. 244 (2d Dep't 1937); *Rosenthal v. Rosenthal*, 230 App. Div. 483, 245 N.Y. Supp. 253 (1st Dep't 1930); *Cavallo v. Cavallo*, 33 Misc. 2d 245, 224 N.Y.S.2d 937 (Sup. Ct. 1962); *Sallah v. Sallah*, 28 Misc. 2d 130, 219 N.Y.S.2d 311 (Sup. Ct. 1960).

¹³² FIRST REP. 117.

¹³³ 1962 N.Y. LEG. DOC. NO. 8, SIXTH REPORT TO THE LEGISLATURE BY THE SENATE FINANCE COMMITTEE ON THE REVISION OF THE CIVIL PRACTICE ACT 30, 43 [hereinafter cited as SIXTH REP.].

¹³⁴ 20 App. Div. 2d 641, 246 N.Y.S.2d 298 (2d Dep't 1964) (memorandum decision).

to conduct a pretrial examination of the other would be denied.¹³⁵ More modern decisions, interpreting Section 193-a(2) of the CPA, have held that since a third-party defendant is a party to the action for all purposes and, usually, is the real defendant in the action because he may ultimately be required to satisfy the original plaintiff's claim, the third-party defendant would be permitted to examine the original plaintiff regardless of whether the formal pleadings created an issue between them.¹³⁶

The present statute, Section 1008 of the CPLR, grants a third-party defendant all the rights of a party adverse to the other parties to the action. By designating him an adverse party, section 1008 has adopted the modern approach and, hence, the third-party defendant is immediately afforded the same rights as the original defendant. One of the rights of the original defendant is the right to conduct a pretrial examination of one of his codefendants although neither asserted a claim against the other.¹³⁷ Therefore, since the original defendant could have conducted a pretrial examination of his codefendant as to all issues involved in the main action and since the third-party defendant under CPLR Section 1008 and under later CPA decisions is immediately afforded the rights of the original defendant, it would seem that the court, by not permitting the third-party defendant to occupy fully the position of the third-party plaintiff (a codefendant in the main action), has not decided the question within the spirit of section 1008.

Party Taking His Own Testimony

In *Lapensky v. Gordon*,¹³⁸ the defendant moved to vacate plaintiff's notice to take a deposition of plaintiff's own testimony. The court denied the motion by liberally construing the pertinent provisions of the CPLR.

Section 288 of the CPA provided that "any party to an action . . . may cause to be taken by deposition, before trial, his own

¹³⁵ *E.g.*, *Salgo v. Amdor Structures*, 133 N.Y.S.2d 435 (Sup. Ct. 1954); *Gile v. Sears, Roebuck & Co.*, 110 N.Y.S.2d 211 (Sup. Ct.), 2d case, *aff'd*, 281 App. Div. 95, 120 N.Y.S.2d 258 (3d Dep't 1952); *Reizer v. Pardes*, 197 Misc. 384, 98 N.Y.S.2d 276 (Sup. Ct. 1950); *Anida Realty Corp. v. 6145 Realty Corp.*, 197 Misc. 157, 94 N.Y.S.2d 56 (Sup. Ct. 1950); *Foote v. Joseph Bisceglia & Sons*, 195 Misc. 19, 80 N.Y.S.2d 60 (Sup. Ct. 1948).

¹³⁶ *Argento v. Beech & Bowne Building Corp.*, 37 Misc. 2d 513, 236 N.Y.S.2d 462 (Sup. Ct. 1962); *Sorrentino v. City of N.Y.*, 14 Misc. 2d 78, 178 N.Y.S.2d 500 (Sup. Ct. 1958).

¹³⁷ *Hensel v. Held*, 17 App. Div. 2d 806, 233 N.Y.S.2d 14 (1st Dep't 1962) (memorandum decision); *Frost v. Walsh*, 195 Misc. 391, 90 N.Y.S.2d 174, *aff'd*, 275 App. Div. 1017, 91 N.Y.S.2d 689 (3d Dep't 1949) (memorandum decision).

¹³⁸ 41 Misc. 2d 958, 246 N.Y.S.2d 442 (Sup. Ct. 1964).